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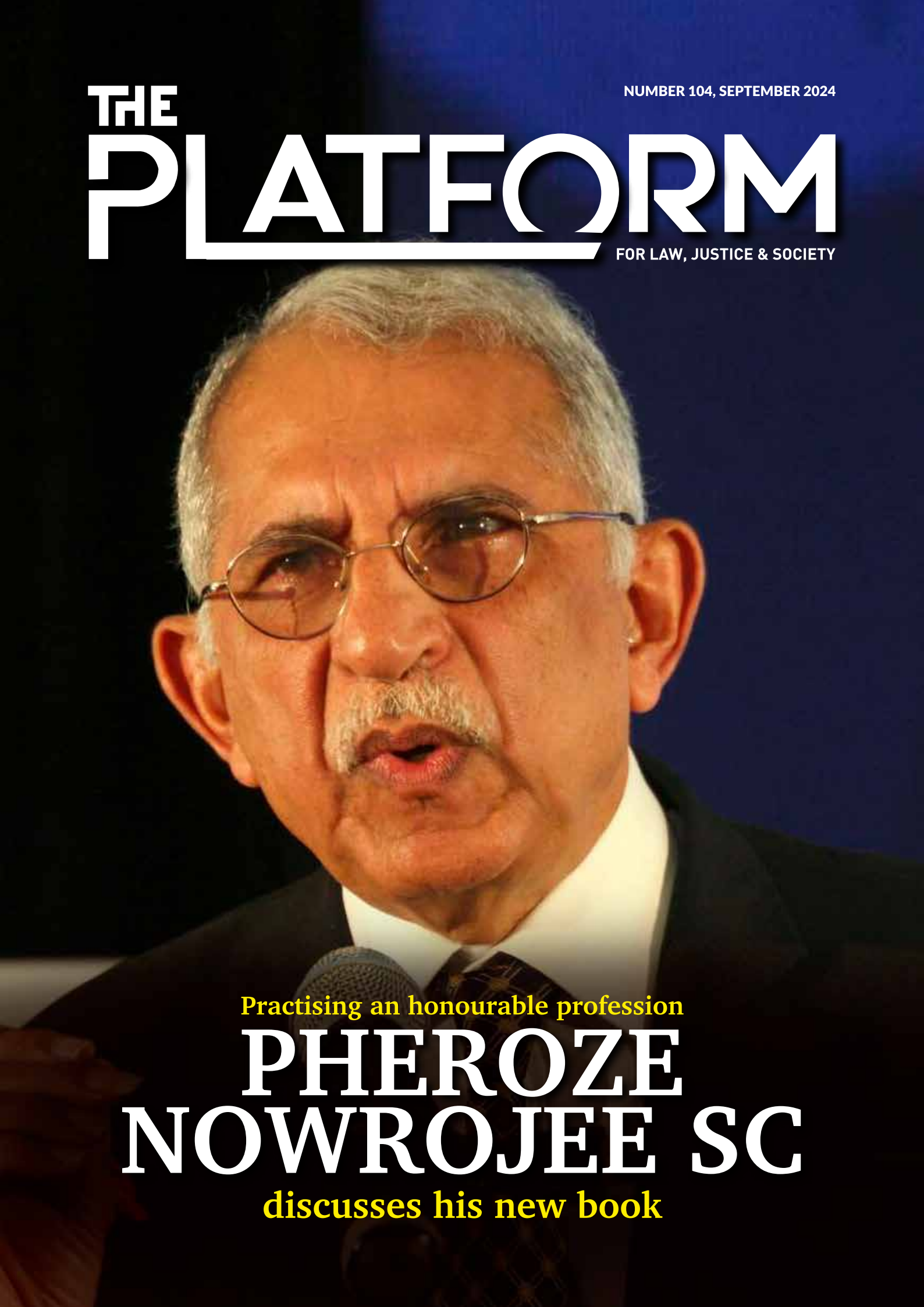

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discusses his new book

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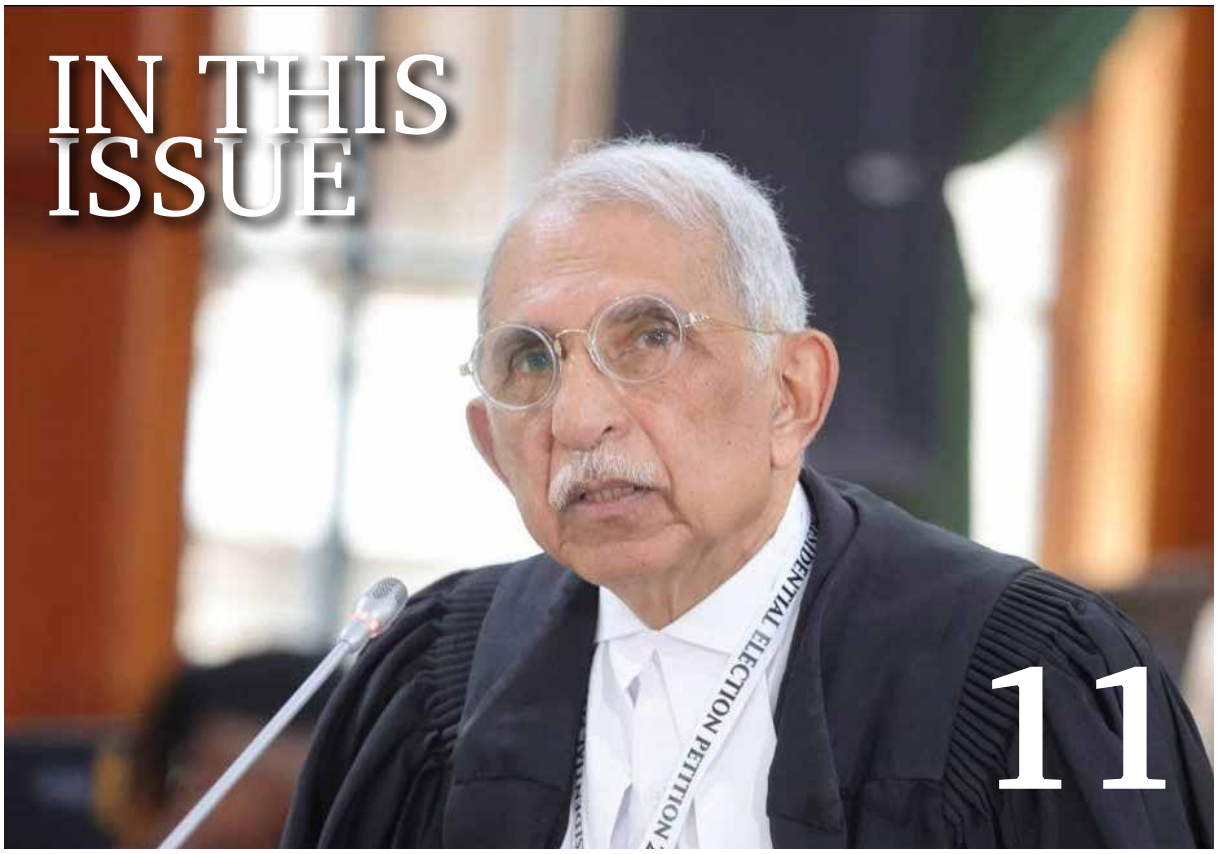
IN THIS ISSUE



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EDITORIAL

Public participation in the impeachment process of a governor

Meru Governor Kawira Mwangaza

Public participation, enshrined as a constitutional principle, holds a pivotal role in the process of impeaching governors. This principle underscores the necessity of involving the citizenry in decisions that bear significant implications on governance and public administration. The impeachment of a governor is not merely a legal proceeding but a profound political and social event that directly affects the lives of the citizens governed. As such, ensuring public participation in this process is essential to uphold the democratic values of transparency, accountability, and inclusivity. In many constitutional frameworks, particularly in democratic societies, public participation is recognized as a fundamental right. It allows citizens to have a say in critical matters, ensuring that their voices are heard in the decision-making process. In the context of impeachment, this principle ensures that the process is not conducted in isolation or as a mere exercise of power by political elites but is instead reflective of the will of the people.

Moreover, public participation in the impeachment process serves as a check against potential abuses of power. It provides a platform for the electorate to express their views on whether a governor should be removed from office, thereby reinforcing the accountability of elected officials. Through public hearings, consultations, and other participatory mechanisms, citizens can present evidence, offer opinions, and engage in discussions that contribute to a fair and just outcome.

Following the recent impeachment of Governor Kawira Mwangaza, it is imperative to consider public participation during the impeachment of Governors and the standard the Courts have set regarding the said public participations.

Article 10 of the Constitution of Kenya 2010 places a duty upon a state organ, state officer, public officer and all persons to ensure public participation is undertaken, whenever any of them applies, interprets or implements the constitution. In the case of **Justice Kalpana H. Rawal & 2 others vs. Judicial Service Comission & 2 others [2016] e KLR** the Court of Appeal held that the national values and principles of governance listed under Article 10 of the Constitution including the principle of public participation, bind all state organs, state officers, public officers and everyone who applies or interprets the constitution or any law or performs any public duty.

In addition, the Court of Appeal in the case **Commission for the Implementation of the Constitution vs. The Attorney General & Another**, Nairobi Civil Appeal No. 351 of 2012 added the following regarding the arms of government bound by Article 10 of the Constitution:

> **It seems clear that the listing of the phases of action the actors wherein are bound by the national values and principles enumerated in Article 10 bear the peculiar imprimatur of the three arms of government namely;**
>
> **a. The Judiciary that must apply and interpret the Constitution**
> **b. the Legislature that must enact legislation and**
> **c. the Executive that must make and or implement public policy.**

It is trite law that public participation must be undertaken before the County Assembly tables the motion to impeach a sitting Governor. Impeachment of a Governor is not a closed door affair. Where an impeachment motion succeeds it does not only affects the Governor but also prejudices the political rights of the people who voted for the Governor. Therefore, it is mandatory that the public is involved through qualitative and quantitative participation. In the case of **Martin Nyaga Wambora vs. County Assembly of Embu & 37 others [2015] e KLR** the Court of Appeal observed that, **" ...The removal of the Governor was not just any other business of the County Assembly, but rather in which the electorate in the County Assembly were deeply interested, the Governor having been directly elected by the electorate. The matter was weight and of great interest to the people of Embu whose only opportunity to participate effectively in the removal process, was from the time of communication of the motion to the Speaker of the County Assembly to the time the motion is debated in the County Assembly."**

Under section 87 of the County Government Act as read with Article 10 and 196(1) of the Constitution, a County Assembly must undertake a meaningful and qualitative public participation and not a mere formality. In the case of **Aden Ibrahim Mohamed & 6 Others vs. County Assembly of Wajir & 9 Others [2022] e KLR** the Court laid the following factors to consider whether the County Assembly undertook meaningful public participation:

We say that because public participation should always be real and not treated as a mere formality but one substance. The test on whether there has been due public participation rests with the court, on case to case basis, upon consideration of many a factor including the goodwill or bona fides of the public actor(s), the nature of the matter, the length and quality of engagement and the mechanisms or media used to reach the people.

Similarly, in the case of **Robert Gakuru & Others vs. Governor of Kiambu County & 3 Others [2014] e KLR** the Court held as follows relating to qualitative and quantitative public participation:

"75. In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action…. 76. In my view to huddle a few people in a 5 star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another a one day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation."

By embedding public participation in the impeachment process, the constitutional principle not only legitimizes the proceedings but also strengthens the bond between the government and the governed. It ensures that the process is transparent, that justice is not only done but is seen to be done, and that the ultimate decision reflects the collective will of the people.

In conclusion, the Constitution of Kenya 2010 places a duty on the County Assembly to conduct meaningful public participation before impeachment of a Governor is undertaken. It should not be a mere formality and where the Court finds that public participation was not done, the impeachment will be null and void. Public participation as a constitutional principle is integral to the impeachment of governors, ensuring that such a significant action is conducted with the involvement, input, and consent of the citizenry. This not only upholds democratic ideals but also reinforces the legitimacy and integrity of the process.

2024

12th C.B. Madan Prize call for nominations - 2024

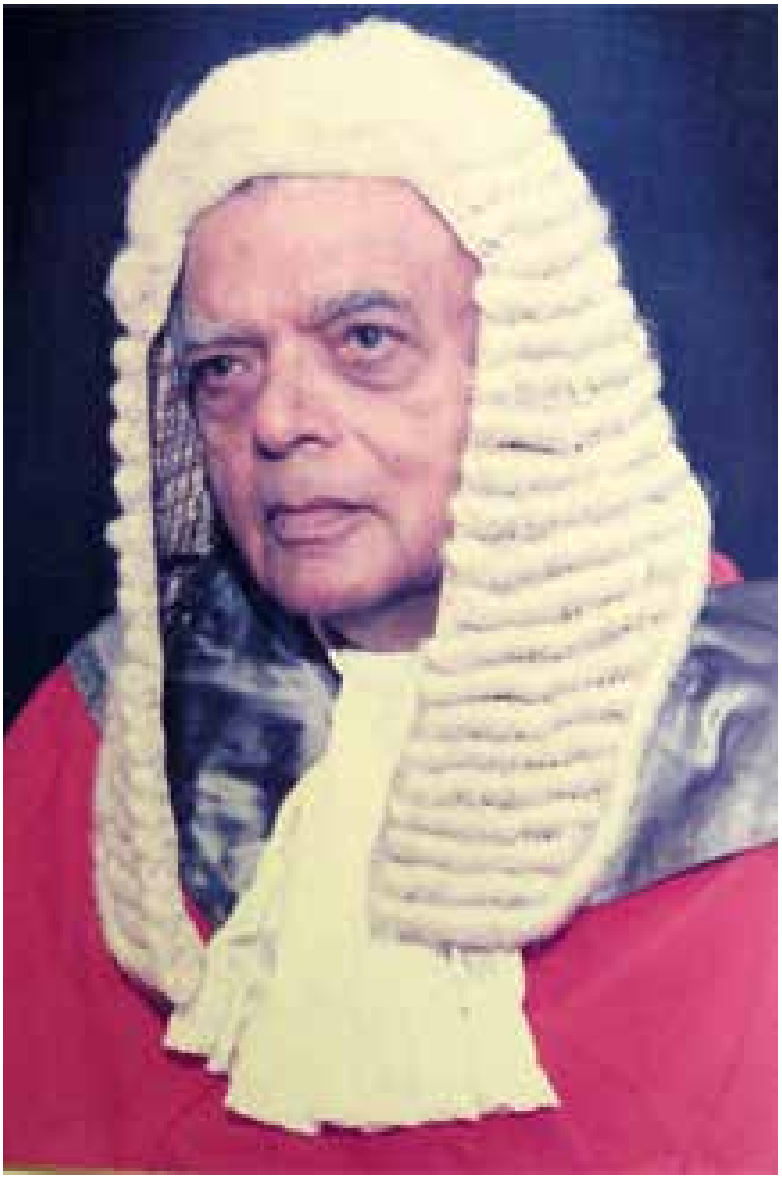
Nominations and applications to the *Tenth C.B Madan Prize* for outstanding contribution to constitutionalism and the rule of law in Kenya are now being accepted.

The Prize is awarded annually by *The Platform for Law Justice and Society* and is presented to an individual or group who has made a significant effort to advance the cause of constitutionalism and the rule of law in Kenya.

It commemorates the distinguished career of Hon. Mr. Justice C.B. Madan for his brilliance and independence, his sense of justice and deep understanding of the law, and – above all - his respect for the rule of law.

This year's *C.B Madan Prize* will be awarded in the month of December at a date and venue to be announced together with the recipient of the award as well as C.B Madan Student Awardees, in our next edition.

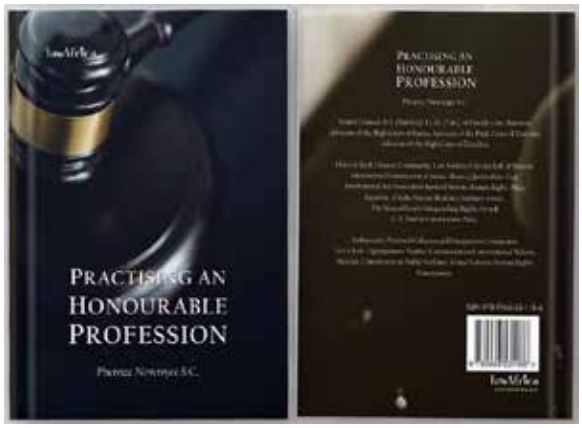
Any further information can be obtained from T*he C.B Madan Prize* Award Committee at editor@theplatformke.co.ke. All applications must be received at the above email by **October 20, 2024.**



COVER STORY

Pheroze Nowrojee SC discusses his latest book: Practising the Honourable Profession

By Miracle Okumu Mudeyi



Introduction

Pheroze Nowrojee SC's latest book, '***Practising An Honourable Profession***',[1] stands as a remarkable tribute to a lifetime devoted to upholding the principles of justice and integrity in the legal field. Known for his exceptional contributions to Kenya's legal community, Nowrojee's career exemplifies the highest standards of professionalism and ethics.

This book offers more than legal insights; it provides a heartfelt exploration of what it means to practice law with honour. Through his experiences and reflections, Nowrojee offers valuable guidance for both emerging and seasoned lawyers. By honoring Pheroze Nowrojee SC, I not only acknowledge his significant impact on the legal profession but also celebrate the enduring values he has championed. His work encourages all legal practitioners to uphold the core principles of fairness and respect in their practice, ensuring that the pursuit of justice remains at the heart of their work.

Recently, I had the opportunity to sit down with Pheroze Nowrojee SC, a figure whose contributions to the legal profession have been as impactful as they are enduring. Over tea, we explored issues that continue to shape the profession and our society, reflecting on the intersections of law, politics, and justice. Against the backdrop of his latest book, Nowrojee candidly discussed the evolution of the legal field, the challenges that young lawyers face today, and the unyielding principles that have guided his own journey. The conversation felt more like an exchange of ideas than an interview, offering insights that were as personal as they were thoughtful.

In this conversation, Nowrojee reflects on his extensive experience in the legal field, offering valuable insights into the challenges and triumphs that have shaped his distinguished career. We explore his perspectives on current legal issues, the evolution of legal practice in Kenya, and the

[1]Pheroze Nowrojee, *Practising an Honourable Profession* (Law Africa 2024).

Pheroze Nowrojee, born in Nairobi, is a leading human rights lawyer, a poet, and a writer, who over many decades has been an influential part of the political and social movements for constitutional and social change in Kenya.

guiding principles that have informed his approach to law. Through his reflections, Nowrojee provides a window into the values and experiences that have defined his journey, offering inspiration and guidance for both current and future generations of legal practitioners.

Your book, *Practicing an Honourable Profession*, is dedicated to your father and a broader ideal that resonates throughout your work. Could you elaborate on the significance of this dedication?

SC Pheroze Nowrojee: The dedication in my book is not merely to one individual but to a collective ideal shared by my family. This ideal was not limited to the legal profession or even to a single person; it was an ideal for Kenya. The thoughts and principles contained within the book survived and thrived in Kenya through some of the darkest years of our history. These were years marked by personal suffering and national repression, yet this ideal endured.

The Nairobi Law Monthly, for instance, had a print order of 15,000 copies and at one point reached 50,000 in July 1990, reflecting the peak of public support. This was not just about a profession; it was about the country, about Kenya's ideals. These ideals enabled the thoughts in this book to survive and later flourish. The dedication is a reminder that those dark days can return, and we must look to these ideals once again, as they propelled Kenya forward before and can do so again.

The book seems to intertwine the struggle of one man and his family with the broader struggle for Kenya. Could you speak more to this connection?

SC Pheroze Nowrojee: Indeed, while the book may focus on the legal profession, it is ultimately about the country. The struggle depicted is not just the struggle of one man or one family; it was a struggle for Kenya. The essence of this book represents what we have stood for over the years—not just as lawyers, teachers, or leaders, but as

individuals who have lived the profession most honorably.

You end your book with a powerful statement: "The defense of the rule of law is always a continuing task." Given the current situation in Kenya, how do you see this statement playing out today?

SC Pheroze Nowrojee: The defense of the rule of law is indeed a continuing task. Power that is unchecked tends to expand in the wrong direction, breaking down structures in order to maintain its hold. This was evident during the reigns of Jomo Kenyatta and Daniel Arap Moi, and it remains true today. The current regime, like any other that comes to power in questionable ways, seeks to remove the checks on its authority, starting with the judiciary. However, we are witnessing a pushback; our judges are not as easily intimidated or enticed as they once were. Many of them value something greater than money or titles—the ideals of justice that Kenya has always stood for.

This resistance is evident in the actions of young protesters today, who are demanding accountability on issues like the cost of living. These protests are a reflection of the regime's mishandling of governance, taxation, and the economy. The protesters are exercising their constitutional rights under Article 37 to assemble, despite attempts by the regime to curtail these rights through fear tactics such as water cannons, tear gas, rubber bullets, and, when all else fails, live ammunition. The ongoing state of abductions is reminiscent of the worst times under Moi, but it has reached unprecedented levels today.

You mentioned that despite the promise of the 2010 Constitution, we risk normalizing such oppressive actions if we do not make this an ongoing struggle. Could you elaborate on that?

SC Pheroze Nowrojee: Absolutely. The 2010 Constitution was a milestone, but it was not the end of our struggle. These dark forces can and do return. Our task is to continue pushing back against them, using the tools and strengths we now have. We have a generation that understands the failures of the current regime and a constitution that continues to protect those who invoke it. The judiciary, backed by the people, is one of our strongest pillars in this fight.

On page 285 of your book, you discuss the role of judges as the principal defenders of the Constitution and the rule of law. How well do you think the judiciary has upheld this role since the 2010 Constitution came into force?

SC Pheroze Nowrojee: The judiciary, both judges and magistrates, has done a tremendous job. Despite attempts by the regime to intimidate them, we have seen a significant shift. Unlike in the past, where we expected judges to throw out cases challenging the regime, today we have better expectations and stronger support from the public. However, it is essential that lawyers and advocates continue to bring these cases before the courts and to push the judiciary to uphold the law and the Constitution.

You also predicted that future generations of advocates would face similar dilemmas and dangers as those before the 2010 Constitution. How can the legal profession prepare to overcome these challenges in the face of a repressive regime?

SC Pheroze Nowrojee: The legal profession must first define its aim—whether it is to serve the executive or to remain independent. Our profession must hold to the ideal of independence from the executive. This is rooted in our history and is visible in our Constitution. Good training, strong ideals, and consistent practice are crucial. We must practice

Court of Appeal president Justice William Ouko and senior counsel Pheroze Nowrojee paying their last respects to retired late Justice Daniel Aganyanya.

our ideals and improve continuously. Fear cannot be a factor. As soldiers are not afraid during battle because they understand their mission, so must lawyers face their tasks without fear. The current repression, including abductions, must be met with persistent action and unwavering commitment to justice.

In your book, you also highlight the role of South African freedom fighter and judge Albie Sachs, who asked you whether what you were doing was right. Reflecting on that, do you believe that our ongoing struggle is the right path?

SC Pheroze Nowrojee: Yes, while abroad, I met a senior colleague from the University of Dar es Salaam's law faculty and a South African ANC freedom fighter Albie Sachs. He inquired about the situation in Kenya, and I conveyed that it was dire. I questioned whether they ever considered giving up. He responded by asking if I believed in the righteousness of my actions. When I affirmed that I did, he said, "Then what is there to give up?" This conversation reinforced the idea that if one believes in the correctness of their cause, surrender is not an option, no matter how challenging the circumstances. Albie Sachs' question was a profound one, and it still resonates today. Yes, our struggle is the right one. Despite the challenges, the repression, and the setbacks, we must continue. We are on the right path, fighting for the ideals of justice and the rule of law. This struggle is ongoing, and it is one we must continue with determination and conviction. The struggle continues, and we must all do our part.

You mentioned that the current situation seems paradoxically similar. Do you believe that today's Generation Z and their legal defenders share this belief in the righteousness of their cause?

SC Pheroze Nowrojee: Absolutely. Today's Generation Z, their advocates, and the Kenyan populace overwhelmingly believe

in the legitimacy of their demands. This collective conviction underscores the resilience against oppressive forces, as enduring belief and constant affirmation of one's rights are crucial in the face of such adversity.

On page 216 of your work, you discuss the concept of legal struggle as a patient accumulation of partial successes, likening it to diplomacy. You also emphasize the role of counsel in challenging insidious attacks on the rule of law. Given your extensive experience in public interest litigation, what role should the judiciary play in driving social change?

SC Pheroze Nowrojee: The judiciary has a critical role in upholding the rule of law and driving social change. However, the judiciary alone cannot effect change without the support of the bar. Both institutions must diligently perform their respective functions—advocates must present well-prepared cases, and judges must act impartially and conscientiously. Only through this collaboration can the rule of law be effectively upheld and social progress achieved.

Can you highlight a particular case that stands out as transformative in your career?

SC Pheroze Nowrojee: Two cases are particularly notable. The first is the *Nairobi Law Monthly* case, where we challenged a ban imposed by the Attorney General. This case was groundbreaking as it overturned a ban that had previously silenced dissenting voices. It demonstrated the judiciary's willingness to confront state-imposed censorship and was a significant victory for press freedom.

The second landmark case is the ***2017 presidential election*** challenge, which marked the first successful overturning of a rigged election in Kenya. This case is akin to the Brown v. Board of Education decision in the United States, establishing a precedent that, while not resolving all issues, set a significant legal and moral benchmark for future electoral integrity.

Reflecting on the relationship between the executive and judiciary, what are your thoughts on the *BBI case* and the *Stephen Muriithi case*?

SC Pheroze Nowrojee: In the ***BBI case***, the Supreme Court's decision that service of process must be directed through the Attorney General rather than the President raises concerns about accessibility to justice and accountability. Similarly, in the ***Stephen Muriithi case***, the court's technical rejection of compensation due to procedural issues with the Attorney General highlights ongoing challenges in addressing historical injustices. Both cases reflect systemic issues where technicalities can obstruct justice and accountability.

What advice would you offer to young legal professionals and advocates?

SC Pheroze Nowrojee: I would advise young professionals to rigorously engage with key legal issues, to be prepared and persistent in their advocacy. The legal field requires both strategic litigation and a deep commitment to principles of justice. Staying informed about landmark cases and actively contributing to discussions on legal reforms are essential for advancing the rule of law.

Could you elaborate on the significance of the platform provided to you 40 years ago, and how it has influenced your current perspective on constitutional and legal defense?

SC Pheroze Nowrojee: The platform given to me four decades ago was pivotal. It allowed me to contribute meaningfully to the defense of constitutional principles both legally and politically. Today, as I reflect on the developments, I see parallels between

the current political climate and historical patterns. For instance, the recent actions by leaders such as Modi, aiming to undermine constitutional structures, underscore the importance of maintaining vigilance. Despite the strengthened constitutional framework, we must continually reinforce its integrity to prevent erosion.

How do you view the current administration's actions in relation to historical precedents set by leaders like Moi, and what implications does this have for the legal field?

SC Pheroze Nowrojee: The current administration's actions can be seen as reminiscent of the approaches taken by Moi, particularly in terms of undermining constitutional safeguards. This poses a significant issue for us as legal practitioners, as it challenges us to defend the constitution with greater resolve. The historical context of such actions informs our strategies and responses in contemporary legal battles.

What are your reflections on the judicial approach to justice and mitigation, particularly in relation to historical court martial practices?

SC Pheroze Nowrojee: Reflecting on historical judicial practices, particularly in court martial settings, it is evident that mitigation of injustice was often viewed with skepticism. The principle that one cannot mitigate an inherent injustice remains a cornerstone of my legal philosophy. Historical figures such as Aragon, who presided over significant cases, exemplify the challenges faced in balancing justice and mitigation.

In your professional experience, what advice would you offer to young lawyers entering the field? What should they focus on and what pitfalls should they avoid?

SC Pheroze Nowrojee: My advice to young lawyers is to focus on the fundamental principles outlined in my book. Chapter 1 discusses the essential character of an advocate, which is crucial for personal and professional development. Chapter 6 addresses our role within the profession, highlighting that the questions we face as novices remain relevant throughout our careers. Additionally, Chapter 10 explores how to overcome challenges and maintain resilience. Emphasizing constancy in ideals and persistence in action will guide you through your professional journey.

How do you envision your legacy in the legal profession, and what core principles do you hope will stand out?

SC Pheroze Nowrojee: I hope my legacy will reflect a steadfast adherence to professional ideals and persistent efforts to realize those ideals. The constancy of one's principles, even when faced with tempting offers or challenges, and the relentless pursuit of justice, are key aspects of my legacy. Despite the inevitable challenges and partial realizations of these ideals, the commitment to them remains crucial.

Are there any additional comments or advice you would like to share with the legal community?

SC Pheroze Nowrojee: It is important for legal professionals to remain adaptable and resourceful. Even when traditional avenues are closed, finding alternative methods to advocate for justice is essential. The resilience and creativity demonstrated in past legal battles serve as a reminder that persistence and innovative approaches are vital for advancing our principles.

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

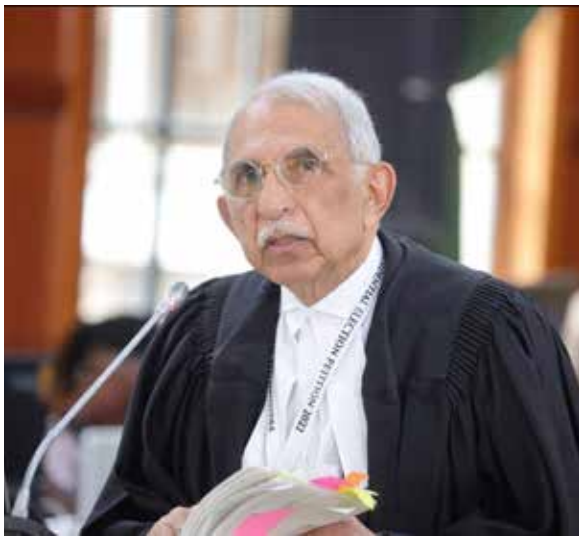
Pheroze Nowrojee SC: Unabashed, unbending and unwavering

By Muriuki Wahome

Introduction

The saying goes that there are many ways to the top of a mountain, but the journey to the summit varies for each climber. Pheroze Nowrojee's climb has undoubtedly been an interesting one, boasting a career both monumental and inspiring. With a remarkable career traversing through litigation, activism and human rights advocacy, his life's work has left a visible and indelible mark on Kenya's legal and sociopolitical spheres. Not many people get to meet their heroes, and fewer get to come across the acolyte nature that Senior Counsel Nowrojee possesses as a transformative figure who has actively formed and shaped what we understand of justice and liberty in Kenya today.

With his grandparents arriving in Kenya to build the Kisumu to Mombasa railway,[1] It inadvertently goes without saying that Pheroze Nowrojee was born into a family already ingrained into the vicissitudes of public service. His early life was shaped by the complex socio-political dynamics of colonial Kenya, where the fight for independence and the quest for human rights were at the forefront of societal discourse. These formative years were crucial in shaping Nowrojee's worldview, one that combined a deep sense of justice with a commitment to the rule of law.



Senior Counsel Pheroze Nowrojee

Nowrojee's pursuit of legal education took him to the prestigious University of Delhi, where he was exposed to a diverse and intellectually stimulating environment. It was here that he first encountered the works of legal giants like Mahatma Gandhi and Jawaharlal Nehru, whose writings and activism would have a lasting impact on his approach to law. His academic journey continued at the London School of Economics, an institution renowned for its rigorous academic standards and

[1]Pherozie Nowrojee, 'A Kenyan Journey' (Google Books2019) <https://books.google.com/books/about/A_Kenyan_Journey.html?id=F-gixgEACAAJ> accessed 6 August 2024.

progressive ethos. This experience not only honed his legal skills but also deepened his understanding of the law's role in shaping societies.

Upon returning to Kenya, Nowrojee brought with him a wealth of knowledge and a passion for justice that would define his career. The combination of his education abroad and the rich history of his homeland equipped him with a unique perspective—one that was both technically proficient and deeply rooted in a commitment to human rights.

The Makings of a Senior Counsel: Nowrojee's Spectacular Early Career

In the early 1970s, when Kenya was experiencing severe political turmoil, Nowrojee started his profession. Political power, civil rights, and the consolidation of state authority were all hotly contested topics in the years after independence.[2] Nowrojee emerged as a fearless lawyer at this delicate time, taking on issues that others would have avoided, especially those that concerned political freedom and human rights.

A prominent and early case he took on was that of a raging political activist named Koigi wa Wamwere, who was imprisoned under the harsh restrictions of the Moi reign. Sedition was a common tool to stifle political criticism, and it was employed against Wamwere, a vociferous opponent of the administration.[3] By defending Wamwere, Nowrojee showed not only his skill as a lawyer but also his unwavering commitment to upholding the rule of law and protecting people's rights. The case was a watershed moment in Nowrojee's career, solidifying his reputation as an unafraid champion of justice, ready to take on the state in protection of his clients' rights.

Pheroze Nowrojee was also instrumental in defending Raila Odinga, a prominent opposition leader, during his multiple detentions in the 1980s under the repressive Moi government. Odinga was detained without trial as part of the government's broader crackdown on political dissent[4]. Nowrojee's legal strategies challenged the legality of these detentions, arguing that they were unconstitutional and politically motivated. His work not only aided in Odinga's eventual release but also exposed the authoritarian nature of the regime, galvanizing the movement for democratic reforms in Kenya.

Another landmark case in his early career was the defense of the Mwakenya detainees in the 1980s. The Mwakenya movement, an underground organization opposed to the Moi government, saw many of its members detained without trial under the infamous Public Security Act.[5] Nowrojee's defense of these individuals was both legally and politically significant, as it highlighted the government's misuse of power and its violation of fundamental human rights. His involvement in these cases not only brought him national recognition but also solidified his reputation as a champion of civil liberties.

The Intersection of Law and Activism: Shaping Kenya's Political Landscape

The life and work of Pheroze Nowrojee demonstrate how the law may be a potent

[2]Julius Gathogo, 'Consolidating Democracy in Kenya (1920-1963)' (2020) 1 Jumuga Journal of Education, Oral Studies, and Human Sciences (JJEOSHS) 1.
[3]Koigi wa Wamwere, *I Refuse to Die: My Journey for Freedom* (2002).
[4]Raila Odinga, *The Flame of Freedom* (2013).
[5]'Kenya: Abusive Use of the Law: Koigi Wa Wamwere and Three Other Prisoners of Conscience on Trial for Their Lives | Refworld' (Refworld2023) <https://www.refworld.org/reference/countryrep/amnesty/1994/en/94441> accessed 6 August 2024.

Pheroze Nowrojee SC address at the official opening of Law Society of Kenya Annual Conference 2024 at the Diamonds Leisure Beach and Golf Resort.

instrument for societal transformation. Nowrojee has been an influential figure in Kenyan politics outside of the courtroom as well, speaking up for civil rights and constitutional change. His involvement with these concepts is evident in his books, lectures, and public appearances, and his impact goes far beyond the realm of law.

The constitutional review process that led to the adoption of the 2010 Constitution was a major accomplishment for Nowrojee in terms of his impact on Kenya's political and legal coming of age.[6] The procedure was the result of Nowrojee's decades-long fight for social justice, during which she played a pivotal role. It was under his leadership as senior counsel that the Kenyan people's hopes and dreams for human rights, devolution, and the division of powers were advanced. It is often believed that this constitution is one of the most progressive in Africa, and his extensive knowledge of the law and his steadfast dedication to justice were important factors in its development.

As an activist, Nowrojee is also visible in his work on human rights concerns on a global scale. He has championed human rights causes all around the world and spoken out against the suppression of civil freedoms, lending his knowledge to organizations fighting for equality in Africa and beyond. His involvement in the field of international law and his engagement with groups like the International Commission of Jurists (ICJ) demonstrate his dedication to upholding human rights. The worldwide reputation of Kenya as a nation devoted to human rights and rule of law has been enhanced because to Nowrojee's participation in these endeavors.

A Legacy of Literature: Contributions to Legal Scholarship

Pheroze Nowrojee has rendered substantial contributions to the realm of legal studies in addition to his efforts in activism and the courts. Among the many subjects addressed in his publications are human rights, constitutional law, and the judiciary's responsibility to preserve democratic values. His magnum opus, "Practising an Honourable Profession," captured his views on the function of lawyers and the legal profession as a whole.

Nowrojee contends in his book that the law is more than just a collection of regulations; it is a self-sustaining organism that has to adapt to the changing requirements of society. Integrity, independence, and bravery are characteristics he has lived by throughout his career as an attorney, and he stresses their significance. His works have inspired many future attorneys in Kenya

[6]Yash Pal Ghai, Kenya's Constitution: An Instrument for Change (2011).

and beyond, and they have received several citations in the legal community. Academics and practitioners alike may benefit much from the scholarship that Nowrojee has produced, which he has aided in the advancement of Kenyan legal thinking.

Nowrojee's contributions to legal scholarship are not limited to books and articles; he has also been a sought-after speaker at various international conferences and academic institutions. His lectures, particularly those on the role of the judiciary in protecting human rights, have been well-received and have contributed to the global discourse on these critical issues. His ability to bridge the gap between legal theory and practical application has made his work particularly valuable, as it provides both a philosophical foundation and practical guidance for those working in the field of law. Look no further than his Mahatma Gandhi lecture for evidence of this.[7]

The Human Side of Law: Personal Values and Professional Ethics

What sets Pheroze Nowrojee apart from many of his contemporaries is not just his legal acumen but his unwavering commitment to professional ethics and personal integrity. Throughout his career, Nowrojee has been guided by a set of core values that emphasize the importance of fairness, justice, and the rule of law.[8] These values are reflected not only in his legal work but also in his interactions with colleagues, clients, and the broader community.

Nowrojee's devotion to ethics is possibly most shown by his reluctance to compromise on ideals, even in the face of enormous pressure. This was obvious in his handling of politically delicate issues, when he constantly prioritised justice before personal or political advantage. His ethical approach has garnered him the admiration of his colleagues and established a high bar for Kenya's legal profession. His approach to legal practice reminds us that, at its finest, the law is a noble profession that requires not just expertise but also a strong sense of social duty.

Moreover, Nowrojee's humility and dedication to mentoring young lawyers have further cemented his legacy. He has been a mentor to many in the legal profession, providing guidance and support to those who follow in his footsteps. His approach to mentorship is rooted in the belief that the law is a noble profession that requires not only skill but also a deep sense of responsibility to society. By sharing his knowledge and experience with the next generation of lawyers, Nowrojee has ensured that his values and principles will continue to influence the legal profession for years to come.

Landmark Cases

Pheroze Nowrojee's legal career is replete with landmark cases that have had a lasting impact on Kenyan jurisprudence. One of the most notable cases is the 2007-2008 Kenyan presidential election petition, where Nowrojee played a critical role in challenging the election results. This case was a turning point in Kenya's political history, as it exposed significant flaws in the electoral process and led to widespread violence across the country.[9] Nowrojee's legal arguments in this case were instrumental in highlighting these flaws

[7]'Pheroze Nowrojee Gives Annual Gandhi Lecture | Yale MacMillan Center South Asian Studies' (*Yale.edu*2017) <https://southasia.macmillan.yale.edu/news/pheroze-nowrojee-gives-annual-gandhi-lecture> accessed 6 August 2024.
[8]Yu Voloshyna, 'Integrity in the Professional Activity of a Lawyer' 16.
[9]Felix Odhiambo Owuor, 'The 2007 General Elections in Kenya: Electoral Laws and Process' (2008) 7 Journal of African elections 113.

and set the stage for significant reforms in Kenya's electoral laws.

The case was not just about the election results; it was about the integrity of the electoral process and the need for transparency and accountability in the conduct of elections. Nowrojee's involvement in this case demonstrated his deep commitment to the principles of democracy and the rule of law. His arguments were not only legally sound but also morally compelling, as they underscored the importance of upholding the will of the people in a democratic society.

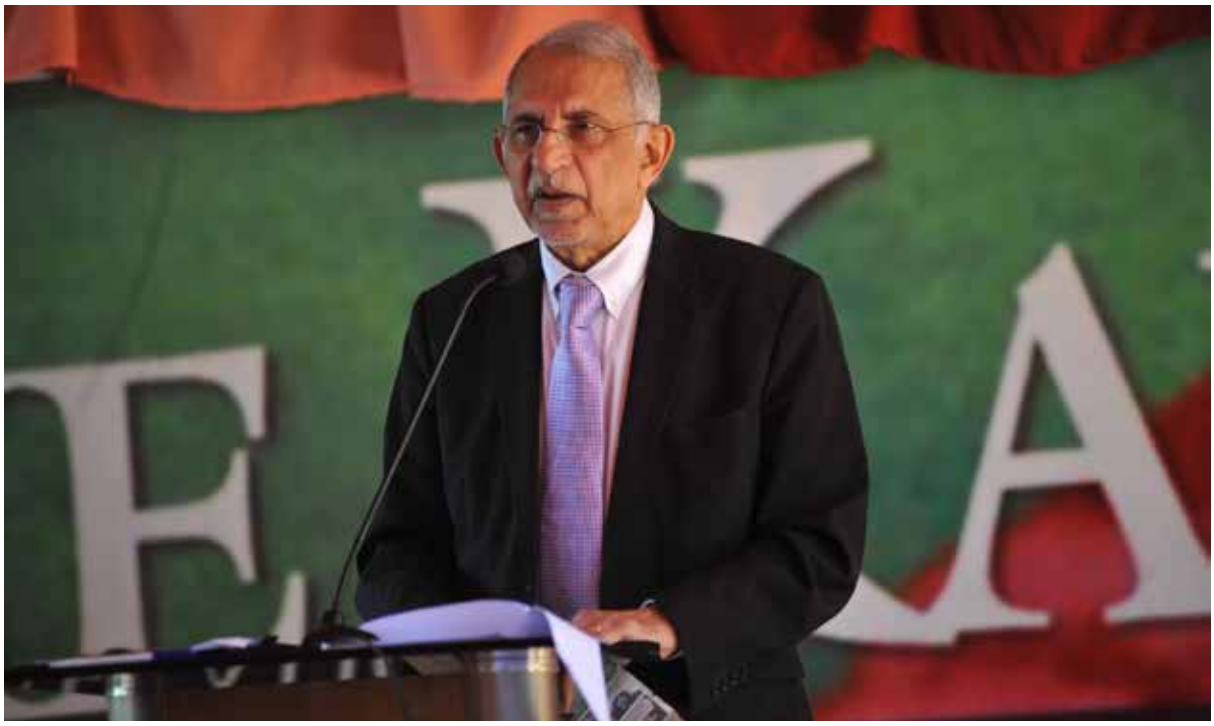
Another landmark case in Nowrojee's career was his involvement in the Goldenberg scandal, one of Kenya's largest corruption cases. The scandal, which came to light in the early 1990s, involved the Kenyan government's compensation of Goldenberg International, a company that claimed to have exported gold and diamonds, but which in reality had engaged in massive fraud.[10] The scandal is estimated to have cost Kenya the equivalent of more than 10% of its GDP at the time.Nowrojee represented various parties seeking justice and accountability in this scandal, including the Law Society of Kenya. His work was instrumental in the legal battles that sought to expose the truth behind the fraudulent activities and bring those responsible to justice.

He was also instrumental in the defense of the editors of The Standard newspaper, who were arrested and charged with sedition in 1993 after publishing articles critical of the Moi government.[11] Nowrojee's defense strategy emphasized the fundamental role of a free press in a democratic society and the dangers of suppressing dissenting voices. He argued that the charges were an abuse of the legal process and a violation of the constitutional right to freedom of expression.The case was a pivotal moment in the struggle for press freedom in Kenya. Although the editors were initially convicted, their sentences were later overturned on appeal, thanks in large part to the efforts of Nowrojee and his legal team.

Another significant case was his involvement in the fight against the oppressive colonial-era laws that continued to linger in Kenya's legal system post-independence. Many of these laws were relics of the colonial period, designed to suppress dissent and maintain the power of the colonial administration. Nowrojee's work has also extended to the international arena, where he has been involved in cases related to human rights violations in other African countries. His involvement in these cases has not only contributed to the protection of human rights but has also enhanced Kenya's reputation as a country committed to the rule of law. Through his work, Nowrojee has demonstrated that the fight for justice and human rights transcends national boundaries and that lawyers have a responsibility to stand up for these principles wherever they are threatened.

This can be seen through his pivotal role in the legal battles for reparations on behalf of former Mau Mau fighters who had suffered atrocities during Kenya's colonial period. He advocated for the recognition of these veterans' rights and supported their claims against the British government, seeking justice for the horrific abuses they endured. The case led to a historic settlement in which the British government agreed to compensate the victims, marking

[10]Paul Goldstein, *The Goldenberg Scandal and Its Impacts on Kenya's Political Economy* (2005).
[11]Amnesty International, 'KENYA, TANZANIA, UGANDA, ZAMBIA and ZIMBABWE @Attacks on Human Rights through the Misuse of Criminal Charges' <https://www.amnesty.org/en/wp-content/uploads/2021/06/afr010011995en.pdf> accessed 6 August 2024.



Pheroze Nowrojee, originally from India, played a notable role in Kenya's political and social landscape during the early to mid-20th century. His work in Kenya, particularly in the context of the Indian community and broader political activism, has been acknowledged as part of Kenya's historical narrative.

a significant acknowledgment of colonial wrongs.[12] Nowrojee's work in this case was crucial in bringing international attention to the plight of the Mau Mau veterans and securing long-overdue justice.

Awards and Recognition: A Career Acknowledged

Throughout his career, Pheroze Nowrojee has received numerous awards and accolades, recognizing his contributions to the legal profession and society at large. Among the most prestigious is his appointment as Senior Counsel, a title that is bestowed upon lawyers who have demonstrated exceptional skill and integrity in their practice. This recognition is a testament to Nowrojee's enduring commitment to the principles of justice and fairness.

In addition to being named Senior Counsel, Nowrojee has received several other awards for his work in human rights and constitutional law. These include the International Commission of Jurists' Jurist of the Year Award,[13] the Law Society of Kenya's Lifetime Achievement Award, and the Presidential Order of the Burning Spear, one of Kenya's highest honors. These honors reflect the high esteem in which he is held by his peers and the broader legal community. They are also a recognition of the impact that his work has had on the legal profession in Kenya and beyond.

The Legacy of Pheroze Nowrojee: Inspiring Future Generations

Pheroze Nowrojee's legacy is one that will continue to inspire future generations of lawyers, activists, and scholars. His career

[12]Caroline Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (2005).
[13]ICJ Kenya. (2019). Human rights and rule of law: Annual report. Nairobi: International Commission of Jurists.

Pheroze Nowrojee's professional career in Kenya is characterized by his dedication to legal practice, political activism, and community service, leaving a lasting impact on both the Indian community and the broader Kenyan society.

exemplifies the idea that law can be a powerful tool for social change, and that lawyers have a responsibility to use their skills to advance justice and protect the vulnerable. Nowrojee's work has not only shaped the legal landscape in Kenya but has also contributed to the global discourse on human rights and the rule of law.

As Kenya continues to evolve, the principles that Nowrojee has championed—integrity, justice, and the rule of law—will remain as relevant as ever. His life and career serve as a reminder that the legal profession is not just about winning cases but about making a positive impact on society. For those who seek to follow in his footsteps, Nowrojee's legacy offers a blueprint for how to practice law with honor and purpose.

Moreover, Nowrojee's influence extends beyond the legal profession. His commitment to social justice and human rights has made him a role model for activists, scholars, and public servants. His work has shown that it is possible to effect change through legal means and that the law can be a powerful tool for advancing the cause of justice. In a world where the rule of law is increasingly under threat, Nowrojee's example serves as a beacon of hope and a call to action for all those who believe in the power of the law to transform society.

Conclusion

A testament to the law's ability to influence significant social change is perfectly exemplified by Pheroze Nowrojee's professional career. The political and legal climate in Kenya has been forever changed by his contributions as a mentor, scholar, activist, and lawyer. Both his legal acumen and his steadfast dedication to fairness and human rights are shown by his accomplishments. Looking back on Nowrojee's career, it's easy to see how his legacies will shape the bar in Kenya and beyond for years to come. Distinguished ladies and gentlemen, this is none other than Pheroze Nowrojee: Unabashed, Unbending & Unwavering.

Muriuki Wahome is a finalist law student at the University of Nairobi.

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Crimes against humanity: The role of command responsibility in addressing police violence during Kenya's anti-Finance Bill protests

By Youngreen Peter Mudeyi

Abstract

This paper explores the doctrine of command responsibility in the context of human rights violations during Kenya's Anti-Finance Bill protests, drawing from pivotal cases such as Baby Pendo and the Garissa University Al-Shabaab attacks. The study critiques the application of command responsibility in Kenyan law compared to international standards, emphasizing the need for accountability among police commanders who issued unlawful orders during these protests. By analyzing the historical development of command responsibility—from its early concepts in Hugo Grotius' writings to its formalization in the Geneva Conventions and the Rome Statute—the paper argues that Kenya must borrow from international norms when dealing with the Doctrine of Command Responsibility. The analysis highlights the systemic nature of the human rights abuses committed and asserts that these actions constitute crimes against humanity. Recommendations are made for prosecuting implicated authorities to uphold justice and prevent future abuses.

1.0. Introduction

The reasoning of the High Court in the *Baby Pendo case*[1] and the Garissa University *Alshaabab case*[2] has raised very important issues and questions around command responsibility. These decisions have been rendered at a time when the Police Commanders have been issuing orders[3] that violate national and international human rights principles intending to curb the peaceful Anti-Finance Bill protest, an outright limitation of the right to peacefully picket and demonstrate.[4] The paper aims to

[1]See Republic & another v Yoma & 11 others & another; Independent Medico-Legal Unit & 2 others (Interested Party) (Criminal Case E074 of 2022 & Miscellaneous Criminal Application E033 of 2023 (Consolidated)) [2024] KEHC 8984 (KLR) (Crim) (25 July 2024) (Ruling) < Available at https://kenyalaw.org/caselaw/cases/view/295793/ > Accessed on 30th July 2024.

[2]See Legal Aid Center T/A Kituo Cha Sheria & 84 others v The Cabinet Secretary Ministry of Education & 7 others, Petition No. 104 of 2019, (CONSOLIDATED WITH PETITION 353 OF 2022 AND PETITIONS 209, 210, 211, 212, 213, 214, 215 of 2021) Judgement of the High Court of 31st day of July 2024. < Available at Pet._104_of_2019[1].pdf >

[3]See ICJ Kenya Commission, 'Command and Individual Responsibility in Law Enforcement: Lessons for Kenyan Police - ICJ Kenya' (ICJ Kenya - International Commission of Jurists27 June 2024) < Available at https://icj-kenya.org/news/command-and-individual-responsibility-in-law-enforcement-lessons-for-kenyan-police/#:~:text=NAIROBI%2C%20Kenya%20%E2%80%93%20The%20doctrine%20of,crimes%20committed%20by%20their%20subordinates > accessed 3 August 2024.

[4]Constitution of Kenya 2010, Article 37. Article 2(6) states that any Convention or Treaty Ratified by Kenya shall form part of the Laws of Kenya. For this reason, this right is also found in the International Covenant on Civil and Political Rights (ICCPR) Article 21, the African Charter on Human and Peoples' Rights (Banjul Charter) Article 11, and the Universal Declaration of Human Rights (UDHR) Article 20(1). I acknowledge that this right is not an absolute right but its limitation is supposed to be as provided by the law in Article 24 of the Constitution of Kenya.

establish how police commanders and their juniors can be held accountable for human rights violations during the Anti-Finance Bill protests,[5] arguing these violations amount to crimes against humanity. It calls for prosecution by the Director of Public Prosecutions and draws on international law due to the underdevelopment of the Command Responsibility doctrine in Kenya.[6] The paper defines Command Responsibility, traces its history, and analyzes its application in International Law, highlighting aspects Kenya can adopt. It then examines the Anti-Finance Bill protests, focusing on police orders and calling for the prosecution of those responsible for human rights violations. The paper concludes with recommendations for the doctrine's future in Kenya.

2.0. History of the Doctrine of Command Responsibility

Command responsibility, a principle in international law,[7] traces its origins back to early concepts of accountability articulated by Hugo Grotius in the 17th century.[8] Grotius proposed that communities or rulers could be held responsible for crimes they failed to prevent when they had the power and obligation to do so.

The modern doctrine of command responsibility began to take shape in the aftermath of World War I, notably during the Versailles Conference, where it was discussed but not fully embraced.[9] The principle gained prominence after World War II, particularly through the Tokyo trials, which significantly shaped its current form.[10] The Tokyo trials were important as they marked the first time that a commanding officer, General Tomoyuki Yamashita, was held criminally liable for atrocities committed by subordinates, despite lacking direct evidence linking him to the crimes.[11]

The Tokyo Tribunal's use of "negative criminality" or liability for failure to act, where commanders were judged based on their failure to prevent or address crimes, was a groundbreaking development.[12] This approach was controversial and not widely accepted before these trials, with previous legal standards requiring direct involvement or knowledge of the crimes.[13] The Tribunal's acceptance of this theory reflected a shift towards a broader interpretation of

[5]The Kenya National Human Rights Commission has noted that as of 1st July 2024, thirty-nine people had died (other sources have it that 50 people died) and 361 were injured (Citizen Digital states that there were 413) out of the police brutality that occurred during the Anti-Finance Bill protests. < Information available at https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1200/Update-on-the-Status-of-Human-Rights-in-Kenya-during-the-Anti-Finance-Bill-Protests-Monday-1st-July-2024 > Accessed on 31st July 2024.

[6]The doctrine of Command Responsibility has its roots in the Rome statute where leaders can be held accountable for crimes against humanity among other International Crimes where they give orders to their subordinates and the orders are the source of the violations.

[7]See L.C. Green, Command Responsibility in International Humanitarian Law, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 320-28 (1995) (discussing the historical development of the doctrine from fifteenth-century France to World War II).

[8]See HUGO GROTIUS, THE LAW OF WAR AND PEACE 523 (Francis W. Kelsey trans., 1925) (1625) (Exploring the historical foundations of a community's responsibility in addressing specific criminal offenses).

[9]See , e.g., Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, Mar. 19, 1919, 14 AM. J. INT'L L. 95, 117 (1920) (holding that high-ranking officers are liable to criminal prosecution for "offences against the laws and customs of war or the laws of humanity") in O'Reilly, Arthur Thomas, "Command Responsibility: A Call to Realign Doctrine with Principles," American University International Law Review: Vol. 20: Issue. 1, (2004) Article 5. Available at: https://digitalcommons.wcl.american.edu/auilr/vol20/iss1/5 > Accessed on 4th August 2024.

[10]See ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 6 (1962).

[11]See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW, BEYOND THE NUREMBURG LEGACY 6 (1997).

[12]Richard H. Minear, 'Victors' Justice: The Tokyo War Crimes Trial,' 67 (1971).

[13]Ibid.

command responsibility, though it faced criticism for its perceived reliance on Victor's justice and lack of clear legal standards.[14]

In 1977, the doctrine was codified with the adoption of Article 86 in the Additional Protocol I to the Geneva Conventions. This article formalized the responsibility of commanders to prevent and address violations of international law committed by their subordinates, even when they lack direct knowledge of the crimes.[15] Article 86 requires that superiors take all feasible measures to prevent or repress breaches, establishing a legal obligation that extends beyond mere negligence to encompass a higher standard of recklessness or willful blindness.[16]

The International Criminal Tribunal for the Former Yugoslavia (ICTY) with Article 7(3) of its Statute outlining command responsibility states that superiors can be held accountable for crimes committed by subordinates if they knew or should have known about these crimes and failed to act.[17] Initially, this provision preserved a negligence standard, though its interpretation evolved. The ICTY jurisprudence indicates that the mens rea requirement involves more than mere negligence; it extends to a form of recklessness or willful blindness.[18] The Tribunal emphasized that ignoring clear evidence of crimes by subordinates constitutes a serious breach of duty. This will later on be relevant in this paper as it will show that if the office of the Director of Public Prosecutions fails to take relevant actions, it will be a breach of fundamental human rights.

Tens of thousands of Rwandan refugees who were forced by the Tanzanian authorities to return to their country despite fears they will be killed upon their return stream back towards the Rwandan border on a road in Tanzania, Dec. 19, 1996.

The doctrine further developed in response to atrocities in Rwanda. The International Criminal Tribunal for Rwanda (ICTR) was formed with Article 6(3) of its Statute mirroring the ICTY's provisions but has shown a slight variability in its application of the mens rea standard.[19] Cases such as *Prosecutor v. Musema*[20] required a high level of negligence, almost akin to acquiescence, while *Prosecutor v. Bagilishema*[21] adopted a

[14]Ibid.
[15]Claude Pilloud et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 1014 (Yves Sandoz et al. Eds., 1987)
[16]See Steven R. Ratner & Jason s. Abrams, 'Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg legacy (1997) p 6.
[17]International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 7(3), U.N. Doc. S/RES/827 (1993). < Available at: http://www.un.org/icty/lbasic/statut/statll-2004.htm > Accessed on 31st of July 2024.
[18]See Prosecutor v. Delalic, Case No. IT-96-21-T, para 392 (I.C.T.Y. Nov. 16, 1998) and Prosecutor v. Blaskic, Case No. IT-95-14-T, para 332 (I.C.T.Y. June 7, 2001).
[19]O'Reilly, Arthur Thomas "Command Responsibility: A Call to Realign Doctrine with Principles," American University International Law Review: Vol. 20: Issue. 1, (2004) p 83.
[20]See Prosecutor v. Musema, Case No. IT-96-13-A, para 131 (I.C.T.R. Jan. 27, 2000).
[21]See Prosecutor v. Bagilishema, Case No. IT-95-1A-T, para 46 (I.C.T.R. June 7, 2001).

less stringent negligence standard, focusing on whether a superior's ignorance resulted from negligence.

Last in the development, the International Criminal Court (ICC), through Article 28 of its Rome Statute, codified command responsibility with distinctions between military and civilian superiors. The ICC's statute demands that superiors either knew or consciously disregarded clear indications of subordinate crimes and failed to act.[22]

3.0. The Doctrine of Command Responsibility in International Law: What Should Kenya borrow

It is a truism that the Constitution of Kenya 2010 is the Supreme Law and it binds every person and state organ.[23] It provides that conventions and treaties that are ratified by Kenya shall form part of the laws of Kenya.[24] This then means that where Kenya has ratified an International instrument, and the instrument is not in conflict[25] with the municipal laws, the instrument will automatically be law. The Supreme Court of Kenya in the *Mitubell case*[26] stated that in the hierarchy of laws and norms in Kenya, International Law ranks after the Constitution, Statutes, and Kenyan case laws. It is important to note that this hierarchy only applies where there is a conflict of laws and where such a conflict does not exist, then International Law principles can be applied. International Laws that govern the doctrine of Command Responsibility do not conflict with any of our municipal laws[27] and that's what informs my idea of borrowing from them.

Kenya is a signatory to the Rome Statute,[28] which created the International Criminal Court. Notably, in 2008, Kenya incorporated the Rome Statute into its national law through the International Crimes Act.[29] The International Crimes Act provides that any person who commits a crime against humanity is liable of an offence.[30] I will later revisit this in the subsequent section where the paper will outline the elements of a crime against humanity and whether the violations of human rights during the Anti-Finance Bill protests meet the threshold.

Section 7 of the International Crimes Act provides that to proceed with offenses under section 6, Article 28 of the Rome Statute will apply when dealing with matters which relate to the responsibility of commanders and other superiors.[31] Article 28 of the Rome Statute provides that a military commander or equivalent, as well as a superior in non-military contexts, shall be liable for crimes

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[22]Rome Statute of the International Criminal Court, July 17, 1998, art. 28, U.N. Doc. A/CONF. 183/9. < Available at: http://www.un.org/law/icc > Accessed on 31st July 2024.
[23]Constitution of Kenya 2010, Article 2(1).
[24]Ibid, Article 2(6).
[25]The Constitution provides that any law that conflicts with the Constitution is null and void to the extent of its inconsistency.
[26]See Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) para 132. < Available at http://kenyalaw.org/caselaw/cases/view/205900/ > Accessed on 31st July 2024.
[27]Republic & another v Yoma & 11 others & another; Independent Medico-Legal Unit & 2 others (n 1 above) para 29 and 44 where the Court observed that Article 245 focuses on the national command hierarchy of the police service and the Inspector General's authority over the service. In contrast, Sections 6(3)(a) & (b) and 7(1)(f) of the International Crimes Act, along with Article 28(b) of the Rome Statute, address individual criminal liability. There is no evident conflict between these provisions and Article 245 or Article 157 of the Constitution. The relationship between the Constitution, general rules of international law, international treaties, and domestic law has been previously addressed in the context of this dispute.
[28]Rome Statute of the ICC, 17th July 1998. < Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court >
[29]Act No. 16 of 2008, Laws of Kenya CAP 60. < Available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2060 > Accessed on 31st July 2024.
[30]International Crimes Act, Section 6(1b).
[31]Ibid, Section 7(1f).

Demonstrators protest against Kenya's controversial finance bill in Nairobi.

within the Court's jurisdiction committed by forces or subordinates under their effective command, authority, and control, as a result of their failure to exercise proper control.

4.0. Anti-Finance Bill protests and the Human Rights Violations committed: Who should be held Accountable

This section addresses crimes against humanity as defined by the Rome Statute and integrated into Kenyan law through the International Crimes Act. It outlines the standards for using force, emphasising that firearms should be a last resort and that force must be reasonable. I start by analysing the elements of a crime against humanity and weighing them against the violations that occurred during the Anti-Finance Bill protests.

4.1. Crimes Against Humanity: Do the violations meet the threshold

Crimes against humanity were established in positive law through the Nuremberg and Tokyo Tribunals to address extensive human rights abuses by the Nazis, targeting both occupied nations and German citizens.[32] This concept was later included in the statutes of the ICTY, ICTR, SCSL, ECCC, and ICC.[33] Kenya then ratified the Rome statute and domesticated it by enacting the International Crimes Act.

The International Crimes Act states that Crime against humanity" refers to the definition provided in Article 7 of the Rome Statute. It encompasses any act recognized as a crime against humanity under conventional international law or customary

[32]See the Martens Clause (named after Russian delegate Fyodor Martens) in the preambles of the 1899 and 1907 Hague Conventions and See also M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 86 –111 (2011).
[33]This paper focuses on the ICC Statute, popularly known as the Rome Statute to which Kenya is a signatory.

international law that is not specifically addressed in the Rome Statute or this Act.[34] The Rome statute provides that a "crime against humanity" refers to acts committed as part of a widespread or systematic attack against civilians with awareness of the attack. These acts include murder, extermination, enslavement, deportation or forcible transfer, severe deprivation of physical liberty, torture, various forms of sexual violence, persecution of identifiable groups, enforced disappearance, apartheid, and other inhumane acts causing significant suffering or harm.[35] It further states that an "attack directed against any civilian population"[36] involves repeated acts targeting civilians as part of a state or organizational policy. "Torture"[37] means deliberately causing severe physical or mental pain to someone in custody, excluding lawful sanctions. "Persecution" involves severe deprivation of fundamental rights based on a group's identity, contrary to international law.[38] "Enforced disappearance of persons"[39] involves the abduction or detention of individuals by a state or organisation, followed by denial of their detention and lack of information about their fate. This section has been interpreted by various International Court and National Ad-hoc Tribunals and that's what this paper discusses below.

Judge Kaul in one of her dissenting opinions in the International Criminal Court states that only states or entities resembling states that pursue criminal policies are capable of committing crimes against humanity.[40] Kaul takes a narrow view of crimes against humanity as she emphasizes that crimes against humanity are conceptualized from organizational policies. Leila Nadya critiques this position, and I agree with her that the judge's historical approach does not accurately describe the modern law of crimes against humanity, which has developed since Nuremberg as a matter of customary international law through the work of national courts and the ad hoc international criminal tribunals.[41] The modern law of crimes against humanity looks at both the Rome Statute and Customary International Law. I agree with David Luban's suggestion that crimes against humanity occur in environments of "politics gone cancerous,"[42] and if so, then

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[34]International Crimes Act, Section 6(4).
[35]Rome Statute, Article 7(1).
[36]To see how the International Court enforces this, see e.g., Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48 (Sept. 15, 2009). < Available at https://www.un.org/unispal/document/auto-insert-201780/#:~:text=The%20Mission's%20investigation%20led%20to,humanity%2C%20against%20the%20Palestinian%20people > Accessed on 4th August 2024.
[37]For torture see Prosecutor v. Sesay (RUF case), Case No. SCSL-04-15-A (Oct. 26, 2009) < Available at https://www.refworld.org/jurisprudence/caselaw/scsl/2009/en/92052 > Accessed on 31st July 2024 and Prosecutor v. Brima (AFRC case), Case No. SCSL-04-16-A (Feb. 22, 2008). < Available at https://www.refworld.org/jurisprudence/caselaw/scsl/2008/en/58558 > Accessed on 31st July 2024.
[38]To see how the International Courts have charged someone with the Offence of a crime Against Humanity for persecution, see Prosecutor v. Kaing, Case No. 001/18-07-2007/ECCC/TC (July 26, 2010) (convicting Duch of, among other offenses, crimes against humanity for persecution on political grounds) < Available at https://www.refworld.org/jurisprudence/caselaw/eccc/2010/en/92084 > Accessed on 31st July 2024.
[39]To see how international Courts have handled forced disappearances in the context of crimes against humanity, See Prosecutor v. Brdanin, Case No. IT-99-36-A (Apr. 3, 2007) < Available at https://www.icty.org/en/case/brdanin > Accessed on 4th August 2024 and Prosecutor v. Simic et al, Case No. IT-95-9A (Nov. 28, 2006). < Available at https://www.icty.org/en/case/simic > Accessed on 4th August 2024
[40]See Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Diss. Op. Kaul, J., para. 18 (Mar. 31, 2010)
[41]See Sadat LN. 'Crimes Against Humanity in the Modern Age,' American Journal of International Law, 107(2):334-377 (2013) p 336. < Available at https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/crimes-against-humanity-in-the-modern-age/43B1AF8F2E516F220132552FD4B4F34B >
[42]See David Luban, A Theory of Crimes Against Humanity, 29 YALE J. INT'L. L. 85 (2004). < Available at https://openyls.law.yale.edu/handle/20.500.13051/6479 > Accessed on 5th August 2024.

Allegations of human rights violations included unlawful detentions, beatings, and the suppression of peaceful assembly. Reports emerged of arbitrary arrests and mistreatment of those detained during the protests.

the post-election violence in Kenya that led to ICC intervention appears to fit closely in the post-Nuremberg conceptualization of crimes against humanity as not necessarily resulting from the organized policies which in turn means that the crimes against humanity committed during the Anti-Finance Bill protests, which are as a result of civic opposition to bad political governance, what I classify as "politics gone cancerous" "lung and bronchus cancer"[43] fits the protest scenes into the crimes against humanity environment as required by the post-Nuremberg conceptualization. This then satisfies the first and one of the most important elements of a crime against humanity.

The second important element when proving a crime against humanity is "discriminatory intent."[44] However, they noted that this element is only important and the prosecution needs to satisfy it when proving crimes against humanity in persecutions only.[45] To buttress this, Article 27 of the Constitution of Kenya 2010 states that no person shall be discriminated against on any grounds including but not limited to their belief or for holding a different ideology. In the Anti-Finance Bill protest,

[43]I specify the idea by David Luban into Lung and Bronchus cancer because based on the 2023 reports by UnityPoint Health, Lung and Bronchus cancer was the highest killer cancer. < The Information is available at https://www.unitypoint.org/news-and-articles/most-dangerous-cancers-in-men-and-women >

[44]See Prosecutor v. Tadic´, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, paras 283. (October 2, 1995). < Available at https://www.internationalcrimesdatabase.org/Case/86#:~:text=Du%C5%A1ko%20Tadi%C4%87%20was%20the%20President,to%2020%20years%20of%20imprisonment. > Accessed on 31st July 2024.

[45]In the Tadić case, it was determined that establishing a crime against humanity does not require proof of discriminatory intent, despite the Secretary-General's report that set up the ICTY suggesting that such intent was a component of the crime.

there was outright persecution of civilians, including journalists[46] and to prove that there was outright discrimination, the hired goons who were taken to counter the peaceful Gen Z protestors were not injured or rather arrested by the police forces.[47] This then clearly depicts that the second element has been proved and the prosecution will have an easy time in establishing the elements. My argument is that the failure of the police to arrest the goons is an outright discrimination of Generation Z simply because they hold a contrary political belief and ideology.[48]

Robert Cryer notes that the required elements for crime against humanity include: An objectively existing situation of scale and gravity in which civilians are at risk,[49] collectively referred to as crimes be widespread or systematic This element, though not included in Articles 5 and 7 of the Rome Statute, the Tribunal read this element into the Statute, finding that “proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime.[50] This is an element that has developed in Customary International Law.[51] Also, in its first judgment, the ICTR trial chamber[52] determined that crimes against humanity must be part of a "widespread or systematic attack." To further define "systematicity," it stated that this involves being thoroughly organized and following a consistent pattern based on a common policy, utilizing significant public or private resources. (Please note that I had argued and proven above that based on the ICTY, the availability of a policy or a plan is not mandatory). This element is easy to prove in the Anti-Finance Bill human rights violations. The crimes and atrocities committed by the Police Forces occurred in over 16 counties[53] which clearly shows its widespread nature thus proof of this element geographically. On intensity, the number of violations affected an uncountable number of families that lost their loved ones.

The fourth essential element is the civilian population requirements.[54] The ICTY addressed the "civilian population" requirement in multiple cases, which has been a source of jurisprudential challenges

[46]See REPORTER S, ‘Journalist Injured as Protesters Chant Anti-Finance Bill Songs in Nairobi CBD’ (The Star20 June 2024) < Available at https://www.the-star.co.ke/news/realtime/2024-06-20-journalist-injured-as-protesters-chant-anti-finance-bill-songs-in-nairobi-cbd/ > accessed 3 August 2024.

[47]See KENYA, ‘NTV Kenya: Eldoret: Armed Goons Patrol Streets, Rough up Anti-Finance Bill Advocates’ (NTV Kenya27 June 2024) < Available at https://ntvkenya.co.ke/news/eldoret-armed-goons-patrol-streets-rough-up-anti-finance-bill-advocates/ > accessed 3 August 2024

[48]If one is to counter my argument here, which I happily welcome, I will seek reliance in the Supreme Court’s judgement in NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (with dissent - MK Ibrahim & W Ouko, SCJJ) para 79 in which the Court stated that the grounds are not limited to the Article 27(4) ground. < Available at http://kenyalaw.org/caselaw/cases/view/252450/ >

[49]Cryer, R., Robinson, D., & Vasiliev, S. ‘An Introduction to International Criminal Law and Procedure’ (4th ed.). Cambridge: Cambridge University Press (2019). < Available at https://www.cambridge.org/highereducation/books/an-introduction-to-international-criminal-law-and-procedure/7A2068BB50AE8386A5D8C689F140C37C#overview >

[50]Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, para. 98 (June 12, 2002). < Available at https://www.icty.org/en/case/kunarac > Accessed on 2nd August 2024.

[51]See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, supra note 71, para. 34 where the Secretary-General's report advocating for the tribunal's establishment emphasized that it should enforce international humanitarian law rules that are unequivocally part of customary law, thereby avoiding issues related to the varying adherence of states to specific conventions.

[52]Prosecutor v. Akayesu, Case No. ICTR-96-4-T, para 580 (Sept. 2, 1998).

[53]Bashir Mbuthia, ‘50 People Dead, 413 Injured in Anti-Finance Bill Protests - Kenyan Rights Commission Reports’ (Citizen Digital16 July 2024) < Available at https://www.citizen.digital/news/50-people-dead-413-injured-in-anti-finance-bill-protests-kenyan-rights-commission-reports-n345993 > accessed 3 August 2024

[54]See Sadat LN. ‘Crimes Against Humanity in the Modern Age,’ American Journal of International Law, 107(2):334-377 (2013) p 346.

and criticism.[55] The term "population" seems redundant when paired with the "widespread or systematic" element, while the term "civilian" raises questions about its definition.[56] The ICTY first tackled this issue in Tadić and later in Martić,[57] concluding that "civilian" as used in the ICTY statute aligns with the meaning in Protocol I,[58] Article 50(1), referring to individuals who are not members of the armed forces. This definition likely excludes those involved in organized armed resistance against an invader.[59] However, the ICTY appeals chamber noted that Article 5 does not require every victim of a crime against humanity to be a civilian, as long as the overall attack targets a civilian "population."[60]

To satisfy and hold someone responsible for committing a crime against humanity, one must also prove *mens rea* in which it will be required to be shown that a person was aware of the attack that makes his or her act a crime against humanity. The policemen undergo human rights training[62] and they ought to be able to distinguish what amounts to a crime and violation of a human right, and what does not amount to the same. When trying to contain protests, the policemen ought to protect the protestors and if the need arises for the use of force, then the amount of force used must be reasonable. The Public Order Act, which the police ought to be well conversant with, provides that during protests, if force is to be used, there must be a necessary purpose, but it must not exceed what is reasonably necessary for that purpose.[63] It further states that whenever possible, without severely endangering people's safety or risking uncontrollable disorder, firearms should not be used unless less-lethal weapons have been tried unsuccessfully. If firearms or other potentially deadly weapons are used, they must be employed with utmost caution and care, avoiding recklessness or negligence. The question that I will simply ask the Police Forces is how do they teargas and shoot children and youths who simply go to demonstrate with a poster, or water bottle and go to the protests with a Uba or Bolt?

One may also raise the issue of the requirement that one has to have acted on a policy or plan for a crime against humanity to be established. This is easy to handle because judicial decisions have dismissed the argument that, to prove a crime against humanity, the prosecution must demonstrate that the accused acted according to a plan or policy to commit such crimes.[64] In *Prosecutor v. Kunarac*,[65] the appeals chamber determined that neither the attack nor the actions of the accused needed to be backed

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[55]Kai Ambos, Crimes Against Humanity and the International Criminal Court, in FORGING A CONVENTION, supra note 19, at 279.
[56]Egon Schwelb, Crimes Against Humanity, 1946 BRIT. Y.B. INT'L 178 in Sadat LN. 'Crimes Against Humanity in the Modern Age,' American Journal of International Law, 107(2):334-377 (2013) p 346.
[57]See Prosecutor v. Tadic´, Case No. IT-94-1-T (May 7, 1997).
[58]This is Additional Protocol I to the 4 Geneva Conventions of 1949.
[59]Sadat LN. 'Crimes Against Humanity in the Modern Age,' American Journal of International Law, 107(2):334-377 (2013) p 346.
[60]Martic´, Case No. ICTY-IT-95-11-A, para. 306.
[61]See *Prosecutor v Radislav Krstic*, Case No ICTY IT-98-33-A (2004), 597.
[62]C I Sempill, 'The making of East African Policeman 1(4) Sage Journal (1928) 669-670.
[63]Public Order Act, CAP 56 of the Laws of Kenya, Section 8. < Available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2056 > Accessed on 25th July 2024. See also The National Police Service Act, 2011, section 49 and 61.
[64]See Guenael Mettraux, Crimes Against Humanity and the Question of a "Policy" Element, in FORGING A CONVENTIONFORCRIMESAGAINST HUMANITY (Leila Nadya Sadat ed., 2011). The proposed convention was published in French and English in August 2010, at 167– 69.
[65]Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, para. 98. The appeals chamber observed that there had been some "debate" within the Tribunal's jurisprudence about whether a policy or plan is an element of crimes against humanity. However, the decision in the Kunarac appeals chamber effectively resolved this debate.

There were instances where the use of force resulted in deaths. This raised serious concerns about the proportionality and legality of the response by security forces.

by any form of 'policy' or 'plan.' The appeals chamber noted that neither the Statute nor customary international law at the time of the alleged acts necessitated proof of a plan or policy to commit these crimes. After a consideration of the elements, I will now seek to give reasons on why and who should be held accountable.

4.2. Who should be held Accountable?

Section 8 of the International Crimes Act provides that a person accused of an offence under Section 6 Act can be tried and punished in Kenya if the act or omission occurred in Kenya, or if, at the time of the offence, the person was a Kenyan citizen, employed by the Kenyan government, a citizen of a state in armed conflict with Kenya, or employed by such a state. Additionally, if the victim was a Kenyan citizen or a citizen of a state allied with Kenya in an armed conflict, or if the person is present in Kenya after committing the offence, they can be tried. Such trials are conducted in the High Court of Kenya. On the other hand, the Constitution provides that no person may give a direction to the Inspector General concerning the enforcement of the law against any particular person or persons.[66] This then means that the IG of the police acts based on the law and can be held responsible where his acts or the acts of his subordinates are done under his direction.[67]

[66]Constitution of Kenya 2010, Article 245(4b).

[67]One may raise the argument of the Constitutional Immunity that is granted to the Inspector General. To understand this, see the judgment of the Supreme Court in *Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent)* para 272-293. < Available at http://kenyalaw.org/caselaw/cases/view/231325/ > The Court in interpreting the Constitution stated that the Immunity of Members of Independent Commissions is not absolute but is qualified and only protects them if the duty is within the ambits of their office work, the conducts are done in good faith and they do not contravene the law.

The International Criminal Court of the former Yugoslavia in *Prosecutor v Sefer Halivovic*[68] stated that the principle that commanders bear individual criminal responsibility for failing to prevent or punish crimes committed by their subordinates is a well-established tenet of customary international law. The tribunal determined that the prosecutor must prove:[69]

(a) the existence of a superior-subordinate relationship;
(b) that the superior was aware or should have been aware of the imminent or actual criminal act; and
(c) that the superior neglected to take appropriate and reasonable actions to prevent the crime or to address the perpetrator.

The three elements are easy to prove in the context of the Anti-Finance Bill protests. The first element can be constitutionally proved as the then IG of the police and the Police Commanders in various regions such as Sergeant Bungei are superiors and the policemen both in uniform and those without uniform using Subaru's with no number plates are juniors. On the second element, the news of killings was everywhere and the IG of the police and the then Minister of Interior, Professor Kithure Kindiki also used to report and confirm some deaths.[70] On the third element, negligence is defined as the omission to do something that a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do.[71] If this doctrine is to be followed, then my suggestion is that Professor Kindiki, the then Cabinet Secretary of Interior, the Former IG of the police Japheth Koome, and the Nairobi Police Commander Adamson Bungei are supposed to be sued and prosecuted. If the office of the DPP fails to perform its duties, then Constitutional Commissions such as the Kenya National Human Rights Commission[72] should come into play and ensure that justice is administered.

5.0. Conclusion

In the realm of command responsibility, the Anti-Finance Bill protests serve as a glaring example of governance gone awry—a political malignancy that can be compared to the cancerous growth as described by this paper. The human rights violations committed during these protests highlight a stark failure of Commanders, where senior officials disregarded their legal and ethical obligations. Just as cancer metastasises if left unchecked, so too will impunity spread if those responsible for these abuses are not held accountable. The failure of Kenya's legal system to prosecute the implicated commanders reflects a broader systemic issue that undermines public trust and the rule of law. To prevent further erosion of justice, the Kenyan judiciary and relevant bodies must take decisive action. Only through rigorous enforcement of Command Responsibility can Kenya hope to excise this malignant injustice and restore faith in its commitment to human rights.

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[68]Prosecutor v Sefer Halivovic (2001) ICTY Case No: IT-01-48-I, 26th January 2005, para 55. < Available at https://www.icty.org/en/case/halilovic > Accessed on 4th August 2024. See also O'Reilly, Arthur Thomas, "Command Responsibility: A Call to Realign Doctrine with Principles," American University International Law Review: Vol. 20: Issue. 1 (2004) p 92-99 where the authors discuss and critique the three elements.
[69]Ibid, para 56.
[70]PERPETUA ETYANG, 'It's Regrettable! Kindiki Says on Deaths Reported during Protests' (The Star4 July 2024) < Available at https://www.the-star.co.ke/news/2024-07-04-its-regrettable-kindiki-says-on-deaths-reported-during-protests/ > accessed 3rd August 2024.
[71]'NEGLIGENCE Definition & Meaning - Black's Law Dictionary' (The Law Dictionary4 November 2011) < Available at https://thelawdictionary.org/negligence/#:~:text=NEGLIGENCE.,reasonable%20man%20would%20not%20do > accessed 3 August 2024.
[72]See Constitution of Kenya 2010, Article 59.

Allied Kenyan Gen Z's cajoled digital 'wankers' activism: A force to reckon with

By Nyamboga George Nyanaro

Abstract

Kenyan Generation Z's digital activism has emerged as a powerful force challenging the leadership of President William Ruto and Kenya Kwanza's regime. Motivated by widespread discontent over economic hardships, corruption, and unkept campaign promises, the Gen Z allied movement organised nationwide protests leveraging social media platforms to mobilise and coordinate their efforts. Their activism has led to significant political developments, including the dismissal of key government officials and the withdrawal of Finance Bill 2024. This leaderless, tribeless, and partyless movement is characterised by its rejection of traditional political manipulation and its commitment to transparency, accountability, and socio-economic transformation. The protests revealed deep-seated frustrations with the government's failure to address economic inequalities and highlighted the role of international financial institutions in perpetuating economic challenges. Despite facing brutal repression, the movement has continued to push for meaningful changes, demanding accountability for extrajudicial killings, and better governance. This new wave of digital activism signifies a turning point in Kenya's political landscape, driven by a well-informed and technology-savvy youth determined to reclaim their sovereignty and ensure a brighter future for all Kenyans.

Gen Z is the first generation to grow up with the internet, social media, and smartphones as integral parts of their lives. They are highly proficient with technology and are accustomed to instant access to information.

1. Introduction

"All sovereign power belongs to the people of Kenya and shall be exercised in accordance with this Constitution."[1]

Over the past year, Kenya Kwanza's leadership has been marked by political manoeuvring and the swift passage of harsh laws, while politicians displayed wealth

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

amid widespread widening poverty gaps of the citizenry. Frustrated by this situation, Gen Z organized protests in Nairobi and other areas, criticizing President William Ruto's failure to uphold the social contract promised under "THE PLAN," which had narrowly secured their 2022 election victory.[2]

According to Zeleza, this digital revolution, which has led to dramatic shake-ups like the Cabinet's dismissal, the Attorney General's exit, and the spectacular retraction of the Finance Bill 2024, along with an impressive array of austerity measures slashing through the Executive, Legislature, and Judiciary, has enthralled a youth majority. With roughly 80% of Kenyans under thirty-five, their frustration spilled over from platforms such as X (formerly Twitter), where unfulfilled and endlessly postponed promises of economic growth and development have become tiresome. In the Kenya Kwanza regime's saga, Gen Zs erupted in fury over President Ruto's betrayal, as his cynical mobilization in 2022 under the grandiose banner of THE PLAN morphed into glaringly false promises of entrepreneurial opportunities and decent jobs, swiftly disintegrating their renewed hopes for an economic renaissance. His campaign theatrically leveraged the "dynasty versus hustler" narrative, pitting the impoverished against the affluent aristocrats and casting himself as the tireless saviour of the downtrodden.[3] However, this tale has degenerated into a politically deceptive wild goose chase, yielding nothing of tangible socioeconomic value.

Kenya School of Law President, Joshua Okayo

What astonished the political class about this wave of digital activism was that it was neither led nor facilitated by cynical politicians. In fact, abductees who survived the torture of extrajudicial abductions and killings narrated how their torturers forced them to confess who was funding them. A notable example is the Kenya School of Law President, Joshua Okayo, whose harrowing account, which brought him to tears as he recalled the torture, demonstrated the regime's deep concern regarding the funding and trajectory of the protests. This wave of digital activism cannot be easily co-opted, bribed, intimidated, or isolated, as it is leaderless, tribeless, and partyless, owing no allegiance to traditional parties or coalitions.[4] The organisational architecture is based on contemporary youth's social

[2]KHRC, 'Kenya Kwanza's First Year in Office Fails to Inspire Hope in Kenyans' (*Kenya Human Rights Commission (KHRC)* 13 September 2023) <https://khrc.or.ke/press-release/kenya-kwanzas-first-year-in-office-fails-to-inspire-hope-in-kenyans/> accessed 13 July 2024.

[3]Andrew Wasike, 'Withdrawal of Financial Bill May Not by Itself End Government Worries in Kenya: Experts' (*Aa.com.tr* 2024) <https://www.aa.com.tr/en/africa/withdrawal-of-financial-bill-may-not-by-itself-end-government-worries-in-kenya-experts/3261401#> accessed 13 July 2024.

[4]Daniel Mule, 'Retrogressing into the Dark Abyss of Violations and Atrocities! Current State of Human Rights in the Nation' (*Kenya National Commission on Human Rights* July 2024) <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1199/Retrogressing-into-the-dark-abyss-of-violations-and-atrocities-Current-state-of-Human-Rights-in-the-Nation> accessed 13 July 2024.

Gen Z generation is notably diverse in terms of race, ethnicity, and gender identity. They are generally more open-minded about issues related to diversity and inclusion and often advocate for social justice and equality.

media, meetings, and engagement in public squares, thereby averting manipulation that is easily achievable through mainstream media and physical squares, thereby making the movement an indefatigable force to reckon with.

Present success of such a movement to the extent of compelling the President to attend X Spaces dubbed #EngagethePresident[5] has also been attributed to Gen Z's repudiation of tribal politics, divide and rule system which was characterised by elected leaders' pride and bravado, deeply entrenched divisive politics, nepotism, ethnicity and division of regional grounds that have robbed the 55-million national population of its enormous potential that had one seen the President Ruto falsely promise to make the country a new Singapore.[6] As a result of protests engulfing the entire nation event, President Ruto's stronghold and homeyard, banishing of electorates, the president was compelled to tone down, swallow his pride, and lead a listening year. Considering arbitrary use of police force that maimed innocent civilians,[7] Lawyers and policy analysts viewed the soiled relation relationship between the electorates and elected leaders' relationship to have crossed the rubicon (a point of no return),[8] finding it hard to put the genie back to the bottle;

[5]The Kenyan Historian, 'President Ruto Engages Gen-Z on X Spaces | Full Session' <https://www.youtube.com/watch?v=e-furBHHWHs> accessed 13 July 2024.
[6]Kenya Talk, 'Gen Z Have Broken the Political Tribalism Status Quo' (*Kenya Talk* 23 June 2024) <https://kenyatalk.com/t/gen-z-have-broken-the-political-tribalism-status-quo/492951> accessed 13 July 2024.
[7]EVELYNE MUSAMBI, 'Kenya's President Apologizes for Arrogant Officials and Promises to Act against Police Brutality' (*AP News* 5 July 2024) <https://apnews.com/article/kenya-protests-finance-bill-william-ruto-65965d6b7f9b4a713be6ee6a47d382aa> accessed 10 July 2024.
[8]Ken Opalo, 'The Political Class Has Panicked about Ongoing Protests' (*The Standard* 13 July 2024) <https://www.standardmedia.co.ke/article/2001498881/the-political-class-has-panicked-about-ongoing-protests> accessed 13 July 2024.

successfully make it right (through) amends with the electorates.

A resonant voice across the Gen Zs discourse and plight of normal Wanjiku rejects neocolonial powers at play, as evidenced by external forces' geopolitical influences, for example, the Finance Bill 2024, which sounded like an international financial institutions' economic force at play. According to economists, institutions such as the IMF do not know how to put off fires, but they have mastered the craft of starting heavily combusting fires. Gen Zs' unspared International Monetary Fund (IMF) advisories' critique (even by emails of concerned Kenyans) sordidly evidenced such institutions potency to extort, exploit,[9] marginalise the global south countries such as Kenya due to their developing trust.

Recently experienced protests were the result of a cocktail of events that blew up when Kenyans could no longer tame their rage. History records the protests eruption to have metamorphosizes after controversial Ruto's expensive tour to the United States of America, whose costs angered citizens due to its cost, whereas JSS teachers were decried about their permanent non-confirmation by TSC citing budgetary constraints, unposted medical interns citing empty coffers at the national treasury, while Ruto's CSs, doubling as close aides, were seen publicly displaying opulence and fundraising amounts of money that exceeded their monthly remuneration.[10]

More angering was the trip geopolitical effects which saw Kenya being christened by President Joe Biden as a major non-Nato Ally, while the majority of African Countries, noting the exploitation often associated with the Global North's association, have slowly reasserted their non-alignment.[11] Among the consequences of such alignment was Kenya pledging and deploying the first batch of 400 Kenyan police to a peacekeeping mission in Haiti[12] while they have been ironically unable to combat banditry-infested areas such as Kapedo and Baragoi.[13] How did we get this? The following section briefly revisits the history of Kenyan liberation.

2. Going back to the roots: Kenyans historical archive

Political activism in Kenya traces back to post-World War II, when much like the current Gen Z uprising, a constellation of aspirations and forces clamoured for self-rule. Africans became aware that the colonisers were humans and could be overthrown. What sets this third revolution apart from other political movements against tyranny is its quest for transparency, stemming from malignant corruption, demands for value in return for exorbitantly levied taxes, nepotism and party loyalty triumphing over meritocracy in appointments, silencing of dissent, increased enforced disappearances, extrajudicial killings (even minors), peaceful protesters being labelled as "treasonous criminals" by

[9]Rasna Warah, 'Gen Z Will Lead the People's Revolution in Kenya - the Elephant' (*The Elephant - African analysis, opinion and investigation* 20 June 2024) <https://www.theelephant.info/analysis/2024/06/20/gen-z-will-lead-the-peoples-revolution-in-kenya/> accessed 10 July 2024.
[10]Zachary J Patterson, 'Uprising in Kenya - Thousands Protest Austerity and Struggle for Liberation - ROAPE' (*ROAPE* 27 June 2024) <https://roape.net/2024/06/27/uprising-in-kenya-thousands-protest-austerity-and-struggle-for-liberation/> accessed 10 July 2024.
[11]Sam Cabral, 'US Names Kenya as Major Ally in Face of Growing Russian Influence' (*Bbc.com* 23 May 2024) <https://www.bbc.com/news/articles/cv22nd9pdwwo> accessed 10 July 2024.
[12]Andrew Wasike, '400 Kenyan Police Officers Depart for Haiti to Lead UN-Backed Mission' (*Aa.com.tr* 2024) <https://www.aa.com.tr/en/africa/400-kenyan-police-officers-depart-for-haiti-to-lead-un-backed-mission/3257234> accessed 11 July 2024.
[13]Kang-Chun Cheng, 'Northern Kenya's Unending Battle with Banditry and Cattle Rustling' (*New Lines Magazine* 16 November 2023) <https://newlinesmag.com/reportage/northern-kenyas-unending-battle-with-banditry-and-cattle-rustling/> accessed 11 July 2024.

The Late Dedan Kimathi

a president in scandal after scandal-infested regime, and parliamentarians elected to represent the will of the people betraying their constituents at the behest of their party leaders.[14] A striking similarity between this and other movements is the citizens' relentless drive to achieve a functionally inclusive and sustainable democracy ruled by Pan-African leaders committed to the state and society's development. The first such movement occurred when Kenyans were on the cusp of attaining self-rule, clamouring for independence from the gruelling and torturous colonial regime and its legacy. The second movement clamoured the democratic order and the eradication of tyrant-based postcolonial nepotism and dictatorial governance.[15] This third wave, coined by the title of the column, emphasises accountability and socioeconomic transformation.

According to Gen Zs, the torture of abducted activists, illegal addresses, and alleged payment of a faction of digital influencers to quell the movement mirrors neocolonial legacies characterised by political activists post-WWII. In the aforecited clamour for self-rule, they were subjected to gruelling killings by police force, long hours of torture, and even arrest and detention without trials without forgetting the colonialist playbook of compelled confessions. Moreover, the likes of Dedan Kimathi and the MauMau rebellion were resilient in their quest to see Kenya unchained from colonial whims of power, waging war from various fronts, from the guerrilla warfare tactics, to using scorched earth policies, protests, civil disobedience, and even go-slows played by Tom Mboya-led labour law movements,[16] and the mushrooming political parties akin to the 2022, United Democratic Alliance (UDA),[17] to erode colonialists elitists occupations, and embracing Kenyan socialism through nationalistic parties such as the Kenya National African National Union that emerged under the stewardship of the Mzee Jomo Kenyatta.

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[13]Kang-Chun Cheng, 'Northern Kenya's Unending Battle with Banditry and Cattle Rustling' (*New Lines Magazine* 16 November 2023) <https://newlinesmag.com/reportage/northern-kenyas-unending-battle-with-banditry-and-cattle-rustling/> accessed 11 July 2024.

[14]Paul Tiyambe Zeleza , 'The Gen Z Uprising in Kenya ' (*The Elephant - African analysis, opinion and investigation* 2 July 2024) <https://www.theelephant.info/opinion/2024/07/02/the-gen-z-uprising-in-kenya/> accessed 9 July 2024.

[15]Job Mwaura, 'Kenya Protests: Gen Z Shows the Power of Digital Activism - Driving Change from Screens to the Streets' (*The Conversation* 22 June 2024) <https://theconversation.com/kenya-protests-gen-z-shows-the-power-of-digital-activism-driving-change-from-screens-to-the-streets-233065> accessed 10 July 2024.

[16]Jo Moore, 'Kenyan "Mau Mau" Claim Dismissed: Fair Trial Not Possible because of Half Century Delay - UK Human Rights Blog' (*UK Human Rights Blog 6* August 2018) <https://ukhumanrightsblog.com/2018/08/06/kenyan-mau-mau-claim-dismissed-fair-trial-not-possible-because-of-half-century-delay/> accessed 13 July 2024.

[17]Moses Nyamori, 'Jubilee Curse? Why UDA Is No Longer at Ease' (*Nation* June 2024) <https://nation.africa/kenya/news/politics/jubilee-curse-why-uda-is-no-longer-at-ease--4642826#story> accessed 9 July 2024.

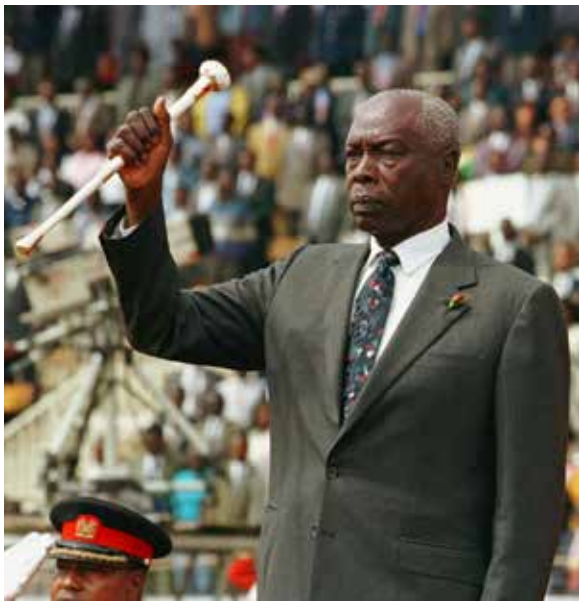
The party, with agitating forces such as the Kapenguria, six saw the culmination of nationalistic struggles metamorphosizing into the 1963 decolonisation of Kenya to attain self-rule, hence 1st of June becoming ***Madaraka Day***. At the time, revolutionaries such as Tom Mboya and Dedan Kimathi represented a large faction of young male and female charismatic leaders devoted to political mobilisation and struggles for a common cause. This was a watershed moment and a mirror of the true independent movement in Africa. Comparatively, Martin Luther King Junior was aged 26 in 1955 when he led a Bus Boycott in Montgomery, culminating in national prominence that led to his mass following baptising him as a civil leader.[18]

Kenyan youth political activism gains evidenced by 1 June 1961 self-rule (*Madaraka*) and 12 December 1964 independence (*Jamhuri*) were preceded by movements and protests and opposition to colonial structural legacies and social and ideological schisms which contravened ideals of nationalist movements such as the African National Union and Kenya African Democratic Union (KADU). The genesis of the 2nd revolution emerged, considering that the Kenyan political throne, instead of being inherited by workers and peasants who had been victims of British torture, racial segregation, Zeleza's understood "murderous gulag in the British Concentration camps" and those who suffered human and degrading treatment during the tenure, was ascended to by aspiring national bourgeoisie and political opportunities that had been secretly loyal and "in bed" with the oppressor.[19] The intoxicating clamour to reap the benefits of democratic freedom was soon replaced by the Kenya African National Union (KANU)'s one-party autocracy.[20] Malleable, tactile, and booming dreams of economic takeoff, transformational growth, and development quickly morphed into the revolutionaries of the time referred to as authoritarian developmentalism. This was evidenced by an overreliance on foreign aid, rising socio-economic inequalities highlighted by the widening gap between the rich and the poor, mass unemployment, developmental kleptocracy,[21] and underemployment.

1980s and 90s marked the "second Kenyan clamour for independence's crescendo", heralding by fight for multiparty democracy,

The Late Tom Mboya

[18]'Montgomery Bus Boycott' (*The Martin Luther King, Jr. Research and Education Institute* 2024) <https://kinginstitute.stanford.edu/montgomery-bus-boycott> accessed 9 July 2024.
[19]'Kenya: A History since Independence 9780755619023, 9781848858862 - DOKUMEN.PUB' (*dokumen.pub* 2024) <https://dokumen.pub/kenya-a-history-since-independence-9780755619023-9781848858862.html> accessed 9 July 2024.
[20]Stanley Gazemba, 'Opinion | the Crushing of the Safari Ants' *The New York Times* (15 March 2013) <https://www.nytimes.com/2013/03/15/opinion/why-kenyan-democracy-is-a-fragile-proposition.html> accessed 10 July 2024.
[21]Samuel Kariuki, 'We've Been to Hell and Back: Can a Botched Land Reform Programme Explain Kenya's Political Crisis (1963–2008)?' (2008) 7(2) Journal of African Elections 135-167.



The late President Daniel Toroitich Arap Moi

and other socio-economic ills that were bringing the nation on its knees. This second phase of revolution revealed cracks in political leadership, exposing deformities in Kenya's socio-political and economic structures, brutally clarifying the ills of structural adjustment progress to external forces and age-old global capitalism gendarmes, the World Bank and the International Monetary Fund (IMF) imposed as a larger collection of their fundamentalist zeal, presently married into neoliberalism's uncompromising gospel, strategically dismantling the global north and south juxtaposed welfare and developmentalist states, respectively. At the time, education had started penetrating middle- and low-income earners through government sponsorship and scholarship, thereby leading to disenfranchised and disenchanted masses, the majority of whom comprised young people in schools (especially universities), the informal sector, and rapidly expanding Kenyan cities rising to agitate for democracy, signifying fatigue with President Daniel Toroitich Arap Moi's dictatorship. With the help of disenchanted elders who, despite having fought for Kenya's self-rule and independence, were increasingly becoming pauperised as working classes, peasants, struggling middle classes, and political classes perceived pariahs or marginalised factions, emerging movements cornered Moi to repeal an act that had previously rendered Kenya a single-party state to revert to being a multi-party state.[22]

It is around this period that President William Samoei Ruto, an undergraduate student at the University of Nairobi, thrust himself into the political realm. As the second clamour for independence gathered momentum, him and Ilk formed the 1992 *Youth for KANU* to back former President Daniel Arab Moi's dictatorial leadership. It should therefore be known from the outset that President Ruto and Uhuru Kenyatta's political careers did not mushroom Kenya's democratic leadership and movements soil. They are political progenies of President Daniel Toroitich Arap Moi's post-colonial autocratic and dictatorial leadership, and by far, Kenya's longest-serving ruler, in of course, a nation that experienced his 24-year tyranny, dysfunctional leadership, disregard of the rule of law, detention without trial, torture in the Nyayo chambers, political assassination, abduction and/or expulsion of University Student leaders who opposed Moi's leadership, arbitrary deployment of state machinery, suspension of the Constitution of the land that was supposedly a supreme and guiding law of the land. Other student leaders such as Miguna Miguna, through his text, *Peeling Back the Mask*[23] recounts that some of them were forced to exile and seek political asylum in countries such as Canada in fear of their lives.

[22]Jennifer A Wildner , 'The Rise of a Party-State in Kenya' (*University of Carlifornia Press* 1993) 1982-1991 <https://publishing.cdlib.org/ucpressebooks/view?docId=ft9h4nb6fv;chunk.id=0;doc.view=print> accessed 13 July 2024.
[23]Miguna Miguna, *Peeling Back the Mask; A Quest for Justice in Kenya* (Gilgamesh Africa, 2012) Book Two-Exile, 83-95.

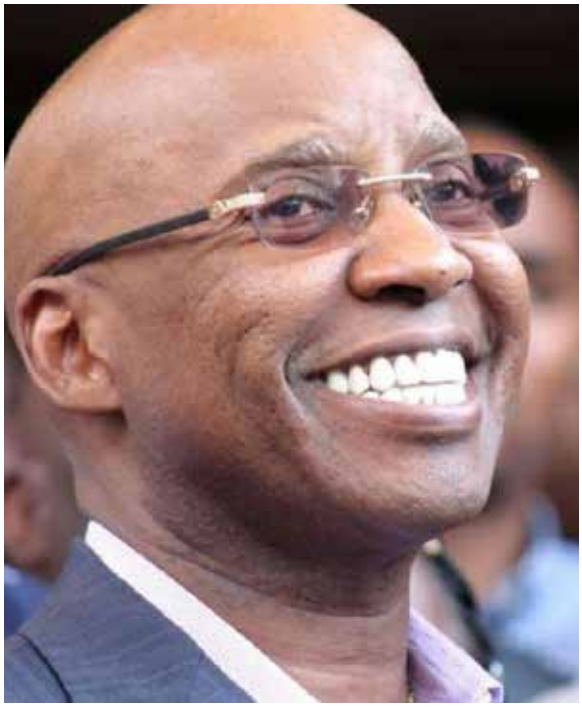
Gen Z often values economic fairness and transparency. Finance Bills that seem to contradict these values can prompt a strong response from this generation, as they push for policies that align with their principles

According to Professor Paul Tiyambe Zeleza, President Ruto, being Moi's political grandson heavily borrows from President Moi's dictatorship playbook, evidenced by political instincts justified as ruthless, disdain for democratic values and governance, and populism, "notwithstanding his rhetoric often beguiling foreign audience, which, despite brainwashing Kenyans to vote for him in his 2022 General Elections, no longer yields any persuasive value, considering Kenyans are woke and can no longer be fooled easily. Teleza further notes that the rapidity with which President Ruto and the United Democratic Party (hereinafter "his political outfit") have lost public trust and confidence barely two years after taking charge of the country remains unprecedented in the annals of Kenya's political history. Whereas this is majorly attributed to his government remorseless response to a youth uprising evidenced by arbitrary security forces massive crackdown, killing of peaceable protesters on 25th June 2024, e.g *Rex*,[25] *Beastly* and a twelve-year-old child that was massively shot twelve times only for him to remorselessly ask Linus Kaikai in an interview, "he's alive, right?" Activist abduction, protesters being levelled trumped up charges, and sympathisers being intimidated, according to Zeleza, is a straightforward extract from Moi dictatorship's repressive playbook.

3. 2024 Finance Bill as a catalyst for Gen Z's revolution

The Finance Bill 2024 marked a watershed moment in Kenya's political landscape. Oppressive provisions in the bill, coupled with lingering outrage over a controversial house levy that had been unconstitutionally incorporated into legislation with the courts' controversial support, triggered a political

[24]Zeleza (n14).
[25]Daniel Ogetta and Winnie Onyando, 'Seven Days of Rage Declared over Fatal Shooting of Anti-Tax Protester' (*Nation* 22 June 2024) <https://nation.africa/kenya/news/seven-days-of-rage-over-fatal-shooting-of-anti-tax-protester-4665562#story> accessed 9 July 2024.



Jimmy Wanjigi

revolution led by Generation Z. From the outset, there was widespread verbal opposition to plans to increase taxes on a broad range of essential household items, as Kenyans were already grappling with the high unemployment and inflation rates. The bill's proponent justified tax hikes by citing the government's commitment to repaying staggering public debt.[26] However, many Kenyans criticised the lack of transparency surrounding the debt situation, echoing dissenting voices such as those of activist Jimmy Wanjigi and Senator Okiya Omtatah, who claimed that Kenya had already fully repaid its debt.[27] Critics argued that the government could not further burden Kenyans to pay off debt, while the economy remained in a dilapidated state and the gap between the rich and poor continued to widen. Another faction of protesters linked increased taxation to corruption, highlighting a lack of meaningful public participation, as mandated by the Constitution of Kenya 2010 and the Public Finance Management Act of 2012.[28]

In *Fresh Produce Exporters Association of Kenya (FPEAK) and three others v Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries through Attorney General & three others; Kenya Flowers Council (Interested Party)*, Judge A.C.. Mrima laid grounds for meaningful public participation with reference to the *Supreme Court of Kenya 2010 determination in British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties)*; Mastermind Tobacco Kenya Limited (Affected Party): Firstly, the subject matter should be clearly articulated and in the case of the Finance Bill of 2024, the general public was expected to clearly understand the contents of the bill. Members of the public and stakeholders were supposed to be engaged using clear, simple, and accessible media of engagement, and in the spirit of providing a balanced influence opportunity, the public was supposed to be given an equal opportunity to meaningfully contribute to the final outlook of the bill. Considering the impracticality of having approximately 55 million Kenyans offering their views, an effective and inclusive representation from all parties that the bill stood to affect sufficed. Lastly, the public was supposed to be adequately informed and engaged in the formative stages of the bill, and all their constructive views reflected on the final draft bill presented on the National Assembly for the second reading and

[26]AfricaNews, 'Kenya's Finance Bill: This Is What Led to the Protest' (*Africanews* 26 June 2024) <https://www.africanews.com/2024/06/26/kenyas-finance-bill-this-is-what-led-to-the-protest//> accessed 10 July 2024.
[27]Mwalimu Mati, 'The Tall Order That Is Wanjigi's and Omtatah's Call for Declaration of Odious Debt ' (*Debunk Media* November 2023) <https://debunk.media/the-tall-order-that-is-wanjigis-and-omtatahs-call-for-declaration-of-odious-debt/> accessed 13 July 2024.
[28]Article 10(2) of the Constitution of Kenya 2010.

consequently putting into a vote.[29] Therefore, these laid ingredients of meaningful public participation by the court's legal application and interpretation ensure that public participation is not merely a cosmetic exercise or formality, but rather a substantive part of the governance process.

When it comes to Kenyan principles governing public finance, the Constitution provides for mandatory openness and accountability encompassing public participation in financial matters, ensuring fair sharing of the taxation burden and equitable sharing of revenue among the two levels of government: a. national and b. County Assembly. The expenditure of taxpayers' money should mandatorily promote a country's equitable development, including special provisions for marginalised regions and groups of persons.[30] Openness and accountability as national values and principles are stressed in the overarching provisions of the Public Finance Management Act of 2012, obliging treasury to ensure meaningfully effective public participation in its annual process of drawing and developing a budget, ensuring the public's timely access to public access to information; availing such information through media that have a wide public reach; presentable in national languages; and, where possible, in forms that are user-friendly.[31]

The Finance Bill 2024-fuelled digital activism opposed brazen government use of force to choke down an unpopular bill down the throat of Kenyans already grappling with a high cost of living, deliberately ignoring public outcry as had been the case the previous year, this year Kenyans saying, "enough is enough." The economic turmoil previous outrageous budget and money bills had brought to the Kenyan Bill, especially the Finance Act 2023, which made them cautiously vigilant, and this time around resolute to disallow a government from getting away with unconstitutionally founded laws' passage twice in a row. A brewing militant youth, the majority of whom were in universities or schools of government/college-educated and informed waged protests, incessant repressive laws passed by the legislature who seem to have abdicated their independent legislative role to become an appendage of the executive arm of the executive. Arguably, the Finance Bill 2024 was a trigger, a point of no return, considering that most protestors had been frustrated by discouraging the business environment and worsening living standards and economic conditions despite the nation's economic indicators projecting relative economic growth.[32] In the well-informed view of Gen Z and their supporting digital activists, the government has irretrievably breached the social contract established by the Constitution of Kenya, 2010. They argue that the government prioritises Western backers and IMF conditionalities at the expense of citizen welfare.[33]

Economists argue that Kenya has significantly increased its debt to its lenders. However, financially strapped citizens claim that there is no evidence of prudent utilisation of borrowed funds, as there are

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[29]*Fresh Produce Exporters Association of Kenya (FPEAK) & 3 others v Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries through Attorney General & 3 others; Kenya Flowers Council (Interested Party) (Constitutional Petition E236 of 2021) [2022] KEHC 13591 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)* [114]-[122].
[30]Article 201 of the Constitution of Kenya 2010.
[31]Public Finance Management Act 2012 (Kenya), s. 207.
[32]Sarah Carter, 'Deadly Protests over Kenya Finance Bill Prompt President William Ruto to Drop Support for Tax Hikes' (*Cbsnews.com* 26 June 2024) <https://www.cbsnews.com/news/kenya-protests-2024-finance-bill-president-ruto-drops-support-for-tax-hikes/> accessed 10 July 2024.
[33]David Monda, 'My Few Questions on the Gen Z and the Way Forward for Kenya' (*The Saturday Standard* 13 July 2024) <https://www.standardmedia.co.ke/health/opinion/article/2001498884/my-few-questions-on-the-gen-z-and-the-way-forward-for-kenya> accessed 13 July 2024.

no tangible benefits from the money that was supposed to be well invested. In fact, a recent audit by the Kenyan Auditor General revealed that 1.1 trillion Kenyan shillings worth of Eurobond funds mysteriously vanished before reaching Kenya, justifying digital activists' outrage over rampant pilfering by political elites, including all Kenyan presidents and their government lieutenants, and tenderpreneurs in both the public and private sectors.[34] This situation further eroded the electorate's faith in the Kenya Kwanza regime's capacity to prudently manage and utilise national resources for the benefit of the Mwananchi.

The Kenya National Treasury's 2024 report calculated that, in nominal terms, the publicly guaranteed debt by the end of June 2023 stood at 10,287.7 billion Kenyan shillings, equivalent to 70.8 percent of the nation's Gross Domestic Product. A breakdown of the figures revealed external debt at 5,446.5 billion Kenyan shillings compared to the domestic debt of 4,832.1 billion Kenyan shillings.[35] While indicators suggest that the debt situation is sustainable, Moody's downgrade of Kenya's local and foreign currency ratings from B3 to Caa1 portends a negative outlook.[36] This downgrade followed President Ruto's refusal to sign the controversially passed Finance Bill 2024. According to the agency, the downgrade was justified by Kenya's "significantly diminished capacity to undertake revenue-based fiscal consolidation to improve the affordability of debt."

The debt outlook, along with mounting external debt and looming repayment periods, is, according to a new wave of digital activists, a reflection and indictment of the Kenyan political ruling class that Zeleza views as inherently avaricious and bankrupt. Historically, many borrowed debts and generated national revenues have been secretly expatriated to overseas accounts in the Global North, orchestrating a choreographed looting in which capitalistic international financial institutions are complicit.[37] The the 1960s and 70s poignantly captured this phenomenon through dependency scholarship. The 1972 classic by Walter Rodney, "How Europe Underdeveloped Africa", argued that Europe choreographed Africa's underdevelopment by orchestrating or complicating the repatriation of African resources to Western countries.[38] This has been an ongoing process since the historical dark days of the Atlantic slave trade, when colonial capitalism traded African human capital for trinkets, demonstrating how Africans have always received a raw deal in transactions with the West.[39] For example, Zeleza argued that the disarticulated colonial capitalist system saw Africa export valuable raw materials in unfinished forms in exchange for a pittance under contemporary debt imperialism, resulting in Africa repatriating more money than it had received.

Apart from the costly trips across the globe that earned him the nickname "the flying president" in the dailies, Kenyans

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[34]Janet Muchai, 'Kenya's Public Debt: Risky Borrowing and Economic Justice' (*ACEPIS* 30 June 2023) <https://www.acepis.org/kenyas-public-debt-risky-borrowing-and-economic-justice/> accessed 11 July 2024.
[35]National Treasury and Economic Planning, '2024 Medium-Term Debt Management Strategy' (Republic of Kenya, January 2024) 10, 14.
[36]'Moody's - Credit Ratings, Research, and Data for Global Capital Markets' (*Moodys.com* 2024) <https://www.moodys.com/research/Moodys-Ratings-downgrades-Kenyas-ratings-to-Caa1-maintains-negative-outlook-Rating-Action--PR_492643?cid=GAR9PTU7VKT2671> accessed 5 July 2024.
[37]Zeleza (n14).
[38]Review of Walter Rodney's *How Europe Underdeveloped Africa* (Verso, new edition, 2018) 416 pages, 'The Suffocating Nature of Colonial Capitalism' https://www.theoryculturesociety.org/blog/review-walter-rodney-how-europe-underdeveloped-africa Accessed 7 July 2024.
[39]Eze MO, 'Cult of Personalities and Politics of Domination' in *The Politics of History in Contemporary Africa* (Palgrave Macmillan, New York 2010) https://doi.org/10.1057/9780230110045_6 Accessed 7 July 2024.

seem increasingly frustrated with how President Ruto was managing the situation before the chilling effects of continuous demonstrations. While President Ruto may have hoped for financial aid, as evidenced by his close alignment with President Biden's administration and his equidistant approach from China, such assistance seems unlikely.[40] This, coupled with his perceived despotic leadership, is a recipe for continuous protests that could potentially mature into successful revolts. African history records similar revolts, such as the ouster of Mobutu Sese Seko, Hosni Mubarak, Yahya Jammeh, Omar al-Bashir, and even the South African Boers.[41] This justifies the phrase "imperialism, akin to other nations, neither has permanent enemies nor friends, only permanent interests,"[42] translating to global wealth accumulation, a view shared by the renowned Egyptian political economist, the late Samir Amin.

Despite the head of the state's attempt to revive the dynasty versus the hustler narrative amidst growing public rage, discontent, and escalating protests, restless young Kenyans, primarily millennials and Gen Zs, refused to be deceived or placated. His initial contemptuous dismissal of the protests and reliance on hardline tactics only further enraged the public, intensifying their resolve to reject punitive laws and the #OccupyParliament.[43] A paraphrased editorial excerpt from a Daily Nation column read that top Kenya Kwanza leaders' cynical attitude towards taxpayers and insensitive public display of opulence whilst the government decries resource constraints,

Late Mobutu Sese Seko

empty public coffers in the midst of youth unemployment, stalled service delivery, delayed posting of medical interns, punitively revised remuneration, reluctant confirmation of Junior Secondary School Interning Teachers,[44] forming a cocktail of revolution to unshackle the country from the whims of inconsiderate leaders.

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[40]Zeleza(n14).
[41]Ibid.
[42]Chuka Okoye, 'Crises of Leadership and the Ethical Grounds of Revolution in Africa' (2013) 5 Journal of African Studies and Development 20-26 <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=ea3c34f5c7bff549aea1bf756b5ff88dbe11721e> accessed 13 July 2024.
[43]Brian Otieno, 'How Unrelenting Youth Protesters Forced Once in Two-Decades Move' (*The Standard* 12 July 2024) <https://www.standardmedia.co.ke/health/amp/politics/article/2001498830/how-unrelenting-youth-protesters-forced-once-in-two-decades-move> accessed 12 July 2024.
[44]Editorial, 'Stop Extravagance by Officials amid High Tax' (*Nation* 24 May 2024) <https://nation.africa/kenya/blogs-opinion/editorials/stop-extravagance-by-officials-amid-high-tax-4633958> accessed 11 July 2024.

Member of Parliament for Mwea Mary Maingi

Worryingly, executive and legislative members allied to President Ruto's regime have dismissively, chest-thumpingly, and with bravado, dispelled legitimate concerns and expectations of their constitutional employers, heeding to the party's heeding to pass laws that would strangle the hustlers whom they deceptively convinced to vote for them by riding on the Hustler Narrative on 9 August 2022 polls. Remorselessly, legislative members of the National Assembly allied to the National Assembly ruling coalition sided with the party ideals, forgetting Articles 1(1) and (2) that thus decree.

"All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this constitution...The People may exercise their sovereign power directly or through their democratically elected representatives...and The Sovereign power of the people is exercised at both the (a) national level and, (b) county level." Derogating from her mandate, Honourable Maingi, an MP for Mwea is on record saying that; *"I agree the people of Mwea voted me in 2022. But let me make it clear for the avoidance of doubts, the people of Mwea were voting for the United Democratic Alliance (UDA)* and I happen to be the candidate; *it is the party that made me a Member of Parliament, hence not the people; otherwise, my predecessor would be in power. Therefore, I will be loyal to William Ruto, my party leader, and his agenda as a way of thanking Him. I will vote for the Finance Bill 2024. I cannot fight what is immortal, therefore I choose peace with Ruto*."Kiambaa's Member of Parliament (MP) also followed suit, averring that *"Yes, the people of Kiambaa elected me, but I am in parliament to serve/represent the will and wishes of President Ruto and his government. I cannot go against my master 'sand friend, Hon.. Kimani Ichungwa, the Majority Leader* (of the National Assembly). *I will vote YES*."[45]

Despite the constituents' persistent call for their elected Members of the National Assembly to vote for NO to the Finance Bill 2024, supported by the opposition coalition's spirited rejection of the Bill on 20 June 2024 out of the 319 MPs that cast their votes, 204 votes Ayes (YES), while 115 voted No (Nays), the Ayes having it, and consequently the bill sailing for a committee state and subsequent third reading before being forwarded to the president for assent. Feeling betrayed, the country's conflagration boiled over, evidenced by massive protests nationwide that reached its peak on 25 June 2024 sending shockwaves beyond the borders evidenced by a response by international communities such as the United Nations Secretary General, Commonwealth, and European Embassies domiciled in Kenya. Zeleza's described trigger-happy police officers fired stray live bullets, robbing peaceful protestors of

[45]Zeleza (n14).

their lives. Other peaceful protesters were injured, while the rogue police officers even started tear-gassing medics offering injured patriots first aid.[46] Save to say On 25 June 2024 a country faced a country teetered to a violence edge akin to what befell the motherland in 2007-8 Post-Election Violence (PEV), the only difference being that PEV had a high affinity to tribal policies and claimed over a thousand people dead while rendering hundreds of thousands as internally displaced.[47]

The 5th Estate proceeded to record history made by Gen Zs christened movements, a 26th *Daily Nation Editorial* being inscribed with the headline ***"Let us reason together, Kenya belongs to us all."*** An excerpt from the column thus reads:

"June 25th, 2024. The Date Will Remain is etched in Kenyan collective memory. The foundations of the country have been shaken to the core, and the historical trajectory will never be the same again. The sacred social and legal fabric holding the country together has been torn apart in a manner never observed before. Previous lives have been lost, limbs maimed, and bucket loads of blood have spilled. The hallowed institution of parliament was set on fire and breached in a manner never seen before in Kenya."

The nation went further to implore the country as follows:

Taking stock and pulling back from the brink, a solution mandatorily begins by identifying the cause of the fire rather than merely dousing the flames. The editor underscored that the groundswell of rage that galvanised the youthful population of the country against the political ruling class ought to inform and chart the way for meaningful surgery of political governance and the current national governance architecture. The protests' organisational anatomy, according to the editorial, has never been witnessed before in the country. The aforediscussed genesis of the rage has been inept leadership, broken down systems of service delivery, corruption, and the economic pain that has knocked on majority of Kenyan households for the past years, *wanton pilferage of public funds, merciless plunder of the political class*, the youthful populations showing the President how far the can go to drain the swamp of inept leadership, hence the editor's clarion call, Let us reason together, Kenya belongs to us all and reminiscent of political scriptures, *"Come Now and Let us Reason together."*[48]

Filled with rage over national events, President Ruto, completely disregarding legitimate public anger, defiantly addressed the nation on the night of 25 June 2024. He condemned the nationwide protests, terming them a great threat to national security, referring to protestors as saboteurs and alleging that the demonstrations had been hijacked by "dangerous people," criminals whom he described as "treasonous." He offered various assurances, including nationwide deployment of the country's security infrastructure to restore normalcy. That night, a massive crackdown occurred in Githurai, Juja, and Ongata Rongai, with police gunshots heard and claims that innocent civilians were killed. Some bodies whisked from the scenes, only to be found in the city morgue, while others remained

[46]Florence Odiwuor and Fredrick Ogenga, 'On the Issues: A Q&a on Citizen-Led Protests and Governance with SVNP Partners in Kenya' (*Wilson Center* 1 July 2024) <https://www.wilsoncenter.org/article/issues-qa-citizen-led-protests-and-governance-svnp-partners-kenya> accessed 9 July 2024.
[47]'Post-Election Violence in Kenya and Its Aftermath | Smart Global Health | CSIS' (*Csis.org* 2024) <https://www.csis.org/blogs/smart-global-health/post-election-violence-kenya-and-its-aftermath> accessed 11 July 2024.
[48]Editorial, 'Let Us Reason Together, Kenya Belongs to Us All' (*Nation* 26 June 2024) <https://nation.africa/kenya/blogs-opinion/opinion/let-us-reason-together-kenya-belongs-to-us-all-4669960> accessed 10 July 2024.

The late Rex Kanyeki Masai

missing.[49] On 12 July 2024 the local youth retrieved numerous bodies from a quarry near a Kware police station, with the police moving their bodies to the morgue. While the deaths of these protesting citizens remain a mystery, angry activists and the 5th Estate suspect the involvement of state machinery in their extermination,[50] possibly to send a chilling message and silence dissent.

President Ruto has since declined to sign into law the punitive Finance Bill that most parliamentarians passed with the chest-thumping bravado, referring it back to the National Assembly for withdrawal and a fresh legislative drafting process, and has also dissolved the entire Cabinet and the Office of the Attorney General.[51] Mounting pressure led to the resignation of NIS Director Noordin Haji and Inspector General of Police Japheth Koome. Still, the Generation Z Allied movement demands that all those involved in the extrajudicial killings be brought to justice, regardless of their dismissal or resignation. This demand extends to the reported pilferage of funds and abuse of power within the institutions they headed. Human rights activists are also mounting pressure for accountability for those entangled in the authorised extrajudicial killings of innocent protesters, including Dr. Margaret Oyuga, Rex Kanyeki Masai, Frank Okoth, Nick Adams, Erick Njeru, David Chege, Ian Kenya, Belinda Achieng, Edwin Otieno, Eric Shieni, Beasley Kamau, Ericsson Mutisya, Credo Oyaro (17 years old), Emmanuel Tata, Ibrahimu Kamau Wanjiku,[52] and others yet to be identified.

With trouble looming, Gen Zs and youthful anti-tax protests have attracted the interests of international monetary institutions and lenders. High stakes are focused on the president and his core team of heavily criticised economic advisors and diplomats, who, due to their stubborn stance against complying with citizenry's demands, have come under intense scrutiny. Some are terming his tenure as a "one-term presidency." This criticism includes his creation of unconstitutional offices upon ascending power, which has increased the national wage bill that could have been reallocated to key economic pillars such as education, agriculture, and manufacturing.[53] According to the signed Appropriations

[49]David Herbling and Adelaide Changole, 'Kenyan President Deploys Army to Halt "Treasonous" Protests' (*Bloomberg.com* 25 June 2024) <https://www.bloomberg.com/news/articles/2024-06-25/kenyan-president-deploys-military-to-halt-treasonous-protests?embedded-checkout=true> accessed 10 July 2024.
[50]Cyrus Ombati, 'Five More Bodies Retrieved from Kware in Mukuru Slum' (*The Star* 13 July 2024) <https://www.the-star.co.ke/news/2024-07-13-five-more-bodies-retrieved-from-kware-in-mukuru-slum/> accessed 11 July 2024.
[51]'PRESIDENT RUTO DECLINES to SIGN FINANCE BILL, CALLS for ITS WITHDRAWAL' (*The Official Website of the President of the Republic of Kenya* 2024) <https://www.president.go.ke/president-ruto-declines-to-sign-finance-bill-calls-for-its-withdrawal/> accessed 13 July 2024.
[52](X (*formerly Twitter*)2024) <https://x.com/nyxwanga/status/1806417770021892257> accessed 13 July 2024.
[53]Warah (n9).

Act of 2024, these sectors experienced budget cuts, while members of parliament and executives were set to receive pay increases.[54] Meanwhile, the fate of Kenyan medical interns and the confirmation of Junior Secondary School teachers as permanent employees remains unresolved.[55]

As things stand, even those who still retained their elective and appointive seat courtesy of the ruling regime are split into two factions. One side sees fragile political leadership and governance as a chance for the president to reorganise his house by having helpers merited and competent to occupy the office, steer the nation in the right trajectory, listen to the voce of reason and not coalition politics, and give in to demands of the general public, while others remain unsurprised if the president does not heed statesmanship and assert control by further wielding security apparatus to suppress dissent voices and critiques of his crumbling leadership.[56] Ahmednassir Abdullahi was equally concerned of entire appointees of President William Ruto underwhelmingly delivered in various ministerial dockets they were tasked with.[57] Perhaps it is the incessant diplomatic calls the president allegedly received from Western Nations, the states in the Gulf, and the international community that softened his hardline regime to pursue a conciliatory path, as evidenced by him attending an X Space themed #Engagethepresident.

Moreover, the youthful movement and legal experts were further angered by President Ruto's decision to send off police troops, leaving behind inadequate police that saw unwarranted deployment of the military to assist the police in containing the protests.[58] Justice Mugambi's controversial decision to merit the President and CS for defence's reverse constitutional engineering surrounding military deployment pursuant to the Constitution of Kenya 2010 was, according to Malidzo, an affront to the rule of law, and unjustified given the renowned stature of the High Court in preserving constitutional order.[59] Fortunately, military deployment, contrary to the perception of being ruthless for protesters, and contrary to the police that had indiscriminately fired teargas cannisters and bullets on peaceful protestors, they did not engage the patriots in any arbitrary way. Media outlets recorded youthful protestors associated with the military and, in some instances, hanging on military vehicles while changing anti-punitive bill songs and #Rutomustgo slogans.

4. The double-edged sword of Elections' Consequences

The 2022 General Elections, like previous elections, aimed to dismantle dynasty-led politics and establish a government for ordinary citizens, embodied in President Ruto's phrase "*Serikali ya Mama Mboga*

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[54]'GOVERNMENT REDUCES BUDGET, INCREASES COUNTY ALLOCATION' (*The Official Website of the President of the Republic of Kenya*2024) <https://www.president.go.ke/government-reduces-budget-increases-county-allocation/> accessed 13 July 2024.

[55]WANGECHI PURITY, 'Fate of JSS Teachers, Medical Interns in Jeopardy Following Budget Cuts Proposal' (*Capital News* 20 June 2024) <https://www.capitalfm.co.ke/news/2024/06/fate-of-jss-teachers-medical-interns-in-jeopardy-following-budget-cuts-proposal/> accessed 13 July 2024.

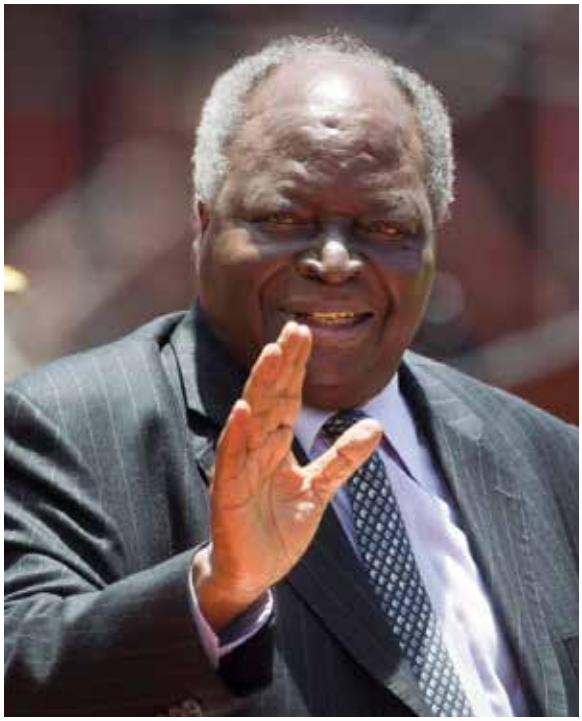
[55]WANGECHI PURITY, 'Fate of JSS Teachers, Medical Interns in Jeopardy Following Budget Cuts Proposal' (*Capital News* 20 June 2024) <https://www.capitalfm.co.ke/news/2024/06/fate-of-jss-teachers-medical-interns-in-jeopardy-following-budget-cuts-proposal/> accessed 13 July 2024.

[56]Opalo (n8).

[57](X (*formerly Twitter*)2024) <https://x.com/ahmednasirlaw/status/1810898018104676463> accessed 13 July 2024.

[58]Martin K.N Siele, 'Kenya Finally Deploys Police to Haiti amid Protests at Home | Semafor' (*Semafor.com* 24 June 2024) <https://www.semafor.com/article/06/24/2024/kenya-deploys-police-to-haiti-amid-protests> accessed 10 July 2024.

[59]Joshua Malidzo Nyawa, 'The hesitant sentry: Unpacking Justice Mugambi's injudicious judicial decision' (*The Platform* Magazine, Nairobi, Kenya, July 2024 Issue) 9-16.



The late President Mwai Kibaki

na mtu ya bodaboda' and the bottom-up economic model designed to uplift Medium-sized and Small-Scale Micro-enterprises (MSMEs). However, recent nationwide protests toppled the long-standing political elite's house of cards, revealing the false promises used to rig their way to power. More significantly, these youth-led protests, supported by their parents and employers, debunked the stereotype that Gen Z and overall youth movements are weak, self-indulgent, and apolitical. Like their parents and grandparents who fought for independence and multiparty democracy, this new movement has been driven to a breaking point by poor governance, carrying the heavy burden of socioeconomic liberation on their shoulders.[60] According to Zeleza, the Finance Bill acted as a catalytic straw that broke the camel back for its generation and other segments of the Kenyan population.

According to political commentaries of Kenyan jurists and Gen X political analysts such as Paul Mwangi, the Youthful Movements leading current protests are products and evident beneficiaries of their ancestors struggles, parents' quest for Kenyan socialism, the political activists' quest for democratic dispensation in the 1980s and 90s, birthing vibrant multi-party democracy in Kenya. Fruits of such democratic liberation were the President Mwai Kibaki regime, replacing the controversial 24-year dictatorial and despotic rule with Emeritus president, the late President Daniel Toroitich Arap Moi.[61] Kibaki, having served under President Moi's government as the Minister for Finance, broke ranks with Kanu to join an opposition that later opposed his oppression of tyrannical rule. He saw the 2nd president to be insensitive to socio-economic plights of the citizenry,[62] creating an avenue to agitate for demands of them formidable citizens siding with the citizens to demand for a new dual democratic and developmental state architecture.

Many Kenyans who lived through President Moi's tyrannical leadership found that Mwai Kibaki's 10-year tenure accelerated the nation's sociopolitical and economic progress compared to his predecessor. Consequently, some attribute the current youthful movement's awareness of Kibaki's policies to free primary education and affordable secondary and university education.[63] However, the new university

[60]KHRC (n2).
[61]AfriMAP, OSIEA and Institute for Development Studies, University of Nairobi, 'Kenya: Democracy and Political Participation' (Discussion Paper, March 2014) 1-27.
[62]'Mwai Kibaki in Opposition | Presidential Library & Museum' (*Presidentiallibrary.go.ke* 2022) <https://www.presidentiallibrary.go.ke/mwai-kibaki-opposition> accessed 9 July 2024.
[63]Ishmael Munene, 'Kibaki's Kenya Education Legacy: Well-Intentioned, with Disastrous Consequences' (*The Conversation* 26 April 2022) <https://theconversation.com/kibakis-kenya-education-legacy-well-intentioned-with-disastrous-consequences-181847> accessed 10 July 2024.

Extrajudicial killings have been a significant and troubling issue in Kenya, involving cases where individuals are killed by law enforcement or state actors without legal due process. This issue has been a subject of considerable concern and controversy, both nationally and internationally.

model has been seen as a regression, a step forward, and a two-step backward.

Regarding the comparison of President Moi and Kibaki's track records, the Business Daily reported that in 2002, the year President Moi left office, the economic growth rate had dropped to 0.6 percent. This figure rose to 7.1 percent in 2007 when Kibaki completed his first term. However, the president of Kibaki's tenure is not flawless.[64] He faced significant clashes with political factions, particularly over the Bomas draft constitution, which experts considered highly transformative but never saw vetoed rights of implementation.[65] Additionally, his controversial re-election in 2007 led to gruelling and heart-wrenching Post-Election Violence (2007-8). This period saw major crimes against humanity, including tribal killings, the burning of congregants in a church in Kiambaa, extrajudicial killings, and the Mung'iki uprising, resulting in the deaths of over thousand innocent civilians. Survivors, many of whom narrowly escaped death, continue to suffer from the trauma of rape, sexual assault, amputations,[66] and other horrors that caused Post-Traumatic Stress Disorder (PTSD) for them and their families.

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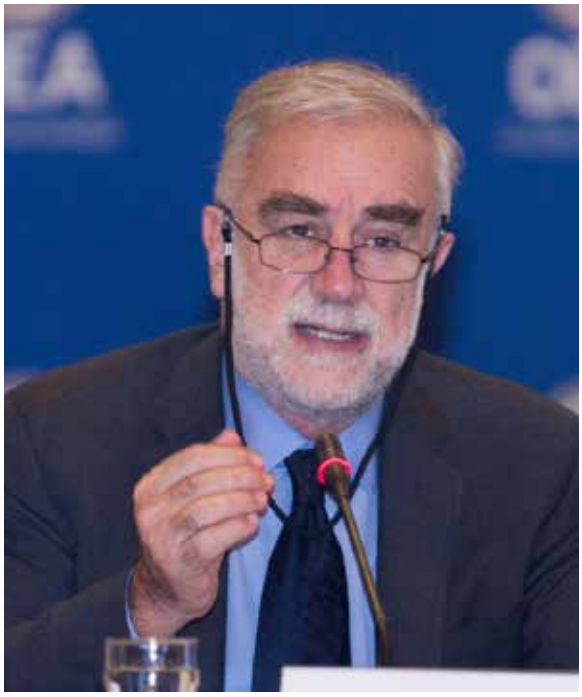
[64]George Wachira, 'Kibaki's Leadership Was Game-Changer' (*Business Daily* 26 April 2022) <https://www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/kibaki-s-leadership-was-game-changer-3795418> accessed 13 July 2024.
[65]David K Leonard and Felix Odhiambo Owuor, with contributions from Katherine George, 'The Political and Institutional Context of the 2007 Kenyan Elections and Reforms Needed for the Future' (2009) 8(1) Journal of African Elections 71-98.
[66]Christopher Albin-Lackey, 'Ballots to Bullets' (*Human Rights Watch* 16 March 2008) <https://www.hrw.org/report/2008/03/17/ballots-bullets/organized-political-violence-and-kenyas-crisis-governance> accessed 10 July 2024.



Former International Criminal Court Chief Prosecutor Luis Moreno Ocampo

considered highly transformative but never implemented. Additionally, his controversial re-election in 2007 led to gruelling and heart-wrenching Post-Election Violence (2007-8). This period saw major crimes against humanity, including tribal killings, the burning of congregants in a church in Kiambaa, extrajudicial killings, and the Mung'iki uprising, resulting in the deaths of over thousand innocent civilians. Survivors, many of whom narrowly escape death, continue to suffer from the trauma of rape, sexual assault, amputations, and other horrors that cause Post-Traumatic Stress Disorder (PTSD) for them and their families.

Such events saw President Ruto and former President Jomo Kenyatta being indicted for crimes against humanity before the International Criminal Court (ICC). This forced them into a marriage of convenience in preparation for the 2013 general elections, attempting to fend off external interference by stoking nationalistic sentiment. At the time, Luis Moreno Ocampo was the prosecutor before Fatou Bensouda succeeded. The charges eventually dropped as witnesses died, disappeared, or withdrew their testimony.[67] During this period, Johnnie Carson, then U.S. ambassador to Kenya, remarked on the interconnectedness of actions and their consequences. Unlike Carson, the current U.S. Ambassador to Kenya, Meg Whitman,[68] has close diplomatic ties with President Ruto, as seen during his tour to the United States.

In other words, Carson's post-PEV 2007-08 remarks backfired when Kenyans, especially from the North Rift and Central regions, rallied behind the indicted William Ruto and Uhuru Kenyatta, leading to their controversial yet narrow win in the 2013 general elections. In December 2024, the ICC withdrew the indictment on controversial "without prejudice" grounds, justified by the deaths of key witnesses and the inability of terrified remaining witnesses to testify, thereby failing to meet the evidential threshold. Key witnesses recanted or withdrew their testimonies, and the Kenyan government's lack of political goodwill hindered prosecution's capacity. The ICC bench withdrew from the matter, citing a lack of evidence and widespread witness tampering.[69] Judges that left the case open for reopening should compel evidence to emerge.

Suffice to say that ICC survival was further proceeded by the current and former president's political marriage of

[67]'Kenya' (*International Criminal Court* 2023) <https://www.icc-cpi.int/kenya> accessed 10 July 2024.
[68]BRIAN NGUGI, 'Joe Biden Taps Former HP Boss Meg Whitman as US Ambassador to Kenya' (*Business Daily* 9 December 2021) <https://www.businessdailyafrica.com/bd/news/biden-taps-former-hp-boss-meg-whitman-us-ambassador-kenya-3646568> accessed 13 July 2024.
[69]Westen Kwatemba Shilaho, 'Old Wine in New Skins: Kenya's 2013 Elections and the Triumph of the Ancien Régime' (2013) 12(3) Journal of African Elections 89-115.

convenience treading on shacky grounds as during the second term, a public fall-out was evident, further complicated by the entry of an additional spouse: NASA leader, former Prime Minister Raila Amolo Odinga. The entry of this political spouse could be attributed to mounting pressure by opposition and historical swearing of the towering political leader as the people's president, a move, albeit being treasonous, marked a watershed moment for a political union of convenience, a major problem being that akin to other political marriages, the first political wife was unceremoniously sidelined. Moreover, issues such as the historic annulment of the 2017 First General elections and consequent boycotts by Raila Amolo Odinga compelled a union of convenience to restore a sense of normalcy and avoid the crumbling of national political and socio-economic structures and functions.

The trio, that is, former president Uhuru Kenyatta, Prime Minister Raila Amolo Odinga and the Kenyan President Ruto being president Ruto's legal progenies and having never participated in a goodwilled (devoid of quintessential opportunism) democratic movements, shared the autocratic reflexes and dictatorial play script. Albeit the worry gearing to 2022 general elections that the current president could be a reincarnation of a sophisticated former president, Moi 2.0, others harboured the belief that Kenya had undergone a significant overhaul of political structures with the Constitution of Kenya 2010 as a crucial shield and defender of socio-economic ideals and democratic governance. Whereas Gen Z and Millennials remained split between the Azimio La Umoja-Kenya One and Kenya Kwanza political alliances, their conviction of the better candidate delivering premised on the growth realised from multiparty democracy. However, the majority of the Kenya Kwanza youthful population was perhaps persuaded by how the alliance nominated many women and youth to vie for various elective and political posts countrywide while they were also revenging on the former Prime Minister's 2017 betrayal, citing his unholy alliance with president as a cesspool of quintessential opportunism and a betrayal of his huge followers who did not anticipate for him to pull the selfish dialogue card, albeit justified for the purpose of building broken Kenyan bridges.

While this gave UDA a wavelength of prosperity and a political advantage, barely two years, even Gen Zs and Millenials in the diaspora who joined anti-tax protests in Kenyan embassies globally, such as that in Washington DC seem disgruntled on how the hustler narrative has slowed lost credibility, other wondering the president who they expected to perform a surgery on the economy by ensuring fair tax administration has turned to be an economic oppressor. Remains of his clips that promised to create an enabling business environment through revision of taxes being replayed by Kenyans holding their chicks, coming to the realisation that it was a game of chess, and they were

The former Prime Minister Raila Amolo Odinga

Economic advisor to the Kenyan president David Ndii.

neither a Knight nor a queen, rather a pawn, acting as a ladder for him to ascend to the highest political seat in the country.

Coming to age of digital activism; a new wave

Thanks to President Mwai Kibaki's introduction of free and affordable education and the rise of digital activism, Kenyan democracy matured. More Kenyans, especially Gen Z and Millennials, are now aware of their sovereignty, a development furthered by the 2010 Constitution. Despite history's tendency to prove doubters wrong, the government economic advisor David Ndii dismissed the youth's anti-tax movements as inconsequential, referring to them as "digital wankers", while legislators deemed them ill-mannered and ill-advised. As Tiyambe noted, seemingly stable conditions can be quickly overturned by massive protests. In a surprising turn, Reuters highlighted the once-dismissed digital activism *"Over just one week, what began as an online outpouring of anger by young tech-savvy Kenyans on proposed taxes on bread and diapers has morphed into a nationwide movement untethered from politicians who have traditionally rallied the masses* (physically and through political enticements).[70]

Leaders allied to Ruto's dismissive tone regarding the protests has slowly toned down, even the majority leader toning down his view that protestors were a *plan of entitled wealthy kids whose kin were able to afford them owning smartphones*. Importantly, this youth movement, albeit having its sell outs, and saboteurs (preferably under political leaders' payroll), have largely remained tribeless, leaderless, and partyless, even signalling Baba to step down on his recent insinuation of the ruling and opposition coalitions dialogue.[71] The inorganic and predictable structure of these Gen Zs has therefore made the political elites' traditional routes or sinister tricks of circulation from influential political figures from party to party, asking heads of movements to name their price in exchange for political cooperation, and hence a vital autocratic tool of control.[72] This may explain why abductees are tortured to name the source of the movement's funding and leadership if there are any (to which none currently exists).

The lack of a clear leadership structure, such as the Arab Spring and Occupy Wall Street movements pre-2010s, poses a significant vulnerability for radical democratic and political transformation movements, often leading to their demise. Gen Z should consider adopting a decentralised structure to ensure sustainability. The weaknesses of #OccupyWallStreet and #ArabSpring

[70] https://www.reuters.com/world/africa/kenyas-youth-led-protest-movement-leaves-ruto-fumbling-response-2024-06-26/
[71] Opalo(n8).
[72] Fidelis Mogaka, 'Gen Z Surprise: Too Organised to Stage Protests without a Leader' (*The Standard* 9 July 2024) <https://www.standardmedia.co.ke/business/national/article/2001498614/gen-z-surprise-too-organised-to-stage-protests-without-a-leader> accessed 11 July 2024.
[73] 'The Varieties of Protest Experience: How Accountability Gaps Link the Arab Spring and Occupy Wall Street' (Carnegiecouncil.org 9 February 2012) <https://www.carnegiecouncil.org/media/series/ethics-online/the-varieties-of-protest-experience-how-accountability-gaps-link-the-arab-spring-and-occupy-wall-street> accessed 10 July 2024.
https://www.nation.co.ke/tea/oped/comment/youth-triggered-overdue-talk-on-the-state-of-nationhood-4681828

offer valuable lessons to Kenyan Gen Z protesters.[73] Former President Kenyatta once asserted that the frustrated youthful generation is dangerous. Initially, the youth supported President Ruto's Kenya Kwanza, but their current sense of betrayal suggested diminishing hope in his administration. Former Minister Fred Matiang'i accused Ruto of being a consistent liar, a sentiment echoed by international media and the youth who now say,[74] "he lies all the time, and all the time he lies."

Attempts by President Ruto through his aides to infiltrate digital movements have also failed. Protesters on various social media platforms remain steadfast in their stance of being party-less, classless, and tribeless, rejecting the divisive, manipulative, and exploitative tactics of the Kenyan political classes. These tactics, often used during election cycles, pit the youth and general population against each other while politicians engage in dialogue funded by punitive taxes on taxpayers.[75] This supports the view that Kenya's issue is not a tax revenue problem but an expenditure problem, a characteristic that resonates with both young and old supporters. Undoubtedly, this modern revolution is remarkably run by well-informed protests who are tech-savvy on their social media platforms leveraging to mobilise the nationwide cause for transparent and accountable governance. A publication in the Daily Nation further revealed that: *"What sets these demonstrations apart are their meticulous organisation via social media platforms, a tactic which has mobilised thousands of passionate protestors."*[76]

Popular websites that support the success of this digitally savvy movement include Zello for project management and planning, X (formerly Twitter) to broaden the reach of the movement, and WhatsApp and Telegram to coordinate meeting points during physical protests. TikTok, Vimeo, Viskit, and YouTube were used to broadcast the demonstrations, ensuring that elected leaders listened. Artificial intelligence also aids the movement, with experts training GPTs to break down punitive bills and criticise MPs who breach social contracts. Language translation experts have translated the Finance Bill 2024 into local languages, helping older generations understand the bill.[77] These efforts are seen as a political act of decolonising African linguistics in postcolonial Kenyan society, convincing many parents to join the movement. According to the parents, who have blessed their patriotic children's cause for a liberated Kenya and even joined them, they are surprised by their tremendous contribution to the course. In fact, they are on record remarking that:

"*At first, we thought it was a bad idea for our children to take the frontline of the battle against the high taxes. However, Tuesday, the 25th of June 2024 together with our children, we occupied the streets, chanting "Ruto Must Go'*…parents also noted, according to the media reports, that *"apart from the Finance Bill 2024, parents were compelled to occupy the streets in solidarity with Youth-led peaceful protests as a result of tough economic times, poor governance, and service delivery, while the cabinet and elected members of the National Assembly and Ruto's close aides brazenly displayed opulence and resource wastage. They were also raged by Members of Parliament's accumulation of illicitly acquired wealth at the expense of continuously milked marginalised population, slow creation of*

[75]Otiato Opali, 'Kenyan President Tries to Quell Anger Using Social Media - Chinadaily.com.cn' (*Chinadaily.com.cn* 2024) <http://epaper.chinadaily.com.cn/a/202407/08/WS668b17fca3106431fe82cf27.html> accessed 10 July 2024.
[76]Editorial (n48)
[77]Citizen TV Kenya, 'Protest Organizers Translated Bill into Languages' <https://www.youtube.com/watch?v=p-AuF84CoZo> accessed 13 July 2024.

employment opportunities, meaning majority of their graduate children were still at home, their HELB repayment periods, while the government promised them jobs of being a housemaid, driver, and other career-mismatch and ridiculing dark collar jobs abroad."[78] By them rising against such impunity, parents noted that Gen Zs have made history by achieving tremendous progress the older folks dreadfully failed to pursue, such as complaints surrounding poor leadership and a lack of accountability due to their fearlessness.

The Church's unholy alliance with the state has not been spared. The youthful movement has boldly criticised and petitioned for the dissolution of this unhealthy and costly relationship, citing its adverse effects on society. Protesters satirically claim that the Gen Z protests against punitive bills, notably the Finance Bill 2024, have driven the church back to God. Clerics are now under scrutiny and struggling to dispel allegations of being complicit with the state. The song "*ni wakati wa kupepetwa, pepetwa, kanisa limekwisha pimwa kwenye Mizani ya Bwana*" echoes the sentiment. While pressure mounts the government to fulfil its bottom-up promises to citizens, the church finds itself at crossroads, trying to reclaim its independence and integrity. What angered protesters during the 20 June 2024 protests was the Holy Family Basilica closing its doors to shield protesters from police, while Jamia Mosque offered aid and allowed medics to set up a first aid camp.[79] Critics have also highlighted the church's silence during the onset of the protests, only to later call on the state over the brutality meted out on tax protesters, thereby justifying the use of the phrase "too little to late."

Such a move, in the eyes of the fourth and fifth estates, served as a smokescreen and an ingenuine chess move by the church, succumbing to congregants pressure upon being on the receiving end of criticisms regarding them *"Cozying up to the government. Some churches, as a sign of covering their reluctance and fence-sitting* that could translate to siding with the oppressor bowed to the pressure of providing protesters with a safe haven on 25 June 2024 protests, in a sympathy-seeking move to endear themselves to the public, strategically trying to show support for their cause. More raging is the fact that whereas the youthful movement was the one that made the president not t. succumb to the pressure of not signing the finance bill 2024, the clergy was the first to be consulted on issues charting the nationalistic way forward, a view, Gen Zs allied movement viewed as a joke of the century.[80] A church has, therefore, been a yardstick that has also put other vital societal actors, such as the international community and multinational corporations, perceived to be conniving with the state on the spotlight, opening a Pandoras box of a perceived citizen accountability juggernaut.

Suffice to say, for the last two months, institutions, towering political figures, and individuals have come under intense pressure flaired by criticism by Gen Zs. Creative eerie silence was noted, traitors of the movement were called out, and politicians that voted YES to the Finance

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[75]Otiato Opali, 'Kenyan President Tries to Quell Anger Using Social Media - Chinadaily.com.cn' (*Chinadaily.com.cn* 2024) <http://epaper.chinadaily.com.cn/a/202407/08/WS668b17fca3106431fe82cf27.html> accessed 10 July 2024.
[76]Editorial (n48)
[77]Citizen TV Kenya, 'Protest Organizers Translated Bill into Languages' <https://www.youtube.com/watch?v=p-AuF84CoZo> accessed 13 July 2024.
[78]Standard Team, 'Gen-Z Parents Back Demos, Tell Kenya Kwanza to Listen to Pleas' (*The Saturday Standard*24 June 2024) <https://www.standardmedia.co.ke/health/national/article/2001497719/gen-z-parents-back-demos-tell-kenya-kwanza-to-listen-to-pleas> accessed 11 July 2024.
[79]https://nation.africa/kenya/news/how-gen-zs-drove-the-church-back-to-god-4675172
[80]Ibid.

By engaging in activism and advocacy, Gen Z can influence policy discussions and decision-making, ensuring that their concerns and perspectives are considered in future legislative actions.

Bill 2024, contrary to the constituents' cry, have also been grilled while the source of their opulence, property, and behaviour was put under a microscope. Such criticism has been done through means that are legal and some of which state agencies have deemed to be borderline ultravires and borderline harassment, such as baptised *kusalimiwa*- evidenced by sharing of phone numbers publicly, spamming of their inboxes and social media DMs, and being walked out or booed online. This has also indirectly allowed the testing of online accountability tools, contemplation of the right to recall an MP now that the IEBC amendment bill was assented to law, and the occupy movement targeting institutions such as parliament. Politicians, particularly MPs, have succumbed to public pressure.[81] This led to them making a growing list of public apologies from embattled legislators that chest-thumpingly voted Ayes to the now shelved 2024 Finance Bill.

The president has equally bowed to pressure evidenced by the highlighted decline to sign the bill that is now shelved, promising to cut unnecessary expenditure such as on the unconstitutional offices such as that of the first lady, office of the Deputy President's spouse, and one belonging to the spouse of the illegally held and occupied office of the Prime cabinet minister. He also dissolves the cabinet regarding what seems to be the constitutional ground of incompetence. He also signed the Appropriations Act while instructing on further budget cuts as part of the austerity measures sought by the new wave of revolutionaries. The President also engaged in the youthful movement on X Spaces, reinforcing their stance that they do not need a dialogue; rather, they want to see their demands being met.

Way forward

Whereas it remains difficult to predict the trajectory Kenyan Youth-led protests and digital activism leads to, Gen Zs allied movement will not stop any time soon considering pertinent unmet demand. Apart from the dissolution of the cabinet,

[81] Opalo(n8).

the movement still demands an audit of Kenyan's debt situation, as it remains unclear what figure and repayment terms Kenyans are working with. According to the movement, this would be the first step toward unshackling the country from the economic hostage of lenders and their sanctioned tax measures. Second, Kenyans wanted to understand how loans borrowed were utilised and whether Kenyans got a return value. They are further demanding a paper trail of how funds were pilfered, especially the controversy-shrouded public mystery, which can be brought to the book. Third, firing the whole cabinet was not enough; Gen Zs' allied movement demands a lifestyle audit and ministerial audit on how allocated budgets were spent considering CoK's leadership and integrity chapter as well as transparency and accountability national values and principles. A lifestyle audit would establish whether the former cabinet secretary's public display of opulence was at the expense of taxpayers' money looting or other illicit dealings, while an audit of ministerial books of accounts would show how taxpayers' money was utilised. Where found complicit of grafts, deterrent measures ought to be taken in the recovery of looted funds.

Regarding the aforecited extrajudicial killing of peaceful protestors and illegal abductions of various activists and even student leaders, the Gen Z movement demands that perpetrators and complicit proxies be brought to book. This may justify the mounting pressure of the resigned NIS Director, Police Inspector General, and Emeritus Ministry of Interior Cabinet Secretary not being off the hook, considering the public demand that they be brought to book. According to civil society organisations, they have serious international human rights violations allegations to answer following compelling evidence showing peaceful protestors were killed during peaceful protests by state machinery, some of whose bodies were found dumbed in quarries, abductees were tortured contrary to prohibited human rights under Chapter.

Another issue concerns constitutional socioeconomic rights, namely food, health, and education. As for food security, the noted fertiliser scandal was never probed and perpetrators brought to book; farmers were not recompensed of substandard fertilisers they were supplied with. As for health, it is imperative for all the medical interns according to the Gen Z allied movement to be posted pursuant to the 2017-21 Collective bargaining agreement and with immediate effect albeit realignment of the appropriations act. According to the allied Gen Z movement, it makes no sense to budget for an increase in the legislature and executive arms of the government, whereas key state departments and functions such as health lack funding for critical functions. As for education, budgets should be re-aligned to oversee confirmation of Junior Secondary School intern teachers on permanent and pensionable terms; it remains a joke that an intern teacher is paid an amount less than the airtime allowance of a member of parliament. Lastly, the new University Funding model needs to be relooked as the increased university fees have started gatekeeping education. President Mwai Kibaki and Uhuru Kenyatta strived to make this affordable.

These would form the start of a national rebuilding by Gen Zs allied reckoning forces as more issues regarding increased funding of manufacturing and agricultural sectors to prevent brain drain through the creation of local jobs. Nonetheless, the Gen Zs allied movement needs all the support from civil society and the embattled Kenya Kwanza regime, ensuring commitment of the nation and the continent towards a brighter tomorrow.

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Arrests, abductions and the Kenyan protester's dilemma

By Esther Nasimiyu Wasike

Introduction

The recent protests witnessed in Kenya, particularly in response to the controversial Finance Bill 2024, have exposed a troubling pattern of protesters disappearing under mysterious circumstances. The general public has deemed the disappearances as abductions, whereas some law enforcement agencies have described them as lawful arrests. Essentially, these two schools of thought have been postulated for our consideration. This article delves into the legal distinctions between arrest and abduction, analyzes the situation in Kenya, and proposes potential solutions.

The thin blue line

In Kenya, a clear distinction exists between an arrest and an abduction, primarily based on their legality. An arrest is a lawful act, defined under Section 2 of the National Police Service Act as the apprehension of an individual for a suspected offence or by legal authority. In contrast, an abduction, which involves taking someone against their will through force, persuasion, or deception, is

Authorities often justify arrests as necessary for maintaining public order and preventing violence. However, the proportionality and legality of such actions are frequently questioned.

In Kenya, while the concept of Miranda rights as known in the U.S. does not directly apply, similar protections are enshrined in the Constitution and other legal frameworks. The legal system provides for certain rights during arrest and detention, including the right to be informed of charges, the right to legal representation, and protections against inhumane treatment. Ongoing reforms and advocacy efforts aim to address challenges and ensure that the rights of individuals are upheld throughout the legal process.

considered a criminal offence under Section 256 of the Penal Code. Applying these legal distinctions to the disappearances reveals a complex situation. While both scenarios involve confinement, the key difference lies in the process. Apprehensions by law enforcement officers, based on reasonable suspicion and adhering to legal procedures, would be classified as lawful arrests. Conversely, instances of forced removal or deception, lacking due process, strongly indicate abduction.

Miranda Rights, arrest and detention in Kenya

A report by Amnesty International alludes to what are commonly known internationally as the "Miranda Rights", derived from the celebrated case of *Miranda v Arizona* (1966), in the United States, where the proper procedure for arrest was defined to include the officer informing the arrested persons on their rights to remain silent, the right to an attorney and the right to be told the consequences of not remaining silent, promptly in a language that they understand.

In the report, Amnesty International documents nearly 627 arrests and 32 abductions by July 7th, 2024, highlighting a concerning pattern of unlawful detainment. The organization notes that many individuals were not informed of the charges against them, denied access to legal counsel, and held incommunicado, underscoring a significant departure from established legal procedures.

Article 49 of the Constitution of Kenya, 2010, mirroring the Miranda Rights guarantees arrested persons the right to be told the reason for their arrest, to remain silent and to be told the consequences of not remaining silent, promptly in a language that they understand. This is to protect the arrested persons from self-incrimination.

Moreover, the Arrest and Detention Rules

under schedule 5 of the National Police Service Act entitle detained persons the right to enjoy all the rights that do not relate to the restriction of liberty. They are entitled to communicate with and receive visits from members of the family and have their family members informed of the arrest and detention and place of detention. Further, detained persons are to only be held in a designated lock-up facility.

The UN General Principles for Law Enforcement Officers reinforce the importance of adhering to legal safeguards by emphasizing due process, prohibiting torture, and ensuring access to legal representation for detainees. Furthermore, these principles advocate for the use of force as a last resort, emphasize that detention should be the exception rather than the rule, and mandate that detainees be held only in recognized facilities with their families and legal representatives fully informed.

Systemic Lacunae in Oversight

While the Kenyan legal landscape provides clear guidelines and safeguards for arrests, the disconnect between these legal provisions and actual practices on the ground raises serious concerns. Potential gaps in oversight mechanisms, inadequate training of law enforcement personnel, or even a deliberate disregard for legal safeguards in pursuit of maintaining order could erode public trust in the justice system, potentially fueling civil unrest, and exacerbating the challenges facing law enforcement in Kenya.

There exist numerous shortcomings that contribute to the escalated blurring of the line between arrests and abductions, especially as witnesses during the recent protests. These issues underscore the urgent need for reform and accountability within the law enforcement sector to ensure that the rights and freedoms of Kenyan citizens are protected and that the law is upheld in practice, not just in books.

Late lawyer Willy Kimani

Firstly, there is lack of information among citizens on their rights when arrested. According to the Independent Police Oversight Authority (IPOA) Baseline Survey Report of 2013, only 40.2% of the public reported familiarity with their rights when arrested. In the report, while the average number of days between the arrest and charge of a suspect is 5.5 days, the range shows that, in at least one case, 95 days passed before the police brought the accused to court for charging after their arrest.

Secondly, it is not clear at what point the arrested person is informed of their place of detention. Is it at the point of arrest, on the way or when already at their place of detention? It is also not clear whether Kenyan legal officers actually mention to the arrested persons their place of custody, or their rights against self-incrimination as properly outlined under Article 49 of the constitution.

Another loophole is the execution of arrests by non-uniformed officers, using unmarked vehicles. In an interview by a local television station, one of the allegedly abducted persons in narrating his ordeal

explained that other than neither identifying themselves nor offering an explanation for his arrest, the officers who apprehended him were not in uniform and used a private vehicle which was unmarked.

The tragic murder of lawyer Willy Kimani together with his client and driver in 2016 should serve as a stark reminder of the potential dangers associated with the use of unmarked vehicles and plainclothes officers in arrests. The case highlighted the heightened vulnerability of individuals when apprehended by unidentified figures, as it obscures the line between lawful arrest and abduction. In such instances, malicious people might take advantage of the situations and execute abductions in claims of being law enforcement officers. This practice can instill fear and mistrust in the public, undermining the legitimacy of law enforcement and eroding citizens' confidence in the justice system.

The way forward

Essentially, several concrete steps must be taken to ensure clarity among citizens and law agencies as to whether their detention amounts to an arrest or an abduction. Importantly, oversight mechanisms such as the Independent Policing Oversight Authority (IPOA) must be fortified with increased resources and independence to effectively investigate allegations of abuse and misconduct by law enforcement agencies. The IPOA guidelines and the National Police Service also ought to state outrightly at what point the specific rights of the arrested person should be executed.

Simultaneously, comprehensive training programs for law enforcement personnel are essential. These programs should focus not only on legal procedures but also on human rights and the ethical conduct of arrests, fostering a culture of respect for the rule of law and the rights of individuals.

Promoting transparency and accountability is also paramount. Every arrest should be meticulously documented, with prompt notification provided to family members. A centralized database tracking the location and status of all detainees would significantly enhance transparency and serve as a deterrent against enforced disappearances.

The writ of habeas corpus, a powerful legal tool allowing individuals to challenge unlawful detention, should be readily accessible and utilized to secure the release of those unjustly held. By proactively employing this legal remedy, the judiciary can play a crucial role in safeguarding the rights of individuals and ensuring adherence to due process. The courts could also play a role by properly evaluating the procedure followed during arrests, when a detained person is presented before them.

Public awareness campaigns and advocacy efforts are also essential. By educating the public about their rights and the legal remedies available to them, individuals can become empowered to challenge unlawful actions and hold law enforcement accountable. Collaboration between civil society organizations, human rights defenders, and the media can further amplify these efforts and ensure that cases of abduction and arbitrary detention do not go unnoticed.

Conclusion

In conclusion, the escalating tension between protesters and law enforcement in Kenya, marked by accusations of abductions under the guise of arrests, underscores a critical juncture for the nation. The government must take decisive action to address the underlying grievances fueling the protests, while simultaneously upholding the principles of due process in order to clearly distinguish arrests from abductions.

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Kenya's crisis of trust and the pursuit of responsive leadership -an uphill task

By Munira Ali Omar

Introduction

In 2023, Nandi Senator Samson Cherargei was in public saying:

"The decision to pass the 2023 Finance Bill by Parliament is not optional where even a comma shall not be amended because we either borrow more or raise our revenue through taxation."

Cherargei's statement pointed to a broader issue of rushed legislative processes and decision-making where even minor amendments or otherwise inclusion of inputs from citizens are considered impractical. This approach not only marginalizes public voices but also risks enacting laws that do not fully address the needs of the people. In this context, the court's decision in the case of ***Okiya Omtatah Okoiti and 51 Others -vs- The Cabinet Secretary for the National Treasury and Planning and 6 Others***[1] becomes even more significant. In this case, the High court held that public participation process must be both facilitative and fair. The court further held that section 84 of the

Nandi Senator Samson Cherargei

Finance Act was unconstitutional null and void. It consequently declared the housing levy illegal and issued prohibitory orders against the respondents from charging, levying or in any way collecting the affordable housing levy. Unfortunately, in December 2023, the Clerk of the National Assembly disregarded the court orders when he published a notice calling for public participation on the Affordable Housing Bill, 2023. This was also despite widespread public opposition to a levy that was deemed illegal *ab initio*.

The debate over public participation did not end with the High court decision. Instead, it took on new dimensions as the struggle for authentic civic engagement moved to the Court of Appeal. In its recent landmark decision in ***Okiya Omtatah Okoiti and 51 Others -vs- The Cabinet Secretary for the National Treasury and Planning and 6 Others*** regarding the 2023 Finance Act, the Court of Appeal observed that the National Assembly's failure to provide written explanations for its decisions particularly regarding amendments that contradicted public feedback was a significant breach. The Court firmly disagreed with the High Court's view that providing such reasons was merely "desirable" rather than mandatory. It further observed that public participation must be more than a formality and that it must be a genuine and impactful process where public input is meaningfully considered and integrated into decision-making.

The Court of Appeal's decision marked a critical juncture in Kenyan constitutional jurisprudence vis-à-vis public participation. By declaring the Finance Act 2023 unconstitutional, the Court reaffirmed the principles of legislative integrity, transparency and public participation. This ruling not only resolves the issues specific to the Finance Act, 2023 but also sets a precedent for future legislative processes emphasizing the need for strict compliance with constitutional standards.

Secretive Appointments

The core issue at hand is the severe erosion of trust in our leaders.In the last two years, Kenya has witnessed troubling developments that have exposed a growing mistrust in those in power. The pattern of hasty and opaque decision-making was glaringly evident in the recent controversy over the appointment of new Cabinet Secretaries. On 8th August 2024, the nation was met with disappointment and frustration when the Parliamentary Committee on Appointments tabled its ***Second Report on the Approval Hearings of Nominees for Appointment as Cabinet Secretaries*** on 7th August 2024 with the new cabinet secretaries being sworn into office the very next day. Remarkably, this happened on the very day Gen Z had organized a demonstration to demand accountability from the government.

The seemingly planned swearing-in of the ministers a day after the tabling of the report demonstrated a concerning pattern of decision-making that is shrouded in mystery. By withholding this crucial information, the National Assembly silenced the public and denied them an opportunity to review, understand and scrutinize the criteria used to appoint ministers thus impeding meaningful participation and democratic oversight while further undermining trust in leadership. This apparent disregard of the Constitution specifically chapter six suggests a concerning lack of commitment to the rule of law and the ethical standards that should govern our leaders. So, it was not only the integrity of the nominees that was in question but also the credibility of the MPs themselves. The public's faith in the political process was at stake as it became clear that both the nominees and the MPs failed to meet the moral and ethical benchmarks expected of them. This deepening crisis of trust threatens the integrity of our governance and leaves many questioning whether their voices and values are truly represented.

Senator Edwin Sifuna

The road to reform

The government's resistance to fully comply with public participation rules points to a deeper problem of a growing gap between official decision-making processes and the needs and expectations of the public. This disconnect not only erodes trust in governmental institutions but also fuels public frustration and activism. As citizens are increasingly compelled to take to the streets to demand accountability, it becomes evident that there is a significant need for enhanced civic education to continue empowering citizens in order to close the growing gap between those in power and the general public.

As I wrap up, Senator Edwin Sifuna's words still hit hard:

"These guys are overworking us. As a member of the opposition, I feel overworked. Because every single day I wake up there is something to fight this government on."

Now, even though some of those who once opposed the government have now joined its ranks, Sifuna's frustration vividly reflects the ongoing struggle for accountability and true democratic engagement amidst a government resistant to meaningful reform. It is imperative that we continue stepping up and speaking up.

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 tranquilization of legislative tyranny: How Kenyan Courts are giving life to Article 10

By Dennis Gitonga

The Constitution of Kenya, promulgated on August 27th, 2010, encompasses national values and principles of governance contained in Article 10.[1] They include, inter alia, patriotism, national unity, social justice, the rule of law, democracy, and public participation. In essence, public participation is a cornerstone of good governance. Article 118 of the Constitution also requires parliament to facilitate public participation in the enactment of laws.[2] This article examines how the judicial arm of government in Kenya has come in handy, to help curb legislative tyranny by giving life to Article 10 of the constitution.

There exists an arm of government in Kenya called the legislature. It exercises legislative authority conferred to it by the people by virtue of Article 94.[3] One of the chief roles of the two houses of Kenya's parliament is to make laws, which are thereafter assented to by the president to become statutes.[4]

In a record two months, the Kenyan High Court and Court of Appeal have declared four statutes to be unconstitutional. The Social Health Insurance Fund Act, the Digital Health Act, and the Primary Health Act of 2023 were declared to be unconstitutional by the High Court in Petition E473 of 2023. On the other hand, Kenya's Court of Appeal, in Civil Appeal E003 of 2023, declared the process that had led to the enactment of the Finance Act of 2023 a nullity hence rendering the act null and void. The state appealed for the stay of the two respective judgments. The Court of Appeal declined to give a stay to the judgment that had declared the SHIF Act to be unconstitutional. The Supreme Court on the other hand, in a ruling delivered on 21st August 2024, granted conservatory orders staying the judgment of the Court of Appeal that had declared the Finance Act of 2023 to be unconstitutional.

One common factor that led to the two acts being declared unconstitutional was that the state had not carried out public participation that was sufficient and reasonable. Public participation in the law-making process comes after the second reading of a bill has already been done.

To contextualize this, here are the stages that a bill passes through before it becomes law.

First reading - The clerk of either of the two houses of parliament merely reads the title of the bill.

Second reading – The sponsor of the bill moves a motion for the second reading of

[1]Constitution of Kenya 2010, Article 10
[2]Constitution of Kenya 2010, Article 118
[3]Constitution of Kenya, Article 94
[4]Constitution of Kenya, Article 109

Finance Committee Chair, Honorable Kimani Kuria

the bill. The house debates the object and principles of the bill. A vote is taken at the end and should it pass, the bill goes to the third stage.

Committee stage – Here, the plenary of the house, either the Senate of the national assembly converts itself into a committee. A clause-by-clause analysis is done on each part of a bill. Amendments are also done at this stage. This stage takes place after the public participation stage of a bill has passed and the mover of a bill has the liberty to amend a bill to conform to the views collected in public participation.

Third reading – Not much debate goes on here. The house takes a vote and if a bill is passed it is taken to the president for assent. Once the bill is assented to, it becomes an act of parliament.

Each year, the state usually brings a bill in parliament called a finance bill. It's sole purpose is to amend laws that relate to various taxes and duties. The Finance Bill of 2023, had more than 84 clauses as of 4th May 2023. The Bill the first and second reading in the National Assembly. It, therefore, underwent 'public participation' and returned to the floor of the national assembly for the committee stage. It was at the committee stage of the National Assembly that the Finance Committee Chair, Honorable Kimani Kuria, introduced at least 18 clauses to the initial Finance Bill. This act of introducing at least 18 clauses to a bill, clauses that had not undergone public participation in a bill was a ground for challenging the constitutionality of the process that had led to the enactment of the Finance Act. The High Court, led by Justice Majanja (the late), in Petition E181 of 2023 held that once the National Assembly has heard the views of members of the general public and stakeholders on the Bill, it was not precluded from effecting amendments to the Bill during debate before it is passed, and it could do so without necessarily carrying out a public participation exercise. The High Court found that the public participation carried out was real and not cosmetic.

The state appealed the High Court's judgment and the petitioners at the High Court level cross-appealed on several factors

including the issue of public participation. Dr Fredrick Ogola, opined that the act of reintroducing new amendments or proposals after the first and second reading of a bill has already been done amounted to a mischievous act to steal a match. The Court of Appeal, in what can be regarded to be a landmark decision, recently held that the decision by the Finance Committee to re-introduce 18 new proposals after the first two stages of the law-making process had been bypassed was a flagrant disregard of Article 10 and 118 of the Constitution and therefore the end result was a nullity. The Court of Appeal therefore annulled the 18 clauses introduced after the first and second reading stages of the Finance Act of 2023.

Many times, bill sponsors in the houses of Parliament introduce bills and cheekily introduce clauses post the second reading stage that do not undergo public participation. The Court of Appeal in its judgment terms this as a mockery of the constitution and parliamentary standing orders. Anything arising from such a process therefore becomes unconstitutional.
In the SHIF case the High Court declared the Social Health Insurance Fund Act among other statutes to be unconstitutional.

The main reason why the statutes were deemed invalid is due to inadequate public participation in the stages of their formulation. In this case, the court set out the bare minimum requirements for any public participation process. It includes;

i) Proper sensitization of the public on what a bill or policy contains.
ii) Adequate notice.
iii) Facilitation of the public to ensure they get the information required in regards to a bill.
iv) Consideration of the views and reasons to be given as to why a rejection has been done.
v) Integrity and transparency.
vi) It should be an inclusive process.

Among the six bare-minimum requirements set out in the SHIF Case, requirement number 4 is the most significant. In that, where a public participation exercise has been carried out, the legislature is obligated to give adequate reasons as to why a particular view has been rejected. This makes the public participation exercise not a mere Public Relations stunt.

Doctor Gautam Bhatia, a constitutional law scholar, regards the duty to give reasons in the context of public participation to be a significant doctrinal development.[5]

The Court further held that where an amendment to a bill has been done, it requires a fresh round of public participation. This again comes in handy to tame the tyranny of the legislature and ensures that every law or policy is subjected to public participation.

As demonstrated above, Kenyan courts continue to produce what I consider to be progressive jurisprudence in an effort to enforce Articles 10 and 118 of the Constitution. This judicial approach helps curb legislative tyranny and ensures that laws and policies from the two legislative houses meet the required standards for public participation. Adhering to these standards reinforces Article 1 of the Constitution of Kenya, which emphasizes the sovereignty of the people. Decisions affecting the public should not be made without providing them the opportunity to voice their opinions.

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[5]Gautam Bhatia, https://indconlawphil.wordpress.com/2024/07/16/giving-meaning-to-public-participation-the-kenyan-high-courts-shif-judgment/ Accessed 17th August 2024
[6]Constitution of Kenya, Article 1

The place of battered women syndrome in the Kenyan criminal justice system

By Elizabeth Waiteiyo

1.0 Introduction

Domestic violence is gut wrenching in itself but when it leads to a murder it's most foul. Women are not socialized to be violent in response to danger, rather they are defensive. It is therefore alarming when it is reported that a woman killed their husband in a situation of domestic violence. In Kenya, our courts have been confronted with such cases and the greatest challenge for the woman has been to prove self-defense. It is usually difficult to satisfy the elements of self-defense primarily because traditional application of this defense does not take into account the unique difficult circumstances that women facing IPV have to endure.

The majority of battered women who kill their abusers do so in response to some trigger in their current circumstances that, together with all of their past experiences, makes them feel as though danger to themselves or their loved ones is imminent.[1] Unfortunately, by isolating the woman's acts from her abuse history, the legal system tends to decontextualize the murder.[2] Consequently, the actions don't seem to be a reaction to impending danger or provocation, and as a result, they don't fit the conventional legal definition of self-defense.[3] Without knowing the complexities of the abuse experience, the law's stringent application of self-defense and provocation overrides a woman's sense of immediate threat drawn from years of prior violence from their intimate partner.

Domestic violence is a serious and pervasive issue that affects individuals and families across the globe. In Kenya, as in many other countries, domestic violence encompasses a range of abusive behaviors that occur within domestic settings, typically involving intimate partners or family members.

[1]Dana D. Dehart, "Women's Pathways to Crime: A Heuristic Typology of Offenders." (2018) vol 45 no.10 *Criminal Justice and Behavior* 1461<https://heinonline.org/HOL/P?h=hein.journals/crmjusbhv45&i=1405.> accessed 26th Nov 2023
[2]Jane Wangmann, 'Coercive Control as the Context for Intimate Partner Violence: The Challenge for the Legal System' in McMahon M and McGorrery P. (eds) *Criminalising Coercive Control* (Springer Publisher 2020) ISBN 978-981-15-0653-6 <https://doi.org/10.1007/978-981-15-0653-6_11> accessed 26th Nov 2023
[3]Ibid

Lady Justice Jessie Lesiit

Mostly applied in Western nations, Battered Women Syndrome (BWS) is useful in establishing self-defense for women accused of killing their violent intimate partner where there is proof of domestic abuse.[4] BWS is the result of abuse-induced personality traits that make the victim less likely to be able to leave the relationship and more likely to survive in it.[5] As a doctrine it expands the concept of self defense by focusing on the impact of violence and the woman's perception of threat.[6]

This paper will examine the application of this doctrine in Kenya by analyzing cases where courts have addressed similar issues. The application of this doctrine has provided judges with insight into why women in abusive relationships often remain with their abusers and, in some instances, resort to killing them. Additionally, it has ensured that these women receive fair trials and that their voices are heard in the judicial process.

This paper includes three additional sections. Section two presents a case study of five cases, some of which involve the invocation and application of the doctrine, while others highlight situations where the doctrine could have been applied. Section three delves deeper into the findings from these cases, comparing them with practices in other jurisdictions. The conclusion will summarize the discussion and outline the potential path Kenya should take in recognizing and applying this doctrine, along with other concluding remarks.

2.0 Case studies

2.1 *Ruth Wanjiku Kamande v Republic [2020]eKLR*

This was an appeal from a conviction of murder imposed by Lesiit J where the accused was sentenced to death. The material facts are that on 20/9/2015 the deceased screamed for help after being stabbed by the accused. The owners of the house arrived and tried to help before they could manage the deceased was stabbed again. The police arrived soon after a crowd had gathered. As per the accused, the deceased became violent after she discovered an AIDS report on him and treated to expose him.

The accused stabbed her several times on the chest, thighs and stomach. The appellant managed to overpower him and used the same knife to stab him severally. There was

[4]Keerthana Medarametla, "Battered Women: The Gendered Notion of Defenses Available." (2017) vol.13 no.2 *Socio-Legal Review* 108, 112 [2] <https://heinonline.org/HOL/P?h=hein.journals/soclerev13&i=132> accessed 26th Nov 2023
[5]Lenore E. Walker, *The Battered Woman Syndrome*, (4th Edition, Springer Publishers 2016) 45
[6]Ibid (n1)

no witness as to how the fight started but it was not in dispute that a few days before the two had misunderstandings over old love letters that the deceased kept from past relationships. The post mortem report showed that the deceased died of blood loss and multiple injuries. The two were in a relationship and were cohabiting. They had had intense arguments over the past two days.

The trial court dismissed the accused's claim of finding an AIDS report as an afterthought because it wasn't raised by the defense in cross-examining the prosecution witnesses. Further, its finding was that there was overwhelming evidence from eyewitnesses that the accused had the intention to kill. On the plea of self-defense, the court stated that because the accused was seen to stab the deceased intermittently, she couldn't be said to be warding off an attack. Moreover, that 25 stabs weren't reasonably necessary nor a show of reasonable force.

Twenty grounds of appeal were raised which were condensed into three issues for determination. The appellate court reaffirmed the trial court's finding on malice aforethought based on the evidence before it and agreed with the court's findings in rejecting the plea of self-defense. It further held that the mitigation was rightly considered by the accused and consequently dismissed the appeal.

An examination of this case

This case clearly demonstrates that the past experiences of violence endured by a battered woman are often overlooked when assessing whether she acted in self-defense. The determination on malice aforethought and self defense were the most contentious issues which will be analyzed below. The trial court was convinced by the testimony of 3 witnesses that the deceased was stabbed intermittently in different areas of the house and discredited the accused statement that they fought from the bedroom. On this fact, the court might have made a big assumption that the 3 witnesses were right by giving their testimony more weight than that of the accused, not considering that these witnesses weren't present when the confrontation started.

The Kenyan Constitution guarantees the right to personal security and freedom from violence. Article 29(a) ensures the right to be free from violence and threats to one's person.

However, the court considered other evidence from witnesses, such as the fact that the accused had blocked the deceased from accessing the house keys to free himself and had stabbed him twenty five times intermittently. Considering these and other factors, the trial court concluded that the accused acted out of spite and hatred. The appellate court, in reaffirming this finding, stated that the trial court had correctly assessed the evidence, which painted an irrefutable picture of the accused as someone who intended to kill. The appellate court noted that the nature of the injuries sustained by the deceased—multiple, severe, and inflicted repeatedly—clearly demonstrated an intent to kill, thereby establishing malice aforethought beyond reasonable doubt.

Although the court correctly considered the law and facts in reaching its conclusion, it remained silent on the fact that the murder took place in the context of domestic violence. The court wasn't alive to the fact that in such a context the dynamics are different. Significance wasn't given to the dynamics of an domestic relationship which are characterized by intimacy, familiarity and dependency.[7] With these dynamics the individuals are likely to be highly emotionally reactive when attacked by the other.[8]

On the plea of self-defense, the trial court took the view that reasonable force to ward off an attack is the one acceptable in self-defense. Its finding was that at least 2 stabs were acceptable but 25 stabs couldn't be accepted as an attack of self-defense hence not reasonably necessary nor was it reasonable force. Further, the accused couldn't be said to have faced imminent attack because according to two witnesses who were first at the scene, the accused was holding a knife which she used to stab the accused over a period of time. Moreover, even though there was a confrontation between the accused, the injuries the accused suffered were cuts classified as being caused by harm incomparable to the stab wounds the deceased had. It therefore rejected the plea of self-defense based on those reasons. The appellate court reaffirmed the said findings. Their view was that the plea was unbelievable given the cogent and compelling evidence tendered by the accused.

2.2 *State v Truphena Ndonga Aswani [2021] eKLR*

In this case the accused was charged with murder contrary to section 203 as read with section 204 of the Penal Code and pleaded not guilty. Later on the charges were reduced to manslaughter through a plea bargain agreement. The accused pleaded guilty to the charge of manslaughter and was convicted accordingly.

The facts are that on 14/12/2020 the deceased came home drunk and started an argument with the accused where he was demanding for the title deed his father had given her. The deceased's father considered him irresponsible and could sell the land rendering his family homeless. While still arguing, the deceased looked for a panga to attack the accused with. Before he could cut her, the accused defended herself by getting hold of the panga and using it to cut him severally.

The accused panicked upon realizing what she had done and decided to hide the deceased's body 200 meters away on a neighbor's land. The body was later

[7]Walter W. Steele Jr. & Christine W. Sigman, 'Reexamining the Doctrine of Self Defense to Accommodate Battered Women' (1991) 18 Am J Crim L 169 <https://heinonline.org/HOL/P?h=hein.journals/ajcl18&i=177> accessed 26th November
[8]Debra Umberson et al. "Relationship dynamics, emotion state, and domestic violence: A stress and masculinities perspective" in Mangai Natarajan (ed), *Domestic Violence: The Five Big Question* (1st Edition Routledge 2017)

Physical abuse includes any form of physical violence, such as hitting, slapping, kicking, or using objects to inflict harm.

discovered, and a report was made to the police, who then handed the investigation over to the DCI. The accused confessed to the crime, and a confession statement was recorded and presented in court. The post-mortem report confirmed that the cuts, some of which were deep, led to the death of the deceased.

In mitigation, the accused provided a detailed account of how the deceased had tortured her, including a recent incident where he nearly beat her to death. She lived under constant threats that she would be killed if she did not hand over the title deed given to her by the deceased's father. Despite the abuse, she endured it because, before marrying the deceased as his third wife, she had no children and hoped that he would eventually change. The deceased frequently assaulted her in front of their children and villagers, humiliating her. Even after discovering that the deceased was HIV positive, she remained by his side, despite him hiding his ARVs and threatening to kill both her and their child. The pre-sentencing report corroborated the accused's account and recommended that she undergo counseling for trauma and be given an opportunity to care for her 10-year-old son.

The court issued a non-custodial sentence of one day, which lasted until the end of the court session. Additionally, it ordered that the accused be provided with witness expenses to facilitate her relocation to a safe home, rather than returning to her matrimonial home. The court also directed the probation officer to arrange counseling sessions for the accused.

An analysis of the above case

This case represents a paradigmatic shift from the introductory case, as the court invoked Battered Woman Syndrome (BWS), drawing on various academic literature. After carefully considering the history of violence, the court was persuaded that the deceased posed a serious threat to the accused's life, and that if he had succeeded in killing her, her story of enduring an abusive relationship would never have been told. The court cited an article by Loraine

Patricia, noting that constant battering by intimate partners places women in a state of intense terror, forcing them to confront the harrowing dilemma of either waiting to be killed by their husbands or acting first to save themselves.[9]

With this perspective in mind, and after reviewing the laws on self-defense, the court found it appropriate to apply the subjective test to determine whether the accused's actions constituted self-defense. This approach allowed the court to consider the accused past experiences of domestic violence. In applying the subjective test, the court concluded that the accused killed her husband in self-defense, supported by ample evidence that the deceased, while armed, regularly attacked her, leaving her with no option but to defend herself. The court also referred to a passage from the same article on why battered women stay in abusive relationships, explaining that their perceptions of danger and the need to use force are real, shaped by their dependency on their partner and marriage. However, the court held that the defense was not absolute, as the accused, Truphena, had used excessive force in her actions.

2.3 *Republic v Alice Nyabonyi Ondiba [2021] eKLR*

The accused herein was charged with murder contrary to section 203 as read with section 204 of the Penal Code which was reduced to manslaughter after a plea bargain. The accused pleaded guilty and was convicted accordingly. While both the deceased(husband) and accused were drunk an argument arose between them and they got into a physical fight. The deceased first hit the defendant on the head and she ended up stabbing him on the head hence falling unconscious. The post mortem report showed that the deceased husband died from the stabbing.

The probation report revealed that the accused was a victim of gender violence and that most conflicts between the deceased and the accused were handled by the chief. The severity of the violence is noted when at one time the public had to intervene and the accused was arrested. The chief blamed the deceased for being an aggressor in most cases. Moreover, her children were highly dependent on her and living without both parents would make them unstable.

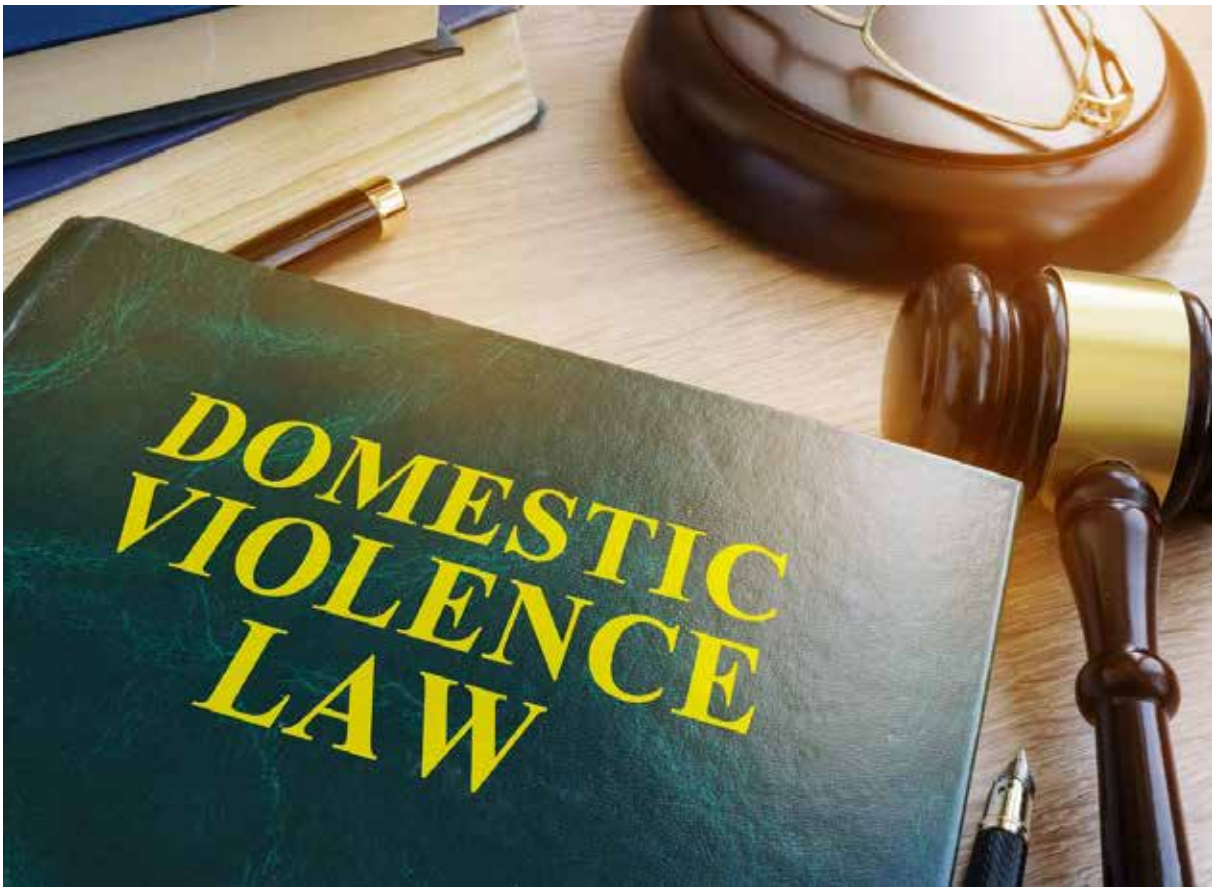
In considering the circumstances of the case, the court sentenced her to two years imprisonment.

An analysis of this case

In this case, Alice was attacked first and responded by using excess force that led to the death of her husband. The history of domestic violence is severe and undeniable. The doctrine of battered women syndrome would have potentially been invoked and applied in trying to understand why the accused used force that was excessive and not proportionate to that posed by her husband in trying to defend herself. However, it was neither invoked nor applied.

The probation report as well as the submissions of the defense counsel emphasized that the accused was a victim of gender-based violence. Despite this emphasis the court overlooked this important factor and stressed on the fact that she chose to take a knife and stab the deceased. The court particularly noted that her actions were unlawful hence the custodial sentence instead of the non-custodial sentence as recommended. Had the battered women syndrome been invoked, then the judge would have been in a position to understand why the accused acted in that manner.

[9]Loraine Patricia Eber, 'The Battered Wife's Dilemma: To Kill or to Be Killed' (1981) 32(4) Hastings LJ 895



The Penal Code criminalizes various forms of violence, including assault and sexual offenses, which can be applied in cases of domestic abuse.

2.4 *Republic v Christine Okenyuri [2022] KEHC 12868 (KLR)*

The accused was charged with murder, contrary to section 203 as read with 204 of the Penal Code. On 16/2/2019, the deceased drunkenly provoked the accused by hitting her on the head and pushing her away leading to tension. She placed his food and knife on the cupboard. Given the circumstances she decided to go to her grandmother for safety. The accused walked out with her husband's walking stick but before she could leave the husband got hold of her and a physical confrontation ensued. The struggle continued until they were outside. The deceased remained in control, insisting on killing her because the pregnancy she was carrying wasn't his. They fell on the ground, and a knife fell from the husband's pockets. The accused managed to get hold of the knife but couldn't free herself due to the deceased's tight grip.

In rage, the accused stabbed her husband in the abdomen, believing that the knife had gone through his clothes. She was certain that if he had gained possession of the knife first, he would have killed her. She then ran away to her grandmother's house and spent the night there. The prosecution's second witness, Christine's mother, testified that she and the deceased had frequent fights, leading her to run to her mother's home. The accused also mentioned their tumultuous marriage, with the deceased coming home drunk and beating her when not provoked.

The post mortem report confirmed that the deceased died from the stab wound. The investigating officer testified that the accused confessed to the murder, even though a confessionary statement wasn't recorded. The court found that malice aforethought was not proven to sustain the charge of murder and reduced it to

manslaughter. The accused was found guilty of manslaughter and convicted accordingly.

Case examination of this case

This case is distinct from the previous two cases in the sense that here it was the court that reduced the charge to a lesser offense and not the prosecution. This was after its finding that the element of malice aforethought wasn't proven by the prosecution. Even though no one witnessed the struggle between the accused and the deceased on the material night, the court was persuaded by her narration because of her demeanor and the fact that it found corroboration in the testimony of the first prosecution witness. The court held that the murder was not intended but was an unfortunate aftermath of domestic violence. The existence of this domestic violence was undeniable because it was mentioned by three prosecution witnesses out of five as well as the accused on oath. Generally, the deceased was violent when drunk which is supported by the instance where he intentionally broke the windows of his father's car and was beaten up as a result.

The court was of the view that the accused threw away the knife and stick out of fear and shock which is expected for a person in such a situation. It also rejected the prosecution's submission that the accused killed her husband out of revenge because it was never brought up during the proceedings. In its obiter the court held that this scenario was one of the many cases of domestic violence and its aftermath when left unchecked, which brings out the fault in the justice system to create awareness of both the existence of the law and the remedies one would get from the same.

The circumstances in this case provided a good opportunity for the application of the doctrine of the battered women's syndrome by helping the court understand why the domestic violence remained unchecked for as long as 20 years. Most importantly, it would have also been easier to understand why the accused tolerated the abuse for so long and even developed a coping mechanism of running away to her grandmother's house. The application of the doctrine would have helped the prosecution in understanding why the accused used a knife instead of the stick in defending herself.

2.5 *Ruth Wanjiku Kamande v Republic [2023]*[10]

This is a ruling on an application to the court of appeal for the case[11] to be certified for appeal to the Supreme Court. The main grounds for appeal to the apex court are that the appeal involves two matters of public interest; the battered women syndrome doctrine and the standard and weight of proof that apply when an accused person enters a plea of self-defense. Moreover, both concerns go beyond the specifics of the case and, in the best-case scenario, will significantly impact the public interest in defending and advancing the rights of victims of domestic abuse in accordance with the Protection Against Domestic Violence Act's provisions. The application was not opposed by the state counsel. Having considered the issues raised in the case, the court found that the issues surrounding BWS are still raw in Kenya and allowed the application.

An analysis of this case

The submissions by the applicant's counsel raised very thoughtful issues surrounding the question: whether requirements of self-defense accommodates the circumstances of battered women who kill their abusers in a domestic violence situation. Counsel

[10]Unreported, available at: https://drive.google.com/drive/folders/105YIDwViSkLu7iXAY4ZnuLOuJuuqCmKo?usp=drive_link
[11]See the introductory case in this section

stated that provocation and self-control stem primarily from the outdated, stereotypical view of human psychology, which holds that anger is a direct result of a major life event that causes a person to lose control of themselves. As a result, murder is considered a separate crime from past abuse. This in itself is the idea behind the application of the BWS doctrine in cases where women kill their abusers.

However, the doctrine cannot be applied without guiding principles so as to avoid a situation where it is misused in cases where women kill their abusers in revenge. This point of view is envisaged under the intended issues of determination of the appeal. One of the issues are what would be the applicable tests and burden of proof where the accused (particularly women) in the same circumstances[12] as the appellant, raises the plea of self-defense that their actions were precipitated by domestic violence experienced in the relationship. The second issue is what would be the proper sentencing guidelines in such cases. The first issue cuts across all cases as analyzed above. This latter issue was raised in the obiter by Justice Matheka.[13]

In general, the appeal is based on the proposition that in such cases the accused should benefit from the law and the charges automatically lowered to manslaughter once a defense of self-defense is presented and supporting proof is shown. This approach was already taken by the court in the case of Republic vs Okenyuri as analyzed in this section. Whether or not this is the best approach to take is a matter that will be discussed in the following section.

3.0 Findings and issues

From the series of cases analyzed above several issues and findings can be drawn.

Lady Justice Teresia

The issues will be discussed in the subsections below. The findings are as follows;

a) The courts have appreciated the prevalence of domestic violence in Kenya and its detrimental aftermath that is death and grievous bodily harm.
b) The elements of self-defense didn't envision the circumstances that battered women live under and the effect it has on their perspectives on imminence of danger and need to use force.
c) The practice has been that the charge is lowered from murder to manslaughter because in most cases, battered women who kill their abusers are deemed not to have done so out of malice.

The issues that arise in this context include whether the practice of lowering the charge

[12]Killing a person whom they were in a close or domestic relationship with.
[13]Republic vs Okenyuri [2022] KEHC 12868 (KLR), Supra page 5[1]

Ensuring effective implementation of laws and protections remains a challenge. Training for law enforcement and judiciary on handling domestic abuse cases is crucial.

to manslaughter is appropriate in cases involving battered women who kill their abusers. Another key question is whether the subjective or objective test should be applied when a plea of self-defense is raised by a battered woman. Additionally, there is a pressing need to consider whether gender-responsive policies should be implemented for sentencing in such cases to ensure fair and just outcomes. Finally, it is crucial to establish suitable guidelines for the application of Battered Woman Syndrome (BWS) in Kenya, ensuring that courts consistently and accurately consider the complex dynamics of domestic violence when making their determinations.

3.1 The approach of lowering the charge

As drawn from the cases analyzed above the murder charge against the battered women were lowered to manslaughter. This is because a deep scrutiny of the cases shows that they never had the motive of killing. On the contrary, it is usually an aftermath of their changed perspectives of danger and need to defend themselves. At the onset, lowering the charge is a fair and just move hence the accused benefits from the law.

However, it has been argued that lowering the charge may end up not being favorable for the accused person upon sentencing. In the case of *Republic vs Juliana Wanza*[14] the court held obiter that the law only envisioned a maximum sentence for manslaughter which is unfavorable for battered women convicted of manslaughter because such cases are not the worst type that would attract a maximum sentence. Hence a possible risk is that a court would mete the maximum sentence on a battered woman who truly didn't kill out of malice because facts are at times misconstrued.

Moreover, the judiciary sentencing guidelines don't provide for factors to take in manslaughter cases hence the starting

[14]Republic vs Juliana Wanza [2020] eKLR

point in the determination of a custodial sentence for offenses of manslaughter is usually precedents. This brings lack of clarity and uniformity in the precedents hence creating fear of uncertainty of outcomes amongst the kenyan population. It is therefore my considered view that the approach of lowering the effect may not be a long lasting solution to this conundrum. The courts and counsels should utilize the BWS doctrine by applying it in such cases.

3.2 The Subjective vs Objective Test

In the case of *Republic vs Ruth Wanjiku* Lesiit J applied the objective test while Aburili J in *State vs Truphena Ndonga* chose to apply the subjective test and reached differing opinions. Due to the lack of clarity on the suitable test to use in such cases, this subsection will discuss various opinions by scholars. The battered woman must prove her belief in imminent danger is reasonable and the standard of reasonableness under self-defense consists of a subjective and objective standard. The objective standard is typically applied in all cases which has historically disadvantaged the battered woman.

The objective standard of self-defense in court is based on the ordinary reasonable man's response to a defendant's actions, which overlooks the underlying circumstances of the defendant.[15] This is detrimental to battered women, as it overlooks their experiences in abusive relationships and the collective effects of the abuse.[1617] The subjective standard, on the other hand, requires the court to determine if the defendant's circumstances compelled them to use force to protect themselves.[18] This approach is more equitable for battered women, as it allows the court to understand the woman's thoughts and feelings and the impact of the abuse.[19] Walter Steele suggests changing the reasonableness criterion to a subjective one to create a more equitable law of self-defense for battered women.[20] This addition would acknowledge the effects of the particular conundrum that a woman caught in the Battered Woman Syndrome faces.[21]

3.3 The Need for a gender responsive policy

In the case of Republic vs Alice Nyabonyi it was clearly brought out in the probation report that the accused was a mother of 4 children who depended on her for direction. Moreover, their home would be unstable without both parents if the accused would be imprisoned. I am alive to the fact that, where a court reached a different opinion to what was recommended in the PR doesn't it didn't consider it's recommendations. The court is at liberty to decide otherwise but it should have been more critical to the complexities in the case as demonstrated below. It is my considered view that the court didn't deeply consider the accused's

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[15]R. George Wright, 'Objective and Subjective Tests in the Law'(2017) vol.16 no.1 *University of New Hampshire Law Review* 121 <https://heinonline.org/HOL/P?h=hein.journals/plr16&i=125> accessed 1 Dec 2023

[16]Andy Myhill, 'Measuring domestic violence: Context is everything' (2017) vol.1 issue 1 *Journal of gender-based violence* 33, ISSN 2398-6816 <https://doi.org/10.1332/239868017X14896674831496> accessed 1st Dec 2023

[17]Aishwarya Deb, "Battered Women Syndrome: Prospect of Situating It within Criminal Law in India." (2021) vol.8 no.4 *BRICS Law Journal* 103 <https://heinonline.org/HOL/P?h=hein.journals/brics8&i=679> accessed 1st Dec 2023

[18]Fritz Allhoff, "Self-Defense without Imminence' (2019) vol.56 no.4 *American Criminal Law Review* 1527 <https://heinonline.org/HOL/P?h=hein.journals/amcrimlr56&i=1548 > accessed 1st Dec 2023

[19]Mindy B. Mechanic, 'Battered women charged with homicide: Expert consultation, evaluation, and testimony' (2023) vol.32 issue 1-2 *Journal of Aggression, Maltreatment & Trauma* 198 <https://www.tandfonline.com/doi/abs/10.1080/10926771.2022.2068393 >accessed 1st Dec 2023

[20]Steele (n7), 177[1]

[21]Alena M. Allen, "The Emotional Woman."(2021) vol.99 no.4 *North Carolina Law Review* 1027 <https://heinonline.org/HOL/P?h=hein.journals/nclr99&i=1061 > accessed 1st Dec 2023

Addressing cultural attitudes and stigma associated with domestic abuse is essential for encouraging victims to seek help and promoting a culture of zero tolerance for violence.

caregiving responsibilities and the fact that she was a victim of domestic violence and its effect on her perspective on the need to defend herself.

The likely effect of the 2 years custodial sentence that the judge imposed is that the children were cared for in an institution rather than their natural mother was offering them. Although the matter of child maintenance was not before the court, it should have addressed this issue suo motu. This is happening in the wake of the Children's Act (2022) which seeks to promote the care of children in the family setup rather than institutions.

Matheka J in the case of *Republic vs JC* stated obiter that with the increase of cases of gender based violence there is need for a gender responsive policy to guide on sentencing of women offenders. Moreover, the policy would ensure that the courts deliberately consider the women's caretaking responsibilities and the plight of the children of women offenders. In the upshot Kenya is experiencing this challenge because it is far from implementing the Bangkok rules. There is therefore a need for formulating a gender responsive policy for women offenders especially in such cases.

3.4 Suitable guidelines for the application of BWS in Kenya

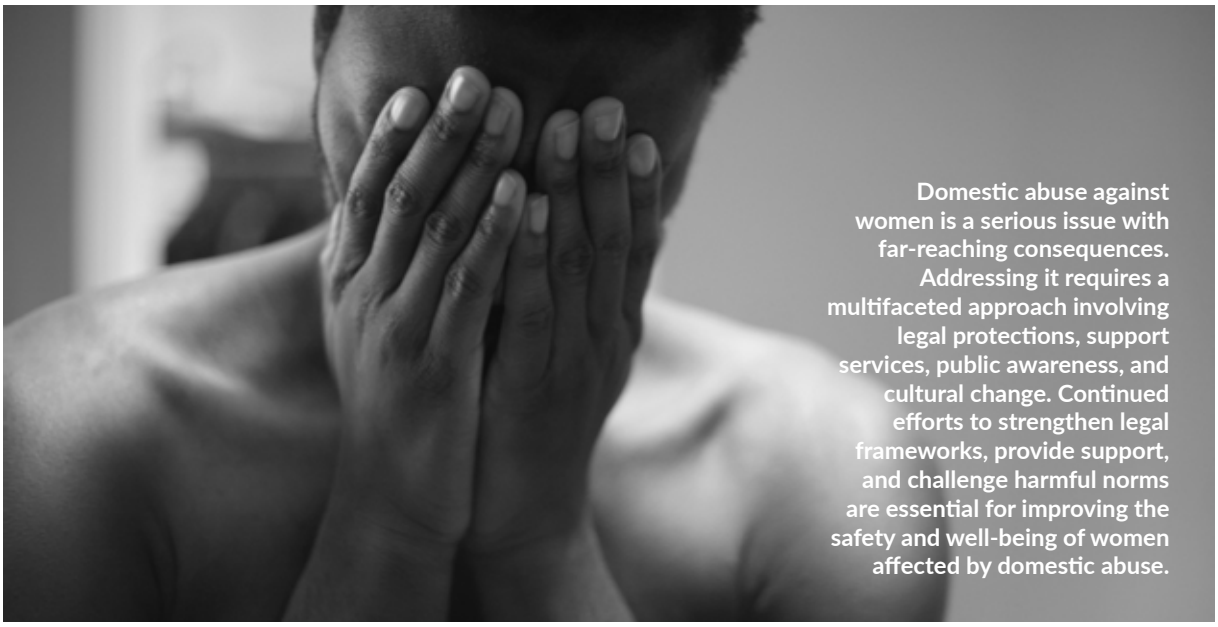
Several countries in the west have applied this doctrine in such cases hence this subsection will draw some examples and juxtapose this with the situation in Kenya. In the United States, expert testimony on BWS doctrine is admissible in all states hence it is used as an affirmative defense for battered women who kill their abusers.[22] Most of the experts are psychologists whose testimony is used to show evidence of battering and how it has had effects on the perceptions of the woman under trial.[23] In general, the requirements of these doctrine are that the defendant should demonstrate that she reasonably believed she was facing imminent danger, that she used a reasonable amount of force to defend herself and that she was not the perpetrator in the first place.[24]

In the state of Victoria in Australia, self-defense as previously governed by common law was amended through the Crimes (Homicide) Act 2005. According to this statute, the defendant must prove she had

[22]Colin P. Holloway and Richard L. Wiener, "Abuse History and Culpability Judgments: Implications for Battered Spouse Syndrome." (2018) vol .24 no.3 Psychology, Public Policy, and Law 279

[23]Sandeep K. Narang et al, "Expert witness participation in civil and criminal proceedings."(2017) 139(3) *Pediatrics* <https://doi.org/10.1542/peds.2016-4122 >Accessed 18th Jan 2024

[24]Paulina Lucio Maymon, "Judging Women Who Kill Their Batterers in the United States: A Violation of Their Right to Equality before the Law under the ICCPR." (2021) vol.37, no. 1 *American University International Law Review* 97 <https://heinonline.org/HOL/P?h=hein.journals/amuilr37&i=109 > accessed 1st Dec 2023



Domestic abuse against women is a serious issue with far-reaching consequences. Addressing it requires a multifaceted approach involving legal protections, support services, public awareness, and cultural change. Continued efforts to strengthen legal frameworks, provide support, and challenge harmful norms are essential for improving the safety and well-being of women affected by domestic abuse.

a subjective belief that was supported by reasonable grounds[25] that the measures she took in self-defense were essential[26] in order to succeed in her plea of self-defense. The Act clearly states that the defense may be brought up in domestic abuse cases even if the defendant was defending against harm that was not immediate and even if her actions included using more force than was necessary to avert the injury or threat of harm.[27] In doing so, the reform tackles the issues brought up about every requirement of traditional self-defense in common law. This example buttresses the argument in the preceding section that the subjective test is more equitable especially in the case of battered women.

Kenya still applies the requirements of self-defense as envisioned under common law which has proved to be unjust to battered women as brought out in *Republic vs Ruth Wanjiku Kamande*[28] as read with *State vs Truphena Ndonga Aswani*.[29] The Courts should therefore employ the subjective test exemplified in the latter case. The law of self-defense should also be reformed to accommodate the perceptions of battered women. Recognizing that reforming the law may take a while, courts can employ expert testimony in the interim.

4.0 Conclusion

The application of the battered women syndrome in Kenya is still a sensitive issue in Kenya due to lack of clarity in its application. Moreover, not may have recognized it and realized its significance in cases where the battered women kill their intimate partners. The development of the doctrine in Kenya will primarily be guided by precedents because some judges and counsels have already invoked it. However, guidelines should be formulated to apply this doctrine to give clarity. Kenya can pick novel examples from other jurisdictions while having regard to its unique circumstances; prevalence of GBV and socio-cultural issues that lead these cases.

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[25]Section 9AE
[26]Section 9AC
[27]Section 9AH (1)

Equality paradoxes in the Kenyan constitution: The case against gender quotas

By Kelvin Nzaro

Abstract

The arguments on the two-third gender rule and constitutional gender equality have been a great area of discussion in Kenya since the enactment of the Constitution of Kenya in 2010. This paper critically examines the implications of the gender quotas embedded in the Kenyan Constitution, particularly focusing on Article 27 and the paradoxes of egalitarian principles. It addresses how the two-thirds gender rule, intended to promote gender equality, paradoxically undermines political participation and representation by favoring outcome over opportunity. Historical and contemporary contexts of gender relations in Africa and Kenya are analyzed, with a focus on the practical and legal challenges posed by gender quotas. The paper argues that equality before the law, rather than equality of outcome, should be the guiding principle for ensuring genuine equality in political participation. Recommendations for achieving this balance are provided, emphasizing the need for policies that promote equal opportunities without compromising democratic rights.

Gender equality is a fundamental human right and a crucial element for creating equitable and just societies. While significant progress has been made in many areas, challenges remain. Continued efforts to address discrimination, promote inclusive policies, and support affected individuals are essential for achieving true gender equality. By addressing these challenges and implementing effective measures, societies can work towards a more equitable future for all.

1. Introduction

We live in a time where human equality is a fundamental principle and order of the day.[1] Despite this, it is lucidly evident that you need only to look at the physique of men to note that by nature, men are unequal.[2] Equality does not exist even in factory products. Equality is an egalitarian wish that is impossible to achieve[3] which explains the coercive force used by states which sought to impose equality; to impose

[1]Mhando Mashaka Mikidady, 'Gender Inequality: An Alien Practice to African Cultural Settlement,' Universal Journal of History and Culture, Volume 4 (2022) p 2. < Available at https://dergipark.org.tr/tr/download/article-file/2015395 > Accessed on 25th July, 2024.
[2]Fiona Basile, 'Men and Women Are Not Equal' (*IGNITUM TODAY*20 October 2013) <Available at https://ignitumtoday.com/2013/10/19/men-and-women-are-not-equal/ > accessed 25th July 2024.
[3]'Half of the Citizens Believe That Full Gender Equality Is Impossible to Achieve' (*UNDP*2021) <Available at https://www.undp.org/montenegro/press-releases/half-citizens-believe-full-gender-equality-impossible-achieve > accessed 26th July 2024

the impossible. The only equality worth dying for is equality before the law which is enshrined in the Constitution of Kenya.[4] The article states that every person is equal before the law and has the right to equal protection and equal benefit from the law.[5] Further, women and men have the right to equal treatment[6] and the state shall not discriminate directly or indirectly against any person on any ground including race, sex, or any other ground.[7] It is important that while looking at this, one must note that equality includes the full and equal enjoyment of all rights and fundamental freedoms.[8]

My argument is that while Article 27 of the Constitution was established to ensure that both genders are equal and not discriminated against, it has served a purpose with a reading of other parts of the Constitution that I will analyse below of curtailing the right to free political participation in Kenya. Article 27(8) introduces the egalitarian principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. Article 100 outlines groups that will be beneficiaries of the political quotas.[9] Men are conspicuously missing. That means the quotas introduced by Article 27 (8) favour women and other groups. I will also argue that the introduction of political quotas does not serve to solve the problem of discrimination but rather is a barrier to political participation. This reasoning emanates from an erroneous egalitarian understanding of Equality. "Reformists" have extended the meaning of the word to include not only equality before the law but also equality of outcome.[10] That is appealing but laughably idiotic. It emanates not from strong abstract reasoning but from fervent emotions to do the "desirable and necessary" thing. Be that as it may, it does not make their cause right.

The first section introduces the paper. The second section examines the concept and history of equality in Africa, differentiating between equality before the law and equality of outcome. The third section analyzes Article 27 of the Kenyan Constitution, with a focus on its equality provisions and gender quotas. The fourth section addresses the paradoxes inherent in egalitarian principles. The fifth section evaluates the impact of gender quotas on political participation and men's rights. The sixth section discusses democratic principles and voter sovereignty, contending that quotas undermine democratic values. The final section offers recommendations and concludes by emphasizing the importance of equality before the law over equality of outcome.

2. The Concept and History of Gender Equality in Africa

Many scholars argue that gender relations in Africa are particularly problematic due to disparities in economic opportunities, political participation, and social changes between men and women.[11] This issue

[4]See Constitution of Kenya 2010, Article 27. This article will form the greatest part of this paper which will raise an argument of how the first clauses of the article conflict with the fourth clause.
[5]Ibid, Article 27(1).
[6]Ibid, Article 27(3).
[7]Ibid, Article 27(4).
[8]Ibid, Article 27(2).
[9]Constitution of Kenya 2010, Article 100. It states that the marginalized groups that shall be promoted are women, persons with disabilities, the youth, ethnic and other minorities, and marginalised communities. Men are not included in this. This then leaves men as the only group in Kenya that cannot be disadvantaged unless they fall into the other subcategories.
[10]See 'An Introduction to Equality of Opportunity' (*Equality of Opportunity and Education*2024) Stanford: McCoy Family Center for Ethics in the Society. < Available at https://edeq.stanford.edu/sections > accessed 25th July 2024.
[11]See Anunobi, F., Women and development in Africa: From marginalization to gender inequality. African Social Science Review, 2 (2), (2002) Article 3 and Lilian Lem Atanga, 'African Feminism,' USA: John Benjamins Publishing Company, 2013. University of Dschang, Cameroon. <Available at https://www.academia.edu/26547312/African_feminism > Accessed on 25th July 2024.

Gender Equality ensures that individuals of all genders have equal rights and opportunities in various aspects of life, including education, employment, health, and political participation.

is largely linked to the prevalence and dominance of patriarchal systems rooted in pre-colonial African cultural traditions, which marginalized women and restricted their access to privileges.[12] Gender inequality has been discussed academically, initially in Europe before spreading globally.[13] Early debates focused on male dominance in various life aspects, leading to unequal opportunities for women.[14] Female scholars exposed these disparities rooted in patriarchal and capitalist systems in Europe, with significant progress made in the 20th century through the feminist movement.[15] The Universal Declaration of Human Rights by the United Nations further advanced the global fight for gender equality.[16] In Africa, the struggle against patriarchal systems intensified in the late 20th century, led by scholars like Marjolie Mbilinyi and Sylvia Tamale.[17] Conferences and research publications were pivotal in advocating for women's rights.[18] Despite some progress, male dominance remains prevalent, and efforts to empower women are progressing slowly.[19] Please take note that as I am tracing the history of this argument, I acknowledge its existence based on written literature but this does not mean that I support it.

Historically, women have faced oppression and marginalization, which is a Western concept that was introduced in Africa during colonisation, with their contributions undervalued. Although pre-colonial African societies had instances of gender equality(which I argue was not equality but an acknowledgment of inequality and appreciation of the differences to have a better outcome), colonialism reinforced gender inequalities by prioritizing male

[12]Davison, J. Agriculture, Women, and Land: The African Experience. Boulder: Westview, (1988).
[13]Butler, J. Gender and Sexuality in Walton, D. Doing Cultural Theory. London: Sage (2012).
[14]Atanga, L. L. African Feminism? USA: John Benjamins Publishing Company, (2013).
[15]Ibid. See also Robertson, C. Women and Class in Africa. New York: Africana Publishing (1986).
[16]UDHR, United Nations (1949).
[17]Tamale, S. African feminism: How should we change. Development. 49(1), (2006) 38-41.
[18]African Feminist Charter (2006). See also Henry, A. A. Gender Inequality in Income Distribution: A Study in Tanga Tanzania. Unpublished MA Thesis, Norwegian University of Life Sciences (2018).
[19]Meena, R., Rusimbi, M., Isrel, C. Women and Political leadership: Facilitating Factors in Tanzania. Dar es salaam. Uongozi institute (2017).

labor.[20] Today, globalization continues to influence gender relations, often perpetuating cultural imperialism from powerful countries.[21] The notion that gender inequalities in Africa stem from pre-colonial traditions is a recent and historically inaccurate concept.[22] This paper argues that activists and researchers have misunderstood pre-colonial African gender relations, which were based on specialization and division of labor. These roles were accepted at the time, and no one complained about the system. Thus, interpreting pre-colonial African life through the lens of modern gender inequalities is misleading and anachronistic. This is the reason why we have had to come up with gender quotas, which is an alien concept in Africa and doesn't solve the purpose its propagators think it ought to solve.

In Kenya, this egalitarian principle of gender equality emanated mainly from disparities observed in the number of men and women elected.[23] This disparity was viewed as evidence of discrimination and barriers created by men in the Kenyan electoral process against women getting into politics. The absence of evidence of discrimination was treated as proof of how clever and diabolical the "barriers" are. That argument which is by all means an *argumentum ad ignorantiam* (argument from ignorance) has been accepted in perfect a chorus by everyone. At any rate, the disparity is not discrimination. Before moving to the next

Gender equality is a fundamental human right and essential for the realization of other human rights.

section, it is important to keep in mind that the physique, appearance, and character of women and men are different to enable them to intertwine to produce the best product. It is like the body of man, you take different meals, proteins, carbohydrates, and vitamins to be strong and healthy. In the next section, I analyse the concept of equality before the law and equality in outcome.

2.1. Equality before the law versus equality of outcome

Equality before the law means that all citizens are subject to the same laws without exception, a principle fundamental to many modern constitutions and central to a fair legal system.[24] Some scholars have

[20]Akyeampong, E., Hippolyte F. The Contribution of African Women to Economic Growth and Development: Historical Perspectives and Policy Implications Part I: The Pre-Colonial and Colonial Periods. Policy Research Working Papers, 2012 (April).
[21]Mikail, K. W., Abdullah, A. The impact of globalization on African culture and politics. Journal of International Studies, 13 (2012) 13-14.
[22]Mhando Mashaka Mikidady, 'Gender Inequality: An Alien Practice to African Cultural Settlement,' Universal Journal of History and Culture, Volume 4 (2022) p 2.
[23]'GENDER EQUALITY CHALLENGES in KENYA and AFRICA KEYNOTE ADDRESS by COMMISSIONER WINFRED LICHUMA EBS, CHAIRPERSON NATIONAL GENDER and EQUALITY COMMISSION KENYA during the EVENT: GENDER EQUALITY: INTERNATIONAL CHALLENGES and STRATEGIES for SUCCESS ORGANIZED by AUSTRALIAN FEDERAL POLICE at the AUSTRALIAN HIGH COMMISSION in LONDON OFFICES on 28 TH JUNE 2017' Page 1. < Available at https://www.ngeckenya.org/Downloads/Gender%20Equality%20in%20%20Kenya%20post%202010%20%20Constitution.pdf > Accessed on 26th July 2024.
[24]Acemoglu D and Wolitzky A, 'A Theory of Equality before the Law' (2020) 131 The Economic Journal 1429 < Available at https://academic.oup.com/ej/article/131/636/1429/5913319 > accessed 1 August 2024

counted it as the most essential element of a liberal society,[25] which I fully agree with. The principle of "equality before the law" signifies that judicial institutions should not differentiate beyond what the law specifies.[26] This principle is not fundamentally about equality but asserts that the law should be applied as intended.[27] It embodies the principle of legality or legitimacy inherent in any legal system, whether just or unjust.

On the other hand, equality of outcome means equalizing where people end up despite the difference in how and where they began.[28] This definition is defective from the word go as it defeats the notion of equality. The first question is what are we seeking to equalize and the second question is what is the need to try and make people who have invested different efforts the same outcome? A good example is in resources. Equalising of resources will always overlook the difference in reference and taste of different persons. Equalising outcomes also tend to deny the importance of individual responsibility.[29] Seeking equality in outcome is some sort of political envy or a critique of people, who when given equal opportunities with others, decide to do beyond what others do and they rise above the normal societal standards. Any egalitarian theory must define both the scope of the theory (i.e. the situations to which the principle applies) and the equalisandum (i.e. the currency of what is to be equalised).[30] This is what the scholars arguing in support of egalitarian gender equality have failed to achieve.

3. Legal Framework and Article 27: An Analysis of Article 27 of the Kenyan Constitution

What was the intention of the drafters of the Constitution when laying down Article 27? What have their courts stated? These are the questions that this section seeks to establish. The Commission on the Final Draft of the Constitution when dealing with equality stated that the way to deal with the disadvantaged in society is not by adopting protective and discriminative measures but by providing equal opportunities and level playing ground for all.[31] This argument is prevalent in the neo-liberal ideologies based on the free market principles as reflected in the policies of the World Bank and the International Monetary Fund. The Final Report provided that women feel marginalized, facing one of the lowest proportions of female legislators in the world, a lower rate of participation in education than men, and inadequate involvement in business and government.[32] Customary law denies women inheritance of land, often leaving widows and their children destitute. The State should provide facilities and opportunities to enhance the

[25]Hayek, F. The Constitution of Liberty, Chicago: University of Chicago Press (1960) p 127.
[26]Kenneth I. Winston, On Treating Like Cases Alike, 62 California Law Review (1974); Herbert Lionel Adolphus Hart, The Concept of Law: 160-161 (Clarendon Press. 1997); Peter Westen, The Empty Idea of Equality, 95 Harvard Law Review (1982); Peter Ingram, Procedural Equality, 21. Christopher J. Peters, Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis, 105 Yale Law Journal (1996); Christopher J. Peters, Equality Revisited, 110 Harvard Law Review (1997); Fred Feldman, The Irrelevance of Equality before the Law, unpublished manuscript, http://people.umass.edu/~ffeldman/EBLforLund2.pdf (2004).
[27]Thomsen FK, 'CONCEPT, PRINCIPLE, and NORM—EQUALITY before the LAW RECONSIDERED' (2018) 24 Legal Theory 103. < Available at https://www.cambridge.org/core/journals/legal-theory/article/abs/concept-principle-and-normequality-before-the-law-reconsidered/8BBD5B2B814F19EF454E5826B8668C73 > Accessed on 29th July 2024.
[28]Phillips A, 'Defending Equality of Outcome' 12 Journal of Political Philosophy 1 (2004) 1-19. < Available at http://www.blackwellpublishing.com/journals/JOPP > Accessed on 27th July 2024.
[29]Ibid p 1.
[30]Thomsen FK, 'CONCEPT, PRINCIPLE, and NORM—EQUALITY before the LAW RECONSIDERED' (2018) 24 Legal Theory 103
[31]Final Report of the Constitution of Kenya 2010 Review Commission, p 103. < Available at http://libraryir.parliament.go.ke/handle/123456789/540 >
[32]Ibid, p 107-108.

Gender equality is a fundamental human right. It ensures that all individuals, regardless of gender, have the same rights, opportunities, and freedoms, contributing to their dignity and personal worth.

status of women, enabling them to realize their full potential and advancement. Women ought to be integrated at all levels of decision-making, and allowed to express their views, and a women's bureau should be established to monitor progress. The Constitution should outlaw religious and cultural practices that discriminate against women, both indirectly and directly. These are some of the factors that ought to have been considered when drafting the whole of Article 27.

The Supreme Court of Kenya has noted some of the hard technicalities that are faced when dealing with the two third gender principle. They stated that examining Article 81(b) alongside Articles 97 and 98, it becomes clear that Article 81(b) has not yet been established as a fully enforceable right regarding the composition of the National Assembly and Senate. Therefore, it cannot be immediately implemented without the State taking specific actions. Additionally, Article 81(b) cannot supersede the explicit provisions outlined in Articles 97 and 98, which clearly define the composition of the National Assembly and Senate. To transform Article 81(b) from a guiding principle into an enforceable right, either Articles 97 and 98 would need to be amended to include a "hard gender quota," as suggested by Mr. Kanjama, or legislative measures would need to be introduced in line with Article 27(8) to ensure gender equity while adhering to the membership criteria specified in Articles 97 and 98.[33] The main idea ought to have been granting of equal opportunities so that the outcome is determined by one's efforts. This is what dictates the next section which analyses the egalitarian paradox.

4. The Paradox of Egalitarian Principles

An egalitarian might think that while the improper treatment of X justifies the similar treatment of Y for the sake of equality, there are stronger reasons against such treatment that outweigh the push for equality.[34] The

[33]See Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR, para 8 and Advisory Opinion No 2 of 2012, para 72.
[34]Christopher J. Peters, Equality Revisited, 110 Harvard Law Review (1997) 1227.

alleged scope of non-tautological equality primarily applies when one person, X, has been wronged by a nonegalitarian treatment rule, raising the question of how to treat another similarly situated person, Y.[35] In this scenario, prescriptive equality suggests a reason to treat Y similarly wrongly, a reason not provided by the nonegalitarian rule. This reason is that X has already been treated wrongly.[36] However, prescriptive equality does not hold much weight when X has been treated correctly according to the nonegalitarian treatment rule. It is in light of this that I will analyse Article 27(8).[37] In this section considering the above, I look at the logic of Article 27(8) and critique the argument that disparity in election results symbolizes discrimination.

4.1. Logical and practical implications of Article 27(8)

This provision of the Constitution states that efforts shall be taken to ensure that not more than two-thirds of an elective or selective body are of the same gender.[38] My argument will be on the elective part. The laws of Kenya do not bar any woman from vying for any elective position and competing on equal measures with men. On the other hand, the Constitution has barred men from vying for some positions on the grounds of their gender. The Constitution provides that the National Assembly shall consist of forty-seven women, each elected by the registered voters of the counties, each county constituting a single-member constituency.[39] This emanates from the history of having fewer women in elective positions and it is grounded on Article 27(8) to ensure the achievement of the two-third gender rule. I will raise a few questions on this, the forty-seven women are county representatives at the national assembly, they are elected by both male and female registered voters and they represent both genders. From the word go, this article which seeks to bring equality in outcome defeats the great notion of equality before the law. Secondly, the Constitution is a document that should be both forward-looking and backward-looking.[40] The Court has stated that a Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods.[41] A question that then arises is what will happen in case more women are elected to the National Assembly than men yet the Constitution has already introduced a gender quota that favors women? Another issue is what if the members of the County do not want to be represented by a woman in the National Assembly? This gender quota inhibits the rights to free and fair political participation of citizens. It beats logic to raise an argument that this was done because of disparities in election outcomes which many counts as evidence of discrimination.

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[33]See Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR, para 8 and Advisory Opinion No 2 of 2012, para 72.
[34]Christopher J. Peters, Equality Revisited, 110 Harvard Law Review (1997) 1227.
[35]Ibid 1226.
[36]Ibid 1226.
[37]Constitution of Kenya 2010.
[38]Ibid, Article 27(8).
[39]Constitution of Kenya 2010, Article 97(1b).
[40]See the Supreme Court's judgement in Ogentototo v Ogentoto. The Constitution is not like statutes that cannot apply retrogressively. In *Samuel Kamau Macharia & Another v KCB & 2 Others* and subsequent cases, SCORK established that statutes are generally prospective unless explicitly stated otherwise. For a law to apply retroactively, the intention must be unambiguous. In Ogentoto v Ogentoto, SCORK affirmed that without clear legislative intent, the Matrimonial Property Act does not apply retroactively, and pre-existing claims fall under the Married Women Property Act, of 1882.
[41]See Samuel Kamau Macharia & Another v KCB & 2 Others, SC. Application No. 2 of 2011; [2012] eKLR. They held that The Constitution cannot be subjected to the same principles of interpretation applied to statutes on retrospective application.

Gender equality enhances economic growth by tapping into the full potential of the workforce. When women and marginalized genders have equal access to education and employment, it leads to increased productivity and innovation.

4.2. Critique of the argument that disparities in election outcomes are evidence of discrimination

Disparities in election results are often interpreted as signs of discrimination, but this perspective needs careful examination. Election outcomes reflect a range of factors beyond discrimination, such as socioeconomic conditions, voter preferences, and political engagement. Reducing these disparities to mere bias oversimplifies the issue. Robert Putnam, in "Bowling Alone," highlights that social capital—networks and norms that promote cooperation—significantly affects political participation.[42] Variations in social capital might account for differences in election outcomes, rather than discrimination alone. Similarly, Frances Fox Piven and Richard Cloward's analysis of political strategies suggests that voter mobilization and engagement methods influence election results.[43] Thus, disparities in election outcomes may result from diverse strategies rather than systemic bias. This can be due to factors such as high costs of campaigns and electoral violence. But they do not solely affect women and men are certainly not the creators rather they are also victims. And it is not fit, fair, and proper that men be subjected to further curtailing of their political rights. While discrimination can be a factor, it's essential to consider the broader socio-political context. A more comprehensive analysis is needed to understand election outcome disparities, rather than attributing them solely to discrimination.

[42]Putnam, R. D. *Bowling Alone: The Collapse and Revival of American Community*. Simon & Schuster (2000) p 19.
[43]Piven, F. F., & Cloward, R. A. *Why Americans Still Don't Vote: And Why Politicians Want It That Way*. Beacon Press (2000) p 12.

Gender quotas are mechanisms designed to increase the representation of women and marginalized genders in political and decision-making processes. They can have a significant impact on political participation and representation.

5. The Impact of gender quotas on political participation and representation

Gender quotas are intended to improve women's representation in politics. In Kenya, however, these quotas have had mixed results, with some negative effects on both political participation and rights. Kenya's 2010 Constitution introduced a gender quota to address historical imbalances in political representation. The Constitution requires that no gender should exceed two-thirds of elected representatives.[44] This measure aimed to create a more balanced political landscape. However, the quota system has led to some unintended issues. One problem is tokenism. Quotas sometimes result in selecting women who lack genuine support or effectiveness, reinforcing stereotypes rather than challenging them.[45] This approach can undermine the intended goal of empowering women in politics.

Men's rights are also affected by gender quotas. The focus on meeting gender quotas can lead to the exclusion of qualified male candidates, impacting the principle of equal opportunity.[46] This exclusion creates tension and disengagement among men who feel sidelined. Political parties also face challenges with gender quotas. The need to fulfill gender requirements can pressure parties to place less qualified candidates on electoral lists. This can diminish the overall quality of political representation.[47] Although gender quotas in Kenya are designed to increase female representation, they have brought about challenges such as tokenism, the exclusion of qualified candidates, and potential declines in representation quality.

6. Democratic Principles and Voter Sovereignty

The imposition of gender quotas is undemocratic and discriminatory towards the gender that is excluded from the quotas. It defeats the notion in Article 38(1) of the Constitution of Kenya of people being able to choose their leaders and exercise political free will.

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[44]Constitution of Kenya, 2010, Article 81(b).
[45]Marie E. Berry, Yolande Bouka, and Marilyn Muthoni Kamuru, 'Implementing Inclusion: Gender Quotas, Inequality, and Backlash in Kenya,' March 2020. Available at https://www.researchgate.net/publication/339725653_Implementing_Inclusion_Gender_Quotas_Inequality_and_Backlash_in_Kenya >
[46]MURRAY R. Quotas for Men: Reframing Gender Quotas as a Means of Improving Representation for All. American Political Science Review. 2014;108(3):520-532. < Available at https://www.cambridge.org/core/journals/american-political-science-review/article/quotas-for-men-reframing-gender-quotas-as-a-means-of-improving-representation-for-all/7296949BAF74A139E443DE7F057EAAB2 > Accessed on 27th July 2024.
[47]Franceschet S and others, 'The Impact of Gender Quotas: A Research Agenda' (2009) < Available at https://mlkrook.org/pdf/FKP%20APSA%202009.pdf > Accessed on 28th July 2024.

Quotas imposed by Article 27 (8) seek to bypass the sovereign and unassailable right of the voter to make political choices enshrined under Article 38 (1) by imposing a conclusion on him/ her. Free, fair, and credible elections are the foundations of democracy, and if people are voting to meet a planned and desired outcome, where is the freedom here? Further, candidates will be ruled out based on gender and the legislation that parliament is yet to enact will make such discrimination mandatory. This means men will be treated unequally before the law and that is discrimination. Discrimination is discrimination whether positive or negative. We cannot reconcile equality before the law as envisaged under 27 (1, 2, 3, and 4) with equality of outcome envisaged by clause (8). If people are to be treated equally before the law, we should expect and welcome inequality of outcome.

7. Recommendations and Conclusion

To address the issues raised by gender quotas in the Kenyan Constitution, several measures can be considered. First, amending Article 27(8) and related provisions is essential. The Constitution should be revised to ensure that gender quotas do not override the principle of equality before the law. This involves revisiting Articles 97 and 98 to eliminate any potential conflicts with the overarching aim of fair political representation. Additionally, promoting equal opportunities rather than enforcing quotas is crucial.[48] Efforts should be directed towards creating equal opportunities for all genders through educational programs, mentorship initiatives, and financial support for women candidates. The focus should be on empowering individuals to compete on an equal footing rather than guaranteeing specific outcomes.

Enhancing voter education is another vital step. Educating voters about the importance of gender equality and the value of diverse representation can help mitigate biases in the electoral process.[49] Voter education campaigns should emphasize the qualifications and capabilities of all candidates, regardless of gender, to foster informed voting decisions. Strengthening anti-discrimination laws is also crucial. Robust enforcement of these laws should protect all individuals from discrimination based on gender and ensure that any form of bias in the electoral process is addressed promptly and effectively.[50]

In conclusion, while the intent behind gender quotas in the Kenyan Constitution is to promote gender equality, the practical implications reveal significant challenges. By prioritizing equality of opportunity over equality of outcome, Kenya can foster a more inclusive and fairer political environment. Amendments to the Constitution, voter education, and voluntary party quotas are viable solutions to address the current issues. Upholding the principle of equality before the law is essential for genuine democratic participation and representation.

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[48]Cogito, 'Are Quotas a Solution for Equality?' (Cogito18 May 2020) < Available at https://www.sciencespo.fr/research/cogito/home/are-quotas-a-solution-for-equality/?lang=en > accessed 1 August 2024.
[49]Waiphot Kulachai, Unisa Lerdtomornsakul and Patipol Homyamyen, 'Factors Influencing Voting Decision: A Comprehensive Literature Review' (2023) 12 Social Sciences 469 < Available at https://www.mdpi.com/2076-0760/12/9/469 > accessed 1 August 2024.
[50]Katharina.kiener-manu, 'Crime Prevention & Criminal Justice Module 9 Key Issues: Topic 1 - Gender-Based Discrimination and Women in Conflict with the Law' (Unodc.org2020) < Available at https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-9/key-issues/1--gender-based-discrimination-and-women-in-conflict-with-the-law.html > accessed 1 August 2024

Partisanship; The poison slowly placing Kenya in a state of democratic dictatorship

If there's one thing that can keep me awake at night it's a vision, which I sometimes have, of this country being ruled by the wishes of its rulers and not by the rule of law.
~Michael Gilbert.

By Lawrence Kariuki Muthoni

Abstract

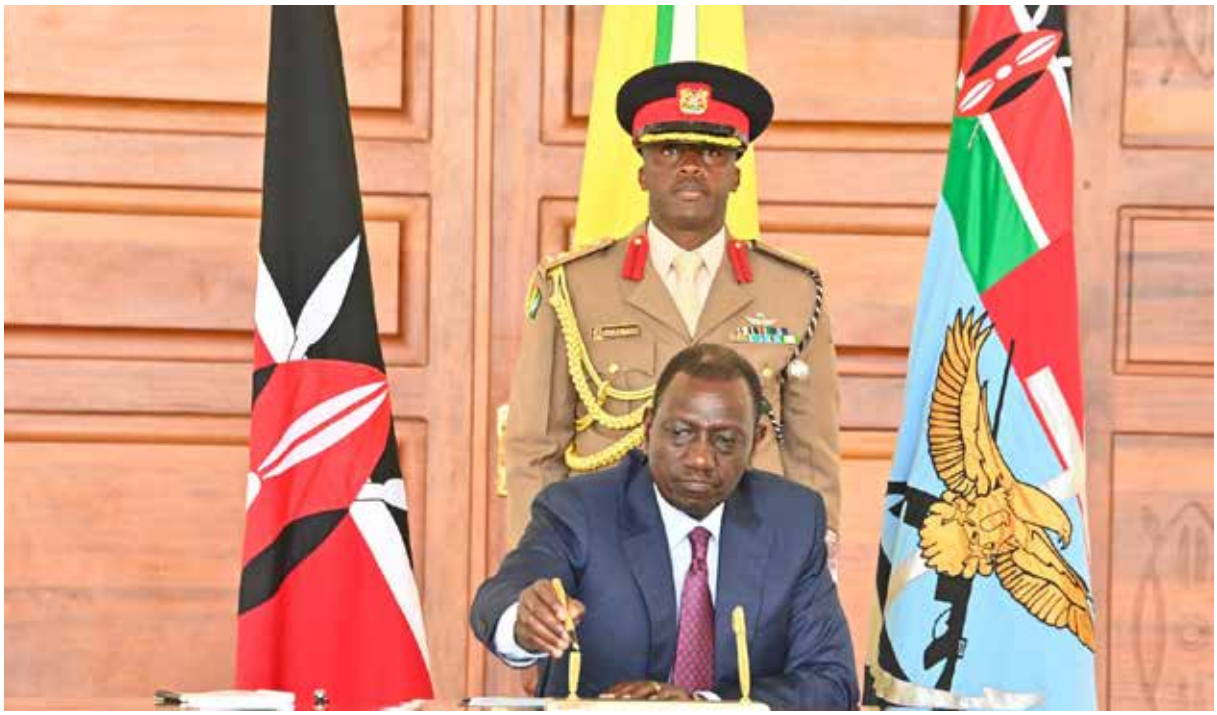
The executive's ruling party has had the majority of Members of Parliament (MPs) in parliament since 2013. For the last two parliaments, the executive's ruling party always had the majority members in parliament. Through the chains of party unity enforced by party disciplinary measures, resource allocations, and regional political dynamics, the executive has forced its ruling party MPs (and parliament in consequence) to pass decisions that protect the interest of the executive rather than the people. Partisanship demands that MPs make decisions as decided by the party and not their own constituents' views. This begs the question, is parliament's independence a fallacy? This paper argues that through partisanship, the MPs are reduced to the executive's voting machines. Parliament's independence remains a concept in the books. To resolve this problem, this piece proposes having an all-time opposition parliament where, for any parliament decision to be passed, a certain number of opposition MPs must vote to approve the decision. This way, Kenya can continue with its stalled journey to the destination of parliamentary independence.

1.0 Introduction

Kenya is a multi-party state.[1] Groups of people with different political interests among other things, forming the government, opposing the incumbent government, and mobilising people to a certain political action, can form and use political parties as vehicles to their desired political destinations.[2] One of the beneficiaries of this constitutional institution is the ruling party that is at the helm of power in the country.

The ruling parties are political parties made up of persons with the interest of capturing political power and having successfully obtained political power in the country. The ruling parties are made up of elected members of the executive, members elected or nominated to parliament via the party and any other members who register to become members of the parties. Therefore, about the ruling party, the elected members of the executive and MPs who are members of the party are one body working in

[1]Constitution of Kenya, 2010, art 4(2).
[2]Dr Fred Jonyo, 'Assessing the Role of Political Parties in Democratization in Kenya: The Case Of 2013 General Elections' Friedrich Ebert Stiftung Working paper, 2013 pg. 2.



The executive branch of government is responsible for the administration and enforcement of laws, as well as the overall management of government affairs. The executive branch is headed by the President and supported by various other key offices and ministries.

different, separate, but interrelated arms of government. Due to this interlinking factor- ruling political party- the executive has a tool to communicate and marshal support for its legislative policies and ideas that may help it meet its promises as per its manifestos.

Unfortunately, the executive has extended this tool to control and dictate the decisions of the parliament. Since the eleventh Parliament, the ruling party/coalition has also been the majority party in parliament.[3] The executive has taken advantage of their majority numbers in parliament to advance and dictate a tyranny of the majority. The executive's position is the position of parliament advanced without questions by their majority members. This has been done through- using (i) party positions and demands for party unity, (ii) party disciplinary measures and (iii) reduced resource allocation to threaten and quench any default from the executive's position, and (iv) taking advantage of regional single party dominance to destroy the political careers of ruling party MPs who default from executive's position.

This piece discusses the four ways the executive uses the ruling party to control the party MPs and the corollary control of parliament. It proposes that it is only by ensuring an opposition-dominant parliament that the executive will be kept in check and the independence of parliament protected. The piece is keen to note some challenges that may arise from an opposition-dominant parliament, i.e. difficulty in passing laws and the problem of 'buying out' opposition MPs hence killing the opposition in the country. It makes some suggestions to deal with the

[3]Parline Archive Database <IPU PARLINE database: KENYA (National Assembly), ELECTIONS IN 2013> accessed on 18/06/2023; Parline Database < Parline: the IPU's Open Data Platform> accessed on 18/06/2023; Votes and Proceedings- Thursday, October 6, 2022 At 2.30 pm; Parline Database <| Parline: the IPU's Open Data Platform> accessed on 18/06/2023.

arising problems and highlights areas for future research.

2.0 The executive's say is the law

As highlighted earlier, the executive uses its majority ruling party members in parliament to control the decisions of the parliament. The executive does this by using party positions enforced by party disciplinary measures and fortified by the regional dominance of political parties and the clientelistic nature of Kenyan politics.

2.1 The executive uses the ruling party's party positions to dictate the actions of MPs in parliament.

Political parties are based on the idea of party unity. The idea argues that members of parliament from a certain party vote/ make decisions in unison or as a bloc whether they agree with the proposals or not.[4] The MPs are prohibited from having their independent views on proposals. In case the MPs have differing views, such views should not influence their decision-making in parliament.[5] For instance, per Jubilee Party (ruling coalition and later party from 2013-2022) dictates that no member of the party will defy the party's position in parliament.[6] Members defying such a position invite hefty consequences that may, in extreme cases, destroy their political careers. This way, what the executive says, through the party, is the position that is taken by the majority MPs and hence the position of parliament. The use of party positions to infringe on the independence of parliament is exacerbated by two factors: the personified nature of the political parties and the roll call voting system in parliament.

Political parties in Kenya are not based on ideologies or beliefs. Rather, they are based on the personalities of certain political elites.[7] Certain individuals run the party, or rather, from the public's purview, the individual runs all the aspects of the party. If the person leaves, the party dies or loses following.[8] For instance, Jomo Kenyatta and Moi personified Kenya African National Union (KANU), Kibaki personified the Party of National Unity (PNU), and Uhuru Kenyatta and Ruto personified Jubilee. When Moi left power, he retired with KANU's influence. The same has happened with PNU and Jubilee. This way, the political elite and the party are the same.

This personified nature means that the position of the party is, in most instances, the position of the political elite personifying the party (party leader). The MPs and the public are loyal to the party leader, not the party itself.[9] What the party leader dictates is taken as the party's position that has to be advanced in parliament loyally. Therefore, the party's position is, in reality, the position of the party leader, who is, in another reality, the head of the executive. Any defection from that position attracts tough party and political disciplinary measures.

The voting system in parliament is shaped in a way to ensure that MPs as dictated by the party position. The voting system in parliament takes three different forms:

[4]A Malapane, 'Holding the Executive Accountable: Parliament as the Beacon of Hope to the People' (2016) 1(1) Journal of Public Administration and Development Alternatives 135, 142.
[5]A Malapane, 'Holding the Executive Accountable: Parliament as the Beacon of Hope to the People' (2016) 1(1) Journal of Public Administration and Development Alternatives 135, 142.
[6]Jubilee Party Constitution, 2016, art. 17(2).
[7]Christian B. Jensen, Michelle Kuenzi, and Daniel J. Lee, 'The effects of political parties on roll-call voting in Kenya's Parliament' (2020) 26(4) The Journal of Legislative Studies 523.
[8]Dr Fred Jonyo, 'Assessing the Role of Political Parties in Democratization in Kenya: The Case Of 2013 General Elections' Friedrich Ebert Stiftung Working paper, 2013 p. 15.
[9]Ken Ochieng' Opalo, Legislative Development in Africa: Politics and Postcolonial Legacies (Cambridge University Press, 2019) p.224.

voices of "Ayes" and "Noes",[10] electronic voting[11] and roll call voting.[12] The most appropriate one to ensure that the party position is adhered to is the roll call voting system. In this case, the MPs have to voice out their votes by saying 'I vote YES' or 'I vote NO' in plenary; hence everyone can witness the voting process.[13] MPs who violate the party's position are known, and they are appropriately punished. This voting system allows the executive to dictate and enforce their position on MPs.

However, some MPs may put on the cloth of courage and decide to follow their own will and go against the party position. Such MPs only attract party disciplinary actions which may reduce their influence in parliament or, in the extreme, be disastrous to their political careers. This is the second way that the executive dictates parliament.

2.2 Party disciplinary measures to punish and threaten defection from the will of the executive

The whip awaiting any party defectors, especially those acting against the interest of the executive in parliament, can take different forms, including fines, removal from member committees in parliament or other influential positions in parliament, suspension, and, in extreme cases- the expulsion of members from the party.[14] This piece focuses on two measures: - (a) removal from influential parliamentary committees and positions and (b) expulsion from the party.

The executive removes defecting ruling party MPs from influential positions and committees in parliament to quench any form of party rebellion. A party can remove its members from the positions of majority leaders, whip, and discharge them from specific committees.[15] This was a tool that was highly used by the Jubilee Party from 2017-2022. It discharged the majority leaders and majority whips of the parliament.[16] The party went further to remove more than fifteen (15) MPs from committees.[17] The only MPs who were retained in influential positions were those who were loyal and protected the interests of the executive in the House. The action of removing defecting ruling party MPs has the effect of attenuating their influence. With the party loyalists in influential positions and influential committees, the voice of the executive remains untamed.

In extreme cases, the ruling party goes to the extent of expelling defecting members to instill fear among other MPs who may think of defying. Parties have the legal capacity to expel members who violate the provisions of the party's constitution.[18] Looking at the Jubilee's Constitution, the party could expel members for, *inter alia*, disloyalty to the party, allegiance to another political party, acting or advancing positions contrary to the party position, and failure,

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[10]National Assembly Standing Orders, standing order 69(2).
[11]National Assembly Standing Orders, standing order 70.
[12]National Assembly Standing Orders, standing order 73.
[13]National Assembly Standing Orders, standing order 73.
[14]See Jubilee Party Constitution, 2016, Article 13(4).
[15]The National Assembly Standing Orders (6th Edition), Standing Order 19 A and 176(2).
[16]Japheth Ogila, 'Jubilee purge: Kimunya replaces Duale as National Assembly Majority Leader' (The Standard Newspaper, 2020) <Jubilee purge: Kimunya replaces Duale as National Assembly Majority Leader - The Standard (standard media.co.ke)> accessed on 15/06/2023; Citizen Reporter, 'It's Official! Murkomen & Kihika Are Out Of Jubilee Senate Leadership' (Citizen Digital, May 2020) <It's official! Murkomen & Kihika are out of Jubilee Senate leadership (citizen.digital)> accessed on 15/06/2023.
[17]Sharon Maombo, 'Muturi approves discharge of 16 Jubilee MPs from House Committees' (The Star, 18th June 2020) <Muturi approves discharge of 16 Jubilee MPs from House Committees (the-star.co.ke)> accessed on 15/06/2023; Eric Wainaina, 'Jubilee purge targets at least 20 MPs for ejection from National Assembly committees' (K24 Digital, 3rd June 2020) <Jubilee purge targets at least 20 MPs for ejection from National Assembly committees - K24 TV: K24 TV> accessed on 15/06/2023.
[18]Political Parties Act, 2011 s. 14 B.

refusal, or neglect to carry out directives or instructions of the Party.[19] These grounds also fall under the circumstances when an MP can be assumed to have resigned from the sponsoring political party. MPs are deemed to have resigned from the sponsoring political party if, among other reasons, they promote the ideology, interests, or policies of another political party.[20] Therefore, if a member is expelled for the reasons highlighted above, the party is making a declaration that the member is assumed to have resigned from the party. The consequence of the implied resignation is that the members expelled lose their MP positions. If the defying MPs are nominated, they lose their seats and are replaced by other loyal nominees. For the elected MPs, they have to go back to their people for re-election. Here too, the executive may use the regional party dominance to thwart the defying MPs' chances of re-election.

2.3 Taking advantage of regional party dominance to diminish chances of defying MPs' re-election

Political parties in Kenya are region-based depending on the area of influence of the party leader. The Constitution, in the clearest of terms, prohibits regional parties in the country.[21] However, the personified nature of political parties in Kenya makes this difficult to achieve. Different political elites exert different levels of influence on people in certain regions. For instance, H.E. Raila Odinga exerts a major influence on the people in Nyanza and the Coastal region. On the other hand, H.E. Uhuru Kenyatta, in the period 2013-2022, exerted a huge influence on the people in Central Kenya. The parties they led also had a major influence in those regions. This grounds the reality of regional single-party/coalition dominance.

Aspirants in such regions who use other parties to seek elective positions other than the regional party have very low chances of winning. People are loyal to the party leader and not the party itself.[22] The party/coalition becomes a formation where aspirants loyal to the party leader use to appeal to the people. This makes them gain favour in the eyes of the public, and hence aspirants of the party get easily elected.[23] The probability of winning using other parties is very low.[24] For instance, when the Jubilee Party lost its dominance in central Kenya to the Kenya Kwanza Coalition in 2022, the people who used the Jubilee Party ticket to vie for elective seats diminished their chances of winning.[25] Kenya Kwanza coalition led in the region. Therefore to increase the chances of re-election in a certain region, the MPs have to make sure that they are members of the party dominating the region. If not, then they will have an uphill task to get re-elected.

The executive takes advantage of this political dynamic to ensure that the MPs in their party play to the executive's tune. The

[19]Jubilee Party Constitution, art. 13(3) and 13(4).
[20]Political Parties Act, 2011, s. 14 A.
[21]Constitution of Kenya, 2010, Art 91(1) (a) and Art 91 (2) (a).
[22]Ken Ochieng' Opalo, Legislative Development in Africa: Politics and Postcolonial Legacies (Cambridge University Press, 2019) 224.
[23]Saskia Brechenmacher and Nanjira Sambuli, 'The Specter of Politics as Usual in Kenya's 2022 Election' (Carnegie Endowment for International Peace, July 2022) <The Specter of Politics as Usual in Kenya's 2022 Election - Carnegie Endowment for International Peace> accessed on 24/06/2023.
[24]Saskia Brechenmacher and Nanjira Sambuli, 'The Specter of Politics as Usual in Kenya's 2022 Election' (Carnegie Endowment for International Peace, July 2022) <The Specter of Politics as Usual in Kenya's 2022 Election - Carnegie Endowment for International Peace> accessed on 24/06/2023.
[25]Citizen Reporter, 'Wamatangi: Why Mt. Kenya People Can't Trust Uhuru Anymore' (Citizen Digital, 31st March 2022) <Wamatangi: Why Mt. Kenya people can't trust Uhuru anymore (citizen.digital)> accessed on 16/06/2023; Hebrews Rono Jubilee Alleges Massive Vote Rigging in Mt Kenya, Bungoma Counties: "Highly Compromised" (Tuko News, 12th August 2022)<Jubilee Alleges Massive Vote Rigging in Mt Kenya, Bungoma Counties: "Highly Compromised" - Tuko.co.ke> accessed on 24/06/2023.

MPs know that if they defy the party, they can be easily thrown out. If this is done, they will not get nomination slots in the party and hence will not take advantage of the party waves/ dominance in the region. Their chances of re-election are, therefore, greatly attenuated.

2.4 Use of allocation of resources to bind MPs to the executive

Politics in Kenya are clientelistic. The voters are not interested in the laws and programs that MPs pass in parliament.[26] All they want to see is the visible physical developments brought to them at personal levels.[27] Both the constituents and the MPs consider the greatest duty of Members of Parliament is not to make laws. Rather, it is to get government projects to the constituents and their areas.[28] Therefore, MPs are only re-elected if the people consider that they have brought visible development in their areas that warrant them the people's votes.

The executive takes advantage of this nature of politics in the country to keep the members of the ruling party in check. The nature of the relationship between the MPs and the executive determines the resources and government projects that will be allocated to the MPs' areas.[29] The closer the relationship, the more resources for the MPs' constituents and hence more evidence of work done. This consequently increases the MPs' chances of re-election. The defying MPs are punished by reduced resource allocation in their areas. This attracts the wrath of their constituents, who decide that the defying MPs will never set foot in Parliament again.

Githunguri MP Gathoni Wa Muchomba

The government has refined this method of punishing defying MPs to allocate resources to the political competitor of the defying MP. This increases the competitor's favor in the constituent's eyes and hence increases the competitor's chances of winning in future elections. For instance, in Githunguri Constituency (in Kiambu County), when the incumbent MP (Gathoni wa Muchomba) defied the ruling party's position on Finance Bill 2023, the executive started promoting the brand of her political competitor in the constituency by allocating resources to him.[30] That way, he will appeal to the people and increase his chances of being elected in the next elections to the detriment of the incumbent MP.

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[26]Ken Ochieng' Opalo, *Legislative Development in Africa: Politics and Postcolonial Legacies* (Cambridge University Press, 2019) 211.
[27]Ken Ochieng' Opalo, *Legislative Development in Africa: Politics and Postcolonial Legacies* (Cambridge University Press, 2019) 211.
[28]Joel D. Barkan, '*Bringing Home the Pork: Legislator Behavior, Rural Development and Political Change in East Africa*'; *In Legislatures in Development: Dynamics of Change in New and Old States* (Joel. Smith and Lloyd. Musolf. Durham eds, NC: Duke University Press 1979), pp. 265–288.
[29]Christian B. Jensen, Michelle Kuenzi, and Daniel J. Lee, 'The effects of political parties on roll-call voting in Kenya's Parliament' (2020) 26(4) The Journal of Legislative Studies 523, 530- 531.
[30]Justus Ochieng', 'President Ruto, Gachagua front Kago to tame MP Gathoni Muchomba over Finance Bill stand' (*Nation* Media Group, 20th June 2023)<President Ruto, Gachagua front Kago to tame MP Gathoni Muchomba over Finance Bill stand | Nation> accessed on 25/06/2023.

The Kenyan Parliament in a sitting.

Using the means described above, the executive is able to ensure that the independence of parliament remains a fallacy. However, all is not lost. By restructuring the decision-making system of parliament and limiting the roles of MPs as per the doctrine of separation of powers, Kenya can protect the independence of parliament. It is on that basis that the author suggests that the critical solution to the problem of infringed independence of parliament is making the House opposition dominant and limiting MPs' roles to the development of laws, oversight, and representation.

3.0 Recommendations

Two practical solutions can protect and enhance the independence of parliament. (a) Making Parliament an opposition stronghold by making sure that the opposition members are the majority in parliament or demanding that their voice be the deciding factor in parliamentary decisions. (b) Discharging MPs from all community development duties other than legislative and policy advancement. This should be followed up by civic education to educate both the MPs and the public about the roles of MPs in their areas.

3.1 Making parliament an opposition stronghold

Prof. Ben Sihanya and Kennedy Opalo argue that the 10th Kenyan parliament was the strongest and most independent parliament in Africa.[31] The unique factor that caused this position was the fact that the house was dominated by opposition MPs.[32] The solution, therefore, lies in making the opposition the dominant party in all parliaments. This can be done by demanding that for parliament to make a

[31]Kennedy Opalo, 'The long road to institutionalization: the Kenyan Parliament and the 2013 elections' (2014) 8(1) Journal of Eastern African Studies 63, 63 and 64; Ben Sihanya (forthcoming 2023) *"Legislative Power, Structure and Process in Kenya and Africa,"* in Ben Sihanya (due 2023) Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Theory, Structure, Method and Systems, Sihanya Mentoring & Sihanya Advocates, Nairobi & Siaya.

decision, a certain number of opposition MPs and MPs representing specific regions must agree to that decision. The author calls this 'forgetting the simple majority rule and adopting the real majority rule'.

Forgetting the simple majority rule and adopting the real majority rule

Parliament makes decisions using the simple majority rule unless, in circumstances, the Constitution or any other law dictates otherwise.[33] In this system, the decision is determined by the team with the largest number of votes. This system is problematic in two aspects. First, it allows for easy control of the parliament by the ruling party using partisanship. Since the 2013 parliament, the ruling party always had a majority of members in parliament.[34] Therefore, using the party means described above, the executive finds it easy to make laws by taking binding party positions which their members must obey. Being the majority in parliament, the executive position becomes law and the voices of the opposition are not heard.

Second, the decision-making system does not consider that the MPs are from different regions with differing needs. In some instances, the MPs in a majority of the regions may be satisfied to take a certain course of action to the detriment of people in certain regions who do not agree to the course of action (and in some instances, the disagreeing people are the most negatively affected by the decision). Since MPs are representatives of the people living in different regions, the decision-making system should consider not only the majority view but also the representation from each region. Therefore, the decision-making system should have the following three considerations:

a) The majority of the MPs should pass a decision in terms of numbers.
b) At least 25% of the opposition party members also pass the decision- this is to ensure that partisanship in the ruling party does not influence decision-making to promote the will of the executive to the detriment of the interests of the people.
c) The majority of the MPs passing the bill also represent the different regions in the country especially the regions that are highly affected by the bills. Therefore, every region in the country and its interests shall be represented against the whims of the decisions of the executive.

3.2 MPs should be discharged from any development of projects and implementation of laws duties

MPs have three major roles: legislate, oversight the other arms of government, especially the executive and represent the people.[35] On the other hand, the executive has the role of implementing parliamentary directives.[36] However, the MPs participate

[32]Ben Sihanya (forthcoming 2023) *"Legislative Power, Structure and Process in Kenya and Africa,"* in Ben Sihanya (due 2023) Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Theory, Structure, Method and Systems, Sihanya Mentoring & Sihanya Advocates, Nairobi & Siaya.
[33]The National Assembly Standing Orders (6th Edition), Standing Order 69 (1); The Senate Procedural Handbook (First Edition), order 33.
[34]Gilbert M. Khadiagala, 'Kenya's political elites switch parties with every election – how this fuels violence' (Nation, 22nd May 2023) <Kenya's political elites switch parties with every election – how this fuels violence| Nation (theeastafrican.co.ke)> accessed on 16/06/2023. Also see See Parline Database <IPU PARLINE database: KENYA (National Assembly), ELECTIONS IN 2013> accessed on 16/06/2023 for 2013 results; Parline Database <IPU PARLINE database: KENYA (Senate), Last elections> accessed on 16/06/2023 for 2017 results; Parline Database <|Parline: the IPU's Open Data Platform> accessed on 16/06/2023 for 2022 elections.
[35]Constitution of Kenya, 2010, art 94, 95, 96.
[36]Trusted Society of Human Rights Alliance v The Attorney General and Others Nairobi Petition No. 243 of 2011 [2012] eKLR and *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR.

in the development of their constituencies using funds such as the Constituency Development Fund (CDF) and its mutation National Government Constituency Development Fund (NG-CDF). This is interfering with the executive's sphere and duties and hence a violation of the doctrine of separation of powers.[37] Kenya should scrap off Constituency Development Funds and any of their mutations that are controlled, directed, and patronised by the MPs. MPs should only do their duties as per the Constitution. The funds allocated to them should be taken to the counties to make and enhance local development projects.

By making this move, the executive will lose the tool that they use to demand the allegiance of MPs and control them. Further, this move has to be fortified by civic education to the members of the public. The public should know the specific duties of their MPs and the performance indicators to help them evaluate the MPs' work. It is only by such civic education that the public will learn how to evaluate the quality of their leaders before electing/ re-electing them and improving the quality of leadership in the country.

These recommendations are bound to attract their fair share of challenges. This piece discusses at least two challenges: the difficulty in passing legislation and the 'buying out' of opposition MPs to pass the threshold needed to pass legislation. The two challenges inform the future areas of research on this topic.

4.0 The Challenges arising from the recommendations

4.1 The executive will find it hard to pass policies that may require legislative backing.

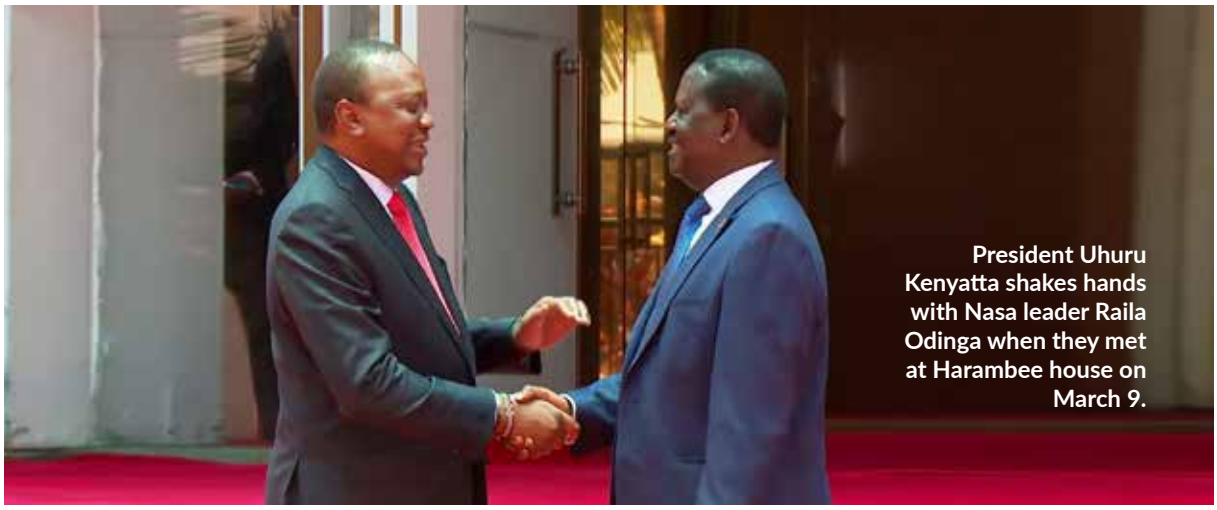
The executive needs to have laws that enable it to meet the promises made in their manifestos, e.g. to meet the socio-economic rights, the executive may need laws that enable them to tax more/ borrow more. However, to make such legislative intent come true, as per my recommendations, the executive will not only have to convince their party members, they have to convince a certain number of members of the opposition party and make sure that a certain number of MPs from each region have agreed to such a proposition. This may demand a lot of effort, but on the positive side, it will ensure only quality and acceptable laws are made.

The executive, with such legislative intent, will have to convince the opposition and all the MPs that the proposals made are best for the country. Therefore, the draconian imposition of laws through partisan ruling party MPs will be difficult since the executive will still need the numbers from the opposition party. Therefore, by balancing the results and the efforts, the results of that recommendation will be more beneficial for the country.

4.2 The executive may 'buy' opposition MPs to meet the required threshold

To make it easier for the executive to pass the opposition threshold needed to pass decisions, the executive can decide to 'buy out' some opposition MPs. This can take three forms. Some MPs of the opposition party can join the ruling party brigade.[38] Therefore the MPs are *de jure* members of the opposition party but *de facto* members of the ruling party. Resolving this is a little easy

[37] *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR.
[38] Benson Nyagesiba, 'Azimio leaders decamping to Kenya Kwanza threat to democracy, lawyer warns' (The Star, 13th September 2022) <Azimio leaders decamping to Kenya Kwanza threat to democracy, lawyer warns (the-star.co.ke)> accessed on 16/06/2023.



President Uhuru Kenyatta shakes hands with Nasa leader Raila Odinga when they met at Harambee house on March 9.

since the opposition party in question can decide to punish the defecting MPs using the party disciplinary mechanisms.

Second, some parties in the opposition coalition can decide to join the ruling coalition by relying on post-election coalition agreements. For instance, after the 2022 elections, fourteen parties of the opposition coalition ditched the coalition for the ruling party.[39] Resolving this may call for the use of courts to enforce the pre-election coalition agreements and declare such party movements illegal. If the parties insist on making the illegal movement to the ruling party, then this action should call for a vacation of the MPs' positions and subsequent re-election in the areas.

The third form is where the whole opposition coalition decides to join the ruling party/coalition. This can take the form of agreements between the opposition leader and the president. For instance, in 2018, the opposition leader, H.E. Raila Odinga, and then president H.E Uhuru Kenyatta had the famous handshake that had the effect of killing opposition in the country.[40] The whole opposition joined the government. There was no opposition to protecting the people from the government's excesses. The question of post-election coalition agreements should be looked into with a keener eye, and solutions to deal with the problems arising from it be recommended.

5.0 Conclusion

Partisanship and party unity are good to the extent that they promote the strength of parties in the country. However, the executive can take advantage of party unity to advance tyrannical views in parliament and kill the independence of the legislator. To protect the independence of parliament, the voice of the opposition should always be the deciding factor in parliament. This paper, therefore, proposes that more nomination slots for the opposition party and that for a decision of parliament to be passed, a certain number of opposition MPs agree to that position. It is only by making the opposition party/ coalition dominant in parliament that the Kenyan parliament will be independent from the whims of the executive.

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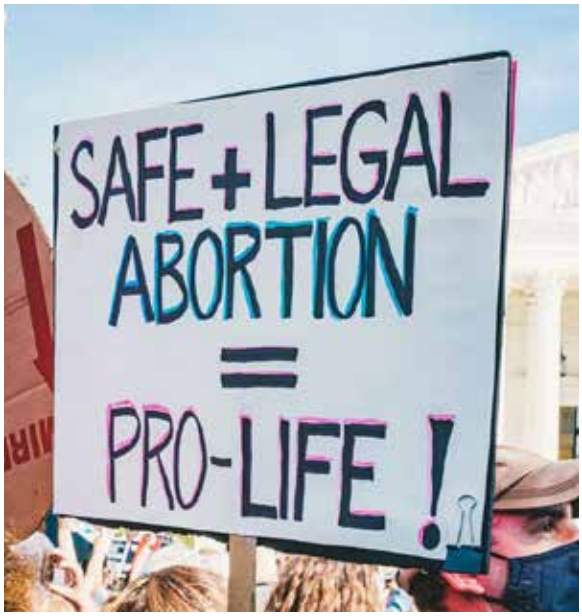
[39]Votes and Proceedings-Thursday, October 6, 2022 at 2.30 PM.
[40]Samwel Owino, 'How Uhuru-Raila handshake killed the Opposition' (Nation Africa, 28th December 2020) <How Uhuru-Raila handshake killed the Opposition | Nation> accessed on 16/06/2023.

The U.S. and Us: The influence of U.S. political shifts and the impact of Trump's administration on abortion rights in Kenya

By Teddy Odira

Introduction

The intersection of global politics and local rights is the area of critical study, especially when the policy decisions made by the mighty nations like the United States, affect the health reproductive and rights of the people living as far away as in Kenya.[1] The reproductive choice has always been one of the most controversial topics; however, abortion has been conspicuous due to the strained debate and changed policies throughout the world.[2] Approximately 45% of abortions globally are considered unsafe, contributing significantly to maternal deaths and morbidities.[3] Each year, around 22,800 women die from unsafe abortions, with 97% of these unsafe procedures occurring in low and middle-income countries.[4] The election of Donald Trump as President of the United States shifts even more focus toward the Global Gag Rule, also known as the Mexico City Policy.[5] This U.S. policy restricts foreign NGOs from using U.S. government funds to provide or discuss abortion services, with major implications for reproductive health worldwide.[6] These are deep ramifications in countries like Kenya, where U.S. foreign aid is critical to the healthcare sector.



The Constitution of Kenya (2010) allows abortion under certain conditions, specifically where the life or health of the mother is at risk or in cases of severe fetal abnormalities (Article 26(4)).

[1]Kelly Hunter, Sarah Hubner and Ema Kuczura, '"If You Don't Help Me, I'm Going to Take My Life": The Devastating Impact of the US's Global Gag Rule and the COVID-19 Pandemic on Women's Sexual and Reproductive Health in Kenya' (2021) 23 International Feminist Journal of Politics 350.
[2]Azita Fathnezhad Kazemi and others, 'Various Aspects of Abortion and Related Policies in the World' (2017) 11 Medical Ethics Journal 75.
[3]Ibid.
[4]World Health Organization, 'Abortion' (World Health Organization17 May 2024) <https://www.who.int/news-room/fact-sheets/detail/abortion> accessed 22 August 2024.
[5]Nathan C Lo and Michele Barry, 'The Perils of Trumping Science in Global Health — the Mexico City Policy and Beyond' (2017) 376 New England Journal of Medicine 1399.
[6]Ibid

First implemented by President Ronald Reagan in 1984, the Global Gag Rule has long been a political football in the U.S., typically reinstated by Republican administrations and revoked by Democratic ones.[7] When Trump took office in 2017, his administration not only reinstated the policy but also further expanded it to cover all U.S. global health assistance, affecting billions of dollars in aid.[8] Such expansion meant that billions of dollars in aid were affected, covering other health services beyond family planning, such as HIV/AIDS treatment, maternal and child health, and others. This means that in a country such as Kenya, which heavily relies on foreign aid to support its health system, it forces NGOs to make a choice between critical funding and the provision of comprehensive reproductive health services inclusive of safe abortion.

The regime governing abortion in Kenya is already very restrictive. In this case, according to the new Constitution of 2010, it can only be performed when the life or health of the mother is in danger or if the situation constitutes an emergency. This is further exacerbated by international policies such as the Global Gag Rule, which heightens stress on the already overburdened health care system of Kenya and further marginalizes women who already face significant barriers to RH services.[9] The victory of Trump is likely to have huge implications for abortion rights in Kenya. This paper will trace the history and implementation of the Global Gag Rule, its specific effects on Kenyan health, and broader socio-political challenges that present themselves. The main aim of this paper is to highlight the complicated dynamics at play and how such intersections call for a nuanced approach in securing reproductive rights in view of global political pressure.

The late US President Ronald Reagan.

The Global Gag Rule: A Historical Overview

This was formerly known as the Mexico City Policy, enacted in 1984 under President Ronald Reagan.[10] It denies funding to foreign NGOs from the U.S. if they are involved in any way with abortion services, even if such activities are permissible in countries of operation and subject to non-U.S. funding.[11] The effect of the rule is to "gag" organizations from performing any activities having to do with abortion, including advocacy, counseling, and referral services.[12] Republican administrations, starting with Reagan, have generally reinstated the policy, while Democratic administrations, starting with President Bill

[7]Jeffrey B Bingenheimer and Patty Skuster, 'The Foreseeable Harms of Trump's Global Gag Rule' (2017) 48 Studies in Family Planning 279 <https://onlinelibrary.wiley.com/doi/full/10.1111/sifp.12030> accessed 22 August 2024.
[8]Ibid.
[9]Ibid.
[10]Scott L Greer and Sarah D Rominski, 'The Global Gag Rule and What to Do about It' [2017] BMJ.
[11]Ibid.
[12]Ibid.

Former US President Donald Trump.

Clinton, rescinded it.[13] It was most recently reinstated by President Donald Trump in 2017 and expanded at large to apply to all global health funding, not just family planning assistance.

The global gag rule finds its roots in a larger conservative agenda of the Reagan administration, which hoped to stem the tide of abortion at home and around the world.[14] This policy was initially enacted in Mexico City at the 1984 United Nations International Conference on Population and therefore came to be known as the "Mexico City Policy."[15] The Reagan administration made the justification that with abortion being such a controversial issue in so many countries, the U.S. taxpayer should not have to fund or assist overseas abortion services. The policy was a recognition of the need to have U.S. foreign aid conditioned on the administration's stance on pro-life issues reflective of the general broader culture and religious values of the conservative base. Another view is that the gag rule was a balance to the Supreme Court's Roe v. Wade[16] decision that legalized abortion in the United States nationwide.[17] Since so many of the U.S. funds would end up being utilized for abortion-related activities abroad, the Reagan administration instituted this as a way to curtail the global consequences of such liberal abortion policies.

Although it was then known as the global gag rule, it has since been changed numerous times by successive administrations as part of their political mandate. When President Bill Clinton came to power in 1993, he annulled the policy and allowed foreign NGOs to resume their abortion-related activities without losing their U.S. funding.[18] It was reinstated by President George W. Bush in 2001 and remained in effect until President Barack Obama rescinded it in 2009.[19]

In 2017, Trump's reinstatement and expansion of the global gag rule did have a real point of departure.[20] While past renditions only applied to family planning assistance, Trump's version applied to all kinds of global health funding, including that dedicated to HIV/AIDS, malaria, maternal and child health, and more.[21] This

[13]Patrick Allitt and William C Berman, 'America's Right Turn: From Nixon to Bush.' (1995) 100 The American Historical Review 1730.
[14]Lindsay B Gezinski, 'The Global Gag Rule: Impacts of Conservative Ideology on Women's Health' (2011) 55 International Social Work 837.
[15]Adil Najam, 'Predictions for Cairo: A Reaffirmation, a Reversal, a Realignment, and a Refusal' (1994) 21 Environmental Conservation 105.
[16]410 U.S. 113 (1973).
[17]Karen Weingarten, 'Fifty Years since Roe v. Wade: Forum' (2022) 48 Feminist Studies 824.
[18]DavidH Frankel, 'USA: Victory over Gag Rule for Family Planning Groups' (1992) 340 The Lancet 1215.
[19]Nature, 'Obama Swiftly Reverses Bush Orders' (2009) 457 Nature 523.
[20]Nature, 'Obama Swiftly Reverses Bush Orders' (2009) 457 Nature 523.
[21]Constancia Mavodza, Rebecca Goldman and Bergen Cooper, 'The Impacts of the Global Gag Rule on Global Health: A Scoping Review' (2019) 4 Global Health Research and Policy.

Kenya, like many other countries, relies on international funding to support family planning and reproductive health services. The Global Gag Rule affects the ability of NGOs and health organizations to provide these services if they are bound by the policy.

had the effect of greatly expanding the reach and impact of the policy, hitting a wide swath of health services and organizations globally.

The Global Gag Rule and Kenya

Kenya is one of the most affected countries by the global gag rule because underneath it all, there is an overly high reliance on U.S. foreign aid into health care.[22] The effects of the rule on reproductive health are very deadly and are felt in the rural and other underprivileged areas with marginalized access to health care. To truly grasp the implications of Trump's win on the issue of abortion in Kenya, it is very important that we also look at how the global gag rule historically affected what changes may come with its revival and expansion.

This has been stiffened by the fact that Kenya heavily relies on foreign aid in her health sector for which the United States ranks among the largest donors.[23] Supported are a range of programs on health from HIV/AIDS, malaria to maternal and child health, and reproductive health. Of these, over 60% of the programs support nongovernmental organizations that run in partnership with the Government of Kenya and local communities.[24] It affects an estimated $9bn of US global health assistance.[25]

Legalizing abortion in Kenya within a specific framework, the provision for safe and legal abortion services is still restricted, especially in the rural areas. Women generally go through unsafe abortion, due to which materna morbidity and mortality

[22]Boniface Ayanbekongshie Ushie and others, 'Foreign Assistance or Attack? Impact of the Expanded Global Gag Rule on Sexual and Reproductive Health and Rights in Kenya' (2020) 28 Sexual and Reproductive Health Matters 1794412.
[23]Zosia Kmietowicz, 'Abortion: US "Global Gag Rule" Is Killing Women and Girls, Says Report' [2019] BMJ.
[24]bid.
[25]Ibid.

rates can turn out to be very high. U.S. funding has been critical in supporting organizations that provide safe abortion services, among others for family planning and reproductive health education.[26] Over three-quarters of abortion clients presented with moderate or severe complications. Approximately 65% of these complications are managed using manual or electronic vacuum aspiration, 8% with dilation and curettage, another 8% with misoprostol, and 19% with forceps and fingers.[27] In 2015. the likelihood of experiencing moderate or severe complications was 43% higher for those with mistimed pregnancies compared to those with wanted pregnancies.[28] For women who did not want any more children, the odds of having a severe complication are twice as high compared to those who desired the pregnancy at the time.[29] Women who report inducing the abortion themselves have 2.4 times higher odds of experiencing a severe complication compared to those who reported a spontaneous abortion.[30] Additionally, women who delayed more than 6 hours before seeking care at a health facility have at least twice the odds of developing moderate or severe complications compared to those who sought care within 6 hours of the onset of complications. Specifically, a delay of 7–48 hours is associated with an OR of 2.12, a delay of 3–7 days has an OR of 2.01, and a delay of more than 7 days was associated with an OR of 2.35.[31] Very many nongovernmental organizations that offer abortion-related services or even advocate for reproductive right will find themselves in a quagmire in between complying with the gag rule or lose funding from the United States. This brings forward a situation where some clinics have to close, some service was lost, and the atmosphere around advocacy efforts was chilled.

The Legal Framework for Abortion in Kenya

To fully appreciate the ramifications of the global gag rule on abortion rights in Kenya, one needs to put it within the context of the country's legal framework that guides abortion.[32] In Kenya, the law on abortion is complex, reflecting the tension among traditional values, religious beliefs, and protection of women's health and rights.[33] The Constitution of Kenya promulgated in 2010 provides for a nuanced legal framework on abortion. Article 26(4) of the Constitution provides, "abortion is not permitted unless, in the opinion of a trained health professional, there is a need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."[34] This provision accommodates legal abortion under specified circumstances, including when the life or health of the mother is in danger.

It is also fully enshrined in the Constitution as a fundamental right to health, inclusive of reproductive health. Article 43(1)

[22]Boniface Ayanbekongshie Ushie and others, 'Foreign Assistance or Attack? Impact of the Expanded Global Gag Rule on Sexual and Reproductive Health and Rights in Kenya' (2020) 28 Sexual and Reproductive Health Matters 1794412.
[23]Zosia Kmietowicz, 'Abortion: US "Global Gag Rule" Is Killing Women and Girls, Says Report' [2019] BMJ.
[24]bid.
[25]Ibid.
[26]Abdhalah Kasiira Ziraba and others, 'Unsafe Abortion in Kenya: A Cross-Sectional Study of Abortion Complication Severity and Associated Factors' (2015) 15 BMC Pregnancy and Childbirth.
[27]Ibid.
[28]Ibid.
[29]Ibid.
[30]Ibid.
[31]Ibid.
[32]Emily Maistrellis and others, 'Beyond Abortion: Impacts of the Expanded Global Gag Rule in Kenya, Madagascar and Nepal' (2022) 7 BMJ Global Health.
[33]Charles Okeyo Owuor, 'Abortion and the Law in Kenya' [2017] SSRN Electronic Journal.
[34]The Constitution of Kenya 2010, Article 26(4)

(a) guarantees the right to the highest attainable standard of health, including a healthy reproductive system and access to reproductive health care.[35] Some legal scholars and advocates interpret this provision as providing a basis for a woman's right to have access to safe and legal abortion services.[36]

The Penal Code, however, still remains confused and makes abortion a crime except in cases where it is necessarily procured to save the life of the mother. Sections 158-160 in the Penal Code provide severe penalties for a person who procures or performs an abortion, with the punishment ranging from imprisonment to fines.[37] This creates a legal grey area whereby abortion would be considered both a constitutional right on one hand and a criminal offense on the other, depending on the circumstances.

The implementation of Kenya's abortion laws has been challenging. In spite of all the constitutional provisions, it is still quite difficult to get safe and legal abortion services, especially in the rural setup.[38] Many healthcare providers shy away from performing abortions because of legal and social stigma. Additionally, the ambiguity in guiding principles that should support the Constitution has caused inconsistencies in applying the law.[39]

Second, the global gag rule exacerbates the challenges already faced by NGOs working on abortion-related services or advocating for changes in the legal framework. The policy is essentially undermining the protected constitutional rights of Kenyan women by limiting them to access safe and legal abortion services and further constricting efforts to expand reproductive rights.

Socio-Political Consequences of Trump's Victory on Abortion Rights in Kenya

As such, Trump's win in the U.S. presidential race has great implications in relation to abortion rights in Kenya. These reach beyond the direct impact of the global gag rule to the socio-political environment at large.[40] The global gag rule is part of a bigger conservative agenda that seeks to roll back reproductive rights and promote traditional values. This way, the agenda may influence the legal and social environment in Kenya by changing the rights and health of women.[41]

The global gag rule is surely entwined with traditional values, usually at odds with the advancement of reproductive rights, as part of Trump's broader conservative agenda.[42] In a country like Kenya, where religious and cultural beliefs play a significant role in shaping public opinion, the spillover effect of US policies emboldens groups opposed to abortion.[43] This sets the stage for an environment where pushing for legal and policy reforms that expand abortion rights becomes even more challenging.

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[35]Ibid, Article 43(1)(a).
[36]C Zampas and JM Gher, 'Abortion as a Human Right--International and Regional Standards' (2008) 8 Human Rights Law Review 249 <https://academic.oup.com/hrlr/article-abstract/8/2/249/677800> accessed 22 August 2024.
[37]Penal Code CAP 63 Laws of Kenya.
[38]Ruvani T Jayaweera and others, 'Women's Experiences with Unplanned Pregnancy and Abortion in Kenya: A Qualitative Study' (2018) 13 PLOS ONE.
[39]Ibid.
[40]Stacy Banwell, 'Gender, North–South Relations: Reviewing the Global Gag Rule and the Defunding of UNFPA under President Trump' (2019) 41 Third World Quarterly 1.
[41]Suzie Lane, Sonja Ayeb-Karlsson and Arianne Shahvisi, 'Impacts of the Global Gag Rule on Sexual and Reproductive Health and Rights in the Global South: A Scoping Review' [2020] Global Public Health 1.
[42]Margaret Giorgio and others, 'Investigating the Early Impact of the Trump Administration's Global Gag Rule on Sexual and Reproductive Health Service Delivery in Uganda' (2020) 15 PLOS ONE.
[43]Ibid.

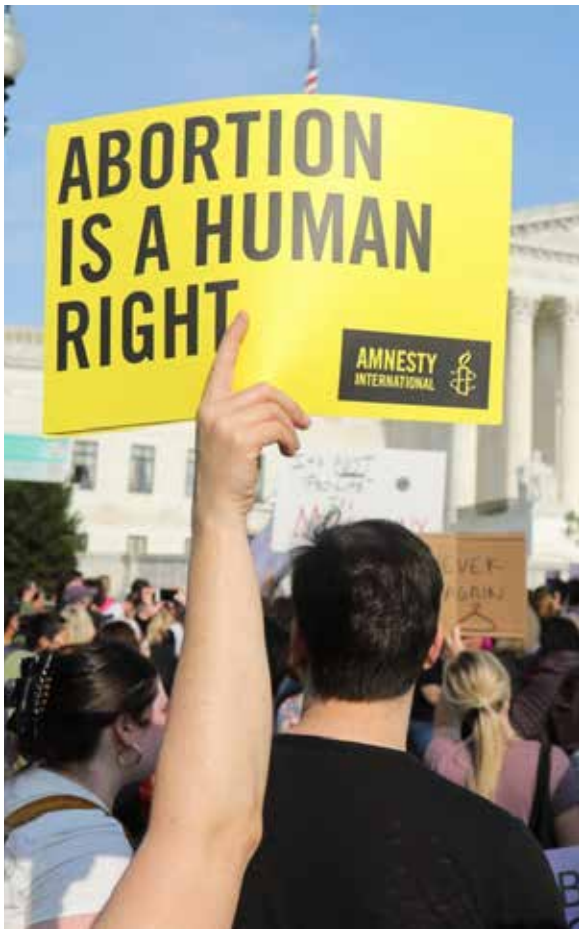
The global gag rule has a general chilling effect on CSOs engaging in reproductive rights advocacy in Kenya.[44] A state of self-censorship on all matters of abortion, including advocacy and education, has been left for NGOs who are afraid of losing U.S. funding. Once public discourse in regard to reproductive rights is dampened, the possibility that CS will push for reforms is circumscribed. With weak advocacy, the chance to advance the rights to abortion in Kenya is greatly curtailed.

The influence of the United States on the law and policy of Kenya cannot be understated. The global gag rule and the general conservative agenda of Trump can influence the fate of reforms in law and policy in Kenya. For instance, the criminalization or expansion of abortion rights may be frustrated by pressure for consistency with the United States, mainly in a context where Kenya depends on the funding and support from the United States.

Conclusion

The election of Donald Trump and the reinstatement of the global gag rule have significant implications for abortion rights in Kenya. The policy not only restricts access to safe and legal abortion services but also stifles advocacy efforts and reinforces conservative values that are at odds with the advancement of reproductive rights. To protect and advance these rights, it is essential to develop strategies that include legal advocacy, public education, and international cooperation. By doing so, Kenya can uphold the constitutional rights of its citizens and ensure that all women have access to the reproductive health services they need.

This article has explored the historical context of the global gag rule, its impact on Kenya's healthcare system, and the potential challenges that may arise as a result of Trump's win. As the global landscape continues to evolve, it is crucial for Kenya to remain vigilant in protecting the reproductive rights of its citizens and to resist external pressures that seek to undermine these rights.



In Kenya, abortion is legally permitted under specific conditions (e.g., risk to the mother's life or health, severe fetal abnormalities). The Global Gag Rule's restrictions can impact organizations that provide information and services related to safe abortion.

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[44]Elizabeth A Sully and others, 'Impact of the Global Gag Rule on Women's Contraceptive Use and Reproductive Health Outcomes in Ethiopia: A Pre–Post and Difference-In-Difference Analysis' (2023) 13 BMJ Open.

The illusion of change: How International Monetary Systems continue to favor Developed Economies post the New International Economic Order

By Victoria Titus

Abstract

This paper seeks to delve into the discussion of whether the New International Economic Order with regard to the International Monetary Systems, that is the IMF and World Bank, has been beneficial or detrimental to developing countries. The paper employs desktop research methodology where it analyzes literature and reports. The paper finds that, although the New International Economic Order aimed at establishing a fairer global economic framework that would benefit developing nations, this has nevertheless been the case since the international monetary system still advantages wealthy developed countries over poorer ones. Through examining the key aspects of the International Monetary System, this paper will demonstrate how the New International Economic Order has fallen short of its promises.

Key Words; *New International Economic Order, International Monetary Systems, Developing Countries, IMF, World Bank.*

IMF headquarters in Washington, D.C.

1.0 Introduction

In the quest for equality and fair treatment in the International Economic systems, the least developed countries with the assistance of communist states demanded for a New International Economic Order (NIEO) around the 1960s and 1970s.[1] The main concepts of the NIEO were to create better economic and social conditions for the development of the poorer countries.[2] Part of the NIEO was the establishment of an

[1]R Caldera, 'The Juridical Basis of a New International Order' (1986 I) RdC 196, 387.
[2]Ibid.

International Monetary System. The system was established following the negotiations held at the Bretton Woods Conference in 1944 through the Articles of Agreement of the International Monetary Fund (IMF)[3] with the aim of creating an international monetary order based on free convertible currency.[4]

The IMF was established to ensure a stable international monetary system as a basis of international trade and capital movements, to foster sound economic growth, and to contribute to a stable monetary regime of Member States.[5] The World Bank on the other hand was established to promote economic reconstruction after the Second World War, to assist less developed or war-afflicted countries, and to promote international trade.[6]

With the new order, the International Monetary Systems were to offer financial aid to countries with balance of payment problems, mostly the heavily indebted countries, provided by governments and international organizations such as the International Monetary Fund (IMF) an important mechanism to stabilize currencies. In addition to the financial assistance, the IMF also offers policy advice and technological assistance to developing countries most particularly, the poor countries facing financial crises or those coming out from long periods of war. Further, in advancing the goals of the NIEO, the IMF offers lower interest rates and zero rates for poor countries.

However, there have been controversies on whether the NIEO benefits developing countries. Does the NIEO with regards to International Monetary Systems create a fair balance between the developed economies and the least economies? Some of the arguments and theories that will be looked at in this section are: the dependency aspect which tends to weaken the poor countries and strengthen the developed economies, debt-crises as a result of overborrowing witnessed in least developed countries like Ghana and Zambia, and lastly, the exclusion of LDCs in the governance of the International Monetary Institutions backed up by the Rawl's theory of Egalitarian Liberalism.

The paper will delve into analyzing these contrasting arguments and conclude whether the NIEO with regard to the international monetary system is beneficial to developing countries is beneficial or not. In doing so the paper will be divided into six sections the first one being this introduction. Section II will look into the objectives of both the IMF and the World Bank. Section III will analyze how the IMF has benefitted developing countries in line with its functions and goals of the NIEO. Section IV will discuss extensively the disadvantages of the international monetary systems in developing countries. Section V will offer practical recommendations and Section VI will conclude.

2.0 The objectives of the IMF and the World Bank

International Monetary Fund

The objectives of the IMF are set out in Article 1 of the IMF Agreement to include the following:

(i) Promoting international monetary cooperation through a permanent institution that provides the

[3]United Nations Monetary and Financial Conference (1944: Bretton Woods, N.H.). Title: Articles of agreement of the International Monetary Fund: adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 22, 1944. <https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf> Accessed on 17 February 2024.
[4]Mathias Hedergen, *Principles of International Law*, (Oxford University Press Ed 1 2013).
[5]Ibid.
[6]Ibid.

machinery for consultation and collaboration on international monetary problems.

(ii) Facilitating the expansion and balanced growth of international trade, and contributing thereby to the promotion and maintenance of high levels of employment and real income and the development of the productive resources of all members as primary objectives of economic policy.

(iii) Promoting exchange stability, maintaining orderly exchange arrangements among members, and avoiding competitive exchange depreciation.

(iv) Assisting in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions that hamper the growth of world trade.

(v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with the opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.

(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.[7]

According to Article IV, section 1 first sentence of the IMF Agreement, the main functions of the IMF are coordination and member surveillance of monetary relations, in particular of exchange rate policies; and assistance to economic difficulties.[8]

The World Bank

The objectives of the World Bank are set out in Article I of the Articles of Agreement of the IBRD (IBRD Agreement)[9] They include:

(i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.

(ii) To promote private foreign investment using guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its capital, funds raised by it and its other resources.

(iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living, and conditions of labor in their territories.

[7]United Nations Monetary and Financial Conference (1944: Bretton Woods, N.H.). Title: Articles of agreement of the International Monetary Fund: adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 22, 1944, Article 1. <https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf> Accessed on 17 February 2024.
[8]Ibid at Article IV.
[9]Articles of Agreement of the International Bank for Reconstruction and Development (1945) 2 UNTS 134.

World bank headquarters Washington, DC.

(iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.

(v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate postwar years, to assist in bringing about a smooth transition from a wartime to a peacetime economy. The Bank shall be guided in all its decisions by the purposes set forth above.[10]

In ensuring international economic stability and helping countries with financial problems, the World Bank operates as a type of investment bank as it borrows from investors and lends to developing countries.[11] The operations of the World Bank are to ensure social and economic development and its instruments for financing include: medium and long-term loans, with a concessional interest rate (for a term of usually up to 15 years, exceptionally up to 30 years); guarantees for loans provided by private lenders; and grants.[12]

3.0 How the IMF and World Bank have benefitted the Developing Countries

3.1 Providing financial assistance during crises

One of the core functions of the IMF is to provide financial assistance through loans to members with balance of payment problems or facing financial crises. Instances that might cause a country to fall into a financial crisis include: the mismanagement of economic policies; global demand for

[10]Articles of Agreement of the International Bank for Reconstruction and Development (1945) 2 (As Amended effective June 27, 2012)Article 1. <https://thedocs.worldbank.org/en/doc/722361541184234501-0330022018/original/IBRDArticlesOfAgreementEnglish.pdf> Accessed on 20 February 2024.
[11]Mathias Hedergen, *Principles of International Law*, (Oxford University Press Ed 1 2013).
[12]P Benoit, 'The World Bank Group's Financial Instruments for Infrastructure' (1997)

its exports; or an occurrence of a natural disaster.[13] With such, a country might find itself in a position where it cannot pay bills. The IMF was therefore established to provide emergency financial assistance and help countries in financial crises stabilize their economy.[14] Usually, countries approach the IMF when they have no other lending options.

In the recent past, the IMF has extended bailouts and loans to developing countries facing economic instability, debt, and balance of payment issues. For instance, in March 2023, the IMF dispensed 2.7 billion dollars to Ukraine as part of a 15.6 billion dollar loan to help the country reach economic stability with the ongoing war with Russia.[15] For the Sub-saharan Africa countries, the IMF issued loans to countries such as Angola, South Africa, Nigeria, and Cote d'Ivoire to help them address the COVID-19 pandemic in 2020.[16]

The Word Bank on the other hand medium to long-term loans to countries facing financial problems. In achieving this, the Bank borrows from investors and lends to the countries facing financial strains.[17]

3.2 Policy advice and technical assistance

One of the IMF's central duties is monitoring and evaluating the economic and financial policies of its member nations and offering policy guidance to them, a process termed surveillance. Through this global, regional, and national-level surveillance, the IMF pinpoints potential risks and advises on suitable policy changes to maintain economic growth and financial stability.

For instance, trade disruptions in one country may increase the price of food in a neighboring country or affect supplies in a distant continent. Similarly, when a country increases its rates the cost of borrowing may also increase. The IMF therefore spots such risks and helps address them. The IMF has organized itself in a way that every year a team from the IMF visits all the 190 member states and meets with governments, local bankers and other important actors in the local economy such as leaders, academics, activists and students.[18] The team discusses ways in which the country can promote growth and stability, prevent financial crises, and ultimately improve people's lives.[19]

A good example of IMF offering policy advice and technical assistance was in Rwanda where it helped the government come up with statistical reforms.[20]

3.3 Poverty reduction lending

The IMF Poverty Reduction and Growth Fund provides short-term loans at lower rates than those in the market.[21] In relation to poor Countries, the IMF provides zero

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[13]IMF Website. <https://www.imf.org/en/About/Factsheets/IMF-at-a-Glance#:~:text=The%20IMF%20has%20three%20critical,and%20with%20other%20international%20bodies.> Accessed on 20 February 2024.
[14]Ibid.
[15]The FDI 2023 Report,' *The IMF's Top 10 Biggest Debtors*,' <https://www.fdiintelligence.com/content/news/the-imfs-top-10-biggest-debtors-81405> Accessed on 20 February 2024.
[16]The FDI 2023 Report,' *The IMF's Top 10 Biggest Debtors*,' <https://www.fdiintelligence.com/content/news/the-imfs-top-10-biggest-debtors-81405> Accessed on 20 February 2024.
[17]Mathias Hedergen, *Principles of International Law*, (Oxford University Press Ed 1 2013).
[18]IMF Website. <https://www.imf.org/en/About/Factsheets/IMF-at-a-Glance#:~:text=The%20IMF%20has%20three%20critical,and%20with%20other%20international%20bodies.> Accessed on 20 February 2024.
[19]Ibid.
[20]International Monetary Fund, '*IMF Executive Board Completes First Reviews Under the Policy Coordination Instrument and Resilience and Sustainability Facility for Rwanda*,' (24 May 2023) Press Release No. 23/176. <https://www.imf.org/en/News/Articles/2023/05/24/pr23176-rwanda-imf-exec-board-completes-1st-rev-policy-coord-inst-rsf> Accessed on 20 February 2024.
[21]IMF Website. <https://www.imf.org/en/About/Factsheets/IMF-at-a-Glance#:~:text=The%20IMF%20has%20three%20critical,and%20with%20other%20international%20bodies.> Accessed on 20 February 2024.

rates for the loans as a means of poverty alleviation.[22] In addition to this, the IMF works with countries to address the issues that caused the crises while paying attention to protecting the poor and the vulnerable groups who are the most affected by the crises.[23]

Countries that have benefitted from the IMF Poverty Reduction and Growth Fund include Bangladesh. Bangladesh was one of the Asian countries to benefit from the IMF Resilience and Sustainability Facility. The country received a 42-month loan of 1.4 Billion US dollars aimed at reserving macroeconomic stability, protecting the vulnerable, and fostering inclusive and green growth.[24]

4.0 Disadvantages of the International Monetary Systems on Developing Countries

4.1 Creation of structural dependency by the Developing Countries

The developing countries seem to be the biggest dependents of international borrowing. Compared to capitalist and industrialized countries like the U.S., developing countries are the weakest point when it comes to issues of infrastructural development. Additionally, the developing countries face financial crises and in turn the governments tend to divert to loans and borrowing. With the NIEO, the developing countries could now access international loans at lower exchange rates and as a result, the developing countries became too reliant on these loans creating a situation of dependency. In a CRS Report for Congress (2004), it was indicated that since the establishment of the IMF, the major countries, the then G7 seemed to have dealt with their problems through changes in their monetary and exchange rate policies and did not approach the IMF for loans.[25] Contrastingly, only developing countries approach the IMF for assistance with their international monetary problems.[26] Interestingly, the report states that this financial borrowing turns the IMF into a development fund although it is not.

Looking at the facts presented above it is clear that the developing countries were from the beginning at a disadvantaged spot. This is due to the unequal resource and wealth distribution between the developed and the developing countries. The developed countries therefore had no business with the IMF as their economies were stable from the very beginning. The creation of the institution therefore was solely to lend to developing countries. It is clear that given the financial situation of these least developed countries, chances were they would rely on these institutions for financial support resulting in dependency.

4.2 Dollar-Centric monetary system and lack of stable reserve currency alternatives

The main problem of having a dollar-centric system dominating the International monetary systems is that it results in debt crises for developing countries. Due to the low creditworthiness, developing countries in most instances have difficulties

[22]Ibid.
[23]Ibid.
[24]International Monetary Fund, *'IMF Executive Board Approves US$3.3 Billion Under the Extended Credit Facility/Extended Fund Facility and US$1.4 Billion Under the Resilience and Sustainability Facility for Bangladesh,'* (30 January 2023) <https://www.imf.org/en/News/Articles/2023/01/30/pr2325-bangladesh-imf-executive-board-approves-usd-ecf-eff-and-usd-under-rsf> Accessed on 21 February 2024.
[25]Jonathan E. Sanford & Martin A. Weiss, International Monetary Fund: Organization, Functions, and the Role of International Economy, (2004) CRS Report for Congress.
[26]Ibid.

in securing funds externally in their own currency.[27] Consequently, they tend to issue external debt in a major foreign currency, mostly the U.S. dollar. This would mean that changes in the U.S. dollar policies affect to a great extent, the financial conditions of borrowing countries.[28] Negative changes such as the increase in exchange rate makes it hard for borrower countries to undertake stabilizing measures for their own economies even in situations where they experience recession.

An increase in policy interest rates by the U.S. means that the capital would flow back to the U.S. while depleting it in developing countries. Additionally, the increased pressure or demand for a higher dollar weakens the currencies of developing countries. The increase of these exchange rates can be witnessed in Kenya where in less than a year the rate changed significantly and ranged at around Kenya Shillings 161 in 2023.

What this dollar-centric system does to the developing countries is the weakening of the economy and the deterioration in the value of local currencies. As a result, many developing countries are unable to pay their debts and fall into financial crisis. An illustration is Ghana which to this point maintains the position of the most indebted country to the IMF. As per the data of the IMF's Quarterly Finances for July-ending 2023, Ghana's debt to IMF increased by 35.55% over the time of consideration.[29]

Another problem which causes debt crises in developing countries is that the IMF offers short-term loans while these developing countries need these loans for long-term projects.

The dollar-centric system refers to the dominant role of the U.S. dollar in global finance and trade. This system has significant implications for the international monetary system, impacting global trade, financial stability, and economic policy.

4.3 Power imbalance in the governance of the International Monetary Institutions

It is not a subject for debate that the international monetary systems are dominated by the supreme powers, that is, America and Europe. There seems to be a skewed leadership selection whereby the head of the IMF will always be a European while the World Bank president is always an American. This has led to neglect and exclusion of developing countries in the governance matters of the monetary systems creating inequalities in power dynamics. As argued by Rawls in his libertarianism theory, liberty and equality do not only include giving incentives for natural goods and services but also include the least developed countries in the governance and decision-making processes.[30] These imbalances are reflected in the following ways: the voting power is based on economic quotas and developing countries' underrepresentations.

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[27]ITO Hiroyuki, 'Limitations of the International Monetary System and the Rise of China Renminbi,' (15 August 2015) <https://www.rieti.go.jp/en/columns/a01_0429.html> Accessed on 17 February 2024.
[28]Ibid.
[29]Redaction Africannews, 'Ghana tops African Countries with highest debt with IMF,' (19 September 2023)'<https://www.africanews.com/2023/09/19/ghana-tops-african-countries-with-highest-debt-with-imf//> Accessed on 17 February 2024.
[30]Rawls John, ' A Theory of Justice,' (1971).

Voting power is based on economic quotas unpacked

The IMF has two primary funding sources, quotas and loans.[31] Quotas which are linked to a country's economic and financial significance globally, generate most IMF finances.[32] Nations with larger economies have bigger quotas and contributions. The IMF is governed by an Executive Board of member countries. Countries providing more funding hold greater weight in board decisions and loan approvals.[33] To gain voting rights, members must contribute based on economic size. In line with monetary contributions, countries get voting shares in determining IMF policies.[34] Hence, voting power is weighted toward larger financial contributors like the USA possesses higher voting influence over key decisions. As the largest shareholder, the United States holds sway, with voting dominance on major IMF decisions, given its outsized funding contribution to the overall IMF pool.[35] The Board's governance structure grants more power to countries providing greater monetary inputs.

4.4 Financial assistance and policy conditionality of IMF

While the IMF provides financial help and policy guidance to member countries, its Structural Adjustment Policies (SAPs) have created modern economic colonialism.[36] SAPs mandate developing nations receiving IMF loans reduce social spending, and food/ transport subsidies, devalue currencies to stimulate exports, privatize state assets, and suppress wages.[37] These policies worsen poverty and malnutrition, erode domestic economic capacity, and enable multinational corporations to exploit cheap labor and degrade working conditions. Thus, despite claims of benefitting developing countries, IMF loan conditionality secures debt repayment but damages livelihoods and entrenches inequality and dependence. It also limits countries' ability to chart their own development path.

4.5 Overcontrol of the IMF on developing economies

There have been critics that the IMF programs and policies exercise a lot of control on developing countries who borrow loans from the institution. This occurs through policy demands for the countries to either raise taxes or cut government expenses.[38] A good example is Kenya which was required to come up with a tax policy that would enable the country to raise revenue in order to repay the IMF debt.[39] This kind of demand by the IMF proves to be immoral, inhumane, and culturally degrading.

Other criticisms which have been made regarding the overcontrol of the IMF on developing countries include;

i. Low-income countries have a less dominant role and control compared to developed countries in IMF

[31]Mathias Hedergen, *Principles of International Law*, (Oxford University Press Ed 1 2013).
[32]Ibid.
[33]Ibid.
[34]Ibid.
[35]Shabikunnahar Bonna, 'The Bad Effects Caused by Policy Prescription and Financial Assistance by IMF on Developing Countries,' (2021) Asian Journal of Social Sciences and Legal Studies, 3(5)172-177. <https://universepg.com/journal-details/ajssls/the-bad-effects-caused-by-policy-prescription-and-financial-assistance-by-imf-on-developing-countries> Accessed on 21 February 2024.
[36]Ibid.
[37]Shabikunnahar Bonna, 'The Bad Effects Caused by Policy Prescription and Financial Assistance by IMF on Developing Countries,' (2021) Asian Journal of Social Sciences and Legal Studies, 3(5)172-177. <https://universepg.com/journal-details/ajssls/the-bad-effects-caused-by-policy-prescription-and-financial-assistance-by-imf-on-developing-countries> Accessed on 21 February 2024.
[38]Ibid.
[39]Ibid.

decision-making and governance.

ii. IMF assumes developing country payment imbalances are due to domestic policy failures, while UNCTAD argues external factors are responsible.
iii. Some IMF policies may impede development due to their deflationary effects reducing output and employment in borrower countries.
iv. As a macroeconomic expert, reforms are needed in IMF's generalized policy prescriptions to address rising income inequality in countries adopting its programs.
v. Debtor country's economic policies come under the control of the IMF and its economists, representing a new form of colonization.
vi. Cuts in public health spending mandated by IMF loan conditions demoralize healthcare workers and spur the migration of medical personnel from borrowing countries.
v. Many IMF programs fail due to adverse unexpected external events. Insufficient financing leaves countries unable to cope with natural disasters like droughts and hurricanes.[40]

4.6 Absence of a fair sovereign debt resolution mechanism biased against poor debtor nations

Unlike the bankruptcy frameworks available to troubled companies, there is no comprehensive global system in place for renegotiating unmanageable sovereign debt burdens. This deepens crises precipitated by crushing repayment obligations facing low-income debtor countries. Rather than instituting binding resolutions to provide debtor nations fiscal space, the IMF and World Bank have resorted to self-interest-driven, creditor-aligned debt relief programs. Initiatives such as the Heavily Indebted Poor Countries approach require implementing harsh austerity policies in return for partial debt write-downs while excluding middle-income nations with substantial debt overhangs.

Moreover, the prevailing debt restructuring conditions continue to disadvantage poor countries due to the oversized influence of wealthy creditor country governments and private bondholders over global capital flows. Key decisions get made in opaque elite forums like the Paris Club dominated by large creditor states including the US and UK with no neutral arbitration or adjudication avenues accessible to distressed debtors. In the absence of a transparent, impartial mechanism grounded in shared responsibility, the global debt regime is unjustly skewed to prioritize the rights of lenders over crisis-impacted populations in indebted developing countries. Undertaking reforms is imperative to halt recurring cycles of destabilizing defaults and lost decades of economic development for such countries.

The prevailing practice of doling out fresh loans to pay off existing claims while simultaneously enforcing harsh austerity and restructuring on deeply indebted nations continues unchecked. This reflects the northern-country favoritism deeply ingrained within the institutional DNA of the IMF and World Bank.

5.0 Recommendations

Considering the discussions and findings from the previous sections and especially Section IV, this paper proposes recommendations aimed at resolving the plight of developing countries in the shackles of the IMF and World Bank. The proposals seek to improve the state

[40]Shabikunnahar Bonna, 'The Bad Effects Caused by Policy Prescription and Financial Assistance by IMF on Developing Countries,' (2021) Asian Journal of Social Sciences and Legal Studies, 3(5)172-177. <https://universepg.com/journal-details/ajssls/the-bad-effects-caused-by-policy-prescription-and-financial-assistance-by-imf-on-developing-countries> Accessed on 21 February 2024.

of developing countries in the Monetary System sphere.

The first proposal is on the IMF governance structure to increase developing country voting power, seats on the Executive Board, and open leadership selection. This would solve the power dynamic issues and allow the representation of developing countries in the decision-making and policy-making in both the IMF and World Bank.

The second proposal is on the relaxation of policy conditionalities attached to IMF loans to provide more autonomy for borrowing country governments to pursue context-specific solutions. This will help solve the issue of debts and economic instabilities for developing countries that fall in debts due to harsh policy conditionalities.

The third set of recommendations is on the Customization of policy advice based on economies' unique structures and cycles instead of one-size-fits-all prescriptions. This will help factor in the different unique features in every single developing countries and come up with policy advice that is unique to that specific country.

The fourth recommendation is on the interest rates and the loan repayment periods. This paper proposes lower interest rates and lengthening of repayment periods for IMF loans to troubled economies to sustainable levels.

The fifth recommendation is on the structural dependency created by the IMF and World Bank. The paper recommends supporting of regional monetary cooperation mechanisms and institutions championed by developing country bodies. This will help solve the issue of dependency on the Western-dominated institutions which cripple developing countries.

Lastly, the paper proposes periodic external independent assessments of the social impact of IMF programs in borrowing countries. This will help solve the issue of overcontrol by the IMF on developing countries.

6.0 Conclusion

The paper served as a spotlight on the debate whether the NIEO in relation to international monetary sytems has been beneficial or not to developing countries. The Paper found that, the international monetary system through the IMF and the World has had some benefits on developing countries such as: financial assistance to members with balance of payment problems or facing financial crises; offering policy advice and technological assistance to the developing countries; and through poverty reduction lending. However, despite these benefits, the paper found that the IMF and the World Bank have a lot of disadvantages to the developing countries reflected in the following ways: Creation of Structural Dependency by the Developing Countries, Dollar-centric system dominating the International monetary systems which result in debt crises for developing countries, Power Imbalance in the Governance of the International Monetary Institutions whereby the monetary institutions are dominated by the Western developed countries, Financial Assistance and Policy Conditionality of IMF which proves to be harsh on the developing countries and last but not the least the Overcontrol of the IMF on developing economies. The paper concluded by giving a set of recommendations aimed at resolving the plight of developing countries in the shackles of the IMF and World Bank. In upshot, to say that the NIEO in relation to the international monetary system has been beneficial to developing countries is fallacious, untrue, and lacking a proper basis.

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Nature's pharmacy: The role of indigenous medicine in enhancing healthcare and biodiversity conservation

By Mohammed Abdullahi Hassan

Introduction

The entangled relationship between human health and the natural world is profoundly exemplified by the practice of traditional medicine. Rooted in millennia of Indigenous knowledge and cultural practices, traditional medicine advances a holistic approach to healthcare, depending on the rich biodiversity that surrounds the communities that practice it. With the modern world continuing to grapple with environmental degradation, climate change, and the loss of biodiversity, the role of traditional medicine in bolstering healthcare and biodiversity conservation has increasingly become paramount.

Indigenous Medicine or Traditional Medicine (TM) is a comprehensive term used to refer to systems such as traditional African Medicine, Traditional Chinese Medicine, Indian Ayurveda, Arabic Unani medicine, and various indigenous medicine across the globe.[1] According to the World Health Organization (WHO), TM can thus refer to the knowledge, skills, and practices that are based on the theories, beliefs, and experiences Indigenous to different cultures and used in the maintenance of health and the prevention, diagnosis, improvement, or treatment of physical and mental health.[2]

Traditional medicine encompasses a wide range of practices, including herbal medicine, acupuncture, massage therapy, spiritual healing, and dietary practices.

[1]Alves RRN and Rosa IML, 'Biodiversity, Traditional Medicine and Public Health: Where Do They Meet?' (*Journal of ethnobiology and ethnomedicine*, 21 March 2007) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1847427/ > accessed 7 July 2024
[2]Gakuya DW and others, 'Traditional Medicine in Kenya: Past and Current Status, Challenges, and the Way Forward' (Scientific African, 20 March 2020) <https://www.sciencedirect.com/science/article/pii/S2468227620300983#:~:text=According%20to%20the%20World%20Health,of%20physical%20and%20mental%20health.> accessed 7 July 2024

Traditional Medicine is a worldwide practice that has preoccupied humanity since time immemorial. WHO estimates that eighty percent of Africa's rural population still relies on traditional medicine to meet their needs partially or wholly, its health needs.[3] WHO recognizes traditional medicine as an integral component of primary healthcare.[4] Currently, a large number of people in developing countries irrespective of their social status, ethnic group or religion regularly use complementary medicine. In countries where the dominant health care system is based on allopathic medicine, or where TM has not been incorporated into the national health care system, TM is often termed "complementary", "alternative" or "non-conventional" medicine.[5]

It is estimated that 33 % of the drugs produced in developed countries are derivatives of compounds originally isolated from higher plants. 25 % of these owe their origins to the tropical rain forests of Africa, Asia, and South America.[6] These drugs fetch an annual retail value worldwide of over 50 billion dollars.[7] This showcases the importance of these Indigenous plants and their ability to sustain modern healthcare by providing crucial drugs such as chemotherapy.

The interdependent link between Traditional Medicine and the biotic environments may be viewed in the health benefits procured from the existence of a full complement of species, genetic diversity, intact watersheds, and climate regulation as well through the human fundamental need for water, food, shelter, and clean air.[8] Therefore the link between TM and biodiversity is imperative, especially when taking into account the importance of the former as a source of primary healthcare for 80 percent of the world's population.[9]

The interrelationships between society and nature, and the importance of environmental and human health, have lately become widely acknowledged, and have peaked attention to the fact that biodiversity loss can have direct or indirect effects on human well-being. By hampering ecosystem function, biodiversity loss leads to ecosystems that are less resilient, more vulnerable to shocks and disturbances, and less able to supply humans with needed services.[10]

Despite the interconnectedness of traditional medicine, the healthcare system, and biodiversity conservation, traditional medicine faces numerous challenges in the modern world. Overharvesting, habitat destruction, and the erosion of traditional knowledge due to globalization and urbanization threaten the sustainability of these practices. Furthermore, the lack of recognition and integration of TM into modern healthcare often marginalizes these practices and the communities that rely on them. It is thus imperative to explore the multifaceted role of traditional medicine in biodiversity conservation and healthcare to get a glimpse of the importance of TM in modern healthcare, environmental, and biodiversity conservation.

[3]Mwangi JW and others, 'Traditional Herbal Medicine in National Healthcare in Kenya' [2005] East and Central Afiican Journal of Pharmaceutical Sciences - Vol. 8 (2) 22- 26
[4]Ibid
[5]WHO World Health Organization. Traditional medicine strategy 2002–2005. 2002. <http://whqlibdoc.who.int/hq/2002/WHO_EDM_TRM_2002.1.pdf> Accessed 7 July 2024
[6]Mwangi JW (N3)
[7]ibid
[8]Alves RRN (N1)
[9]Ibid
[10]Ibid

The biodiversity conservation and indigenous medicine

Biological diversity ("biodiversity") encompasses all the diversity of life on Earth, from the genetic diversity of species to the functioning of entire ecosystems. Biodiversity is not only rare or unusual species, but the entire natural world, from the most common species and their habitats to endangered species and factors that threaten the existence of species.[11] Biodiversity is an integral part of the effective functioning of the planet's environment and the maintenance of human life and the conditions of its existence. Biodiversity directly (biological products such as food, medicines, and building materials) and indirectly (ecosystem services) ensures the well-being of people.[12]

Biodiversity underpins ecosystem services such as pollination, water purification, soil fertility, climate regulation, and nutrient cycling, which are essential for maintaining healthy ecosystems.

The practice of TM is not immune to the current environmental crisis across the globe. Consequential changes in forests, savannahs, and other vegetational types have impacted the procurement, preparation as well as cost of plant medicine. The degradation and desecration of sacred spots, and grooves have tended to reduce the dignity of such areas and subsequently encourage their abuse.[13] For instance, the forest degradation of the Brazilian Amazon has diminished the availability of some widely used medicinal plant species. Degradation of Amazonian forests may signify not only the loss of potential pharmaceutical drugs for the developed world but also the erosion of the sole healthcare option for many of Brazil's rural and urban poor.[14]

Under the impact of industrialization and urbanization, western medicine has displaced indigenous medical systems in many areas, in the process leaving many without any health care. Traditional medicinal knowledge is rapidly disappearing, owing to cultural change and declining access -in both urban and rural areas- to sources of natural medicinal products. Most villages in the world are no longer surrounded by the natural habitat that formerly served as a medicine cupboard, and bodies of folk knowledge that have accumulated and been honed for thousands of years are disappearing at an alarming rate. In some cases, this loss may confer net health benefits, however, modern society will never know what effective medicinal treatments are being lost.[15] In Latin America, for example, despite the many individual efforts of the governments to preserve biodiversity for future generations, traditional knowledge, especially that derived from traditional

[11]Dinara Cheldieva, Daniil Cheldiev and Ekaterina Ayskhanova, 'The Legal Aspect of the Problem of Biodiversity Conservation of Specially Protected and Protected Areas in the Regions' (2023) 63 BIO Web of Conferences 06013
[12]Ibid
[13]Alves RRN (N1)
[14]Ibid
[15]Daily GC, Ehrlich PR, 'Global Change and Human Susceptibility to Disease' Annual Review of Environment and Resources Vol 21, 1996 <https://www.annualreviews.org/content/journals/10.1146/annurev.energy.21.1.125 > accessed 7 July 2024

medicine such as Indigenous knowledge, is also disappearing.[16]

Human economic activities have significantly altered local ecosystems, severely limiting the availability and accessibility of certain plant and animal species used for medicinal purposes. In many regions of the developing world, forests are being degraded into savannas, savannas into scrublands and bushes, and scrublands into deserts. As a result, some plant species are disappearing entirely. This situation threatens the future of indigenous medicine, as most traditional remedies are made from concoctions of plants, plant organs, or their secreted products.

Despite the importance of TM for general and public health in many parts of the world, like the current spasm of plant and animal species extinction, as remarked by,[17] the practitioners of ethnomedicine (especially herbalists and cult healers) appear to be at a greater risk of extinction than even forests and other biomes. Knowledge of the use of plants is disappearing faster than the plants themselves. The destruction of tropical forests has meant, in many parts of the tropical region, increasing the disappearance of native peoples who have been living in these areas and who have accumulated a compendium of folk knowledge about the usefulness of plants for curing various diseases.

Article 8 of the CBD stipulates that Each Contracting State Party shall, as far as possible and as appropriate: Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity; Develop, where necessary, guidelines for the selection, establishment, and management of protected areas or areas where special measures need to be taken to conserve biological diversity. This ensures that states establish protected areas for species conservation, especially in their original habitat. On-site communities with extensive knowledge of local environments may be used for collaborative conservation and management. Examples of such practices can be found in Brazil, Zimbabwe, the Philippines, and in Pacific Islands.

Some frameworks mention indigenous rights to the use and development of their traditional medicines and related practices. For instance, Article 8(j) of the CBD stipulates that 'Subject to its national legislation, respect, preserve and maintain knowledge, innovations, and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations, and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices.'[18] Indigenous people thus have the right to give their free, prior, and informed consent on the use of their medicines and practices. Additionally, benefits from any use of these biological resources must and should be shared with such communities.

Article 7 of the Nagoya protocol asserts that 'In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources

[16]Shanley P, Luz L, 'The impacts of forest degradation on medicinal plant use and implications for health care in eastern Amazonia' Bioscience Vol 53, issue 6, 2003 <https://academic.oup.com/bioscience/article/53/6/573/224740 > accessed 7 July 2024
[17]Anyinam C. "Ecology and Ethnomedicine: Exploring Links Between Current Environmental Crisis and Indigenous Medical Practices', *Social Science & Medicine*. 1995;40(3):321–329
[18]Article 8(j), Convention on Biological Diversity 1992

that are held by Indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these Indigenous and local communities and that mutually agreed terms have been established.'[19] In terms of traditional medicine, bio-piracy has been a challenge in that Western companies acquire traditional knowledge of medicine and pass it as their own without giving due regard to the Indigenous communities they acquired from. Furthermore, Article 12 of the Nagoya Protocol on Traditional knowledge associated with genetic resources mandates that 'Parties shall in accordance with domestic law take into consideration Indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.'[20] In the context of traditional medicine, the Nagoya Protocol underscores the need to respect and integrate the customary laws, community protocols, and procedures of indigenous and local communities when accessing and using their traditional medicinal knowledge associated with genetic resources. This means that any use of traditional medicinal knowledge, such as remedies derived from plants and other natural resources, should be governed by the rules and practices established by these communities. This approach ensures that the benefits arising from such use are fairly and equitably shared, safeguarding the rights and preserving the cultural heritage of Indigenous and local communities

The Governance of Traditional Medicine in Kenya

Kenya has a rich and diverse culture that brings together different ethnic groups each with a unique and inherent knowledge of

In Kenya, traditional medicine plays a significant role in the healthcare system, especially in rural areas where access to modern medical facilities may be limited. The governance of traditional medicine in Kenya involves various aspects, including regulation, integration with modern healthcare systems, and cultural considerations.

medicinal plants. There are about 1,200 species of plants that have been touted to afford therapeutic benefits to humans and animals. Furthermore, there are several reports that document various medicinal plants used to offset the healthcare needs of communities in Kenya. It is against this backdrop that the regulation and protection of traditional medicine within Indigenous communities is pertinent.

Article 43(1) of the Kenyan Constitution iterates the significance of the right to health by denoting that Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.[21] For its part, the constitutional basis for the legal recognition and provisioning for traditional medicine is Article 11 of the said Constitution; which recognizes culture as the foundation of the nation and the cumulative civilization of the Kenyan

[19]Article 7, Nagoya Protocol 2014
[20]Aricle 12, Nagoya Protocol 2014
[21]Article 43, Constitution of Kenya 2010

people and nation.[22] It further directs the State (government) to recognize the role of Indigenous technologies in national development. Similarly, the same article further asserts that the state should recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics, and their use by the communities of Kenya. This asserts that traditional medicine falls within this ambit and thus the ownership of Indigenous seeds and plant varieties with medicinal properties and their use by communities should be protected. Unfortunately, even with all this constitutional foundation, Kenya lacks a specific statute or legislation on traditional medicine. All it has is a plethora of scattered pieces of legislation which although on other subjects, nevertheless have some provisions whose application has significance and implications for it.[23]

The Health Act, 2017

The Health Act of 2017,[24] This Act in its preamble states that it is an Act of Parliament to establish a unified health system; to co-ordinate the inter-relationship between the national government and county governments' health systems; to provide regulation of health care services and health care service providers, health products and health technologies; and for connected purposes. The enactment of this legislation was a milestone in Kenya's health legislative history. With regard to traditional medicine, this fact is in the sense that it is the first legislation in Kenya's legislative history so far, to expressly recognize alternative medicine as a health system in Kenya.[25] It is also Kenya's first legislation to expressly recognize traditional medicine and adopt the World Health Organization's (WHO) definition of traditional medicine already stated in the introductory section of this paper. Part X of the Act is on Traditional and Alternative Medicine. It defines traditional medicine as "including the knowledge, skills, and practices based on the theories, beliefs, and experiences Indigenous to different cultures, whether explicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement or treatment of physical and mental illness.[26]

The Act assigns the national government the task of creating regulations to control the practice of complementary and alternative medicine under section 74. Notably, the Act mainly focuses on regulating the practice of traditional medicine rather than promoting it as a health system, recognizing it as a health system in and of itself, and integrating it into the nation's mainstream health care system. Thus, rather than the system of health care as a whole, the practitioners are the main focus, not the system's overall growth and development. Moreover, the Act requires that legislation be passed to establish a body to regulate this practice whose mandate would be to register, license, and enforce standards for practitioners in this field. Also, the body should set the minimum criteria of practice.[27] While the integration of traditional and alternative medicine

[22]Sifuna N 'Configuring a Model Framework Statute on Traditional Medicine for Kenya: To Be Called "The Traditional Medicine Coordination Act' 2022, Beijing Law Review Vol 13, No. 1 <https://www.scirp.org/journal/paperinformation?paperid=116098#:~:text=For%20its%20part%2C%20the%20constitutional,the%20Kenyan%20people%20and%20nation. > accessed 14 July 2024
[23]Ibid
[24]Health Act 2017
[25]Sifuna N n(22)
[26]Ibid
[27]Odour M, 'A Critical Overview of the Health Act 2017' (2018) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126423#:~:text=The%20Health%202017%20was%20passed,health%20in%20Kenya%20is%20concerned. > accessed 14

into conventional medical practice is the contemplated outcome, it is obvious that the former is deemed somewhat inferior. For example, the national government is required to develop policy guidelines for referral from traditional practitioners to conventional hospitals. However, no reverse referral is contemplated.[28]

The Public Health Act

The Public Health Act, emphasizes the health of the general public, or as broad a percentage of the population as possible, as opposed to the health of any one person, even those who would benefit from medical care but do not seek it. This is distinct from clinical medicine, which is focused on the individual's health, particularly that of people who seek medical attention; for this reason, population medicine is sometimes used to refer to public health.[29]

Sifuna and Mogere in their paper 'Enforcing Public Health Law in Africa: Challenges and Opportunities, the Case of Kenya'[30] discuss four reasons compelling arguments for why any policy pertaining to public health should address traditional medicine. First, conventional medicine addresses not only diseases and illnesses but also general health and well-being, as this text has already mentioned. Second, traditional medicine is utilized for both the avoidance, averting, and prevention of diseases (preventive medicine) as well as for the treatment and cure of diseases (curative medicine), in the same way as public health promotes preventive and promotional health. In a similar vein, traditional medicines are employed in both preventative and curative care.[31] A crucial facet of public health is

Public health is essential for ensuring the well-being of populations and improving quality of life. By focusing on disease prevention, health promotion, and the management of health systems, public health professionals work to address both immediate and long-term health challenges.

the latter. Thirdly, several diseases that are significant for public health are avoided, averted, prevented, diagnosed, and treated by conventional medicine. There have also been, for example, discussions as to how medicinal plants might help with ailments that are important for public health. The fourth reason is that traditional medicine serves a significant portion of the healthcare needs of both the world's population (between 70 and 80 percent) and Kenyans (at least two-thirds), particularly in rural and peri-urban areas.[32] Despite this, the Public Health Act neither mentions nor has any specific provisions on traditional medicine. This therefore highly reduces

[28]Ibid
[29]Sifuna N N(22)
[30]Sifuna, N., & Mogere, S. (2002). Enforcing Public Health Law in Africa: Challenges and Opportunities, the Case of Kenya. Zambia Law Journal, 34, 148-159.
[31]Ibid
[32]Ibid

The Witchcraft Act in Kenya represents a historical and legal response to practices associated with witchcraft. While it aims to address harmful practices, it also raises important issues related to cultural sensitivity, human rights, and modern legal standards.

the applicability of traditional medicine on matters concerning public health, which further diminishes the importance and utilization of traditional medicine overall. It is thus pertinent to include traditional medicine in matters concerning public health not only to bolster the current healthcare system but to also implement the spirit of Article 43 of the Constitution.

The Witchcraft Act (1925) Cap 67 of The Laws of Kenya

The Witchcraft Act of 1925 outlawed any forms of witchcraft practices that were detrimental to the colonial government administration. Traditional medicine practitioners were generally labeled witchdoctors or often charged for practicing witchcraft and having outlawed charms. The authentic traditional healers lived in constant fear and risked being convicted, punished, or slapped with hefty fines or imprisonment. The Witchcraft Act therefore slowed down the advancement of traditional medicine in pre-independent Kenya.[33] Traditional medicine in Kenya may be hindered by the law's ban on witchcraft and activities connected to it. For instance, it has been reported that the decline of folk medicine during the colonial era was due to the colonialists associating it with witchcraft and "black magic". This explains why in Kenya, traditional medicine started declining at the onset of colonial rule.[34] This has led to a significant loss of Traditional knowledge and traditional medicine since people were afraid of being charged with witchcraft.

The Protection Of Traditional Knowledge And Cultural Expressions Act (Act No 33 Of 2016)

The goal of this legislation is to prevent outside parties from exploiting traditional knowledge (TK) and traditional cultural expressions (TCE). These kinds of expressions typically take the shape of various media, like folklore. According to the preamble, the purpose of this Act of Parliament is to give effect to Articles 11, 40, and 69 (1) of the Constitution (i.e., the 2010 Kenyan Constitution) and to establish a framework for the preservation and advancement of traditional knowledge and cultural manifestations.[35]

The Act provides for equitable sharing of the benefits accruing from traditional knowledge. It gives the community exclusive use rights over their traditional knowledge, and allows the owners of such knowledge to enter into agreements with others.[36] Therefore vis a vis traditional medicine one of the ways equitable sharing of the

[33]Chebii KW & others, 'The governance of traditional medicine and herbal remedies in the selected local markets of Western Kenya' (2020) Journal of Ethnobiology and Ethnomedicine 16, Art No. 39, < https://ethnobiomed.biomedcentral.com/articles/10.1186/s13002-020-00389-x > accessed 14 july 2024
[34]Thairu, K. (1975). The African Civilization. East African Literature Bureau.
[35]The Protection of Traditional Knowledge and Cultural Expressions Act (2016)
[36]Sifuna N N(22)

benefits arising from traditional knowledge is manifested is negotiation and execution of use agreements between traditional medical practitioners and their counterparts in the conventional medicine system, or even the government and other non-governmental actors such as pharmaceutical companies.[37] In order to protect Traditional Knowledge the act has prohibited the derogatory treatment of traditional knowledge and its practitioners, the misappropriation, misuse, and inequitable or unlawful access and exploitation of traditional knowledge and culture. Similarly, it is an offense to use traditional knowledge without the prior informed consent of its owners. The act imposes five to ten years imprisonment and fines of up to one million Kenya shilling for the offenses herein stated.

The Industrial Property Act 2001

This is an act of the parliament of Kenya that makes provision for the promotion of inventive and innovative activities, facilitates the acquisition of technology through granting and regulating patents, utility models and industrial designs and provides for the establishment, powers, and functions of the Kenya Industrial Property Institute (KIPI).[38] For the purposes of this review, the following definitions are noteworthy; a) innovation: refers to any utility/technovation model/industrial design or any other non-patentable creations/ improvements that may be deemed as deserving specified industrial property rights; b) invention: means a new and useful art/process/machine/method of manufacture/composition of matter that is not obvious.[39]

It could also refer to any novel or beneficial advancement of the previously described that is not immediately apparent and has the potential to be employed or implemented in commerce or industry, including purported inventions; c) Utility model: any arrangement, configuration, or element of an electrical or electronic circuitry, tool, appliance, instrument, handicraft mechanism, or other objects, or any portion of the same, that permits improved or altered functioning, use, or manufacture of the subject matter, or that provides utility, advantage, environmental benefit, saving, or technical effect not previously available in Kenya, and that includes microorganisms, other self-replicable material, products of genetic resources, herbal remedies, as well as nutritional formulations that produce novel effects.[40] At this point, the law seems appropriate as far as the regulation of herbal medicine is concerned. However, Part III of this law, which elaborates on patents and patentability seems to present a dissenting opinion. Under this section, an invention is defined as a solution to a specific problem in the field of technology. The law goes on to give details on what may be considered for patents. However, discoveries, scientific theories, and mathematical models are not considered inventions and are thus excluded from patent protection.

Additionally, methods of treatment of the human or animal body by surgery/therapy, as well as diagnostic methods are not

[33]Chebii KW & others, 'The governance of traditional medicine and herbal remedies in the selected local markets of Western Kenya' (2020) Journal of Ethnobiology and Ethnomedicine 16, Art No. 39, < https://ethnobiomed.biomedcentral.com/articles/10.1186/s13002-020-00389-x > accessed 14 july 2024
[34]Thairu, K. (1975). The African Civilization. East African Literature Bureau.
[35]The Protection of Traditional Knowledge and Cultural Expressions Act (2016)
[36]Sifuna N N(22)
[37]Ibid
[38]Industrial Property Act 2001
[39]Okumu MO and others 'The legislative and regulatory framework governing herbal medicine use and practice in Kenya: a review' (2017) < https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5882212/#cit0062 >accessed 14 July 2024
[40]Ibid

patentable except products for use in any such method. Thus, from the foregoing, this law seems to offer contradictory statements. On one hand, the definition of "innovation" may be construed as broad enough to include herbal medicine. Thus, the implication is that they are covered under this law. On the other hand, the law expressly excludes discoveries and scientific theories from patent protection.[41] Thus, by excluding discoveries and scientific theories from patent protection, it may therefore be stated that the law does not seem to recognize the "fluid" and diverse nature of the practice of herbal medicine.

The law states that any public disclosure of information, whether written (including drawings and illustrations) or oral (such as exhibits), is considered prior art and cannot be patented. For herbal medicine researchers, this restricts the ways they can share their findings. It can therefore be deemed that the law is overly harsh, as presenting research at a workshop, conference, or in a journal would prevent the researcher from obtaining a patent for their innovation. This raises the issue of how herbal medicine researchers should communicate their work.

Challenges faced by traditional medicine in Kenya

There is little official recognition of the role traditional medicine in Kenya plays as far as National healthcare is concerned. As aforementioned above legislations like the Public Health Act have failed to accommodate traditional medicine as a component of national healthcare in protecting and promoting public health. Apart from that a number of concerning challenges such as h stigmatization due to poor perceptions and attitudes, inadequate efforts to conserve medicinal plants and indigenous knowledge, modernization, exploitation of communities that own the knowledge, issues on safety, efficacy, and quality, access, irrational use of herbal medicine.[42]

Sociocultural Issues

Many members of the public continue to harbor negative perceptions of traditional medicine. Negative and biased reporting by the mainstream media may also tarnish the reputation of traditional medicine in the eyes of the public.[43] The practice of traditional medicine in Kenya, unlike other parts of the globe, has largely been considered primitive by the elite. Over the years, the practice of traditional medicine has been downgraded as a result of the introduction of conventional medicine that are available in more patient friendly (compliant) formulations such as syrups, capsules and tablets as opposed to traditional roots, barks and leaves which are often bitter to taste. In addition, the practice is also no longer a major income earner as it was previously. It has therefore been downgraded to poor and illiterate people.[44]

In most Kenyan communities, perhaps due to cultural reasons, the practice was considered a family affair and the practitioner would prefer to transfer the talent to one close relative. Unfortunately, due to modernization most of the young people are not willing to take up the art for lack of financial gain, are engaged in other income generating activities, have trained in other professions, or are simply not interested as the practice as it is generally

[41]Ibid
[42]Gakuya DW (N2)
[43]Ibid
[44]Kigen GK and others 'Current trends of Traditional Herbal Medicine Practice in Kenya: A review' (2013) African Journal of Pharmacology and Therapeutics Vol. 2 No. 1 (32-37) <http://journals.uonbi.ac.ke/ajpt/article/view/1106> accessed 16 July 2024

Medicinal plants are plants that are used for their therapeutic properties to prevent, treat, or manage various health conditions. They have been a cornerstone of traditional medicine across cultures for thousands of years and are increasingly recognized for their potential in modern medicine.

considered outdated.[45] Unfortunately, most of these practitioners end up dying with their valuable knowledge that may probably have been used to treat some of the conditions that currently have no cure such as cancer. Indeed most of the "true" herbalists are now at advanced age, perhaps over 70 years. On the contrary, the Chinese traditional medicines were recorded and thanks to this we now have a leading cure of malaria from the wormwood that was used in China more than a thousand years ago.[46]

Conservation of Medicinal Plants and Traditional Knowledge

Medicinal plant resources in Kenya are diminishing at an alarming rate due to unsustainable harvesting practices and the destruction of plant habitats.[47] Kenya in the past two decades has witnessed the massive destruction of forests in Kenya and which has substantially threatened the existing biodiversity and subsequently traditional medicine. The unsustainable harvesting practices and destruction of habitats are directly related to poverty and a high rate of unemployment. This has led to the emergence of quacks keen on profits with total disregard for conservation. *Mondia whitei* is one such plant that has been exhaustively harvested by youths from forest areas and sold in the urban centers resulting in scarcity of the plant.[48] Habitat destruction due to land degradation, fragmentation, destruction, overgrazing, unsustainable

[45]Ibid
[46]Ibid
[47]Fabricant DS, Farnsworth NR, 'The value of plants used in traditional medicine for drug discovery' (2001) Environmental Health Perspectives Vol 109 Issue 1 <https://ehp.niehs.nih.gov/doi/10.1289/ehp.01109s169 > accessed 16 July 2024
[48]Gakuya DW (N2)

methods of harvesting and loss in traditional controls that regulate the use of natural resources are other factors that have led to the unsustainable use of medicinal plants.

Intellectual Property Rights, Equitable Benefits, and Exploitation of Communities that Own the Knowledge

Despite the protection of Traditional Knowledge by the constitution and relevant legislation like Protection of Traditional Knowledge and Cultural Expressions Act, traditional knowledge and medicine continue to be at the risk of exploitation. Presently, the custodians of the knowledge of traditional medicine are growing increasingly wary of sharing this knowledge on account of the bad experiences they have had in the past. Unscrupulous researchers/scientists have tended to steal their knowledge, adopting it and even securing patents. Unscrupulous businessmen, manufacturers, and quacks who may also benefit at the expense of the real custodians.[49] Kenya, like many other developing countries, has suffered from the appropriation of valuable medical know-how and materials by foreign companies.[50] Documented cases of bio-piracy in Kenya and elsewhere in Africa, are attributed to weaknesses and asymmetries in standard intellectual property law, now enforced by the World Trade Organisation. These tend to favour countries of the global north and companies based there.[51]

Preference for Allopathic Medicine

In modern Africa, allopathic medicine is generally considered to be superior to African traditional medicine and therefore perceived as the mainstream health care system; while the latter is considered primitive and supplemental as well as inferior to it. The same is the case with traditional medicines, which are considered to primitive and inferior to biomedicines (pharmaceutical medicines).[52] This view misconceived and is largely due to the fact that Africa's contemporary society is predominantly elitist and westernized and influenced by American and European civilization and concepts; which is pretentious as it is a typically indigenous African society trying to be more American than the Americans themselves, and more European than the Europeans themselves. The Asian scenario is in diametrical contrast with the African scenario, in that the Asian society has largely remained Asian, promoted Asia and all that is Asian. This is what has helped Asian traditional medicine to develop in leaps and bounds, unlike African traditional medicine that has for centuries remained a cropper.[53] In Kenya a dedicated traditional medical research unit was opened at the Kenya Medical Research Institute (KEMRI). But, unlike other African countries such as Ghana, Tanzania and Zimbabwe, plans to professionalize traditional medicine came to nothing.[54]

Recommendations

There is a need for concerted campaigns to highlight the positive aspects of traditional medicine especially in dispelling witchcraft fallacies. Accurate information on the facts and fallacies of traditional medicine should be provided to the mainstream media to debunk the myths surrounding

[49]Ibid
[50]Harrington J, 'Kenya's Struggle to Modernise Traditional Medicine is Far From Won' (2018) The Conservation, <https://theconversation.com/kenyas-struggle-to-modernise-traditional-medicine-is-far-from-won-102205> accessed 16 July 2024
[51]Ibid
[52]Sifuna N, 'African Traditional Medicine: Its Potential, Limitations and Challenges' (2022) Vol 5 Issue 1 < https://scholars.direct/Articles/health-care/jhc-5-025.php?jid=health-care >accessed 16 July 2024
[53]Ibid
[54]Harrington J (N50)

traditional medicine. There is a need for the government to recognize traditional medicine as a reality that is rooted in Kenyan history and culture. The education system should also be revised to incorporate several aspects of traditional medicine so that awareness is created among school-going children.

There is need to Implement strategies to conserve medicinal plants and indigenous knowledge, including sustainable harvesting practices and community-based conservation initiatives. Training on sustainable harvesting practices should be encouraged to preserve plant habitats. Additionally, there should be protection of endangered species through traditional means to avoid unsustainable usage by the community that relies on it.

A forum facilitating open dialogue between traditional medicine practitioners and scientists should be established to promote idea sharing. Encouraging partnerships between traditional healers and researchers is essential. It is crucial to honor and protect the interests and beliefs of traditional medicine practitioners. Communities should be fairly compensated for the utilization of their cultural practices and heritage. Recognition and preservation of ownership rights over indigenous seeds and plants are paramount.

It is fundamental to emphasize the importance of enacting specific legislation to recognize and protect traditional medicine practices, as well as the need for regulatory frameworks to govern their integration into national healthcare systems. As aforementioned it is pertinent for some legislations like the Public Health Act to be amended to include traditional medicine since it has the requisite to participate in Public Health and curb some diseases. Traditional medicine practices often focus on preventive healthcare measures, such as boosting immunity, promoting overall well-being, and preventing diseases before they occur. Furthermore, Traditional medicine can provide treatments for infectious diseases such as malaria, respiratory infections, and gastrointestinal illnesses using plant-based remedies and traditional healing techniques.

Many pharmaceuticals are derived from natural sources. Preserving biodiversity ensures the availability of genetic resources for developing new medicines and treatments.

Conclusion

The intertwined relationship between traditional medicine, public health, and biodiversity conservation is crucial for promoting holistic healthcare practices and preserving natural resources. Traditional medicine offers a wealth of knowledge and remedies that can address a diverse range of health conditions, from chronic diseases to infectious ailments, while also contributing to preventive care and mental well-being. By recognizing the value of traditional medicine, implementing supportive policies, and engaging with local communities, we can harness the potential of indigenous healing practices to enhance healthcare outcomes, promote biodiversity conservation and conserve traditional knowledge, culture and history. Embracing the multifaceted role of traditional medicine in modern healthcare systems is essential for achieving sustainable health solutions and safeguarding the rich diversity of life on our planet.

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Reclaiming their rightful share: Information as the key to women's succession rights

By Brenda Kwamboka

I. Introduction

Knowledge (information) is power. This common expression encourages a lifestyle of continuous learning and self-improvement. Those who actively seek out and apply new knowledge are better equipped to navigate challenges, make informed decisions, and seize opportunities in an ever-changing world. The Internet and social media have transformed the way we obtain information, making it easily accessible to anyone who seeks it. What used to be limited to a select few is now within reach of the general public. The right to access to information is fundamental to any country that is governed by the rule of law.[1] Information, specifically, is necessary if one is to enjoy a host of other entitlements the constitution and other laws guarantee by creating rights and obligations. In 1946, the United Nations General Assembly adopted Resolution 59(1) on Freedom of Information whose terms were; "*Freedom of Information is a fundamental right and is the touchstone of all the freedoms to which the United Nations is consecrated. Freedom of Information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the word.*" This was later followed by Article 19 of the UDHR which recognizes the right of access to information as was the case for Article 19 of the ICCPR, 1966. Article 9 of the African Charter on Human and Peoples' Rights also enshrines the right to information. Making information easily accessible is important for three key reasons: It is a platform for innovation that will generate economic and social value; It enables data-driven decision-making and; It is the foundation for improving transparency and accountability.[2]

Women's succession rights in Kenya are protected under various legal frameworks, including the Constitution, the Succession Act, and the Matrimonial Property Act. While legal protections exist, societal, cultural, and practical challenges can impede the full realization of these rights.

However, this has not been the case in Kenya with the state of women from rural areas

[1]Edwin Abuya, 'Promoting Transparency: Courts and Operationalization of the Right of Access to Information in Kenya', (2017) 46 Common Law Review 112, p1.
[2]ICJ Kenya, 'Towards implementation of Access to Information in Kenya', p32

in both testate and intestate succession. After just a few visits to courts in rural areas, you'll be stunned to discover how many women—wives and daughters—are deprived of their property by male relatives, simply because they are unaware of their property rights. Cultural and patriarchal norms create a disparity in the inheritance of property for women despite the existence of legal safeguards. Many women are either unaware of these protections or lack the necessary resources to assert their rights. Consequently, male relatives often exploit this information gap, manipulating or circumventing legal procedures to deny women, particularly widows and daughters, their entitled inheritance. This perpetuates gender inequality and results in the economic disenfranchisement of numerous women, leaving them vulnerable and unable to secure their livelihoods.

II. Challenges facing access to information for women in rural areas

Access to information in our country is mainly hindered by the following: Citizenry is unaware of their rights, weak implementation capacity for public officials or bodies, poor information management and lack of an implementation framework. The rights of many women often go unrecognized due to a lack of resources and knowledge. They are not informed about their legal rights as women and are unfamiliar with the laws governing land ownership. This becomes problematic when they are dependents of the deceased and must navigate complex succession procedures, leaving them vulnerable to exploitation regarding property left by the deceased.[3] Legal language often acts as a barrier, further deterring women from engaging in property matters, especially in regions with high illiteracy rates. As a result,

Access to information for women in rural areas faces several significant challenges. These challenges can impact various aspects of their lives, including health, education, economic opportunities, and legal rights.

they frequently depend on male relatives to handle these transactions, leading to land being registered in the men's names, thereby putting women at a disadvantage. Rural, illiterate women lack access to the new Constitution, which guarantees their land and property rights, rendering them unable to assert their rights when necessary.[4] Moreover, due to the deeply entrenched prevailing patriarchal attitudes, it is still difficult to attain the equality envisioned by the Constitution. Discriminatory social and traditional practices perpetuate the notion that sons should inherit land and women should negotiate the use of land through male relatives such as fathers, uncles, brothers, husbands, and sons.[5] Women in rural areas, whose livelihoods depend on pastoral and agricultural land, are often evicted without recourse because the law defers to customary practices in these communities. When they seek justice through the courts, they face prohibitively high legal fees or are forced to proceed without legal representation. . Even when they succeed in court, these women are often stigmatized, ostracized, and disowned by their communities. Moreover, poor and

[3]Federation of Women Lawyers Kenya, 'Women's Land and Property Rights in Kenya', Training Handbook, p1-p4.
[4]Ibid.
[5]Ibid.

rural women frequently face significant challenges in enforcing favorable court decisions. Forcibly evicting a widow from her matrimonial home and land is illegal under Kenyan law, and a succession law bars her husband's relatives from arbitrarily appropriating her inheritance.[6] However, laws are not always enforced, and justice remains elusive, particularly in rural areas. It falls upon judges to inform these women of their fundamental rights, ensuring access to justice in matters of gender and property—rights they should have been aware of.

III. Laws on succession rights for women

The newly enacted laws, including the National Land Commission Act 2012, the Land Act 2012 and the Land Registration Act 2012 all entrench principles of gender in access to land. It is important to note that land access and ownership is crucial to gain access to markets and better standards of living for women. Article 35(1) of the Constitution on access to information states that every citizen has the right of access to information held by the state; and information held by another person and required for the exercise or protection of any right or fundamental freedom.[7] The right of access to information is a central component of the right to freedom of expression. Article 33(1)(a) states that every person has the right to freedom of expression which includes – freedom to seek, receive or impart information or ideas.[8] The Law of Succession Act outlines the inheritance rules for cases where a person dies with or without a will in Kenya. It further provides different arrangements depending on whether the deceased left behind a spouse and children, or a spouse but no children.

Without freedom to access information of all kinds, abuses may take place, policies affecting the general welfare may not be tested and improved and overall public engagement and participation decreases. For example, the current Law of Succession Act has a lot of deficiencies but it may be extremely difficult to have it amended if the citizens themselves are oblivious of what it entails and how it affects them.

Ralph Waldo Emerson once said, "Nothing great was ever achieved without enthusiasm." Without deliberate action – fueled by enthusiasm and passion – nothing of great significance has ever been accomplished. It's what you do with the knowledge you acquire that defines your power. If you don't convert knowledge into action, it will remain a source of untapped energy. Kenya's challenge lies in the implementation of this key right.[9] An access to information law does not implement itself. It is imperative that a wide range of promotional measures are established to ensure that the public are aware of their rights, that systems are being used and implemented properly, and that standards are being applied to promote the goal of maximum disclosure. Efforts must be directed towards ensuring that awareness-raising initiatives extend beyond urban areas to effectively reach rural populations. Additionally, these endeavours should encompass diverse demographic groups within society, with particular attention to the inclusion of traditionally marginalized populations.

This approach should involve collaborations between government agencies, civil society organizations and grassroots community leaders to develop and implement

[6]Juliana Nnoko, 'Securing Women's Property Rights in Kenya' Daily Nation (March 7 2020). Available at https://www.hrw.org/news/2020/03/07/securing-womens-property-rights-kenya,accessed on 25th July 2024.
[7]Constitution of Kenya, 2010.
[8]Ibid.
[9]Edwin Abuya, 'Realizing the right of access to information: What should stakeholders be on the look out for? [2013], In: Diallo F and Callan R (eds) Access to Information as a Catalyst for Social Change in African Countries. Leiden: BRILL, pp. 215–244

comprehensive education campaigns. These campaigns should utilize various media channels, including radio broadcasts, mobile technology, and community gatherings, to disseminate information about succession rights in culturally sensitive and linguistically appropriate ways. Furthermore, the establishment of legal aid clinics and mobile court services is essential to provide accessible legal support and dispute resolution mechanisms, particularly in rural areas where traditional customs may conflict with statutory law. By combining awareness-raising efforts with practical support systems, Kenya can work towards bridging the gap between legal provisions and their effective implementation, ensuring that women's succession rights are not just enshrined in law, but actively protected and realized across all segments of society.

Gender equality and succession rights are closely intertwined issues that address how laws and societal norms impact the distribution of inheritance and property, particularly regarding the rights of women and men. Ensuring gender equality in succession rights is crucial for achieving fairness and justice in the distribution of estates.

IV. Judicial decisions in Kenya on gender equality and succession rights

Kenya's Judiciary has taken a lead role in creating a transparent society. Doubtless, significant steps have been made towards the realization of the fundamental right of access to information and the initiatives by the courts must be sustained. In the case of *Famy Care Limited vs. Public Procurement Administrative Review Board & Another*, the court stated that unlike the old Constitution, the Constitution of Kenya 2010 stipulates the principles to be applied in the enforcement of the Bills of Rights. In terms of interpretation, the bill of rights can be said to be self-encompassing in that it would not even require the court to seek refuge in any other interpretation approach, like the liberal or purposive interpretation. Article 20(4) of the Constitution provides that courts and other adjudicating authorities shall in interpreting the provisions of the bill of rights promote the spirit and objects of the bill of rights and promote the values that underlie an open and democratic society, humanity, equality, equity and freedom. Further, Article 20(3) provides that in applying a provision of the bill of rights the courts shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom and develops the law to the extent that it does give to a right or fundamental freedom.[10] Section 35 of the Law of Succession Act, for example, restricts a widow's life interest in the property of her deceased spouse when she remarries but does not place a similar restriction on a widower. A petitioner in the case of *Douglas Njuguna Muigai v John Bosco Maina & another (2014) eKLR*, argued that this inequality in the law was brought about by regressive customary laws which prevented women from enjoying the rights and freedoms guaranteed by the Constitution, and further urged the legislature to consider the section for amendment. In line with the reasoning of the Court of Appeal, Hon. Mr. Justice Muriithi found this differential

[10]Famy Care Limited v Public Procurement Administrative Review board & another & 4 others [2013] eKLR, Petition 43 of 2012.

treatment of women as against their male counterparts indefensible and declared the same unconstitutional on the grounds that it contravened Article 27 of the Constitution which protects the rights of women and men to have equal treatment and provides that the state shall not discriminate directly or indirectly on the basis of sex or marital status.

In the case of *Ripples International v The Attorney General & Others (Constitutional Petition No. E017 of 2021)*, the High Court sitting in Meru vide Judgment dated 29th September 2022, declared certain sections of the Law of Succession Act unconstitutional, on the grounds that the said provisions contravened the Constitution of Kenya 2010 and infringed on Kenyan women's right to marry and enjoy equal treatment under the law. Ripples International initiated the public interest petition to protect women who they contended are discriminated against and denied the right to property by dint of sections 35 (1) (b), 36 (1), and 39 (1) (b) of the Act. These provisions denied a widow the right to enjoy a life interest in her deceased husband's estate should she remarry and gave priority to fathers over mothers in the line of succession where a child died intestate.

Tasked with the duty of enforcing and interpreting laws, there is therefore a need for the Judiciary to create jurisprudence that promotes women's land and inheritance rights. In addition, it should continue to review the Law of Succession Rules to ensure that it promotes access to justice for women. In the contemporary era, there is no justifiable reason for any provisions of the law to show bias towards one gender. As stipulated in Article 27 of the Constitution, all individuals, irrespective of gender, are entitled to equal protection and benefits under the law.

Recommendations

The Kenyan government should provide accessible legal information and advice and make sure it reaches marginalized groups, especially rural women and girls. The Law of Succession has been in existence for over three decades, but women continue to suffer human rights violations. This challenge has been brought by social bias and lack of proper implementation and enforcement mechanisms of the existing laws.[11] The Committee on Economic, Social and Cultural Rights (CESCR) in its concluding observation to Kenya's combined 2nd- 5th period report in 2016 called upon the government to take all necessary measures including raising awareness amongst women, local administration, traditional leaders, land administrators and judicial officers on women's land rights.[12] It further called upon the state to provide legal support to women to reclaim their rights. Government agencies, along with independent constitutional commissions, should actively engage in disseminating information to raise awareness about the existing legal provisions that uphold inheritance rights. Furthermore, they should consider submitting pertinent reports, such as those to parliament, to facilitate the advocacy for necessary reforms in the law.

In addition, through the Legal Aid Programme under the guise of the Legal Aid Act 2016, the government should offer legal services to the indigent women whose rights have or are under actual threat of violations. It is recommended that government agencies collaborate to advance women's land and property rights. Although

[11]R. Giovanelli, Gender and Land Tenure Reform in ONE BILLION RISING (2009) pg. 198.
[12]Committee on Economic, Social and Cultural Rights, 'Concluding observations on the combined second to fifth periodic reports of Kenya' (4 March 2016) p4-5. Available at https://eachrights.or.ke/ssd/2020/07/CESCR-Concluding-observations-Kenya-2016.pdf, accessed on 25/07/2024.

the Kenyan government has initiated efforts to develop information literacy, there is still much ground to cover in achieving comprehensive information literacy. It is imperative to conduct a thorough assessment of the education system to ensure that individuals are equipped with essential information literacy competencies, thereby contributing to the enhancement of social lifestyles and heightened political participation. In the capacity of governance oversight, civil society organizations (CSOs) need to engage in advocacy for legal reforms and provide legal aid services to women whose land, property and succession rights have been infringed upon. When providing legal aid services, it is prudent for CSOs to engage in strategic impact litigation to contest the unconstitutional provisions of the Law of Succession Act.

Access to justice is a constitutional right. Article 48 provides that the State shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice. The succession process in Kenya involves filing the necessary documents in the appropriate court. The process is complex, expensive, and takes around nine months to complete. Backlog of cases, complex procedures, and high litigation costs have prevented many women, especially those in rural areas, from pursuing succession to protect their interests.[13] There is need to ensure that the process is accessible and affordable to all to ensure justice is achieved. In addition, ADR including mediation is now an accepted mode of resolving disputes. The Succession Act should allow for use of ADR especially when dealing with contentious probate.

The media holds a pivotal position in not only disseminating these rights but also in monitoring and reporting on their implementation. As a significant user group of information access, the media can contribute substantially by directing requests to promote a progressive interpretation of the law. As rights holders, community members should hold the state accountable for its actions. Additionally, community members should take it upon themselves to know the law and pursue redress when their rights are infringed upon. As the saying goes, better be unborn than untaught, for ignorance is the root of misfortune. In the age of information, ignorance is a choice. Hon. Justice Limo in the case of *Ziporah Muthoni Njagi v Faith Wairimu Gitubu* stated that 'Ignorance of law is no excuse for indolence'. Therefore, we should all be aware of our rights and any changes in law in order to progress individually and as a society.

V. Conclusion

Women have made strides towards equality in Kenya but we still have a long way to go to make the right to land and property a reality for all women. A critical step in addressing this issue lies in improving women's access to information about succession laws. By empowering them with knowledge of their legal rights and the processes involved in inheritance, we can help bridge the gap between policy and practice. This will help to assert their claims, challenge discriminatory practices and navigate the legal system more effectively. Ultimately, ensuring women's access to information is not just about legal equality—it's a catalyst for economic empowerment, social justice and the overall development of Kenyan society. As we strive for true gender equality, making this vital information readily available to all women must be a priority.

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[13]Human Rights Watch Report Double Standards: Women's Property Rights Violations in Kenya. New York: (2003).
[14]Ziporah Muthoni Njagi v Faith Wairimu Gitubu [2015] eKLR.

Harnessing environmental impact assessment for sustainable development: A climate action pathway for Kenya

By Darryl Isabel

Abstract

This paper explores the key role of Environmental Impact Assessment (EIA) in advancing Sustainable Development Goal 13 (SDG 13) in combating climate change. EIA is an important tool for evaluating the potential environmental consequences of proposed projects and ensuring that these activities contribute to sustainable development rather than exacerbating climate challenges. In Kenya, climate considerations are integrated into EIA by assessing climate risks, mitigating greenhouse gas emissions, and promoting adaptation strategies across sectors. Through a detailed case study of the Turkana Wind Power Project (LTWP), this paper highlights how EIA has successfully guided project planning and implementation towards climate-friendly outcomes. It also highlights EIA's crucial role in achieving SDG 13 and promoting sustainable development in Kenya, while addressing challenges like policy gaps, capacity issues, and the need for better stakeholder engagement. The paper concludes with recommendations for strengthening the EIA framework to support Kenya's Nationally

Determined Contributions (NDCs) and overall climate goals. The methodology employed involves reviewing existing literature to analyze the effectiveness of EIA in integrating climate considerations and to identify best practices and challenges, thereby providing a comprehensive understanding of its role in promoting sustainable development.

1.0 Introduction

Sustainable Development Goal 13 (SDG 13) focuses on urgent action to combat climate change and its impacts.[1] Defined by the United Nations, the key objectives of SDG 13 include strengthening resilience and adaptive capacity to climate-related hazards and natural disasters, integrating climate change measures into national policies, strategies, and planning, improving

[1]United Nations, 'Sustainable Development Goals,' <Climate Change - United Nations Sustainable Development> accessed 21 July 2024.

education, awareness, and human institutional capacity on climate change mitigation, adaptation, impact reduction and early warning.[2] Addressing climate change is imperative for sustainable development as it directly affects all aspects of life including economic stability, environmental health, and social well-being.[3] However, the escalating frequency and intensity of climate-related events - more frequent and severe storms, heatwaves, floods, droughts, and wildfires - threaten to undermine global development gains, making robust climate action essential.[4]

In Kenya, Article 69(1) of the 2010 Constitution enshrines sustainable development, mandating the state to ensure sustainable exploitation, use, management, and conservation of the environment and natural resources.[5] This provision is crucial for balancing economic growth with environmental protection and resource sustainability.[6] It obliges the government to integrate environmental considerations into development planning, promote equitable resource distribution, and safeguard ecosystems for future generations.[7] By embedding these principles in the constitution, Kenya strengthens its legal framework to address environmental challenges, support climate resilience, and promote long-term socio-economic sustainability.

Environmental Impact Assessment (EIA) is an important tool in this context, designed to evaluate the potential environmental consequences of proposed projects before they are carried out.[8] An EIA aims to predict environmental impacts at an early stage, find ways to reduce the adverse effects, shape projects to suit the local environment, and present predictions and options to decision-makers.[9] Since its incorporation in the National Environmental Protection Act of the United States in 1972, EIA has gradually been included in domestic legislations globally. Additionally, Principle 5 of the United Nations Environment Program draft Principles of Conduct urges states to make an environmental impact assessment before undertaking any activity related to a shared natural resource that could potentially impact the environment of another state or states sharing that resource.[10] Moreover, Principle 17 of the Rio Declaration emphasizes the necessity of an EIA. It states that an environmental impact assessment, as a domestic instrument, shall be carried out for proposed activities likely to significantly affect the environment. Such activities require approval from a competent national authority.[11] The significance of EIA in climate action and sustainable development lies in its ability to ensure that development projects do not exacerbate climate change impacts.[12] Additionally, it incorporates measures to mitigate and

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[2]United Nations Environment Program, 'Goal 13: Climate Action,' <GOAL 13: Climate action | UNEP - UN Environment Programme >accessed 21 July 2024.
[3]United Nations, 'What is Climate Change?'< What Is Climate Change? | United Nations >accessed 21 July 2024.
[4]UNFCCC Secretariat, 'Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries,' 2006, 42 < CLIMATE CHANGE: IMPACTS, VULNERABILITIES AND ADAPTATION IN DEVELOPING COUNTRIES (unfccc.int)>
[5]Constitution of Kenya 2010 Art. 69(1)
[6]Kariuki Muigua, 'Constitution of Kenya 2010 and Natural Resources and Environment Management,' (The Lawyer Africa, 5 March 2022) <Constitution of Kenya 2010 and Natural Resource and Environmental Management – The Lawyer Africa> accessed 21 July 2024.
[7]ibid.
[8]Environmental Management and Coordination Act 2015, s 2.
[9]Philippe Sands, '*Principles of International Environmental Law*,' (2nd ed, Cambridge University Press,2003), 799-800.
[10]United Nations Environment Program Draft Principles of Conduct 1977, prin. 5.
[11]Rio Declaration 1992 prin. 17.
[12]Shardul Agrawala , Arnoldo Kramer, Guillaume Prudent-Richard, Marcus Sainsbury, Victoria Schreitter, 'Incorporating Climate Change Impacts and Adaptation in Environmental Impacts Assessments: Opportunities and Challenges,' Climate Development Vol 4 (2012) 26–39.

The Stockholm Conference of 1972, formally known as the United Nations Conference on the Human Environment, was a landmark event in the history of global environmental policy. Held from June 5 to June 16, 1972, in Stockholm, Sweden, this conference marked the first major international meeting to address environmental issues on a global scale.

adapt to these impacts. By promoting environmentally sound practices, EIA aids in safeguarding ecosystems, enhancing community resilience, and aligning development activities with global climate goals.[13] Thus, EIAs are indispensable in steering projects towards sustainability and ensuring that climate action remains at the forefront of development planning.

This paper argues that the effective integration of Environmental Impact Assessments (EIA) with climate considerations is crucial for advancing Sustainable Development Goal 13 (SDG 13) in Kenya. By giving an overview of the evolution of Environmental Impact Assessment legislation in Kenya and examining how climate considerations have been integrated into the framework. A case study of the Lake Turkana Wind Power Project demonstrates EIA's practical application and effectiveness in addressing climate-related concerns. The article then analyzes the impact of EIA on SDG 13, addresses challenges in integrating climate factors, and concludes with actionable recommendations for improving EIA to better support SDG 13 and enhance sustainable development outcomes in Kenya.

2.0 Evolution of environmental impact assessment legislation in Kenya

EIA manifested after the Stockholm Conference in 1972. The conference had several action plans, one of them being the Global Environmental Assessment Programme- watch plan. The assessment of environmental impacts has been institutionalized as an international and national legal norm for integrating environmental factors into decision-making protocols.[14] EIA in Kenya has significantly evolved since the late 1970s, following its potential for environmental protection. Its foundation in Kenya was laid by the enactment of the Environmental Management and Coordination Act (EMCA) in 1999, which established a comprehensive legal and institutional framework for environmental protection and management.[15] EIA then became effective in January 2000 and subsequent regulations were formulated to guide the EIA processes. These include the Environmental Impact Assessment and Audit Regulations (EIAAR) in 2002 and the Environmental Impact Assessment Guidelines and Administrative Procedures (EIAGAP) in 2003. The Environmental (Impact Assessment and Audit) Regulations of 2003 were later

[13]Velosi Author, 'Sustainability Goals in Relation to Environmental Impact Assessment,' 9 October 2023, <Environmental Impact Assessment - EIA - Sustainability Goals (velosiaims.com)> accessed 21 July 2024.
[14]Commission of the European Communities, 'Council Directive of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment,' *Official Journal of the European Communities*, vol. L175; (1985) 40-48.
[15]Sec. 42; Part VI – Integrated Environmental Impact Assessment (sec. 57A-67). See also Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003.

introduced to provide further guidelines on how EIAs should be conducted, emphasizing procedural steps, public participation, and the scope of environmental impacts to be assessed. However, these regulations did not yet fully integrate climate change as a core component. Therefore, the current statute, embodied in the Environmental Management and Coordination (Amendment) Act of 2015, along with subsequent regulations, sought to address this gap by incorporating climate change considerations directly into the EIA process.

Section 7 of the EMCA Act establishes the National Environment Authority (NEMA) which is mandated to oversee the EIA processes in Kenya. In line with that, NEMA is responsible for reviewing and approving EIA reports, issuing licenses to developers, and monitoring compliance. The procedure for conducting an EIA process outlined in the Act is designed to be thorough and ensure public participation. It mandates that proponents of any project listed in the Second Schedule undertake a full EIA study and submit the report to the Authority before obtaining a license.[16] However, the Authority may waive this requirement in certain cases.[17] The Act also requires the EIA study report to be publicized in the Kenya Gazette and a local newspaper for two consecutive weeks, inviting public comments within a maximum of sixty days.[18] In addition, the Authority may request the proponent to conduct further evaluations or provide additional information to ensure the EIA report is comprehensive.[19] Once satisfied with the report's adequacy, the Authority can then issue an EIA license with terms and conditions to promote sustainable development and effective environmental management.[20] Ultimately, The EIA license may be canceled, revoked, or suspended for a period of up to twenty-four months if the licensee violates the terms of the license.[21]

Furthermore, other relevant bodies, including sector-specific agencies and county governments, play crucial roles in the EIA process by providing technical input, conducting public consultations, and monitoring project compliance at the local level.[22] This multi-layered institutional framework facilitates comprehensive environmental governance, thus promoting sustainable development by balancing economic growth with environmental protection. Through these mechanisms, Kenya has progressively strengthened its EIA system, positioning it as a vital tool for mitigating environmental impacts and fostering resilience against climate change.
Kenya's EIA Evolution: Insights from the Mui Case.

The Mui case holds significant relevance in the historical context of Environmental Impact Assessments (EIA) in Kenya. The case underscores the importance of adhering to the procedures outlined in earlier regulations, specifically the Environmental (Impact Assessment & Audit) Regulations of 2003, which were central to the development of EIA practices in Kenya. In this case, the trial court noted that when conducting an EIA, the Government must conform to the rules set

[16]Second Schedule (Act No. 5 of 2015, s. 58, 80.) - Projects Requiring Submission of an Environmental Impact Assessment Study Report.
[17]Environment Management and Co-ordination Act s 58(2).
[18]Environment Management and Co-ordination Act s 59.
[19]Environment Management and Co-ordination Act s 62.
[20]Environment Management and Co-ordination Act s 63.
[21]Environment Management and Coordination Act s 67.
[22]Kelvin K Kiromo, ' Factors Influencing the Implementation of Environmental Impact Assessment Recommendation on Commercial Projects: A Case of Nakuru Town, Nakuru County, Kenya,' (2016) 36.<Factors Influencing The Implementation Of Environmental Impact Assessment Recommendations On Commercial Projects.a Case Of Nakuru Town, Nakuru County, Kenya (uonbi.ac.ke) >

out in Regulation 17 of Legal Notice No. 101, the Environmental (Impact Assessment & Audit) Regulations 2003. It further emphasized that information should be shared with the public in a simple, easily understood language, at accessible venues, and with meeting dates announced well in advance. The County Government should also be involved from the start. The Court highlighted the importance of EIA, calling it essential for sustainable development as It guides us on the project's potential negative impacts on the environment and helps us decide whether the project should proceed.[23]

In a historical context, the Mui case illustrates how the 2003 regulatory framework for EIAs in Kenya emphasized public participation, transparency, and local government involvement. The court's focus on these procedural aspects highlights the early recognition of the need for thorough environmental assessments. This case serves as a milestone, demonstrating the practical application of earlier regulations and bridging them with recent amendments that have expanded EIAs to include climate change considerations. It underscores the evolution of Kenya's EIA approach and the lasting impact of foundational principles established in earlier statutes.

Building on this foundation, the historical development of EIA in Kenya has evolved significantly. The integration of climate considerations represents a major advancement, ensuring that assessments comprehensively address both environmental and climate change impacts. This evolution highlights the continuous improvement and adaptation of Kenya's EIA framework to meet emerging challenges and global commitments.

Integration of climate considerations in EIA

Environmental activities and climate change are closely linked, as environmental impacts can affect climate and vice versa.[24] Integrating climate considerations into EIA ensures that potential climate-related impacts are assessed, leading to better decision-making and more effective strategies for mitigation and adaptation.[25] Therefore, integrating climate change considerations into the EIA process is crucial for ensuring the sustainability and resilience of development projects.[26] This involves integrating climate risk assessments into EIAs to identify vulnerabilities and impacts of climate change, such as extreme weather, sea-level rise, and biodiversity shifts, on proposed projects.[27] Additionally, Mitigation and adaptation strategies-such as reducing emissions, enhancing energy efficiency, protecting habitats, and using climate-resilient design- are essential for addressing climate change impacts and ensuring sustainable development in EIA projects.[28] By addressing these factors, EIAs can help ensure that projects are environmentally sound and capable of withstanding the adverse effects of climate change.[29]

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[22]Kelvin K Kiromo, ' Factors Influencing the Implementation of Environmental Impact Assessment Recommendation on Commercial Projects: A Case of Nakuru Town, Nakuru County, Kenya,' (2016) 36.<Factors Influencing The Implementation Of Environmental Impact Assessment Recommendations On Commercial Projects.a Case Of Nakuru Town, Nakuru County, Kenya (uonbi.ac.ke) >

[23]Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others [2014] eKLR

[24]National Geographic Society, 'The Influence of Climate Change on Extreme Environmental Events,' 19 October 2023 <The Influence of Climate Change on Extreme Environmental Events (nationalgeographic.org)> accessed 26 July 2024.

[25]Agrawala , Kramer, Prudent-Richard, Sainsbury, Schreitter, (n 12) 26–39.

[26]Mathew Elliot, 'Adapting EIA for Climate Change,' 18 June 2012 < Adapting EIA for climate change - IEMA > accessed 26 July 2024.

[27]ibid.

[28]Agrawala , Kramer, Prudent-Richard, Sainsbury, Schreitter, (n 12) 26–39.

Incorporating climate risk assessments into EIA is fundamental for sustainable development and project resilience.[30] This integration helps safeguard ecosystems and long-term investments. The key methods for evaluating climate risks include climate models, Geographic Information Systems (GIS), and vulnerability assessments. Climate models provide predictive insights into future scenarios, aiding in risk identification,[31] while the GIS tools enable spatial analysis and mapping areas susceptible to climate impacts.[32] Vulnerability assessments examine the exposure, sensitivity, and adaptive capacity of natural and human systems, offering a comprehensive understanding of potential risks.[33] By employing these tools, EIAs can effectively incorporate mitigation and adaptation strategies into project planning, ensuring that developments are robust and adaptive.

Climate change mitigation involves actions taken by governments, businesses, or individuals to reduce or prevent the emission of greenhouse gases, as well as efforts to enhance carbon sinks that absorb these gases from the atmosphere.[34] Mitigation measures are a crucial part of this integration, with a primary emphasis on strategies aimed at reducing greenhouse gas emissions.[35] For instance, incorporating renewable energy sources, enhancing energy efficiency, and implementing carbon offset programs are effective ways to achieve

Lake Turkana Wind Power Project

these goals.[36] The Lake Turkana Wind Power Project (LTWP) exemplifies efforts to reduce carbon dioxide emissions by replacing electricity generated from fossil fuels with sustainable energy solutions, therefore highlighting the project's commitment to mitigating climate change and promoting renewable energy sources.[37] The LTWP is recognized as the next least-cost project to be developed. According to the Least Cost Power Development Plan, this wind farm will produce the most affordable power available in Kenya, with short-term marginal costs of power generation expected to range between 12.8 and 22.6 cents per kWh.[38] By embedding such strategies into the EIA process, projects in Kenya can significantly contribute to climate change mitigation, ensuring both environmental sustainability and resilience.

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[29]ibid.
[30]IEMA, 'Environment Impact Assessment Guide: Climate Change Resilience and Adaptation,' (2020) 23.
[31]IPCC, ' Climate Models and Their Evaluation,' (2018) 3 < Chapter.8_FINAL.5.9.07.indd (ipcc.ch) >
[32]Maged N Kamel Boulos, John P Wilson, 'Geospatial Techniques for Monitoring and Mitigating Climate Change and its Effects on Human Health,' *International Journal of Health Geographics* 22(2), (2023) 2 <https://doi.org/10.1186/s12942-023-00324-9>
[33]IEMA (n 30) 23.
[34]United Nations Development Program, 'What is Climate Change Mitigation and Why is it Urgent?' 29 February 2024 < What is climate change mitigation and why is it urgent? | Climate Promise (undp.org)> accessed 21 July 2024.
[35]Samer Fawzy, Ahmed Osman, John Doran, David Rooney, 'Strategies for Mitigation of Climate Change: A Review,' *Environmental Chemistry Letters* (2020) 6.
[36]Reuel Shinnar, Francesco Citro, 'Decarbonization: Achieving Near-total Energy Independence and Near-total Elimination of Greenhouse Emissions with Available Technologies,' Technology in Society Vol 30 (2008) 1–16. <https://doi.org/10.1016/j.techsoc.2007.10.006>
[37]Lake Turkana Wind Power Project Ltd, 'LTWP 2022 Sustainability Report,' 23 June 2023 < LTWP 2022 Sustainability Report - Lake Turkana Wind Power > accessed 21 July 2024.
[38]African Development Bank Group, 'Updated Environmental and Social Impact Assessment summary of Lake Turkana Wind Power Project,' (2011) 6.

Adaptation strategies on the other hand involve actions aimed at reducing vulnerability to the present or anticipated impacts of climate change, such as extreme weather events, rising sea levels, biodiversity loss, and food and water insecurity.[39] These strategies, often proposed in EIA reports, include designing infrastructure to withstand extreme weather events, implementing sustainable agricultural practices, adopting water conservation techniques, and enhancing ecosystem resilience.[40] By including climate considerations in the EIA process, planners can identify vulnerabilities and implement adaptive measures early in project development.[41] Not only does this proactive approach help safeguard the environment, but also ensures that development projects are sustainable and resilient in the long term. This highlights EIA as an excellent entry point for integrating climate change adaptation into development planning because it provides a structured framework for assessing potential environmental impacts.[42]

Therefore, integrating climate considerations into EIAs is vital for sustainable development as demonstrated by the Lake Turkana Wind Power Project, which incorporates climate resilience measures for sustainable development. Thorough climate risk assessments, effective mitigation measures, and robust adaptation strategies reduce environmental impacts and enhance project resilience. These steps ensure long-term viability, community well-being, and compliance with global climate goals, therefore highlighting EIAs' critical role in responsible planning.

Case Study: Lake Turkana Wind Power Project

The Lake Turkana Wind Power Project in Kenya is a significant example of how large-scale renewable energy initiatives can contribute to reducing carbon emissions while benefiting from a comprehensive Environmental Impact Assessment process.[43] Located in the arid region of Lake Turkana, this wind power project stands out not only for its scale but also for its role in addressing Kenya's energy needs and climate goals.[44] With a planned capacity of 310 megawatts (MW), it is the largest wind farm in Africa and aims to provide clean and renewable energy to the national grid.[45]

The Lake Turkana Wind Power Project is a key component of Kenya's strategy to cut carbon emissions and shift to renewable energy.[46] As a clean energy source, wind power avoids greenhouse gas emissions, offering a significant environmental advantage over fossil fuels.[47] The project, with a 310 MW capacity, is anticipated to cut carbon dioxide emissions by around 736,615 tons per year, which is comparable to removing over 150,000 cars from the

[39]United Nations Development Program, 'What is Climate Change Adaptation and why is it Crucial?' 30 January 2024 <What is climate change adaptation and why is it crucial? | Climate Promise (undp.org)>
[40]UNFCCC, (n 4) 12.
[41]IEMA, (n 30) 26.
[42]Julius W Kamau, Francis Mwaura, 'Climate Change Adaptations and EIA Studies in Kenya,' *International Journal of Climate Change Strategies and Management* Vol. 5 (2013) 163.
[43]World Bank Group, 'Updated Environmental and Social Impact Assessment Summary: Lake Turkana Wind Power Project,' (2011) 4. <World Bank Document>
[44]African Development Bank Group, 'Lake Turkana Wind Power Project: The Largest Wind Farm in Africa,' 17 September 2015 <Lake Turkana Wind Power Project: The largest wind farm project in Africa | African Development Bank Group (afdb.org)> accessed 31 July 2024.
[45]African Development Bank Group, (n 38) 3. See Gargule, A. Achiba, 'Navigating Contested Winds: Development Visions and Anti-Politics of Wind Energy in Northern Kenya.' (2019) 7. <https://doi.org/10.3390/land8010007>
[46]Pamela Cookson, Jessica Kuna, Emily Golla, 'Benefits of Low Emission Development Strategies: The Case of Kenya's Lake Turkana Wind Power Project,' (2017) 2.
[47]ibid.

roads.[48] This reduction supports Kenya's commitments under the Paris Agreement and its Nationally Determined Contributions (NDCs).[49] The EIA process played a vital role in the project's development, ensuring that it was designed and implemented to minimize environmental impact while achieving substantial emissions reductions.[50] This underscores the value of thorough environmental assessments in promoting effective and sustainable energy projects.

The EIA process for the Lake Turkana Wind Power Project was integral in ensuring that the project was developed in an environmentally sustainable manner.[51] It began with the preparation of an initial Environmental and Social Impact Assessment (ESIA), which was pivotal in identifying potential environmental and social impacts associated with the project. This comprehensive assessment evaluated the potential effects on local ecosystems, wildlife, and communities, ensuring that the project's benefits outweighed its potential risks.[52]

One of the primary contributions of the EIA process was its role in minimizing negative environmental impacts and enhancing the project's sustainability. In particular, the EIA identified key areas of concern, including the impact on local flora and fauna, water resources, and the socio-economic effects on nearby communities.[53] By addressing these concerns through mitigation measures, the EIA helped to ensure that the project did not unduly harm the environment or local livelihoods.

To mitigate environmental impacts, the EIA recommended several strategies, such as careful site selection to avoid sensitive habitats, the implementation of wildlife monitoring programs, and measures to minimize disruption during construction. For instance, the project employed advanced technology to minimize noise and visual impacts, and measures were taken to protect local wildlife, particularly migratory bird species, which are known to be sensitive to wind turbines.[54]

The EIA also played a critical role in addressing potential social impacts. It involved extensive consultations with local communities and other stakeholders to understand their concerns and incorporate their feedback into the project's planning and implementation.[55] This participatory approach helped in identifying and mitigating potential social issues, such as displacement or disruption of local livelihoods. The project included provisions for community development programs, such as infrastructure improvements, healthcare services, and educational initiatives, to enhance the well-being of local populations and ensure that they benefited from the project.[56]

In summary, the Lake Turkana Wind Power Project exemplifies the positive impact of a thorough EIA process in advancing renewable energy projects. By addressing

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[48]African Development Bank Group, 'Lake Turkana Wind Power Project: The Largest Wind Farm in Africa,' 17 September 2015 < Lake Turkana Wind Power Project: The largest wind farm project in Africa | African Development Bank Group (afdb.org)> accessed 31 July 2024.
[49]Article 10, Paris Agreement 2015. See Kenya Climate Action Tracker 28 December 2020 <Kenya | Climate Action Tracker> accessed 31 July 2024.
[50]World Bank Group, (n 43) 4. <World Bank Document>
[51]URS, 'Lake Turkana Wind Power Project, Kenya IFC Performance Standards on Social & Environmental Sustainability: Project Review,' (2011) 13.
[52]World Bank Group, (n 43) 4. <World Bank Document>
[53]ibid 7-11.
[54]ibid 20.
[55]African Development Bank Group, (n 38) 8-9.
[56]ibid 17.

potential environmental and social impacts and integrating mitigation measures, the EIA has contributed to the project's success and its role in reducing carbon emissions. The project stands as a model for future renewable energy initiatives, showcasing the benefits of combining environmental stewardship with innovative energy solutions to achieve sustainable development and combat climate change. Moreover, the Lake Turkana Wind Power Project showcases the impact of the Environmental Impact Assessment in achieving SDG 13 in Kenya, therefore demonstrating how EIAs promote climate action and sustainability.

Impact of EIA in achieving SDG 13 in Kenya

The Environmental Impact Assessment process significantly contributes to achieving Sustainable Development Goal 13 on combating climate change in Kenya by ensuring that development projects incorporate climate action measures from inception through to implementation and monitoring.[57] Its impact manifests in several ways and one of the primary impacts of EIA is its alignment with Kenya's Nationally Determined Contributions under the Paris Agreement.[58] This is coupled with the promotion of sustainable practices by recommending environmentally sound alternatives and technologies.[59] By integrating climate risk assessments into EIAs, developers can identify and mitigate potential greenhouse gas emissions, thereby supporting national climate policies and strategies aimed at reducing carbon footprints.[60] This strategy helps projects avoid or minimize activities that could exacerbate climate change, aligning them with broader climate goals and promoting sustainable development. This can be demonstrated by the EIA process in the Lake Turkana Wind Power Project, which was started in Kenya to scale back carbon dioxide emissions by swapping electricity generated by fossil fuels and promoting sustainable energy solutions.[61]

Additionally, EIAs enhance the resilience of projects to climate impacts by requiring the inclusion of adaptation measures.[62] These measures ensure that infrastructure and other developments can withstand climate-related hazards such as floods, droughts, and extreme weather events, thereby safeguarding investments and protecting communities.[63] This can be demonstrated by the LTWP bolstering its resilience to climate change impacts through thorough EIAs. These assessments facilitated optimal site selection, ensuring strong wind patterns and minimal environmental disruption.[64] The EIAs guided the design of durable infrastructure capable of withstanding harsh climatic conditions and included climate adaptation measures like erosion control and sustainable water management.[65] Additionally, the project emphasized community engagement, creating local employment, and investing in social programs, which collectively enhance both the project's and the local community's resilience to climate-related challenges.[66] The EIA process also promotes public

[57]Alex Weaver, Jenny Pope, Angus Morrison-Saunders, Paul Lochner, 'Contributing to Sustainability as an Environmental Impact Assessment Practitioner,' *Impact Assessment and Project Appraisal* Vol 26(2008) 91-98.
[58]Corinna Hausner, Fritz Jaax, 'Paris Agreement Alignment Review: Nakkaş - Başakşehir Motorway, Turkey,' (2021) 1.
[59]Hussein Abbaza, Ron Bisset, Barry Sadler, 'Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach,' (United Nations Environmental Program, 2004) 15.
[60]International Institute for Sustainable Development, ' Climate Change Adaptation and EIA,' (2016) 2 <CCA.pdf (iisd.org)>
[61]African Development Bank Group, (n 38) 6.
[62]IEMA, (n 30) 10.
[63]ibid.
[64]African Development Bank Group, (n 38) 3.
[65]ibid 36-37.
[66]ibid 15-17.

participation and stakeholder engagement, ensuring that the voices and concerns of affected communities are actively heard and addressed.[67] This inclusivity is vital for the successful implementation of climate action initiatives. By involving local communities, the EIA process helps identify and mitigate potential issues early on, fostering trust and cooperation between project developers and stakeholders.[68] Engaging the public not only enhances the transparency and credibility of the project but also ensures that the measures taken are well-aligned with community needs and expectations.[69] This collaborative approach is crucial for achieving effective and sustainable outcomes, as it integrates diverse perspectives into the planning and execution of climate-related projects.

Hence, The EIA process is essential for achieving SDG 13, as it offers a structured framework for incorporating climate considerations into development projects. This approach promotes sustainable practices, enhances climate resilience, and supports both national and global climate goals, ensuring comprehensive climate action. The impact of Environmental Impact Assessment in achieving SDG 13 in Kenya highlights its importance. Nonetheless, challenges in implementing climate considerations in EIA reveal areas needing improvement for better climate action.

Challenges in implementing climate considerations in EIA

Implementing climate considerations in Environmental Impact Assessments faces several significant challenges, each impacting the process's effectiveness in addressing climate change. These challenges include institutional and regulatory challenges, resource constraints, stakeholder engagement, and public participation, all of which can hinder comprehensive climate risk integration and mitigation efforts.

Lack of cohesive legal and institutional frameworks

A primary challenge is the lack of cohesive legal and institutional frameworks. Kenya's environmental legislation, though robust on paper, often suffers from overlapping laws and insufficient enforcement mechanisms.[70] This fragmentation hampers the effective integration of climate considerations into EIAs, undermining their overall effectiveness.[71] While laws such as Kenya's Environmental Management and Coordination Act (EMCA) provide a framework for EIA, enforcement is often inconsistent due to limited resources and capacity within regulatory bodies like the NEMA.[72] For example, despite existing regulations, many projects proceed without thorough climate risk assessments due to inadequate monitoring and enforcement mechanisms. This inconsistency can result in inadequate assessments that fail to address significant climate risks, undermining the effectiveness of EIA as a tool for climate action.

Stakeholder engagement and public participation

Stakeholder engagement and public participation presents notable challenges. This is because effective EIA processes require the meaningful involvement of local

[67]Transparency International Kenya, ' Environmental Impact Assessment Process in Kenya Simplified Handbook,' (2020) 7 < ENVIRONMENTAL-IMPACT-ASSESSMENT-HANDBOOK-FINAL.pdf (tikenya.org)>
[68]ibid
[69]ibid
[70]World Bank Group, 'Kenya Country Environmental Analysis,' (2019) 28.
[71]ibid.
[72]ibid.

communities and stakeholders to ensure that climate impacts are comprehensively addressed. However, in many instances, public consultations are either superficial or entirely omitted, leading to inadequate consideration of community concerns and local knowledge.[73] As demonstrated by A. ***Abdallah, Chairman, Donholm Phase 5 Residents' Association & another v Director General NEMA & another, Tribunal Appeal No. NET/38/2009***, the appellants had, among other things, complained that NEMA had issued an EIA license without consulting the affected parties. The project proponent had put up a five-storey high-rise building, thereby blocking the complainants' access to sunlight and air. Additionally, the complainants were also concerned that this project would increase vehicular traffic in the area, and overload the water and sewer systems. The tribunal found that the project proponent had "failed to properly conduct stakeholder consultation and thereby denied the stakeholders public participation."[74] This disconnect can result in projects that are not only less effective but also face opposition from local communities, highlighting the need for more inclusive and transparent stakeholder engagement.

Capacity and resource constraints
Lastly, capacity issues pose significant challenges in integrating climate considerations into EIAs. Many governmental and regulatory bodies lack the necessary resources, technical expertise, and trained personnel to conduct comprehensive EIAs that effectively incorporate climate risks and adaptation strategies.[75] This limitation is further exacerbated by competing economic priorities, where immediate development goals often overshadow long-term climate considerations. For instance, in the rush to meet urgent infrastructure needs, such as road construction and urban expansion, climate assessments may be hastily conducted or inadequately performed, leaving projects vulnerable to future climate impacts.

Additionally, insufficient funding and institutional support can lead to gaps in data collection, analysis, and monitoring, further weakening the EIA process.[76] Limited financial resources hinder the ability to access advanced technologies and training programs necessary for conducting thorough climate assessments and implementing effective adaptation measures.[77] This underscores the urgent need for strengthening institutional capacities to balance immediate development goals with long-term climate resilience.

Challenges in implementing climate considerations in EIA highlight existing obstacles, leading to recommendations that provide actionable solutions for enhancing the integration of climate aspects in environmental governance.

Recommendations for strengthening EIA for climate actions

Policy and legislative improvements

Policy and legislative improvements are paramount, especially in updating and

[73]John O Kakonge, 'EIA and Good Governance: Issues and Lessons from Africa,' *Environmental Impact Assessment Review* Vol 18, (1998) 289-305.
[74]A. Abdallah, Chairman, Donholm Phase 5 Residents' Association & another v Director General NEMA & another, Tribunal Appeal No. NET/38/2009.s
[75]S. Obudho Omondi, V Ochanda, ' Environmental Impact Assessment in Kenya: Challenges of Emerging Technologies in Development Project,' (International Conference on Sustainable Research and Innovation, Volume 5, Jomo Kenyatta University of Agriculture and Technology, May 2014) 4.
[76]Essam El Badry Fadl, 'TheRole of Environmental Impact Assessment in Achieving Sustainable Development,' *International Journal of Modern Agriculture and Environment* Volume 1, Issue 1 (2021) 43.
[77]World Bank Group, 'Kenya Country Environmental Analysis,' (2019) 24.

Stakeholder engagement in the Environmental Impact Assessment (EIA) process is crucial for ensuring that the views, concerns, and needs of those affected by or interested in a proposed project are considered. Effective engagement helps to enhance the quality of the EIA, promotes transparency, builds trust, and can lead to better project outcomes and reduced conflicts.

strengthening existing EIA regulations to explicitly incorporate climate change considerations.[78] For example, Kenya's Environmental Management and Coordination Act could be revised to mandate comprehensive climate risk assessments for all significant projects. These revisions should include clear guidelines on integrating both mitigation and adaptation strategies, ensuring that projects are resilient to climate impacts and contribute to national and global climate goals. Such legislative enhancements would foster a proactive approach to environmental management, aligning Kenya's development with sustainable practices and international commitments like the Paris Agreement.[79]

Stakeholder engagement

Stakeholder involvement must be prioritized to ensure transparent and inclusive processes. This includes fostering genuine public participation by engaging local communities and stakeholders throughout the EIA process, from initial scoping to final decision-making.[80] Mechanisms such as public hearings, community workshops, and accessible reporting should be institutionalized to gather and

[78]Mark Burrage, 'Climate change and environment impact assessments (EIA): Unpicking the EIA regulations (2017) 3 March 2020 <Climate change and environment impact assessments (EIA): Unpicking the EIA regulations (2017) • RSK (rskgroup.com)>
[79]Ministry of Environment, Water and Natural Resources, 'National Environment Policy,' (2013) 20.
[80]World Bank Group, (n 77) 147.

Increased funding is essential for integrating climate considerations into various sectors and projects. Proper financial support can significantly enhance efforts to address climate change by enabling the development and implementation of effective strategies and solutions.

address community concerns effectively.[81] Ensuring that local voices are heard and considered not only enhances the legitimacy and acceptance of projects but also helps identify potential environmental and social impacts early. By institutionalizing these participatory mechanisms, the EIA process becomes more democratic fostering trust and collaboration between developers and affected communities.

Increased funding

Increased funding is essential to address resource constraints in integrating climate considerations into EIAs in Kenya.[82] Adequate financial resources can support the development of comprehensive training programs for EIA practitioners, equipping them with the necessary skills to assess climate risks and incorporate mitigation and adaptation strategies effectively. Enhanced funding can also facilitate the acquisition of advanced technologies and data management systems which are critical for accurate climate modeling and impact prediction. Moreover, increased investment can bolster the capacity of regulatory bodies to monitor and enforce climate-related EIA requirements ensuring compliance and accountability. By allocating sufficient funds, the government can support research initiatives that provide localized climate data helping tailor EIAs to specific regional vulnerabilities.[83] Ultimately, sustained financial support will enable a more robust and responsive EIA process, aligning Kenya's development projects with sustainable and climate-resilient practices, thus fulfilling national and international climate commitments.

Conclusion

In conclusion, the EIA process plays a critical role in achieving SDG 13: Climate Action in Kenya by ensuring that development projects are evaluated for their climate impacts. By incorporating climate risk assessments, mitigation measures, and adaptation strategies, EIA contributes significantly to reducing greenhouse gas emissions and enhancing climate resilience. Strengthening EIA regulations, increasing funding, and fostering stakeholder involvement are essential steps to address existing challenges and gaps. Looking ahead, there is significant potential for the EIA to further support national climate goals and promote sustainable development practices. Therefore, it is imperative to continue refining and reinforcing EIA frameworks to effectively address climate change challenges and contribute to a sustainable future for Kenya.

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[81]Cheryl Wasserman, 'Strengthening Public Participation in Environmental Management in Indonesia Training Workshop July Training Workshop,' (Jakarta, Indonesia July 10-11, 2012)
[82]World Bank Group, (n 77) 148.
[83]Fadl, 'The Role of Environmental Impact Assessment in Achieving Sustainable Development,' (n 76) 44.

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