NUMBER 106, NOVEMBER 2024

THE PLATFORM

FOR LAW, JUSTICE & SOCIETY

A CONVERSATION WITH THE CHIEF JUSTICE

LAW SOCIETY OF KENYA

nobuk
automated reconciliation and reports

MWANGO CAPITAL

STAND UP FOR JUSTICE

SUPPORT LSK LEGAL AID FUND FOR VICTIMS OF PROTESTS

Join Us! Every voice matters! Every act of kindness will lift the veil & support justice. We call upon all who are willing, to contribute to the LSK fund to provide legal aid and pro bono representation for:

- Protesters standing up for their rights
- Abductees seeking justice and closure
- Victims of police brutality
- Families affected by extrajudicial killings

DONATE NOW

bit.ly/LegalAidLSK

LSK@LSK.OR.KE

+254 - 111- 045 - 300

LSK.OR.KE

HAKI IWE NGAO NA MLINZI

Award winning magazine

The Platform; your favourite publication for Law, Justice & Society was awarded Gold at the 2022 Digitally Fit Awards, in recognition of its online presence and impact online through our website and social media.

Platform Publishers Kenya Limited
The Platform for Law, Justice and Society is published monthly by Platform Publishers Kenya Ltd
Fatima Court, 2nd Floor Suite 148
Junction at Marcus Garvey/Argwings Kodhek Road, Opposite Studio House
Kilimani, P.O.Box 53234-00200
Nairobi, Kenya

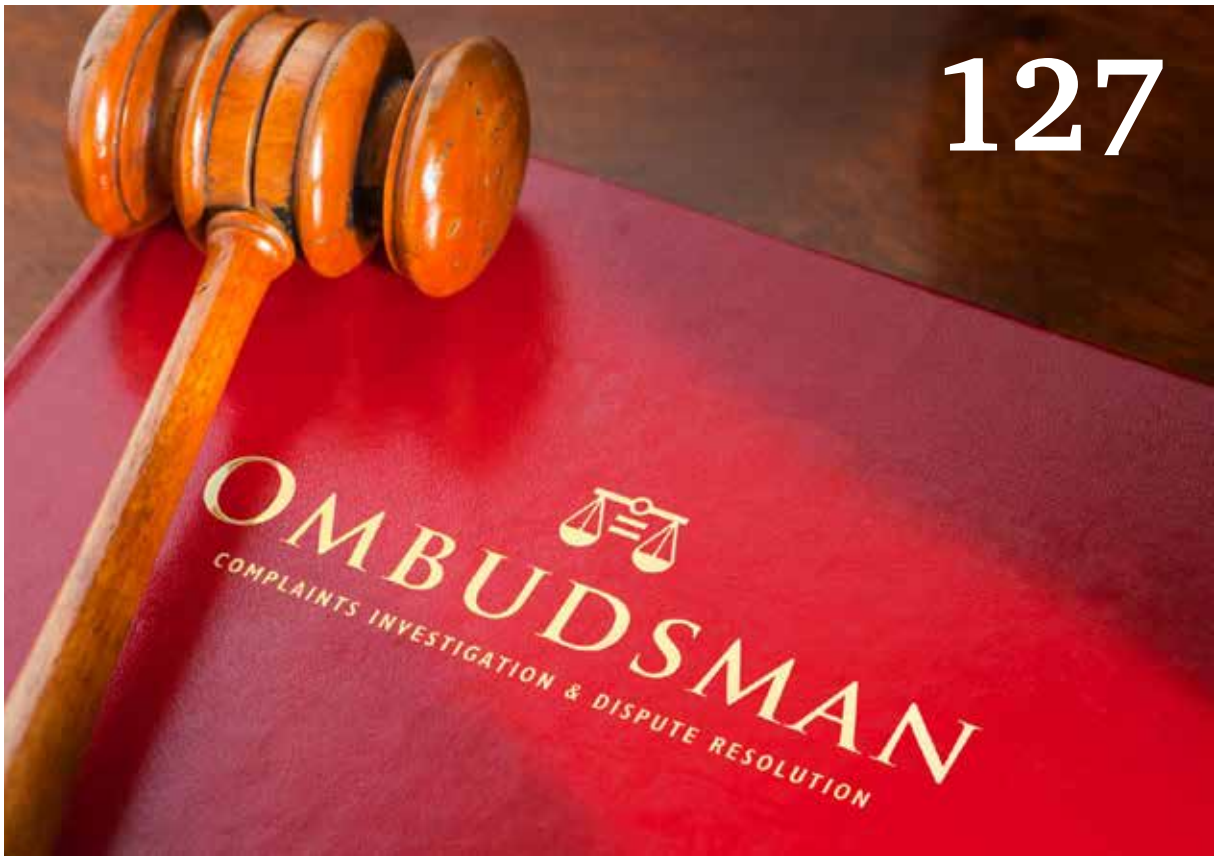
All correspondence intended for publication should be addressed to:
editor@theplatformke.co.ke

To support this pro-bono effort published in the public interest use:

IN THIS ISSUE

40

9



EDITORIAL

Stop the Silence on the Brutal Killings of Women and Girls; Enough with the Abductions!

Abductions create a climate of fear and insecurity, affecting local communities, disrupting livelihoods, and leading to social and economic instability.

In the shadow of everyday life, a horrifying trend has emerged, striking at the very core of our society's sense of safety, dignity, and justice. Women and girls are being targeted, abducted, and killed at an alarming rate, often in broad daylight. Their lives are being extinguished with chilling brutality, while our collective response has been one of dangerous silence. These incidents are not isolated or mere statistical anomalies; they are manifestations of deep societal failures. The grim reality is that women are increasingly unsafe even in spaces where they should feel secure. Each victim is not simply a case file, but a mother, a daughter, a sister, a friend—individuals robbed of their futures, dreams, and the right to exist freely. The surge in such crimes reflects a systemic collapse in multiple areas: security agencies are either ill-equipped or unwilling to protect vulnerable groups; justice systems allow offenders to act with near impunity; and society often downplays gendered violence, tolerating attitudes that permit such brutality.

Kenya, in particular, is facing a disturbing reality: a surge in abductions that has devastated families and instilled widespread fear. Women, men and even children are vanishing at alarming rates, often at the hands of suspected state agents or

(AP Photo/Andrew Kasuku, File)

Sacks with human remains are seen after being removed from a quarry in Mukuru Kwa Njenga area in Nairobi, Kenya Saturday, July 13, 2024.

individuals operating under the guise of authority. What once seemed rare has now become a troubling regularity, calling for an urgent and collective response from society and the highest levels of government. For families, each disappearance is a harrowing ordeal. They are left to search for answers, often without support or transparency from law enforcement.

Cases drag on unresolved, leaving victims in danger and families in anguish. This persistent inaction has eroded public trust in law enforcement, with many Kenyans feeling abandoned by the very institutions meant to protect them. Without immediate reform, the current system will only worsen, as criminal activity escalates unchecked.

The rise in abductions highlights broader societal issues. It reveals cracks in the justice system, weaknesses at border points, and the unchecked growth of organized crime. The crimes are often accompanied by human trafficking, ransom demands, and violence—heinous acts that tear at the fabric of communities. Inaction in the face of this crisis emboldens criminals and endangers vulnerable citizens.

Our leaders must act now. First, law enforcement agencies require an immediate overhaul, with dedicated resources to improve response times, conduct thorough investigations, and swiftly apprehend perpetrators. Police need specialized training and advanced technology to track missing persons effectively and to disrupt organized criminal networks involved in abductions.

Secondly, the government must make public safety a priority. Establishing a national task force on abductions, complete with a dedicated hotline and resources for families of victims, would be a significant step toward addressing these crimes. Increased funding for community policing initiatives could strengthen neighborhood watch efforts and empower communities to collaborate against crime.

As a community, we are all accountable

Addressing the issue of political killings in Kenya requires a commitment to upholding the rule of law, ensuring accountability, and fostering a political culture that respects human rights and democratic values.

for the environment that enables this violence. But we are not helpless. We must demand that authorities not only respond to these cases with urgency, but also take preventative action. Law enforcement should adopt a victim-centered approach that prioritizes accountability and support for victims and their families. To tackle the root causes, we must address the societal attitudes that enable such violence. Silence in the face of brutality is a form of tolerance, and tolerance allows violence to continue. Communities, schools, religious leaders, and public figures must rally against these crimes and challenge the norms that sustain them.

As a society, we also have a critical role to play. Civil society organizations, media, religious leaders, and influencers must raise awareness of the risks of abduction and educate communities on personal safety. Together, we can create an environment where criminals find no refuge and communities refuse to harbor such behavior.

Let us be clear: the right to feel safe is fundamental. The safety of every Kenyan, from the busy streets of Nairobi to the quiet villages across the nation, is non-negotiable. We must unite and demand a safer Kenya, where families can live without fear of losing loved ones to senseless violence. This is a fight for our people, our future—and it is a fight we must win.

The life of every woman and girl is sacred, and no one should have to live in fear. It is time for an unwavering stand—*not one more life lost to senseless violence*. The surge in abductions is a crisis that no society can afford to overlook. The right to safety and security is fundamental, and every disappearance chips away at the very foundation of trust in our communities and institutions. We must demand accountability, transparency, and action from those in power, and we must stand together to create a society where every person's safety is a priority. It is time to break the silence, confront this injustice, and work toward a future where no family lives in fear of losing a loved one to senseless abductions. To the families of those lost, we stand with you in your grief. To the survivors and those who feel unsafe, we pledge solidarity and action. Only through decisive action can we restore justice and protect the lives and freedoms of all.

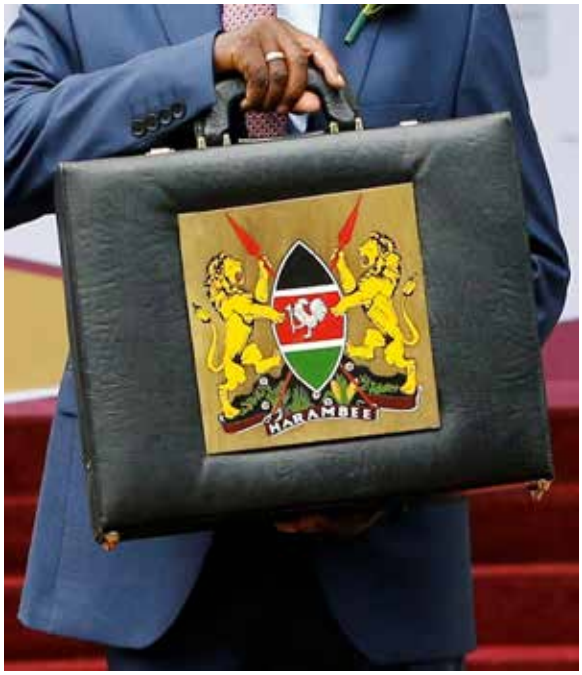
Decoding the Supreme Court's Finance Act 2023 Judgment: Implications for Legislative Accountability and Democratic Governance

By Faith Odhiambo

Introduction

The recent decision by the Supreme Court of Kenya on the Finance Act 2023 has sparked intense debate, highlighting two inter-related issues that lie at the heart of democratic governance: public participation and judicial independence. The Court's decision raises critical questions about the extent to which Parliament must engage citizens in the legislative process, particularly regarding amendments made after initial consultations. As the decision calls for a re-evaluation of public participation norms, it simultaneously challenges the fundamental principles of judicial independence enshrined in the Kenyan Constitution.

The judgment navigates the delicate balance between legislative efficiency and the need for meaningful citizen engagement, distinguishing between "material" and "trivial" amendments. While this framework aims to streamline legislative processes, critics caution that such flexibility may enable lawmakers to sidestep robust public scrutiny on significant amendments, creating a veneer of participation that lacks substantive input from the populace. Additionally, the Court's stance on suspended declarations of unconstitutionality raises alarming questions about the potential for unchecked legislative authority, suggesting a troubling trend toward diminishing judicial oversight.



The Supreme Court's judgment on the Finance Act 2023 represents a critical moment in Kenya's legal and financial landscape. By reinforcing constitutional principles and the importance of public involvement, the ruling aims to ensure that fiscal policies are equitable and accountable. The decision will likely shape future legislative processes and enhance scrutiny of government financial decisions.

This article delves into the complexities of the Supreme Court's decision, examining its implications for public participation and judicial independence in Kenya. By comparing the situation to international standards, particularly from jurisdictions like South Africa that have successfully implemented strong public engagement frameworks, we can glean valuable insights for Kenya's democratic evolution. Ultimately, this exploration seeks to

illuminate the critical interplay between effective governance, citizen engagement, and the role of the judiciary in safeguarding constitutional principles, emphasizing the need for a robust framework that respects both legislative prerogatives and the fundamental rights of citizens.

Nuances of the Supreme Court's Decision

The Supreme Court's decision in the Finance Act 2023 case plays a significant role in shaping the discourse on public participation within the legislative process. The Court examined two crucial questions: whether fresh public participation is necessary for amendments made to a Bill after initial consultations and whether Parliament must provide detailed reasons for its decisions regarding public feedback. This ruling has opened avenues for potential legislative maneuvering.

1. Fresh Public Participation Requirement

The Court's decision regarding the necessity for fresh public participation when new provisions are introduced post-initial consultation marks a significant moment in Kenyan constitutional law. The establishment of a test to differentiate between substantive (material) amendments and minor (incidental) amendments reflects an attempt to strike a balance between legislative efficiency and the public's right to participate in governance. According to the Court, only amendments that significantly alter the essence or effect of the original Bill necessitate renewed public input, while minor amendments—often described as clerical or trivial—can proceed without additional engagement.

While this framework aims to streamline the legislative process, it raises critical concerns about the potential for misinterpretation and misuse. The subjective nature of defining what constitutes a "substantive" amendment could empower Parliament to categorize significant changes as minor, thus circumventing public consultation entirely. This could result in a legislative environment where the public's right to participate is undermined by bureaucratic classifications, leading to legislative opacity. The implications of such a precedent are far-reaching, as it may erode the trust between citizens and their representatives, fostering a perception that Parliament is more concerned with expediency than with genuine democratic engagement.

Moreover, the risk of excluding meaningful public input cannot be overstated. In a democratic society, public participation is not merely a procedural formality; it is a fundamental principle that ensures that the voices of citizens are heard and considered in the law-making process. The Court's decision, while well-intentioned in its recognition of legislative efficiency, must be scrutinized for how it might facilitate a disengaged approach to public input, thereby compromising the integrity of the democratic process.

2. Obligation to Provide Reasons for Accepting or Rejecting Public Input

The Court's stance on Parliament's obligation to provide detailed reasons for accepting or rejecting public feedback introduces another layer of complexity. While the decision indicates that there is no legal obligation for Parliament to furnish comprehensive explanations, it encourages the adoption of reasonable measures to account for public submissions. This position reflects a desire to uphold transparency and accountability within the legislative process but ultimately establishes a framework that lacks enforceable rigor.

The characterization of this approach as a "good practice" rather than a strict legal requirement presents significant challenges. It implies that adherence to transparency principles may be discretionary, leaving room for Parliament to engage in superficial public participation exercises without the

necessity of genuinely considering the public's views. The lack of a mandatory requirement to provide detailed responses can lead to scenarios where Parliament appears to fulfill its public participation obligations without genuinely engaging with the concerns and suggestions raised by citizens.

This situation raises concerns about the authenticity of public participation processes. If Parliament can comply with public participation requirements in a tokenistic manner, it risks creating an illusion of engagement while failing to address the substantive issues raised by the public. Such a development could foster disillusionment among citizens, who may feel that their voices are not being heard or valued in the decision-making process.

In essence, while the Supreme Court's decision seeks to navigate the delicate balance between legislative efficiency and public engagement, the implications of its interpretations warrant careful scrutiny. The framework established may serve to streamline legislative processes, but it also poses significant risks to the integrity of public participation in Kenya's democratic governance. As Parliament navigates this new landscape, it will be essential for stakeholders to advocate for genuine engagement and accountability, ensuring that the principles of democracy are upheld in practice, not just in theory.

3. Surrender of Judicial Independence

One of the most concerning aspects of this decision is the perceived surrender of judicial authority, particularly as the Court has suggested the need for legislation to govern public participation. This call contradicts the principles outlined in Articles 94(5) and 165(3) of the Kenyan Constitution, which emphasize the supremacy of the Constitution and the limited scope of parliamentary supremacy. At the heart of the issue is the judiciary's role as the ultimate interpreter of constitutional principles. The Kenyan judiciary possesses absolute authority in determining the meanings and implications of constitutional provisions. By suggesting that legislation should govern public participation, the Supreme Court appears to undermine its own interpretive authority. The expectation is that judicial interpretations should guide legislative frameworks, not the other way around. This principle of constitutional supremacy demands that the judiciary maintain its independence, particularly in safeguarding the democratic processes enshrined in the Constitution.

The Supreme Court's position, as articulated through its previous decisions, particularly in the BAT case, underscores the importance of consistency in judicial interpretation. The doctrine of precedent dictates that decisions should either be upheld or clearly articulated when a departure is warranted. This principle serves not only to maintain legal consistency but also to uphold public trust in the judiciary. The call for new legislation on public participation indicates a departure from established interpretations without a clear rationale, potentially jeopardizing the stability of the legal framework that underpins public engagement in governance.

To further illustrate the significance of judicial independence, one can draw parallels with landmark cases such as Roe v. Wade (1973) in the United States. Decided amidst significant political turmoil, Roe transformed abortion into a federal issue while simultaneously establishing a crucial precedent for judicial independence. Even in states with opposing views, courts respected Roe as a constitutional marker, resisting the urge to legislate contrary to judicial interpretation. This respect for judicial authority maintained the integrity of the judicial system despite the politically charged climate. In contrast, the Supreme Court's recent decision and its inclination toward legislative direction could reflect

a weakening of this essential judicial independence. The subsequent reversal in Dobbs exemplifies how courts can demonstrate awareness of their position within the system of checks and balances. By altering its stance, the Court recognized the importance of contextual understanding and the dynamic nature of law. Such intellectual agility ensures that courts remain relevant and responsive to the evolving societal landscape. Make this one section under one subtitle.

Negative Effects: Erosion of Legislative Accountability Through Leniency

The Supreme Court's lenient stance on public participation poses significant risks to the integrity of legislative accountability in Kenya. By permitting the provisions of the Finance Act to remain effective despite recognizing procedural irregularities—specifically the introduction of new provisions after initial public engagement—the Court's decision opens the door for a superficial approach to public participation. The reliance on “time-bound” legislative necessities could create a troubling precedent, allowing authorities to leverage tight timelines as justification for minimizing meaningful public input.

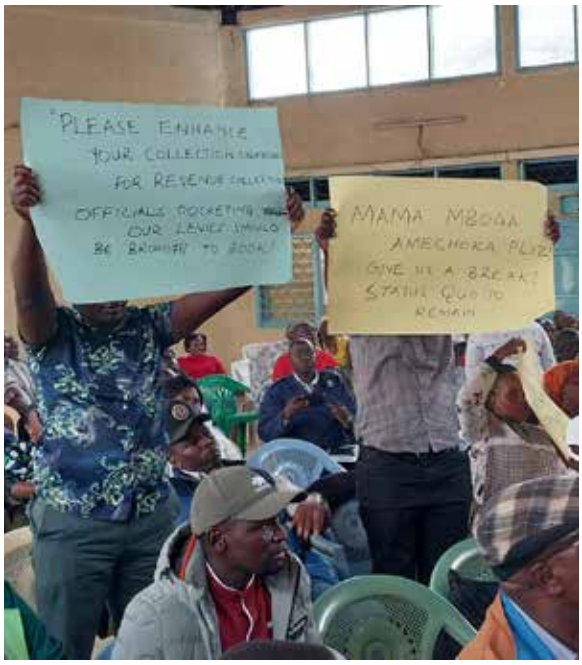
This leniency not only undermines the constitutional commitment to genuine public engagement but also risks fostering an executive-dominated legislative process that may sidestep the public while maintaining a façade of compliance. Such a shift could lead to a scenario where public participation is reduced to a mere procedural checkbox, stripped of its vital role as a mechanism for democratic accountability and citizen empowerment.

Without vigilant oversight, this trend threatens to erode the foundational principles of public participation, transforming it into a formality that serves the interests of those in power rather than the public good. The potential for legislative processes to become insulated from meaningful scrutiny is alarming, as it could enable the government to push through controversial measures while bypassing genuine public discourse. Ultimately, the Supreme Court's flexible approach raises profound questions about the future of democratic engagement in Kenya, calling for urgent reflection on how to preserve the integrity and effectiveness of public participation in legislative processes.

Comparative Jurisprudence: Lessons from South Africa & other Jurisdictions

In the realm of public participation, other jurisdictions, notably South Africa, have established robust standards that Kenya's Supreme Court could beneficially emulate. A significant case, **South African Iron and Steel Institute and Others v. Speaker of the National Assembly and Others [2023]**, exemplifies this approach. The South African Constitutional Court mandated that authorities provide clear reasons for accepting or rejecting public input, reinforcing the notion that practical limitations cannot justify the exclusion of public contributions. This stringent framework not only enhances accountability but also compels the government to substantiate its decisions, ensuring that public views substantially influence legislative outcomes.

In stark contrast, the Kenyan Supreme Court's decision in the Finance Act 2023 judgment did not incorporate similar rigorous standards for public participation. By failing to establish a legal obligation for Parliament to justify its handling of public feedback, the decision potentially weakens the role of citizen input in the legislative process. This divergence highlights the need for Kenya to look towards jurisdictions with established practices to fortify its own public participation mechanisms, ultimately ensuring that citizens' voices are meaningfully integrated into governance.



Strengthening public participation in Kenya is vital for building a more inclusive, transparent, and accountable governance system. By implementing these strategies, the government can enhance citizen engagement, ensure that diverse voices are heard, and foster a culture of active citizenship. This will ultimately lead to more effective policies and improved trust between the government and the public.

The Road Ahead: Strengthening Public Participation and Accountability

The Supreme Court's decision on the Finance Act 2023 presents both challenges and opportunities for Kenya's democratic framework. Although it clarifies certain aspects of public participation, it simultaneously opens avenues for potential legislative overreach and diminishes the mechanisms designed to enforce constitutional accountability. To address these critical issues, several key recommendations can be made:

a. Mandating Detailed Reasons for Public Feedback: Parliament should be legally required to provide comprehensive explanations for its acceptance or rejection of public input. This requirement would promote transparency and foster meaningful public engagement, ensuring that citizens' voices are not merely acknowledged but actively considered in the legislative process.

b. Limiting Suspended Declarations of Unconstitutionality: Courts should exercise caution and restraint in delaying the invalidation of unconstitutional laws. This practice should not become a blanket allowance for legislative inaction, as it risks creating loopholes that undermine the fundamental principles of the Constitution.

c. Monitoring Amendment Characterization: The judiciary must closely scrutinize the classification of amendments as "substantive" or "incidental." This oversight is crucial to prevent the misuse of procedural classifications that could allow Parliament to sidestep necessary public consultation on significant legislative changes.

Conclusion

In conclusion, the Supreme Court's decision on the Finance Act 2023 underscores the delicate balance between legislative efficiency and the necessity for genuine public participation. While the decision introduces a framework for differentiating between substantive and minor amendments, it also risks undermining accountability by allowing Parliament to sidestep meaningful engagement with citizens. To strengthen democracy in Kenya, it is essential that the legislature adopts stricter standards for public input, including the obligation to provide detailed reasons for decisions and careful scrutiny of legislative amendments.In reinforcing these principles, Kenya can ensure that public participation remains a vital and impactful component of its governance.

Faith Odhiambo is an Advocate of the High Court and President of the Law Society of Kenya.

THE PLATFORM
FOR LAW, JUSTICE & SOCIETY

Strathmore UNIVERSITY

Reserve the date

12th C.B. Madan Awards and Memorial Lecture

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

C.B Madan Laurette 2024

Faith Odhiambo Citation

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

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

Under her leadership, the LSK has initiated numerous legal actions against government bodies that have breached the law. Beyond the courtroom, Faith Odhiambo's hands-on approach in advocating for the release of peaceful protesters, who were illegally detained for participating in the Gen-Z-led demonstrations against the Finance Bill 2024, has marked her as a visible champion of the rule of law. Her vocal advocacy for a government grounded in democratic and accountable governance, along with her commitment to protecting human rights for all, has cemented her place as a defender of the Constitution's values and principles. Through her stewardship, the LSK has regained its stature as a protector of public interest and a guardian of constitutional governance. Faith Odhiambo's leadership embodies the spirit of public service, accountability, and dedication to justice that Chief Justice Madan represented, making her the deserving recipient of the 2024 C.B. Madan Award.

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

2024

C.B. Madan Student prize 2024 Citation

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

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

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

COVER STORY

Beyond the Bench

Chief Justice Martha Koome's Vision for the Judiciary

By Miracle Okoth Okumu Mudeyi

Introduction

In a rare and insightful conversation with Kenya's Chief Justice Martha Koome, she opens up on the driving forces behind the Judiciary's vision and its dedication to shaping a people-centric judiciary. At a time when courts worldwide grapple with complex issues of justice, governance, and human rights, Chief Justice Koome offers a candid view into the Judiciary's role as both a guardian of the Constitution and a true voice of the people. She speaks to the transformative power of landmark cases rendered by the Supreme Court, underscoring how such decisions transcend legal principles to resonate with Kenyans' daily lives and aspirations.

Known for her commitment to accessible justice, Koome has guided the Supreme Court in a direction that not only enforces the rule of law but also listens closely to the pulse of society. Her approach-rooted in a deep respect for the lived realities of Kenyan citizens-redefines how the Court's judgments impact those beyond the courtroom. In this interview, Chief Justice Koome reveals how she aims to inspire and guide by balancing strict adherence to the law with a sensitivity to social values, establishing a judicial legacy that is both firm and empathetic. Chief Justice Koome discusses the philosophy that underpins her judicial decisions, the challenges of interpreting constitutional mandates, and her aspirations for a judiciary that serves as both a shield and a bridge for all Kenyans.

What would you describe as the judicial philosophy guiding Kenya's Supreme Court today?

CJ Martha Koome: Our philosophy is fundamentally people-centered justice. This philosophy captures the essence of what we are building here. Our approach ensures that the Supreme Court can feel, touch, and talk to Kenyans through its judgments. Whether in cases like the ***Building Bridges Initiative (BBI)*** case that addressed crucial constitutional questions, or in landmark decisions on land law and customary trusts, the Court has remained committed to interpreting the law in a way that reflects Kenyans' lived realities and aspirations.

Through our judgments, the Supreme Court has aimed to resonate with the public. Landmark cases, like those on the Building Bridges Initiative (BBI) or land ownership, reflect this. The BBI case dealt with significant constitutional questions, where we spoke directly to the interests of society. Similarly, in *Muruatetu*, we addressed sentencing discretion, reflecting the judiciary's responsiveness to societal expectations. It's a philosophy that's felt in each judgment, allowing the Court to set guidelines aligned with the public's aspirations.

The BBI judgment, for example, was not just a constitutional exercise—it was a demonstration of our commitment to a society-centered judiciary. When we handle issues like land, where families have had deep-rooted conflicts, or the Muruatetu case on sentencing guidelines, we aim to act as custodians of justice who can weigh society's values and individuals' rights. In this way, the Supreme Court becomes a court of guidance, offering clarity on issues that touch Kenyans' daily lives and influencing lower courts to adopt the same society-centric approach.

What is the expectation of people-centered justice, especially in terms of the multi-door approach to justice?

CJ Martha Koome: Access to justice is fundamental to achieving a people-centered judicial system. People cannot truly experience justice if they cannot

reach it, or if the paths to it are limited. For example, victims of crimes may spend six or seven years trying to access justice, only to face delays and frustrations that make the original issues almost unrecognizable by the time they're addressed.

The challenge is that our formal court system currently only serves about 10% of Kenyans. A recent justice needs assessment confirmed this, revealing that a vast majority—around 70%-find justice through informal means, such as community mediations, local religious councils, and even chiefs who act as arbiters in local disputes. These alternative mechanisms help manage the majority of disputes in ways that are accessible and rooted in the local context. So, my question as Chief Justice is: Am I only serving that 10%, or am I responsible for the entire country? And the answer is clear—I'm responsible for all Kenyans.

Our response has been to encourage a multi-door approach to justice, one that goes beyond the physical courtrooms to encompass the broader lived experiences of justice. This includes actively supporting methods such as court-annexed mediation, where we vet and identify cases that may be settled faster outside the traditional litigation route. Through this approach, we can resolve issues more amicably and swiftly—especially in sensitive cases like family and succession disputes, where prolonged litigation often does more harm than good.

How is court-annexed mediation contributing to this approach?

CJ Martha Koome: Court-annexed mediation has been transformative, particularly in family and commercial disputes. When we launched this initiative as a pilot in 2016, we saw significant interest from institutions like the Kenya Banking Association, which saw an opportunity to expedite the resolution of financial disputes. The success has been so compelling that it's expanded to 68 court stations across the country. The impact is

especially apparent in succession matters, where family members often experience deep conflicts. Instead of escalating these disputes in court, we encourage families to engage in mediation, where they can focus on resolving issues rather than extending them. The anecdote shared by an elder—about families unable to "divide the meal" left by a deceased loved one—illustrates how avoiding lengthy legal procedures benefits everyone. Instead of losing value in prolonged battles, mediation facilitates an equitable and timely settlement, helping families move forward without additional strain.

How does the judiciary ensure that alternative justice systems like AJS honor both traditional customs and constitutional standards?

CJ Martha Koome: This is indeed critical because, while we value cultural traditions, we must ensure they align with human rights standards and our constitutional values. The alternative justice systems (AJS) are enshrined in our Constitution, but they are carefully calibrated. Not all traditional customs meet the threshold—practices like early childhood marriage and FGM are inherently at odds with human rights principles, and we categorically reject them in any form of dispute resolution.

To maintain this balance, we conduct thorough training for the elders and community leaders who operate within AJS. We introduce them to constitutional principles such as inclusivity and non-discrimination, emphasizing that all participants must be heard and treated fairly. For example, the Njuri-Ncheke, a traditional tribunal from my community, traditionally did not include women. We insisted on reform: they must now involve women, youth, and persons with disabilities to meet our inclusivity standards.

This methodical training also ensures that all AJS entities understand and uphold the principles of fair hearing and transparency. The process is incremental—currently, we're active in 11 counties, with plans to scale up gradually. Every tribunal member receives training in standard operating procedures and a code of conduct to mitigate risks of corruption and misconduct, which are concerns in any community-based setting.

What challenges has the judiciary encountered while implementing AJS initiatives?

CJ Martha Koome: The primary challenge has been budgetary constraints. AJS started without dedicated funding from the Judiciary; instead, we relied on external support. This year, the Judicial Service Commission was able to budget for some AJS initiatives, yet funding remains insufficient to expand at the desired pace. Training community leaders and establishing infrastructure in more counties requires resources. However, we're grateful that local entities, such as religious organizations, have been proactive in supporting AJS initiatives in certain areas, connecting them with the judiciary and allowing us to maximize our reach despite limited resources.

What role do you see technology playing in enhancing access to justice, especially for historically marginalized groups?

CJ Martha Koome: Oh, that is truly a game-changer. Technology has become the game-changer when it comes to access to justice, bridging the digital divide even in remote areas. Lawyers, for example, now find it more convenient to handle cases without leaving their offices. Previously, filing meant going to court, finding parking, accessing the registry, and physically taking the file before a judge. Now, they can handle all of this online—from filing documents to receiving orders. Virtual hearings and video conferencing are available, and there's a portal for court schedules. In the past, lawyers had to send staff to different court

stations just to get a court list, but now, with a click, it's all accessible.

We're also leveraging partnerships with agencies like Huduma Centers to allow citizens to file documents there instead of using cybercafes, giving them flexibility. The Law Society initially had concerns that this would impact lawyers' work, but now we understand it's just another option. Digitizing court records has been a huge leap forward. We have records from 2019 onwards digitized, with the support of the Ministry of ICT and Mastercard Foundation through the AJIRA programme. African chief justices are also looking to Kenya as a model for using technology to expand access to justice.

What potential do you see in artificial intelligence, particularly in judicial operations?

CJ Martha Koome: It's a work in progress. Right now, we're exploring how AI can improve efficiency, especially in managing records and transcription. We've set up a National Transcription Center, where AI is being used to transcribe online proceedings overnight. We're also looking into how AI might support judges and magistrates in organizing research, referencing similar cases, and identifying relevant laws to enhance consistency. AI has great potential to streamline the work of judges, and we're actively exploring these possibilities.

You mentioned the digital divide, especially for people who lack digital literacy or internet access. How is the judiciary addressing this gap?

CJ Martha Koome: The ICT Department is working hard to train our staff, judges, magistrates, court users, lawyers, and even police officers. Recently, I attended a training session on a new digital leave application tool as we work toward going paperless. This training extends to police stations, where officers are being taught to use the judicial e-filing system and track cases via mobile phones.

Public education is crucial, but resources are limited. Ideally, we'd run awareness programmes, even on vernacular radio, to help people understand how they can access court services. We also know some people don't have smartphones or access to Huduma Centers, but our customer service desks at courts offer in-person assistance, equipped with computers and staffed to help anyone needing guidance, be it filing documents or getting information.

What are the future plans for virtual hearings and digital services in the judiciary?

CJ Martha Koome: We're consolidating the gains we've made through e-filing, virtual courts, and case management, but it goes beyond that. We're implementing an ERP system to streamline administrative functions like financial and human resource management. It tracks staff activities, performance, and resource allocation. I can log into any court station from my dashboard and monitor real-time data on case filings and adjournments. Though we're making progress, there's still work to be done.

On specialized courts. One, they reflect the progressive approach towards specific social issues, especially in Kenya. Could you share your perspectives on the impact of specialized courts and the impact that they have on judicial efficiency and public confidence in the system?

CJ Martha Koome: Specialized courts play a crucial role in addressing specific socio-economic needs within our society. For instance, we recognized the importance of commercial disputes and established commercial courts to ensure that such disputes are resolved swiftly. This initiative is vital for boosting confidence among investors and promoting commercial activities in Kenya. As a result, commercial divisions have been replicated in various regions, like Mombasa and Nakuru, adapting to the unique needs of each locality.

When it comes to gender-based violence, we've found this issue to be deeply entrenched. Despite the enactment of the Sexual Offences Act in 2006, cases of sexual violence continue to rise. In response, we launched a pilot specialized court in Shanzu focusing on sexual and gender-based violence (SGBV). This court expedited the handling of such cases, reducing turnaround times significantly. However, we faced challenges, including the burnout of magistrates exposed to traumatic cases. To address this, we implemented a registry model for SGBV cases, where files are color-coded, and staff are specifically trained. By renaming the court to the Gender Justice Court, we aimed to destigmatize it and make it more accessible, leading to improved case resolution times.

Additionally, we are committed to children's rights. Children should not be in court corridors; they belong in schools and playgrounds. We have trained our judiciary personnel to approach cases involving children in conflict with the law with a focus on diversion and community involvement, ensuring their best interests are prioritized.

What criteria do you use to determine if you are to establish new specialized courts?

CJ Martha Koome: Data is central to our decision-making process. We analyze case volumes and types to determine where specialized courts are needed. For example, if a particular court station reports a high number of SGBV cases, we assess the situation and establish a specialized court to address this demand effectively.

Are there other areas you consider rightful specialization in Kenya's judiciary, especially in our justice landscape?

CJ Martha Koome: Yes, we are also focusing on serious crimes, including

counterterrorism, cross-border crimes, piracy, and money laundering. In today's interconnected world, we recognize that these issues require specialized attention. We have established courts in Shanzu and Kahawa to tackle such crimes. Moving forward, we will continue to explore specialization based on emerging challenges and the demands of our justice system.

Institutional capacity is very critical in the effectiveness of the Judiciary. How is the judiciary working to secure adequate funding, especially given the competing national priorities?

CJ Martha Koome: The challenge of securing adequate funding for the Judiciary is significant, particularly amid competing national priorities. Currently, the judiciary faces severe resource constraints. For example, the High Court's establishment requires 200 judges, yet only 96 are currently serving. Recently, we lost two senior judges, which further strains our capacity. For the magistracy, the establishment stands at 1,200, but we only have 570 active magistrates, with attrition rates high. In the Court of Appeal, we are similarly short-staffed, with an establishment of 70 judges and only 29 available. This situation necessitates constant recruitment and support staff, including court assistants and secretaries, to ensure we can deliver justice effectively.

In July, we planned to interview Court of Appeal judges, but budget cuts forced us to pause. The Judiciary's budget was reduced by almost 30%, and despite our request for KSh 43 billion, we were allocated only KSh 22 billion, which was then further reduced. However, we have reached a critical juncture where we must proceed with recruitment despite these challenges.

Judicial wellness is often overlooked. What initiatives are being taken to promote wellness, resilience, and mental health among judicial officers and court staff?

CJ Martha Koome: You are correct; the Judiciary bears the burden of resolving societal disputes, leading to significant stress for judges, magistrates, and other adjudicators. Therefore, mental wellness is crucial for our effectiveness. We are currently revamping a psychosocial unit within the judiciary, which will provide support and counseling, especially after traumatic hearings.

Additionally, we encourage physical activities and team-building exercises. For instance, we recently organized a hike in the Ngong Hills for judges and magistrates, fostering bonding and promoting mental health. This focus on wellness is relatively new; it was not emphasized when I joined the Judiciary 22 years ago.

To support our mental wellness, we also encourage judges and staff to identify mentors, even if informally. This approach allows for personal development and helps staff manage stress more effectively. Case management systems are being implemented to alleviate the burden on judges by streamlining how cases are processed. By efficiently managing dockets, we aim to reduce stress and improve the quality of judicial decision-making.

Effective case management not only helps in identifying issues but also empowers judges to handle cases with clarity and focus, ensuring that we respond appropriately without being overwhelmed by the volume of work.

How do these initiatives impact the overall efficiency of the judiciary?

CJ Martha Koome: These initiatives are vital for enhancing the overall efficiency of the judiciary. By prioritizing mental health and wellbeing, we create an environment where judicial officers can perform their duties without the crippling effects of stress. The introduction of effective case management systems allows judges to tackle cases more systematically, reducing delays and increasing the speed of justice delivery. By addressing both the human resource needs and the mental health of our judiciary, we position ourselves to meet the demands of a growing population seeking justice. We must continue to advocate for adequate funding and resources to build a robust and resilient Judiciary that can serve all Kenyans effectively.

What are your thoughts on the security of judicial officers in Kenya?

CJ Martha Koome: The security for judicial officers has remained a concern, especially for those in politically sensitive positions. This is a primary issue for us within the Judiciary. In 2022, just before the general elections, I met with one of our partners, and they posed a significant question: “What stops you from sleeping?” Initially, I had no worries, as we have navigated through re-elections before. However, during our last meeting, I candidly admitted that I could not sleep due to security concerns. The shooting of a magistrate while sitting in court marked a turning point for me.

We have witnessed many of our colleagues dying suddenly, raising concerns about stress and the neglect of our health due to the pressures of work. Infrastructure plays a crucial role here; for instance, our Supreme Court lacks adequate security measures. In contrast, when I visited the Westminster Magistrates' Court in the UK, I was not allowed to enter with even a small pair of scissors. Such stringent security protocols have been absent in our courts, which have not received the necessary attention over the years.

Since I assumed the role of Chief Justice, I have taken these matters personally. Being a woman in this position adds another layer of responsibility; any security lapses could be attributed to my leadership. Thus, we have established a Judicial Police Unit to enhance security for judges and judicial

officers. We have made progress in providing security at court stations, yet much work remains. The tragic incident involving our magistrate underscored our vulnerabilities and the lessons learned regarding courtroom security.

We found that many courtrooms were not secure, particularly after a magistrate was shot in a makeshift tent due to overwhelming caseloads. To remedy this, our Judicial Leadership Team (JLT) decided that we would no longer hold court in such unsafe environments. We are in the process of demolishing those tents and implementing a comprehensive security report to safeguard the judiciary.

A committee led by Supreme Court Justice William Ouko has produced a report outlining short-term, mid-term, and long-term strategies to enhance security in our courts. Key recommendations include the installation of screening measures at court entrances and various other security enhancements that are critical to ensuring a safe working environment for our judicial officers.

As a law student or an observer, I see that there have been persistent allegations of corruption within the Judiciary. Some members of the legal community argue that the judiciary has lost public trust due to internal corruption. How is the Judiciary addressing these issues, and what has been achieved so far?

CJ Martha Koome: This is indeed a serious issue that strikes at the heart of judicial integrity, and it is one we tackle with utmost vigilance. The Judiciary operates under a zero-tolerance policy toward corruption. Bribery, favoritism, and conflicts of interest are prohibited, with mechanisms in place for addressing any complaints that arise.

Within the Judiciary, the Judicial Service Commission (JSC) holds disciplinary powers, while my office has established the Ombudsperson Unit, which addresses day-to-day complaints about judicial

delays, missing files, or case adjournments. More complex corruption complaints can be reported to the Office of the Judiciary Ombudsperson, ensuring that issues are logged, tracked, and appropriately addressed.

Recognizing that corruption is deeply entrenched within society, the Judiciary collaborates with various bodies, including the Ethics and Anti-Corruption Commission (EACC). In 2022, we invited the EACC to examine our systems, and they provided us with comprehensive insights into how we might better prevent corruption within our ranks. We have also encouraged the public to report any credible information about corrupt practices, with the JSC ready to investigate if there is substantive evidence.

We have posted prominent messages across courthouses, reminding Kenyans that bribery is prohibited. The public is urged to resist any solicitation for bribes and to report it. Judiciary accountability goes hand-in-hand with public cooperation—combating corruption cannot be a one-sided effort. We need the public to stand firm and refuse bribes, and if they encounter wrongdoing, to report it.

My role as Chief Justice is to lead and ensure justice for all Kenyans, not to engage in social media battles against baseless accusations. I am committed to upholding the values enshrined in our Constitution, and I remain undeterred by those who might seek to undermine our integrity. Our message is clear: the Judiciary is here to serve justice, and we ask all Kenyans to support us in eradicating corruption.

You mentioned accountability within the judiciary, which the Constitution provides alongside judicial independence. How does the judiciary ensure accountability, and what structures are in place to uphold it?

CJ Martha Koome: While the Constitution mandates judicial independence, accountability is equally critical and cannot be overlooked. Each judicial officer is accountable to the public, which funds the judiciary through taxes. To uphold this accountability, we implement a performance measurement system across all levels of the judiciary.

Every judicial officer keeps a daily record of their work, noting how many cases they have presided over, witnesses they have heard, and rulings they have made. This data is compiled monthly and submitted for review to ensure productivity and diligence. Moreover, the Performance Management and Accountability Committee, led by a judge of the Court of Appeal, assesses this information. Annually, we release a report on the state of our case management and clearance rates, allowing us to track progress and maintain transparency.

For instance, in the previous fiscal year, we achieved a case clearance rate of 99%, which means we resolved 419 out of 423 cases filed. Some courts, like the Supreme Court, Employment and Labor Relations Court, and Environment and Land Court, even surpassed the 100% benchmark. This structured accountability ensures that we remain committed to addressing backlog issues and improving service delivery with the limited resources we have.

The judiciary collaborates with the EACC in the fight against corruption. How effective has this partnership been, and what areas could benefit from further strengthening?

CJ Martha Koome: Our relationship with the EACC has been robust. We welcomed them to conduct an anti-corruption mapping of the judiciary, and they provided valuable guidance on best practices and frameworks for anti-corruption efforts within our institution. As chair of the National Council on the Administration of Justice, I oversee the collaboration among all justice system actors, with the EACC being a vital partner.

The Anti-Corruption Committee, chaired by EACC officials, has developed specific guidelines on how each institution within the justice system should address corruption. For the Judiciary, collaboration with the police and Directorate of Public Prosecutions is essential. The Judiciary alone cannot investigate or prosecute; we depend on these agencies to bring cases before us.

Regular engagement through the Court Users Committees in every court ensures we're aligned in handling cases efficiently. In our Anti-Corruption Court, we've seen real progress, but there are always opportunities to improve. We need to avoid overwhelming cases with too many charges or witnesses, which often delays justice. Our goal is to ensure fair trials that serve the interests of Kenyans, not hinder them.

And one of the aspects I've come to learn about is judge-led case management. What is the reasoning behind this approach, and what has been its impact?

CJ Martha Koome: That's a very perceptive question, and indeed, judge-led case management is a core transformation we've integrated. Previously, court proceedings were heavily directed by advocates. They would file cases and return only to set hearing dates, often adjourning matters indefinitely. Few cases actually moved forward in a meaningful way. Now, however, we've embraced a proactive law and joint policy. If someone files a case, it is expected to proceed; if they don't wish to continue, they withdraw it. Judges now set hearing dates. If a party fails to attend, the case can be dismissed. The Judiciary isn't a parking lot; we're here to facilitate resolution, not to indefinitely store unresolved disputes.

Judge-led case management has allowed us to identify dormant cases – what we call "dead stock" – and isolate them. A judge, being in control, initiates a case management conference, ensuring each file is ready for hearing. For instance, at the Supreme Court, we hold these conferences virtually, going over each matter to confirm submissions, document exchange, and statement filings. Only once every requirement is fulfilled do we set a hearing date. It's efficient, targeted, and ultimately upholds the court's role in delivering timely justice.

Based on this approach, what are some challenges the Judiciary is facing in implementing these judge-led courts, especially given the possible rigidity from advocates?

CJMartha Koome: A key challenge lies in requiring collaboration from the bar, which represents litigants. Some litigants use court processes to stall—especially debtors who know they're nearing a judgment day. For instance, if someone owes money, they may attempt to delay the process to avoid a verdict. To counter this, we need advocates to encourage clients to fulfill obligations, rather than manipulate proceedings. Courts will only reinforce a person's duty to honor agreements, which becomes costlier if delays add interest and auctioneer fees.

The Judiciary's challenge is in balancing these dynamics, often between litigants with opposing intentions. Typically, the oppressed party wants an expedited resolution, while the other may not. Our mandate is to ensure both parties meet as equals before the court, regardless of their positions outside. We are making significant progress; the success rate is encouraging. Gradually, the legal and policy framework is gaining traction, and we see positive outcomes.

On this aspect of case backlog, you spoke of three superior courts. How are the other courts doing, especially in light of rule 5 (2)(b) of the Court of Appeal rules that sees people complaining it is impeding and actually creating a case backlog? So, how are the other courts managing? Now the High Court, the Court of Appeal, and other subordinate courts?

CJ Martha Koome: We are really trying. In terms of case clearance rates, we are at a remarkable 99% globally, which speaks to the dedication across our judicial system. As I mentioned earlier, some of our courts are even exceeding the 100% clearance rate benchmark. For instance, magistrate courts are clearing cases at 98%, which is impressive by any standard.

However, the Court of Appeal faces unique challenges. Currently, we have only 29 judges despite an establishment mandate of 70. Increasing this number has been difficult, primarily due to budget constraints. Rule 5(2)(b) has been a persistent issue since my tenure at the Court of Appeal. It requires every decision of the High Court or courts of equal status to undergo appeal at the Court of Appeal. Each appeal comes with an application and a certificate of urgency, necessitating a stay under rule 5(2)(b), which often requires immediate judicial attention.

This rule burdens the Court of Appeal, as judges must handle both the applications and the appeals. Given the limited number of judges, we have to explore alternative approaches. One consideration is whether these applications under rule 5(2)(b) could be handled by a single judge instead of a full bench of three. Another alternative, which worked effectively during my time in Nyeri, Meru, and Mombasa, involved convincing lawyers to prioritize hearing the full appeal rather than the rule 5(2)(b) applications. This approach streamlined the process, reducing the need to write multiple rulings and freeing time to focus on judgments.

The ongoing dialogue between the bar and the bench at the Court of Appeal reflects our collective aim to serve litigants efficiently. Addressing this issue is a complex process that also involves committees within the court.

You said that Court User Committees (CUCs) have been instrumental in connecting and strengthening these court societies, especially in under-resourced rural areas. How effective have these efforts been?

CJ Martha Koome: CUCs are essential in engaging the public with the Judiciary. The Constitution mandates us to involve people in decisions that affect their lives, particularly in delivering justice. Every court station has a CUC; they're not only a management tool but a form of participatory leadership. Each CUC meets at least once per term—some even more frequently, as their members are committed to supporting the courts. We have specialized CUCs for areas such as children's rights, gender-based violence, and land disputes. Particularly in Nairobi, we've established a working group to tackle complex land issues collaboratively, addressing challenges like double allocation of land with community involvement. CUCs include police, the Law Society, the DPP, NGOs, and more, which helps identify and resolve systemic delays, such as in criminal cases where witnesses may not appear or legal representation is delayed. Ultimately, the CUCs are sustainable because they're driven by the people, fostering a strong justice chain that works for everyone.

Now, turning to your role as the president of the Supreme Court, how crucial has the Kenya Judiciary Academy (KJA) been in supporting the Judiciary's functions?

CJ Martha Koome: The KJA is pivotal for the ongoing training of the judiciary's 7,000 employees and beyond, as it also educates other critical stakeholders. KJA is essentially the Judiciary's knowledge hub. We recently acquired 55 acres in Ngong for a dedicated facility and are moving forward with development plans, which have garnered significant regional interest. We've hosted many delegations from across Africa eager to benchmark with KJA. Our judiciary's training needs are unique, covering complex areas like counter-terrorism, money laundering, and gender-based violence,

which demand a specialized approach. The Judicial Service Commission (JSC), mandated to oversee training, fully supports KJA's vision as a center of excellence—not just for Kenya but regionally. Through KJA, we aim to promote access to justice and empower people to understand and claim their rights.

There's an increased interaction between the Supreme Court and academic institutions recently. How far do you intend to take this Bar-Bench collaboration?

CJ Martha Koome: We want this collaboration with universities and law schools to be a permanent feature. The legal academia is an integral audience of our judgments, and we're committed to mentoring young people in the field. This year, as part of celebrating the Supreme Court's 12th anniversary, we're hosting moot courts where we'll preside over the proceedings ourselves. Our aim is to make these engagements a cultural staple, featuring regular Supreme Court visits to educational institutions. The lectures and dialogues we hold allow students and academics to challenge and question our decisions, providing valuable insight into the judiciary's philosophies and actions.

In what you've described as a people-centric judiciary, how are you using technology to enhance accessibility to justice?

CJ Martha Koome: Technology is vital in bridging accessibility gaps, making justice truly people-centered. For example, with a mobile phone, you can follow court proceedings from anywhere, even while tending to your cattle. Beyond this, communities now have localized options for resolving disputes, such as in Nyumba Kumi and other communal settings. By embedding technology within the judiciary, we're breaking down barriers, offering Kenyans a convenient way to stay informed and engaged with their cases.

With all these efforts, public expectations inevitably grow. How do you handle such high expectations given the practical limitations?

CJ Martha Koome: Every Kenyan has a role to play in ensuring democracy and governance function. When systems fail, cases come to court. But ideally, if governance structures remain robust, fewer matters would end up with the Judiciary. Each sector—be it ministries, registration offices, or even individual citizens—needs to uphold justice within its remit. The Judiciary alone cannot carry the weight of governance. We resolve disputes, but democracy's integrity depends on everyone doing their part. If registration offices, for example, did their jobs correctly, many issues would not spill over to the courts. My plea is for everyone to uphold justice, starting with treating others fairly.

Finally, could you share some advice for young lawyers and those entering the legal profession?

CJ Martha Koome: For young lawyers, there's no substitute for hard work and commitment. My background wasn't privileged; I grew up in a patriarchal, polygamist household with limited resources. But I worked hard, making the most of every opportunity. I tell young lawyers to avoid the misconception that there are no jobs or the profession is saturated. With 25,000 lawyers for a country of 55 million, there's ample room for dedicated advocates. My advice is to remain focused, diligent, and to seize the opportunities available within our robust and growing legal economy.

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

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

May 21, 2021-October, 2024

Chief Justice Martha Koome, has been championing institutional reform under the Judiciary vision 'Social Transformation through Access to Justice,' (STAJ). The vision's goal is to put in place a people-centred justice system that addresses the justice gaps that have been obstacles to the realization of a justice system that is accessible, efficient, timely, and cost-effective. To this end, there have been laudable initiatives under her administration as illustrated hereunder.

(a) Utilizing Technology in the Delivery of Justice

The Judiciary is proactively harnessing digital technologies, the Internet and ICT to promote access to justice, human development and social transformation. Under STAJ, key technological initiatives have been adopted and operationalised by the Judiciary. These include e-filing, Court Recording and Transcription Services(CRTS), Case Tracking System (CTS), Enterprise Resource Planning (ERP), and continued provision of ICT hardware and Internet.

The Judiciary's home-grown e-filing system includes e-case registration, automated court fees assessment, e-service facilitation, e-payment and automated generation of orders and communication.

The Judiciary Case Tracking System (CTS) has brought positive transformation to registries enabling automated registry functions. These include digital registration of cases, tracking of the case progress, automated court fees assessments and management of the court calendar and cause list.

The Judiciary is keen to mitigate potential digital exclusion. It has therefore developed strategies and innovations to provide e-Judiciary services through Huduma Centres and Constituency Innovation Hubs

for members of the public without access to the internet. Through these efforts, citizens are able to access judicial services across the country through community centres that are easily accessible to them.

In addition, the Judiciary website and e-platforms are designed with mobile-friendly interfaces for enhanced accessibility. The Judiciary services can also be accessed using mobile-friendly formats such as USSD and SMS.

The digitization agenda has improved access to justice and is enhancing institutional performance, efficiency and effectiveness in service delivery.

(b) Specialised Courts

• ***Gender Justice Courts***

In March 2022, Hon Chief Justice Martha Koome launched the Shanzu Sexual and Gender Based Violence (SGBV) Court (now Gender Justice Court) as the first specialised SGBV Court. The Judiciary developed and launched the SGBV Strategy on 26th June 2023. This strategy is aimed at embedding a survivors-centered approach in the courts. Under this Strategy, the Judiciary undertook a study to determine the prevalence of SGBV cases in the country and it was established that the Gender Based Violence (GBV) case load is highest in almost all regions with large population concentrations in Kenya. Thus, the Chief Justice launched additional courts at Kibera, Makadara (Nairobi), Meru, Nakuru, Kiambu, Machakos, Kisii, Kitale, Kakamega, Kisumu and Siaya Law Courts in June 2023. Most recently is the Dagoretti Court launched on 11th October 2024. Therefore, there are currently 13 Gender Justice Courts in the country. The Hon Chief Justice has directed the Heads of Stations across the country designate special registries for SGBV matters.

As a follow up to this initiative, numerous strides have been made in protecting and enforcing the rights of SGBV victims. These include:

- The Office of the Chief Registrar of the Judiciary, **established a Committee on the Definition of Case Types** for the Gender Justice Court to define what constitutes SGBV cases; provide a criterion to determine the case types to be tried by the SGBV court; consider whether the description /name of the court is appropriate; outline the role of the court in protecting victims and witnesses; and any other matter indicated to and related to the operations of the court. As a result of stakeholder engagements, the committee renamed the SGBV Courts to **Gender Justice Courts** and came with Practice directions for the court.

- **Convicted Sexual Offenders Electronic Register.** Through the Office of the Chief Registrar of the Judiciary, the Convicted Sexual Offenders Electronic Register was launched on 26th June 2023.

- **Committee on the Review of Laws and Policies relating to Sexual Offences and Gender Based Violence in August 2022.** The Hon Chief Justice, as the Chairperson of the National Council on the Administration of Justice (NCAJ), established the Committee on the Review of Laws and Policies relating to Sexual Offences and Gender Based Violence in August 2022.

• ***Small Claims Courts (SCC)***

The SCC is a subordinate court with jurisdiction to determine civil claims with a monetary value not exceeding KSh1,000,000 (One million). The Court is characterized by procedural simplicity, efficiency and expeditiousness in delivery of decisions. The SCC was operationalised on 26th April, 2021 vide gazette notice No. 3791, with the

first station located at Milimani commercial court premises. More SCC have been established and operationalised at Kajiado, Machakos, Nyeri, Naivasha, Nakuru, Eldoret, Kakamega, Kisumu, Mombasa, Thika and Meru, as well as one virtual sub-registry. The Judiciary collaborated with the Nairobi Metropolitan Services (NMS) to construct additional SCC in Kasarani, Makadara, Dagoretti, Mathare and Embakasi. The aim is to operationalize 100 Small Claims Courts in the country.

There are over twenty-five Resident Magistrates designated as adjudicators in the SCC, with efforts also being made to expand the Judiciary ICT infrastructure such as e-filing and the CTS to these courts.

Information, Education and Communication (IEC) material on the Court have been developed and disseminated to the public in English and Swahili to improve understanding of the court's processes and requirements.

SCC contribute to the reduction of overall case backlog in mainstream courts. This is because the statutory lead time for resolution of disputes in SCC is pegged at a maximum of 60 days from the date of filing of a case. Further, the SCC reduces the cost and time for hearing and determination of commercial disputes and consequently support the ease of doing business in Kenya. This is achieved through freeing-up of investment funds and other capital resources otherwise rendered inactive through court injunctions. The timely re-circulation of these funds into the economy bolsters economic transactions by optimizing limited resources thereby creating a favorable environment for economic growth. SCC are a critical part of realizing the Judiciary's

vision to achieve enhanced access to justice.

• ***Child Justice***

Great strides have been made in the Children's Legislation in the Judiciary. There is enhanced awareness and knowledge of court procedures. Simplified rules of procedure were developed and disseminated. On December 8th 2023, a workshop was held for validation of the fair set of rules under the Children's Act 2022, as follows:

i) The Children (Adoption Proceedings) Rules 2023
ii) The Children (Foster Care) (Procedure and Practice Rules) 2022
iii) The Children (Guardianship) Procedures Rules 2023
iv) The Children (Children in Conflict with the Law) (Procedure and Practice Rules) 2023.

• ***The Child Justice Strategy***

The Child Justice Strategy was launched on 26th June 2023. The Chief Justice recognises that empirical data indicates that a large number of children come into contact with the legal system, either as minors in conflict with the law, victims of child abuse, or children in need of care and protection. It is thus imperative for the justice institutions to demonstrate awareness of the circumstances of children and their well-being as they navigate the intricate path of legal proceedings.

The Child Justice Strategy developed under her leadership has four areas of focus: The Rights of Children in Conflict with the Law; Protection of Child Victims and Witnesses and Children in Need of Care and Protection; Children Accompanying Their Mothers or Primary Caregivers to Prison; and the Legal Obligations of the Judiciary as the Lead Collaborator for Ensuring Access to Justice for Children.

To achieve the goals of the strategy, the Judiciary intends to collaborate with various justice agencies, raise awareness within the Judiciary regarding the needs of child victims, and establish a specialised, trauma-informed court.

(c) Widening the Doorways of Justice

• ***Alternative Justice Systems (AJS)***

The Hon. Chief Justice is categorical that the justice system must be responsive and alive to the realities of the Kenyan people and offer tangible and substantive justice that speaks to their concerns, vulnerabilities, and pains. Therefore, the Judiciary is dedicated to the idea of justice beyond the confines of State institutions embracing the multi-door institutional approach and nurturing its potential to deepen access to justice. The AJS is one such mechanism.

AJS offers Kenyans an appropriate and effective system of dispute resolution, given that communities have used elements of facilitated consensus-building in dispute and conflict management outside State structures for centuries. By focusing on root causes of injustice and the justice needs of entire communities and societies rather than just individuals, this model encourages cohesion and unity subsequent to the resolution of disputes.

The Judiciary through the National Steering Committee for the Implementation of the Alternative Justice Systems (NaSci-AJS), promotes AJS across the country through the development and implementation of the AJS Action Plans. These plans have been launched in Kajiado and Nakuru Counties. They outline the specific activities, responsibilities and timelines for implementing the AJS Policy (launched in August 2020) at the county level; and the establishment of AJS Suites (Ukumbi) to provide physical spaces for alternative justice actors to conduct their dispute

resolution processes in a dignified and conducive environment. Ukumbi Suites are open in Isiolo, Kajiado, Nakuru and Lamu Counties to provide a platform where parties can come together to discuss their issues candidly, fostering understanding and providing an avenue to craft mutually beneficial solutions particularly for cases involving family, land and commercial disputes.

(d) Entrenchment of Alternative Dispute Resolution (ADR) Mechanisms:

• ***Expansion of Court Annexed Mediation (CAM)***

To entrench ADR mechanisms within the Judiciary and consequently enhance access to justice, CAM was instituted in 2016 as a strategic initiative. The Judiciary under STAJ, continues to implement, improve and expand CAM across all the court stations as an avenue to resolve disputes especially in family matters. Matters resolved amicably and expeditiously would otherwise have spent time tied up in litigation. Eight CAM registries were established and operationalised in the years 2021-2022. By June 2023, 17 new mediation registries were established in Kikuyu, Limuru, Thika, Mavoko, Kajiado, Murang'a, Bungoma, Iten, Vihiga, Migori, Gatundu, Webuye, Runyenjes, Siakago, Busia, Kangundo and Gichugu. In 2024 registries were established at Kenol, Isiolo, and Marsabit, Makueni, Nyahururu, Narok, Homabay, Voi and Garissa Law Courts.

In addition, the Mediation Policy was developed and is being implemented across all Mediation Registries. Additionally, CAM

Rules, Policy on Private Mediation, Google query procedure, and Mediation Payment Guidelines have been developed.

(e) Expansion of Courts and Tribunals

The Judiciary prioritizes the expansion of court services across the country. This is in line with the STAJ vision of improving physical access to justice, reducing distances travelled by litigants and decentralizing the delivery of justice for all in the society, particularly the marginalized and vulnerable.

The objective of the STAJ vision is to reduce the proximity of courts to less than 100 kilometers; establish and operationalize a Magistrates' Court in each sub-county; a High Court, Environment and Land Court (ELC) & Employment and Labour Relations Court (ELRC) in each county; and further decentralize the Court of Appeal beyond Nairobi, Mombasa, Kisumu and Nyeri. To this end, the Supreme Court established two sub-registries in Mombasa and Kisumu to enable the filing of cases from these locations thus defraying the attendant costs of filing the same in Nairobi. The Court of Appeal operationalised its Kakamega sub-registry and held its inaugural court circuit in March 2022. The Court of Appeal further established four other sub-registries in Busia, Meru, Garissa and Kisii. The High Court operationalised two sub-registries in Kapsabet and Kilgoris. The ELRC sub-registries at Bungoma and Malindi have been upgraded to fully fledged courts.

In addition, the year 2022-2023 saw an increase in the number of Court of Appeal, Environment and Land Court, and Magistrates' Court stations. Further, more sub-registries were established at the various superior court levels. At Milimani, specialised divisions were created in the ELRC and the ELC to improve operational efficiency.

(f) Young Advocates Mentorship Programme

On April 17, 2022 the Chief Justice officially launched the Young Advocates Mentorship Programme, in collaboration with the Law Society of Kenya and the Senior Counsel Bar. Through this initiative the Judiciary seeks to deepen partnership with the Bar in addressing critical justice needs and gaps in the society. The Programme is founded on two major limbs: to enlist young advocates as key players in the revamped Judiciary Pro Bono Legal Aid Scheme; and second, to address the skills and knowledge gap that young lawyers often grapple with as they embark on their career journey. In addition, the initiative seeks to revamp the Judiciary's Pro Bono Legal Aid Scheme, expanding its scope to include capital offenses and children's cases in acknowledgement of the vulnerability of children entangled with the legal system.

(g) Commercial Justice Sector Reforms

A key deliverable under the STAJ vision is ensuring commercial disputes are resolved expeditiously to promote ease of doing business and create a conducive business climate through the provision of a responsive and efficient commercial justice system that also builds investor confidence.

On June 15, 2022, the Chief Justice launched the Commercial Justice Sector Court Users Committee (CUC). The CUC will provide a platform that brings together actors in the commercial justice sector to engage, develop a shared understanding of access to justice and promote effective partnerships for shared benefits.

(h) Election Preparedness

The Chief Justice recognizes that fair, efficient, timely, and effective settlement of electoral disputes is a crucial component of achieving a successful electoral process

that preserves national unity and cohesion. Therefore, the Judiciary seeks to enhance its preparedness to dispose of matters related to elections. For instance, prior to the General Election of 2022, the Chief Justice on February 25, 2022, gazetted 120 Special Magistrates to hear and determine matters relating to offences under the Election Offences Act, 2016. These Judicial Officers were taken through a comprehensive capacity-building programme to prepare them to discharge their special mandate. Further, the Chief Justice issued a directive to Magistrates handling hate speech matters under the National Cohesion and Integration Act, 2008 to finalize all pending hate speech matters within four months from February 2022.

(i) Operationalization of the Judiciary Fund

After the Chief Justice came into office, the Judiciary intensified its engagements with the National Treasury, Controller of Budget, and the Central Bank of Kenya towards operationalizing the Judiciary Fund and strengthening management policies and systems to optimize the management of financial resources. On September 3, 2021, the Chief Justice established a multi-institutional Technical Committee on the Operationalization of the Judiciary Fund (TCOJF) to, *inter alia*, develop clear operating modalities for the management of the Judiciary Fund bank account and, to define connected banking arrangements. The Judiciary Fund became operational effective 1st July 2022. It still has some logistical problems, which the Chief Justice and other stakeholders are addressing.

(j) Backlog reduction through Service Weeks and Rapid Results Initiative (RRI)

A key pillar of the STAJ vision is clearance of case backlog and hearing of matters within three years. In 2022 through the implementation of service weeks, among other initiatives, the case backlog was reduced. In the same year, the High Court deployed its newly recruited judges to 32 court stations across the country to handle backlog cases through the RRI's. Through this initiative, 12,609 cases were handled with 2,852 concluded.

Tribunals deal with case backlog by conducting file appraisals to determine the age of various cases, mapping cases for dismissal for want of prosecution, holding service weeks, listing old matters on cause lists, and scheduling case deliberation conferences.

(k) Judiciary as a regional hub for judicial dialogues

Under STAJ, the Judiciary seeks to evolve into a regional and global centre of excellence in the administration of justice. The Chief Justice encourages this spirit of consultation, cooperation and mutual development and seeks to engage in activities and platforms that foster the sharing of experiences, ideas, and perspectives on the administration of justice and the place of judiciaries as core anchors of the development agenda within their jurisdictions.

In this regard the Judiciary of Kenya hosted the Southern African Chief Justices' Forum (SACJF) Management Committee Meeting, and Judicial Symposium on Digitisation & Internet Governance from 20th April to 23rd April 2022 bringing together Chief Justices and their Deputies from 12 African jurisdictions to strengthen cooperation and knowledge exchange. The goal of the meeting was to deepen the rule of law regionally and discuss Internet governance, digitisation and the potential of ICT to radically improve the extent, efficiency, and efficacy of access to justice in Africa.

On 3rd to 5th April 2023, the Judiciary of Kenya, the Kenya Judiciary Academy

and the Africa Judicial Educators Network on Environmental Law (AJENEL) hosted the 3rd Regional Symposium on Greening Judiciaries in Africa. This brought together Chief Justices and Heads of Judicial Training Institutions from 26 jurisdictions from Africa and beyond.

The Judiciary seeks to share best practices and innovations with regional jurisdictions to improve efficiency, quality of jurisprudence and services.

(l) Judiciary Personnel Wellness

The Chief Justice recognises that for courts and tribunals to perform optimally, the wellness of judges, judicial officers and staff is critical. The STAJ vision emphasises that without a healthy, motivated and inspired workforce, performance will be sub-optimal. The Judiciary therefore strives to improve the working environment for its personnel by, amongst others, establishing peer-to-peer mentorship programmes and partnering with service providers across the country to expand the benefits under the Judiciary medical cover for preventative care and psycho-social support.

In furtherance of its commitment to improve the well-being of its employees and their families, the Judiciary in October 2022, executed a Memorandum of Understanding (MoU) with the Kenyatta University Teaching Research and Referral Hospital (KUTRRH) for the provision of a wellness programme for diagnostic, preventive, mental and psycho-social support. Within the framework of this program, KUTRRH offers wellness examinations, clinical and surgical services, diagnostic and imaging services, as well as mental health assessments. KUTRRH also prepares and delivers health presentations to Judiciary personnel via online platforms, addressing various healthcare subjects encompassing physiotherapy and psychiatry. The Judiciary employee wellness programme is essential for judges, judicial officers and staff for early diagnosis of diseases, identifying risk factors of chronic conditions and receipt of preventive care and guidance.

(m) Mobile Courts

Th STAJ vision recognises the need to enhance access to justice for marginalised and vulnerable groups. Consequently, the Judiciary operationalised mobile courts in remote areas and as of June 2023, there were 57 operational mobile courts across the country, the majority of which are in arid and semi-arid areas.

(n) Mahakama Popote

This initiative was rolled out during in 2023 whereby judicial officers in less busy court stations are assigned cases from courts with a higher caseload. The judicial officers would hear and determine these cases utilising virtual courts and thus leveraging on technology to ensure increased efficiency in resolution of cases. This initiative not only alleviates backlog in the source stations but also ensures an equitable distribution of workload in the Judiciary.

(o) Robust Judges' Consultative Forums

The Chief Justice has taken the initiative made the commitment to regularly holds consultative forums with the Heads of Courts to identify persistent and emerging challenges in justice delivery and measures to prevent, address or mitigate them. These Heads of Court include the heads of Superior Courts of Kenya representing the Supreme Court, the Court of Appeal, the High Court, the Employment and Labour Relations Court, and the Environment and Land Court. Some of the issues identified on 21st February 2024 were:

- The need to Finalise the Development of Rules under the Fair Administrative Actions Act. This has been done with

the Fair Administrative Action Rules, 2024 set for gazettement.

- The need to utilise RRI using Mahakama Popote model to fast-track time sensitive matters at the Commercial, Constitutional and Human Rights Divisions of the High Court, and RRI to fast-track preparation of Records of Appeal in Criminal Matters to enable fast-tracking of criminal appeals. This is ongoing.

- The need for the Commercial Division of the High Court to pursue collaborative initiatives with support from the Kenya Private Sector Alliance (KEPSA) and Kenya Bankers Association. The meeting with KEPSA successfully took place on 16th July 2024.

- The necessity of holding Open Days and Outreach programmes to reach out to the public and sensitize the public on judicial processes. This is a continuous process that takes place in courts all over the country at the discretion of each court station.

(p) The Judiciary Anti- Corruption Agenda

The Chief Justice is keen to weed out corruption in the institution. A central pillar of STAJ is to ensure that complaints of misconduct, including allegations that relate to corruption, are dealt with promptly and satisfactorily so as to continually mainstream the idea of 'judicial hygiene' in the conduct of judges, judicial officers and staff. In 2021, the Chief Justice invited the Ethics and Anti-Corruption Commission (EACC) to undertake a systems review of the policies, procedures, and practices of the Judiciary with a goal of identifying the avenues and opportunities for unethical and corrupt practices. This preventive approach was informed by the reality that aside from being a function of lack of personal and professional ethics, corruption is also a function of distortion of laws, policies, practices, and processes that are manipulated in order to favour personal or private interests. The findings and recommendations from the two reports form part of the Judiciary's 'judicial hygiene' strategy as the proposals and recommendations are a guide for creating an institution that reflects the aspirations of Kenyans for a corruption-free Judiciary. The Judiciary is committed to implementing these findings and recommendations noting that they are pivotal towards eliminating corruption, enhancing accountability and building trust in service delivery by the Judiciary. The recommendations are also being integrated into the Judiciary's digitisation strategy as technology presents a unique opportunity to enhance the Judiciary's operational efficiency and accountable service delivery.

The Judiciary also appointed 187 Integrity Assurance Officers from various court stations and units. These officers undertook a training programme prepared by the Judiciary in collaboration with the EACC's National Integrity Academy (NIAca). The training equipped the integrity officers with the necessary skills to detect, investigate, report and close loopholes that provide opportunities for Judiciary staff to compromise their integrity. These officers are also responsible for undertaking corruption sensitisation programmes at the court stations.

The Judiciary is also making great efforts to ensure that all corruption and economic crime cases in the courts are heard and determined as soon as possible and the Chief Justice, on 30th September 2024 gazetted 100 magistrates to hear and determine these cases.

(q) Green Justice

The Chief Justice is cognisant that

environment and land justice is gaining increasing global recognition. Additionally, the right to a safe, clean, healthy, and sustainable environment is enshrined in our Constitution. The impacts of climate and environmental crises, such as climate change, bio-diversity loss, soil degradation, air and water pollution, affect the enjoyment of environmental rights and other fundamental human rights, such as the right to food, health, shelter, amongst others, with uneven and disproportionate impacts on vulnerable and marginalised groups.

To address this unfortunate reality, the Kenya Judiciary aims to utilize the 3R strategy of 'reducing, reusing and recycling'. On August 23rd 2024, the Chief Justice launched the '*Strategic Guiding Framework for Greening Kenya's Justice System*', which will guide efforts to incorporate environmental sustainability into the operations and decisions of agencies within the justice sector. The Judiciary is aligning the operations of court stations, particularly in remote areas, with sustainable practices, such as getting them alternative off grid source of power including solar power.

The Kenya Judiciary Academy is also imparting Judicial education aimed at promoting sustainable use, management, and protection of the environment, as well as enhancement of the right to a clean and healthy environment. This is equipping Judges and Judicial Officers with adequate information and enabling them to deliver well informed decisions when adjudicating contemporary and emerging climate-related disputes, including litigation on climate change, or the enforcement of the right to a clean and healthy environment.

(r) Simplification of Court Procedures

To improve functional access to justice, the Judiciary has implemented initiatives to bring justice closer to the people by simplifying procedures for accessing judicial services. The Chief Justice gazetted standardised court fees across the Judiciary in order to improve customer experience and remove barriers associated with fee assessment across the Judiciary. In this regard, the revised court fees for the Supreme Court have been incorporated into the Supreme Court service delivery charter, practice directions, and the Supreme Court website. The Court of Appeal created the Court Recording and Transcription Guide 2023 to standardise transcription services and make it easier for litigants to request court transcripts of proceedings. The Judiciary finalised revision of the Magistrates and Kadhis Courts Registry Manual necessitated by significant policy, legislative, and administrative changes. This has streamlined procedures for handling Kadhis cases and Probate & Administration matters while introducing aspects of automation and records management. The Office of the Registrar Tribunals validated one registry manual for use by all tribunals to ensure standardisation of common registry services across all tribunals.

Conclusion

From the foregoing it is evident that the Chief Justice is socially transforming the society through access to justice. She: has leveraged on technology in the delivery of Justice, has established specialised courts, has ensured that there is improved physical access and proximity to courts, has widened the doors of justice by advocating for AJS, has improved ADR, is improving on reduction of case back log, is taking the lead on regional Judiciaries engagement, is promoting wellness, peer review and mentorship, is inculcating the culture of shared and inclusive leadership, has deepening partnerships, is driving the Judiciary anti-corruption agenda, is promoting green justice in the Judiciary and has simplified court procedures.

Impeachment in Kenya: Should public opinion shape quasi-judicial decisions?

By Alvin Kubasu

Abstract

Public participation as a constitutional principle, though cardinal should not be cast on stone. Quasi-judicial proceedings like vetting for nominees for appointment into positions, tribunals established for particular purposes, and impeachment proceedings both at the national and county assemblies, should shine more light on 'judicial' in 'Quasi Judicial' and seek to be more of evidence-based assessment than an assessment that seeks to draw legitimacy from the court of public opinion. Considering that more often than not these proceedings are not initiated directly by the people, purporting to involve them in a process with a determined outcome is not only pretentious but also a waste of valuable resources such as time which would be better spent on other matters of national importance.

The Constitution of Kenya 2010 under Article 10 provides for public participation as one of the many principles of governance in the interpretation of the Constitution, enactment of laws, and the implementation of public policy decisions. However, with public participation lacking a substantive legislation laying out the requisite conditions and legal standards to be met, courts have always borne the burden to interpret this concept and ascertain whether the process of impeachment was done in accordance with the law.

In perhaps one of the most progressive jurisprudence on public participation, in ***Republic v Independent Electoral and***

Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya and 6 others; while setting aside a ballot papers tender awarded by IEBC due to lack of public participation pronounced itself that public participation was not envisioned by Kenyans to be a suggestion, superfluous, ornamental or a lost aspiration. The court went on to affirm that public participation was intended to be substantive, enforced and implemented.

While all these remain not only undisputed but also true, the looming question remains, should impeachment proceedings for public officers be subjected to public participation?

Introduction

The impeachment of elected officials especially at the county level has been on the rise with governors and deputy governors facing the impeachment axe as often as you can blink. Since the promulgation of the constitution in 2010 there have been over ten impeachment proceedings of governors and deputy governors at the county assemblies with most of the impeachments making their way to senate. While the impeachment processes are majorly politically motivated, the law is usually invoked to facilitate the process and make it compliant with the Constitution.[1] Leaders who the majority of the time seem to lack a cognitive understanding of their constitutional mandate gain solomonic at the floor of the house to table impeachment motions.[2] While this remains within the limb of their responsibilities, the embattled officers be it governors or deputy governors have always sought refuge in the loving arms of the courts often to question whether the due process of law was followed.[3]

More recently the deputy president found himself at the wrong end of a parliamentary voting. With an overwhelming vote of 281 votes, the National Assembly sent the second in command home.[4] However, just like before in the other impeachment proceedings, the courts have once again been marshalled in the cross-fire.[5]

The Deputy President through his legal representatives poked holes at the manner in which the parliament conducted the process. Among the issues raised by senior counsel Paul Mwite was the approach taken in conducting public participation considering the position of the person to be impeached and the national importance of the impeachment process.[6]

Bearing in mind the sovereignty of the people as enshrined in the Constitution,[7] considering that one of the ways this sovereignty is expressed directly is through the election of representatives into various positions;[8] Why should they not have a say when sending the same public official person home? To this end, should public participation be a critical step in impeachment proceedings?

---

[1]Leonard M. Mwakuni,'*Kenya's Gubernatorial Impeachments: Superior Courts as Guardians against Abuse of Power*,' (Vol 5 Kabarak Journal of Law and Ethics) 2020

[2]Andrea Munyao,' *An Inquiry into the Limits of Judicial Intervention in the Impeachment Process of Governors in Kenya*', Strathmore Law Review, August 2020

[3]Harry Misiko, 'Reprieve for Kawira Mwangaza as court stops Senate resolution to uphold impeachment', Available at https://nation.africa/kenya/counties/meru/reprieve-for-kawira-mwangaza-as-court-stops-senate-resolution-to-uphold-impeachment-4732890 last accessed on 12th October 2024

[4]Kenya lawmakers vote to impeach Deputy President Rigathi Gachagua, https://www.aljazeera.com/news/2024/10/8/kenya-lawmakers-vote-to-impeach-deputy-president-rigathi-gachagua

[5]Richard Munguti, ' High Court refers 5 DP Gachagua impeachment cases to CJ Koome', Available at, https://ntvkenya.co.ke/news/high-court-refers-5-dp-gachagua-impeachment-cases-to-cj-koome/ last accessed on 12th October 2024

[6]High Court refers Gachagua Impeachment Petition to CJ Koome for Review, Available at https://www.citizen.digital/news/high-court-refers-gachagua-impeachment-petition-to-cj-koome-for-review-n351149 last accessed on 12th October 2024

[7]Constitution of Kenya, Article 1

[8]Ibid

Public participation aims to ensure that diverse perspectives are considered, enhance transparency, and foster a sense of ownership among community members. Effective participation can lead to better decision-making and stronger community ties.

Legal standards for public participation

Considering the historical background of Kenya, the importance of public participation in governance can neither be understated nor overlooked.[9] In every Constitutional process, the State is under an obligation to the greatest extent possible to encourage public participation.[10] While laying emphasis to the importance of public participation; the court in ***Robert N. Gakuru & others v Governor, Kiambu County*** stated that the public participation process should not be done as a mere formality in fulfilment of constitutional dictates. Furthermore, public participation must not be equated to consultation.[11] This case not only set the standard that public participation must meet but also created a domino effect affecting how the State conducted public participation.

While public participation has been open to innovation, the legal standard applied in court has consistently been the test of effectiveness.[12] Courts have focused on whether the approach considered both the quantity and quality of public involvement, ensuring that those governed had a meaningful opportunity to participate in their own governance. This includes assessing whether the public was provided with sufficient and relevant information.[13] The rationale behind this being that those going to be affected the most by the decision should not only have a bigger say but also that their views ought to be considered.[14] Juxtaposing this with the impeachment of the deputy president, several pertinent questions arise. First, why would someone elected by seven million Kenyans be at the mercy of only three hundred and sixty legislators? If public participation involves furnishing relevant information to the public, why wasn't he allowed to defend himself and the public involved with both sides of the story? Lastly, although the right to public participation does not necessarily impose an obligation to accept the given views as dispositive. If there was a unanimous consensus from the public that the charges levied against the deputy president are facetious and that he should remain in office. Would that negate the grave corruption claims he is being accused of?

---

[9]Dennis Ondieki,'*The Power and Necessity of Effective Public Participation*', ICJ Kenya, Available at https://icj-kenya.org/news/the-power-and-necessity-of-effective-public-participation/ last accessed on 13th October 2024

[10]Leah Muhia & Sandra Nganyi, *'A critique of the Public Participation Bill - A case study of the Al Gurhair Case'* , Available at, https://wamaeallen.com/a-critique-of-the-public-participation-bill-a-case-study-of-the-al-gurhair-case/ last accessed on 13th October 2024

[11]*Robert N Gakuru, Jamofastar Welfare Association & 459 others v County Government of Kiambu & Attorney General* [2015] KEHC 7214 (KLR)

[12]*Whitehorse Investments Ltd v Nairobi City County* [2019] KECA 102 (KLR)

[13]*Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya, Al Ghurair Printing and Publishing LLC, Attorney General, Jubilee Party, Ekuru Aukot & Third Party Alliance, Samuel Waweru & Stephen Owoko Oganga* [2017] KEHC 4663 (KLR)

[14]Leah Muhia & Sandra Nganyi,' *A critique of the Public Participation Bill - A case study of the Al Gurhair Case'* , Available at, https://wamaeallen.com/a-critique-of-the-public-participation-bill-a-case-study-of-the-al-gurhair-case/ last accessed on 13th October 2024

Arguments can be made that the Public Participation Bill seeks to address some of the challenges surrounding public involvement in governance. The Bill's provisions aim to create a structured process for engaging citizens in decision-making within state organs and public offices. However, upon closer examination, it becomes evident that the Bill falls short in addressing the unique requirements of impeachment proceedings, which are distinct from other forms of public engagement.

The Bill defines public participation as the involvement and consultation of the public in decision-making processes within relevant state organs and public offices.[15] While this broad definition captures general governance matters, it does not fully account for the sensitive and often urgent nature of impeachment proceedings, where the balance between transparency, public involvement, and procedural efficiency is critical.

Moreover, the Bill outlines its primary objectives as providing a framework for public involvement in decision-making processes by state organs and public offices, as well as advocating for informed, effective, and efficient public engagement.[16] While the Bill acknowledges Article 10 of the Constitution, which outlines national values, and Chapter 6, which emphasizes the principles and values of leadership and integrity,[17] Its core framework highlights a significant issue concerning public participation. The Bill raises an important point: public participation should primarily be limited to public policy matters. Extending this participation to impeachment proceedings undermines the very purpose it seeks to serve. Impeachment is a legal and procedural mechanism that requires efficiency, and adherence to rules. Involving the public in such proceedings risks compromising these principles and may result in political interference, thereby defeating the intended objectives of accountability and good governance.

Public participation vis a vis parliament as a quasi-judicial body

The legislative arm of the government is all but a stage with all legislators merely players, and each one of them in their time plays many roles. In impeachment proceedings, the national or county assembly, as quasi-judicial bodies, should wear that hat and make their decisions based on the evidence before them and not because of influence of anyone else including the public. Quasi-judicial indicates that the actions of that particular body should mirror the judiciary.[18] Therefore, the decision should be arrived at upon close consideration of the provisions of the law, and the evidence tabled before the house.[19]

In these impeachment proceedings, the parliament, as a quasi-judicial body, is obliged to objectively determine facts and draw conclusions from them to provide the basis for an official action.[20] Either send the accused home or dismiss the charges altogether. Article 10 as a constitutional provision on governance, is too wide for it to live and die with public participation.[21]

---

[15]Public Participation Bill, 2023, Section 2
[16]Public Participation Bill, 2023, Section 4
[17]Public Participation Bill, 2023, Section 5
[18]Bosire, Conrad M., 'The courts and devolution: The Kenyan experience'. In Federalism and the Courts in Africa, pp. 124-144. Routledge, 2020.
[19]Ibid
[20]*Ahmad & another v Kadhi Mombasa; Khalifa & another* (Interested Party) (Judicial Review 4 of 2020) [2021] KEHC 133 (KLR) (21 October 2021) (Ruling)
[21]Bwana, Ronald, 'Public Participation In Kenya: *Dead Letter Law?*', Dead Letter Law (2021).

Martin Wambora, Former Governor of Embu County.

There could be solace in arguing that for a country often divided along ethnic lines, perhaps letting the impeachment process of an elected leader be solely based on objective analysis of facts and law, promotes national unity which is another principle of governance.

The legal impeachment architecture left no doubt that the removal of the elected official relates to accountability, political governance and personal responsibility.[22] The proof of these grounds is predicated on objective analysis of facts and evidences, thus rendering the views of the public not only moot but also counterproductive to the intended aim. The over emphasis of public participation in impeachment proceedings has created an apparent escape route for embattled elected officials seeking to prolong their tenures.[23] While courts have consistently hammered the public participation nail, they have consistently failed to demonstrate the nexus in impeachment proceedings.[24] In the Martin Wambora case, the court was of the view that some level of public participation ought to be injected into the process in order to appreciate the fact that the people elected the elected public officer, and in order to avoid situations where an otherwise popular elected official is removed from office due to malice, ill will and vendetta on the part of the legislators.[25]

This view fails to appreciate that popularity of a leader does not negate gross misconduct or corruption offences which might not be

[22]Sonko v Clerk, County Assembly of Nairobi City & 11 others [2022] KESC 26 (KLR)
[23]Leonard M. Mwakuni,*'Kenya's Gubernatorial Impeachments: Superior Courts as Guardians against Abuse of Power,'* (Vol 5 Kabarak Journal of Law and Ethics) 2020
[24]Ibid
[25]*Martin Nyaga Wambora v Speaker of The County Of Assembly Of Embu & 3 Others* [2014] eKLR

in the public domain. Moreover, whereas it is true that legislators might be malicious,[26] The constitution has safeguards for that. The two step process involving the senate significantly addresses these shortcomings. While the complete separation and independence of the Senate cannot be guaranteed, the fact that the senate has on several times gone against the will and wishes of county legislators is a welcomed reprieve that the constitution envisioned and guards against malice and ill intentions.

Furthermore, Constitutional provisions should not be read in clinical isolation or where one provision defeats another.[27] Rather, the constitution lays the clarion call for it to be interpreted in a manner that permits the development of law, contributes to good governance, advances rule of law, and promotes its values and principles.[28] To this end, public participation under Article 10 should not be construed as the silver bullet whenever impeachment proceedings are upon us. Impeachment proceedings being quasi judicial what is required is that the allegations are substantiated with the evidence rules and procedure.[29]

Nonetheless, if the parliament's conduct during the process offends the rules of natural justice or other procedural requirements; the high court is vested with unlimited original jurisdiction as well as supervisory jurisdiction over quasi-judicial bodies.[30] Thus offering an added layer of protection to the rule of law.

In conclusion, while public participation is a cornerstone of Kenya's constitutional democracy, its application in impeachment proceedings presents unique challenges. The nature of quasi-judicial processes demands an approach centred on evidence and legal principles rather than public opinion. Impeachment, as a tool for accountability, should not be diluted by the complexities of mass public involvement, especially when such processes require swift and impartial resolutions.

Diverse perspectives lead to more informed and effective policies and programs, as they take into account the needs and concerns of various stakeholders.

Alvin Kubasu is a finalist law student at the Kenyatta University, School of Law.

[26]Edwin Nyarangi,'Meru Governor Kawira Mwangaza survives impeachment', Standard Newspaper, Nairobi, Available at https://www.standardmedia.co.ke/article/2001484984/meru-governor-kawira-mwangaza-survives-impeachment last accessed on 13th October 2024
[27]Major General David Tinyefuza v Attorney General (Constitutional Petition No. 1 of 1996) [1997] UGCC 2 (5 March 1997)
[28]Constitution of Kenya, Article 259
[29]Sonko v Clerk, County Assembly of Nairobi City & 11 others [2022] KESC 26 (KLR)
[30]Constitution of Kenya, Article 165

Unpacking the Illegal Investment of Ksh 20 Billion Housing Levy Funds in Treasury Bonds

By Munira Ali Omar

The allure of power and wealth can be a powerful motivator for most politicians as leadership positions offer access to significant resources like public funds, lucrative contracts and influential networks. Unfortunately, this access can tempt some to prioritize personal enrichment over genuine public service.

In today's political climate marked by widespread distrust in leaders and a growing sense of greed, the menace of greed and selfishness is evidently prevalent. In Kenya, this concern has been particularly revealed by recent developments regarding the Affordable Housing Fund which surfaced in May. The use of Ksh20 Billion collected from the housing levy particularly its investment in Treasury Bills has sparked a debate that raises serious legal and ethical questions. The Affordable Housing Fund was created under the Affordable Housing Act of 2023, a law that has since been declared illegal. This law requires that funds collected from the housing levy be used exclusively for affordable housing projects. The levy, a 1.5% deduction from Kenyan employees' gross salaries matched by employers is intended to support the construction of the so-called "affordable housing units".

Alice Wahome, Lands Cabinet Secretary.

Scrutiny by Members of Parliament has brought into question about whether the process for investing Ksh20 Billion from the Housing Levy Fund into Treasury Bills was properly followed. The Housing and Planning Committee, led by Emurua Dikir MP Johanna Ngeno has demanded clarity on the approval documentation and the involvement of the Housing Levy Fund Board[1] in this decision.

Legal and ethical implications of the investment

While Lands Cabinet Secretary Alice Wahome's argument that investing Ksh20 billion in Treasury Bills for short terms

[1]The Board is tasked with overseeing the administration and allocation of funds collected through the housing levy. Its responsibilities include ensuring that funds are used effectively for affordable housing projects and ensuring compliance with statutory regulations and policies related to housing development.

like three to six months is a prudent use of funds might seem practical from a financial management perspective, it does not address the core legal issue. The fundamental concern is not merely about the short-term nature of the investment but whether such an investment adheres to the legislative intent of the Affordable Housing Act. From a legal perspective, even if the correct procedural steps were taken, the investment of these funds in Treasury Bills is legally questionable The Affordable Housing Act and associated regulations prescribe specific uses for the housing levy collections which are intended exclusively for affordable housing projects and therefore diverting these funds into Treasury Bills even for a short period fundamentally contravenes this legal mandate.

PS Hinga maintained that due to the ongoing legal disputes over the housing levy tax and pending a final court decision, it was not possible to stop the collection of taxes deposited into the housing fund. However, PS Hinga's reasoning does not justify the investment of funds in Treasury Bills. In my opinion, until the court provides definitive guidance, investments made under the current legal uncertainty do not conform with the statutory purpose and if there was a concern about the financial implications of leaving Ksh 20 billion idle, the logical step by the government would have been to suspend the collection of the housing levy until the courts provide a until a clear legal determination is made.

Incomplete housing projects

To buttress the argument that the government's claim of idle affordable

Dennis Itumbi, Head of Presidential Special Projects & Creative Economy.

housing fund is unfounded, one must consider the ongoing issues of stalled and unfinished housing projects across the country. For instance, projects like Buxton and Likoni and Mzizima which were originally launched with ambitious goals of delivering affordable housing within a specified timeframe have been marred with delays and incomplete phases. This contradiction not only challenges the government's credibility but also reveals a serious discrepancy between government declarations and the actual status of housing developments as evidenced by Haki Yetu Organization's[2] ***'Housing For Who campaign'*** and former Buxton tenants who have been instrumental in exposing economic crime and theft of public land under the guise of affordable housing.[3]

As Kenya gears up for Mashujaa Day, Dennis Itumbi, Head of Presidential Special Projects & Creative Economy, tweeted,

[2]Haki Yetu is a Kenyan human rights organization that advocates for land rights and the inclusion of the urban poor in housing policies as well as promoting governance transparency. For more information, see http://www.hakiyetu.org (Accessed 9th September 2024).

[3]The research titled 'Housing For Who? A Look at the Place of the Urban Poor in the Fabled Affordable Housing Program as Implemented in Mombasa County' conducted by Haki Yetu's has provided an in-depth examination of how the government's Affordable Housing Program is being implemented thereby exposing grand corruption in its implementation. Available at: https://hakiyetu.ke/wp-content/uploads/2022/11/Housing-for-Who-Affordable-Housing-in-Mombasa.pdf. <Assessed on 9th September 2024>

Addressing the "Housing for Who?" question in Kenya requires a multifaceted approach that considers economic, social, and environmental factors, aiming to provide equitable and sustainable housing solutions for all citizens.

"This year's Mashujaa Day will be themed #BomaYangu to highlight the success of the Affordable Housing program."
This celebratory theme blatantly contrasts with ongoing legal and practical troubles that still loom large. For instance, former Buxton and Likoni tenants have offered personal testimonies that vividly illustrate the daily struggles and frustrations faced due to the incomplete state of the housing development. Their firsthand accounts serve as tangible evidence of the government's failure to live up to its promises in the undeniably flawed housing plan.

Constitutional compliance in public fund management

The legal framework governing public funds is explicitly outlined in the Constitution and various statutory provisions upholding the importance of transparency and accountability in their management. A**rticle 201** mandates that public money must be used openly and responsibly while **Article 207** further affirms that public money should not be used for purposes other than those prescribed by law emphasizing strict adherence to statutory directives. **The Public Financial Management Act (PFMA) 2012** echoes these principles by requiring that public financial management be based on openness, accountability and integrity and that expenditures must be authorized by the Constitution or an Act of Parliament. Additionally, **Article 232** upholds accountability as a core value of public service. These constitutional and statutory provisions collectively support the argument that the investment of KSH20 billion from the Housing Levy Fund into Treasury Bills regardless of procedural correctness fundamentally contravenes the provisions of the Affordable Housing Act and undermines the intended use of the funds.

Addressing affordable housing in Kenya requires a comprehensive approach that includes policy reform, investment, and community engagement to create sustainable and inclusive living environments for all.

Besides, the ongoing legal challenge to the 2023 Affordable Housing Act led by Busia Senator Okiya Omtatah further complicates the situation. If both the High Court and the Court of Appeal have ruled that the Affordable Housing Act is unconstitutional, the Act would be considered void ab initio under the doctrine of legislative validity rendering the affordable housing program or investments made from the housing fund legally impotent. In other words, since the legitimacy of the affordable housing program is in question, any expenditures undertaken is also illegal.

Conclusion

Public officials have a fiduciary duty to act in the best interest of the public. This includes managing funds transparently and in accordance with legal requirements. The 2023 Affordable Housing Act was specifically crafted to ensure that funds from the Housing Levy are exclusively used towards affordable housing projects. Put another way, legislative intent is clear in the statutory language which prescribes specific uses for these funds. Therefore, the investment of Ksh20 Billion from the Housing Levy Fund into Treasury Bills, even if procedurally correct is fundamentally illegal and undermines the program's objectives.

By choosing to invest the housing levy funds in Treasury Bills, the government not only reveals but also confirms the true motive behind the levy i.e to divert money and steal public land from Kenyans for ulterior purposes. Given the significant resources involved in affordable housing projects, there is a valid concern that the financial maneuvering could be a strategic move to misappropriate public funds. A scenario which reflects a wider trend of political and economic manipulation where public resources are siphoned off for personal benefit under the guise of financial prudence.

Munira Ali Omar serves as an advocate at the High Court of Kenya and holds the position of Land Program Officer at Haki Yetu Organization.

The road to justice; Demystifying third party proceedings in Kenya

By Agnes Kithia Nzioka

Abstract

Whenever found red handed, it is human instinct to want to throw the blame to someone else. Either claiming that someone painted your hands red or someone else has their hands equally as red. In law, this blame is not thrown helter skelter. There is an established procedure for passing the blame to someone else, third-party proceedings. This article seeks to enlighten litigants on third party proceedings. The article explores third party proceedings within the context of Kenyan civil litigation, providing a comprehensive overview of their purpose, procedure and application. The article also contrasts third party proceedings with related concepts such as subrogation and garnishee proceedings.

1.0. Introduction

Almost no day goes by without hearing of a road accident in Kenya. The headlines "Nine killed in Kericho road crash; 12 killed in road accident at Nithi Bridge; 13 killed in Migaa road crash, 36 injured etc" dominate our screens and newspapers every now and then[1]. According to NTSA data, 7,198 Kenyans had been involved in road accidents in the period between 1st January 2024 and 1st April the same year.[2] Consequently, road traffic accidents suits are not a rarity in Kenya. Here the court determines the liability of parties and the quantum of damages for pain, suffering and loss of amenities. Lord Reid in *Stapley v Gypsum Mines Limited*[3] observed that to determine what caused an accident from the point of view of legal liability is a most difficult task. This is because while the plaintiff blames the defendant entirely for the accident, the defendant often shifts the blame to the plaintiff or a third party.

With regard to blaming a third party the courts have pronounced themselves on the duty of the defendant to join the third party to the suit if they intend to shift the blame to the third party.[4] Third party proceedings are the procedural means to accomplish this. However, a problem arises when the defendant shifts the blame to a third party without joining them into the suit, either out of ignorance or in negligence. In such cases, the court would not consider the liability of the third party nor shift the supposed liability of the third party to the plaintiff. This is because a court of law cannot and should never condemn a party unheard. The court is only supposed to find liability for the parties before it.[5] However, this potentially leads to unfair outcomes for the defendant as was the case in *Kubai Kithinji*

[1]The Standard digital media, "RoadAccident - The Standard" <available at> https://www.standardmedia.co.ke/topic/road-accident accessed on 17th September 2024.
[2]Nation media "Road carnage: 1,189 lives lost since January 2024 | Nation" <available at> https://nation.africa/kenya/news/road-carnage-1-189-lives-lost-since-january-2024-4580036 accessed on 17th September 2024.
[3]*Stapley v Gypsum Mines Limited* (2) (1953) at p 681
[4]*Janet Kathambi v Charity Kanja Njiru* [2021] eKLR.
[5]*James Gikonyo Mwangi vs D M (Suing through his Mother and Next Friend, IMO* (2016) eKLR

Third-party proceedings are a legal mechanism that allows a party involved in a lawsuit (typically a defendant) to bring in another party (the third party) who may be liable for some or all of the claims against them. This process is often used to shift responsibility or to seek indemnification or contribution.

Kaiga (Suing as the legal representative of the estate of John Kaiga (Deceased) v Kenya Wildlife Service[6].

This paper therefore seeks to enlighten litigants on third party proceedings. That is; what they are, why institute the proceedings, when the proceedings may be instituted and the procedure to be followed in instituting the proceedings. The paper also differentiates third party proceedings from other proceedings that involve third parties. This is in line with fostering the overriding objective of Civil Procedure in Kenya.

In delving into third party proceedings, I rely on the Civil Procedure Rules and various decided cases. The conduct of third-party proceedings is governed by Order 1, Rules 15–21 of the Civil Procedure Rules. This article is divided into six parts: Introduction to third party proceedings; The aim of instituting third party proceedings; When third party proceedings can be instituted; How Third Party Proceedings are conducted; Third party proceedings vis a vis the doctrine of subrogation; and Third party proceedings versus Garnishee proceedings.

2.0. Third Party Proceedings

In order to effectively analyze and discuss third-party proceedings, it is prudent to first establish what a third party is. Black's Law Dictionary[7] defines a third party as a person who is not a party to a lawsuit, agreement or other transaction but who is usually somehow implicated in it, that is, someone other than the principal parties. Third party proceedings is therefore a procedural device used in a civil action whereby a defendant brings into the lawsuit a third party, who is

[6][2021] eKLR
[7]9th Edition at pg. 1617.

not already a party to the action, but may ultimately be liable for the plaintiff's claim against the defendant.[8] This is done where a defendant claims entitlement to relief or indemnity from a third party.

In third party proceedings one can claim indemnity or contribution. Indemnity is where a party is alleging that they are entitled to reimbursement. This could arise from court or contract or a tort. On the other hand, Contribution is partial indemnity, that is, the defendant is supposed to pay but somebody else is also responsible and should pay a portion of the liability, as the case maybe in road traffic accidents.

Third party proceedings constitute a distinct claim, separate from the main legal action. Despite their independence, they are closely tied to and connected with the plaintiff's claim against the defendant. The relief sought in third-party proceedings is typically linked to the plaintiff's claim against the defendant, ensuring a comprehensive resolution of interconnected issues within a single legal action.

3.0. What is the aim of instituting third party proceedings?

The Canadian Second Circuit Court of Appeal[9] held that the general purpose of third-party proceedings is to: Avoid two actions which should be tried together; Save the time and cost of reduplication of evidence; Obtain consistent results from identical evidence and; Do away with a handicap to a defendant of a time difference between a judgment against him and a judgment in his favour against the third party defendant. This has been cited with approval in Kenyan courts.[10]

The benefits to be achieved by following the third party procedure were also summarized by Williston and Rolls[11] as: To avoid a multiplicity of actions; To avoid the possibility that there might otherwise be contrary or inconsistent findings in two different actions on the same facts; To allow the third party to defend the plaintiff's claim against the defendant; To save costs and; To enable the defendant to have the issue against the third party decided as soon as possible, in order that the plaintiff cannot enforce a judgment against him before the third party issue is determined. The above underscore the importance of third party proceedings.

4.0 When can third party proceedings be instituted?

Having established the definition of third-party proceedings and their relevance, I move on to determining when third party proceedings are supposed to be instituted. There is a threshold that must be met before joining a third party in a suit. Third party proceedings may be resorted to, only under the following circumstances:[12]

a. That the defendant in the proceedings is entitled to a contribution or indemnity from the third party in respect of any payment which he or she may be ordered to make;
b. That the defendant is entitled to a remedy relating to or connected with the subject matter of the suit and substantially the same remedy claimed by the plaintiff and;
c. That a matter in dispute in the present action is substantially the same as that between the defendant and the third party and should be decided

[8]Steve Ouma, A commentary on Civil Procedure Act CAP 21, 2d ed, (2013) page 109.
[9]*Dery v Wyer* (1959) Ca2 N.Y., 265 F2d 804.
[10]*Wilfred Kamau Githua & Associates v City Council of Nairobi* (2013) eKLR.
[11]Williston and Rolls, *The Law of Civil Procedure*, vol. 1, pp. 426 and 427
[12]Civil Procedure Rules, Order 1, Rule 14.

not only between the plaintiff and the defendant, but also between the defendant and the third party.

This was set out in the case of *Yafesi Walusimbi vs Attorney General of Uganda*,[13] where it was held that in order for a third party to be lawfully joined, the subject matter between the third party and defendant must be the same as the subject matter between plaintiff and defendant and the original cause of action must be the same. Therefore, the defendant's rights against the third party must be dependent on the Defendant's liability to the plaintiff in the action. Unless the defendant is held liable to the plaintiff he has no cause of action to the third party.

When one joins the third party under the rules one commences a separate claim with a life of its own independent of the main action and if the main action is settled, then the 3rd party proceedings can continue.

5.0 The conduct of Third-Party Proceedings

The conduct of Third-party proceedings is governed by Order 1, Rules 15–21 of the Civil Procedure Rules. The following is the procedure to be followed in third party proceedings:

5.1. Application to issue third Party Notice

The defendant institutes third party proceedings by applying to the court within 14 days after the close of pleadings to issue a notice (third party notice)[14]. Such leave is applied for by summons in chambers ex-parte supported by an affidavit. The notice should state the nature and grounds of the claim and be in or to the effect of

Third-party claims can involve various types of issues, such as contractual disputes, negligence, or product liability. For example, if a plaintiff sues a contractor for faulty work, the contractor might bring in a subcontractor who performed part of the work.

Form number 1 of Appendix A with such variations as circumstances require.

5.2. Service to the intended third party

A copy of such notice is then to be filed and be served on the third party according to the rules relating to the service of a summons.[15] A copy of the plaint should be served therewith.

5.3. Appearance of third party

The third party must then enter appearance in the suit on or before the day specified in the notice.[16]

5.4. Default of entering appearance

Well, not all intended third parties oblige to the notice and enter appearance. Where the third party defaults in entering appearance, but the matter nevertheless proceeds to trial as between the plaintiff and the defendant and the plaintiff gets judgment against the defendant, such defendant, must first satisfy the decree in favour of the plaintiff after this, the court may then enter judgment for

[13](1959) EA 223.
[14]Civil Procedure Rules,Order 1, Rule 15(1)
[15]Ibid, Rule 15(2).
[16]Ibid, Rule 17.

The doctrine of subrogation is a legal principle that allows one party (usually an insurer) to assume the rights and remedies of another party (typically the insured) after compensating them for a loss. This principle is commonly applied in insurance law but can also arise in other contexts, such as loans or guarantees.

the defendant against the third party with notice to such third party.[17] Therefore, in default of entering appearance, the third party is deemed to admit the validity of the decree obtained against the defendant and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third-party notice.[18]

5.5. Application for directions

If a third party enters an appearance pursuant to the third party notice, the defendant giving the notice should apply to the court chamber summons for directions. The court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question to be tried at or after the trial of the suit, as the court may direct.[19]

If not so satisfied, the court may order such judgment, as the nature of the case may require, to be entered against the defendant giving the notice against the third party.[20]

6.0. Third Party Proceedings vis a vis the doctrine of subrogation

How does third party proceedings relate to the doctrine of subrogation? Subrogation is the substitution of one thing for another, or of one person into the place of another with respect to rights, claims, or securities.[21] The doctrine of subrogation is a legal principle that allows one party to step into the shoes of another party to claim their legal

[17]Ibid, Rule 19.
[18]Ibid, Rule 17.
[19]Ibid, Rule 22.
[20]Ibid.

rights and remedies. It commonly arises in insurance and financial contexts.

The essence of the doctrine of subrogation is to allow an insurer, after compensating an insured for any loss under the insurance contract, to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated.[22] For example, if an insurance company pays a claim to an insured party for damages caused by a third party, the insurer may have the right to pursue recovery from that third party. Essentially, the insurer steps into the rights of the insured party to seek compensation or reimbursement. This prevents the insured party from receiving double compensation and ensures that the responsible party ultimately bears the cost.

The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby usually by a third party and insurer seeks indemnity from the third party.[23] The insurer is not a party to the proceedings. An insurer cannot, therefore, under the doctrine of subrogation institute a suit in its own name against a third party.[24] The action must be instituted in the name of the insured with his consent and must relate to the subject of the contract of insurance.[25]

Although both the doctrine of subrogation and third-party proceedings deal with indemnity, they operate in different contexts and serve distinct purposes. The following are some of the key differences between the doctrine of subrogation and third-party proceedings:

- **Nature of proceedings**
  Third party proceedings constitute a distinct claim, separate from the main legal action, closely tied to and connected with the plaintiff's claim against the defendant. On the other hand, in a subrogation claim, there is only one claim.
- **Parties to the suit**
  In third party proceedings, the plaintiff, defendant and the third party are all parties to the suit. In subrogation, the insurer is not a party to the proceedings. The suit is instituted in the name of the insured.
- **Institution of proceedings**
  Third party proceedings are instituted by the defendant in the suit while the insurer institutes the suit in the name of the insured, with their consent, under subrogation.
- **Time of institution**
  Third party proceedings are instituted within 14 days after the close of pleadings while a claim under subrogation is brought after crystallization of the risk insured and the insurer has compensated its insured for financial loss occasioned by the third party.

7.0. Third party proceedings versus Garnishee proceedings

In defining garnishee proceedings, the High Court in Kenya[26] cited with approval the Nigerian Supreme Court's definition[27] that garnishee proceedings are a special species

[21]Black's law dictionary, 2nd ed.
[22]*Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited* (2018) eKLR.
[23]*Kenya Power & Lighting Company Limited v Julius Wambale & Another* (2019) eKLR.
[24]*Michael Hubert Kloss & another vs. David Seroney & 5 others* [2009] eKLR.
[25]*Kenya Power & Lighting Company Limited v Julius Wambale & Another* (2019) eKLR.
[26]*Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited* [2021] eKLR para 5.
[27]*C.B.N. v Auto Import Export*, (2013) 2 NWLR (Pt. 1337) 80 p. 126 paras. E – F.

Third-party claims can involve various types of issues, such as contractual disputes, negligence, or product liability. For example, if a plaintiff sues a contractor for faulty work, the contractor might bring in a subcontractor who performed part of the work.

of process by which a judgment creditor may attach (or garnishee) debts due in satisfaction of the judgment debt. The debt owed by the third party to the judgment debtor, on being attached, is to be ultimately paid by the third party to the judgment creditor on the order of the court.

Essentially this involves a court order in which a person to whom a debt is owed as a decree holder can secure payment wholly or partially from a third party. The third party must in fact owe or hold money for the judgment debtor. The three parties involved therein are; the judgment creditor/decree-holder, the judgment debtor, and the third party/garnishee. The effect of the garnishee order is to position the decree holder in the same place as the judgment debtor when it comes to the debt sought to be attached.[28]

Garnishee proceedings are different from third party proceedings in the following ways:

- **Purpose**
  Garnishee proceedings serve the purpose of facilitating the satisfaction of judgment debts while third party proceedings are meant to comprehensively determine all the issues arising from a suit to avoid multiplicity of suits as discussed above.
- **Institution of proceedings**
  Third party proceedings are instituted by the defendant in a suit while garnishee proceedings are instituted by the decree holder, who may either be the plaintiff or the defendant.
- **Time of institution**
  Third party proceedings are supposed to be instituted within 14 days after close of pleadings while garnishee proceedings are usually instituted at the end of the suit when a decree has been issued with the aim of executing the decree.

Conclusion

In conclusion, third party proceedings are a necessary procedure where a defendant in an action has a claim for an indemnity or contribution from a third party. While third party proceedings, subrogation and garnishee proceedings involve a "third party" they are substantially and procedurally different. Therefore, the next time you are a defendant but think someone else is liable against the plaintiff, don't just throw blame around, follow the appropriate procedure in passing the blame if justice is to be served.

Agnes Kithia Nzioka is a fourth year student at the University of Nairobi, School of Law. She can be reached through: **agnesnzioka2003@gmail.com**

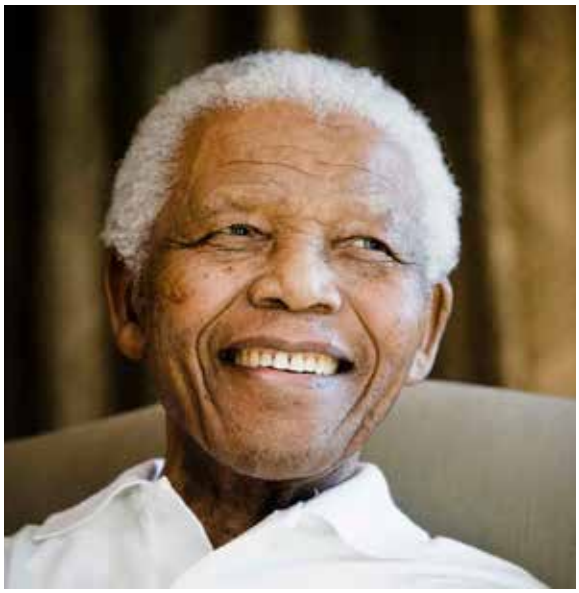
[28]Steve Ouma, A commentary on Civil Procedure Act CAP 21, 2d ed, (2013)-Page 335

A story of poverty being the greatest killer of academic dreams; Interrogating The New Kenyan University Funding Model and the quest for socio-economic justice

By George Nyamboga

I. Introduction

Education has always been an equaliser in Kenya, allowing Kenyan learners even from disadvantaged family background scale high the world of academia and realise their dreams. In one of Ubuntu events, Nelson Mandela himself stressed that education 'is the most powerful weapon you can use to change the world.'[1] It is, according to Mandela, a pathway to achieving personal development and equality. Infact, Mandela's advocacy for education formed the bedrock of his struggle to uplift individuals and improve the society.[2] Mwai's Kibaki's historic elections in 2002 would see him go down the history as a president who made education from the primary to higher learning institutions affordable to both the haves and have nots (the impoverished). His 2003 Free Primary Education Program (FPE) and 2008 Free Secondary Education (FDSE) eliminated tuition fee for most primary



The late Nelson Mandela

and secondary day schools, significantly increasing rates of enrolment.[3] It also forms a cornerstone of vision 2030 that is aimed at transforming Kenya to become a Middle-income country by 2030. Among its foundational pillars is the goal of providing quality training and education to all Kenyans while ensuring a hundred transition rate from the primary to the secondary school. International organisations like UNICEF and Non-Governmental Organisations also joined

[1]Veronica Onjoro, 'Education as an Enabler for Development' (Nation 30 January 2024) <https://nation.africa/kenya/blogs-opinion/letters/education-as-an-enabler-for-development-4508804> accessed 11 September 2024.
[2]Paul Ellis, 'Changing the World through Education - How Nelson Mandela Created the Conditions for Success' (*Cambridge International Education blog* 28 March 2019) <https://blog.cambridgeinternational.org/nelson-mandela/> accessed 11 September 2024.
[3]'Mwai Kibaki First Term in Office | Presidential Library & Museum' <https://www.presidentiallibrary.go.ke/mwai-kibaki-first-term-office> accessed 11 September 2024.

President William Samoei Ruto

the fight against illiteracy, this combined effort significantly making education more equitable and inclusive in Kenya, providing support and ensuring deserving children from disadvantaged background can access education.[4]

However, amid the effort to ensure access to education for all, the changes at the Kenyan University Funding Model seem to be a step backward rather than a step forward with education policy design experts warning of its ramifications to the son and daughter of a normal *Wanjiku* in tapping into the wealth of University Education.[5]

President William Samoei Ruto unveiled the new University Funding Model on 3rd March 2023, transforming how the Kenyan Higher Education is financed. According to consulted higher education stakeholders, they had envisioned the model as student-centric whereby, unlike the previous approach of Differentiated Unit Cost (DUC) that provided Universities with block funding, the new model aimed at focusing on individual students' Unique funding needs.[6] The funding mechanisms has also been greatly altered whereby sources of funds encompass a blend of scholarships and loans whose awards are based on household contributions. State Department of Higher education uses a Means Testing Instrument (MTI) to assess each student's financial needs.[7] According to those in-charge of the funding allocations, the model's envisioned goal was to ensure low-income household students received more support to realise the dreams and aspirations.

Under this new Model, only students placed by the Kenyan Universities and Colleges Central Placement Service (KUCCPS) are eligible for University Funding, thereby excluding those placed under selected private Universities. Students are then categorised into four bands (Band 1-4) based on their financial needs.[8] Band 1 refers to the extremely vulnerable (hence eligible for higher funding), Band 2-Extremely Needy, Band 3-Needy, and Band 4-less needy. Apart from KUCCPs, other key entities tasked with the model's effective implementation encompass the

[4]'Kenya Vision 2030 (Popular Version)' <https://repository.kippra.or.ke/handle/123456789/4087> accessed 11 September 2024.
[5]Francis Maina Gichuru and others, 'Education Curriculum Transitions in Kenya—an Account and Progress to Competency-Based Education Policy' (2021) 41 Curriculum Perspectives 153.
[6]'New Higher Education Funding Model' (*Universities Fund*) <https://www.universitiesfund.go.ke/new-higher-education-funding-model/> accessed 11 September 2024.
[7]SLEDGE.CO.KE, 'Breaking Down Kenya's New Higher Education Funding In 2024: Challenges and Insights' (SLEDGE.CO.KE, 3 January 2024) <https://sledge.co.ke/understanding-the-new-higher-education-funding-model-in-kenya-an-in-depth-guide> accessed 11 September 2024.
[8]'KUCCPS Clarifies Funding for Continuing Students After Ruto Launches New Model - Kenyans.Co. Ke' (12 May 2023) <https://www.kenyans.co.ke/news/89218-kuccps-clarifies-funding-continuing-students-after-launch-new-university-model> accessed 11 September 2024.

stakeholders at the University Fund and the Higher Education Loans Board (HELB).[9] They collegially work together to manage student placements, provide scholarships and loans respectively. Eligibility for the new funding exclusively applies to students that sat for their Kenya Certificate of Secondary Education from the year 2022 and onwards. In the eyes of stakeholders, the model has resolved the crisis that had made majority of the Kenyan Universities technically insolvent. However, some stakeholders in various institutions of Higher Learning have found that whereas the Model aimed at promoting equitable access to higher education by tailoring financial support to each student's needs, making the education system more inclusive, its structural and unintended inefficiencies has made education unaffordable to a middle-income Kenyan.[10] But before, we delve into the concerning demerits, let us have a look of advantages if properly implemented.

Expected pros and unintended consequences

Expected Pros

If the University funding is effectively implemented as envisioned, it could enhance inclusivity and equity. This is because the model aimed to ensure that learners from low-income households receive more financial support, promoting equitable access of higher education. Interconnectedly, Article 54 of the Constitution of Kenya 2010 provides that:

> **(1) A person with any disability is entitled –(b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person; (d) to access materials and devices to arise from the person's disability.**

Article 55 of the Constitution further obligates the state to take measures encompassing affirmative action programmes for purposes of ensuring that the youth-(a) 'access relevant education and training…', tracing back to Article 43(1)(a) of the Constitution that guarantees every person of their right to education. This would also align with Kenya's Vision 2030 blueprint whose key pillars stress on all Kenyans' 'quality education access.'

This New University Funding Model as introduced by President Dr. William Samoei Ruto on 3rd May 2024 Arguably sought to transform the model of financing the Kenyan Higher Education. In my informed view, I fathom that the designers that that the Model

1. Would be need-based funding-whereby the form of education financing would prioritise the aforestressed financial needs of individual students. In a Presidential Townhall held at the Kenyatta International Conference Center, stakeholders involved in designing the model argued that the move away from the previous funding model sought to promote the Constitution of Kenya's Bill of Rights. In fact, the president himself argued that it aligned with the equality and non-discrimination principle (Article 27 of the CoK), ensuring that all learners, their socio-economic background notwithstanding, are guaranteed of their right to (higher) education so enshrined under Article 43 (1)(f) of

[9]'Kenya's New University Funding Model: A Detailed Overview' (19 August 2024) <https://news.switchtv.ke/2024/08/kenyas-new-university-funding-model-a-detailed-overview/> accessed 11 September 2024.
[10]https://www.the-star.co.ke/authors/jamesmbaka, 'Explainer: How New Higher Education Funding Model Will Work' (The Star) <https://www.the-star.co.ke/news/realtime/2023-07-31-explainer-how-new-higher-education-funding-model-will-work/> accessed 11 September 2024.

the Constitution of Kenya 2010 so decreeing that *'every person has the right to-(f) higher education.'*

2. They also believed in the full-proof and efficacy of the Means Testing Instrument (MTI) system used to assess the financial needs of learners joining higher institutions of learning based on the formulated on the variables defined as 'socio-economic barriers.' This encompasses income of the household the individual is hailing from, geographic situation, and special consideration for the minority and often marginalised persons. These people under this context are the Persons with disabilities (Article 55 of the CoK), the Youth. Article 56 (b) of the Constitution of Kenya 2010 explicitly states that:

   The State shall put in place affirmative action measures and programmes thereof that are designed to ensure that minorities and marginalised groups-(b) are provided with special opportunities in educational and economic fields.

Therefore, this approach would support the Constitutional Right to education as so decreed in the aforecited Article 43 of the CoK, thereby promoting social equity.

3. On the issue of the proposed loans and scholarships, the funding allegedly guarantees the learners a broad-based guaranteeing of funding, notably, scholarships and loans. This is why the model proposed a combination of aforenoted scholarships (partial), loans, and contributions made by individual households' contributions. They found enshrined the Article 56's affirmative action as better placed to bridge the socio-economic disparities when it comes to academic funding. Illustriously, the model incorporated affirmative action strategies that were ideally supposed to ensure those from indigent socio-economic background, orphaned learners, and persons with disabilities receive adequate support, critical issues or crevices on the model have emerged as shall be discussed in subsequent sections of the chapters.
4. For Universities as heard or rather testified by the University of Embu Chancellor, Professor Mugendi, the model led to increased government capitation from 2022/23's 54 Billion Shillings to 84.6 Billion Kenya shillings in the concluded 2023/24 Financial Year. Such a substantial increase, in the Vice Chancellors' view, reflects the commitment of the government towards improving the quality and infrastructure of higher education.
5. Save for students and concerned or servant-leadership driven student leaders, other stakeholders praise the funding model for its adherence to Article 10 of the Constitution of Kenya 2010's Transparency and Accountability. Their argument and the president's argument during the Townhall was that the 'new model stresses on transparency and accountability in, a. application, and b. disbursement of the Public Funds. They find this to be achievable through a rigorous socio-economic data validation, strategic and inter-institutional partnerships that would ensure effective funding of institutions.
6. As for the household contributions, the government's justification for the model lies on the fact that whereas it provides a substantial amount of funding, households are expected and obligated to contribute towards their learners' education. Infact, the overreaching goal of the Model was to create a financial model of shared responsibility that incentivises parents to invest in the education of their child, thereby fostering a shared responsibility culture.
7. The model also aimed at supporting both the technical and vocational training and education. This is because

the model supplies provisions for TVET institutions, acknowledging their vitality in realising the now elusively distant Vision 2030 whose sub-goal pursuant to SDG 4 that 'aims to ensure that all people have access to quality education, regardless of their circumstances and education.' They are to catalyse national development through both the technical and vocational training. This would in turn support the economic policy which entailed *'Promoting skill development and self-employment as part of bridging the rapidly accelerating unemployment gaps.*

8. Debatably, designer of the funding hail the seamless process of application. This is because students are applying for the scholarships and loans through the Higher Education Financing (HEF) portal. The streamlined process of application ensures the students' ease of accessing the needed financial support to realise their academic dreams, thereby promoting efficiency and inclusivity.

Whereas the above ideally envisioned pros that portend that the Higher Education Funding Model aimed at creating a more efficient, transparent and equitable model in alignment with the socio-economic policies and constitutional principles, realists such as Kisii Senator Onyoka and a faction of growingly concerned education policy experts and VCs find the current status quo to be so detached from the greater problems and widened discrimination the model has created.[11]

Unintended (adverse) consequences of the New University Funding Model

Despite its ambitiousness and visionary-

Kisii Senator Onyoka

blinded goal of the New Kenyan University Funding Model, the effective rolling out of the New University Funding Model has faced significant challenges and criticism. Analysed below are some of the inexhaustible lists of what is wrong or needs attention with respect to the new University Funding Model.

a. The model has emerged to be inadequately thought-out, inadequately prepared, and lacking definitive clarity. Parents, officials, often-consulted Cyber Café experts, and even the students themselves have found the model to be overly complex, thereby confusing. Evidently, and during the recent presidential Townhall, Beatrice Inyangala, the Higher Education Principal Secretary struggled to justify the criteria applied in banding the students with respect to the MTI system in place, highlighting inherent lack of transparency as an Article 10 envisioned national value and principle.[12]

[11]Alberto Amaral, 'Equity in Higher Education: Evidence, Policies and Practices. Setting the Scene' in Orlanda Tavares and others (eds), Equity Policies in Global Higher Education: Reducing Inequality and Increasing Participation and Attainment (Springer International Publishing 2022) <https://doi.org/10.1007/978-3-030-69691-7_2> accessed 11 September 2024.
[12]Muhammad Naeem and others, 'A Step-by-Step Process of Thematic Analysis to Develop a Conceptual Model in Qualitative Research' (2023) 22 International Journal of Qualitative Methods 16094069231205789.

b. Students from the needly, disadvantaged and deserving background have cited the model to be punitive and discriminatory. In a series of news features done by Safaricom, majority of students who aced their Kenya Certificate of Secondary Education exams found them unable to realise their academic dreams. This is because they find themselves banded in band 4 despite their socio-economic background implying that they are supposed to be placed in band 1. Some of them were sobbing, tears welling down their cheeks as they face the reality that 'poverty has become a killer of their dreams.' Despite being called to professions of nobility and service to humanity like Medicine and Medical Surgery, Bachelor of Laws, Bachelor of Education, Engineering, Architecture, and even Computer Science, parents are sinking deep into depression knowing very well that a University Funding Model which was supposed to ensure 'education became an equaliser' has emerged to be a double-edged sword, assassinating their academic dreams.
c. Parents and students have also found the model's impact to be inherently discriminatory. Students from indigent backgrounds are appalled by stakeholders' lack of concern. Whereas Articles 27 and 43 clearly articulate for equality and non-discrimination when it comes to accessing education, the model's design has made University Model (New) become a Marxist expensive commodity on the *haves* and *those who are well-off* are only also to afford, making its access to wrongly banded and unsuccessful student appellants watch their academic dreams go down the drain, their only crime being that they were born in a poor family. This also justified the range of University Student leaders, especially those in attendance at the presidential townhall to be filled with rage as they watch daily their fellow comrades' and potential comrades' dreams of becoming diligent professionals in the society become a distant dream. Infact, during the televised town, a Kenya Methodist University (KeMU) called Junior told Mr President that:

'When you were an MP, people used to go to the streets to celebrate your wins and initiatives for a better Kenya. Nowadays, people go to the streets to protest how punitive policies passed and models churned out by your regime to continue to oppress the ordinary Kenyans who overwhelmingly voted for your presidency in 2022. What was so wrong with the old funding model that it could not be amended, rather dismantled and introduced a new punitive, and discriminatory model, subjecting comrades into even harder socio-economic suffering? Mr. President, Comrades are suffering, and it is high time you acted upon their complaints.'

Recent protests held by the University of Nairobi comrades, coupled by an illegal abduction of their President on the eve of protests underscore many weaknesses and suffering this model continues to inflict on an ordinary Kenyan parent's pockets, depression on students whose dreams are cut short because of the new model's inefficiencies. All these happenings, have, therefore, violated **Article 43 and 55** of the Constitution of Kenya 2010 as guaranteeing every person and youth (from low-income families) accessing higher education.

Other students have also been unable to either apply for scholarships or loans since they are yet to reach the statutory 18 years. They are left to wonder whether it was their making to finish and excel at the national exams at such an early age. This further compounded by over 26,000 students who have reportedly appealed appeals against the banding model, news outlets noting their concerns with the model regarding

KUCCPS was established to streamline the placement process for students transitioning from secondary education to higher education institutions. Its main goal is to ensure fair and efficient allocation of students to programs based on their preferences and performance.

their financial categorisation, showing their widespread discontent on the efficacy and the prospective inaccuracies of the means-testing procedure. Suppose a parent has four students who have been placed by the Kenya Universities and Colleges Central Placement Service (KUCCPs) and proceeded to be placed in either band 3 or 4, and say his/her income ranges between 50-100,000, such a means-testing process has, without a doubt, increased a financial burden on the families. This is because an appeal is unlikely to be successful, thereby the model would require their significant household contribution, thereby becoming more burdensome on families of a low-income. Hence, this has become a deterrent mechanism for students who have always clamoured to realise their University Education dream,' perpetuating the Universally abhorred and socio-economically-rejected policies and models thereof.

Moreover, the issue has not fully addressed the ideal goal of bridging financial gaps albeit increased university funding as universities continues facing financial constraints. This inter-alia encompasses delays in discussing required to the universities. This is in addition to the fact that the system is, just like the previously block funding model being facing challenges of bailing out the technically insolvent companies whose current ineptness is estimated to be 60.2 Kenyan billion shillings. Challenges further persist during the whole transitional phase since the new model further grapple with envisioned challenge of implementation as encompassing accurate assessment of the student's financial needs.

With the currently programme-based fee structures proving expensive from the inaccurately banded students/potential comrades from the underprivileged or low-income families, it is inevitable that there would be a potentially increased rate of dropouts. This is already being exacerbated by academically high financial strain and complex process of funding process that

HELB aims to promote access to higher education by offering loans and bursaries to eligible students who may not have the financial means to support their education.

discourages learners to go through with the process, moreso students that come from marginalised groups, communities, and areas. Interconnectedly, the equality versus equity debate avers that while the aim of the model is to achieve the argued equality of achieving through access to education, such differentiated funding and additional support of loans based on MTI-testing process of an individual comrade's financial needs, it inadvertently causes or brings about other forms of inequality.

The issue of administrative burden cannot be overlooked when it comes to realising the objects of the new funding model. Precisely, this new higher education funding, considering it is done simultaneously using the Higher Education Loans Board (HELB) portal in close consultation with education and the agencies involved towards putting the said University use in their productive use, the engagement's efficacy remains a complex endeavour, further affected by limited or rather constrained human resource and expertise moreso on the highly complex, controversial, and challenged mean testing process and the consequent allocation of funds.

Public participation in higher education conundrum

Article 2(1) of the Constitution of Kenya 2010 avers that 'The national values and principles of governance include—(b) patriotism, national unity, sharing and devolution of power, the rule of law, democracy, and **participation of the people**…' Public participation which is synonymous with meaningful stakeholders remains a missed jigsaw in the 'New University Funding Model (NFM) saga.' Majority of public policy analysts, designers of education models (funding inclusive) note that there was inherent lack of meaningful engagement of stakeholders, encompassing affected stakeholders, that is, the students, university administrators, parents, and even prospective financiers during the model's

design, remodelling, phased development and implementation.

The foregoing, apart from being an affront, makes realisation of Sustainable Development Goal Number 4 now more distant than ever, considering the highly doubtful future sustainability of the model. This is against the backdrop of ongoing financial challenges that public universities continue facing amidst allegedly ongoing 'drying of the treasury coffers', hence unpromisingly future of further budget cuts when it comes to funding university education.

The issue of how such a model may adversely impact the quality of education remains unaddressed. Take for instance, a case where the students are unable to pay the required fee as banded and consequently the issue of timely remuneration of lecturers emerges, chances are the quality of education churned may reduce due to lack of motivation. As for the case of students, the amount of time they will spend either hustling to raise the balance after scholarships and funding may eat into their reading and revision time. Then there will be a high likelihood of having universities more concerned with money rather than finding an accommodative strategy that would mutually benefit the learners and their learning institutions without compromising the quality of education.

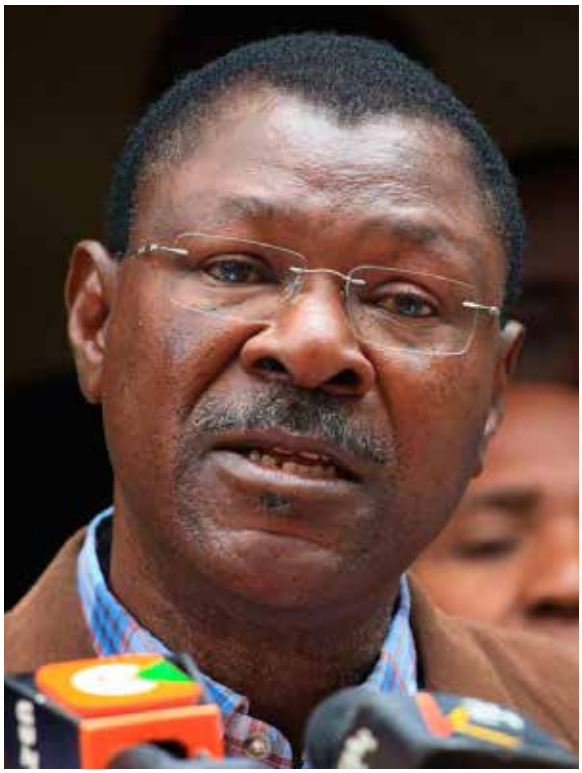
Despite the high praise of the TVETS, their practical support through funding, resource and infrastructural investment remains limited. Whereas the model, according to the discussed envisioned pros provided for a paralllel but similar funding to the student in various TVET institutions. Arguably, critics argue that the capitation of various TVET institutions has been low and insufficient to an extent it cannot adequately service various challenges these institutions face.

The issue of corruption which has been like cancer's malignancy has not spared the education ministry hence the feared potential of this new funding being a siphoning pipe to facilitate corrupt dealings. Arguably, the MTI system's consistency and manipulatable loopholes. This subjects the processes of mean-testing to vulnerabilities, thereby creating an avenue for either corruption, embezzlement or misuse of allocated funds. Things would only get worser with the diminished public trust and perception. Most parents either having or admitting their students to university education now have expressed their widespread protests and criticism. Consequently, there has been an erosion of the valuable 'public trust' currency in the ability of the government to effectively manage funding of higher education.

Recommendations

Despite the challenges faced, it is a fact that whereas the government does not have a revenue problem, rather an expenditure, full funding is impossible now as it shall require over 600 billion Kenyan shillings or 1 Trillion at best, however, the model is far from fact. According to critics like Lord Ted Kiania, the model seems to have been borrowed from the United States Models and UK which have left majority of the graduates in debt distress since the accumulated loans and ludicrous interests' rates are unimaginable.

But first things first, it is imperative that the new University is yet to be fully understood due to its complexity. It is imperative that the new Funding model to be simplified. The criteria should be further simplied and make accessibility or even navigation easily for people with disability. The criteria should have proofing and verifying mechanisms that would ensure that banding and funding allocations reflects the socio-economic status and other household factors such as dependants on the sources of income, net rather than gross income and issues regarding affirmative action-moreso for the disadvantaged. Such simplification out



Speaker of the National Assembly Moses Wetang'ula

to make it easy for students to understand the funding model's dynamics and easily understandable and justifiable for even administrators and parents as well. The first step would be establishing straightforward and clear instructions as well as user-friendly, thereby improving transparency by avoiding confusion.

As for enhancing engagement with the stakeholders, it has become clearer that for any system to either thrive or become efficient, meaningful stakeholder engagement is very important. This justifies the clarion call that has been ongoing, calling for all stakeholders right from the affected comrades, their parents, experts and administration in all institutions of higher learning to have been involved meaningfully throughout the whole process right from the proposal, design, piloting, and implementation. Such engagement should, if reconsidered as a way of ameliorating the inefficiencies of the system. This is why there should have been regular engagements throughout the whole process to ensure the whole architecture of model, apart from having the Kenyanism meticulously sewn into its fabric, it is able to ensure that it satisfies the needs of all the involved parties.

There is also needed to investigate improving the accuracy of means testing formula or even metric. It is thus, imperative to invest ideal resources into robust data collection, comprehensive and meticulous analysis of the said data and looking it where the Means Testing Instruments is having strong weaknesses resulting to the banding concerns. Going forward, this would ensure that there is accurate assessment of the various students effectively, based on their socio-economic background, thereby ensuring justice during the allocation of the much-needed financial support.

As for the case of increased awareness, civic education to all the stakeholders and continuous capacity training is very important. This would, however, need rigorous awareness campaign for purposes of ensuring that the funding model is simplified well-enough and that it is always evolving to capture the best interests of stakeholders affected. This training should stress on navigating the process even to the far-flung rural areas. This would also allow for understanding some of the model's desirable attributes while also giving affected comrades an avenue to raise their concerns and which shall need to be dealt with by the respective agencies.

There is also an urgent need to deal with each and every case strategically and deliberately. Specifically, there is need to further relook into the funding model from the lens of the more deserving and needy vulnerable groups as emphasised in the aforecited Article 56 of the Constitution of Kenya 2010. There is need toe sure that the more needy find a way of even being 100% fully funded and with some upkeep. This would be the case, for example, completely orphaned people with disabilities, communities who are yet to substantially

benefit from the national cake that is being allegedly being eaten ravenously by inconsiderate political class and managers of important seats in the government and affiliate bodies. It is imperative to consider other target scholarships.

Going by the directive of the National Assembly Moses Wetangula, it is imperative that CDF funds for education, county bursaries for higher education, and even ward funds to all be merged to form a single avenue of funding to an extent of increasing the pool of university education funding and also try to curb the manifest pilfering of public funds. Universities and other higher institutions should be advised to explore alternative sources of funding such as research grants, public-private partnerships, innovation hubs, and philanthropic contributions from the alumni groups.

Assessment being a key part of any funding model, it will be ideal to think along the line of implementing a robust framework for purposes of monitoring and evaluation. This would also keep track of how the funding model is fairing, strengths, weaknesses, opportunities for improvement and any threats needling thwarting. Assessments on a regular basis would, therefore, help that the model is recalibrated to achieve goals intended.

Given the conundrum that faces the household contributions due to the very many assumptions of the banding techniques or formulas upon being fed the information that it calls for, the government or stakeholders concerned with implementing the model should consult with affected households so as to find a way of reducing the financial burden coming with the fee structures.

Majority of funds that are budgeted for corruption could be used to alleviate the now-becoming extreme university education if a robust mechanism of enforcement would be enforced. This would be very important during the management of higher education funds. Accountability mechanisms can take the form of regular auditors by certified professionals of good standing as attached to the auditor-general's office, regular public reporting, and enabling effective oversight bodies.

There should be strategic funding towards the TVET Institutions. If in God's working miracles leaders and various stakeholders decide to put an end to corruption and seal loopholes of the ongoing looting spree, thereby allowing for reinvestment of various public funds to projects of greater national cause. There is an urgent to complete such funding with public-private partnerships when it comes to infrastructure, and importantly, research.

Lastly, to rebuild the trust of the public, a lot of rebuilding shall be needed given the complexities of the current higher education funding modern which is patently criticized and passionately rejected by victims of its adversity. Public trust regain would begin with going back to the drawing board and doing what is considered. This might include transparency in communication, engagement with stakeholders, and the funding process' demonstrated improvements. This would in turn ensure a fair and effective university funding model.

Conclusion

This paper, while acknowledging the intended intention of the new university funding model, its implementation has brought more adverse effects compared to the advantages. This is why the proposed recommendations to ameliorate the persisting drawbacks of the model, if implemented would facilitate achievements of the goals to access higher education, transparency, and equity for all students.

Nyanaro George Nyamboga is a lawyer. He recently graduated from the University of Embu, School of Law.

Legitimate expectation in Tax disputes: Musings from Kenya Revenue Authority v Export Trading Company Limited [2022] KESC 31 KLR Case

By John Muasa

Introduction

The question of legitimate expectation in tax disputes is a pervasive one as much as it is a common one in the Tax Appeals Tribunal (TAT) and other Superior courts including the Supreme Court This analysis is anchored on the principles established by the Supreme Court in ***Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020) [2022] KESC 31 (KLR)*** **(The ETC Decision)**. In the ETC Decision, the Supreme Court found that the Kenya Revenue Authority (The Authority) could not undertake a Post Clearance Audit (PCA) under Section 235 of the East Africa Community Customs Management Act 2005 (EACCMA) at the tail end of the statutory five year period without giving reasons to the affected company and moreover, the acquiescence by the Authority by failing to update its customs clearance system (The Simba System) to reflect the correct rate of duty, created a legitimate expectation in favour of the Respondent and as such the process of demanding the short levied duty was unreasonable, irrational and in violation of Articles 10 and 47 of the constitution.

In many ways, the ETC decision is significant as it presents a significant shift in tax administration and the resolution of tax disputes and most importantly, the conduct of the Authority as it carries out its statutory mandate. The Supreme Court has issued a stern warning to the Authority that in the exercise of its mandate, it is to be guided by the National Values and Principles of governance under Article 10 of the constitution and the right to a fair administrative action under article 47 of the constitution.

Understanding the nature of tax disputes and the avenues for resolution can help taxpayers effectively address issues and minimize their impact on their financial situation.

Similarly, the case has brought to fore critical issues in tax controversy. Among them the obligations of the Authority as it exercises its functions when carrying out a PCA, what amounts to an administrative action in tax and whether the conduct of a PCA is an administrative action, and the place of the national values and principles of governance in taxation . Importantly however, is the question whether the finding by the Supreme Court applies to all disputes arising from an audit under Section 235 as read together with Section 135 of the

KRA's primary mandate is to mobilize revenue for national development, ensuring that the government has the financial resources needed for public services and infrastructure.

EACCMA and what this means for tax payers so assessed. In that regard, I examine the above issues as hereunder.

The factual basis of the dispute in KRA v Export Trading Company.

The genesis of the dispute between the Kenya Revenue Authority (KRA) and Export Trading Company (the Company) was a Post Clerance Audit conducted by the KRA on the company demanding a sum of Kshs 378,016,680/- being the revenue due as a result of misapplication of import duty on imported rice. Around July 2005, the East African Community promulgated the Common External Tariff which imposed import duty on imported rice at 75% and this rate was applied on the KRA's Tradex Simba system – an automated tax collection and clearance system. However., through Legal Notice No.1 of 2005, the Council of Ministers of the EAC stayed the application of the 75% import duty on rice imported from Pakistan for two years and consequently, the KRA applied an import duty of 35% in the Tradex Simba system for all rice imports regardless of origin. At the expiry of the two years, the Council of Ministers of the EAC issued Legal Notice No EAC/10/2007 that again stayed the application of the import duty rate of 75% on rice imported from Pakistan for another two years from June 1, 2007to June 18, 2009.

All through this time, the KRA had maintained the 35% import duty on rice regardless of origin on its Simba System until 26th June 2009 when it put up a message on the system informing importers that the import duty would be applied to rice imported from Pakistan upon submitting a certificate of origin, amongst other documents. Notably the company had in 2008 imported rice between from Burma, Vietnam, and Thailand and had paid import duty of 35% as maintained on the KRA's System despite Legal Notice No EAC/10/2007 exempting only rice imported from Pakistan from the 75% import duty. The KRA claimed that this was a human and system error and consequently, it issued an assessment on the short levied taxes on the rice imports from Burma, Vietnam and Thailand triggering the genesis of the

dispute with a demand of tax that was due as a result of the misapplication of the import duty comprising import tax, penalties and interest. Aggrieved, the company instituted litigation at the High Court and the case found itself on appeal at the Apex Court*[1].

Litigation Background

The Kenya Revenue Authority appealed to the Supreme Court, arguing that the Court of Appeal erred in finding that the post-clearance audit conducted nearly four years after the rice importation was irrational and unreasonable. KRA cited Section 235(1) of the East African Community Customs EACCMA, which allows for post-clearance audits, and claimed the tax demand made within five years of importation was lawful. They referenced the High Court case of *Ericsson Kenya Limited v. Attorney General & 3 others 2014 eKLR* to support this argument. KRA maintained that it was simply fulfilling its statutory mandate and that its actions could not be constrained by ETC's rights. They submitted that the Court of Appeal's decision suggested a conflict between Section 235 of the EACCMA and the Constitution. Additionally, KRA contended that legitimate expectation could not override statutory provisions, referring to the Supreme Court case of *Communication Authority of Kenya & 5 Others v. Royal Media Services & 5 Others [2014eKLR.*

KRA further argued that ETC was aware of the applicable import duty rates as outlined in Legal Notice No. EAC/10/2007 and referenced various court cases to assert this. KRA also pointed out that the Tradex Simba System used for goods clearance is prone to human and technical errors and that administrative errors cannot supersede the law, citing *Aryuv Agencies Limited v. Kenya Revenue Authority 2019 eKLR.* KRA asserted that its mandate is derived from the Constitution and Section 235 of the EACCMA, justifying its demand for the unpaid taxes. They referred to the Canadian Supreme Court case of *Chandler v. Alberta Association of Architects 1989 1989 XanLII 41 (SCC), (1989)* to emphasize the need for statutory bodies to fulfill their mandates. KRA maintained that it had responded to ETC's application for review and urged the court to allow it to collect the short-levied taxes amounting to KES 378,016,680.

In response, ETC agreed that Sections 235 and 236 of the EACCMA allow a five-year window for post-clearance audits. However, they argued that KRA's error in tax misdeclaration disqualified KRA from invoking this provision. ETC emphasized that the main issue was not KRA's power to conduct post-clearance audits, but whether the exercise of this power violated their right to fair administrative action. They cited Article 47 of the Constitution, which guarantees lawful, reasonable, and procedurally fair administrative action. Referring to the case *Republic v. Kenya Revenue Authority Ex Parte Cooper K. Brands Limited [2016]eKLR*, ETC argued that the process adopted by KRA in collecting taxes violated the principles of Articles 10 and 47 of the Constitution.

ETC contended that KRA acted unreasonably by failing to offer a rational explanation for the post-clearance audit and by issuing a demand four years after the duty was initially calculated. They referenced the Court of Appeal decision in *Krish*

[1]From my reading of the cases, it is not clear whether the review process contemplated under Section 229 of the EACCMA was followed. At the High Court, the Company alleged that though they initiated the review process, the Commissioner never rendered any decision on it. The KRA on the other hand other argued that a decision was issued within the required timelines. The High Court did not delve into this issue in its determination. See Paragraphs 6, and 11 of Export Trading Company v Kenya Revenue Authority [2018] eKLR

The primary goal of PCA is to ensure that customs declarations are accurate and that duties and taxes are correctly assessed and paid. It helps to identify potential discrepancies, fraud, or non-compliance in customs processes.

Commodities Limited v Kenya Revenue Authority [2018]eKLR to support their position. Furthermore, ETC stated that KRA did not render a decision on their application for review within the 30 days required by Section 229(5) of EACCMA, implying that the application was approved by default. ETC also argued that KRA's actions created a legitimate expectation that, if the correct process was followed, the appropriate taxes would have been paid. They contended that KRA was trying to benefit from its own mistakes, which was unjust.

The Supreme Court identified two main issues for determination: whether KRA's actions violated Articles 10 and 47 of the Constitution and whether a legitimate expectation arose. The Court found that KRA had not acted fairly, reasonably, or in an expeditious manner, and that its actions were inconsistent with the efficiency and expediency envisaged under Article 47(1) of the Constitution. The Court also held that a legitimate expectation had arisen because KRA had applied a 35% rate in their Tradex Simba System rather than the applicable 75%. It was unreasonable for KRA to demand extra duty four years after the assessment when they had full control over the system. The Court concluded that ETC should not be made to suffer the consequences of KRA's failure to input the correct rate into the system. Consequently, the appeal was dismissed.

In the following sections, I anayze key issues that the three Superior Courts analyzed in arriving at their respective judgments. First, I analyze the manner in which the courts understood the function and purpose of PCA, second the manner in which the courts arrived at the determination that a PCA was an administrative action under Article 47 of the constitution and third how the courts resolved the question of legitimate expectation. Finally, I explore the implications of the decision on future disputes arising from the conduct of a PCA.

What is a PCA and what is its Function

The central issue in the ETC decision was the demand of short levied duty as a result of a Post Clearance Audit. Section 235 of the

EACCMA guides the conduct of PCAs and provides as follows:

> *235. (1) The proper officer may, within five years of the date of importation, exportation or transfer or manufacture of any goods, require the owner of the goods or any person who is in possession of any documents relating to the goods– (a) to produce all books, records and documents relating in any way to the goods; and (b) to answer any question in relation to the goods; and (c) to make declaration with respect to the weight, number, measure, strength, value, cost, selling price, origin, destination or place of transhipment of the goods, as the proper officer may deem fit.*

Further Section 135(1) of the EACCMA provides that, Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable. Section 135(3) further provides that the proper officer shall not make any demand after five years from the date of the short levy or erroneous refund, as the case may be, unless the short levy or erroneous refund had been caused by fraud on the part of the person who should have paid the amount short levied or to whom the refund was erroneously made, as the case may be.

From the above sections, a PCA can be carried out anytime within five years after the date of importation, exportation or transfer of any goods and a demand for short levied duties made save for where the short levy or erroneous refund was caused by fraud on the part of the tax-payer. Notably, from the above provisions, a PCA will primarily involve an inspection of the documents relating to goods and not the goods themselves. Thus, a PCA is defined as an audit-based control conducted by customs subsequent to the release of goods to ensure compliance with customs and other related laws and regulations.[2] The World Customs Organization defines a PCA as process of verification of the accuracy of declarations made by persons/companies by examining their records, books, business systems and other relevant commercial data.[3] The COMESA secretariat additionally defines a PCA as a structured examination of client's relevant commercial systems, financial and non-financial records, physical stock and other assets, internally generated data and that which is produced independent of the client with the objective of: Measuring levels of compliance, improving future compliance, supporting those clients who wish to comply, and deterring non-compliance.[4]

The overall objective of a PCA is to assure that Customs declarations have been completed in compliance with Customs legal requirements as well as other requirements under any other law applicable in respect of import or export, via examination of a traders' systems, accounting and other business records and premises.[5] Additionally,

[2]Post Clearance Audit, "Paper Submitted by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu for the July 2012 World Trade Organization (WTO) Symposium on Trade Facilitation" available at https://www.tfafacility.org/sites/default/files/2022-01/7.5_chinese_taipei_-_case_study_of_customs_post-clearance_audit_system_by_chinese_taipei.pdf
[3]World Customs Organization, "Guidelines for Post Clearance Audit (PCA) Volume 1" Updated June 2018 available at https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/key-issues/revenue-package/pca_guidelines_vol1.pdf?la=en
[4]COMESA, Training Manual on Post Clearance Audit at pg.8 available at https://ikesra.kra.go.ke/server/api/core/bitstreams/4a0904de-610d-4306-95c3-321e546cd5e1/content
[5]Ibid at pg 9

a PCA is useful in the verification of the value and declaration of the origin of goods and ensures that the goods liable to specific import/export controls are properly declared. Thus, the conduct of PCAs is crucial in efficient tax administration as it provides tax authorities the flexibility to carry out audits long after the goods have been cleared at customs thereby reducing the costs associated with storage and enhancing the clearance times of goods at ports of entry.

Being central to the present dispute, the three superior courts rightly acknowledged that the authority had the power to conduct PCAs and was supposed to do them in accordance with the law. However, the Court of Appeal failed to appreciate that the import of a PCA is a documentary exercise and does not involve, necessarily, the physical re-inspection of imported goods. The Court while addressing the PCA noted that, *"..the imported goods in this instance was rice and being a perishable commodity, it is unfathomable to expect that an importer, such as the respondent will keep the rice in its warehouse awaiting the expiry of the statutory period of 5 years within which the appellant, under the EACCMA is permitted to carry out a post clearance audit to ascertain the duty chargeable. This is inspite the fact that the rate of duty payable and the assessment thereof is done by the appellant and the respondent has no role in setting the rate applied."*[6] While not dispositive of the issue at hand, this finding by the court was erroneous. It was not proper for the court to assume and make a pronouncement that the authority expected the company to store the rice in its warehouse for five years while awaiting the conduct of a PCA. This was therefore, a misapprehension of the law on the part of the court in relation to PCAs and their function.

Is a PCA an administrative Action under Article 47 of the Constitution?

The three superior courts found that the conduct of the PCA by the authority was in violation of Article 47 of the constitution as it violated the right to a fair administrative action of the company and that the demand of the short levied taxes was unfair and unreasonable. The Supreme court upheld the findings of the two superior courts by noting that the superior courts concerned themselves with ensuring that the process of demanding the duty was fair and based on the evidence before them, the authority had acted unfairly in demanding for the alleged short short levied duty almost 4 years after the initial assessment and payment of the duty so assessed were irrational and did not accord the respondent its right to fair administrative action.[7]

In all the superior courts, the courts did not address their minds on whether a PCA was an administrative action or not. Article 47 of the constitution provides that every person has the right to administrative action that is **expeditious, efficient, lawful, reasonable and procedurally fair**[8] and if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.[9] Section 2 of the Fair Administrative Action 2015 defines an administrative action to include (i) the powers, functions and duties exercised by authorities or quasijudicial tribunals; or (ii) any act, omission or decision of any person, body or authority that affects the legal rights or

[6]Kenya Revenue Authority v Export Trading Company Limited [2020] eKLR at pg 4
[7]The ETC Decision page 15
[8]The Constitution of Kenya Article 47(1)
[9]Ibid Article 47(2)

Prof Tom Ojienda, Kisumu Senator

interests of any person to whom such action relates.[10]

In *EACC and another v Prof Tom Ojienda Sc T/A Prof.Tom Ojienda and Associates Advocates and 2 others SC Petition No. 30 of 2019* (As Consolidated with) Petition No. 31 of 2019, the Supreme Court noted that the foregoing definitions do not provide an accurate picture of the meaning of an administrative action as they simply address the elemental phenomenal aspects of the phenomenon before describing its nature. In the courts view, such definition, without more, *would bring within the ambit of an "administrative action" just about anything done, or any exercise of power by an "authority" or "quasi-judicial tribunal".* As a result, the court was of the view that an "administrative action" is not just any action or omission, or any exercise of power or authority, but one ***that relates to the management of affairs of an institution, organization, or agency.*** In arriving at this determination, the court was guided by the definition of the adjective "administrative" in Burton's Legal Thesaurus (4th Ed) where it is defined to mean among others, "directorial, guiding, managerial, regulative, supervisory".

Based on the foregoing then, the superior courts should have determined whether a PCA was an act that relates to the management of affairs of the Kenya Revenue Authority and whether it was directorial, guiding, managerial, regulative or supervisory. This was a crucial finding since as held in *Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR: "Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies".*

To determine if a PCA was an administrative action as contemplated under Article 47 of the constitution, one would have to look at the functions and powers that the KRA exercises when carrying out a PCA. According to Section 5 of the Kenya Revenue Authority Act, the Authority, under the general supervision of the Minister, serves as an agency of the Government for the collection and receipt of all revenue.[11] In the performance of its functions, the KRA is mandated to *administer and enforce* the provisions of the written laws set out in Part I and Part II of the First Schedule of the Act. Thus, the administrative function of the KRA is the collection of revenue through the enforcement and administration of the laws set out in Part I and Part II of the First Schedule of the Act. The EACCMA is listed under Part II of the First Schedule meaning that the authority exercises its function of

[10]The Fair Administrative Action Act 2015, Section 2
[11]The Kenya Revenue Authority Act 2012, Section

revenue collection through administering and enforcing its provisions.

Section 5(1) of the EACCMA provides for the appointment of a Commissioner responsible for the management of customs by each Partner State and such other staff as may be necessary for the administration of the Act and the efficient working of the Customs. In Kenya, there is established the office of the Commissioner of Customs and Border Control who in line with Section 5(2) of the EACCMA is responsible for the management and control of the customs including the collection of and accounting for customs revenue. Accordingly, when a PCA is conducted and a demand for short levied taxes made, the Authority is exercising its administration and enforcement function which is its administrative function rendering the entire process subject to the provisions of Article 47 of the constitution and the provisions of the Fair Administrative Action Act 2015.

This means that the process of conducting a PCA from the initial stages all the way to the demand must be done reasonably, expeditiously and fairly. In this regard, Wheelright K argues that taxpayers should be given prior notification of the audit and the opportunity to request postponement of the audit if they have good reasons.[12] He states that as in any administrative decision, the tax authority should explain to taxpayers why they are chosen for an audit, what taxes and what years the audit will cover, what documents, books and other records will be required, how the audit will proceed, and give the taxpayer the opportunity to contact and use a legal or other representative in dealing with the tax authority.[13] The author goes on to state that at the commencement of the audit the taxpayer should receive clear guidelines from the revenue authority, setting out the audit procedures, the rights and duties of taxpayers during the audit as well as details of the tax authority's practices and rules governing the outcome of the audit.[14] Where a PCA is not compliant with the above procedure and requirements, any demands made as a result may be subject to judicial challenge. It is therefore incumbent on the authority to ensure that the conduct of PCAs is done in a maner that takes into account any litigation risk but also upholds the right to a fair administrative action of taxpayers.

Resolving the Legitimate Expectation Question

In all the superior courts, the company had argued that the authority's actions had created a legitimate expectation as they had done all they were required to do as taxpayers by paying the taxes so assessed by the authority's customs clearance system.[15] They argued that the authority's failure to respond to their clarification on the correct duty, clearing the imported rice, applying the import duty rate and verifying the goods as cleared created a legitimate expectation that they had paid all taxes due and that the authority could not be allowed to benefit from its own mistakes. The company also argued that since the KRA failed to collect import duty at the applicable rate of 75% and applied the rate of 35%, it could not purport to turn around and ask for additional tax on the rice consignment that had already been cleared by its system on the ground of it being 'under collected duty'. In addition, since the appellant had full knowledge of the applicable duty, but failed to apply the correct duty in the Tradex

[12]Wheelright K Taxpayer' Rights in Australia in Bentley D Taxpayers' Rights: An International Perspective Revenue Law Journal Bond University: Queensland 1998 at page 49.
[13]Ibid
[14]Ibid
[15]See KRA v Export Trading Company para 32 and 33

The Communications Commission of Kenya (CCK), now known as the Kenya Information and Communications Authority (KICA), is the regulatory body responsible for overseeing the communications sector in Kenya.

Simba system, then it was estopped from raising any further/or additional taxes.[16]

On this issue, the KRA argued that it was not only simplistic but also self-serving for the company to claim that the deficiencies of the Tradex Simba system created a legitimate expectation as the company was solely responsible for the short-levied taxies whilst the law was clear that the applicable rate for the rice imported was 75%. It further argued that there cannot be a legitimate expectation that is in contradiction to the law and that the error on the Tradex Simba system cannot oust the law. It thus urged that the findings by both courts did not meet the threshold for the application of the doctrine of legitimate expectation.

The law on legitimate expectation is well settled. The Supreme Court in ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR*** held that legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. For an expectation to be legitimate therefore, it must be founded upon a promise or practice by a public authority that is expected to fulfil the expectation. The court thereafter went on to state that the emerging principles on legitimate expectation were that *(i) there must be an express, clear and unambiguous promise given by a public authority; (ii) the expectation itself must be reasonable; (iii) the representation must be one which it was competent and lawful for the decision-maker to make; and (iv) there cannot be a legitimate expectation against clear provisions of the law or the Constitution.* In the ETC decision, the application of this principles was not difficult as the authority had failed in its duty to maintain the Tradex Simba System knowing very well that taxpayers could not clear their goods through any other system. Additionally, it had short itself in the foot by

[16]Ibid

failing to respond to the clarifications from the company and ironically, its argument that the company was being simplistic and self-serving, could not be further from the truth regarding its own conduct.

Indeed, the present situation was similar to the one decried by Odunga J (as he then was) in ***Republic v Kenya Revenue Authority Ex Parte Universal Corporation Ltd [2016] eKLR*** where he lamented that, *"That the applicant is in control of the instruments through which the actual taxes are payable is not in doubt. By not regularly monitoring its said instruments with a view to determining the actual taxes payable, the Respondent placed the applicant in the unenviable position where the applicant is being exposed to shouldering the burden which legally ought not to have been shouldered by it. In my view the circumstances of this case cry loud against the imposition of the burden on the applicant."*

The authority's argument that legitimate expectation could not run against the law were watered down by its own conduct. The authority could not purport to transfer to its obligations to the company when all it had to do was respond to the clarification and provide the way forward, or simply, update its systems to reflect the correct duty. Nonethelss, the position adapted by the court should be viewed in this circumstances and an appreciation made that this is not the general rule.

The Implications of the ETC Decision on Future Disputes

It is settled law that a case is only an authority for what it decides. In ***YH Wholsalers Limited v Kenya Revenue Authority [2021] eKLR***, the court held that "*A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."* Further, the ratio of any decision must be understood in the background of the particular facts of the case as a case is only an authority for what it actually decides and not what logically flows from it.[17]

Simply put, each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Mativo J (as he then was) in ***Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021) [2022] eKLR*** was of the considered view and I agree that, "precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches."

In this light, the ETC decision needs to be understood in its context especially in relation to the manner in which the conduct of a PCA is to be undertaken under the provisions of Sections 235, 236 and 135 of the EACCMA and moreso, the finding of a legitimate expectation. From the superior courts findings, the existence of a legitimate expectation was based off the fact that there was a failure on the authority to update its systems despite requests for clarifications from the respondent. This should not be interpreted or even understood to mean that in any case where a PCA is conducted, a party will plead that there exists a legitimate expectation simply for the reason that the goods were cleared using the Simba System.

The conduct of a PCA is pegged on the

understanding that Kenya runs on a self-assessment tax programme. The Nature of Kenya's tax regime has been recognized by the Courts as espoused in ***Commissioner of Domestic Services v Galaxy Tools limited [2021] eKLR***, which stated: *"This country operates under a self-assessment tax regime. Under this regime, the tax paver assesses self and declares what he considers to be taxable income on which he then pays tax to the authorities. For this reason, the tax laws are coached in a manner that gives the tax authorities wide powers and discretion in ascertaining ex-post facto, what taxable income is.* That in the event that the taxpayer defaults in this expectation, the law under Sections 135, 235, 236 & 249 of the East African Community Customs Management Act, 2004 (EACCMA) allows the Commissioner to conduct post clearance audit and demand short levied taxes."

Indeed, Odunga J (as the then was) in in Republic v Kenya Revenue Authority Ex Parte Universal Corporation Ltd (Supra) acknowledged that each case must be determined on its own merits and there is no hard and fast rule in these kinds of cases. The general rule is however the one propounded in ***Mombasa Civil Appeal No. 157 of 2007 between Commissioner Customs and Others vs. Amit Ashok Doshi & Two Others*** that, ***"One can well understand, however, that on balance it is preferable that the law should be as it is. It is not in the interest of consistent application of the law that errors should be sanctified as principle'"***

Therefore, the ETC decision needs to be read in its context with the caveat that the doctrine of legitimate expectation will not be upheld where the authority has followed the correct process in the demand of taxes. Additionally, it is to be recalled that in tax disputes the burden of proof is on the taxpayer to demonstrate that the assessment by the authority was excessive or erroneous. This is in line with the provisions of the Tax Procedures act and has been confirmed in ***Digital Box Limited vs Commissioner of Investigations and Enforcement (2020) eKLR***, where the Tax Appeals Tribunal Tribunal observed held as follows: -*"The question of burden of proof in taxation matters is provided for under the Tax Procedures Act as well as the Tax Appeals Tribunal Act. Section 56(1) of the Tax Procedures Act stats tha: 'In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect'. Section 30 of the Tax Appeals Tribunal Act similarly provides that: In a proceeding before the Tribunal, the appellant has the burden of proving-(a)Where an appeal relates to an assessment, that the assessment is excessive; or(b)In any other case, that the tax decision should not have been made or should have been made differently."*

Conclusion

In sum legitimate expectation, while a significant principle in administrative law, must be contextualized within the specific facts of each case. As established by the courts, this expectation arises from clear representations or practices by public authorities, which must be reasonable and lawful. However, it is equally essential to recognize that the burden of proof in tax disputes rests on the taxpayer, who must demonstrate any perceived inaccuracies in the authority's assessments. Moreover, the KRA's role in the administration of tax laws is pivotal; it must ensure compliance with legal standards and maintain effective communication with taxpayers. The findings of this paper suggest that while the ETC decision provides important insights into the doctrine of legitimate expectation, it does not alter the fundamental principles governing tax assessments or the obligations of the KRA

John Muasa is a final year student at the Kenyatta University School of Law with a keen interest in legal research relating to tax matters and the general application of tax law.

Diplomacy and International Law: Catalysts for achieving Sustainable Development Goals in Africa[1]

By Ayaga Max

Abstract

The pursuit of sustainable development has become a global imperative, forming a core constituent of the United Nations' 2030 Agenda for Sustainable Development which introduced the Sustainable Development Goals (SDGs). These goals expand upon the earlier Millennium Development Goals and focus on a broad range of global issues such as poverty, inequality, climate change, and the promotion of peace and justice.

In Africa, the journey towards achieving these ambitious targets is fraught with unique challenges. The continent equally brims with potential for sustainable development through strategic use of available diplomacy and international law. Diplomacy represents a cornerstone in the development of international cooperation—a way through which connections between different nations are built and collaboration in pursuit of common development goals is engendered. At its core, international law is a web of treaties, conventions, and agreements that provide the legal framework for implementing policies compatible with the SDGs, which ensures countries, remain committed to their development.

This paper discusses the critical roles that diplomacy and international law play in furthering SDGs in Africa. It looks at the successes and challenges faced by African nations and tries to show how diplomatic initiatives and international law can be utilized to address key issues: poverty alleviation, environmental sustainability, and social equity. Furthermore, it looks

[1]This paper is dedicated to the love (as it then was) that took me to the trenches. Like it, this paper holds a special place in my heart. Unlike it, at least this essay paper will remain with me forever. To the love of my life (as she then was), I hope this paper reminds you of how much of a motivation you were to me.

Former Liberian President Ellen Johnson Sirleaf

into the role of regional organizations, such as the African Union, in coordinating and supporting these efforts. The author concludes by identifying ways in which the effectiveness of diplomacy and international law on sustainable development can be substantially enhanced across the African continent.

I. Introduction

The United Nations has in the last three decades adopted two development goals with slightly similar visions but different strategic approaches. These are the Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs). Both frameworks aim to address global challenges and improve the quality of life for people all over the world, yet they differ in three things; scope, focus, and methodology.

"*We are here because we share a fundamental belief: that poverty, illiteracy, disease and inequality do not belong in the twenty-first century. We share a common purpose: to eradicate these ills for the benefit of all. And we share a common tool to achieve this: the Millennium Development Goals.*"
Ellen Johnson Sirleaf (Context: September 2000 Millennium Summit, New York)

"There must be a better way to make the things we want, a way that doesn't spoil the sky, or the rain or the land."
Paul McCartney (Context: September 2015 UN Sustainable Development Summit in New York.)

Two different quotes, two different ideologies, same location of interest, fifteen years apart; that is the story of Millennium Development Goals and Sustainable Development Goals. Historically, the journey towards the SDGs began with the Millennium Development Goals (MDGs) in 2000 where 189 member states adopted the Millennium Declaration[2]. The MDGs comprised eight targets aimed at addressing a range of issues, including extreme poverty, education, gender equality, child mortality, maternal health, disease, and global partnerships. However, the MDGs faced criticism for their limited scope, lack of inclusivity, and the uneven progress among different regions and sectors due to what was described as diffuse development[3].

As the 2015 deadline approached, it became evident that while significant progress had been made in many areas, challenges and gaps remained. The lessons learned from

[2]Ved Nanda, 'The Journey from the Millennium Development Goals to the Sustainable Development Goals ' (2015) 4 Denver Journal of International Law Policy <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1043&context=djilp> accessed 19 May 2024
[3]Hulme David and Scott James, "The Political Economy of the MDGs: Retrospect and Prospect for the World's Biggest Promise," *(University of Manchester. Brooks World Poverty Institute, January 2010))*. pp. 3–5. ISBN 978-1-907247-09-5. OCLC 1099885941
[4]'Future We Want - Outcome Document' *(United Nations)* <https://sustainabledevelopment.un.org/futurewewant.html> accessed 16 May 2024

the MDGs highlighted the need for a more comprehensive and inclusive framework that could address a broader range of issues and be applicable to all countries, not just developing ones. In an attempt to address this, the United Nations convened the Rio+20 Conference on Sustainable Development in Rio de Janeiro in 2012. The conference's outcome document, "*The Future We Want*," emphasized the necessity of creating a new set of goals that would build on the MDGs' successes and address their shortcomings[4]. It called for the establishment of an open working group (OWG) which was formed in 2013 and embarked on an 18-month process of drafting the SDGs[5].

On September 25, 2015, the United Nations General Assembly formally adopted the 2030 Agenda for Sustainable Development;17 Sustainable Development Goals[6]. These goals encompass a broad range of objectives, such as ending poverty and hunger, ensuring quality education, achieving gender equality, promoting sustainable economic growth, combating climate change, and fostering peace and justice[7]. Unlike the MDGs, the SDGs are designed to be universally applicable, recognizing that sustainable development requires coordinated efforts from all countries, irrespective of their development status.

Diplomacy and international law on this other end serve as the backbone of state governance. They wield the power to shape not only interstate relations but also the trajectory of development in Africa. As the international community strives to fulfill the Sustainable Development Goals (SDGs) by 2030, Africa stands at a point where the strategic application of diplomacy and adherence to international legal provisions is key to their achievement. Diplomacy, in this regard, plays an important role in fostering international cooperation, securing financial and technical support, and facilitating peaceful conflict resolution[8]. It helps to build bridges between nations, enabling collaborative efforts towards common goals. International law, on the other hand, provides a framework through treaties, conventions, and international agreements to ensure that these diplomatic efforts are grounded in legal commitments and accountability[9].

In this paper I seek to explore the basic role of diplomacy and international law in advancing the SDGs in Africa. The paper examines the successes and challenges faced by African nations in leveraging the same to foster sustainable development. It also highlights how diplomatic initiatives and legal frameworks have been employed to address key issues such as poverty alleviation, environmental sustainability, and social equity and the role of regional organizations, such as the African Union, in coordinating and supporting these efforts.

II. Challenges faced by African Nations in the pursuit for the implementation of SDGS

While African nations have shown dedication to achieving the Sustainable

[5]'Open Working Group on Sustainable Development Goals' (United Nations) <https://sustainabledevelopment.un.org/owg.html#:~:text=The%20Open%20Working%20Group%20was,bodies%20of%20the%20General%20Assembly.> accessed 21 May 2024

[6]UN General Assembly, "Transforming our world : the 2030 Agenda for Sustainable Development, A/RES/70/1," (Adopted on 21 October 2015) <https://www.refworld.org/legal/resolution/unga/2015/en/111816> (accessed 16 May 2024)

[7]Ibid

[8]Patricia Kenneth-Divine, 'The Role of Diplomacy in Achieving the Sustainable Development Goals' (Investment Monitor, 27 June 2023) <https://www.investmentmonitor.ai/comment/sdgs-role-of-diplomacy-in-achieving-the-sustainable-development-goals/> accessed 19 May 2024

[9]Guiry Neiger, 'International law and the sustainable development goals', (The Boolean: Snapshots of Doctoral Research at University College Cork 2024), 7, pp. 1-5 < https://doi.org/10.33178/boolean.2024.1.1> Accessed 19 May 2024

Prof Ben Sihanya

Development Goals, the road to implementation is fraught with challenges. These hurdles range from issues of governance and resource scarcity to environmental threats, each influenced by Africa's unique historical, cultural, and geographical contexts.

Political, governance and institutional challenges

Constitutional and Governance Law Scholar, Prof Ben Sihanya makes an assertion that I resonate with, that political and institutional challenges have overtime since the MDGs significantly impeded the implementation of development goals in many African nations[10]. One of the foremost issues is political instability. Africa continues to witness numerous conflicts and multiple coups, which not only disrupt governance but also divert resources from development projects to conflict resolution and humanitarian aid. For example, countries like South Sudan and the Central African Republic have been embroiled in prolonged conflicts that have decimated infrastructure and left millions in dire need of basic services[11].

Corruption is another pervasive issue undermining efforts to achieve the SDGs. It erodes trust in public institutions, diverts funds from essential services, and hampers economic growth. In Nigeria, for instance, the Economic and Financial Crimes Commission has reported recovering billions of dollars in stolen public funds, yet corruption remains a significant obstacle[12]. Transparency International's 2022 Corruption Perceptions Index ranked Nigeria 145th out of 180 countries[13], highlighting the scale of the problem- a roten to the core corrupt system. This corruption siphons off resources that could otherwise be invested in healthcare, education, and infrastructure, essential for achieving the SDGs. Moreover, governance issues such as weak institutions, lack of accountability, and ineffective legal systems impede the enforcement of policies and regulations aligned with the SDGs. Effective governance requires not just the presence of laws and policies but also the

[10]Ben Sihanya (forthcoming 2021) "Participation and Representation in Kenya and Africa," in Ben Sihanya (2021) Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Theory, Structure, Method and Systems, Sihanya Mentoring & Sihanya Advocates, Nairobi & Siaya. pg 43

[11]'The Sudan Conflict: A Comprehensive Analysis: Sudanese Conflict' (SAPA USA, 25 January 2024) <https://sapa-usa.org/the-sudan-conflict/> accessed 21 May 2024. According to the data from the UN Refugee Agency (UNHCR), conflicts in South Sudan have displaced over 4 million people, severely hampering efforts to implement sustainable development projects; See, 'Health Conditions Worsen as Displacement from Sudan Conflict Exceeds 4 Million' (UNHCR) <https://www.unhcr.org/news/briefing-notes/health-conditions-worsen-displacement-sudan-conflict-exceeds-4-million> accessed 21 May 2024

[12]'Nigeria: US$3.6 Billion in Public Funds Stolen, Says Anti-Graft Body' (OCCRP) <https://www.occrp.org/en/daily/9469-nigeria-us-3-6-billion-in-public-funds-stolen-says-anti-graft-body> accessed 21 May 2024

[13]'Corruption Perception Index in Nigeria' (*Transparency.org*) <https://www.transparency.org/en/countries/nigeria> accessed 21 May 2024

capacity and willingness to implement and enforce them. In many African nations there is often a significant gap between policy formulation and implementation. For instance, taking a home lesson here in Kenya, despite robust anti-corruption laws and agencies like the Ethics and Anti-Corruption Commission (EACC), enforcement remains weak, and corruption continues to be a major impediment to development[14].

The lack of political will and continuity in governance does not do any good for Africa. From MDGs, now SDGs implementation, Diplomacy and International Law is nothing minus genuine political will. As Thoraya Obaid famously quoted;

"If world leaders decide to [meet the Millennium Development Goals], I think it can be done by 2015...The question is, is there a political will to make this investment?" [15]

Economic and financial constraints

On to the financial crisis. Many African countries are burdened with substantial debt, which limits their ability to invest in sustainable development and achieve the goals. According to the International Monetary Fund (IMF), as of 2021, over 20 African countries were in or at high risk of debt distress.[16] Zambia became the first African country to default on its sovereign debt in the pandemic era which highlight the severe financial constraints faced by many nations[17]. Foreign aid and

Many African countries face difficulties accessing both domestic and international capital. High-interest rates, underdeveloped financial markets, and a lack of credit history hinder investment in businesses and infrastructure.

development assistance, while crucial, are not always reliable or sufficient to meet the financial needs required for SDG implementation.

These financial limitations are further compounded by the poor economic policies in place. Structural issues such as over-reliance on a narrow range of export commodities make many African economies vulnerable to global market fluctuations. Nigeria's heavy dependence on oil exports, for instance, makes it susceptible to global oil price volatility, which can disrupt economic stability and planning. When oil prices plummeted in 2014 and again during the COVID-19 pandemic, Nigeria's economy faced severe strain, impacting public spending on SDG-related initiatives[18].

---

[14]*Joachim Njagi (Legal Gaps Facing Implementation Of EACC Mandate On Weeding Out Corruption Cases)* <https://www.iprjb.org/journals/index.php/IJLP/article/download/330/463> accessed 21 May 2024

[15]Craig McGarty, 'Social Psychology of Making Poverty History: Motivating Anti-Poverty Action in Australia' (*Australian Psychologist*, 5 July 2020) <https://www.academia.edu/30264955/Social_psychology_of_Making_Poverty_History_Motivating_anti_poverty_action_in_Australia> accessed 21 May 2024

[16]'Addressing Debt Distress in Africa – International Affairs Think Tank' (Chatham House) <https://www.chathamhouse.org/2022/01/addressing-debt-distress-africa> accessed 21 May 2024

[17]Elliot Smith, 'Zambia Becomes Africa's First Coronavirus-Era Default: What Happens Now?' (CNBC, 24 November 2020) <https://www.cnbc.com/2020/11/23/zambia-becomes-africas-first-coronavirus-era-default-what-happens-now.html> accessed 21 May 2024

[18]Olujobi OJ and others, 'Covid-19 Pandemic: The Impacts of Crude Oil Price Shock on Nigeria's Economy, Legal and Policy Options' (MDPI, 6 September 2022) <https://www.mdpi.com/2071-1050/14/18/11166> accessed 21 May 2024

Many regions in Africa face significant barriers to accessing healthcare services, including a shortage of healthcare facilities, insufficient trained healthcare professionals, and high costs of care. Rural areas are particularly underserved.

Health and educational challenges

For starters education which is at the center of SDGs achievement is an area where these barriers are evident. Despite improvements in enrollment rates, quality of education remains a major concern. The 2021 research by UNESCO notes that more than one-fifth of children aged 6-11 and one-third of youths aged 12-14 in Sub-Saharan Africa were out of school in 2021[19]. The lack of quality education contributes to skill deficits, limiting the ability of young people to participate in and benefit from economic growth and development initiatives.

Turning to the health sector, many African nations face severe healthcare challenges, including high maternal and child mortality rates, prevalence of infectious diseases like malaria and HIV/AIDS, and limited access to healthcare services. In 2020 the World Health Organization (WHO) reported that Sub-Saharan Africa accounted for approximately 94% of global malaria cases and deaths in 2020[20]. Poor health outcomes impede the ability of individuals to work, learn, and contribute to their communities, thereby affecting overall development.

Environmental challenges

Climate change poses a significant threat, with Africa being one of the most vulnerable continents to its impacts despite contributing the least to global greenhouse gas emissions. For example, the Horn of Africa has experienced recurrent droughts, severely impacting food security and livelihoods. The United Nations reports that the 2011 drought in East Africa resulted in a famine that killed more than 260,000 people[21]. Similarly, the Sahel region faces significant desertification, which reduces arable land and exacerbates food insecurity and poverty. Case in point was in 2020 where over 29 million people in the Sahel were in need of humanitarian assistance due to food insecurity exacerbated by environmental degradation and conflict[22].

Urbanization adds another layer of complexity to environmental challenges. Rapid and unplanned urbanization in many African cities often leads to inadequate infrastructure, poor sanitation, and in turn increased pollution. Africa's urban population is expected to triple by 2050[23] which will in turn put immense pressure on

---

[19]'Out-of-School Numbers Are Growing in Sub-Saharan Africa' (*UNESCO.org*) <https://www.unesco.org/gem-report/en/2022-out-school> accessed 21 May 2024

[20]'Malaria in Sub Saharan Africa' (*World Health Organization*) <https://www.afro.who.int/health-topics/malaria> accessed 21 May 2024

[21]Kieran Mulvaney, 'Historic Drought Looms for 20 Million Living in Horn of Africa' (Environment, 14 March 2022) <https://www.nationalgeographic.com/environment/article/historic-drought-looms-for-20-million-living-in-horn-of-africa> accessed 21 May 2024

[22]'Food Insecurity in the Sahel Has Increased Significantly over the Past Year ' (*Ocha West And Central Africa*) <https://reports.unocha.org/en/country/west-central-africa/card/6uW0lQYfGL/> accessed 21 May 2024

[23]'Urbanization in Africa | Our Africa, Our Thoughts' (*Africa Development bank Group*) <https://blogs.afdb.org/fr/inclusive-growth/urbanization-africa-191> accessed 21 May 2024

cities to provide basic services, housing, and jobs. The lack of sustainable urban planning results in environmental degradation and undermines efforts to achieve the SDGs.

To that end, the implementation of the Sustainable Development Goals in African nations is being hindered by a number of the aforementioned challenges. Only through a holistic and coordinated approach that leverages political will and sustainable practices can African nations overcome these obstacles and make strides towards achieving the SDGs.

III.The role of diplomacy as a catalyst in achieving SDGs in Africa

Diplomacy is often defined as the practice of managing international relations by negotiation[24]. This involves the use of strategic communication, negotiation, and collaboration to advance national interests, resolve conflicts, and foster cooperation between states. Diplomacy can be categorized into several forms, each in its own way contributing uniquely to the achievement of the Sustainable Development Goals (SDGs).

The first aspect of diplomacy is bilateral diplomacy which basically involves direct relations between two countries[25]. Bilateral agreements, treaties, and negotiations are fundamental for fostering cooperation on specific issues like trade, investment, security, and development assistance. For example, bilateral aid agreements between developed and developing countries can be vital for funding SDG-related projects in Africa. Multilateral diplomacy on the other hand involves multiple countries working together within international organizations and forums[26]. Multilateral diplomacy comes in when addressing global challenges that require collective action, such as climate change, global health, and international trade. Finally Track II diplomacy involves non-state actors such as me and you in NGOs, in academic institutions, and in the private sector, complementing official diplomatic efforts . These actors can facilitate dialogue, provide expertise, and implement development projects on the ground which contribute significantly to the achievement of the SDGs.

Diplomacy, through its various forms, has been instrumental in supporting SDG-related projects in Africa[28]. Diplomatic initiatives can provide the necessary political, financial, and technical support to advance sustainable development. The United States' President's Emergency Plan for AIDS Relief (PEPFAR) is a notable example[29]. Launched in 2003, PEPFAR has provided billions of dollars to fight HIV/AIDS in Africa, significantly contributing to SDG 3 (Good Health and Well-being)[30].

---

[24]'Diplomacy' (*Encyclopedia Britannica*, 9 May 2024) <https://www.britannica.com/topic/diplomacy> accessed 21 May 2024
Rozental, Andrés, and Alicia Buenrostro, 'Bilateral Diplomacy', in Andrew Cooper, Jorge Heine, and Ramesh Thakur (eds),
[25]The Oxford Handbook of Modern Diplomacy (Online edn, Oxford Academic, 1 August 2013) <https://doi.org/10.1093/oxfordhb/9780199588862.013.0013> accessed 19 May 2024.
[26]Muldoon JP and Aviel JF, 'Multilateral Diplomacy' [2010] Oxford Research Encyclopedia of International Studies <https://doi.org/10.1093/acrefore/9780190846626.013.462> accessed 20 May 2024.
[27]Diana Chigas, 'Track II (Citizen) Diplomacy' (*Beyond Intractability*, 12 January 2024) <https://www.beyondintractability.org/essay/track2_diplomacy> accessed 20 May 2024
[28]Patricia Kenneth-Divine, 'The Role of Diplomacy in Achieving the Sustainable Development Goals' (Investment Monitor, 27 June 2023) <https://www.investmentmonitor.ai/comment/sdgs-role-of-diplomacy-in-achieving-the-sustainable-development-goals/> accessed 20 May 2024
[29]Goosby Dybul ,Dr. Fauci and Needle Bouey ;, 'The United States President's Emergency Plan for AIDS Relief: A Story of Partnerships and Smart Investments to Turn the Tide of the Global AIDS Pandemic' (*Journal of acquired immune deficiency syndromes* (1999)) <https://pubmed.ncbi.nlm.nih.gov/22797740/> accessed 21 May 2024
[30]'PEPFAR 2021 Annual Report to Congress' <https://www.state.gov/wp-content/uploads/2022/05/PEPFAR2022.pdf> accessed 21 May 2024

Grand Ethiopian Renaissance Dam

Diplomatic negotiations on trade agreements also support the SDGs by creating economic opportunities and promoting sustainable development. The African Continental Free Trade Area (AfCFTA), established in 2018, for instance, aims to create a single continental market for goods and services, boosting intra-African trade and economic growth[31]. It further aims to reduce trade barriers and foster economic integration in turn AfCFTA supports SDG 8 (Decent Work and Economic Growth) and SDG 9 (Industry, Innovation, and Infrastructure)[32].

A case study approach on the impact of diplomacy in achieving SDGs in Africa

To get a deeper understanding of the impact of diplomacy on achieving the SDGs in Africa, I will examine specific case studies where diplomatic efforts have played a key role in addressing development challenges in Africa.

The Grand Ethiopian Renaissance Dam (GERD) Project

The GERD project that was initiated in 2011 is a significant infrastructure project that was launched by the Ethiopian government with a vision of improving Ethiopia's energy production and economic development[33]. However, it has led to diplomatic tensions with downstream countries, particularly Sudan and Egypt, over water rights and the potential impact on the Nile River[34]. Negotiations mediated by the African Union have sought to reach a mutually beneficial

[31]'The African Continental Free Trade Area' (*The African Continental Free Trade Area | African Union*, 4 September 2019) <https://au.int/en/african-continental-free-trade-area> accessed 21 May 2024

[32]Ibid

[33]Harry Verhoeven, 'The Grand Ethiopian Renaissance Dam: Africa's Water Tower, Environmental Justice & Infrastructural Power' (*American Academy of Arts & Sciences*, 22 September 2021) <https://www.amacad.org/publication/africa-water-tower-environmental-justice-infrastructure> accessed 21 May 2024

[34]Ron Matthews, '"Water Wars": Strategic Implications of the Grand Ethiopian Renaissance Dam' (*Conflict, Security & Development Journal*) <https://www.tandfonline.com/doi/full/10.1080/14678802.2023.2257137> accessed 20 May 2024

agreement on the dam's operation[35]. These efforts are critical for achieving SDG 7 (Affordable and Clean Energy) by increasing energy access in Ethiopia while also addressing SDG 6 (Clean Water and Sanitation) concerns in downstream countries. While a final agreement is still pending, the ongoing diplomatic efforts indicate the importance of diplomacy in balancing development needs and regional cooperation and at the end of the day achieving SDGs.

The Ebola outbreak in West Africa (2014-2016)

The Ebola outbreak in West Africa (2014-2016) posed a severe threat to public health in the region[36]. African countries and international organizations engaged in extensive diplomacy to coordinate the response to the outbreak.

The World Health Organization (WHO) and the United Nations led diplomatic efforts to secure funding, deploy medical personnel, and facilitate international cooperation[37]. The diplomatic response was instrumental in containing the outbreak and preventing further spread supporting SDG 3 (Good Health and Well-being).

China Belt and Road Initiative (BRI)

China on the farthest end of Asia has become a Ballon player in Africa's development through its Belt and Road Initiative (BRI)[38]. Through bilateral

Ebola outbreaks have been significant public health crises, primarily affecting several countries in West and Central Africa. he first known outbreak occurred in 1976 in the Democratic Republic of the Congo (then Zaire) and Sudan.

diplomacy, China has negotiated numerous agreements with African countries to fund and construct infrastructure projects such as roads, railways, and ports. These projects aim to enhance connectivity and economic development, supporting SDG 9 (Industry, Innovation, and Infrastructure). Whereas Dr. Celestine A. Rarieya and Ms. Sophia E. de Vicente[39] may unfairly argue that these projects have a negative impact on debt sustainability or their durability, this doesn't

[35]'The AU's Role beyond the Gerd Negotiations: PSC Report' (ISS Africa) <https://issafrica.org/pscreport/psc-insights/the-aus-role-beyond-the-gerd-negotiations> accessed 21 May 2024. This move I also seek to argue promotes Pan Africanism as it promotes an Africa minded approach to Africa's problems. See Biruk article on "How the Concept of "African Solutions for African Problems" Can Be Applied to Resolve the GERD Dispute" written by Biruk Kedir Mohammed, published by Open Journal of Political Science, Vol.11 No.4, 2021

[36]Delamou A and others, 'Public Health Impact of the 2014–2015 Ebola Outbreak in West Africa: Seizing Opportunities for the Future' (*BMJ Global Health*, 1 March 2017) <https://gh.bmj.com/content/2/2/e000202> accessed 20 May 2024

[37]'Global Response to Ebola Crisis "Has Succeeded" | Africa Renewal' (*United Nations*) <https://www.un.org/africarenewal/news/global-response-ebola-crisis-has-succeeded> accessed 20 May 2024

[38]L. Venkateswaran, 'China's Belt and Road Initiative: Implications in Africa' (*orfonline.org*, 10 May 2023) <https://www.orfonline.org/research/chinas-belt-and-road-initiative-implications-in-africa> accessed 20 May 2024

[39]Celestine Rarieya and Sophia de Vicente, 'China's Belt and Road Initiative in Africa: Kenya's Pivotal Role' (*Global Affairs and Strategic Studies*) <https://www.unav.edu/web/global-affairs/china-s-belt-and-road-initiative-in-africa-kenya-s-pivotal-role> accessed 20 May 2024

necessitate killing diplomacy but rather calls for a balanced approach to these agreements and their implementation.
Diplomacy, in and itself in various forms, plays an indispensable role in achieving the Sustainable Development Goals in Africa. African nations, in collaboration with the international community, can overcome obstacles and achieve sustainable development for all through diplomacy.

IV. The role of International Law in achieving SDGs in Africa

International law, just like diplomacy, is at the forefront in the global effort to achieve the Sustainable Development Goals (SDGs) in Africa[40]. International Law establishes legal frameworks and conventions that provide the necessary guidelines to support sustainable development in Africa and the world[41]. Aside from the framework, international law provides various mechanisms for accountability and enforcement, which ensures that countries adhere to their commitments under international agreements and make tangible progress toward the SDGs.

One of the primary mechanisms for accountability in international law is periodic reporting. Many international treaties and conventions require signatory states to submit regular reports on their progress in implementing the agreements. Under the Paris Agreement, countries must submit NDCs and report on their greenhouse gas emissions and climate actions[42]. These reports are subject to international review, which promotes transparency and accountability. Similarly, countries that are parties to CEDAW under Article 18 must submit periodic reports to Secretary-General of the United Nations, for consideration by the CEDAW Committee, detailing their efforts to eliminate discrimination against women and promote gender equality[43].

International monitoring bodies also play a crucial role in enforcing international law and supporting SDG progress[44]. These bodies, such as the United Nations Human Rights Council, the CEDAW Committee, and the Committee on Economic, Social and Cultural Rights, monitor compliance with international treaties and provide recommendations to states on how to improve their implementation. Judicial and quasi-judicial mechanisms offer another avenue for enforcement. International courts and tribunals, such as the International Court of Justice (ICJ) and the African Court on Human and Peoples' Rights, can adjudicate disputes between states regarding their obligations under international law. These judicial bodies issue binding decisions that compel states to comply with their international commitments. Additionally, quasi-judicial mechanisms, such as the complaints procedures under CEDAW and the ICESCR, allow individuals and groups to bring complaints about violations of their rights, providing a means of redress and promoting accountability.

---

[40]Ebbesson J, Hey E, "Introduction: The Sustainable Development Goals, Agenda 2030, and International Law." In: Ebbesson J, "The Cambridge Handbook of the Sustainable Development Goals and International Law" (Cambridge Law Handbooks. Cambridge University Press; 2022) 1-49. See also Zeegers Paget, D., & Patterson, D., 'The essential role of law in achieving the health-related Sustainable Development Goals' (*European journal of public health*, 2020 30(Suppl_1), i32–i35) <https://doi.org/10.1093/eurpub/ckaa036> Accessed 20 May 2024

[41]Ibid.

[42]'Nationally Determined Contributions (NDCs) Related News NDC Registry Relevant Decisions Related Information: The Paris Agreement and NDCs' (*United Nations Climate Change*) <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs> accessed 21 May 2024

[43]Article 18 of the CEDAW. See also, 'State Obligation' (*IWRAW AP*) <https://cedaw.iwraw-ap.org/cedaw/cedaw-principles/cedaw-principles-overview/state-obligation/> accessed 20 May 2024

[44]Rachovitsa, A., & Hesselman, M. (Eds.), "Introduction to the Special Issue: International Law for the Sustainable Development Goals" (Brill Open Law, 2(1), 1-7) <https://doi.org/10.1163/23527072-20191031> Accessed 20 May 2024

The Paris Agreement, adopted in 2015 during the 21st Conference of the Parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC) in Paris, is a landmark international treaty aimed at combating climate change and its impacts.

A case Study approach of the frameworks and Conventions in International Law that atalyze the achievement of SDGs

Several case studies illustrate how international law has been instrumental in promoting sustainable development in Africa and beyond. These examples demonstrate the tangible impact of legal frameworks and conventions on advancing the SDGs.

The Paris Agreement (2015)

The Paris Agreement is a landmark international treaty adopted in 2015 under the United Nations Framework Convention on Climate Change (UNFCCC)[45]. It mainly aims to limit global warming to well below 2 degrees Celsius above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5 degrees Celsius[46]. The Paris Agreement is particularly relevant to SDG 13 (Climate Action) as it requires countries to submit nationally determined contributions (NDCs) outlining their climate action plans. African nations, which are highly vulnerable to climate change, benefit from the global commitment to climate action and the financial and technical support provided under this framework. The Agreement also includes provisions article 8 and 9 for climate finance in, technology transfer, and capacity building, all of which are critical for sustainable development in Africa[47].

Many African countries have submitted ambitious NDCs under the Agreement, outlining their plans to reduce greenhouse

[45]'Process and Meetings: The Paris Agreement' (*UNFCC*) <https://unfccc.int/process-and-meetings/the-paris-agreement> accessed 17 May 2024
[46]Limiting Temperature Increase to 1.5°C above Pre-Industrial Levels' (*Imperial College London*) <https://www.imperial.ac.uk/grantham/publications/background-briefings/limiting-temperature-increase-to-15c-above-pre-industrial-levels-/> accessed 17 May 2024
[47]Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104

gas emissions and adapt to the impacts of climate change. For instance, Kenya's NDC seeks to cut its greenhouse gas emissions by 32% by 2030 as part of the effort to achieve sustainable development in a way that protects the environment from climate change[48].

In addition to national efforts, regional initiatives supported by the Paris Agreement have also made significant contributions to climate action in Africa. The African Adaptation Initiative (AAI), launched by African leaders at the 2015 Paris Climate Conference, aims to enhance the continent's adaptive capacity by mobilizing resources and fostering knowledge sharing[49]. These efforts support SDG 13 (Climate Action) and other related goals, such as SDG 2 (Zero Hunger) and SDG 6 (Clean Water and Sanitation).

The Banjul Charter(1981)

The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) on the other hand, adopted in 1981, aims to promote and protect human rights and basic freedoms in Africa[50]. The Charter encompasses a wide range of rights, including civil, political, economic, social, and cultural rights that advance multiple SDGs. For example, it supports SDG 16 (Peace, Justice, and Strong Institutions) by promoting the rule of law and human rights. Not forgetting, the Charter's emphasis on economic and social rights which aligns with SDG 1 (No Poverty), SDG 3 (Good Health and Well-being), and SDG 10 (Reduced Inequalities).

One notable example of the Charter's impact is the African Commission on Human and Peoples' Rights' (ACHPR) work to address the rights of indigenous peoples. The ACHPR has issued landmark decisions recognizing the rights of indigenous communities to their ancestral lands and resources, which supports SDG 15 (Life on Land) by promoting sustainable land use and biodiversity conservation. In Kenya, the Endorois community successfully challenged the government's eviction from their ancestral lands around Lake Bogoria, leading to the recognition of their land rights and compensation[51].

The CEDAW (1979)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which came into force in 1979 aims to eliminate discrimination against women and ensure women's equal rights[52]. This convention directly supports SDG 5 (Gender Equality) by obligating signatory states to take appropriate measures to eliminate discrimination in various fields, including education, employment, and health care. Many African countries are parties to CEDAW, and the convention provides a legal basis for advancing gender equality and empowering women across the continent.

---

[48]'Kenya's Updated Nationally Determined Contribution (NDC) 2020-2030.' (*FAOLEX Database*) <https://faolex.fao.org/docs/pdf/KEN210108.pdf> accessed 17 May 2024. Through this declaration of adherence to the Paris Agreement, Kenya has attracted international support for its climate action plans, including funding from the Green Climate Fund and technical assistance from the UNFCCC. See also 'Climate Induced Mobility on the Agenda, as Kenya Hosts Africa Climate Summit' (*IOM Kenya*) <https://kenya.iom.int/news/climate-induced-mobility-agenda-kenya-hosts-africa-climate-summit> accessed 17 May 2024

[49]'Africa Adaptation Initiative' (*AAI*) <https://africaadaptationinitiative.org/> accessed 17 May 2024

[50]Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("*Banjul Charter*"), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981, <https://www.refworld.org/legal/agreements/oau/1981/en/17306> (accessed 17 May 2024)

[51]Lucy Claridge, "Landmark ruling provides major victory to Kenya's indigenous Endorois," (*Minority Rights Group International*, 1 October 2010) <https://www.refworld.org/reference/countryrep/mrgi/2010/en/76148> (accessed 17 May 2024)

[52]UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women(Adopted 18 December 1979), United Nations, Treaty Series, vol. 1249, p

Rwanda has made significant strides in promoting gender equality, largely albeit not completely due to its commitment to the CEDAW[53]. The country's efforts to implement the convention have led to substantial progress in SDG 5 (Gender Equality). Rwanda boasts the highest percentage of women in parliament globally, with women holding 61.3% of seats as of 2021[54].

The ICESCR (1966)

The International Covenant on Economic, Social and Cultural Rights (ICESCR), which was adopted by the United Nations General Assembly in 1966, obligates parties to the covenant to work toward the granting of economic, social, and cultural rights to individuals, including the rights to health, education, and an adequate standard of living[55]. The ICESCR supports and calls for the actualization of a wide range of SDGs, including SDG 1 (No Poverty), SDG 2 (Zero Hunger), SDG 3 (Good Health and Well-being), SDG 4 (Quality Education), and SDG 10 (Reduced Inequalities).

South Africa's commitment to ICESCR has been crucial in advancing health rights. The country's progressive constitution enshrines the right to health that reflects the principles of the covenant[56]. One notable example is South Africa's response to the HIV/AIDS epidemic- . SDG 3 (Good Health and Well-being). Programs like the South African National Strategic Plan on HIV, TB, and STIs have led to significant improvements in health outcomes, including a reduction

International law plays a vital role in promoting peace, security, and cooperation among nations. It provides a framework for addressing global challenges and protecting the rights and interests of individuals and states alike.

in HIV prevalence and increased access to antiretroviral therapy[57].

These efforts demonstrate the impact of international law in promoting health and well-being, contributing to sustainable development.

V. A futuristic approach on the opportunities for enhancing diplomacy and International Law

As we approach 2030, Africa has an opportunity to achieve the SDGs through marrying diplomacy and international law in the pursuit of the achievement. However, this may not be possible absent regional cooperation and balanced International Support.

---

[53]'Rwanda Leads the Way in Gender Equality with First National Gender Standards in Africa' (*UNDP*, 30 March 2023) <https://www.undp.org/africa/press-releases/rwanda-leads-way-gender-equality-first-national-gender-standards-africa> accessed 18 May 2024

[54]'Revisiting Rwanda Five Years after Record-Breaking Parliamentary Elections' (*UN Women – Headquarters*) <https://www.unwomen.org/en/news/stories/2018/8/feature-rwanda-women-in-parliament> accessed 18 May 2024

[55]UN General Assembly, International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, vol. 993, p. 3 (Adopted in 16 December 1966)

[56]'South Africa's Compliance with the International Covenant on Economic, Social and Cultural Rights' (*The Advocates for Human Rights*) <https://www.theadvocatesforhumanrights.org/Res/south_africa_icescr_final.pdf> accessed 18 May 2024

[57]'The National Strategic Plan for HIV, TB, and Stis 2023-2028' (*Department of Health*) <https://knowledgehub.health.gov.za/elibrary/national-strategic-plan-hiv-tb-and-stis-2023-2028#:~:text=The%20emphasis%20in%20the%20NSP,STI%20prevention%20and%20treatment%20services> accessed 18 May 2024

The African Union plays a critical role in addressing continental challenges, promoting development, and fostering collaboration among African nations. It serves as a platform for dialogue and cooperation to achieve a more integrated and prosperous Africa.

Strengthening regional cooperation

The African Union (AU) needs to stamp its feet on this one. One of the primary ways the AU can enhance diplomacy and in turn regional cooperation is through its conflict resolution mechanisms[58]. The AU's Peace and Security Council (PSC) is tasked with preventing, managing, and resolving conflicts[59]. Therefore, strengthening the capacity of the PSC can lead to more effective interventions in conflict-prone areas, thereby creating a stable environment conducive to sustainable development. For instance, the AU's mediation in the 2018 peace agreement between Ethiopia and Eritrea highlights the potential for regional organizations to facilitate lasting peace and stability.

Furthermore, regional economic communities such as the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) are crucial in promoting economic integration and legal harmonization. If these two align their economic policies and legal standards, they can create a more predictable and stable investment climate, attracting foreign direct investment (FDI) that is essential for funding SDG-related projects. For example, AfCFTA is expected to boost intra-African trade by 52.3% by 2022[60]. This increase in trade can enhance economic growth and development across the continent. Aside from that, regional cooperation can improve legal frameworks by facilitating the adoption of shared standards and best practices.

[58]Oluwseun Bamidele, 'The Role of the African Union (AU) in Preventing Conflicts in African States' (2016) 8 Inkanyiso: Journal of Humanities and Social Sciences <https://www.ajol.info/index.php/ijhss/article/view/140006/129724> accessed 20 May 2024

[59]African Union. 2002. Protocol Relating to the Establishment of the Peace and Security Council of the African Union Durban: African Union.

[60]'AFCFTA: Seizing Opportunities for a Prosperous Africa | Africa Renewal' (*United Nations*) <https://www.un.org/africarenewal/magazine/may-2023/afcfta-seizing-opportunities-prosperous-africa> accessed 20 May 2024

To top it all there needs to be regional legal harmonization in order to facilitate cross-border cooperation and integration. Harmonizing commercial laws, trade regulations, and standards across African countries can create a more predictable and efficient legal environment, boosting trade and investment. The OHADA (Organization for the Harmonization of Business Law in Africa) treaty, which standardizes business laws across 17 West and Central African countries, is an excellent example of how legal harmonization can promote economic integration and development[61].

Leveraging on balanced international support

The Organization for Economic Co-operation Development (OECD) estimates that achieving the SDGs in Africa will require an additional $194 billion per year[62]. Developed countries can support African nations by honoring their commitments to provide 0.7% of their Gross National Income (GNI) as official development assistance (ODA)[63]. Moreover, international partnerships can enhance technical expertise and knowledge transfer. Encouraging multinational corporations to invest in Africa can provide the capital needed for sustainable development. For instance, Unilever's Sustainable Living Plan, which includes projects in Kenya and South Africa, demonstrates how private sector involvement can contribute to sustainable development.[64]

VI. Conclusion

To sum it all, the achievement of the Sustainable Development Goals (SDGs)

The OECD plays a vital role in shaping economic policies and fostering international cooperation among its member countries. Through its research, recommendations, and collaboration, the organization aims to promote economic growth and improve the quality of life for people around the world.

in Africa hinges significantly on the effective and I insist effective application of diplomacy and international law. Through strategic diplomatic efforts and robust legal frameworks, African nations can overcome obstacles and make substantial progress towards sustainable development. As Kofi Annan once said,

"*We need to think of the future and the planet we are going to leave to our children and their children.*"

With a well-founded approach to diplomacy and adherence to international law, without a doubt we will be able to achieve the Sustainable Development Goals and leave a better planet for our children and their children.

Ayaga Max is a third year law student at the University of Nairobi.

[61]Hiez, David & Menétrey, Séverine, "Toward an Elaboration of a More Pluralistic Legal Landscape for Developing West African Countries: Organization for the Harmonization of Business Law in Africa (OHADA) and Law and Development" (*Law and Development Review* 2015). 8. 10.1515/ldr-2015-0009.
[62]Ojijo Odhiambo and Odera Outa, 'Solidarity Fund Needed for Africa's Sustainability Transitions | Africa Renewal' (*United Nations*) <https://www.un.org/africarenewal/magazine/october-2023/solidarity-fund-needed-africa%E2%80%99s-sustainability-transitions> accessed 20 May 2024
[63]"International Development Strategy for the Second United Nations Development Decade", UN General Assembly Resolution 2626 (XXV), 24 October 1970, paragraph 43
[64]'Unilever Sustainable Living Plan 2010 to 2020' (*Unilever*, 2010) <https://www.unilever.com/files/92ui5egz/production/16cb778e4d31b81509dc5937001559f1f5c863ab.pdf> accessed 20 May 2024

VII. References

Ved Nanda, 'The Journey from the Millennium Development Goals to the Sustainable Development Goals ' (2015) 4 Denver Journal of International Law Policy <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1043&context=djilp> accessed 19 May 2024

Hulme David and Scott James, "The Political Economy of the MDGs: Retrospect and Prospect for the World's Biggest Promise," (*University of Manchester. Brooks World Poverty Institute, January 2010*)). pp. 3–5. ISBN 978-1-907247-09-5. OCLC 1099885941

'Future We Want - Outcome Document' (*United Nations*) <https://sustainabledevelopment.un.org/futurewewant.html> accessed 16 May 2024

'Open Working Group on Sustainable Development Goals' (*United Nations*) <https://sustainabledevelopment.un.org/owg.html#:~:text=The%20Open%20Working%20Group%20was,bodies%20of%20the%20General%20Assembly.> accessed 21 May 2024

UN General Assembly, "Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1," (Adopted on 21 October 2015) <https://www.refworld.org/legal/resolution/unga/2015/en/111816> (accessed 16 May 2024)

Patricia Kenneth-Divine, 'The Role of Diplomacy in Achieving the Sustainable Development Goals' (*Investment Monitor*, 27 June 2023) <https://www.investmentmonitor.ai/comment/sdgs-role-of-diplomacy-in-achieving-the-sustainable-development-goals/> accessed 19 May 2024

Guiry Neiger, 'International law and the sustainable development goals', (The Boolean: Snapshots of Doctoral Research at University College Cork 2024), 7, pp. 1-5 < https://doi.org/10.33178/boolean.2024.1.1> Accessed 19 May 2024

Ben Sihanya (forthcoming 2021) "Participation and Representation in Kenya and Africa," in Ben Sihanya (2021) Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Theory, Structure, Method and Systems, Sihanya Mentoring & Sihanya Advocates, Nairobi & Siaya. pg 43

'The Sudan Conflict: A Comprehensive Analysis: Sudanese Conflict' (*SAPA USA*, 25 January 2024) <https://sapa-usa.org/the-sudan-conflict/> accessed 21 May 2024.

'Health Conditions Worsen as Displacement from Sudan Conflict Exceeds 4 Million' (*UNHCR*) <https://www.unhcr.org/news/briefing-notes/health-conditions-worsen-displacement-sudan-conflict-exceeds-4-million> accessed 21 May 2024

'Nigeria: US$3.6 Billion in Public Funds Stolen, Says Anti-Graft Body' (OCCRP) <https://www.occrp.org/en/daily/9469-nigeria-us-3-6-billion-in-public-funds-stolen-says-anti-graft-body> accessed 21 May 2024

'Corruption Perception Index in Nigeria' (*Transparency.org*) <https://www.transparency.org/en/countries/nigeria> accessed 21 May 2024

Joachim Njagi (*Legal Gaps Facing Implementation Of EACC Mandate On Weeding Out Corruption Cases*) <https://www.iprjb.org/journals/index.php/IJLP/article/download/330/463> accessed 21 May 2024

Craig McGarty, 'Social Psychology of Making Poverty History: Motivating Anti-Poverty Action in Australia' (*Australian Psychologist*, 5 July 2020) <https://www.academia.edu/30264955/Social_psychology_of_Making_Poverty_History_Motivating_anti_poverty_action_in_Australia> accessed 21 May 2024

'Addressing Debt Distress in Africa – International Affairs Think Tank' (Chatham House) <https://www.chathamhouse.org/2022/01/addressing-debt-distress-africa> accessed 21 May 2024

Elliot Smith, 'Zambia Becomes Africa's First Coronavirus-Era Default: What Happens Now?' (CNBC, 24 November 2020) <https://www.cnbc.com/2020/11/23/zambia-becomes-africas-first-coronavirus-era-default-what-happens-now.html> accessed 21 May 2024

Olujobi OJ and others, 'Covid-19 Pandemic: The Impacts of Crude Oil Price Shock on Nigeria's Economy, Legal and Policy Options' (MDPI, 6 September 2022) <https://www.mdpi.com/2071-1050/14/18/11166> accessed 21 May 2024

'Out-of-School Numbers Are Growing in Sub-Saharan Africa' (*UNESCO.org*) <https://www.unesco.org/gem-report/en/2022-out-school> accessed 21 May 2024

'Malaria in Sub Saharan Africa' (*World Health Organization*) <https://www.afro.who.int/health-topics/malaria> accessed 21 May 2024

Kieran Mulvaney, 'Historic Drought Looms for 20 Million Living in Horn of Africa' (*Environment*, 14 March 2022) <https://www.nationalgeographic.com/environment/article/historic-drought-looms-for-20-million-living-in-horn-of-africa> accessed 21 May 2024

'Food Insecurity in the Sahel Has Increased Significantly over the Past Year ' (*Ocha West And Central Africa*) <https://reports.unocha.org/en/country/west-central-africa/card/6uW0lQYfGL/> accessed 21 May 2024

'Urbanization in Africa | Our Africa, Our Thoughts' (*Africa Development bank Group*) <https://blogs.afdb.org/fr/inclusive-growth/urbanization-africa-191> accessed 21 May 2024

'Diplomacy' (*Encyclopedia Britannica*, 9 May 2024) <https://www.britannica.com/topic/diplomacy> accessed 21 May 2024

Rozental, Andrés, and Alicia Buenrostro, 'Bilateral Diplomacy', in Andrew Cooper, Jorge Heine, and Ramesh Thakur (eds), The Oxford Handbook of Modern Diplomacy (Online edn, Oxford Academic, 1 August 2013)<https://doi.org/10.1093/oxfordhb/9780199588862.013.0013> accessed 19 May 2024.

Muldoon JP and Aviel JF, 'Multilateral Diplomacy' [2010] Oxford Research Encyclopedia of International Studies <https://doi.org/10.1093/acrefore/9780190846626.013.462> accessed 20 May 2024.

Diana Chigas, 'Track II (Citizen) Diplomacy' (*Beyond Intractability*, 12 January 2024) <https://www.beyondintractability.org/essay/track2_diplomacy> accessed 20 May 2024

Patricia Kenneth-Divine, 'The Role of Diplomacy in Achieving the Sustainable Development Goals' (*Investment Monitor,* 27 June 2023) <https://www.investmentmonitor.ai/comment/sdgs-role-of-diplomacy-in-achieving-the-sustainable-development-goals/> accessed 20 May 2024

Goosby Dybul, Dr. Fauci and Needle Bouey;, 'The United States President's Emergency Plan for AIDS Relief: A Story of Partnerships and Smart Investments to Turn the Tide of the Global AIDS Pandemic' (*Journal of acquired immune deficiency syndromes* (1999)) <https://pubmed.ncbi.nlm.nih.gov/22797740/> accessed 21 May 2024

'PEPFAR 2021 Annual Report to Congress' <https://www.state.gov/wp-content/uploads/2022/05/PEPFAR2022.pdf> accessed 21 May 2024

'The African Continental Free Trade Area' (The African Continental Free Trade Area | African Union, 4 September 2019) <https://au.int/en/african-continental-free-trade-area> accessed 21 May 2024

Harry Verhoeven, 'The Grand Ethiopian Renaissance Dam: Africa's Water Tower, Environmental Justice & Infrastructural Power' (*American Academy of Arts & Sciences*, 22 September 2021) <https://www.amacad.org/publication/africa-water-tower-environmental-justice-infrastructure> accessed 21 May 2024

Ron Matthews, '"Water Wars": Strategic Implications of the Grand Ethiopian Renaissance Dam' (*Conflict, Security & Development Journal*) <https://www.tandfonline.com/doi/full/10.1080/14678802.2023.2257137> accessed 20 May 2024

'The AU's Role beyond the Gerd Negotiations: PSC Report' (*ISS Africa*) <https://issafrica.org/pscreport/psc-insights/the-aus-role-beyond-the-gerd-negotiations> accessed 21 May 2024.

"How the Concept of "African Solutions for African Problems" Can Be Applied to Resolve the GERD Dispute" written by Biruk Kedir Mohammed, published by Open Journal of Political Science, Vol.11 No.4, 2021

Delamou A and others, 'Public Health Impact of the 2014–2015 Ebola Outbreak in West Africa: Seizing Opportunities for the Future' (*BMJ Global Health*, 1 March 2017) <https://gh.bmj.com/content/2/2/e000202> accessed 20 May 2024

'Global Response to Ebola Crisis "Has Succeeded" | Africa Renewal' (*United Nations*) <https://www.un.org/africarenewal/news/global-response-ebola-crisis-has-succeeded> accessed 20 May 2024

L. Venkateswaran, 'China's Belt and Road Initiative: Implications in Africa' (*orfonline.org*, 10 May 2023) <https://www.orfonline.org/research/chinas-belt-and-road-initiative-implications-in-africa> accessed 20 May 2024

Celestine Rarieya and Sophia de Vicente, 'China's Belt and Road Initiative in Africa: Kenya's Pivotal Role' (*Global Affairs and Strategic Studies*) <https://www.unav.edu/web/global-affairs/china-s-belt-and-road-initiative-in-africa-kenya-s-pivotal-role> accessed 20 May 2024

Ebbesson J, Hey E, "Introduction: The Sustainable Development Goals, Agenda 2030, and International Law." In: Ebbesson J, "The Cambridge Handbook of the Sustainable Development Goals and International Law" (Cambridge Law Handbooks. Cambridge University Press; 2022) 1-49.

Zeegers Paget & Patterson, 'The essential role of law in achieving the health-related Sustainable Development Goals' (*European journal of public health*, 2020 30(Suppl_1), i32–i35) <https://doi.org/10.1093/eurpub/ckaa036> Accessed 20 May 2024

'Nationally Determined Contributions (NDCs) Related News NDC Registry Relevant Decisions Related Information: The Paris Agreement and NDCs' (*United Nations Climate Change*) <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs> accessed 21 May 2024

'State Obligation' (*IWRAW AP*) <https://cedaw.iwraw-ap.org/cedaw/cedaw-principles/cedaw-principles-overview/state-obligation/> accessed 20 May 2024

Rachovitsa, A., & Hesselman, M. (Eds.), "Introduction to the Special Issue: International Law for the Sustainable Development Goals" (*Brill Open Law*, 2(1), 1-7) <https://doi.org/10.1163/23527072-20191031> Accessed 20 May 2024

'Process and Meetings: The Paris Agreement' (*UNFCC*) <https://unfccc.int/process-and-meetings/the-paris-agreement> accessed 17 May 2024

'Limiting Temperature Increase to 1.5°C above Pre-Industrial Levels' (*Imperial College London*) <https://www.imperial.ac.uk/grantham/publications/background-briefings/limiting-temperature-increase-to-15c-above-pre-industrial-levels-/> accessed 17 May 2024

Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104

'Kenya's Updated Nationally Determined Contribution (NDC) 2020-2030.' (*FAOLEX Database*) <https://faolex.fao.org/docs/pdf/KEN210108.pdf> accessed 17 May 2024

'Climate Induced Mobility on the Agenda, as Kenya Hosts Africa Climate Summit' (*IOM Kenya*) <https://kenya.iom.int/news/climate-induced-mobility-agenda-kenya-hosts-africa-climate-summit> accessed 17 May 2024

'Africa Adaptation Initiative' (AAI) <https://africaadaptationinitiative.org/> accessed 17 May 2024

Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981, <https://www.refworld.org/legal/agreements/oau/1981/en/17306> (accessed 17 May 2024)

Lucy Claridge, "Landmark ruling provides major victory to Kenya's indigenous Endorois," (*Minority Rights Group International*, 1 October 2010) <https://www.refworld.org/reference/countryrep/mrgi/2010/en/76148> (accessed 17 May 2024)

UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women(Adopted 18 December 1979), United Nations, Treaty Series, vol. 1249.

'Rwanda Leads the Way in Gender Equality with First National Gender Standards in Africa' (*UNDP*, 30 March 2023) <https://www.undp.org/africa/press-releases/rwanda-leads-way-gender-equality-first-national-gender-standards-africa> accessed 18 May 2024

'Revisiting Rwanda Five Years after Record-Breaking Parliamentary Elections' (*UN Women – Headquarters*) <https://www.unwomen.org/en/news/stories/2018/8/feature-rwanda-women-in-parliament> accessed 18 May 2024

UN General Assembly, International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, vol. 993, p. 3 (Adopted in 16 December 1966)

'South Africa's Compliance with the International Covenant on Economic, Social and Cultural Rights' (*The Advocates for Human Rights*) <https://www.theadvocatesforhumanrights.org/Res/south_africa_icescr_final.pdf> accessed 18 May 2024

'The National Strategic Plan for HIV, TB, and Stis 2023-2028' (*Department of Health*) <https://knowledgehub.health.gov.za/elibrary/national-strategic-plan-hiv-tb-and-stis-2023-2028#:~:text=The%20emphasis%20in%20the%20NSP,STI%20prevention%20and%20treatment%20services> accessed 18 May 2024

Oluwseun Bamidele, 'The Role of the African Union (AU) in Preventing Conflicts in African States' (2016) 8 Inkanyiso: Journal of Humanities and Social Sciences <https://www.ajol.info/index.php/ijhss/article/view/140006/129724> accessed 20 May 2024

African Union. 2002. Protocol Relating to the Establishment of the Peace and Security Council of the African Union Durban: African Union.

'AFCFTA: Seizing Opportunities for a Prosperous Africa | Africa Renewal' (*United Nations*) <https://www.un.org/africarenewal/magazine/may-2023/afcfta-seizing-opportunities-prosperous-africa> accessed 20 May 2024

Hiez, David & Menétrey, Séverine, "Toward an Elaboration of a More Pluralistic Legal Landscape for Developing West African Countries: Organization for the Harmonization of Business Law in Africa (OHADA) and Law and Development" (*Law and Development Review 2015*). 8. 10.1515/ldr-2015-0009.

Ojijo Odhiambo and Odera Outa, 'Solidarity Fund Needed for Africa's Sustainability Transitions | Africa Renewal' (*United Nations*) <https://www.un.org/africarenewal/magazine/october-2023/solidarity-fund-needed-africa%E2%80%99s-sustainability-transitions> accessed 20 May 2024

"International Development Strategy for the Second United Nations Development Decade", UN General Assembly Resolution 2626 (XXV), 24 October 1970, paragraph 43

'Unilever Sustainable Living Plan 2010 to 2020' (*Unilever*, 2010) <https://www.unilever.com/files/92ui5egz/production/16cb778e4d31b81509dc5937001559f1f5c863ab.pdf> accessed 20 May 2024

Dispute Resolution versus Dispute Settlement: The Future of the International Court of Justice

By Mohamed Abdi

Abstract

The International Court of Justice (ICJ), along with its predecessor the Permanent Court of International Justice (PCIJ), has long been a hegemonic force in international adjudication. As the principal judicial organ of the United Nations, the ICJ has played a pivotal role in resolving contentious cases and providing advisory opinions that have shaped the development of international law and jurisprudence. However, the landscape of international dispute resolution has evolved significantly since the ICJ's inception. The very notion of dispute resolution, along with the mechanisms employed to achieve it, has undergone a paradigm shift—driven in part by the increasing global embrace of alternative dispute resolution (ADR) mechanisms. These methods, characterized by greater flexibility and adaptability, have gained prominence not only within municipal legal systems but also on the international stage. States are increasingly turning to forums like the Permanent Court of Arbitration (PCA), which offer alternatives to the procedural rigidity of the ICJ.

This evolution raises critical questions about the future role of the ICJ. Should the Court continue to adhere strictly to its formalized procedures, or should it shift its focus to facilitating dispute settlement in a more adaptable and responsive manner? The issue is brought into sharp relief by the ICJ's handling of the Nuclear Tests Cases, where the Court's deference to procedural discontinuance invited significant criticism. This paper seeks to explore whether the ICJ's mission of upholding international justice necessitates a shift toward prioritizing dispute settlement, which emphasizes flexible and constructive outcomes, as opposed to the more rigid framework of dispute resolution.

Effective dispute resolution is essential for maintaining relationships and promoting cooperation. By choosing the appropriate method, parties can resolve their conflicts in a manner that is efficient, cost-effective, and satisfactory for all involved.

Key Terms: International Court of Justice (ICJ), Permanent Court of International Justice (PCIJ), dispute resolution, dispute settlement, alternative dispute resolution (ADR), international adjudication, Permanent Court of Arbitration (PCA), procedural rigidity, Nuclear Tests Cases, international law, flexible outcomes, international justice.

The International Court of Justice plays a crucial role in promoting the rule of law at the international level, providing a platform for states to resolve their disputes peacefully and contributing to the development of international legal standards.

Introduction

The ICJ, established in 1945 as the principal judicial organ of the UN, has long stood as a pillar of international adjudication. Its primary function, under the UN Charter, is to resolve legal disputes between states and offer advisory opinions on matters referred to it by states and UN agencies. The ICJ succeeded the PCI, which had a similar mandate but was affiliated with the League of Nations. Over the years, these courts have played critical roles in shaping international law and ensuring peaceful dispute resolution between states. Through a series of landmark decisions, the ICJ has provided authoritative interpretations of international treaties, contributed to the development of customary international law, and offered a forum for resolving complex disputes.

However, the role of the ICJ, particularly in dispute resolution, is facing new challenges. Since its inception, the landscape of international dispute resolution has changed considerably. The notion of resolving disputes between states is no longer confined to rigid legal processes governed by strict procedures but has expanded to include more flexible mechanisms that prioritize settlement over adversarial litigation. The proliferation of alternative dispute resolution (ADR) methods in municipal legal systems has found resonance in the international system as well, with states increasingly turning to alternative fora, such as the Permanent Court of Arbitration (PCA), to resolve their disputes. These methods often offer greater flexibility, efficiency, and the potential for more diplomatic solutions that accommodate the interests of both parties.

This paradigm shift prompts a critical question: What is the future of the ICJ in this transformed landscape? Should the ICJ adhere strictly to its formal procedures and remain focused on the resolution of disputes, or should it shift its role toward facilitating broader dispute settlement, which might involve greater flexibility in addressing the underlying interests of

states? This paper explores these questions, examining whether the ICJ's mission of delivering international justice necessitates a more adaptable approach that emphasizes settlement over strict resolution. Through an analysis of key cases and theoretical frameworks, the paper assesses whether the ICJ can retain its relevance and authority in a world that increasingly values flexible, diplomatic solutions to disputes.

Evolution of dispute resolution in international law

The ICJ and its predecessor, the PCIJ, have historically played central roles in the resolution of interstate disputes. The PCIJ was established in 1922 under the League of Nations, operating in an international context shaped by the aftermath of the First World War and an emphasis on preventing future conflicts through legal mechanisms. The PCIJ set important precedents in international law, particularly in cases such as *The Mavrommatis Palestine Concessions*, where it interpreted treaties and established the principle of state responsibility for breaches of international obligations.[2]

With the establishment of the United Nations in 1945, the ICJ took on the PCIJ's role as the primary forum for international legal disputes. The ICJ's Statute, largely based on that of the PCIJ, endowed the Court with the authority to resolve disputes between states that consented to its jurisdiction. Over the years, the ICJ has adjudicated a wide range of disputes, including territorial and maritime boundary issues, questions of state responsibility, and the interpretation of international treaties. Notable cases, such as *The Corfu Channel Case and The Nicaragua Case*, have demonstrated the ICJ's role in upholding

Dispute resolution in international law is essential for maintaining peace and stability among states. By employing various methods—ranging from negotiation to judicial settlement—countries can address conflicts in a structured and often peaceful manner, contributing to the development and adherence to international legal norms.

international law and setting standards for state conduct.[3]

At the core of the ICJ's mandate is the principle of judicial settlement. According to Article 36 of the ICJ Statute, the Court's jurisdiction is based on the consent of the states involved.[4] This requirement of consent underscores the voluntary nature of international adjudication, where states must agree to submit their disputes to the Court. While the ICJ has helped shape international law through its decisions, its procedural framework has often been criticized for being rigid, formalistic, and sometimes inadequate for addressing the political and diplomatic complexities of modern international disputes. This rigidity has sometimes hampered the ICJ's effectiveness in delivering timely and practical solutions that align with the interests of the disputing states.

The evolution of the ICJ's approach to dispute resolution has been slow compared

[2] *The Mavrommatis Palestine Concessions* (Greece v United Kingdom) [1924] PCIJ Series A No 2.
[3] *Corfu Channel Case* (United Kingdom v Albania) [1949] ICJ Rep 4; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) [1986] ICJ Rep 14.
[4] Statute of the International Court of Justice, art 36.

to the shifts seen in municipal legal systems, where ADR methods such as mediation, arbitration, and conciliation have gained significant prominence. In international plane, forums such as the PCA have introduced more flexible and adaptive procedures, allowing states to settle disputes in ways that prioritize their mutual interests rather than strictly adhering to legal formalities. This shift has sparked debates over whether the ICJ should adapt its procedures to allow for more dynamic forms of dispute settlement.

The rise of Alternative Dispute Resolution (ADR) Mechanisms

ADR has become a hallmark of contemporary legal systems, both at the municipal and international levels. ADR refers to a range of mechanisms, including mediation, arbitration, and negotiation, that provide alternatives to the traditional judicial process for resolving disputes.[5] These methods are often preferred due to their emphasis on flexibility, confidentiality, and the ability to deliver outcomes more aligned with the interests of both parties.

At the international level, the PCA has emerged as a key institution offering ADR services to states and other international actors.[6] Unlike the ICJ, which functions as a court of law with formal procedures and binding judgments, the PCA offers arbitration grounded in the consent of the parties and is designed to accommodate their specific needs and preferences. The flexibility offered by the PCA has made it an attractive option for states seeking to resolve disputes in a manner that is less adversarial and more collaborative. This includes complex cases such as boundary delimitations, as seen in recent arbitrations like the *Eritrea-Ethiopia Boundary Commission* case.[7]

The appeal of ADR mechanisms lies in their ability to provide tailored solutions that avoid the rigidity of formal litigation. In arbitration, for example, the parties can select arbitrators with expertise in the specific subject matter of the dispute, choose the applicable rules, and set the procedural timetable.[8] This flexibility contrasts with the ICJ's more structured approach, where the Court's procedures are governed by its Statute and Rules, leaving little room for customization based on the preferences of the parties.

The growing preference for ADR mechanisms has led to a significant shift in the way states approach international disputes. States increasingly view arbitration as a means of resolving disputes without the public spectacle and legal constraints of ICJ litigation. For instance, the *South China Sea Arbitration* between the Philippines and China, conducted under the auspices of the PCA, highlights the advantages of ADR in handling complex geopolitical disputes.[9]

This trend raises important questions about the future of the ICJ. Can the Court maintain its relevance in an international system where states increasingly turn to ADR mechanisms that prioritize flexibility and practical outcomes over formal legal resolutions? The ICJ's inability to offer the same level of procedural adaptability may weaken its position as the go-to forum for international dispute resolution, especially in cases where states prefer settlement over strict legal determinations.

---

[5] John G Merrills, *International Dispute Settlement* (6th edn, Cambridge University Press 2017) 1–2.
[6] Permanent Court of Arbitration, 'About Us' https://pca-cpa.org/en/about/ accessed 4 September 2024.
[7] *Eritrea-Ethiopia Boundary Commission* Decision, PCA Case No 2002-01.
[8] Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 919–920.
[9] *South China Sea Arbitration* (The Republic of the Philippines v The People's Republic of China), PCA Case No 2013-19, Award of 12 July 2016.

The ICJ's procedural rigidity: Challenges and criticism

The ICJ's strict adherence to procedural rules has been both a cornerstone of its legitimacy and a source of criticism. While procedural rigor ensures fairness and consistency, it can also hinder the Court's ability to effectively resolve disputes in a rapidly changing international environment. The tension between procedural strictness and the need for flexibility is exemplified in the Nuclear Tests Cases, which have been the subject of significant scholarly debate, particularly from proponents of strict procedural adherence like Iain Scobbie.

The Nuclear Tests Cases: A Departure from Procedural Norms

In the *Nuclear Tests Cases* (Australia v France; New Zealand v France), Australia and New Zealand sought to halt France's atmospheric nuclear tests in the South Pacific, alleging violations of their rights under international law.[10] During the proceedings, France announced that it would cease atmospheric nuclear testing, leading the ICJ to consider whether there was still a dispute to adjudicate. Instead of following the formal discontinuance procedures outlined in Articles 88 and 89 of the ICJ's Rules, the Court declared that France's unilateral declarations constituted binding legal commitments and consequently found that the claims no longer had any object.[11]

The Court's decision effectively terminated the proceedings without the need for a formal discontinuance by the applicant states. This departure from established procedure attracted substantial criticism. Iain Scobbie, in his article "*Discontinuance in the International Court: The Enigma of the Nuclear Tests Cases*," argues that the ICJ circumvented its procedural obligations by not requiring a formal notice of discontinuance from Australia and New Zealand.[12] He contends that the Court overstepped its judicial function by treating France's unilateral statements as legally binding assurances, thus depriving the applicant states of the opportunity to fully present their cases and to challenge the sufficiency of France's commitments.

In the 1960s and 1970s, France conducted a series of nuclear tests at Mururoa Atoll and Fangataufa Atoll in French Polynesia. These tests raised significant environmental and health concerns among neighboring countries, particularly Australia and New Zealand.

Scobbie's critique centers on the principle that procedural rules are fundamental to the integrity of judicial processes. By sidestepping these rules, the Court risked undermining the procedural fairness owed to the parties and eroding confidence in its judicial function. The ICJ's approach in the *Nuclear Tests Cases* raises the question

[10] Nuclear Tests Case (Australia v France; New Zealand v France) [1974] ICJ Rep 253.
[11] Ibid [58]–[60].
[12] Iain Scobbie, 'Discontinuance in the International Court: The Enigma of the Nuclear Tests Cases' (1985) 34 *International and Comparative Law Quarterly* 699, 704–706.

of whether flexibility in procedure serves the interests of justice or compromises the Court's legitimacy.

Balancing procedural rigidity and flexibility

The Nuclear Tests Cases highlight the challenges the ICJ faces in balancing procedural strictness with the practicalities of international disputes. On one hand, strict adherence to procedure ensures that all parties are treated fairly and that the Court's decisions are based on a transparent and consistent application of the law. As Thomas M. Franck notes, procedural fairness is essential to the legitimacy of international institutions.[13] On the other hand, excessive rigidity may prevent the Court from effectively resolving disputes or adapting to changing circumstances.

Shabtai Rosenne acknowledges that while procedural rules are necessary, the Court must also be mindful of their application in practice. He suggests that the ICJ should interpret its procedures in a way that facilitates, rather than hinders, the resolution of disputes.[14] In the context of the *Nuclear Tests Cases*, the Court may have believed that accepting France's declarations and terminating the proceedings was a pragmatic solution serving the interests of international peace and security.

However, critics argue that such pragmatism should not come at the expense of procedural integrity. Scobbie emphasizes that the Court's departure from its rules in the *Nuclear Tests Cases* set a troubling precedent, potentially allowing states to evade judicial scrutiny through unilateral declarations.[15] This could undermine the willingness of states to rely on the ICJ for dispute resolution, fearing that procedural shortcuts may compromise the fairness of proceedings.

Impact on states' trust and the delivery of justice

The ICJ's handling of procedural matters directly affects states' confidence in its ability to deliver justice. When states perceive the Court as either too rigid or too willing to depart from established procedures, they may be less inclined to submit disputes to its jurisdiction. The increasing preference for ADR mechanisms, such as arbitration through the PCA, reflects a desire for processes that offer both fairness and flexibility.

Christine Gray observes that states may opt for arbitration over the ICJ due to the ability to tailor procedures to their specific needs and to have greater control over the selection of arbitrators.[16] This flexibility can lead to more satisfactory outcomes, reinforcing the appeal of ADR mechanisms in an era where diplomatic and political considerations are paramount.

The ICJ's challenge, therefore, is to strike an appropriate balance between procedural rigor and adaptability. Edward McWhinney suggests that the Court must evolve to meet the demands of contemporary international relations, which may require rethinking some of its procedural approaches.[17] Failure to do so could result in the ICJ becoming less relevant as states seek alternative forums better suited to their needs.

---

[13] Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995) 7–9.
[14] Shabtai Rosenne, *The Law and Practice of the International Court*, 1920-2005 (4th edn, Martinus Nijhoff Publishers 2006) vol 3, 1573–1575.
[15] Scobbie (n 12) 710.
[16] Christine Gray, *International Law and the Use of Force* (3rd edn, Oxford University Press 2008) 25–26.
[17] Edward McWhinney, 'The United States Withdrawal from the International Court of Justice: The Amendment of the Court's Rules and the "Automatic" Jurisdiction of the Court' (1986) 20 *International Lawyer* 977, 982.1, 7.

Both dispute resolution and dispute settlement are essential components of conflict management, each playing a critical role in addressing disagreements and facilitating peaceful outcomes. Understanding the distinctions can help parties choose the most appropriate method for their specific situation.

Re-evaluating the Court's approach

The criticism arising from the *Nuclear Tests Cases* and similar situations underscores the need for the ICJ to re-evaluate its procedural framework. While the Court must maintain the principles of fairness and justice that underpin its legitimacy, it may also need to adopt a more flexible approach that accommodates the complexities of modern international disputes.

This re-evaluation could involve exploring ways to incorporate elements of ADR into the Court's procedures, such as mediation or conciliation mechanisms. By doing so, the ICJ could enhance its ability to facilitate dispute settlement in addition to dispute resolution, aligning itself more closely with the evolving needs of the international community.

Dispute resolution vs. Dispute settlement

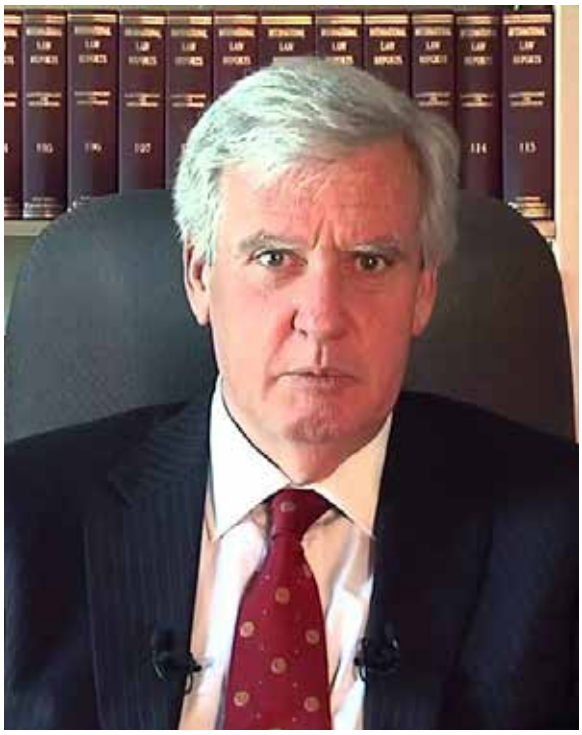
Understanding the nuances between "dispute resolution" and "dispute settlement" is essential to analyzing the future role of the ICJ in a transforming global legal environment.

Defining dispute resolution and dispute settlement

Dispute Resolution refers to the process of resolving disputes through formal legal mechanisms, primarily through adjudication by courts or tribunals. It emphasizes the application of legal principles and precedents to reach a binding decision that determines the rights and obligations of the parties involved.[18] This approach is rooted in legal formalism and seeks to provide a definitive resolution based on the rule of law.

Dispute Settlement, on the other hand, encompasses a broader spectrum of mechanisms aimed at resolving disputes, including negotiation, mediation, conciliation, and arbitration.[19] It prioritizes achieving a mutually acceptable agreement between the parties, often focusing on

[18] Shaw (n 8) 919–920.
[19] Merrills (n 5) 1–2.



Judge Christopher Greenwood

practical outcomes and the underlying interests rather than strictly adhering to legal entitlements. Dispute settlement is characterized by flexibility, cooperation, and the willingness to accommodate the parties' needs.

The ICJ's current role in dispute resolution

The ICJ, as the principal judicial organ of the United Nations, embodies the dispute resolution model. Its mandate, as outlined in Article 38 of the ICJ Statute, is to decide disputes submitted to it in accordance with international law, applying international conventions, customary international law, general principles of law, and, as subsidiary means, judicial decisions and scholarly writings.[20] The Court's procedures are formal, and its judgments are binding on the parties involved.

However, the ICJ's focus on legal resolution may not always align with the broader diplomatic and political interests of states. In cases involving complex issues that extend beyond legal questions— such as environmental concerns, human rights, or geopolitical tensions—the Court's rigid procedures may limit its ability to address the underlying causes of disputes effectively.

For example, in the *Whaling in the Antarctic* case between Australia and Japan, the ICJ ruled that Japan's whaling program was not for scientific purposes as claimed and ordered it to cease.[21]While the decision resolved the legal dispute, it did not address the broader cultural and economic factors influencing Japan's whaling activities, leaving room for continued tensions.

Arguments for the ICJ to evolve toward dispute settlement

Advocates for the ICJ to adopt a more dispute settlement-oriented approach argue that the Court should facilitate resolutions that consider the practical interests and needs of states. By integrating ADR mechanisms, the ICJ could offer more flexible and adaptable procedures.

Judge Christopher Greenwood, a judge of the ICJ himself, has suggested that the ICJ could enhance its role by encouraging negotiated settlements and providing guidance to parties during proceedings.[22] Such an approach would not compromise the Court's judicial function but would acknowledge the importance of pragmatic solutions in maintaining international peace and security.

Moreover, incorporating dispute settlement elements could make the ICJ more attractive

[20] Statute of the International Court of Justice, art 38(1).
[21] *Whaling in the Antarctic* (Australia v Japan: New Zealand intervening) [2014] ICJ Rep 226.
[22] Christopher Greenwood, 'The International Court of Justice and the Peaceful Settlement of Disputes' in Connie Peck and Roy S Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff Publishers 1997) 7.

to states hesitant to submit disputes to a formal judicial process. By offering mediation or conciliation services, the Court could assist parties in reaching mutually beneficial agreements while upholding international law.

Tension between upholding international law and accommodating state interests

The proposal to shift the ICJ toward a dispute settlement model raises concerns about maintaining the integrity of international law. Critics argue that the Court's authority rests on its ability to apply legal principles impartially and that introducing greater flexibility could undermine the consistency and predictability of its judgments.

Sir Robert Jennings emphasized that the ICJ's strength lies in its judicial character and that any move toward a more diplomatic role could dilute its effectiveness.[23] Upholding the rule of law requires adherence to established procedures and the objective application of legal norms.

There is also the risk that accommodating state interests might lead to unequal treatment or the perception of bias, particularly if more powerful states can exert influence over less formal processes. Maintaining procedural rigor ensures that all states, regardless of size or power, are subject to the same legal standards.

Balancing legal principles with practical outcomes

The challenge for the ICJ is to balance its commitment to legal adjudication with the need to address the practical realities of international disputes. This balance could be achieved by incorporating procedural innovations that allow for greater flexibility without compromising the Court's judicial integrity.

For instance, the ICJ could make greater use of provisional measures to encourage dialogue between parties or to preserve the status quo while negotiations take place.[24] By adopting a more proactive role in managing cases, the ICJ can enhance its ability to contribute to dispute settlement while maintaining its fundamental judicial function.

The role of the ICJ in a transforming global legal environment

The global legal environment is experiencing significant transformations due to globalization, technological advancements, and shifting geopolitical landscapes. These changes present both challenges and opportunities for the ICJ in fulfilling its mandate.

Challenges posed by alternative forums

Alternative forums, such as the PCA, regional courts, and specialized tribunals, offer states more flexible and tailored mechanisms for dispute settlement. The PCA, for example, allows parties to customize procedures, select arbitrators, and ensure confidentiality.[25] This flexibility appeals to states seeking efficient and less adversarial resolutions.

The proliferation of investor-state arbitration under instruments like the ICSID Convention has also shifted attention away from the ICJ.[26] These mechanisms provide forums that address specific types of

[23] Robert Y Jennings, 'The Role of the International Court of Justice' (1997) 68 *British Yearbook of International Law* 1, 7.
[24] Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) 255.
[25] Permanent Court of Arbitration (n 4).
[26] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 575 UNTS 159.

The future of the ICJ is likely to be shaped by both challenges and opportunities as it navigates an increasingly complex international landscape. By adapting to new legal realities and maintaining its commitment to justice, the ICJ can continue to play a vital role in the promotion of international law and the peaceful resolution of disputes.

disputes with procedures designed to meet the needs of the parties involved.

The ICJ faces competition from these alternative forums, which may be perceived as more adaptable and responsive to contemporary disputes. The Court's procedural rigidity and lengthy proceedings can deter states from utilizing its services.

Adapting to new global realities

To remain relevant, the ICJ may need to adapt to the evolving needs of the international community. This could involve procedural reforms aimed at increasing efficiency, such as streamlining written submissions, adopting time limits for oral arguments, and utilizing technology to expedite proceedings.

Philippe Sands has advocated for the ICJ to embrace innovation, suggesting that the Court could benefit from adopting practices used in other international tribunals.[27] For example, the use of pre- trial conferences and case management techniques could help focus disputes and reduce delays.

Additionally, the ICJ could consider enhancing its advisory role by providing legal opinions on emerging global issues, such as cyber warfare, climate change, and transnational terrorism. By addressing contemporary challenges, the Court can demonstrate its relevance and contribute to the development of international law. However, this paper is not oblivious to the practicalities needed to bring these suggestions to bear, especially considering the geopolitical context in which the Court operates.

Exploring collaborative approaches

The ICJ could explore collaborative approaches with other international institutions to address complex disputes. This might involve joint hearings, sharing of expertise, or coordinated efforts to resolve multifaceted issues.

[27] Philippe Sands, 'Reflections on International Judicial Administration' (2012) 9 *Loyola University Chicago International Law* Review 291, 295.

For instance, in the *Guyana v Venezuela* border dispute, the involvement of regional organizations and the United Nations has complemented the legal proceedings, highlighting the potential for collaborative efforts.[28] By embracing a more integrative approach, the ICJ can enhance its capacity to contribute to dispute settlement while maintaining its judicial integrity.

The future of the ICJ: Pathways forward

Considering the challenges and opportunities identified, several potential pathways emerge for the ICJ to navigate its future role.

Maintaining the Status Quo

The ICJ could choose to maintain its current procedures and focus on its core function of legal adjudication. This approach emphasizes the importance of the rule of law and the Court's role in providing authoritative judgments. However, this may result in the ICJ becoming less relevant as states opt for alternative mechanisms that better meet their needs.

Implementing Procedural Reforms

The ICJ could pursue procedural reforms to enhance efficiency and responsiveness. This might include revising its Rules to expedite proceedings, adopting electronic filing systems, and utilizing virtual hearings. Reforms could also address the Court's approach to provisional measures and preliminary objections, reducing delays and fostering greater trust among states.

Integrating ADR Mechanisms

Incorporating ADR mechanisms within the ICJ's framework could enhance its appeal to states seeking flexible solutions. The Court could offer mediation or conciliation services alongside its judicial functions. By facilitating negotiated settlements, the ICJ can contribute to dispute settlement while upholding international law.

Strengthening Engagement with States

The ICJ can strengthen its engagement with states by increasing transparency, promoting dialogue, and providing education on its procedures and functions. Enhancing communication can build trust and encourage states to utilize the Court. The Court could also collaborate with regional organizations and other international bodies to address specific issues, leveraging collective expertise and resources.

Conclusion

The International Court of Justice faces a pivotal moment in its history. The evolving landscape of international dispute resolution presents both challenges and opportunities for the Court to redefine its role.

Balancing the principles of dispute resolution and dispute settlement requires the ICJ to adapt without compromising its commitment to the rule of law. By embracing procedural reforms, integrating flexible mechanisms, and enhancing engagement with the international community, the Court can reinforce its relevance and effectiveness.The future of the ICJ lies in its ability to navigate the intersection of legal adjudication and practical dispute settlement. Through innovation and collaboration, the Court can continue to uphold international justice and contribute to global peace and stability.

Mohamed Abdi is a lawyer who is awaiting admission into the Roll of Advocates.

[28] United Nations Secretary-General, 'Report on the Border Controversy between Guyana and Venezuela' (2018) UN Doc SG/SM/18806.

Bibliography

- Brownlie, Ian, 'The Peaceful Settlement of International Disputes' (2009) *8 Chinese Journal of International Law* 267.
  Crawford, James, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019).
- Franck, Thomas M, *Fairness in International Law and Institutions* (Clarendon Press 1995).
- Gray, Christine, *International Law and the Use of Force* (3rd edn, Oxford University Press 2008).
- Greenwood, Christopher, 'The International Court of Justice and the Peaceful Settlement of Disputes' in Connie Peck and Roy S Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff Publishers 1997).
- Hernández, Gleider I, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014).
- Jennings, Robert Y, 'The Role of the International Court of Justice' (1997) 68 *British Yearbook of International Law* 1.
- McWhinney, Edward, 'The United States Withdrawal from the International Court of Justice: The Amendment of the Court's Rules and the "Automatic" Jurisdiction of the Court' (1986) 20 *International Lawyer* 977.
- Merrills, John G, *International Dispute Settlement* (6th edn, Cambridge University Press 2017).
- Rosenne, Shabtai, *The Law and Practice of the International Court*, 1920-2005 (4th edn, Martinus Nijhoff Publishers 2006).
- Sands, Philippe, 'Reflections on International Judicial Administration' (2012) 9 *Loyola University Chicago International Law Review* 291.
- Scobbie, Iain, 'Discontinuance in the International Court: The Enigma of the Nuclear Tests Cases' (1985) 34 *International and Comparative Law Quarterly* 699.
- Shaw, Malcolm N, *International Law* (8th edn, Cambridge University Press 2017).

The intersection of personal privacy and workplace policy: Analysing Mark Ngugi Mwaura v. G4S Kenya Limited (E232 of 2021) Judgment on workplace relationships by Justice Rika

By Oswin Trevor

Abstract

This paper examines the recent judgment by Justice Rika in Mark Ngugi Mwaura v. G4S Kenya Limited (E232 of 2021) regarding the termination of a manager at G4S Security Company due to a romantic relationship with a subordinate, which the company deemed a violation of its code of ethics. Justice Rika's decision raises critical questions about the balance between personal privacy and employer interests. While the judgement aims to uphold individual rights, it risks undermining employer concerns related to conflicts of interest and workplace dynamics. Through a comparative analysis of relevant case law, this paper argues that employers have a legitimate interest in understanding workplace relationships to prevent favouritism and maintain a fair environment. The paper advocates for the adoption of reasonable disclosure policies that strike a balance between employee privacy and the need for organizational integrity. In addressing the complexities introduced by power dynamics and emotional entanglements, this analysis underscores the necessity of navigating privacy rights within the context of workplace relationships, promoting fairness and accountability for both employees and employers.

Personal privacy encompasses the right to keep personal information confidential, control who accesses that information, and make choices about how it is shared.

Introduction

In *Mark Ngugi Mwaura v. G4S Kenya Limited*, handled by Justice Rika[1] regarding the termination of a manager at G4S Security Company, for being engaged romantically with a subordinate, which the company deemed a violation of its code of ethics. The G4S Global Code of Ethics[2] explicitly

[1]Justice James Rika is a judge at the Employment and Labour Relations Court in Kenya
[2]G4S. "G4S Global Code of Ethics." Accessed October 14, 2024. https://www.g4s.com/-/media/g4s/corporate/indexed-files/files/group-policies/2024_g4s_global_code_of_ethics.ashx.

prohibited relationships between managers and their subordinates citing it as conflict of interest. However, Justice Rika's judgment,[3] that has garnered people's attention, that the policy, in specific the part prohibiting the relationships, is in contravention of the constitution of Kenya. This decision was guided and rooted in the right to privacy under article 31 of the constitution of Kenya[4] which guarantees individuals the right not to have information relating to their private or family life unnecessarily revealed or required.[5] The judge also invoked article 25(a)[6] and article 28[7] of the Constitution of Kenya that emphasizes the right to freedom from torture, inhuman or degrading treatment and the right to dignity respectively.

This judgement, in as much as it seeks to uphold constitutional protections, I believe risks setting a dangerous precedent by shielding workplace relationships from legitimate employer concern. In this paper, I will argue that companies have a justifiable interest in knowing about romantic or sexual relationships between employees, especially where such relationships can lead to conflicts of interest or other workplace issues.

The Scope of Privacy in the Workplace

The Constitution of Kenya, under Article 31[8], provides for the right to privacy, which includes the protection of personal and family information. The broad interpretation of this constitution provision, concluding that the company's policy on workplace relationships amounted to an unjustified intrusion into the employees' private life. The judged relied on privacy precedent, including the one set in the landmark US case of *Lawrence Vs Texas*[9], where the Supreme Court of the United States of America held that private sexual conduct and activities between consenting adults is constitutionally protected from government intrusion under privacy rights.

While this reasoning is sound and can be applied in a case where the state intrudes into individuals' most personal spaces, such as the bedroom, this broad application in the workplace does not account for the unique dynamics of employer-employee relationships. Employers have the responsibility for maintaining a professional and fair work environment that is free from conflicts of interest. When relationships in the workplace, especially between supervisors/managers and their subordinates are hidden under the veil of privacy, the potential for favouritism, conflict of interest and other challenges increases.

Justice Rika's reliance on *Lawrence Vs Texas*[10] in this exact case is, in my view, misplaced. Lawrence involved the state's intrusion into a private, consensual relationship, within the home. The issue in this G4S case, however, involves relationships that manifest in the public space of the workplace, where private conduct can have professional repercussions.

In addition to, the case of *Brenda Parks v City of Warner Robins*[11] also provides insight into how courts view workplace relationships. The court in this instance upheld the city's anti-nepotism policy, which required one spouse to resign when two employees became romantically

[3]Cause No. E232 of 2021, Mark Ngugi Mwaura v. G4S Kenya Limited.
[4]Article 31, Constitution of Kenya 2010
[5]Article 31(c), Constitution of Kenya 2010
[6]Article 25(a), Constitution of Kenya 2010
[7]Article 28, Constitution of Kenya 2010
[8]Article 31, Constitution of Kenya 2010
[9]Lawrence v. Texas, 539 U.S. 558 (2003).
[10]Lawrence v. Texas, 539 U.S. 558 (2003).
[11]Parks v. City of Warner Robins, Ga., 43 F. 3d 609 Court of Appeals, 11th Circuit 1995

involved. The court rules that this policy did not infringe on the employees rights, recognizing the employers legitimate interest in preventing conflict of interest.

That courts have recognized that employers have legitimate interests in avoiding conflict of interest between work related and family-related obligations, reducing favouritism or even the appearance of it, and preventing family conflicts from affecting the workplace, is a strong indicator that a manager (vertical relationship) has no reasonable expectation of privacy in pursuing an intimate relationship with a subordinate. As noted in the case of Crosier v United Parcel Service,[12] the court concluded that employers are "legitimately concerned with possible claims of sexual harassment created by romantic relationships between management and non-management employees." This legal reasoning underscores and appreciates the potential complications arising from such relationships, particularly in environments where power dynamics can lead to allegations of favouritism or coercion.

Moreover, these cases indicate, "customs, practices and physical settings," weigh heavily against finding a "broadly based and widely accepted community norm,"[13] that management staff have a privacy right to engage in intimate relationships with their subordinates. In a workplace setting, the existential power imbalance creates an environment susceptible to perceptions of impropriety, where employees may feel compelled to act in ways that align with the interests of a manager rather than their own. Therefore, the expectation of privacy in such relationships is diminished, as the broader implications for workplace integrity and employee welfare take precedence over individual romantic pursuits.

Managing conflicts of interest in the workplace is essential for maintaining ethical standards, trust, and organizational integrity. By implementing clear policies and fostering a culture of transparency, organizations can effectively mitigate the risks associated with conflicts of interest, ensuring that all employees act in the best interests of their employer and colleagues.

Conflict of Interest in the Workplace

The Merriam-Webster dictionary defines a conflict of interest as "a conflict between the private interests and the official responsibilities of a person in a position of trust[14]." In the context of workplace relationships, a supervisor-subordinate dynamic introduces an inherent conflict of interest because the supervisor may have the ability to influence decisions such as promotions, raises, and work assignments.

For instance, consider the hypothetical scenario of James, who becomes suspicious of John for speaking to Jane "a bit too much." Unbeknownst to James, John and Jane are already in a relationship. This tension can lead to workplace hostility, which employers seek to mitigate through

[12]Crosier v. United Parcel Service, Inc., 150 Cal. App. 3d 1132 - Cal: Court of Appeal, 2nd Appellate Dist., 6th Div. 1983
[13]Hill v. National Collegiate Athletic Assn., 865 P. 2d 633 - Cal: Supreme Court 1994
[14]Merriam-Webster. Conflict of interest. In *Merriam-Webster.com dictionary*. Retrieved October 14, 2024, from https://www.merriam-webster.com/dictionary/conflict%20of%20interest

Privacy in the workplace is a vital consideration for fostering a respectful and productive work environment. Balancing employer interests with employee privacy rights is essential for maintaining trust, morale, and compliance with legal standards.

disclosure policies. In extreme cases, if James holds a higher rank than John, he may leverage his position to have John transferred to possibly a less lucrative job area to avoid perceived interference with Jane. Such scenarios illustrate why employers have a legitimate interest in understanding the relationships between their employees.

In *Meritor Savings Bank v. Vinson*[15], the U.S. Supreme Court ruled that employers can be held liable for the creation of a hostile work environment by supervisors, further supporting the argument that employers should be aware of the personal dynamics that can affect workplace fairness[16]. Knowledge of relationships within their organization, can help employers to mitigate the risk of perceived or actual favoritism and address potential conflicts before they arise.

A similar case, *Barbee v. Household Automotive Finance Corporation (HAFC)*[17], further illustrates this point. Barbee, a sales manager at HAFC, began dating a subordinate, Melanie Tomita. When the company's leadership learned about the relationship, Barbee was informed that such relationships were discouraged due to

[14]Merriam-Webster. Conflict of interest. In *Merriam-Webster.com dictionary*. Retrieved October 14, 2024, from https://www.merriam-webster.com/dictionary/conflict%20of%20interest
[15]Meritor Savings Bank v. Vinson 477 U.S. 57 (1986)
[16]Cavico, F. J., & Mujtaba, B. G. (2020). Workplace romance and sexual favoritism in the #MeToo workplace: Legal and practical considerations for management. *Nova Southeastern University, Fort Lauderdale, Florida, USA.*
[17]Barbee v. HAFC, 6 Cal. Rprt. 3d 406 Court of Appeal, 4th Appellate Dist., 1st Div. 2003

potential conflicts of interest. Barbee was given a choice to either end the relationship or have one of the parties resign. After a series of events, Barbee's employment was terminated when he continued the relationship in secret.

Barbee sued HAFC, claiming invasion of privacy and wrongful termination. However, the court ruled in favor of the company, finding that Barbee had no reasonable expectation of privacy regarding his relationship with a subordinate. The court emphasized that HAFC's policy requiring disclosure of workplace relationships between supervisors and subordinates was legitimate, as it aimed to avoid conflicts of interest and maintain a fair work environment.

This case highlights the importance of disclosure. Rather than banning relationships entirely, employers can implement policies that require transparency, allowing the company to manage potential conflicts. The ruling in Barbee supports the notion that employers have a legitimate interest in ensuring that workplace relationships do not interfere with professional responsibilities.

The Need for a Balanced Approach

E232 of 2021, *Mark Ngugi Mwaura v. G4S Kenya* Limited, raises important questions about the balance between privacy rights and employer interests. While I acknowledge that individuals have a right to privacy, the workplace introduces complexities that must be carefully navigated. Employers should not be barred from establishing policies that prevent conflicts of interest or ensure a harmonious working environment. In cases where relationships between employees, particularly those involving supervisors and subordinates, can affect workplace dynamics, employers have a right to know about such relationships to take appropriate action.

We have seen what men and women alike are capable of doing when controlled by emotions. For instance, in the biblical story, Samson revealed the secret of his strength to Delilah, who used that knowledge to betray him. Similarly, the case of Lord Egerton[18], who built a castle for a fiancée who later rejected him, reflects how emotional entanglements can lead to drastic decisions, ultimately affecting workplace dynamics. Such cases illustrate the extreme instances where love turns sour, reinforcing why employers have a reasonable interest in the relationships budding between their employees.

Rather than prohibiting workplace relationships entirely, companies can adopt disclosure policies that strike a balance between privacy and organizational interests. Such policies allow employees to maintain their privacy in personal matters while giving employers the tools they need to manage workplace dynamics effectively.

Conclusion

The ruling by Justice Rika, although rooted in the protection of the rights guaranteed by the constitution, may create a hurdle for employers who strive to maintain fairness and to prevent conflict of interest in the workplace. Such cases should be analyzed on a case-by-case basis, while assessing the reasonableness of privacy expectations by employees as was done in the *Barbee V HAFC case*[19]. This will also give a way for the employers to implement reasonable disclosure policies to avert professional conflict or instances of favouritism.

Oswin Trevor is a student at the University of Nairobi, Faculty of Law.

[18]*Lord Egerton Castle*. Retrieved October 29, 2024, from https://www.lakenakurukenya.com/lord-egerton-castle/#:~:text=The%20story%20of%20the%20 Castle,houses%20which%20 are%20 moderately%20 small

[19]Barbee v. HAFC, 6 Cal. Rprt. 3d 406 Court of Appeal, 4th Appellate Dist., 1st Div. 2003

The Church must submit to regulation of its own good

By Wanja Gathu

The church must submit to regulation for its own good. Doing so can help rid the church of the multitude of liars and charlatans fleecing and killing Kenyans in God's name and shore up declining public trust in the institution.

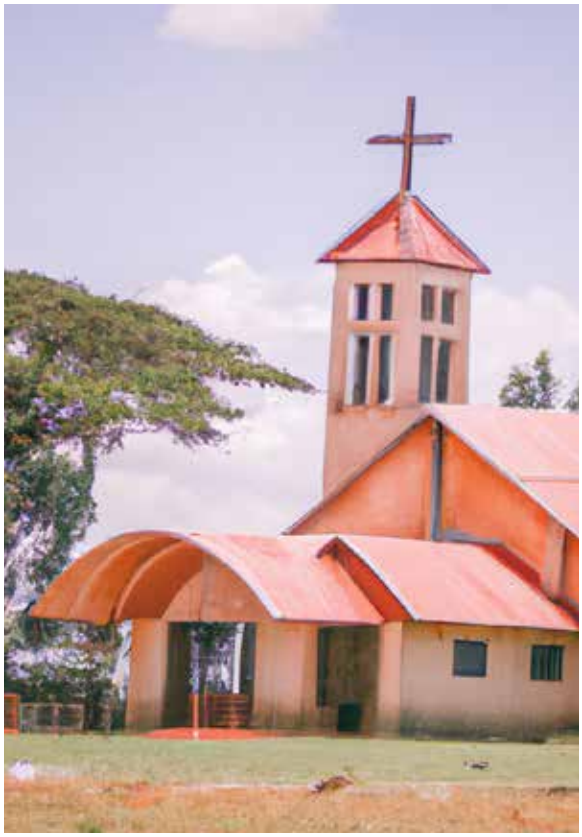
By submitting to regulation, the church also takes its power back from the executive, which has always dangled the threat of regulation over the church's head to force it to toe the line especially in times of political turmoil.

History shows, the current and subsequent regimes have used the carrot and stick approach when dealing with the church by showering church leaders with money and favours to support a particular regime then threatening regulation when the church tries to challenge government excesses as is the case now.

President Daniel arap Moi did it. Uhuru Kenyatta also did it. Today, William Ruto, the church's own God chosen president and great friend is doing it so why not submit to regulation and get it over with.

But then again, the church preaches obedience to authority-the bible is replete with verses to support this. Romans 13:1 ***"We must submit to governing authority"*** so the church can't be preaching water and drinking wine.

The vehemence with which the church has



opposed proposed regulation makes one wonder what the church needs to hide.

The Religious Organisation Bill 2024 proposes in a nutshell to register and regulate the conduct of religious organisations under an umbrella body irrespective of denomination, ostensibly to promote professionalism, transparency accountability.

Guard against extremism and protect Kenyans against exploitation as seen with the Shakahola disaster where more than 400 people are reported to have died during purported religious rituals.

The bill proposes regular audits of church books of accounts and that the church pays taxes.

The bill also proposes stringent measures to punish errant church operators with fines ranging between one and 10 million shillings depending on the gravity of offenses committed, among a raft of other measures.

At face value, the stated objective of this bill seems noble and much needed given the state of the church in Kenya today, where anyone regardless of background, character or qualifications can open a church, commence to recruit congregants and within no time start collecting alms, in the form of tithes, offerings, donations and sacrifices without any form of transparency or accountability.

They use selected bible verses such as Proverbs 19:17 saying, ***"whoever cares for the poor lends to the lord, who will pay back the sum in full"*** to compel congregants to give everything, and extol the virtues of poverty, yet it is not uncommon to find church leaders living lavishly and preaching from extravagant mega churches amid extreme poverty and suffering.

Den of iniquity: washing machine & sanitizer for criminals

The church as currently constituted and operated is a profitable tax-free business for anyone willing to lie, cheat and steal without question, because no one should question the anointed. 1Chronicles 16:22. "Do not touch my anointed ones. Do my prophets no harm" Bible says.

Could explain the proliferation of the so-called prosperity gospel, a specialty of Pentecostal churches who entice congregants to give everything in exchange for double blessings.

The church has fashioned itself out to be the washing machine, detergent and sanitizer for all manner of criminals, selling absolution to the wealthy.

Explains why people with a chequered past, like Kamlesh Patni the architect of the infamous Goldenberg Heist, Maina Njenga and Ndura Waruinge, the leaders of the notorious, murderous and extortionist racket also known as the Mungiki, each have a church to their name and a congregation to match.

Arrangements like this open loopholes for financial crimes, requiring stringent regulation to check the trend.

Mainstream churches like the Catholics, the Anglicans and others, engage in a different form of stealing from the poor, leaving them destitute, landless and homeless by accepting gifts, assuming ownership of property under false pretenses and manipulation of elderly members of their congregations to donate property to the church, often without the knowledge or consent of family members. With proper regulations issues like this can be avoided.

Explains why the Catholic church for example claims ownership of large swaths of prime properties in Karen and in every major town in Kenya, operating guest houses and other commercial activities and generating billions of shillings annually and yet are reluctant to pay taxes.

A 2015 article published in the National Catholic Record, confirms that the church owns thousands of acres of land in Kenya, alone, most of it idle, while thousands of Kenyans are landless, and hunger stricken. See link. https://www.ncronline.org/blogs/world/eco-catholic/kenya-s-catholic-church-fight-hunger-farming-its-vast-land-reserves.

Ironical because the church preaches about and stresses the virtues of giving to Caesar what belongs to him but are themselves reluctant to practice what they preach.

Other churches are not saints when it comes to this kind of robbery without violence. This is the genesis of resource-based

conflicts plaguing Kenya today. Churches are largely the architects and beneficiaries of stolen land and are partly to blame for historical injustices going back to colonial days, where indigenous people were manipulated, deceived and dispossessed of their land in the name of God.

The Anglican church of Kenya lost acres of land it claimed was given to them as a gift by church members but did not have titles to claim ownership. The head of the Church Archbishop Ole Sapit was quoted by the standard saying the land in dispute was given to the church as gifts by trusted member. A publication by the Anglican church of Kenya reported on this in 2020. See link. https://virtueonline.org/anglican-church-kenya-loses-land-and-property-legal-battles.

These are just a few examples how the church in Kenya has continued to perpetuate systemic injustices by holding onto illegally acquired property but paying lip service to conversations about justice, reparations, restoration, restitution, truth and reconciliation. Legislation geared towards compelling churches to audit assets, declare wealth and show the sources of their wealth can help redeem the image of the church in the eyes of the public and close avenues for corruption, money laundering and in some cases, outright theft.

Sixty years after independence Kenyans appear to have seen through the sham that is organised religion. They want historical injustices addressed and those responsible, the church included held accountable so those affected can find closure and healing.

That said, the religious organisations bill only scratches the surface of what needs to change in how the church is currently constituted, packaged and operated because it is unpalatable. As is, the church in Kenya today is in fact a mockery of all that is good or Godly for that matter.

Give us back that old time religion

The church demands leaders of integrity. Regulation could ensure that only vetted persons of integrity and with the requisite knowledge and experience are allowed to operate churches.

Kenyans are sick and tired of watching morally bankrupt church leaders betray their trust with impunity and sacrifice youth for their own selfish interests as seen during the June 25 killing by gunfire of dozens of young people, whose only crime was to demand better governance and exercising their democratic rights to protest.

The church has remained suspiciously quiet when grave state sanctioned injustices are committed against the people of Kenya- When dozens of mutilated bodies were discovered in a Quarry for example and in Githurai where more youth died under a hail of bullets. None spoke when more than 20 children died in a fire at Endarasha, Nyeri County-a tragedy that could have been avoided if proper systems, checks and balances were in place and bylaws enforced.

The church refuses to hold the government accountable or challenge those in positions of power to do right by the people from whom they derive their mandate to govern, yet both church and state claim to work for public good. This is hypocritical.

Church leaders appear to have sold their collective conscience to the highest bidder if not the devil. They will not speak against evil just in case the blood money stops coming.

In contrast, the church has been quick to rally around embattled deputy president, Rigathi Gachagua by conducting sham prayer shows and allowing him, president Ruto and other incompetent, corrupt and morally bankrupt politicians to use the pulpit to cheat coerce and blackmail church congregants to vote for them and by so

doing endorse bad governance with dire consequences.

Since the motion to regulate the church was mooted, church leaders have come together in a brazen 'stomach led coalition' to oppose regulation, issuing statements left right and center, all calculated to ensure they keep their snouts in the feeding troughs while hapless Kenyans suffer death by gunfire, pain, disease and hunger.

After a series of frantic meetings with the president and his handlers, the church got its reprieve when, the president in his wisdom or lack thereof, announced in the second week of October that churches will not be regulated by the state after all. One can only guess what the church leaders were forced to trade to keep their mouths shut and stomachs full. I am guessing, it was their voices.

The value of integrity

A popular quote attributed to Warren Buffet, arguably the richest man on earth extols the virtues of integrity. I paraphrase. "When looking for people to hire, look for integrity, intelligence and energy. If the first is lacking, the other two won't matter. The same goes for church leadership. If the incumbent lacks integrity, nothing can save the flock. Not even tonnes of prayers.

The church needs leaders of integrity. Men and women who abide by bible teaching about truth, justice, fairness and other good Christian values.

If the church allowed itsself to be guided and to abide by biblical dictates, there would be no need for external regulation because the BIBLE an acronym for-Basic Instructions for life on Earth- would be sufficient.

Kenyans are desperate for the church of yore, with fearless leaders like the Reverend Timothy Njoya, Bishop Alexander Muge, Father John Kaiser and others who were unflinching in their defense of what is right no matter the consequences.

Rev. Njoya was beaten to within an inch of his life while demanding the expansion of democratic space and multi-party democracy, to rescue Kenyans from under the strong-armed Moi rule.

Njoya lived to tell the tale, but others were not so lucky. Bishop Muge was murdered for opposing bad governance and Father John Kaesar died protecting young girls from rape and defilement by known but powerful political figure.

These are the kind of leaders that the church needs today to champion justice for all, counter government excesses and stop the rise of William Ruto a dictator who seeks to take Kenya back to the dark days of Moi rule, which everyone would rather forget.

Regrettably these kinds of brave, fearless, selfless people of integrity are few and far between. Evidently, the church today is led by weak spineless people without integrity. Men/women who live to eat without regard for anyone but themselves.

Since we cannot legislate against gluttony and bad behavior, we must make laws that support strong institutions, promote professionalism and protect the public from abuse and exploitation by those who hide behind church privileges or any other public institutions with the sole objective of benefiting themselves.

For these reasons, the Religious Organisations Bill 2024 should be interrogated, analysed and expanded by smart and shrewd lawyers, to capture and seal, watertight every loophole that has allowed religious institutions operating in Kenya to cheat, exploit and abuse the fundamental rights of believers in the name of God.

Navigating the digital space: The impact of the digital influencer culture on children's rights in Kenya

By Faith Moraa

By Adrah Perez

By Stella Gathoni

The digital influencer culture has a complex impact on children's rights in Kenya, presenting both challenges and opportunities. Addressing these challenges requires a collaborative effort from parents, educators, policymakers, and the influencers themselves to ensure that children's rights are protected in the evolving digital landscape.

Introduction

The rise in the digital influencer culture in Kenya has brought about unprecedented opportunities and challenges. The Kenyan digital content creation economy has experienced massive growth since the advent of COVID-19[1], providing a space for Kenyans to explore their creative side. Due to the reliability of online platforms, most Kenyans have monetized their content, making social media a major source of income for them. Parents have not been an exception in the exploration of the digital space in Kenya. The increase of family influencers cannot be overstated, with parents vlogging their lives and that of their children for content. Some parents set up dedicated accounts for their children for the sharing of pictures and videos or use their own profiles to share such content. Some parents also create YouTube accounts to document their children's daily activities.

Arguably, most jurisdictions including Kenya are differential to parental rights to make autonomous decisions for their children.

[1]Brian Murimi, *'The Rise of digital influencer space in Kenya'* (2022) <https://ntvkenya.co.ke/entertainment/the-rise-and-rise-of-digital-influencer-space-in-kenya>

Therefore, it can be said that the parents can do whatever they please with their children. However, family influencing presents unique challenges that cannot be ignored. Although parents may have no intention of endangering their children, publicly sharing the children's personal information and having children participate in sponsored content raises both human rights and ethical issues.

The impact of parents' influencer culture on children's rights

1. Privacy and safety concerns

By posting their children on online platforms and the parents gaining influencer status, the child runs the risk of being seen as an extension of the adult, which could impact the child's identity. This also raises issues of breach of privacy and autonomy of the child due to the lack of consent. Further, the inappropriate sexual comments targeting the children brings forth issues of emotional abuse. Emotional abuse is defined as "acts that involve behavior or words that have negative effects on a child[2]. Additionally, the inappropriate or negative comments on children's images can affect their self-esteem, and images can be used by other websites for different purposes[3]. This has a potential impact on the child's development.

The internet equally holds a permanent record, and having the children's intimate details on social media available to masses will likely affect how the children will be treated by their peers. This is prejudicial to the child's welfare.

UNICEF through its **Guidelines for Industry on Online Child Protection Report 2020** notes that the digital age has amplified the existing risks and challenges to children's privacy rights and in some cases, introduced new ones[4]. Child abuse, exploitation, and trafficking continue to exist offline and have become amplified through mainstream digital platforms and social media[5]. Consequently, children are further exposed to cyberbullying, hate speech, harassment and exposure to unsuitable materials such as pornography and gambling sites[6].

2. Dangers of exploitation of the children

The family influencer sector is inherently exploitative in nature. Masterson argues that platforms like Instagram and YouTube require users to be 13 years old to create accounts on their websites[7]. Therefore, for kid influencers, parents manage their accounts in order to sustain their online presence. The compensation received from sponsored content promoted on these platforms provides a strong incentive to regulate the parents' involvement since the child is essentially vulnerable. He also argues that these children are treated differently because their activity takes place in a private home setting on a platform in which parents consensually participate. Their activity fails to be viewed as 'work' due to the absence of an employer-employee relationship and the fact that children are deemed to be undertaking normal activities on camera rather than putting on a "performance." This thus leaves room for potential exploitation.

There is therefore a need to regulate the involvement of children in content creation in Kenya, especially due to the inadequate domestic laws addressing this issue. This

[2]Ayten Doğan Keskin, '*Sharenting Syndrome: An Appropriate Use of Social Media?*' Healthcare (Basel) 2023 May; 11(10): 1359.
[3]ibid
[4]UNICEF Guidelines for industry on Child Online Protection (2020)
[5]ibid, 14
[6]ibid
[7]Masterson, M.A., '*When Play Becomes Work: Child Labor in the Ear of 'Kidfluencers'*, University of Pennsylvania Law Review, Forthcoming; May 2020

Children may not fully understand privacy settings or the importance of protecting their personal information, leading to potential exploitation or predation.

article thus seeks to explore the challenges and opportunities presented by the rise of influencer culture involving children. We endeavor to make a comparative analysis with other jurisdictions that have adopted legal and policy frameworks to protect children from social media exploitation, and make recommendations on what Kenya can emulate from these best practices.

Legal framework from which the regulation of children's exposure on social media can be inferred

The United Nations Convention on the Rights of the Child (UNCRC) underscores the principle of the best interests of a child[8]. In relation to the digital environment, this principle can be evoked to protect children's rights having regard to the risks associated with their continued exposure on social media platforms. In its General Comment 25, the United Nations Committee on the Rights of the Child (CRC Committee) stated that "*children's rights shall be respected, protected, and fulfilled in the digital environment*.[9]" It was stated that, in considering the best interests of the child, regard should be had for all children's rights, including their rights to seek, receive and impart information, to be protected from harm and to have their views given due weight, and ensure transparency in the assessment of the best interests of the child and the criteria that have been applied[10].

Article 12 could equally be applied to the issue of children's consent to being featured on social media accounts[11]. This Article requires that children capable of forming their own opinions be given a chance to freely express their views on matters affecting them[12]. This provision does not however apply to minors, since they lack demonstrable ability to comprehend what they're being put through. Even if the child says they want to be featured or share some piece of information, they may not truly understand what is being asked of them[13]. Family and child influencer content is significantly criticized because children cannot consent to being featured or having their information shared online.

Further, Article 16 of the UNCRC prohibits subjection of children to arbitrary or unlawful interference with their privacy, honor or reputation[14]. When the UNCRC was adopted in 1989, the internet and digital services were not as prevalent as they are today; therefore, the right to privacy applied

[8]Article 3(1), United Nations Convention on the Rights of the Child, 1989
[9]United Nations Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment;* < https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation >
[10]ibid
[11]Article 12, United Nations Convention on the Rights of the Child
[12]ibid
[13]ibid
[14]Article 16, ibid

more to physical space and well-being than to digital space and digital rights. However, this provision can be extended to protect children in the digital space as a response to the changing circumstances.

At the regional level, the African Charter on the Rights and Welfare of the Child (ACRWC) echoes the need to protect children's right to privacy under Article 10[15]. However, parents or legal guardians have the right to exercise reasonable supervision over the behavior of their children and may also consent to the processing of their children's data[16].

In Kenya, Article 53(2) of the Constitution asserts that the 'best interests of children' should be given paramount importance in all matters concerning children. Further, Article 31(c) guarantees the right to privacy, which extends to protecting children's personal information from being exploited or shared without consent.

This provision paved the way for the enactment of the Data Protection Act of 2019, as well as the Children's Act of 2022. Section 5 of the Children's Act reinforces the child's right to protection from all forms of violence, abuse, neglect, and exploitation. It covers sexual exploitation, trafficking, and may include any form of abuse that may occur through the online platforms. Further, Section 18 prohibits the exploitation of children for labor or other harmful purposes, which includes the use of children in social media activities that exploit their image or labor without proper safeguards or compensation.

The Data Protection Act prohibits processing of personal information about a child

The Data Protection Act is a legislative framework designed to regulate the handling of personal data by organizations, ensuring that individuals' privacy rights are protected. In Kenya, the Data Protection Act, 2019, was enacted to align with international standards and enhance data protection.

without consent of the parents or legal guardians[17]. Such information must equally be processed in a manner that promotes the child's rights and best interests[18]. Further, Section 25 provides that, the right to privacy and protects individuals, including children, from the misuse of personal data. It requires that personal data, including that of children, be processed fairly and lawfully, ensuring that online platforms obtain informed consent before collecting or using children's data. The Act equally places responsibility on data controllers, including social media platforms, to implement measures ensuring that children's data is securely processed and protected against unauthorized access or misuse[19].

Implementation challenges

In Kenya, the enforcement of legal provisions, such as the Data Protection Act,

[15]Article 10, African Charter on the Rights and Welfare of the Child,1990
[16]ibid
[17]Section 33, Data Protection Act Cap 411C, Laws of Kenya
[18]ibid
[19]Section 37, Data Protection Act

2019, remains a challenge due to limited resources and public awareness. Many parents, guardians, and even children themselves are unaware of their rights under these laws and this leaves the children vulnerable to exploitation on social media.

Further, while most existing legal frameworks provide for the best interests of children to be upheld, it remains undefined what constitutes best interests in the social media context. Existing legislations are thus inherently limited. Protection for the child's best interests needs to be balanced against the parent's rights to make choices which they believe to be in the best interests for their children.

Comparative analysis

a) France's Social Media Laws

In October 2020, France adopted a law to regulate commercial use of images of children under the age of 16 on social media platforms. This legal framework serves to regulate the work of child influencers since their work could easily be exploited by their parents[21].

Under this legislation, child influencers whose activity is considered "work" are protected under French labor law. Prior to the child performing any work activity on a social media platform, the child's parents or legal representatives are required to petition for an authorization or approval before the French administration[22]. Further, children whose activity is not considered work are also protected, as a declaration must be made before the French administration if certain thresholds relating to video duration, number of videos, or revenue associated with published videos are exceeded[23].

The law requires a portion of the income received by such minors to be deposited in a special state-handled *Caisse des dépôts et consignations*, which is responsible for managing it until the child reaches the age of majority or, where applicable, until the date of his or her emancipation[24]. As many influencers are minors, this legal provision ensures the minor influencers' protection, either from their parents or from themselves as legally vulnerable persons.

Additionally, video sharing platforms are required to adopt charters that are intended to promote education of users on the regulatory provisions applicable to the dissemination of the image of children under the age of sixteen through their services and on the risks, in particular psychological, associated with the dissemination of this image[25].

Users are equally mandated to report audiovisual content featuring children under the age of sixteen that would undermine their dignity or moral or physical integrity[26].

In addition to the 2020 law, France reached a new milestone in protecting children's rights with the adoption of Law No. 2024-120.[27] This text was adopted as a response

[20]*France: Parliament Adopts Law to Protect Child "Influencers" on Social Media*; <https://www.loc.gov/item/global-legal-monitor/2020-10-30/france-parliament-adopts-law-to-protect-child-influencers-on-social-media/>
[21]ibid
[22]*France: Influencers and Digital advertising*; <https://armingaud-avocat.fr/en/influencers-and-digital-advertising/>
[23]ibid
[24]LAW No. 2020-1266 of October 19, 2020 aimed at regulating the commercial exploitation of the image of children under the age of sixteen on online platforms, https://www.legifrance.gouv.fr/loda/id/LEGIARTI000042440573/2021-04-20/; Article 3
[25]Ibid, Article 4
[26]ibid
[27]A law to better protect children's image rights against the behavior of certain parents adopted by the National Assembly, <https://www.lemonde.fr/pixels/article/2024/02/06/l-assemblee-nationale-adopte-definitivement-une-loi-pour-proteger-le-droit-a-l-image-des-enfants_6215094_4408996.html>

The laws regarding the protection of child influencers in Illinois and Minnesota primarily focus on safeguarding the rights and welfare of minors in the entertainment and digital industries.

to the excesses denounced by associations, such as those of "vlogs" kept by parents sharing family intimacy, including that of their children[28]. It introduces children's image rights to the Civil Code as part of provisions relating to parental authority[29]. This legislation thus places limitations on parental authority over their children and seeks to protect children's privacy as a major priority.

b) The States of Illinois and Minnesota's Laws on the protection of child influencers

In July 2024, an amendment to the Child Labour Laws of the State of Illinois in the United States came into effect. The aim of this law is to protect the earnings of child influencers. The law requires that vloggers should set aside a portion of the compensation they receive in connection with content they create if the content contains the name, image or likeness of a minor[30]. The funds must be set aside in a trust for the minor and made available when the minor turns 18 or is declared emancipated[31]. Further, vloggers have an obligation under the law to provide the minor appearing in their content records to enable the calculation of the amounts that should be put into trust for the child under the law, as well as records confirming all amounts deposited into the trust account[32]. Minors are entitled to a private right of action to enforce this law against the adults who included the minor in their influencer content if these requirements are not met[33].

Similar protections are found in the State of Minnesota's law with additional protections

[28]ibid
[29]ibid
[30]Senate Bill 1782 Section 12.6 (a)
[31]Ibid, Section 12.6 (b) (3)
[32]Ibid, Section 2.6 (c)
[33]bid, Section 12.6 (c)

requiring that a minor over the age of thirteen years or an adult who was under the age of eighteen when their likeness was used in the content has the right upon request to have that content removed from the online platform by the individual who posted the content, the account owner or another person who has control over the account[34]. Additionally, minors under the age of fourteen are prohibited from engaging in the work of content creation and if a minor under the age of fourteen is featured by a content creator, the minor shall receive 100 percent of the proceeds of the creator's compensation for the content they have appeared in, less any amount owed to another minor[35].

These laws are in place to ensure the fair compensation of children whose likeness is used in creating content and guard against exploitation by adults.

Recommendations

i) Parental Education

The government, in collaboration with non-governmental organizations should conduct awareness campaigns to educate parents and guardians about legal protections and their role in safeguarding their children's online presence.

ii) Social Media Accountability

The Kenya Information and Communications Act (KICA) should be updated to require social media companies to adopt proactive measures for content moderation, ensuring that harmful content involving children is swiftly removed.

iii) Child Rights Impact Assessments (CRIAs)

Kenya should consider adopting CRIAs, ensuring that social media companies and digital service providers assess the potential impact of their platforms on children before rolling out new features or services.

iv) Adoption of an elaborate legal and policy framework to govern children's online presence

Direct regulation of the family influencing sector could spur stricter enforcement of existing parental obligations. Kenya should follow in the steps of other jurisdictions and come up with laws and policies that protect child influencers from exploitation. The proposed legislation should adopt a child-centric approach considering the diversity of children's experiences and their digital literacy levels. Policies should not treat children as a homogeneous group but should account for varying levels of digital exposure and maturity.

Conclusion

This paper has exposed the threat to children's rights that has been brought about by the use of children in content creation in Kenya. It has established that despite there being laws safeguarding the best interests of the child, not much has been done to protect child influencers who are often victims of exploitation on the social media space. Kenya should follow in the steps of France and the United States to come up with laws that guarantee the protection of child influencers. This will make the digital environment a safe space of children and enhance the principle of the best interests of the child.

Faith Moraa, Adrah Perez and **Stella Gathoni** are fourth year law students at the University of Nairobi Faculty of Law.

[34]Minnesota Statutes 2022, Section 181A.13 Subd. 5
[35]Ibid, Subd. 6

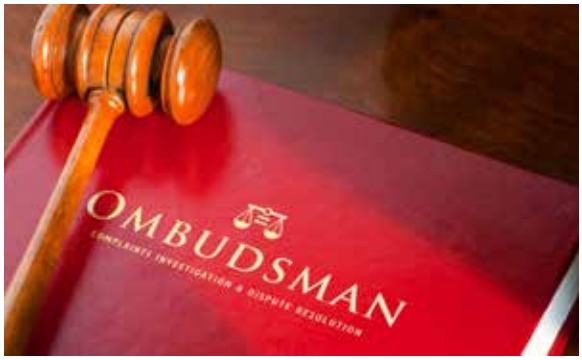
The ombudsman: A muzzled watch dog?

By Mohamed Abdi

Abstract

Kenya's Commission on Administrative Justice (CAJ) or the Ombudsman is a quasi-judicial oversight commission tasked with watch-keeping functions over the administrative actions of public authorities under the Constitution. It is a watchdog that scrutinizes the administrative excesses of these institutions and provides a speedy, efficient and complementary recourse aside from the mainstream justice system. In this manner, the CAJ is therefore an important institution of overseeing accountability in the service delivery process. However, like similar quasi-judicial organs, there is a fundamental hurdle which beleaguers the commission from fully realizing its watch-keeping function: the limitation of enforceability.

The Purpose of this article is to analyse the current status quo on the enforceability of the decisions of the CAJ. This will be undertaken by a comparative assessment from selected Scandinavian countries from where this institution was conceived and developed, and also in South Africa where recent progressive decisions have been rendered on the subject. The article holds that the CAJ is largely toothless and makes the case that it should be more empowered for it to optimally perform its surveillance function. The article contends that considering the context of a developing democracy like Kenya, the appropriate model of the CAJ should depart from the traditional "weaponless" gatekeeper in the developed democracies. This is considering that such countries have an entrenched and more robust public administrative systems such that the ombudsman plays a minimal complementary role.



Ombudsmen play a crucial role in promoting fairness, accountability, and transparency in various sectors. By providing a mechanism for individuals to voice their concerns and seek redress, they help ensure that institutions remain responsive to the needs and rights of the public.

Introduction

In the architecture of most modern Constitutions, there are established institutions which have commonly been labelled as the "Independent Regulatory and Oversight (fourth-branch) Institutions[1]. These institutions which fall outside the purview of the traditional 3 arms of government, are often politically neutral and

[1]Elliot Bulmer, *Independent Regulatory and Oversight (Fourth-Branch) Institutions* (2019).

The ombudsman serves as a neutral party to investigate complaints, ensuring that individuals have a means to seek redress for grievances.

seek to foster accountability and improve the resilience and quality of democratic governance[2]. They are watchdogs put in place by the constitutional machinery to check on the exercise of power by the traditional organs of government and their affiliates. They include independent offices and commissions and it is within this category that the office of the Ombudsman falls.

Tracing its origin from the Scandinavian regions such as Sweden, Denmark and Finland, the office of the Ombudsman has overtime been institutionalized and entrenched to occupy an integral position in the realm of modern public administration[3]. Today, the office is considered as an important indicator of an ideal administrative justice system as it complements courts in enforcing the right to a fair administrative action[4]. In the African front, the great importance tied to this institution is evidenced by the creation of the African Ombudsman Centre to encourage the establishment, development and promotion of theOmbudsman Institution in Africa[5].

In Kenya, the CAJ is the constitutional and Legislative body playing the overarching role of the ombudsman. As will be shown later, it has a broad range of functions ranging from receiving and investigation of complaints of Maladministration to the promotion of fundamental human rights in public administration[6]. The commission is therefore a fully-fledged quasi-judicial organ as it has powers resembling that of a court including issuing summons and adjudicating matters on administrative action[7].

However, the aspect of enforceability of its decisions has made some scholars to

[2]ibid.
[3]Damir Aviani, 'The Origin and Development of the Ombudsman' (1998) 35 Zb. Radova 501.
[4]Richard Kirkham, 'Explaining the Lack of Enforcement Power Possessed by the Ombudsman' (2008) 30 Journal of Social Welfare & Family Law 253.
[5]'The African Ombudsman Centre (A.O.C.)' <https://ombudsman.govmu.org/Pages/International%20Organisations/The-African-Ombudsman-Centre-(A-O-C-).aspx> accessed 29 December 2021.
[6]Section 8 of the Commission on Administrative Justice Act, Act No 23 of 2011.
[7]Section 26 of the Fair Administrative Action Act.

remark that the court system may be a more favourable dispute resolution mechanism as opposed to it[8]. For instance, Owino[9] remarks that the decrees of the courts are binding and that it has a plethora of mechanisms of enforcing these orders including attachment and sale of property, commitment to civil jail, arrest and detention among others[10]. Sadly, the CAJ lacks these weapons. This state of affairs informs the enquiry of this paper. If at all the CAJ was meant to be a watchdog to track administrative injustices, shouldn't it be more proper to grant it the teeth to bite? Shouldn't it not be an active referee as opposed to a passive spectator?

The discussion will commence by an exposition of the legal architecture of the CAJ in Kenya. The statutory limitations on the enforceability of its decisions will be highlighted. Thereafter, a comparative assessment of the enforceability of the decisions of the ombudsman from the Scandinavian regions and South Africa will be undertaken. By and large, the discussion will hold that as to whether the decisions should be binding or not should entirely depend on the administrative context of each country.Ultimately, the discussion contends that the CAJ is muzzled. The discussion will conclude with some practical recommendations.

The CAJ: Legal framework and mandate

Establishment

The CAJ is the Successor of the defunct Public Complaints Standing Committee (PCSC)[11]. The Commission is established under Section 3 of the CAJ Act pursuant to the constitutional requirement on the restructuring for the Kenya National Human Rights and Equality Commission[12]. Therefore, unlike its predecessor whose legal foundation rested on a mere gazette notice, the CAJ is now deeply entrenched in the constitutional order. By Virtue of Article 59(5) (c) of the Constitution, the Commission has been accorded the status of chapter 15-institutions with all the attendant benefits and obligations including that of being independent. The membership of the Commission is composed of a chairperson and 2 members, according to the constitutional requirement that the Commissions should have at least 3 members but no more than 9 members[13].

Section 55 of the CAJ Act provides that at the expiry of 5 years from the date of commencement of the Act (which lapsed on 5th September 2016), parliament shall review its mandate with a view of amalgamating the CAJ with the body responsible for Human rights i.e the Kenya National Commission on Human Rights. However to this end, such an amalgamation has not been done. To the contrary, the Introduction of *The Commission on Administrative Justice (Amendment) Bill, 2019*[14] seeks to amend the CAJ Act by deleting the sunset clause of sec 55 with a view of making the Commission a stand-alone commission. The bill is however yet to see the light of the day. Therefore, the current state of affairs is that the Commission is still a stand-alone commission with no prospects of its amalgamation with the body on human rights.

---

[8]Roxan Venter, 'Enforcement of Decisions of Ombudsmen and the South African Public Protector: Muzzling the Watchdogs' (2016) 10 International Journal of Law and Political Sciences 2051.
[9]Kojo Owino, 'Challenges Facing Implementation of Administrative Justice by the Kenyan Ombudsman' (Thesis, University of Nairobi 2019) <http://erepository.uonbi.ac.ke/handle/11295/109793> accessed 22 December 2021.
[10]ibid page 15.
[11]Established under Gazette Notice No. 5826 of 29th June, 2007.
[12]Article 59(4) of the Constitution.
[13]Article 250(1).
[14]Kenya Gazette Supplement No. 51 (Senate Bills No. 6).

The next session will briefly expose the mandate of the CAJ as found in its constitutive legislation and other related statutes.

Mandate of the commission

The CAJ's mandate is to be broadly found in the CAJ Act and the Access to Information Act (ATI)[15]. In the former, the Commission is mandated to majorly fight maladministration by enforcing the right to a fair administrative action, while in the latter, the commission is the mandated oversight agency in implementing the right to access information. In this manner, the commission plays a hybrid role and is therefore hybrid in nature[16]; a trend which is the practice in most jurisdictions[17]. This appears to have been the intention in the Kenyan context under Article.

59(5) of the constitution and the sunset clause in section 55 of the CAJ Act which aims to amalgamate the CAJ and the KNCHR.

i. Fighting maladministration under the CAJ Act

Under Sec 8 of the CAJ Act, the roles of the Commission are broadly listed in its bid to enforce the right to a fair administrative action and to fight maladministration. They include: investigation[18], Inquiry into allegations of maladministration[19], reporting functions to the national assembly[20], advisory role in the improvement of public administration[21] and promotion of public awareness on policies and administrative procedures on administrative justice[22].

On this front, the functions of the commission largely extends to public institutions. Unlike its predecessor, the CAJ has been tasked with greater remedial action avenues. The PCSC was only provided with the avenue of reporting to the President[23]. .However, the CAJ, in addition to performing the classical watch keeping functions, has also been given an array of remedial action and also the mechanism of reporting to parliament in case of non-compliance[24].

ii. Oversight role under the ATI

In its bid towards operationalizing the constitutional right of Access to Information[25], parliament enacted the *Access to Information Act*. Under the Act, the CAJ is designated as the oversight body in enforcing its provisions[26]. Section 20 spells out the mandate of the commission under the Act. The Act stipulates that the commission shall designate one of its commissioners as the "Access to Information commissioner" with the specific mandate of overseeing the functions of the commission in matters access to information. The Commission's functions extends to receiving complaints and investigations on access

[15]Act No 31 of 2016.
[16]Victor O Ayeni, 'Ombudsmen as Human Rights Institutions' (2014) 13 Journal of Human Rights 498; see also Owino (n 9) page 53.
[17]For instance, the Ghanaian Ombudsman plays the roles of 3 institutions: being the ombudsman, the Human rights institution and the Anti-corruption Agency. Similarly, the Australian Common wealth Ombudsman is also the Oversight Agency under its Public Disclosure Act.
[18]Section 8(a)and (b) of the Act
[19]Section 8(d) of the Act.
[20]Sec 8(c) and 8(i) of the Act.
[21]Section 8(h) of the Act.
[22]Section 8(j) of the Act.
[23]Clause 2(i) of the Gazette Notice establishing the PCSC.
[24]This recourse to parliament is provided for under Sec 42(4) of the Act. This paper will later argue that this alone is an insufficient enforcement mechanism.
[25]Article 35 of the Constitution
[26]Section 2 on interpretation of the Act designates the "Commission" under the Act to be the CAJ.

to information and on data protection[27], monitoring the state's compliance with its obligations under international treaties and conventions on access to information and data protection[28], among others.

The mandate of the Commission under the ATI, unlike with the CAJ, extends to Private entities as well. Furthermore, the powers granted to it under the ATI are broader. Even the enforceability of the decisions of the commission under the ATI appears to have been placed at a higher pedestal. **Section 21(3)** of the ATI provides that the decisions of the commission shall be binding on the national and county government. This paper's focus is however on the enforceability of the decisions of the Ombudsman with regard to maladministration under the CAJ Act.

Limitations on the powers of the Ombudsman

The Mandate of the commission are not without limit. Under Sec 30 of the CAJ Act, the commissions powers does not extend to the following: decisions of the cabinet, criminal proceedings, matters pending before any court or constitutional commission and the grant of an award or honour by the president, among others.

Enforceability of the decisions of the ombudsman for maladministration: Statutory and case law barriers

The status of the decisions of the Ombudsman under the CAJ Act appears to be fairly restricted. **Section 42** of the CAJ Act details the steps to be followed by the Commission upon concluding its investigations. The findings of the investigations are to be included in a report which shall contain among other things: the findings and recommendations of the Commission, the actions the commission considers should be taken and the reasons and any recommendations the commission considers appropriate[29].

If the relevant public institution has not implemented the recommendations of the commission, the only recourse that the Act provides for the Commission is that of reporting to Parliament detailing the failure to implement its recommendations[30]. This reporting function is also captured under section 8(c) of the CAJ Act.

Therefore, it appears that the decisions of the commission, which are described as "recommendations" are not enforceable and binding upon the public authority against which it is rendered. The CAJ has to rely on the goodwill of parliament for its decisions to be enforced. As will be demonstrated, this constitutes the greatest hurdle to the functions of the commission. Since its inception, none of the CAJ's reports have been acted upon by parliament[31]. Therefore, this is the current statutory position on the import of the decisions of the Ombudsman with regard to maladministration. On Access to information however, the Commission is given much more powers and its decisions have been accorded the binding force on entities against which they are rendered[32].

The jurisprudence of the courts as illustrated in cases such as **Republic v Commission on Administrative Justice Ex parte Nyoike Isaac [2017] eKLR**[33] and **Wesley Mdawida Charo v University of Nairobi;**

[27]Section 21(1)(a) of the Access to Information Act.
[28]Section 21(1)(e) of the Access to Information Act.
[29]Section 41(2) of the CAJ Act.
[30]Section 42(4) of the CAJ Act.
[31]Owino (n 9).
[32]See generally, Section 21(3) of the ATI.
[33]'Judicial Review Case 436 of 2016 - Kenya Law' <http://kenyalaw.org/caselaw/cases/view/140831> accessed 3 February 2022.

Commission on Administrative Justice (Interested Party) [2020] eKLR[34], is that the decisions of the ombudsman are not binding on public institutions against which they are rendered.

The most recent of these decisions is the case of **Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others [2021] eKLR**[35], decided by the Supreme Court of Kenya. When called upon to determine the import of the decisions of the Ombudsman, the court stated that the Ombudsman's decisions are mere recommendations. It went on to express that a recommendation is a suggestion or proposal for a certain cause of action that does not bind the person to whom the suggestion is made; that it is the recipient of the suggestion to determine what import can be attached to the suggestion.

The court thus effectively determined that the suggestions are not binding but merely persuasive. It further outlined six guiding principles to assist courts when considering the recommendations of the commission[36]. These guiding principles further stifle the binding force of the commission's decisions. For instance, guiding principle (b) of the judgement provides that the manner in which the recommendation is implemented is purely discretionary. This therefore provides public institutions with great latitude on whether to implement the recommendations or not. The court also restated that if there is failure to implement a recommendation, the only recourse is to parliament. These pronouncements by the highest court of the land are a firm testament that the Ombudsman decisions have been accorded very weak import.

Constitutionally, however, the functions of the Commission under **Article 59(2) (j)** of the Constitution appears to be broader than the narrow confines which have been stipulated by the CAJ Act and case law. The article provides that the commission, upon concluding its investigations can "take remedial action". The investigations alluded to here include maladministration by public authorities. This article therefore points to the constitutional intention of giving the ombudsman powers beyond mere investigations but also that of taking remedial action[37].

The next section will do a comparative assessment of the position of enforceability of the ombudsman decisions in the Scandinavian countries of Denmark and Norway together with the regional experience in South Africa.

Comparative assessment of enforceability of the decisions of the ombudsman

Scandinavia

i. Denmark

The Danish Ombudsman is established by the ***Ombudsman Act***[38]. Sec 7 of the Act provides that the jurisdiction of the Ombudsman shall extend to all parts of the public administration. On the conducting of investigations, the Act provides that the ombudsman may either investigate upon a complaint being lodged to it[39] or initiate its own investigation and inspection[40]. The ombudsman is obligated to submit an annual report to the *Folketing* (parliament) on its operations. Additionally, Sec 24 of the Act stipulates that if the findings reveal that

[34]'Petition 63 of 2018 - Kenya Law' <http://kenyalaw.org/caselaw/cases/view/197088> accessed 3 February 2022.
[35]'Petition 42 of 2019 - Kenya Law' <http://kenyalaw.org/caselaw/cases/view/209732> accessed 15 December 2021.
[36]These principles can be found in paragraph 43 of the judgement.
[37]Amelia J Otono, 'Public Complaints And The Ombudsman In Kenya' (Thesis, University of Nairobi 2018) <http://erepository.uonbi.ac.ke/handle/11295/105125> accessed 3 February 2022.
[38]Act Number 473 of 1996.
[39]This is generally covered under Chapter 4 of the Act.
[40]Covered under Chapter 5 of the Act.

the public entity committed gross violations, the Ombudsman must report the matter to Legal affairs Committee of parliament for further measures.

It appears therefore that the Danish Ombudsman also relies on Parliament for the enforcement of its decisions. The system is therefore one of indirect enforcement, just like Kenya's.

ii. Norway

The Norwegian Ombudsman is founded by the *Parliamentary Ombudsman Act*[41]. The sphere of its operation as covered under **Section 4** of the Act is Public administration and all personnel who are engaged in its service. **Section 10** details the steps to be followed upon completion of the investigations. It provides that after investigations, the ombudsman may inform the prosecuting agency on the action he believes should be taken. An appreciation of that section reveals that the ombudsman is largely toothless. The section is couched in discretionary terms such as "may express his opinion" and "may suggest compensation". Beyond these, the ombudsman can only but make a report to the *storting* (parliament)[42].

Therefore, just like its Danish counterpart, the Norwegian Ombudsman also plays a complimentary and persuasive role. Its decisions are not binding on the Public authorities against which they are rendered.

It appears therefore that in the Scandinavian regions the ombudsman decisions are only persuasive and are deemed as mere recommendations. Venter[43] however comments that this does not make the office of the ombudsman wholly ineffective in those regions. She comments that such jurisdictions had already established very strong public administrations before adopting the regulations of the ombudsman[44]. Therefore, according to her, the ombudsman only plays a minimal and complimentary role. She however suggests that such a model only suits jurisdictions which have well entrenched public administrations systems. For developing democracies where public administration has not achieved the same level of maturity, she posits that the office of the Ombudsman should be more proactive and play an active role in dealing with maladministration[45]. The ideal model which she makes reference to is the Public Protector of South Africa.

South Africa

The Public Protector is the constitutional and statutory body playing the role of the Ombudsman in South Africa. It is established under Chapter 9 of the Constitution[46] which is a replica of the Kenyan Chapter 15. It is further constituted by the *Public Protector Act*[47]. Just like the COK's **article 59(2)(j)**, **Sec 182** of the South African constitution provides that the Public protector has power to investigate conduct within public administration and to take remedial action. However, just like in Kenya, neither the Constitution nor Statute is explicit on whether the decisions are binding[48]. Nevertheless, the courts have rendered progressive jurisprudence to bolster the place of the decisions of the Public Protector in the realm of public administration. Two of such landmark

[41]Act Number 8 of 1962 as amended by Act Number 89 of 2013.
[42]Section 12 of the Act.
[43]Venter (n 8).
[44]ibid page 4.
[45]Venter (n 8).
[46]Section 182 of the Constitution of South Africa.
[47]No.23 of 1994.
[48]TN Madonsela, 'The Role of the Public Protector in Protecting Human Rights and Deepening Democracy' (2012) 23 Stellenbosch Law Review 4.

decisions are: *SABC v DA* and *EFF v Speaker of NA*.

Jurisprudence on this issue

• *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others (393/2015) [2015]*[49]

In this case the Supreme Court of Appeal reflected on the status of the enforcement of the decisions of the Ombudsman. The Ombudsman received complaints about maladministration at the Applicant Corporation, found that the allegations were indeed true. However, the corporation disregarded the findings and went ahead to appoint a Chief Operations Officer in the face of the maladministration, prompting the case and appeal.

Weighing on the matter, the Supreme Court of Appeal stated that **Sec 181(1)(c)'s** stipulation of "… *to take appropriate remedial action*" means that the ombudsman may chose a course of action and is not merely empowered to give advice only. The Court further analysed the legacy of the country's constitutional history which promoted the inclusion of the office of the Ombudsman. It thus stated that if the powers of the Ombudsman were merely advisory, then the commission would be ineffective in living to its purpose of holding public officials accountable. It stated in relevant part, that this is "*neither fitting nor effective, denudes the office of the Public Protector of any meaningful content, and defeats its purpose*"[50]. The court further went on to analogize the Ombudsman as a watchdog and stated thus: "*As is evident from what is set out above, this watchdog should not be muzzled*"[51]. This case has therefore established that the decisions of the ombudsman are enforceable and binding.

• *Democratic Alliance v Speaker of the National Assembly and Others*[52]

In this case, the commission investigated alleged unlawful non-security upgrades in the private residence of the president. The commission ultimately determined that it the president, not the tax payers who should bear the costs of non-security upgrades to his home. The president however ignored the Public Protector's remedial action, prompting the filing of the case. In affirming the enforceability of the decisions of the Ombudsman, the court gave two justifications:

i. That it would be quite absurd to allocate substantial budget to the office of the Ombudsman if its powers were meant to be inconsequential.
ii. It would be impossible for the commission to contribute to the country's democracy if its decisions were not binding.

The *EFF* decision therefore reiterated the stand of the supreme court of appeal *SABC* case. South Africa has therefore adopted a direct enforcement of the decisions of the ombudsman. Public authorities are therefore not afforded the leisure of choosing whether or not to comply with the decisions of the Public Protector[53]. The Public Protector therefore plays an active role of ensuring accountability within public administration. Considering the historical context of South Africa, the status which has been accorded to the Ombudsman is indeed befitting. The framers of the constitution intended for it to

[49][2015] 4 All SA 719 (SCA).
[50]Paragraph 53 of the judgement.
[51]ibid.
[52][2016] ZACC 8.
[53]Mtendeweka Mhango and Ntombizozuko Dyani-Mhango, 'The Powers of the South African Public Protector: A Note on Economic Freedom Fighters v Speaker of the National Assembly' (2020) 13 African Journal of Legal Studies 23.

be a vibrant channel of accountability[54].

The South Africa model would be the most ideal benchmark for Kenya, considering the constitutional proximity that it has with that of Kenya. The constitutional underpinnings of the institution are identical for the two countries.

From the comparative assessment, it is evident that it is important to appreciate the administrative context of a particular country in determining whether the decision of the Ombudsman should be binding or not. The Scandinavian regions boast of well entrenched public administrative channels hence the ombudsman plays a minimal and complementarity function. However, in South Africa, the same level of maturity in public administration has not yet been achieved, therefore the Public Protector assumes a very active role in matters of public administration. For a developing country like Kenya, a similar approach would be appropriate.

Conclusions and recommendations

This presentation has endeavoured to expose the manacles which hold back the Ombudsman from fully realizing its watch-keeping functions. The CAJ Act only provides it with the avenue of reporting to parliament and this is the position which has also been supported by case law. The Supreme Court's decision is the *Kenya vision 2030 Delivery Board case*[55] is arguably the final nail in the coffin. However, this position robs the Constitution of its transformative mission. Article 59 of the Constitution clearly intended to give the Ombudsman an active role in fighting Maladministration. The present fetters placed by statute and case law runs counter with this intention. Accountability as constitutional value is an important component of service delivery and quasi-judicial institutions such as the CAJ are crucial in seeing that this is fulfilled. This watchdog, therefore needs to be given the teeth to bite. Considering the Kenyan constitutional journey and the historical problems which the constitution of Kenya 2010 sought to remedy, it is fitting for Kenya to take the South African route and empower the Ombudsman by according its decisions the binding force that it currently lacks. By doing so, administrative accountability will be realized.

Recommendations

This paper recommends the following solutions to unmuzzle this watchdog:

i. The CAJ Act should be amended to make its decisions binding on public authorities. This should be similar to the stipulations of **Section 21(3)** of the ATI which makes the decisions of the Commission binding in matters of Access to information. Such an amendment would therefore make the decisions binding and enforceable with regard to maladministration as well.
ii. The courts should be proactive and deliver progressive jurisprudence on the enforceability of the decisions of the ombudsman. The courts have so far been a hurdle in this endeavour. From the South African experience, the current status accorded to the decisions of the Public protector are in most part attributed to the advocacy of the courts. The Kenyan judiciary should therefore adopt a favourable approach and widen the scope of the ombudsman.

Mohamed Abdi is a lawyer awaiting admission into the Roll of Advocates.

[54]Carlos Joel Tchawouo Mbiada, 'The Public Protector as a Mechanism of Political Accountability: The Extent of Its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' (2017) 20 Potchefstroom Electronic Law Journal 1.
[55]Supranote 35.

Bibliography

1. Aviani D, 'The Origin and Development of the Ombudsman' (1998) 35 Zb. Radova 501
2. Ayeni VO, 'Ombudsmen as Human Rights Institutions' (2014) 13 Journal of Human Rights 498
3. Bulmer E, *Independent Regulatory and Oversight (Fourth-Branch) Institutions* (2019)
4. Kirkham R, 'Explaining the Lack of Enforcement Power Possessed by the Ombudsman' (2008) 30 Journal of Social Welfare & Family Law 253
5. Madonsela TN, 'The Role of the Public Protector in Protecting Human Rights and Deepening Democracy' (2012) 23 Stellenbosch Law Review 4
6. Mbiada CJT, 'The Public Protector as a Mechanism of Political Accountability: The Extent of Its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' (2017) 20 Potchefstroom Electronic Law Journal 1
7. Mhango M and Dyani-Mhango N, 'The Powers of the South African Public Protector: A Note on Economic Freedom Fighters v Speaker of the National Assembly' (2020) 13 African Journal of Legal Studies 23
8. Otono AJ, 'Public Complaints And The Ombudsman In Kenya' (Thesis, University of Nairobi 2018) <http://erepository.uonbi.ac.ke/handle/11295/105125> accessed 3 February 2022
9. Owino K, 'Challenges Facing Implementation of Administrative Justice by the Kenyan Ombudsman' (Thesis, University of Nairobi 2019) <http://erepository.uonbi.ac.ke/handle/11295/109793> accessed 22 December 2021
10. 'The African Ombudsman Centre (A.O.C.)' <https://ombudsman.govmu.org/Pages/International%20Organisations/The-African-Ombudsman-Centre-(A-O-C-).aspx> accessed 29 December 2021
11. Venter R, 'Enforcement of Decisions of Ombudsmen and the South African Public Protector: Muzzling the Watchdogs' (2016) 10 International Journal of Law and Political Sciences 2051

READ THE PLATFORM

FOR LAW, JUSTICE & SOCIETY