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Foreword

It is with great pride and reflection that we present Volume 3 of the *Kabarak Law Review*, a scholarly contribution coinciding with a momentous milestone – sixty years since the declaration of the Kenyan Republic in 1964. This edition invites readers to engage critically with Kenya's legal, political, and societal evolution through the lens of academic rigour and thoughtful reflection.

In these six decades, Kenya has witnessed remarkable transformations, from constitutional reforms to the strengthening of democratic institutions and the deepening of governance frameworks. However, the journey has also been fraught with challenges that compel us to continually question whether the ideals of republicanism, justice, and equity have truly been realised.

This volume serves as both a reflection and a challenge. It presents a diverse collection of scholarly works that dissect the nation's constitutional journey, its political realities, and the social questions that continue to shape our Republic. The contributions traverse an impressive breadth of subjects – from historical appraisals of executive power and examinations of police accountability to the profound influence of African literary and diplomatic titans. Each contribution challenges conventional understandings while offering fresh perspectives to enrich legal discourse and inform policy debates.

Notably, the *Kabarak Law Review* remains steadfast in its commitment to addressing contemporary legal challenges within Kenya and across Africa. By publishing cutting-edge research, honouring legacies, and providing critical analyses of judicial decisions, this volume stands as a testament to academic excellence and intellectual resilience.

The success of this publication is owed to the relentless dedication of the editorial board, contributors, peer reviewers, and the broader scholarly community whose commitment ensures that this journal remains a leading voice in legal academia. This volume also pays homage to the enduring spirit of those who advocate for justice, equity, and the rule of law – values that lie at the heart of Kenya's republican journey.

I take immense pride in my students, whose contributions resonate at every stage of this endeavour – be it through editorial leadership, meticulous editing, or scholarly writing. May this spirit of dedication and excellence endure at Kabarak Law School for generations to come.

As we commemorate this historic juncture, it is my sincere hope that this volume serves not only as an academic resource but also as a catalyst for meaningful reflection and dialogue on the future of governance and justice in Kenya.

Professor J Osogo Ambani, LLD
Associate Professor of Public Law, and Dean
Kabarak Law School

Editorial

> People need knowledge more than they need food and drink, because they need food and drink two or three times a day, but they need knowledge all the time. Imam Ahmad Ibn Hanbal.[1]

A mother is a blessed being, a symbol of resilience and sacrifice. She faces countless challenges, determined and focused, ready to overcome every hurdle to ensure her child is born. Her tears turn into moments of joy, and her pain brings forth life, great individuals who go on to transform society.

But why draw a parallel between a mother and a publication? Because leadership, like motherhood, is not for everyone. Leadership is not a skill measured by hours in the gym or physical strength. Instead, it is a quality nurtured by even the slimmest among us, those brave enough to face adversity. True leaders are determined, focused, and willing to endure challenges. They lead with love, care for their figurative pregnancy, endure the sick mornings, and persevere to witness the joy of birth, the birth of ideas, progress, and transformation.

Behind every successful publication stands a united team of editors – a strong, unbreakable wall. This wall must withstand strong winds, scorching sunny days, and unrelenting storms. It serves as the umbrella to their leader, the leaders to their leader, and the advisors who clear the path toward their shared vision. This is how I choose to describe the most resilient force I have led in this battle. The battlefield was not for

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[1] Ideal Muslim, '15+ quotes of Imam Ahmad Ibn Hanbal' Islam practice,-< https://islampractice.wordpress.com/author/hambrin/ > on 28 January 2025. Imam Ahmad Ibn Hanbal, Shaykh of Islam was a renowned Muslim scholar and jurist who dedicated his life to the search of knowledge in Islam.

the faint-hearted. Yet, these soldiers – the *Kabarak Law Review* Volume 3 board members – rose to the occasion. Their great advice and unwavering support became the cornerstone of our success. Together, we are witnessing the birth of *Kabarak Law Review* Volume 3 – a testament to determination, late nights, teamwork, and the unyielding pursuit of excellence.

The third volume of the *Kabarak Law Review* commemorates sixty (60) years of the Kenyan republic – which was declared in 1964 – providing a platform for scholars to critically examine the nation's journey. Through thought provoking contributions, authors explore whether Kenya has truly upheld the fundamental tenets of a republic. This volume brings together insightful contributions from scholars across diverse disciplines, each offering a novel perspective on Kenya's legal, political, and social landscape. Their collective work not only enriches contemporary discourse but also leaves a lasting scholarly imprint, shaping the understanding of Kenya's republican evolution.

Kabarak Law Review Volume 3 features eleven (11) scholarly articles. Six (6) full-length pieces form the first double blind peer reviewed section, laying ground for this year's theme. Two (2) articles in the 'Honouring our Elders' section celebrate the legacies of two great African titans, Ama Ata Aidoo and Salim Ahmed Salim. Continuing our tradition of paying tribute to Emmanuel Ndwiga, a former Kabarak law student and his brother Benson Njiru who died at the hands of rogue police officers on 1 August 2021, we publish two (2) pieces on our police accountability section. We close this volume with a case review.

Babere Kerata Chacha and Shahid Amin Mubari's open this volume with their historical appraisal of Kenya's executive power, *From imperial power to vulnerable authority: A historical study of the institution of the presidency in Kenya*. The authors extensively explore the evolution of the Kenyan presidency, its significant transformation, and expansion of executive power from 1963 to the present. Using archival primary historical sources, they critically examine the presidency's impact on democratic governance.

Barrack Onyango analyses the evolution of women's political participation in Kenya, from the pre-colonial era to the post 2010 Constitution period, highlighting women's fight for gender parity and representation. In his paper, *From seats to voices: Analysing the effective participation of women in governance in the Kenyan parliament*, Barrack advocates for the meaningful participation of women beyond numerical quotas. The author emphasises on the need for women in parliament to actively shape policies and governance rather than serve as symbolic representatives.

Beyond the theme specific contributions, this volume also features general articles, which like the theme centred pieces, have undergone a rigorous double blind peer review process.

Alex Melonye Tamei opens this section with his critical analysis, *A socio-economic rights centred evaluation of Kenya's law and practice on sovereign debt acquisition, servicing and restructuring*. He analyses Kenya's rising sovereign debt burden and its implications for constitutional socio-economic rights under Article 43 of the Constitution of Kenya (2010). Tamei elaborates how fiscal policies focused on debt servicing have worsened citizen welfare through increased taxes, budget cuts, and resource diversion. The author concludes by authoritatively calling for sustainable debt management practices linked to socio-economic rights, drawing from global best practices to address systemic challenges and guide future debt strategies in Kenya.

In their piece, *An assessment of the efficiency and effectiveness of compulsory mediation in Malawi*, Anastanzio Sitolo, Kariuki Muigua and Nkatha Kabira, assess the effectiveness of mandatory judge-led mediation in Malawi. The authors demonstrate how mandatory mediation, despite its intent, infringes on core mediation principles and struggles to fully achieve its objectives in Malawi.

Rachael Kipkoech's paper, *Decolonising Kenya's legal system: The role of legal education, philosophical foundations, and constitutional interpretation* in a novel manner explores the pivotal role of legal education in Kenya, aiming to decolonise the Kenya's legal system. She extensively demon-

strates this through the Kenya's colonial historical basis on legal education and advocates for a more complex educational approach that aligns with the nation's unique historical and cultural identity.

Closing the double blind reviewed full-length article section, Rebecca Andeso addresses the urgent need for a universal legal framework to regulate surrogacy in her piece, *Towards a universal framework: The necessity of international legal regulation for surrogacy*.

The renowned '*Honouring our Elders'* section features two outstanding pieces by Prof Rose A. Sackeyfio and Antony Karol Muma. Prof Sackeyfio's article, *Ama Ata Aidoo: Celebrating her legacy in the twenty-first century*, reflects on Aidoo's profound impact on African literature. She highlights how Aidoo redefined the portrayal of African women by crafting strong female protagonists who challenge societal norms and inequalities. Following this, Antony Karol Muma's piece, *Transforming African diplomacy: Salim Ahmed Salim's vision of non-indifference and the evolution from OAU to AU*, delves into the transformative role of Dr Salim Ahmed Salim in reshaping African diplomacy during his tenure as Secretary-General of the Organisation of African Unity (OAU) from 1989 to 2001.

Tekin Saeko's and Caroline Gatonye's papers authoritatively contribute to the *Police accountability* section, continuing the Kabarak tradition of documenting police brutality. Tekin's *An update of the Kianjokoma brothers' case and the struggle for police accountability in Kenya* and Caroline's *Critiquing police response to the right to peaceful assembly, demonstration, and picketing in light of the recent 2024 Finance bill protests* provide comprehensive insights into policing in Kenya.

Jabez Oyaro then closes the volume with his piece *A critique of the High Court's ruling in FOA v RAO and 2 others in reinstating Section 12 of the Births and Deaths Registration Act.* His analysis exposes inconsistencies in judicial reasoning and highlights the practical challenges of implementing the court's directive, revealing how outdated administrative procedures hinder its enforcement. His piece marks the last article of the volume.

This third volume would not have been possible without a few exceptional individuals. Those who gave their all, not just to bring this volume to life but to propel the *Kabarak Law Review* forward. My managing editor, Elvis Ongiri Mogesa, deserves a standing ovation. He led with passion, stepping in whenever a challenge arose. A true fighter. A warrior in every sense, with a keen eye for intellectual finesse. Pawi Fortune and George Njogu kept the writing spirit alive, tirelessly fostering student publications on the *Kabarak Law Review* blog. Esther-Blessing Nasimiyu – your relentless drive left me speechless. Always at your inbox, drafting emails to peer reviewers and authors ensuring that the editing process ran seamlessly. When I grow up, I want to embody that persistence. Nasra Omar Abdalla and Uday Makokha, keep the fire burning. Keep turning dreams into reality. Uday, the academic training workshops you led stand as proof that resilience, passion, and determination make anything possible. Shukran sana kwenu nyote.

In addition to that, every unit on the battlefield has a commander whose duty is to lead, advise, correct, and ensure victory. The *Kabarak Law Review* is no different. It is led by exceptional commanders from the *Kabarak Law Review* Advisory Board, whose primary role is to provide guidance, expertise, and strategic direction to the editorial team.

This commanding unit, led by the chairperson Mr Delbert Ochola, played a pivotal role in bringing this volume to life. Their unwavering commitment and leadership has been instrumental in shaping this edition. Shukran za dhati to our esteemed Advisory Board members: Chief Justice (Emeritus) Prof Willy Mutunga, Lady Justice Teresia Matheka, Dr Jonathan Rimdolmsom Kabre, Hon Yusuf Shikanda, Dr Rosemary Mwanza, Mr Abdullahi Ali, Mr Arnold Nciko, and Prof John Osogo Ambani. Your commitment and wisdom have been the driving force behind this publication.

To our peer reviewers from across the Global South – Dr Celestine Nyamu-Musembi, Prof Mwiza Nkhata, Dr Gautam Bhatia, Arnold Nciko wa Nciko, Dr Victor Chimbwanda, Dumisani Mlauzi, Wachira Maina, Dr Owiso Owiso, Dr Nerima Were, Walter Khobe, Dr Tesor Makunya, Chepkorir Sambu, Christable Eboso, Eurallyah Akinyi, Dr

Nona Tamale, Prof Attiya Warris, Dr Magalie Masamba and Prof Tomasz Milej – thank you. Your commitment and patience in keeping up with our constant reminders, late-night emails, and tight deadlines ensured that the quality of *Kabarak Law Review* Volume 3 remained uncompromised. Your diligence and expertise form the foundation of this journal's credibility. Shukran sana.

I also extend a special Shukran to my predecessor, Laureen Mukami Nyamu who has done an excellent revise edit of the final text. Thank you for continuing to set the highest standards, and for your advice and guidance.

Finally, this tireless journey would not have been successful were it not for our great able Dean, Professor John Osogo Ambani, who has seen the *Kabarak Law Review*, grow, the first steps it took, learning to walk. Now, I believe we are not just walking or jogging, we are flying. Shukran sana Mwalimu Sipalla, the man behind these great achievements. Your vision and mentorship continue to shape the legacy of the *Kabarak Law Review*. Shukran sana Mwalimu.

Thank you all for your readership of our journal and I welcome you to the 2024 third volume of *Kabarak Law Review.*

Nadya Rashid
Editor-in-Chief, *Kabarak Law Review*
Kabarak, January 2025

From imperial power to vulnerable authority: A historical study of the institution of the presidency in Kenya

Babere Kerata Chacha** and Shahid Amin Mubari***

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Abstract

The role of the presidency in Kenya has animated and dominated popular and political discourses on constitution making, constitutional processes, and constitutional review and implementation, as well as political processes, since independence in 1963. This study employs the ex post facto approach as well as the use of archives and secondary sources and explores the key milestones and shifts that have defined the presidency, analysing its development in the context of democratic governance, executive authority, and the balance of power within the Kenyan government. The study examines the institution of the presidency including debates over executive power, checks and balances, and the role of the president as commander-in-chief. It then proceeds to analyse how successive presidents have interpreted and exer-

* *Contributions to the 'Issue theme section' are double blind reviewed.*

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cised their constitutional powers, considering factors such as party politics, presidential leadership styles, and responses to domestic and international crises. Special attention is given to landmark moments in presidential history, including the expansion of executive authority during times of crises, the emergence of the modern presidency under and in the post-Kibaki era, and the challenges to presidential legitimacy and accountability in that era.

Keywords: imperial presidency, vulnerable authority, implementation, constitutionalism, executive power, presidential leadership styles.

Introduction

> I call on all ministers, assistant ministers and every other person to sing like parrots. During the Mzee Kenyatta period, I persistently sang the Kenyatta tune … If I had sung another song, do you think Kenyatta would have left me alone? Therefore, you ought to sing the song I sing. If I put a full stop, you should put a full stop. This is how the country will move forward. The day you become a big person, you will have the liberty to sing your own song and everybody will sing it too.[1]

The role of the presidency in Kenya has animated and dominated popular and political discourses on constitution making, constitutional processes, and constitutional review and implementation, as well as political processes, since 1963. The preoccupation with the role and power of the presidency continued through the 2010 referendum with the adoption of a new Constitution, and has remained a thorny issue in Kenyan history. As such, the Kenyan presidency elicits a lot of controversy both locally and globally. From controversies over electioneering processes and the quest over the use and maintenance of power, it seems like the institution of the presidency has been weakened and greatly exposed to abuse which has made it more vulnerable as an institution.

Since the dawn of the post-colonial era in Africa the presidency has become an enduring fixture on the continent's political landscape. That is, the presidency has become the dominant institution in African politics by wielding tremendous unfettered powers that span the broad gamut of the public sector – from unbridled control of the 'national purse' to expansive appointive powers.[2] Both the ubiquity and the dominance have led to the typical African president being referred to as a 'prince, autocrat, prophet and tyrant'.[3] Significantly, the suzerainty

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1 Africa Watch Committee, 'Kenya: Taking liberties', *Africa Watch*, 1991, 27 as cited in Africa Watch, 'Divide and rule: State-sponsored ethnic violence in Kenya', *Human Rights Watch*, 1993, 8.

2 Kwasi Prempeh, 'Presidential power in comparative perspective: The puzzling persistence of imperial presidency in post-authoritarian Africa', 35(4) *Hastings Constitutional Law Quarterly* (2008) 821.

3 Robert H Jackson and Carl G Rosberg, *Personal rule in black Africa*: *Prince, autocrat, prophet, tyrant*, University of California Press, 1982, 11.

of the presidency over political power has witnessed the corresponding weakening of the legislative and judicial branches that are supposed to serve as countervailing forces in providing 'horizontal accountability'.[4] In other words, the growth of the presidency has created a 'zero-sum framework' in which the increase in presidential powers leads to a decrease in legislative and judicial powers and the consequent broader weakening of all other public institutions.[5]

Charles Fombad examines the presidency through the lens of constitutionalism, stressing that the effectiveness of governance in Africa hinges on how presidential powers are defined and limited within constitutions. While many African constitutions formally enshrine separation of powers, Fombad argues that enforcement mechanisms are often inadequate, allowing the presidency to overshadow other branches of government. There is need for a more balanced distribution of power and greater public participation in the constitutional process to ensure that constitutions serve as genuine checks on executive authority.[6]

HWO Okoth-Ogendo brings a different perspective by exploring the presidency in relation to African political traditions. He critiques the imposition of Western constitutional models on African societies without considering indigenous governance systems, which were often more communal and less centralised. Okoth-Ogendo argues that the presidency in Africa is a hybrid institution, shaped by both colonial legacies and traditional leadership structures, leading to a disconnect between the presidency and the people. This analysis suggests that rethinking the presidency in Africa requires a deeper engagement with indigenous political traditions.[7]

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4 Pita Ogaba Agbese, 'The political economy of the African state', in George Klay Kieh, Jr (ed) *Beyond state failure and collapse: Making the state relevant in Africa*, Lexington Books, 2007, 33-50.

5 Claude Ake, *Democracy and development in Africa*, Brookings Institution Press, 1996, 34.

6 Charles M Fombad, 'Constitutionalism and the presidency in Africa', in John Akokpari (ed) *The African Charter on Democracy, Elections and Governance: A commentary*, Oxford University Press, 2020, 235-258.

7 Hastings Wilfred Opinya Okoth-Ogendo, 'Constitutions without constitutionalism Reflections on an African political paradox', in Douglas Greenberg and others (eds) *Constitutionalism and democracy: Transitions in the contemporary world*, Oxford University Press, 1993, 79.

Interestingly, the emergence of the 'third wave of democratisation', and the resulting liberalisation of politics in 1990, raised hopes that the 'hegemonic presidency' would be caged, as democratising African states made the transition from political systems based on personal rule,[8] to those based on formal norms embodied in constitutions and statutes. However, these hopes have been dashed as the 'hegemonic presidency' has remained ensconced on the African political landscape, due to its resilience and adaptability.[9] Prempeh puts the case this way:

> However, despite the recent democratic backlash against decades of authoritarian presidential rule in Africa, and the regime change this has wrought in several African states, the phenomenon of the 'imperial presidency', long associated with politics and government in Africa, persists.[10]

Against this background, this study seeks to address some critical questions. First, what factors and forces have shaped the historical development of the presidency in Kenya? Second, what is the nature and dynamic of the imperial presidency phenomenon? Third, what are the major causes of the phenomenon – what are the major axles? This paper asserts that although recent presidents have encountered numerous political troubles, the institution of the presidency in Kenya has grown in power and prominence over the past century. Designed as a 'unitary' office, the presidency possesses a capacity for quick decision and action.[11]

The article examines the evolution of the office of the institution of the presidency in Kenya since 1963 to 2022 when a new constitution was successfully promulgated. This includes the Jomo Kenyatta regime (1963-1978) and the politics of power, resource distribution, and the rise

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8 See for example, Jackson and Rosberg, *Personal rule in black Africa: Prince, autocrat, prophet, tyrant*; Goran Hyden, *African politics in comparative perspective*, Cambridge University Press, 2012.

9 Denis Tull and Claudia Simons, 'The institutionalisation of power revisited: Presidential term limits in Africa', 52(2) *Africa Spectrum* (2017) 96. This resilience is evidenced through specific constitutional provisions such as presidential term limits, see, Tull and Simons, 'The institutionalisation of power revisited', 82.

10 Prempeh, 'Presidential power in comparative perspective', 763.

11 John R Bond and Richard Fleisher, *The president in the legislative arena*, Chicago University Press, 1990, 259.

of the imperial and populist presidency. Then came the Daniel Arap Moi presidency (1978-2002), which sought to consolidate the imperial and populist tradition of the Kenyatta era. Mwai Kibaki's presidency in the pre-coalition phase (2002-2007) was largely a continuum of the Kenyatta-Moi administrations as well as touching briefly on the Uhuru Kenyatta presidency. We argue that precipitated by the urgent need to stem the violence following the 2007 presidential election, the Grand Coalition Government of Kibaki's Party of National Unity (PNU) and Raila Odinga's Orange Democratic Movement (ODM) (2008-2013) ushered in a semi-presidential system without parallel; in these years the exercise of presidential power became somewhat circumscribed. Finally, the study evaluates the impact of the Constitution of Kenya (2010) on the presidency, public authority and public administration.

In essence, this study will focus on the broader matter of how the expression of power has evolved over time depending on the persona of the holder of the presidency at that particular period. More importantly no historical study on the institution of presidency, to our knowledge, has been done before and thus this work will fill the void in Kenyan political historiography. A historical study on the institution of presidency is considered key because it casts light on the changing patterns of presidency in general and examines intellectual merit and coherence in leadership.

After this introduction, the paper proceeds with a historiographical survey on the nature of presidency in Africa discussing the various views on imperial presidency. This section also provides an alternative lens of studying imperial presidency. Thereafter, we will examine the Kenyatta presidency, the Moi era, Kibaki era as well as an anatomy and challenges of the Uhuru presidency, closing with a conclusion.

The institution of presidency: A historiographical survey

Often, scholars studying the presidency face gaps in their understanding due to missing information or data. When research is limited

by the lack of crucial empirical evidence, it highlights the areas that remain unknown and raises new questions about them. In contrast, existing research helps us identify important relationships, based on current knowledge and insights. One key area where there is still insufficient understanding is the president's relationship with the executive branch.

The initial three decades of the post-independence era in Africa were marked by the spectre of one-party states, 'presidents for life', violent usurpations of power either through assassinations or military coups.[12] Further, these political developments revolved around an imperial presidency that was anchored on the personalisation of power, the suppression of human rights, and predation. For example, by the end of the 1980s, only six of the approximately 150 presidents who had ruled various African states voluntarily relinquished power, howbeit, after tenures in excess of 20 years.[13]

The phenomenon of imperial presidency is rooted in 'aspects of the post-colonial history and the evolution of the African state; and in aspects of the constitutional design and politics in Africa's new democracies'.[14] Moreover, even in this era of the 'third wave of democratisation,' presidential suzerainty persists because of the continuation of the practice of the centralisation of power at the national level, weak legislatures, courts and other public institutions, and presidential monopoly over the control of public financial resources.[15]

Similarly, imperial presidency in Africa is mainly powered by presidential control over the financial, material, and logistical resources of the state. Using this position of dominance, the imperial presidency has then created a vast patron-client network. Operationally, the imperial president serves as the chief patron and is assisted by a coterie of national and local pro-consuls, who serve as the intermediaries with ordinary citizens. Particularly, given the pervasiveness of mass poverty in Africa,

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12 Tony Leon, 'The state of liberal democracy in Africa: Resurgence or retreat?', Development Policy Analysis No 12, Cato Institute, 26 April 2010, 2.

13 Leon, 'The state of liberal democracy in Africa', 2.

14 Prempeh, 'Presidential power in comparative perspective', 764.

15 Prempeh, 'Presidential power in comparative perspective', 762-63.

these patron-client networks have become the sources of survival for ordinary citizens. Ultimately, these ordinary citizens have been trapped by a dependent relationship with the imperial presidency.[16]

In the same vein, several key elements are pivotal to sustaining the hegemonic presidency in Africa. The pivot is the establishment of reciprocal relations between the president, the chief patron, and his or her coterie of lieutenants, followers, and clients. Another factor is that access to resources by the president's vast clientelist network is the glue that holds the relationships together. Essentially, the 'clients and followers expect something in return for their loyalty'.[17]

The phenomenon of the 'big man' is visible through these hegemonic presidents.[18] The foundational pillar of these 'big men' is anchored on the fact that they 'are too willing to use undemocratic means to silence their vocal opponents'.[19] In other words, the use of repression is crucial to the maintenance of presidential hegemony.

Using Cameroon as a case study, Fru Doh postulates that the 'big man syndrome' in Cameroonian politics, as personified by the presidency, 'is a gorgon that was inherited from the colonial administrations'.[20] Functionally, the hegemonic presidency in the country has been notorious for fostering a culture of corruption and graft, amid neglected human needs. In other words, while the hegemonic president and his clients have used various corrupt means to accumulate wealth, they have paid very little attention to the needs of the majority of Camerooni-

16 Igwe Dickson Ogbonnaya, 'The continuity of 'autocratic presidency' in Africa's democratisation project', 7 *International Journal of Public Policy* (2011) 183.

17 Hyden, *African politics in comparative perspective.*

18 Helge Ronning, 'Democracies, autocracies or partocracies? Reflections on what happened when liberation movements were transformed to ruling parties, and pro-democracy movements conquered government', Paper for the conference election processes, liberation movements and democratic change in Africa, Maputo 8-11 April 2010, 13 that provides examples of Dos Santos (the former President of Angola), Afwerki (the President of Eritrea), Mugabe (the deposed President of Zimbabwe), Zenawi (the late Prime Minister of Ethiopia), and Museveni (the President of Uganda).

19 Ronning, 'Democracies, autocracies or partocracies?', 13.

20 Emmanuel Fru Doh, *Africa's political wastelands: The bastardization of Cameroon*, Langaa RPCIG, 2008, 21.

ans. The resulting effect is that the institution is despised and unpopular with the majority of the citizens of the country.

In Kenya, the imperial presidency phenomenon is shaped by two major sets of factors: ethnicity and partisanship. In the case of the former presidential hegemons, such as Kenyatta, Moi, and Kibaki, they used the dominant Kikuyu ethnic group as a major anchor of presidential dominance while employing their vast party machinery. Kenyatta and Moi used the Kenyan African National Union (KANU) while Kibaki used the Liberal Democratic Party (LDP) and its subsequent metamorphoses such as the National Rainbow Coalition (NARC) and the Party of National Unity (PNU).[21]

As Quirk has pointed out, '…the presidency is not a single, coherent field…'.[22] The study of the presidency brings together a number of fragmented interests and foci, and with some exceptions, presidency scholars have remained wedded to their own specialisations within this broad and disparate subfield of the study of African politics. Quirk's sound advice was that presidency scholars 'should learn to live with the fundamental diversity of the field',[23] but the quest for scientific rigour and theoretical sophistication may not always be compatible with that proposition. There are some areas of presidency scholarship where theoretical sophistication, at least in the way that term is understood in contemporary political science, is not, and perhaps ought not to be, the prime concern.[24]

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21 Maurice Amutabi, 'Beyond imperial presidency in Kenya: Interrogating the Kenyatta, Moi and Kibaki regimes and implications for democracy and development', 1(1) *Kenya Studies Review* (2009) 56. Treading on the same path, Isumonah interrogates the dynamics of the imperial presidency in the specific context of Nigeria observing that it has undermined the legal and other formal guarantees for political competition and participation in the country. Using the Obasanjo regime as the case study, he postulates that the pivots were presidential domination of the ruling People's Democratic Party (PDP), the Independent Electoral Commission (INEC), and the Economic and Financial Crimes Commission (EFCC). See, Adefemi Isomunah, 'Imperial presidency and democratic consolidation in Nigeria', 59(1) *Africa Today* (2012) 43.

22 Paul J Quirk, 'What do we know and how do we know it?', William Crotty (ed) *Volume 4 of Political science: Looking to the future*, Northwestern University Press, 1991, 38.

23 Quirk, 'What do we know and how do we know it?', 56.

24 William J Crotty, 'Introduction: Setting the stage' in William Crotty (ed) *Volume 4 of Political science: Looking to the future*, Northwestern University Press, 1991, 7.

Literature on the presidency is an area where substantial and significant scholarship has been produced. Such significant contributions illustrate that scholars in the public law tradition do their work on the presidency differently from others. Their method is traditional. It consists of detailed historical research, textual exegesis of legislation and legal opinions, and argument about the nature of constitutionalism, leading to prescriptive conclusions. We still learn a great deal about the presidency through this approach, and without getting into the finer points of epistemology, it has not been demonstrated that the kind of work produced by Koh,[25] and Fisher,[26] operating within the public law tradition would be better informed by what is understood as theory in the post-behavioural age.[27]

The imposition of the tenets of the behavioural revolution on presidency scholarship tends to marginalise a particular focus of research, such as public law. Fisher himself pointed this out 15 years ago. 'In recent decades,' he wrote, 'we have managed to drive an artificial wedge between the disciplines of law and political science'.[28] Fisher thought the problem went further than presidency scholarship, and he did not attribute all the blame to the development of political science, but he was contributing to an evaluation of presidency research and his concerns have yet to be taken on board by those who have developed methodological, conceptual, and theoretical standards for presidency research.

Learning to live with the fundamental diversity of approaches embraced by presidency scholars has not been an easy task. The emphasis on methodology, theory, and scientific rigor has detached the public law approach from what is now mainstream presidency scholarship even more since Fisher first identified the problem. Moreover, Fish-

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25 Harold Hongju Koh, *The national security constitution: Sharing power after the Iran-contra affair*, Yale University Press, 1990, 16.

26 Louis Fisher, *The law of the executive branch: Presidential power*, Oxford University Press, 2014, 112.

27 See, Roger H Davidson, 'Legislative research: Mirror of a discipline' in Crotty (ed) *Political science: Looking to the future*, Vol 4, 23-30, for a broader discussion of the behavioural age.

28 Fisher, *The law of the executive branch: Presidential power*, xvii.

er's concern about the fate of the public law tradition in presidency research could well be extended to other areas. Historical research and analysis, for example, shares much in common with the public law approach, and although history can be made to fit contemporary benchmarks of scholarship in political science, detailed historical research on the institution of the presidency seems to yield less professional payoff than it used to.[29] As Skowronek himself notes, 'it is easy to get lost in presidential history. Each story presents itself as baldly idiosyncratic and therefore defiant of any quest for generalisation.' His work is the exception to the rule.[30]

Quirk provided a thorough and perceptive compendium of the gaps in the 'core topics of the presidency field,' and much of what he highlighted is still relevant.[31] Quirk's survey remains an indispensable reference point for any newcomer to the field who wants to know about the state of presidency scholarship. The purpose of this review therefore, is not to update Quirk but rather to pursue the question of what gets neglected in the study of the presidency by addressing the almost systemic constraints and impediments facing any scholar in this field. It is suggested in this study that those constraints are more responsible for the gaps in the existing knowledge of the presidency than any other variable and that if presidency scholars have been deficient, it is not in the quality of their scholarship but rather in their collective failure to address this fundamental problem.

The Jomo Kenyatta presidency: The unitary state and consolidation, 1963-1978

In December 1963, Kenya gained independence and, after a year of negotiations, became a presidential republic with Jomo Kenyatta as its first president. This section reconstructs Kenyatta's presidency, explor-

[29] Stephen Skowronek, *The politics presidents make: Leadership from John Adams to George Bush*, Harvard University Press, 1993, 526.

[30] Skowronek, *The politics presidents make,* 514.

[31] Quirk, 'What do we know and how do we know it?', 37.

ing the links between his ability to emerge as an uncontested leader and the deeper colonial and postcolonial history of the country.

Kenyatta's regime has been aptly described as an example of 'bonapartist' rule.[32] Bonapartism is characteristic of countries in which capitalist penetration and class formation are incomplete, and a national bourgeoisie has yet to consolidate its power. A bonapartist leader does not represent a single class, but must appear to be simultaneously promoting the interests of various groups in the society and must encourage the emerging bourgeoisie and speak for the peasantry, satisfy the armed forces and the large bureaucracy, which serves as his or her chief power base. To carry out these contradictory policies successfully, such a leader must possess a certain charisma and political adroitness.[33]

Kenyatta was a leader in bonapartist mould and by the time of his death in August 1978, his repression of opposition, the implication of his government in political assassinations and the land grabbing and corruption associated with various family members had eroded a large measure of his support. However, he retained his undoubted charisma and reputation as a 'grand old man' of African nationalism.[34] He still possessed a certain amount of the political cunning which had distinguished his long career. More importantly, there was enough leeway in the economy to enable him to give scope to the ambitions of the bourgeoisie (both national and foreign) and to expand the bureaucracy which provided jobs for school leavers and university graduates.

The smallholders and landless were wooed with the Kenyatta's charisma and settlement schemes while officers in the armed forces were courted with offerings of land in 1964 to perhaps quell possibilities of a mutiny against the Kenyatta state. However, seven years later coup plotters, including an army commander, were undone by a well-developed intelligence network and artful sense of timing. With such char-

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32 Colin Leys, *Underdevelopment in Kenya: The political economy of neo-colonialism, 1964-1971*, Heinemann Educational Books, 1975.

33 Leys, *Underdevelopment in Kenya*, 39.

34 Colin Legum, *Africa contemporary record: Annual survey and documents 1989-1990*, Africana Publishing Company, 1998, 111.

acteristic finesse, Kenyatta declined to press charges against the commander, but instead encouraged him to retire to his 10,000-acre farm.[35]

In his later years, Kenyatta encountered widespread dissatisfaction, especially after the assassination of the highly popular opposition Member or Parliament, Josiah Mwangi Kariuki, in March 1975. The government's attempt to cover up the murder led to the detention of those who openly condemned its actions, intensifying the use of repression. Kenyatta's personal popularity, vital in a bonapartist regime, was waning. However, the economy came to his rescue by 1976, as the Brazilian frost of 1975 drove up coffee prices, creating a seemingly robust – though misleading – economic boom. Capital accumulation surged in 1976 and 1977, with farmers, including smallholders, switching from food crops to coffee. The smuggling of 'black gold' (coffee) from Uganda made Kikuyu middlemen and government officials instant millionaires, creating a neo-patrimonial system that benefited his community while alienating others.[36]

In this way, Kenyatta was beginning to favour and promote his own Kikuyu bourgeoisies. As a result, the small tribes in Kenya banded together in the Kenya African Democratic Union (KADU) party in fear of the alliance of the Kikuyu and Luo in Kenya African National Union (KANU). By 1965, it was certain that the Kikuyu-Luo Alliance had failed. The Luo accused Kenyatta of tribalism and selfishness. On his part Kenyatta regarded the Luo as the ambitious and bitter rivals of the Kikuyu political powers. In this struggle, Kenyatta forged some loose alliance of most Kenyan ethnicities with the Kikuyu and isolated the Luo throughout his rule. It was perhaps only in Luo land where the people danced gleefully when Kenyatta died.[37]

In explaining Kenyatta's character in relation to presidency, we examine this analogy in the context of the Independence Constitution of

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35 Maina wa Kĩnyattĩ, *Mwakenya: The unfinished revolution, selected documents of the Mwakenya - December Twelve Movement (1974-2002)*, Mau Mau Research Center, 2014, 118.

36 Legum, *Africa contemporary record*: *Annual survey and documents 1989-1990,* 320.

37 John W Harbeson, *Nation-building in Kenya: The role of land reform*, Northwestern University Press, 1971, 32.

1963, in which the Prime Minister was the head of government. This office was soon amalgamated with that of the outgoing colonial Governor to create a powerful head of state and government. Between 1966 and 1992, the presidency was beefed up by systematic constitutional amendments and constitutional practice that created what Okoth-Ogendo calls the 'imperial presidency',[38] to the emasculation of other arms of government, including parliament, the judiciary, and other constitutional or public offices.

These amendments included the abolition of constitutional safeguards in presidential systems of government such as devolved governments, the bicameral parliament, parliamentary and judicial independence, and tenure of office for judicial officers and constitutional office holders.[39] In addition, Kenyatta wielded extra-legal authority constructed from tradition.[40] Against the backdrop of the repressive colonial legacy, the presidency was also equated with chiefly authority in traditional societies, which authority was often intertwined with religious authority.

In Sihanya's thinking, Kenyatta is perhaps the best embodiment of traditional authority in post-independence Kenya.[41] With the help of constitutional changes, he managed to create a larger-than-life profile, as most African presidents did. In addition, he used certain Gikuyu traditional institutions to posture himself as a political, tribal and even religious leader (of the Gikuyu), especially when his presidency was increasingly threatened by the opposition led by Jaramogi Oginga Odinga, Kenya's Vice-President. These institutions included oathing.[42] Presi-

38 Okoth-Ogendo, *Constitutions without constitutionalism*, 74.

39 For a sympathetic review of some of these constitutional amendments, See Okoth-Ogendo, 'Constitutionalism and the politics of governance in Africa' in J S Mbaku and S M Mwaura (eds) *The politics of constitutional reform in Africa*, East African Educational Publishers, 1988, 27-35.

40 Jackton Boma Ojwang, *Constitutional development in Kenya, 'Institutional adaptation and social change'*, African Centre for Technology Studies Press, 1990, 180.

41 Ben Sihanya, 'The presidency and public authority in Kenya's new constitutional order', Society of International Development Constitution Working Paper No 2, 2011, 5.

42 See for example, Githu Muigai, 'Political violence in Kenya: A study of the 1992 general elections', Kenya Human Rights Commission, 2004; Bethwell A Ogot, *History as destiny*

dent Kenyatta used charisma as a tool of authority more than any other president during his time.

However, Kenyatta's presidency also took on a more centralised and paternalistic form, where his personal authority often overshadowed institutional frameworks, leading to a consolidation of executive power. His presidency became characterised by neo-patrimonial relationships, in which he empowered his Kikuyu community and created a loyal political elite, but this came at the cost of alienating other ethnic groups and fostering inequalities within Kenya. Thus, while Kenyatta's presidency was initially seen as embodying the aspirations of the independence movement, over time, it became marked by increasing authoritarianism and personal rule, with his charisma being both a unifying and divisive factor in Kenyan politics.

In conclusion, Jomo Kenyatta's indelible mark on Kenya's history and his pivotal role in the struggle for independence has secured his place as a revered figure in the country's narrative. His leadership, vision, and dedication to the ideals of freedom and unity left an enduring legacy that continues to resonate with the people of Kenya and beyond. As president, Kenyatta adopted a pragmatic approach to governance, blending traditional African values with modern statecraft. His leadership emphasised unity and national stability, coining the phrase 'Harambee' (meaning 'let's pull together'), which became central to his philosophy of nation-building. Kenyatta focused on consolidating political power and maintaining Kenya's territorial integrity, while also advocating for Pan-African unity.

Despite criticism over the concentration of power and the marginalisation of certain communities, Kenyatta's legacy as the 'grand old man' of African nationalism remained intact.[43] His leadership style influenced many post-independence African leaders, and his role in decolonisation earned him a place in history as a key figure in the African

and history as knowledge: Being reflections on the problems of historicity and historiography, Anyange Press, 1995; Eisha Stephen Atieno-Odhiambo, *The historical anthropology of an African landscape*, Ohio University Press, 1988.

43 Ojwang, *Constitutional development in Kenya*, 19.

liberation movement. Kenyatta's political legacy continues to shape Kenya's political landscape and remains a subject of both admiration and critique in African historiography.

Moi presidency: Following the footsteps, 1979-2002

When Jomo Kenyatta, the founding president, passed away in August 1978 after fourteen years as head of state, he was succeeded by Daniel Arap Moi, who had served as Kenyatta's vice-president from 1966-1978. During Kenyatta's presidency, the political realm was dominated by a small Kikuyu elite, often referred to as the 'Kiambu mafia'.[44] This group tended to undermine Kenyatta's nationalist and populist background, alienating other ethnic groups, as well as many non-conforming Kikuyus. The succession of Jomo Kenyatta was a highly contested and critical period in Kenya's political history, marked by intrigue and intense political manoeuvring.

Andrew Morton, delves into how Daniel Arap Moi, the then Vice President, successfully navigated the power struggle and eventually became Kenya's second president. Morton highlights Moi's political acumen and ability to outmanoeuvre potential rivals, despite being considered a weak leader by many within Kenyatta's inner circle.[45] The transition was carefully managed to ensure continuity and stability, though it was accompanied by fears of potential ethnic violence and political unrest.

There were power struggles within Kenyatta's government and Moi capitalised on these divisions within the ruling elite. There was resistance and resilience that shaped the succession through backroom deals, alliances, and betrayals. Moi's calm demeanour, loyalty to Kenyatta, and ability to mobilise support within key factions enabled him

[44] Legum, *Africa contemporary record: Annual survey and documents 1989-1990.*

[45] Andrew Morton, *Moi: The making of an African statesman*, Michael O'Mara Books, 1998.

to rise to the presidency peacefully, even as critics underestimated his capacity to consolidate power once he assumed office.[46]

Although Moi was loyal to Kenyatta, he was never accepted into his inner circle. He also came from the Kalenjin ethnic group. He was regarded by Kenyans to be the right candidate to steer the country towards a more accommodating human rights era, without ethnic dominance. This general perception of Moi by Kenyans was reinforced by the decisions and promises he made immediately he took over the presidency. In December 1978 Moi released political detainees across the ethnic spectrum, most of whom had been languishing in jails for years.[47] He also reassured Kenyans that his administration would not condone drunkenness, tribalism, corruption, and smuggling, problems already deeply entrenched in Kenya.

However, as a candidate in a bonapartist situation, he was seriously deficient in two respects: one, he totally lacked charisma and any type of historical claim to the presidency and two, he was not politically adroit, and seemed intellectually out of his depth. On his accession to the presidency, Moi appeared as both the obedient follower and implicit critic of Kenyatta. He attempted to cover himself with Kenyatta's mantle, and at the same time to distance himself from the more corrupt features of Kenyatta's regime. The word *nyayo* (Kiswahili for footsteps) was soon elevated to the level of national ideology. It was first used by the new government to emphasise continuity: Moi was following in Kenyatta's footsteps but lacking the Kenyatta charisma.

Moi had to pledge himself to clean up the corruption associated with the previous regime in order to ensure that the people would follow in his footsteps. He had to pose as a populist leader who would foster the interests of the 'small man' thus, one of his earliest pronouncements was that 'one can accumulate enough wealth to buy a golden bed,

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46 See generally, Philip Ochieng, *I accuse the press: An insider's view of the media and politics in Africa*, East African Educational Publishers, 1992; and Joseph Karimi and Philip Ochieng, *The Kenyatta succession*, Transafrica Press, 1980.

47 David Leonard, *African successes: Four public managers of Kenyan rural development*, University of California Press, 1991, 169.

but one cannot buy sound sleep with money'.[48] His first executive act was to suspend the allocation of residential and commercial plots on the grounds that some big men were grabbing everything and he soon announced his intention to revive the moribund ruling party KANU, and to hold long overdue party executive and national elections.

Despite his failure to match populist rhetoric with deeds, there is no disputing the fact that Moi was popular with most Kenyans at the end of 1978. His release of Kenyatta's political detainees on 12 December 1978, and promise that his government would only use detention without trial as a last resort, brought even the university students into the streets to demonstrate in his favour. But soon things began to go spectacularly wrong for his government and the country and once the downward spiral had begun, there would be no reversing it.[49]

Unlike Kenyatta, Moi came to power with no historic claim to it.[50] He had not only played no direct role in the nationalist struggles leading to independence, but had been in opposition to it, being a member of the pre-independence Legislative Council as a colonial appointee. Also, in the early years of independence he had also been in opposition to the nationalist consensus as a member of the Kenya African Democratic Union (KADU). His personal attribute was dramatically opposed to those of Kenyatta. He lacked his predecessor's charisma, confidence and exuberance. To the extent that manipulation is an art of politics, he was not a politician thus, he paradoxically became the chief political leader because he was non-political. His best credential to leadership was that he would not radically alter the existing power relations.

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48 Legum, *Africa contemporary record: Annual survey and documents 1989-1990.*

49 Daniel Branch, *Kenya: Between hope and despair, 1963-2011,* Yale University Press, 2011.

50 If Kenyatta had enjoyed a reputation as a conciliator before he became chief of state, Daniel Arap Moi came to the presidency as a man whose qualities as a leader were largely unknown. Although Moi served as vice president for twelve years, the Kalenjin leader and former KADU chairman had acted primarily as Kenyatta's agent in building bridges between the country's different cultural communities and had had little opportunity, perhaps little inclination, to articulate his own views.

During this era, President Moi appeared to exercise a mixture of enumerated inherent and residual executive powers.[51] Despite the immense constitutional and statutory powers embodied in those offices, the Constitution did not construct a presidency within the inherent or residual power theories. This was largely a result of the extension of traditional and charismatic authority embodied by the occupants of the offices.[52] The impact on the exercise of public authority was profound. First, the rationale for the exercise of public authority by state officers was neither managerial nor political nor legal; it became patrimonial and patriarchal. The public service became an appendage of the executive through which presidents, their families, handlers and close political associates amassed wealth through rent-seeking, including illegitimate and primitive accumulation of the resources of the state.[53]

The result of the patrimonial exercise of public authority by both the presidency and the public service was deep ethnic, racial, gender, regional and other geographical inequities, inequalities and marginalisation. In addition, public authority was used by the President and other public officials to disenfranchise citizens of their constitutionally guaranteed rights. This fomented dissent in the form of political party opposition, emergence of a civil society and an increasingly insistent international community, all of which pushed for political and legal reforms.[54]

By 1988, there was concerted pressure from the single-party opposition, civil society, academia and the international community for reforms, especially the repeal of section 2A of the Constitution to allow multi-party politics. This finally paid off in 1988 with the restoration of

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51 Such para-juridical powers are partly attributed to the President's claim to a historical role in the struggle for independence, his charisma, or his role in the sole or dominant political party. There are echoes of the classical Weberian legitimate sources of power in this schema.

52 Yash Pal Ghai, 'The rule of law, legitimacy and governance' in Yash Pal Ghai, Robin Luckham, and Francis G Snyder (eds) *The political economy of law: A third world reader*, Oxford University Press, 1986, 179-208.

53 Patrick Michael Ogeto, 'Party politics and repression in Kenya, 1963-2012', Unpublished MA thesis, Laikipia University, 2022.

54 Ogeto, 'Party politics and repression in Kenya, 1963-2012'.

security of tenure to superior court judges, the Attorney General and other constitutional office holders, and, ultimately, the repeal of section 2A in 1991. The repeal allowed for the introduction of multi-party politics in Kenya. Moi and KANU, which by then was dominated by the Kalenjin ethnic group, could no longer maintain a stranglehold on Kenyan politics and the allocation of economic resources.[55]

Between 1992 and 2002, there were other constitutional, statutory and political reforms that had a significant impact on the nature of the presidency and the exercise of public authority. These were the limitation of the President's tenure to two five-year terms, repeal of presidential powers over security and declaration of emergency, the creation of an 'independent' Electoral Commission of Kenya (ECK), and empowerment of Parliament by the establishment of the Parliamentary Service Commission (PSC). The presidency and the state also lost considerable political and administrative power as a result of the market liberalisation programmes advocated by the Bretton Woods institutions from the mid-1980s.[56]

Moi's centralisation and personalisation of power led to the subordination of the functions of the judiciary and of parliament. As was the case during the *de jure* one party state rule, human rights violations by his administration continued even after the post 1992 and 1997 multiparty elections. Moi persistently demonstrated unwillingness to uphold the sanctity of human rights at home. Despite constitutional reform, the government was unable to fulfil its obligation to the country's citizens as enshrined in the constitution and international human rights treaties that it is party to. In and of themselves, the elections of 1992 and 1997 proved insufficient to guarantee human rights. It was also clear that an independent judiciary and an accountable police force were required if human rights and civil liberties were to be secured for the majority of Kenya's peoples.[57]

55 Ogeto, 'Party politics and repression in Kenya, 1963-2012'.

56 Ogeto, 'Party politics and repression in Kenya, 1963-2012'.

57 Ogeto, 'Party politics and repression in Kenya, 1963-2012'.

As the 2002 general election approached, President Moi and his close advisers sought to control the Moi succession politically, administratively and constitutionally through the manipulation of the constitutional review process that looked to be on its home stretch. This presidential power play galvanised the political opposition within and without parliament to come together under the National Rainbow Coalition (NARC), which would successfully challenge the ruling party KANU, and bring to an end its 40-year rule.

In sum, Daniel Arap Moi's presidency in Kenya, spanning from 1978 to 2002, was characterised by an increasingly centralised and autocratic governance style. Moi, who succeeded Jomo Kenyatta, initially maintained a semblance of continuity but gradually consolidated his power, turning Kenya into a *de facto* one-party state under the Kenya African National Union (KANU). His administration was marked by the extensive use of patronage, suppression of dissent, and manipulation of ethnic divisions to maintain control. The 1982 attempted coup led to a crackdown on opposition and further tightening of Moi's grip on power, as he amended the constitution to make Kenya a one-party state, solidifying KANU's dominance.[58]

It was widely believed that under Moi's rule, political repression and human rights abuses became rampant.[59] The government frequently used detention without trial, torture, and intimidation to silence critics and opposition leaders. The media and civil society organisations faced severe restrictions, and freedom of expression was curtailed. Despite internal and external pressure, Moi resisted calls for political liberalisation until 1991, when widespread protests and international pressure forced him to reluctantly legalise multi-party politics. However, the subsequent elections in 1992 and 1997 were marred by allegations of electoral fraud, violence, and manipulation, ensuring Moi and KANU's continued dominance.[60]

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58 Ogeto, 'Party politics and repression in Kenya, 1963-2012', 110

59 Kihoro Wanyiri, *The price of freedom: The story of political resistance in Kenya*, Mvule Africa Publishers, 2005, 28.

60 David Throup and Charles Hornsby, *Multi-party politics in Kenya*, Ohio University Press, 1997, 123.

Economically, Moi's presidency was plagued by widespread corruption and mismanagement, which stunted Kenya's development and exacerbated poverty. Grand corruption scandals, such as the Goldenberg scandal, drained public resources and undermined confidence in the government.[61] Despite these challenges, Moi managed to maintain a base of support through patronage networks and by leveraging ethnic alliances. His departure in 2002, after constitutional term limits prevented him from running again, marked the end of an era and paved the way for a more democratic political landscape in Kenya. The transition to Mwai Kibaki's presidency brought hopes for reform and recovery, setting the stage for significant constitutional changes and efforts to address the legacies of Moi's long rule.

Daniel Arap Moi's presidency, which lasted from 1978 to 2002, has been characterised by contrasting assessments from both regional and Western perspectives. In the regional context, Moi was seen as a stabilising force in East Africa. His leadership played a key role in mediating regional conflicts, particularly in Uganda and Sudan, where he helped to broker peace agreements. Moi's Kenya was also relatively stable compared to its neighbours, which were plagued by civil wars and political unrest.[62] However, his long tenure was marked by growing authoritarianism, with widespread suppression of dissent, a weakened opposition, and increasing ethnic tensions. Regionally, Moi's image as a leader who maintained stability was appreciated, but this was tempered by criticisms of his repressive policies and the entrenchment of patronage politics.

However, despite the above, Moi's presidency found an acclaim from the Western societies. His presidency was initially viewed favourably, especially in the Cold War context. Kenya was a key ally of the West, particularly the United States and Britain, who saw the country as a bulwark against the spread of communism in Africa. Moi's gov-

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61 Michela Wrong, *It's our turn to eat: The story of a Kenyan whistle-blower*, HarperCollins, 2009, 11.

62 Korwa Adar, *Kenya and the Sudan peace process: A decade of diplomatic efforts*, African Centre for Technology Studies, 2003, 45.

ernment received substantial economic aid and diplomatic support, especially during the early years of his rule. However, by the 1990s, as global attention shifted towards democratisation and good governance, Moi's regime faced increasing criticism from Western governments and international organisations for human rights violations, corruption, and resistance to political reforms.[63] The West, while valuing Kenya's strategic importance, pressured Moi into implementing multi-party democracy in 1992, although his regime continued to be criticised for electoral manipulation and stifling opposition.[64] His legacy in the West remains complex – he is remembered as a pragmatic leader who maintained Kenya's international relationships but also as a ruler whose governance was marred by authoritarianism and corruption.

Kibaki presidency: Consolidation and transition to democracy, 2003-2013

The euphoric optimism on the part of the general public was captured in a poll conducted three months after the historic December, 2002 elections that ranked Kenya the most optimistic nation on earth. Indeed, those who remained cautious retained the attitude that anything but Moi or KANU was better.[65] At the more formal level of commentators, two trajectories of optimistic expectations are discernible. The first focused on the person of the new president while the second was rooted in the older civil society paradigm within this immediate post-election context. Some scholars praised Kibaki as a man of 'integrity and efficiency' who, 'despite his association with the worsening performance of the Moi regime took a leading role in fostering the multiparty opposition'.[66]

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63 Branch, *Kenya: Between hope and despair, 1963-2011*, 112.

64 Shadrack Wanjala Nasong'o, *Contemporary Kenya: Democracy and political change*, Palgrave Macmillan, 2008, 39.

65 Shadrack Wanjala Nasong'o, 'Civil society and African democratization: The flip side of the coin', 11 *Studies in Democratization* (2002) 14.

66 David Anderson, 'Briefing Kenya's elections 2002: The dawning of a new era?' 102(407) *African Affairs* (2003), 331-342.

Others, even though they criticised his post-election ethical agenda, noted Kibaki's reputation as a gentleman.[67]

The second trajectory of formal optimism about the possibilities of a new mode of politics in Kenya was rooted in the perspective of civil society as an agent of change and a catalyst of political transformation. This perspective lauds civil society as the bastion of democracy and the realm within which democratisation ought to be engineered. Associated with the World Bank and International Monetary Fund notion of state failure in Africa, this approach vouches for non-state actors as the main players in Africa's democratisation. It calls for greater financial backing for non-state actors such as non-governmental organisations (NGOs) to facilitate the thickening of civil society as a buffer against the corrupt state.[68] Indeed, civil society organisations played a crucial role in the politics of democratisation in Kenya and, on assumption of power, the National Rainbow Coalition (NARC) brought into government a number of luminaries of the civil society realm. These include the likes of Kiraitu Murungi, Kivutha Kibwana and Mirugi Kariuki, even as others including Gibson Kamau Kuria and Maina Kiai were appointed to key positions as lead counsel in the Goldenberg Commission of Inquiry, and head of the public human rights body, the Kenya Human Rights Commission respectively.

In view of this, expectations were high that these individuals would use their democratic credentials, honed within the realm of civil society activism, to nurture and promote a new mode of politics for the overall betterment of governance in the country. The expectation was

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67 C Shisanya, 'The Kibaki ethical agenda for renewal in Kenya: Challenges and proposed solutions', Unpublished Paper presented at the Council for the Development of Social Science Research in Africa (CODESRIA) East African Sub-Regional Conference on East Africa, Addis Ababa, 2003, 16.

68 See for example, Stephen Orvis, 'Kenyan civil society: Bridging the urban-rural divide?', 41(2) *Journal of Modern African Studies* (2003) 247-268; Joel Barkan 'New forces shaping Kenyan politics', 18 *Africa Notes,* 1-5; John Harbeson, 'Civil society and political renaissance in Africa' in John Harbeson, Donald Rothschild and Naomi Chazan (eds) *Civil society and the state in Africa*, Lynne Rienner, 1994, 475-494; Thomas Callaghy, 'Civil society, democracy and economic change in Africa: A divergent opinion about resurgent societies' in Harbeson and others (eds) *Civil society and the state in Africa*, 231-253.

reinforced further with the tapping of John Githongo from directorship of Transparency International's Kenya chapter to become Permanent Secretary for ethics and governance in the Office of the President.

The Kibaki presidency was thus born out of political arrangements between National Alliance Party of Kenya (NAK) and Liberal Democratic Party (LDP).[69] Among the political class, the body politic and the electorate, there was a sense of power-sharing established by the context of the constitutional reform movement and the memorandum of understanding between NAK and LDP. While the constitutional text had not changed, the Kibaki presidency was expected to depart from the Moi approach because of the collegial nature established by such coalition organs as the NARC Summit. During this phase, the checks and balances on the presidency were within the framework of traditional constitutional principles like separation of powers. The coalition arrangements were politically significant to the extent that major government programmes demanded consultation and concurrence between the two coalition members, with the threat of public disapproval or sabotage in case there was no concurrence.[70]

In addition, the NARC Government, in its formative years, sought to introduce a three-pronged approach to the exercise of public authority: First, the new public management was characterised by the initiation of performance contracting, institutional service charters and strategic plans. Second, there was emphasis on broader political representation in governance, characterised by inclusion of civil society, academia and other non-state actors in the governance process, for example, in the initiation of the Economic Recovery Strategy for Wealth and Employment Creation, 2003-2007 (ERS).[71] Third, the juridical or adjudicatory approach ushered in increased recognition of fundamental rights and fi-

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69 Denis Kadima and Felix Owuor, 'Kenya's decade of experiments with political party alliances and coalitions: Motivations, impact and prospects', 13 (1) *Journal of African Elections* (2014) 155.

70 For example, debates on major economic policy blueprints like the Economic Recovery Strategy for Wealth and Employment Creation 2003-2007 [ERS].

71 Government of Kenya, 'Economic recovery strategy for wealth and employment creation 2003-2007', Ministry of Planning and National Development, June 2003.

delity to the law in the governance process. Arguably, during this phase there was a renewed neo-liberal sense of the character of executive and public authority in the affairs of the state.

The 2007-2008 post-election violence in Kenya was a significant crisis that unfolded after the December 2007 general elections, which were marred by allegations of electoral fraud. Following the announcement of President Mwai Kibaki's victory over Raila Odinga, his main rival, widespread violence erupted across the country. The unrest was fuelled by ethnic tensions, political disputes, and deep-seated grievances about inequality and historical injustices.

The violence led to over 1,000 deaths, the displacement of around 600,000 people, and massive property destruction. The crisis prompted international intervention, leading to a mediated peace agreement brokered by former UN Secretary-General Kofi Annan. This led to the formation of a coalition government between Kibaki and Odinga, with Odinga assuming the position of Prime Minister. The aftermath of the violence saw significant political and constitutional reforms aimed at addressing the underlying issues, including the introduction of a new constitution in 2010 that sought to decentralise power and promote inclusivity. These crises altered the nature of presidency in Kenya in many respects.

This phase of the presidency therefore, was ushered in by the passing of the 2008 National Accord and Reconciliation Act (NARA) as part of the constitutional text. NARA created the office of the Prime Minister in the context of a power-sharing agreement on the basis of portfolio balance. It thus created or contextualised the contested idea of a dual or semi-presidency.[72] While it had been there at independence, such sharing of power had not materialised until after the post-election violence.[73]

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[72] Ben Sihanya and Duncan Okello, 'Mediating Kenya's post-election crisis: The politics and limits of power-sharing agreement' in Karuti Kanyinga and Duncan Okello (eds) *Tensions and reversals in democratic transitions: The Kenya 2007 General Elections,* Institute of Development Studies (IDS), University of Nairobi, and the Society for International Development (SID) Eastern and Central Africa, 2010.

[73] In fact, at the instance of any turf war between the President and Prime Minister, the President's handlers and supporters would point out that executive power was vested by the Constitution in the President, and that this power was not shared. This raises

Consequently, the institution of the presidency was qualified, at least juridically, by the power-sharing agreement in two ways: first, the power-sharing between the president and the prime minister, or between the Party of National Unity (PNU) and Orange Democratic Movement (ODM). This is in the share and allocation of executive responsibilities within the executive structure.

Second, power-sharing between the executive and parliament. This has been manifested in the following ways: first, the creation of the post of prime minister who is answerable to parliament and who can be removed from office by a simple majority vote in parliament. Second, in the spirit of the accord and the other mediation agreements, parliament, through parliamentary committees, enacted legislation giving it powers of appointment of members of executive bodies and commissions, such as the Interim Independent Electoral Commission (IIEC), the Interim Independent Boundaries Review Commission (IIBRC), the Truth, Justice and Reconciliation Commission (TJRC), and the Interim Independent Constitutional Dispute Resolution Court (IICDRC).[74]

The historical and then current context of the constitutional review process resulted in a thoroughly negotiated presidential system of government. The 2010 Constitution departs from the dual executive of the power-sharing Grand Coalition Government and establishes what has been called an American presidency. Under Articles 131 and 132, the president exercises, among other powers, executive authority of the republic as the head of state and government; is the Commander-in-Chief of the Kenya Defence Forces; chairs the National Security Council; appoints high ranking state officers; and directs and coordinates the functions of government ministries.

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the question of the concept of 'power' as captured in the NARA, which continues to operate during the transitional phase discussed below.

[74] On numerous occasions in 2008, the Head of Public Service, Ambassador Francis Muthaura, bemoaned the legislature's encroachment onto the Executive's turf and infringement of the doctrine of separation of powers through its new role in the nomination of persons to hold executive offices.

In contrast to the imperial presidency under the 1969 Constitution, this presidency has been subjected to horizontal, vertical and normative checks and balances. Horizontal checks are in the form of an independent and empowered bicameral parliament, an independent and juridically and administratively empowered judiciary, and commissions and independent offices. Vertical checks are in the form of a devolved system of county governments, a restructured public service and an empowered civil society. The president and the entire public service are bound by established standards in their exercise of constitutional, statutory, and administrative public authority.[75]

Unlike the parliament in the 1969 Constitution, the bicameral parliament has been delinked from executive control and given powers to vet all presidential appointees, impeach the president, and oversee and investigate cabinet secretaries and other state officers. Parliament also has its own administrative bureaucracy to facilitate its daily operations. The transitional provisions require parliament to enact at least 49 pieces of legislation to operationalise the Constitution. Thus, as an organ of the state, parliament's legislative role is fundamental to defining the powers and limits of the presidency and other state officials exercising public authority. In addition, its powers to amend the statutes will have significant impact on the relations with the executive and other organs of the state.

The constitutional provisions on principles and values of governance, for example, and also provisions on policymaking, will require legislation to put them into operation across national and devolved levels of government. Parliament's role in interpreting, applying, enforcing and implementing the constitution, legislation and policies will play an important role in checking presidential and public authority.[76] Moreo-

[75] Sihanya, 'The presidency and public authority in Kenya's new constitutional order', 11.

[76] Constitution of Kenya (2010) Article 129 (1) states that 'Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution'. Article 131 (2) states that 'The President shall (a) respect, uphold and safeguard this Constitution; (b) safeguard the sovereignty of the Republic; (c) promote and enhance the unity of the nation; (d) promote respect for the diversity of the people and communities of Kenya; and (e) ensure the protection of human rights and fundamental

ver, the house speaker and parliamentary committees such as the Legal Affairs Committee and the Finance Committee were instrumental in stamping parliamentary authority during the stand-off created by President Kibaki's contested nomination of persons to the offices of Chief Justice, Attorney-General, Director of Public Prosecution and Controller of Budget. Indeed, Speaker Marende's ruling set a precedent in defining the new relations between the presidency and parliament under the Constitution of Kenya (2010), and especially because fresh nominations ensued.

In sum Mwai Kibaki's presidency in Kenya, which lasted from 2002 to 2013, marked a significant shift from the autocratic rule of his predecessor, Daniel Arap Moi, towards greater political openness and economic reform. Elected on a platform of change and anti-corruption, Kibaki's victory ended the Kenya African National Union's (KANU) four-decade rule and brought a sense of renewed optimism to the country. His administration prioritised economic growth, achieving notable improvements in sectors such as education and infrastructure. The introduction of free primary education in 2003 was one of Kibaki's most celebrated policies, dramatically increasing school enrolment and literacy rates.

However, Kibaki's presidency was not without challenges. His tenure was marred by persistent allegations of corruption within his administration, undermining his reformist agenda. The most significant crisis during his presidency was the already mentioned disputed 2007 election, which led to widespread violence and ethnic clashes, resulting in over 1,000 deaths and the displacement of hundreds of thousands of people.

On a more positive note, one of the most notable achievements of Kibaki's presidency was the promulgation of a new constitution in 2010. This landmark reform introduced significant changes, including the decentralisation of power through the creation of county governments,

freedoms and the rule of law'. This is in contradiction to Section 23 (1) of the 1969 Constitution, which was more expansive and stated 'The executive authority of the Government of Kenya shall vest in the President and, subject to this Constitution, may be exercised by him either directly or through officers' subordinate to him'.

enhanced checks and balances on the executive, and the establishment of a more robust bill of rights. The new Constitution was a crucial step in addressing the issues of governance and institutional weaknesses that had plagued Kenya. By the end of his presidency, Kibaki had set the stage for a more democratic and transparent political environment, despite the mixed legacy of his administration's struggles with corruption and ethnic division

The Constitution of Kenya (2010) significantly transformed the presidency by introducing checks and balances to curb the concentration of executive power. It established a more accountable and transparent system by devolving authority to 47 county governments, reducing the president's control over local administration. Presidential terms were limited to two five-year terms, reinforcing democratic succession. The Constitution also introduced a clearer separation of powers between the executive, legislature, and judiciary, enhancing institutional independence. Additionally, the creation of independent commissions, such as the Independent Electoral and Boundaries Commission (IEBC), sought to ensure free and fair elections. These reforms aimed to prevent abuses of power and foster greater political stability, ensuring that the presidency operated within a constitutional framework that promoted inclusivity, accountability, and the rule of law.

The Uhuru state and the vulnerable presidency

Uhuru Kenyatta's presidency from 2012 to 2022 was marked by both political continuity and significant transformation in Kenya's governance and economic landscape. Upon taking office in 2013, Kenyatta's government adopted an agenda focused on economic growth, infrastructure development, and national unity. His administration launched flagship projects such as the Standard Gauge Railway (SGR), which linked Mombasa to Nairobi and later extended to Naivasha, symbolising his ambition to modernise Kenya's infrastructure. Uhuru Kenyatta's government also embarked on other infrastructure megaprojects

like road networks and energy production, particularly through renewable energy investments.

Politically, Kenyatta's presidency was shaped by the pursuit of national unity through initiatives like the 'handshake' with opposition leader Raila Odinga in 2018. This unexpected political truce, following years of hostility between their respective parties, aimed to foster national cohesion after the divisive 2017 elections. It resulted in the Building Bridges Initiative (BBI), which sought to address underlying issues of political instability, ethnic tensions, and electoral disputes through constitutional amendments.[77]

However, the BBI faced strong opposition and was ultimately struck down by the courts, casting doubt on Kenyatta's ability to effect long-term political reform. Despite this, the 'handshake' redefined the political landscape by creating alliances that shifted traditional power structures in Kenyan politics, especially within Kenyatta's own party, Jubilee. The fallout from this realignment led to growing tensions between Kenyatta and his deputy, William Ruto, setting the stage for political intrigue in his second term.

Economically, Kenyatta's presidency was characterised by ambitious visions under the big four agenda, which prioritised affordable housing, universal healthcare, manufacturing, and food security. However, the implementation of these ambitious projects faced challenges, including corruption scandals, inadequate resources, and bureaucratic inefficiencies, which hampered their full realisation. The government was criticised for the slow pace of reforms in manufacturing and food security, while rising public debt, exacerbated by borrowing for large infrastructure projects, put strain on the national economy. While there were visible improvements in certain sectors, by the end of Kenyatta's presidency, questions remained about the sustainability of his economic policies.

[77] Githu Muigai, *Power, politics and law: Dynamics of constitutional change in Kenya, 1887-2022*, Kabarak University Press, 371-378.

In terms of governance and the rule of law, Kenyatta's presidency was marked by both advances and setbacks. The judiciary, emboldened by the Constitution of Kenya (2010), occasionally clashed with the executive, particularly following the Supreme Court's annulment of the 2017 presidential election, a first in African history.[78] Kenyatta initially respected the ruling, though he later expressed frustration with the judiciary, accusing it of undermining his government's efforts. His administration's commitment to the fight against corruption was questioned, as several high-profile graft cases emerged involving government officials and state resources. Despite launching various anti-corruption initiatives, critics argued that political interference hindered their effectiveness. Nonetheless, Kenyatta's presidency left a mixed legacy, characterised by infrastructural transformation, political realignment, and ongoing challenges in governance and economic management.

Conclusion

Since Kenya's independence in 1963, the institution of the presidency has undergone significant evolution, reflecting the country's shifting political landscape. Initially, the presidency was characterised by a centralised and authoritative structure under president Jomo Kenyatta. His administration established a strong executive branch with substantial control over the legislative and judicial arms of government, reinforcing a one-party state that dominated political life. The presidency during this era was marked by extensive executive powers, limited checks and balances, and a personalised form of governance where presidential authority was both absolute and unchallenged.

The post-independence era saw a major transformation with the adoption of the Constitution of Kenya (2010), which redefined the presidency in response to previous criticisms of excessive concentration of power. This new constitutional framework introduced a more decen-

[78] Dominic Burbidge, 'Transition to subnational democracy: Kenya's 2017 presidential and gubernatorial elections', 30(3) *Regional and Federal Studies* (2020) 387-414.

tralised system of governance, with enhanced roles for the prime minister, parliament, and county governments. The presidency's powers were curtailed to ensure greater checks and balances, aiming to prevent autocratic rule and promote democratic governance. These changes reflected Kenya's ongoing struggle to balance effective leadership with democratic principles, illustrating a shift from a highly centralised executive authority to a more collaborative and accountable presidential system.

The Constitution of Kenya (2010), as we have argued, significantly redefined the presidency, aiming to address previous concerns about the excessive concentration of power. By instituting a more decentralised system, it introduced a robust framework for checks and balances, diluting the presidency's authority which had been extensive under previous constitutions. The introduction of a bicameral legislature, increased the devolution of powers to county governments, and the establishment of an independent judiciary which were pivotal changes. These reforms sought to create a more balanced distribution of power, thereby weakening the presidency's grip on the executive and legislative branches. The president's role was redefined to include shared responsibilities with the prime minister and the strengthened parliament, reducing the unrestrained power previously held.

However, this dilution of presidential power also made the office more vulnerable and arguably weaker. The president's diminished authority meant that crucial executive decisions required more negotiation and compromise with other branches of government. This fragmentation of power often led to gridlock and inefficiencies, as the president had to work within a more complex and collaborative framework. Additionally, the strengthened parliament and judiciary increased the scrutiny and accountability of the presidency, limiting the executive's ability to act unilaterally. While these changes aimed to foster democratic governance and prevent autocratic rule, they also resulted in a presidency that lacked the decisiveness and control it once wielded, reflecting a shift towards a more collective and less centralised approach to governance.

From seats to voices: Analysing the effective participation of women in governance in the Kenyan parliament

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Abstract

Since Kenya's independence, women have strived for equal participation in governance, despite facing significant challenges due to societal norms. The Constitution of Kenya (2010) introduced gender reforms, enhancing representation through quotas and decentralisation. Since 2013, women's representation in Kenya's parliament has increased. However, the question that remains is whether the elected or nominated women have exercised their roles effectively. This paper traces women's political participation in Kenya from the pre-colonial to the post-2010 Constitution period, highlighting the fight for gender parity and subsequent representation. It calls for gender equality rather than mere parity thereby addressing concerns about women in parliament being 'voiceless representatives.' This paper emphasises the need for women's meaningful participation in decision-making processes, including their presence in parliamentary committees. This entails not only numerical representation but also active involvement in shaping policies and governance agendas, making their presence substantive rather than symbolic.

Keywords: women representation, effective participation, equality, gender parity, political inclusion

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Introduction

Some communities in Africa hold a negative stereotype of women that suggested the weakness and even inherent stupidity of women.[1] Scholars point out that derogatory statements were common in some communities to the extent that their derogatory connotations were hardly noticed.[2] Some stories and myths have been propagated about the negative traits of women in leadership in the African precolonial societies for example, a tale is told of *Chief Wangu wa Makeri*, who became so intoxicated and crazed for power that she danced naked before a crowd which promptly removed her from power. Additionally, women were portrayed as power-hungry, conceited, cowardly, soft-hearted and immoral.[3]

In some communities, male children were prioritised in inheritance, while women were sidelined.[4] The inheritance of property followed a patriarchal system, where the eldest son or the male heirs inherited property from their father or the deceased male relatives.[5] This system was based on the belief that men were the primary custodians of family property, and they were expected to maintain it for welfare of the entire family.

In the precolonial period, most African communities were headed by chiefs and councils of elders.[6] Leadership and political roles were predominantly male-dominated, with chiefs and councils of elders ex-

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1 Wilhemina Oduol, 'Kenyan Women in Politics: An analysis of past and future trends', 22, *Transafrican Journal of History* (1993) 167, citing Micere Mugo, 'The role of women in the struggle for freedom', in Achola Pala, Thelma Awor and Krystall Abigail (eds) *The participation of women in Kenya society*, Kenya Literature Bureau, 1978, 210.

2 Oduol, 'Kenyan Women in Politics: An analysis of past and future trends', 167.

3 Oduol, 'Kenyan women in politics: An analysis of past and future trends', 167.

4 Mary Mogute, 'Investigating female children's rights to family property and its implication on children's justice in Kisii County,' 1(1) *Interdisciplinary Journal of the African Child,* Special Edition (2019) 2.

5 Patricia Kameri Mbote, 'The law of succession in Kenya: Gender perspective in property management and control', *Nairobi Women and Law in East Africa*, 1995, 4.

6 Martin K Maitha and Magunga Willima Oduor, 'Paramount chiefs', *Google Arts and Culture*, Kenya National Archives.

cluding women. For example, the *Njuri Ncheke* among the Meru community has been largely male dominated.[7] These factors made it near impossible to hear of women's role in 'manly spheres' like politics, international affairs and governance in Kenya.[8] These patriarchal beliefs undermined women and reinforced their dependence on men. Despite women's contributions during the colonial period and in the fight for independence, their achievements in political affairs were glaringly understated.

This paper analyses the effective participation of women in governance. The present part introduces the discussion. The first section explores the effective participation of women in governance in Kenya, focusing on the historical, political, and social dynamics that have shaped their role in decision-making processes. Despite significant strides towards gender equality, women have faced persistent barriers in accessing and influencing political spaces. Beginning from the precolonial period, through the colonial period, and into post-independence Kenya, women have struggled to secure their rightful place at the decision-making table. The barriers have been rooted in social, cultural and institutional factors including deeply entrenched patriarchal norms, limited access to education and restrictive political structures that have historically marginalised women's voices in governance.

Drawing from election data in 2013, 2017 and 2022, the paper then proceeds to explore women's representation after the promulgation of the Constitution of Kenya (2010) highlighting the gradual increase in women's representation in legislative bodies at both the national and county levels. It analyses the court's stance on women's representation, particularly in enforcing the two-thirds gender rule. It underpins the challenges which still persist in ensuring the meaningful participation of women in governance, where simply achieving numerical representation falls short of guaranteeing that women's voices are heard and that their perspectives are integrated into decision-making processes.

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7 Charlese Wanyoro, 'Meru elders heed calls to include women in traditional courts', *Nation*, 3 March 2023.

8 Oduol, 'Kenyan women in politics: An analysis of past and future trends', 167.

This paper then shifts to a discussion of qualitative representation, addressing the importance of ensuring that women's voices are meaningfully integrated into governance processes. It concludes with recommendations to further enhance gender equality in political participation, including enforcing strict compliance with gender equality laws and focusing on fostering not just numerical representation but also the empowerment and influence of women in decision-making roles.

The effective participation of women in governance

From seats to voices: Women's fight for representation in Kenya, 1920-1963

Women remain significantly underrepresented in positions of political power.[9] History shows that no African woman was nominated to LegCo up to 1958.[10] However, white women in Kenya played a significant role in fighting for gender representation in the colonial era.[11] Kenya had its first general election in 1920.[12] Although the election had only one racial group, it involved multiple genders.[13] It was among the first elections to observe gender parity in the world since women were allowed to vote and contest for electoral positions in Kenya.[14] This was yet to happen in Britain, USA and other European countries.[15] In Britain for example, women were neither eligible nor permitted to vote before fulfilling certain conditions.[16] The conditions were that women could only vote if they were above the age of 30, married or held a university

9 Maria Arnal Canudo and Fatuma Ahmed Ali, 'Exploring feminine political leadership attributes and women's campaigns during the 2017 general election in Kenya' in Nanjala Nyabola and Marie-Emmanuelle Pommerolle (eds) *Where women are: Gender and the 2017 Kenyan elections*, Africae, Twaweza Communications, 2018, 116.

10 Godfrey K Sang, 'Women and the parliament of Kenya: Historical reflections (1917-1974)', *SSRN Electronic Journal*, 21 June 2022.

11 Sang, 'Women and the parliament of Kenya: Historical reflections (1917-1974)'.

12 Judy Moraa, 'History of election in Kenya', *Haki FM Shows News Blog*, 11 August 2022.

13 Sang, 'Women and the parliament of Kenya: Historical reflections (1917-1974)'.

14 Sang, 'Women and the parliament of Kenya: Historical reflections (1917-1974)'.

15 Sang, 'Women and the parliament of Kenya: Historical reflections (1917-1974)'.

16 Sang, 'Women and the parliament of Kenya: Historical reflections (1917-1974)'.

degree.[17] These requirements did not apply in Kenya in the 1920 general elections. While no woman vied for an elective position in the first general election, many turned up to vote in the all-male contested elections in 1920.[18]

20 July 1922 marked a historic moment both in Kenya and in the British Commonwealth when Mrs Gertrude Grogan contested in a by election for the Nairobi South seat, competing against three male candidates.[19] Although Mrs Grogan did not win, she made history as the first woman to run in an election in Kenya and possibly in the entire British Commonwealth. [20]

Lady Sidney Mary Catherine Anne Farrar was the first woman was elected to the LegCo in Kenya.[21] She was elected to the LegCo after defeating her male counterpart, Conway Harvey with only two votes.[22] Lady Farrar was elected to the LegCo as a member representing the Rift Valley, a position she held until 1942.[23] She was involved in the affairs of the East Africa Women's League (EAWL) and her election was a major triumph for the EAWL, whose members actively campaigned for her by reaching out to the women voters in her constituency.[24] This opened the door for women to contest and win elective posts in Kenya during the colonial era.

By 1939, Lady Farrar had recruited seventy women to the First Aid Nursing Yeomanry (FANY).[25] Lady Farrar started FANY to provide nursing services to soldiers who were injured during World War II. By the end of 1940, FANY's membership had increased to between 700-

17 Sang, 'Women and the parliament of Kenya: Historical reflections (1917-1974)'.

18 Sang, 'Women and the parliament of Kenya: Historical reflections (1917-1974)'.

19 Sang, 'Women and the parliament of Kenya: Historical reflections (1917-1974)'.

20 Sang, 'Women and the parliament of Kenya: Historical reflections (1917-1974)'.

21 Sang, 'Women and the parliament of Kenya: Historical reflections'. See also Christine Nicholls, 'Lady Sidney Farrar', *Old Africa Stories from East Africa's Past*, 28 September 2015.

22 Nicholls, 'Lady Sidney Farrar'.

23 Nicholls, 'Lady Sidney Farrar'.

24 Sang, 'Women and the Parliament of Kenya: Historical reflections (1917-1974)'.

25 Nicholls, 'Lady Sidney Farrar'.

800 members who were all local women.[26] Since they were no longer nursing but pursuing other useful occupations, the name was changed to Women's Territorial Service.[27] At the end of the War, FANY was disbanded.

The June 1952 elections brought in a second woman, Mrs Agnes Shaw, representing Nyanza Province. In March 1958, Governor Sir Evelyn Baring nominated Mrs Jemimah Thoiya Gecaga to the LegCo, making her the first African woman to be a member of the Legislative Council.[28] The process that led to her nomination was neither transparent nor consultative.[29] Mrs Gecaga was appointed 14 years after Eliud Wambua Mathu was nominated to the LegCo.[30] Mrs Gecaga was among the core founders of the *Maendeleo ya Wanawake* Organisation formed to advocate for gender parity in Kenya; a factor that weighed in on her appointment.[31] This influenced her appointment to the LegCo.

African women appointed to the LegCo faced a number of challenges. These women were first appointed by the country's governor, with short terms that limited their ability to form meaningful alliances with women outside the LegCo.[32] Moreover, deeper structural issues further perpetuated gender inequalities and were evident in the minimal participation of women in the nation's political landscape.[33] Their nominations were primarily a symbolic gesture by the state, showing a lack of substantial effort to address the underrepresentation of women in the LegCo.

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26 Nicholls, 'Lady Sidney Farrar'.

27 Nicholls, 'Lady Sidney Farrar'.

28 Sang, 'Women and the Parliament of Kenya: Historical reflections (1917-1974)'.

29 Phoebe Musandu, 'Tokenism or representation? The political careers of the first African women in Kenya's Legislative Council (LegCo), 1958–1962', 28(4) *Women's History Review* (2018) 587 and 592.

30 Sang, 'Women and the Parliament of Kenya: Historical reflections (1917-1974)'.

31 Nairobian Reporter, 'The immortals: The Gecagas- Chips off the old family block', *The Standard*, 2015.

32 Musandu, 'Tokenism or representation? The political careers of the first African women in Kenya's Legislative Council (LegCo), 1958–1962', 592.

33 Musandu, 'Tokenism or representation? The political careers of the first African women in Kenya's Legislative Council (LegCo), 1958–1962', 593.

After the Lancaster Conference in 1960, the government included a woman among the ten (10) African delegates in the second Lancaster Conference.[34] On 10 May 1961, Ms Priscilla Ingasiani Abwao was nominated as the only African woman representative to the Lancaster Conference.[35] The Conference was meant to provide her with a platform to advocate for the needs of African women as the country moved closer to independence.[36] However, this was not the case. Ms Abwao was silenced and disallowed to speak or engage in the discussions being held. She was made *voiceless* and was relegated to the shadows of the conversations because of her gender.[37]

In the 1962 Conference, she was permitted to submit and present a written memorandum.[38] Ms Abwao grabbed the opportunity and decided to use this opportunity to advocate for women in Kenya.[39] In her memorandum, on behalf of Kenyan women to Kenya's Independence Constitution, Ms Abwao highlighted the importance of ensuring equal representation of women in the independent Kenyan government.[40] She set the tone and pace in the fight for opportunities for women in the political and governance space before independence. By 6 December 1963, the parliament of Kenya had received the royal charter to start its functions as an independent nation, however, its parliament did not include any woman.[41]

The struggle for women representation in post-colonial Kenya

After independence, women realised that political freedom did not automatically lead to economic or social progress, especially for

34 Paukwa, 'Priscilla Abwao: The Legislative Council delegate', *Paukwa*, 21 October 2021.
35 Paukwa, 'Priscilla Abwao: The Legislative Council delegate'.
36 Paukwa, 'Priscilla Abwao: The Legislative Council delegate'.
37 Paukwa, 'Priscilla Abwao: The Legislative Council delegate'.
38 Paukwa, 'Priscilla Abwao: The Legislative Council delegate'.
39 Paukwa, 'Priscilla Abwao: The Legislative Council delegate'.
40 Paukwa, 'Priscilla Abwao: The Legislative Council delegate'.
41 Sang, 'Women and the Parliament of Kenya: Historical reflections (1917-1974)'.

themselves and their families.[42] This realisation prompted a shift in the focus of the organisations established during the colonial era, therefore, aligning them with the aims and objectives of post-independence women groups, such as the Kenya Association of University Women (1965), *Mfangano* Women Groups (1973), Nyeri Women's Association (1974), Breastfeeding Information Group (1973), and Kenya Women Finance Trust (1981).[43]

There was no female representation in the first parliament and President Kenyatta did not nominate any woman to fill the gap thus making it an all-male parliament and reversing the progress made.[44]

In 1966, the Constitution of Kenya (Amendment) Act No 19 of 1966 abolished the senate, and its membership was combined with that of the house of representatives to form a unicameral legislature – the national assembly.[45] In 1969, Honourable Grace Onyango etched her name as the first African woman to win an electoral seat in Kenya, becoming the first woman to serve in independent Kenya's second parliament.[46] She triumphed in Kisumu Town Constituency, defeating the male contenders and capturing national attention.[47] Earlier, in 1965, she had already broken barriers by becoming the first African woman to be elected as mayor and served as the mayor of Kisumu.[48] Her journey progressed and she became the first female deputy speaker of the national assembly.[49]

The number of women increased in the third parliament. Three women were elected to parliament in 1974. These were Honourable Grace Onyango who was now serving her second term, Dr Julia Auma Ojiambo (Busia Central) and Honourable Philomena Chelagat (Eldoret

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42 Riria Ouko, 'Women organisations in Kenya', 15, *Journal of Eastern African Research* (1985) 189.

43 Ouko, 'Women organisations in Kenya', 189.

44 Sang, 'Women and the Parliament of Kenya: Historical reflections (1917-1974)'.

45 The National Assembly, 'Fact sheet No 19: History of the parliament of Kenya', 10; The Constitution of Kenya (Amendment) Act No 19 of 1966.

46 The National Assembly, 'Fact sheet No 19: History of the parliament of Kenya', 10.

47 Sang, 'Women and the Parliament of Kenya: Historical reflections (1917-1974)'.

48 Sang, 'Women and the Parliament of Kenya: Historical reflections (1917-1974)'.

49 Sang, 'Women and the Parliament of Kenya: Historical reflections (1917-1974)'.

North).[50] In 1997, Honourable Charity Kaluki Ngilu boldly stepped into uncharted territory as Kenya's first female presidential candidate and challenging the nation's highest and toughest glass ceiling.[51] Though she came in fourth, Honourable Ngilu left her mark on the political landscape as the first woman to ever contest for presidency in Kenya.

Women's contribution to the fight for constitutional reform and affirmative action in Kenya

A number of constitutional reforms took place in Kenya with major reforms dating back to the 1954 drafting of the Lyttleton Constitution as well as the Lennox-Boyd Constitution of 1958.[52] At independence, the Independence Constitution was not gender responsive. The fight for women representation through affirmative action began strongly after the 1997 general elections.[53] Women created movements that were instrumental to their struggle.[54] This began by the creation of the Women's Political Caucus (1997), the Coalition on Violence Against Women (COVAW) (1998), the Committee on Affirmative Action in 1999, the creation of the Women Lobby Team (1999-2000) and the Women's Political Alliance (2000).[55] Other crucial movements that women created included: the National Women Negotiating Team (2007), the Women's Organisations Coordinating Committee for Protecting Women's Gains (2009/2010), the G10 group (2009), the Caucus for Women's Leadership Regional Assemblies, and the '*Warembo na Yes*' (2010).[56]

Honourable Phoebe Asiyo, a member of parliament, introduced the first motion advocating for affirmative action to enhance women's

50 The National Assembly, 'Fact sheet No 19: History of the parliament of Kenya', 10.

51 Nasibo Kabale, 'Charity Ngilu: Kenya's first female presidential candidate', *The Standard Kenya*, 2018.

52 Paukwa, 'Priscilla Abwao: The Legislative Council delegate'.

53 Elishiba Njambi Kimani and Wanjiku Mukabi Kabira, 'The historical journey of women's leadership in Kenya', 1(1) *Journal of Emerging Trends in Educational Research and Policy Studies* (2012) 843.

54 Kimani and Kabira, 'The historical journey of women's leadership in Kenya', 847.

55 Kimani and Kabira, 'The historical journey of women's leadership in Kenya', 847

56 Kimani and Kabira, 'The historical journey of women's leadership in Kenya', 847.

representation in elective positions.[57] Her motion called for parliament to increase the number of women parliamentarians by eighteen (18), with at least two (2) from each province, and an extra two (2) from the Rift Valley Province.[58] Kenya had eight (8) provinces at the time. The motion was seconded by Honourable Kiraitu Murungi and a majority of the minority members of the House.[59]

Unfortunately, despite the push for change, the members of parliament at the time were unwilling to amend the constitution to include provisions increasing the number of women in leadership positions.[60] Kimani and Kabira quote Honourable Koech, the Minister of State at the time, who stated that there was no need for the motion because male members of parliament represented both women and men, and that there was already one assistant minister for culture who was a woman. He noted that women were doing a wonderful job bringing up children which was a very important role. Honourable Koech argued that 'time was not ripe for affirmative action'.[61] The motion was thus defeated.

On 12 April 2000, Honourable Beth Mugo in collaboration with women organisations and with backing from the Affirmative Action Committee, reintroduced the motion under the title *'Affirmative action'*. She pointed out that Kenya was an outlier in the region, by refusing to embrace affirmative action, like Uganda, Rwanda and Tanzania, which had already adopted and implemented such measures.[62]

The motion was strongly supported and seconded by Honourable Martha Karua.[63] Some members from the House argued that since a constitutional review was about to commence, the clerk of the National Assembly should write to the Constitution of Kenya Review Commission (CKRC) and request that affirmative action be included in the review

57 Kimani and Kabira, 'The historical journey of women's leadership in Kenya', 843.
58 Kimani and Kabira, 'The historical journey of women's leadership in Kenya', 843.
59 Kimani and Kabira, 'The historical journey of women's leadership in Kenya', 843.
60 Kimani and Kabira, 'The historical journey of women's leadership in Kenya', 844.
61 Kimani and Kabira, 'The historical journey of women's leadership in Kenya', 843.
62 Kimani and Kabira, 'The historical journey of women's leadership in Kenya', 844.
63 Kimani and Kabira, 'The historical journey of women's leadership in Kenya', 844.

process.[64] The negotiations and the draft review law had formally entrenched the principle of affirmative action in the proposed law.

Women enjoyed the fruits of affirmative action in 2007, when the number of women members of Parliament increased to twenty-one (21) with fifteen (15) elected and six (6) nominated members.[65]

Gender representation under the Constitution of Kenya (2010)

The Constitution of Kenya (2010) was promulgated on 27 August 2010 provided for a presidential system of governance.[66] The new constitutional dispensation created a bicameral parliament, re-established the senate and increased the size of the national assembly to 350 seats with 290 elected members representing constituencies, 47 county women representatives,[67] 12 nominated members and the speaker who is an *ex officio* member.[68] The senate consists of 68 members – 47 elected senators representing each of the 47 counties, 16 nominated women members and 4 members representing the youth, women and persons with disabilities and the speaker who is an ex officio member.[69]

Articles 97(1)(b) and 98(1)(b) specifically provide for seats that are exclusively reserved for women including 47 women elected by the registered voters of the counties, each county constituting a single constituency for the national assembly and 16 women members to be nominated by political parties according to the proportion of members of the senate elected under Article 90.

The Constitution of Kenya (2010) has been hailed for enshrining the gender-rule requirement through quotas.[70] Under Article 10, the consti-

64 Kimani and Kabira, 'The historical journey of women's leadership in Kenya', 844.
65 National Assembly, 'Fact sheet No 19: History of the parliament of Kenya', 11.
66 National Assembly, 'Fact sheet No 19: History of the parliament of Kenya', 11.
67 Constitution of Kenya (2010) Article 97(1)(b).
68 Constitution of Kenya (2010) Articles 97(1)(c) and (d)
69 Constitution of Kenya (2010) Article 98.
70 Constitution of Kenya (2010) Article 27.

tution provides for equity, inclusiveness, equality, non-discrimination and the protection of the marginalised as national values and principles of governance.[71] Further, Article 21(2) clarifies that equality includes the full and equal enjoyment of all rights and fundamental freedoms.[72] Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.[73] The state and individuals are prohibited from discriminating directly or indirectly against any person and on any ground.[74]

Further, the state is obligated to legislate and ensure that necessary measures are put in place to prevent discrimination since women are under the category of individuals that have suffered because of past discrimination. This includes implementing affirmative action programmes and policies to give full effect to the realisation of women's democratic rights and to recognise their role in governance and leadership positions.[75]

Article 27(8) is a great achievement in the fight for gender representation and gender equality in Kenya. Article 27(8) reads that:

> in addition to the measures contemplated under clause (6), the state shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender.[76]

Despite such a succinct provision, there has been a disconnect between the rule as laid out under the law and its application and requisite implementation.

The National Assembly and the two-thirds gender-rule crisis in Kenya

The Constitution binds parliament to enact legislation to promote the representation of women, persons with disabilities, youth, ethnic

71 Constitution of Kenya (2010) Article 10.
72 Constitution of Kenya (2010) Article 21(2).
73 Constitution of Kenya (2010) Article 27(3).
74 Constitution of Kenya (2010) Articles 27(4) and (5).
75 Constitution of Kenya (2010) Article 27(6).
76 Constitution of Kenya (2010) Article 27(8).

and other minorities as well as marginalised communities.[77] Notably, the fifth schedule, gives a timeline of five years within which parliament must have enacted the legislation. Sadly, this has never been implemented.[78]

Parliament has been criticised for failing to implement the two-thirds gender rule despite court orders.[79] The first parliament constituted in 2013 after the promulgation of the 2010 Constitution, was expected to enact legislation to ensure the two-thirds gender rule is provided for and adhered to within the five-year duration. It is regrettable that since 2015, Kenya's government has had an unconstitutional arm of government (parliament) which has passed laws and enacted legislations that are in force, applicable and binding. The unconstitutionality of parliament is due to its failure to adhere to the two-thirds gender rule, despite court directives and rulings mandating its implementation. Despite failing to meet the constitutional requirement, various bills have been tabled by legislators in the National Assembly in an attempt to move parliament towards the implementation the two-thirds gender rule.[80]

In the first two bills; the Constitution of Kenya (Amendment No 4 of 2015) Bill, popularly known as the Duale I Bill, and the Constitution of Kenya (Amendment No 6 of 2015) Bill, also known as the Duale II Bill, the National Assembly failed to muster the quorum to pass a constitutional amendment.[81] Similarly the Senate Bill (No 16 of 2015) popularly known as the Two-thirds Gender Bill on Article 256(1)(d) or the 'Sijeny Bill' failed twice after the Senate was unable to raise the requisite numbers in its favour. In both instances, members either deliberately

77 Constitution of Kenya (2010) Article 100.

78 Kenya National Commission on Human Rights, 'Advisory on the proposed Constitution of Kenya (Amendment) Bill 2018 on the two thirds gender principle to the Justice and Legal Affairs Committee through the Clerk of the National Assembly,' 23 May 2018.

79 Katiba Institute, 'Parliament's mischief on two- thirds gender rule', Katiba Institute.

80 Constitution of Kenya (Amendment) (No 6) Bill (2015); Duale II Bill (2018).

81 Centre for Rights Education and Awareness, 'Tracing the journey: Towards implementation of the two-thirds gender principle', Centre for Rights Education and Awareness Kenya, 2019, 26 and 28.

abstained from the legislature or openly voted against the bills, including the Constitution of Kenya (Amendment) Bill (2014) (the Mutambo Bill).[82] Undeniably, the failure to enact the law is a direct indicator of the reluctance by legislators to implement the two-thirds gender rule.[83]

The Constitution of Kenya (Amendment) Bill (2015) (popularly referred to as the Chepkong'a Bill) was arguably the more flagrantly unconstitutional of all the bills.[84] The Chepkong'a Bill proposed the 'progressive' realisation of the two-thirds gender rule.[85] The Bill was bad law to the extent that it sought to ignore the implementation of Article 27(8) of the Constitution by deferring the enactment of the two-thirds gender rule up to 2037 despite the constitutional time-limit stipulated in the fifth schedule. Notably, all these bills failed.

Kenya has struggled to achieve significant representation of women in parliament.[86] At 20.8 percent, Kenya has among the lowest percentage of women in parliament in East Africa.[87] In East Africa and worldwide, Rwanda leads in women representation with 61.3 percent of the members of the lower house being women.[88] Burundi comes in second after Rwanda at 37.8 percent, followed by Ethiopia at 37.2 percent, Tanzania at 36.6 percent, and Uganda at 33.5 percent.[89] Additionally, South Sudan is ahead of Kenya at 26.5 percent.[90]

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82 Constitution of Kenya (Amendment) Bill (2014) proposed by Mwingi Central member of parliament, Joe Mutambo.

83 Centre for Rights Education and Awareness, 'Tracing the journey: Towards implementation of the two-thirds gender principle', 28.

84 Centre for Rights Education and Awareness, 'Tracing the journey: Towards implementation of the two-thirds gender principle', 27.

85 Centre for Rights Education and Awareness, 'Tracing the journey: Towards implementation of the two-thirds gender principle', 4.

86 Nyabola, 'A seat at the table: The fight for gender parity in Kenya', 52.

87 Nyabola, 'A seat at the table: The fight for gender parity in Kenya', 52.

88 Eszter Zaborszky, 'Women's participation in Parliament, The case study of Rwanda,' Escola de Sociologia e Políticas Públicas Departamento de História, September 2017, 5.

89 Nyabola, 'A seat at the table: The fight for gender parity in Kenya', 52

90 Nyabola, 'A seat at the table: The fight for gender parity in Kenya', 52.

Kenyan courts' position on the failures by parliament to enact the two-thirds gender rule within the stipulated time frame

The Kenyan judiciary under the Constitution of Kenya (2010) has contributed significantly to promoting and enhancing the rule of law in Kenya.[91] This is exemplified by petitions that have been filed before courts challenging the continued failures by parliament to implement the two thirds gender rule.

The Supreme Court Advisory Opinion No 2 of 2012

In the matter of the principle of gender representation in the National Assembly and the Senate, the Attorney General, Professor Githu Muigai, moved to court seeking an advisory opinion as to whether the terms in Article 81(b) of the Constitution were to be implemented during the general elections scheduled for 4 March 2013 or needed to be applied progressively over an extended period of time.[92]

The arguments of the parties reflected two distinct and contrasted approaches in relation to the applicability of Article 81(b) of the Constitution as read alongside other provisions.[93] First was that the Rule needed not be implemented during the general elections of 4 March 2013, but in stages, through legislative, policy-making and other measures,[94] while the second, contended that the Rule must be realised immediately and in the general election of 4 March 2013.[95]

To reconcile the two approaches, the court interpretated the term progressive realisation to mean; 'the gradual or phased-out attainment

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91 Willy Mutunga, 'Progress report on the transformation of the Judiciary the first hundred-and-twenty days', *Kenya Law*, 19 October 2011.

92 *In the matter of the principle of gender representation in the National Assembly and the Senate*, (with dissent Professor Willy Mutunga, Chief Justice and President of the Supreme Court) Supreme Court Advisory Opinion No 2 of 2012, Advisory Opinion of the Supreme Court on 11 December 2012 [eKLR] para 24.

93 Supreme Court Advisory Opinion No 2 of 2012, para 44; the arguments of the parties were in relation to the following constitutional provisions: Article 27(4), 27(6), 27(8), 96, 97, 98, 177(1)(b), 116 and 125.

94 Supreme Court Advisory Opinion No 2 of 2012, para 44.

95 Supreme Court Advisory Opinion No 2 of 2012, para 45

of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the state.'[96] While the court acknowledged that the term 'shall' in Article 81(b) imposes a mandatory obligation, it also recognised that achieving the two-thirds gender rule is not a straightforward process that can be implemented immediately without a proper framework and preparation.

Subsequently, the Office of the Attorney General and the National Gender and Equality Commission established a Technical Working Group (TWG) in 2014 to develop a formula for implementation. Members of the TWG were drawn from constitutional commissions, the Law Society of Kenya, and civil society organisations.[97] The TWG generated eight proposals but ultimately settled on a post-election mechanism that required an amendment to the Constitution.

Centre for Rights Education and Awareness (CREAW) v Attorney General and another

This petition was filed by CREAW in 2015 ahead of the 27 August 2015 deadline. The petitioner challenged the failure by the attorney general and the Commission of Implementation of the Constitution to publish a bill to be considered and passed by parliament in order to bring into force the two-thirds gender rule in the national assembly and senate.[98]

The High Court, affirmed that the advisory opinion of the Supreme Court *In the matter of the principle of gender representation in the National Assembly and the Senate* was binding.[99] The respondents contested the timing of the petition claiming that it was filed prematurely and argu-

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96 Supreme Court Advisory Opinion No 2 of 2012, para 53.

97 Centre for Rights Education and Awareness, 'Tracing the journey: Towards implementation of the two-thirds gender principle', 18.

98 *Centre for Rights Education and Awareness (CREAW) v Attorney General and another*, Petition 182 of 2015, Judgement of the High Court of Kenya at Nairobi on 26 June 2015, [eKLR] para 12.

99 *Centre for Rights Education and Awareness v Attorney General and another*, para 60.

ing that the petitioner ought to have waited for 27 August 2015 deadline to dawn before approaching the court, the court disagreed citing with approval the decision of the five-judge bench in *Coalition for Reform and Democracy and Others vs Attorney General, Petition No 628 of 2014 (the CORD case).* The court stated that a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the court.[100] It took note of the fact that there had been various processes in the previous year which should have culminated in a draft legislation for presentation to parliament.[101] With this in mind, the court directed that the relevant bill be prepared and submitted to parliament within forty days from the date of judgment.[102]

Centre for Rights Education and Awareness (CREAW) and 2 Others v Speaker of the National Assembly and 6 Others

This was a petition before the High Court challenging the eleventh parliament for failing to pass the bill to implement the two-thirds gender rule. The petitioners sought a declaration that the resultant National Assembly and Senate, if non-compliant with the two-thirds gender rule would be unconstitutional unless the two-thirds gender rule was enacted and implemented before the general elections scheduled for 8 August 2017.

The court correctly pointed out that the Supreme Court in 2012 had rendered its opinion in the matter of Articles 81, 27 (4), (6), (8), 96, 97, 98, 177 (1) (b), 116, 125 and 140 of the Constitution relating to the principle of gender representation in the National Assembly and the Senate. Subsequently the National Assembly extended the period required to pass the requisite legislation to August 2015, a period which has since lapsed.[103] While the court declined the application by the petitioner

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100 *Centre for Rights Education and Awareness v Attorney General and another,* para 66.

101 *Centre for Rights Education and Awareness v Attorney General and another,* para 114.

102 *Centre for Rights Education and Awareness v Attorney General and another,* para 113.

103 *Centre for Rights Education and Awareness and 2 others v Speaker of the National Assembly and 6 others,* Petition No 371 of 2016, Judgement of the High Court at Nairobi on 29 March 2017 [eKLR].

for the empanelment of a three judge bench to listen to the petition for raising a substantial point of law, the court noted that the matter before it was not new and that the Supreme Court in 2012 rendered its opinion on the issue.[104]

The court therefore directed parliament and the attorney general to take the necessary steps to ensure the required legislation was enacted within 60 days from the date the judgment was issued and to report progress to the chief justice.[105]

Katiba Institute v Independent Electoral and Boundaries Commission, High Court

This petition was filed by Katiba Institute against the Independent Electoral and Boundaries Commission (IEBC).[106] The core question was whether there was an obligation imposed on political parties to comply with the two-thirds gender rule in their nominations ahead of the general elections.[107] The court observed that one of the constitutional objects and principles under Article 27 and Article 27(8) is to eliminate all forms of discrimination against women in the electoral system.[108] The court further referred to the case of *Centre for Rights Education and Awareness v Attorney General and another 2015 [eKLR]* stating that:

> the people of Kenya recognised the inequalities in our electoral system, the inequality of power between men and women and the socialisation of patriarchy as a result of inter alia, discriminatory practices, gender insensitive laws and policies.[109]

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104 *Centre for Rights Education and Awareness and 2 others v Speaker of the National Assembly and 6 others,* 10.

105 *Centre for Rights Education and Awareness and 2 others v Speaker of the National Assembly and 6 others.*

106 *Katiba Institute v Independent Electoral and Boundaries Commission*, Petition No 19 of 2017, Judgement of the High Court at Nairobi on 20 April 2017 [eKLR] para 5.

107 *Katiba Institute v Independent Electoral and Boundaries Commission,* para 5.

108 *Katiba Institute v Independent Electoral and Boundaries Commission,* para 47.

109 *Katiba Institute v Independent Electoral and Boundaries Commission,* para 47.

The court further revisited the decision in *Federation of Women Lawyers (FIDA-K) and five (5) others v Attorney General and Another*,[110] which observed that the purpose of Article 27(8) was to provide or place an obligation upon the state to address historical injustices a particular segment of the people of Kenya may have encountered.[111]

The court agreed with the petitioner that political parties are bound by the two-thirds gender rule, and hence their nomination process for parliamentary candidates must comply with the Rule. It noted that political parties are not excluded since the Constitution clearly states that its provisions bind everyone.[112] Additionally, the court asserted that political parties, as public entities funded by the people of Kenya, have a responsibility to empower women and marginalised groups. This is in line with the requirement to mainstream gender equality and eradicate gender discrimination.[113]

Accordingly, the court directed political parties to take measures to formulate rules and regulations for purposes of complying with the Rule during party nominations. However, in order not to disrupt the advanced preparations for the elections, the court directed that the order be applied in the 2022 general election.[114]

Parliament has failed to implement the two-thirds gender rule. Nevertheless, parliament invoked Article 261(2) to extend the deadline for enacting the law by one year. Paradoxically, while it failed to secure the votes needed to pass the Duale Bill I, it managed to gather sufficient support to approve the extension! Even after the additional year expired, parliament was unable to pass the Bill.[115]

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110 *Federation of Women Lawyers (FIDA-K) and 5 others v Attorney General and Another,* Petition 102 of 2011, Judgment of the High Court at Nairobi, 25 August 2011 [eKLR].

111 *Katiba Institute v Independent Electoral and Boundaries Commission,* para 48.

112 *Katiba Institute v Independent Electoral and Boundaries Commission,* para 48.

113 *Katiba Institute v Independent Electoral and Boundaries Commission,* para 48.

114 *Katiba Institute v Independent Electoral and Boundaries Commission,* para 85.

115 Centre for Rights Education and Awareness, 'Tracing the journey: Towards implementation of the two-thirds gender principle', foreword.

Despite the last petition[116] and the court's order to parliament to enact legislation on the two-thirds gender rule within sixty days, parliament failed once again. In response to this situation, the petitioners approached Chief Justice Honourable David Maraga in June 2017 with a formal request to advise the president to dissolve parliament, as outlined by the high court and stipulated in the Constitution.[117] This was followed by a letter from the Law Society of Kenya (LSK), through the then president Nelson Andayi Havi dated 21 September 2020 to the Office of the Chief Justice which led to Justice David Maraga advising the President, Honourable Uhuru Kenyatta to dissolve the twelfth parliament of Kenya for failing to implement the constitutional gender rule.

In his advice to the President under Article 261 of the Constitution, Justice Maraga addressed President Kenyatta stating that:

> Your Excellency, *the gravamen of the six petitions is that* parliament having, for over 9 years and despite 4 court orders, failed, refused and/or neglected to enact the requisite legislation, I should, pursuant to the provisions of Article 261(7) of the Constitution, advise you to dissolve parliament. As parliament had not advised me whether or not it had passed the Representation of Special Interest Groups Laws (Amendment) Bill, 201 *and/or* the Constitution of Kenya (Amendment) Bill, 2019, *I decided not to engage on further correspondence. Instead, I caused summons to be served upon* parliament and the attorney general on 3 August 2020.[118]

President Kenyatta did not act upon the advice from Chief Justice Maraga. However, members of parliament including the speaker of the National Assembly, Honourable Justin Muturi criticised the judiciary and Chief Justice Maraga.[119] He termed the advice to dissolve parlia-

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116 *Centre for Rights Education and Awareness (CREAW) and 2 Others v Speaker of the National Assembly and 6 Others*, Petition No 371 of 2016, Judgment of the High Court at Nairobi, 29 March 2017 [eKLR].

117 Centre for Rights Education and Awareness, Tracing the journey: Towards implementation of the two-thirds gender principle,' 2019, 1.

118 Office of the Chief Justice and President of the Supreme Court of Kenya, 'Chief Justice's advice to the President pursuant to Article 261(7) of the Constitution', 22 September 2022, para 12.

119 David Mwere, 'Muturi fights back after CJ tells Uhuru to dissolve Parliament,' *The Nation*, 22 September 2022.

ment over its failure to effect the two-thirds gender rule as 'ill-advised, premature and unconstitutional'.[120]

The LSK on the other hand, following the advice by Chief Justice Maraga to the president to dissolve parliament, wrote to Dr Fred Matiangi, the then cabinet secretary of the Ministry of Interior and Coordination of National Government, notifying him that the twelfth parliament is unlawful and should not conduct business beyond 22 October 2020 and that all police officers assigned to members of the twelfth parliament should be withdrawn.[121]

The performance of women in Kenya's elections (2013-2022)

History has shown how Kenyan women had a difficult time moving into the country's political structures. Prior to the 2013 election, women in the tenth parliament of Kenya (2008–2013) consisted of approximately 9 percent of the total membership.[122] Only 50 women were elected to parliament between Kenya's independence in 1963 and 2013.[123] This has not been the case after the promulgation of the Constitution of Kenya (2010).

The country has witnessed a positive shift in the political participation and representation of women.[124] The Constitution brought modest gains for women, through affirmative action, the percentage of women representatives increased from 7.5 percent to 19.4percent.[125] In the tenth parliament (2007-2013), there were 13 women members of parliament in comparison to 160 men. The number increased after 2013 with the

120 Moses Odhiambo, 'Raila supporters attack CJ Maraga over Uhuru letter', *The Star*, 23 September 2020.

121 Law Society of Kenya, Letter to Ministry of Interior and Coordination of National Government, 24 December 2020.

122 Natalie Cowling, 'Proportion of seats held by women in the national parliament of Kenya from 2004 to 2023', Politics and Government, *Statista*, 8 April 2024.

123 Aili Tripp, Catie Lott and Louise Khabure, 'Women's leadership as a route to create empowerment: Kenya case study', *USAID*, 29 September 2014, 20.

124 Tripp and others, 'Women's leadership as a route to create empowerment', 21.

125 Cowling, 'Proportion of seats held by women in the national parliament of Kenya from 2004 to 2023'.

senate taking the lead with 18 out of 67 members of the house being women, bringing the percentage of women representatives in the Senate to 26.8 percent.[126] In the National Assembly, there were a total of 68 women legislators out of 349 members.[127] While the two-thirds gender rule was not attained, the country recorded the highest number of women in the legislature since independence.[128]

The 2017 elections represented an incremental step for women representation.[129] Compared to the 2013 elections, women achieved greater representation at all levels except in the presidential race, which remained male dominated. Notably, women won gubernatorial and senatorial seats for the first time (three), and more women were elected to both the national and county assemblies. [130] Below is a table of the number of women and men legislators in the 2013 and 2017 elections.

Table 1: Women and men legislators at the National Assembly (2013 and 2017)[131]

The National Assembly						
	2013			2017		
	Elected	**Appointed**	**Reserved**	**Elected**	**Appointed**	**Reserved**
Men	274	7	0	267	7	0
Women	16	5	47	23	5	47
% of women (290)	5.5%	41.7	100%	7.9%	41.7%	100%

Source: IEBC (2020) and Republic of Kenya (2013)

126 Tripp and others, 'Women's leadership as a route to create empowerment', 23.

127 Tripp and others, 'Women's leadership as a route to create empowerment', 23.

128 Gloria Nyambura Kenyatta, 'The political participation of women in Kenya', 25 *Journal of International Women's Studies* (2023) 4.

129 National Democratic Institute (NDI) and the Federation of Women Lawyers (FIDA Kenya), 'A gender analysis of the 2017 Kenya general election', The National Democratic Institute (NDI) and the Federation of Women Lawyers (FIDA Kenya) 6 February 2018.

130 NDI and FIDA Kenya, 'A gender analysis of the 2017 Kenya general election', 6; in 2017 there were 23 elected female members of the National Assembly as compared to 16 in 2013 and 96 members of County Assembly in 2017 from 82 in 2013.

131 Kenyatta, 'The political participation of women in Kenya', 4.

Table 2: Women and men legislators at the senate (2013 and 2017)[132]

The Senate				
	2013		2017	
	Elected	**Appointed**	**Elected**	**Appointed**
Men	47	2	44	2
Women	0	16	3	18
% of women	0%	89%	6.8%	90%

Source: IEBC (2020) and Republic of Kenya (2013)

The number of women representatives increased after the 2022 general elections in comparison to the 2017 elections. The positive shift was seen across all elective positions except the presidency, 29 female members of parliament were elected in the National Assembly and 7 female governors and 3 female senators were elected.[133] Following the August 2022 election, six women were nominated to the National Assembly while 18 were nominated to the Senate.[134] Following the nominations, the total number of women in the National Assembly currently stands at 82 out of 349 that equates to 29 members of parliament, 47 women representatives and 6 nominated women.[135] The positive shift in women participation in politics and governance reveals a steady increase in women's representation in Kenya over the years.

From the statistics, one can see that the constitutional two-thirds gender rule is attainable. As opposed to the national parliament, the county assemblies in Kenya have already attained the two-thirds gender requirement as established under the Constitution.[136] Although three counties (Taita Taveta, Trans Nzoia and Narok) did not meet the 33 percent threshold in the 2017 election, the IEBC used party lists to in-

132 Kenyatta, 'The political participation of women in Kenya', 4.

133 Konrad Adenauer Stiftung, 'Factsheet of women's performance in 2022 elections', Konrad Adenauer Stiftung, 2022, 2.

134 Konrad Adenauer Stiftung, 'Factsheet of women's performance in 2022 elections', 2.

135 Konrad Adenauer Stiftung, 'Factsheet of women's performance in 2022 elections', 2.

136 NDI and FIDA Kenya, 'A gender analysis of the 2017 Kenya general election', 31.

crease the number of nominated women to achieve the two-thirds gender rule in most counties.[137]

Voicelessness among women leaders in parliament

Factors that inhibit women candidates from vying for elective positions as well as obstacles that exist once they are elected contribute to voicelessness among women leaders.[138] Underrepresentation was a major factor towards voicelessness among women leaders prior to the 2010 constitutional dispensation. Before 2013, the number of women parliamentarians remained low at 9.8 percent.[139]

Higher levels of women's representation in the legislature are linked to the adoption of policies that advance gender equality, foster social inclusion, and support human development. Women legislators in the Global South play a critical role in driving policy changes that improve living standards and foster human development.[140] Developing countries with more women representation in their parliaments are more likely to pass comprehensive gender-sensitive laws.[141]

Formerly, low women representation in parliament undermined the effectiveness of women leaders in pushing for democracy, local and national development agendas, increased responsiveness to citizen's needs, and promoting gender-sensitive legislations. Other factors that also rendered women leaders voiceless in the early parliaments include socio-economic, ideological, and psychological factors, as well as cul-

137 NDI and FIDA Kenya, 'A gender analysis of the 2017 Kenya general election', 31.

138 UN Women Africa, 'Latest study maps out the growing challenges for women in Kenyan politics', 23 May 2023.

139 Sebastian Gatimu, 'Kenyan politics: Where have all the women gone?', Institute for Security Studies (ISS), 24 May 2016.

140 Rollin F Tusalem, 'Does gendered representation in national legislatures promote substantive representation and human development? Evidence from the developing world', 50(6) *Politics and Policy* (2022) 1099.

141 Elizabeth Asiedu, Claire Branstette, Neepa Gaekwad-Babulal and Nanivazo Malokele, 'The effect of women's representation in parliament and the passing of gender sensitive policies', American Economic Association, 18 October 2022, 1.

tural practices and gender stereotyping which have previously shaped men's perceptions of women as being incapable of political leadership.[142]

Factors contributing to women's voicelessness in the post-2010 Constitution period are quite unique. Underrepresentation cannot be viewed as the only and major challenge today. Politics is commonly seen as a male-dominated sphere.[143] Women who enter this arena and achieve legislative success often face being 'othered' therefore enduring ridicule and slander due to perceptions of their inability to lead.[144] The personalisation of politics further entrenches this challenge, as tribal loyalties and patriarchal leadership structures reinforce patronage networks and control over local decisions.[145]

Political parties have played a significant role in perpetuating gender imbalances in representation. Although many parties emphasise gender inclusivity in their manifestos, they consistently fall short in actively supporting or nominating women for key leadership positions. The functions of political parties include 'representation of societal interests in the legislatures, political socialisation and participation, political education and communication, recruitment of political leaders, policy formulation and working towards political cohesion'.[146] Kenya's election system is based on the fact that many voters vote along party lines, often referred to as the 'six-piece'; where they elect candidates from the

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142 Clara Wangari Mutabai, 'Women and global politics: Analysing challenges faced by women political leaders in Kenya', Unpublished Master's Thesis, United States International University Africa, 2017, x; Asiedu, and others, 'The effect of women's representation in parliament and the passing of gender sensitive policies', 4.

143 iKNOWPOLITCS, 'E- discussion: Gender norms in politics', i*KNOWPOLITCS*, 27 November 2023.

144 Mwathi Mary. 'Perceptions of female legislators in the 11th Parliament on media portrayal of women politicians in Kenya,' Unpublished Masters Thesis, University of Nairobi, 2017, 64.

145 Jacqueline Muturi, 'First understand the root causes impact of gendered political violence to curb it', Centre for Human Rights and Policy Studies (CHRIPS), December 2021.

146 The National Assembly Taskforce on Factsheets, Speaker's Rulings and Guidelines, 'Factsheet 12: Role of political parties and key parliamentary offices', The Clerk of the National Assembly, 2022, 4.

same party for all six key positions: president, governor, senator, MP, women representative, and Member of County Assembly (MCA).[147]

Most political parties have biased nomination processes in political party primaries. Powerful male candidates with a strong financial backing are often favoured therefore side-lining women with fewer financial resources. Parties also tend to nominate few women for less competitive positions, leaving the more influential roles predominantly to male candidates. In the 'six-piece narrative', voters tend to align their choices with the dominant party in their region which discourages independent thought about individual candidates' merit.[148] Often, this leads to the exclusion of competent women in favour of male candidates with party tickets.

Political violence is currently another contributor. Political violence against women is distinct from traditional forms, with perpetrators ranging from political opponents and law enforcement to criminal groups, party members, and even family.[149] This violence often occurs across the electoral cycle – before, during, and after elections – and manifests not only as physical and psychological harm but also as economic sabotage, relentless harassment, and character defamation.[150]

On numerous occasions, women politicians have voiced their concerns over political violence, a persistent issue during election periods.[151] Reports of physical violence have surfaced in nearly every electoral cycle. One female candidate recounted an incident, stating, 'the situation became so chaotic that gunshots were necessary to disperse the attackers'.[152]

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147 Mark Sedgwick, 'Kenya elections 2017: "Six-piece" vote explained', *British Broadcasting Channel*, 8 August 2017.

148 Mark Sedwick, 'Kenya elections 2017: "Six-piece" vote explained'.

149 Muturi, 'First understand the root causes impact of gendered political violence to curb it'.

150 Muturi, 'First understand the root causes impact of gendered political violence to curb it'.

151 NDI and FIDA Kenya, 'A gender analysis of the 2017 Kenya general election', 39.

152 NDI and FIDA Kenya, 'A gender analysis of the 2017 Kenya general election', 39.

In 2019, Kenyan member of parliament Honourable Rashid Kassim was accused of slapping fellow member of parliament Honourable Fatuma Gedi, a member of the budget committee, for allegedly not allocating funds to his constituency.[153] The incident sparked outrage among female members of parliament, who staged a walkout from parliament after male colleagues mocked the situation, referring to it as 'slapping day' as reported by then member of parliament for Murang'a County, Honourable Sabina Wanjiru Chege.[154] Additionally, during party primaries, Honourable Millie Odhiambo experienced extreme violence, including the burning of her home and the tragic death of her bodyguard, who was run over by a vehicle associated with an opposition campaign. Similarly, in February 2017, Ms Eunice Wambui, an aspiring member of parliament for Embakasi South, was attacked while conducting a voter registration drive in Mukuru Kwa Reuben, Nairobi.[155]

Overall, violence against women in politics is an offensive barrier that hinders female politicians from full participation in politics and also negatively impacts their durability and success in the political arena.

The voiceless of women in parliament hinders their effective participation in parliament. Used in this context, 'voiceless women on seats' does not mean the inability or weakness of elected female representatives to voice their ideas but refers to the societal obstacles that inhibit women leaders from participating effectively in parliament.

Over the past two decades, there has been a notable rise in women participating in politics across various levels of governance due to the introduction of gender quotas, particularly in African countries.[156] Kenya has adopted the quota system under its constitution to address the gender gap in parliament and in any other elective or appointive positions.[157] This is a significant step which has led to an increase of women

153 BBC News, 'Kenya MP arrested 'for slapping female colleague', *BBC News,* 13 June 2019.

154 BBC News, 'Kenya MP arrested 'for slapping female colleague'.

155 NDI and FIDA Kenya, 'A gender analysis of the 2017 Kenya general election', 39.

156 Asiedu and others, 'The effect of women's representation in parliament and the passing of gender sensitive policies', 5.

157 Constitution of Kenya (2010) Article 27(8).

representation in parliament. Despite these achievements, women still cannot participate as effectively as men in the legislation processes in parliament.[158]

Beyond the seats they occupy in parliament, women do not head major departmental committees or occupy leadership positions of the houses. Most women in the parliamentary positions are also nominated and not elected. In Kenya, nominated members of parliament are considered inferior as compared to the elected members. This offensive barrier hinders most female politicians from fully participating in the businesses of the houses hence making them *voiceless women on seats*.

What next once at the table?

History has proven that the number of women in parliament has increased and continues to increase. The gender-parity requirement has been attained by county assemblies. The National Assembly and the Senate have partially attained the requirement. This begs the questions: What next after attaining the threshold? What is the quality of representation accorded to women once on the seats? Does the increased gender representation alone translate into meaningful engagement and decision-making power? What is the depth and impact of women's role once they have secured seats at the table?

Greater representation of women in parliament often leads to increased focus on women's issues.[159] The fight for numbers is a tool that facilitates women's direct engagement in public decision-making.[160] Sandra Pepera notes that women's active participation in leadership roles at national, local, and community levels has become a cornerstone of the global development policy. Women's participation promotes gender equality and broadens both the range of policy issues addressed and the diversity of solutions proposed. [161]

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158 Zedekia Sidha, 'Despite increased representation Kenyan politicians still face gender barriers', London School of Economics (LSE), 7 August 2023.

159 Political Participation of Women, Asia-Pacific, *UN Women Report*, 2023.

160 Political Participation of Women, Asia and the Pacific, *UN Women Report*, 2023.

161 Sandra Pepera, 'Why women in politics', NDI, 28 February 2018.

Research indicates that women are more effective gender-responsive law-makers than their male counterparts. Secondly, whether a legislator is male or female has a distinct impact on their policy priorities.[162] Evidence also demonstrates that as more women are elected, policies increasingly reflect family needs, the need to improve the quality of life, and the interests of women, ethnic minorities, and racial groups.[163]

In this case, increased women representation is just a stepping stone to achieving gender equality and the promotion of gender responsiveness. It is not the endgame. The fight for gender equality is far from over. Without voices and the equal participation of women in decision making once at the table, there can only be an attainment of gender parity, constitutional gender thresholds and mere numbers in parliament without achieving gender equality. There is no gender equality if women are still undermined in the seats they occupy.

Professor Maria Nzomo underscores the importance of ensuring that women's participation in governance goes beyond mere numbers in representation[164] Drawing inspiration from Hanna Pitkin's theory of representation,[165] she highlights the perspective of gender and feminist scholars who argue that achieving a governance system that fosters gender equality requires deliberate and strategic efforts by women in public leadership. This includes developing transformative agendas, promoting meaningful policy reforms, creating accountability frameworks, and strengthening ties between the state and civil society.[166] She also notes that merely achieving formal access to governance structures or increasing the number of women within them does not necessarily lead

[162] Craig Volden, Alan E Wiseman and Dana E Wittmer, 'The legislative effectiveness of women in Congress', Centre for the Study of Democratic Institutions, Working Paper 04, 2010, 337.

[163] Pepera, 'Why women in politics'.

[164] Maria Nzomo, 'Gender and governance in Kenya: Women's journey beyond numbers' in Wanjiku Mukabi Kabira, Patricia Kameri-Mbote, and Nkatha Kabira and Agnes Meroka (eds) *Changing the mainstream: Celebrating women's resilience*, African Women Study Centre, 2018, 55.

[165] Hanna Pitkin, 'The concept of representation', in Jacob T Levy (ed) *The Oxford handbook of classic contemporary political theory*, Oxford University Press, 2015.

[166] Nzomo, 'Gender and governance in Kenya', 55.

to genuine influence or the capacity to deliver substantive representation.[167] Ultimately, large numbers alone, regardless of the group, are insufficient to guarantee real power or influence in decision-making.[168]

Political systems do not automatically progress toward democracy in a gradual manner. Instead, deliberate interventions in institutional frameworks and political cultures are crucial to promote the active participation and inclusion of all citizens.[169] There is a need to 'foster gender responsive governance' in Kenya and Africa beyond just numbers.[170] More effort is needed in the fight to attain and promote gender equality in political representation and governance in the Kenyan parliament, moving beyond numbers, seats and quotas.

Gender parity and gender equality in the Kenyan parliament

It is quite imperative to distinguish gender parity from gender equality. The attainment of gender parity does not automatically translate into the attainment of gender equality. Kenya is more concerned with the attainment of numbers and the mere achievement of gender parity in parliament and has forgotten the greater need to ensure gender equality. Gender equality is a human-rights concern.[171] It implies that 'women, men, boys and girls of all classes and races participate as equals and have equal value'.[172]

Kenya has seen a significant rise in the number of female legislators, growing from none at independence to 22 percent in the national assembly and 31 percent in the senate following the 2022 elections.

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167 Nzomo, 'Gender and governance in Kenya', 55.

168 Nzomo, 'Gender and governance in Kenya', 55.

169 Shirleen Hassim and Amanda Gouws, 'The power to change: Women's participation and representation in Africa', Background Discussion Paper Prepared for HBS Engendering Leadership Project, 2011, 2.

170 Hassim and Gouws, 'The power to change: Women's participation and representation in Africa', 3.

171 United Nations Population Fund (UNFPA), 'Gender equality', UNFPA.

172 UNFPA, 'Gender equality'.

However, activists and policymakers focusing on formal legal reforms have overlooked informal structures that diminish women's voices. While more women are present in policy dialogue forums at local and national levels, they lack substantial power in policymaking. Progress on key gender issues like domestic violence, female genital mutilation, and reproductive health has stalled. Despite the increase in women legislators, their influence in legislative and policy-making processes remains limited. Barriers to effectiveness include a lack of representation in committee chair roles, which hold significant sway over legislative priorities.[173]

Most house leaders and chairpersons of various committees in the National Assembly, Senate and county assemblies are male. Stephanie Wangari describes the national assembly house leadership as a *boy's club*.[174] The table below presents the gender representation in the committees of the National Assembly and the Senate.

Table 3: Women and men members of committee memberships (after 2022 general election)

The National Assembly						
House committee	**Composition**	**Men**	**Women**	**Chairperson**	**Vice chair**	**% of women**
House business committee	14	12	2	Male	N/A	14.29%
Agriculture and livestock	15	12	3	Male	Male	20%
Blue economy and irrigation	15	11	4	Male	Male	26.67%
Environment, forestry and mining	15	11	4	Male	Male	26.67%

[173] Sidha, 'Despite increased representation Kenyan politicians still face gender barriers'.

[174] Stephanie Wangari, 'Eyes on the data: Kenya's National Assembly remains a boys' club', *Africa Uncensored*, 2 October 2023.

The National Assembly						
House committee	**Composition**	**Men**	**Women**	**Chairperson**	**Vice chair**	**% of women**
Finance and national planning	15	15	0	Male	Male	0.00%
Labour	15	10	5	Male	Male	33.33%
Lands	15	12	3	Male	Female	20%
Trade industry and cooperatives	15	13	2	Male	Female	13.33%
Public investments, social services administration and agriculture	15	13	2	Male	Male	13.33%
Budget and appropriation	27	20	7	Male	Female	25.93%
National cohesion and equal opportunity	21	14	7	Male	Female	33.33%

Data analysed and extracted from the Parliament (NA) Kenya website on 13 February 2024.[175]

Table 4: Women and men members of committees' membership(after the 2022 general election)

The Senate						
House Committee	**Composition**	**Men**	**Women**	**Chairperson**	**Vice chair**	**% of women**
Business committee	10	6	4	N/A	N/A	40%
Agriculture, livestock and fisheries	9	8	1	Male	Male	11.11%
Finance and budget	9	6	3	Male	Female	33.33%

[175] Parliament of Kenya, 'The National Assembly of the Republic of Kenya'.

The Senate						
House Committee	**Composition**	**Men**	**Women**	**Chairperson**	**Vice chair**	**% of women**
Devolution and intergovernmental relations	9	7	2	Male	Female	22.22%
Labour and social welfare	9	7	2	Male	Male	22.22%
Land, environment and natural resources	9	6	3	Male	Male	33.33%
National cohesion, equal opportunity and regional integration	9	5	4	Male	Female	44.44%

Data analysed and extracted from the Parliament of Kenya website (the Senate) on 13 February 2024.[176]

From the above data analysis, no woman heads any of the major parliamentary committees both in the National Assembly and the Senate. In the National Assembly, there are only four women deputy chairs out of the eleven analysed committees, with no woman in the Finance and National Planning Committee. In the Senate there are only three women vice chairs out of the seven major committees being analysed. This in turn has greatly undermined women sponsored legislative processes.

In the twelfth parliament, 499 bills were processed with women sponsoring only 39 bills.[177] Women sponsored nine (9) out of 110 bills in the National Assembly between March 2013 and June 2015.[178] This represents approximately 8 percent of the total bills sponsored by women. The Senate reflects a similar trend, with women sponsoring 9 out of 49

[176] Parliament of Kenya Website, 'The Senate of the Republic of Kenya'.

[177] Wangari, 'Eyes on the data: Kenya's National Assembly remains a boys' club'.

[178] Wangari, 'Eyes on the data: Kenya's National Assembly remains a boys' club'.

bills between March 2013 and June 2015, accounting for roughly 18 percent of all bills.[179] The introduction and sponsoring of gender-responsive bills in parliament has been greatly undermined by male legislators in leadership positions of the National Assembly and the Senate committees. This means that women are still lagging behind when it comes to sponsoring bills in parliament.

The case is no different at the county level. While the number of women in county assemblies has grown, it remains uncommon for them to occupy committee chair positions. When they do, these roles are often limited to committees that are considered less prestigious and are underfunded, such as those focusing on gender, youth, and children's affairs.[180] Men occupy essential positions in county assemblies, including those of the speaker, deputy speaker, leader of majority, leader of minority, chief whip and their deputies.[181] Therefore, it is clear that the counties in Kenya have managed to achieve gender parity without attaining gender equality.

Necessary measures needed to achieve gender equality

'Access' has been identified by scholars as a crucial measure for promoting and ensuring gender equality in governance.[182] Generally, 'access' refers to the need for equitable opportunities for women to participate in political processes, from candidacy and occupying leadership roles to taking up decision-making positions and, ensuring that barriers such as economic, social, and cultural limitations are removed to foster genuine inclusivity. This paper defines access in two ways: first, as women's capacity to engage in the electoral process, and second, as their opportunity to participate in the policy-making sphere.[183]

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179 Wangari, 'Eyes on the data: Kenya's National Assembly remains a boys' club'.

180 Sidha, 'Despite increased representation Kenyan politicians still face gender barriers'.

181 Sidha, 'Despite increased representation Kenyan politicians still face gender barriers'.

182 Hassim and Gouws, 'The power to change: Women's participation and representation in Africa', 5.

183 Hassim and Gouws, 'The power to change: Women's participation and representation in Africa', 5.

Access can be through various means. In the electoral arena, reserved seats, and party influence are commonly used.[184] In the policy arena, governments may actively invite women's participation. Additionally, special mechanisms, collectively known as national gender machineries can be used to provide institutionalised access to the policy-making processes.[185]

In the parliamentary arena, access ranges across various levels, from the ability to submit recommendations on upcoming legislation and attend public hearings, to engaging in one-on-one discussions with members of parliament.

This method is practicable and applicable in Kenya. Access to governance in the electoral arena generally deals with the fight to meet the required numbers. The Constitution of Kenya (2010) through quotas has ensured that this is guaranteed. Seats are now reserved for women in parliament both at the national level and the county level. The only challenge is on access in the policy arena.

The policy arena deals with issues beyond the table, beyond numbers and beyond seats. It concerns quality representation by women and their role in legislation and policy formulation. This can be achieved by implementing necessary laws, policies and regulations to ensure that women are given opportunities to be part of parliamentary leadership and not just have mere membership. Women should be given opportunities to head various committees within parliament, sponsor bills, have their bills supported, voted for and passed as laws.

Political parties have the best opportunity of ensuring gender equality by enforcing proper implementation of quotas, ensuring and establishing clear, transparent nomination processes and providing opportunity to all.

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184 Hassim and Gouws, 'The power to change: Women's participation and representation in Africa', 5.

185 Hassim and Gouws, 'The power to change: Women's participation and representation in Africa', 5.

Political sanctions and penalties should be enforced for the political parties who fail to meet gender representation established under the regulatory frameworks. Sanctions for non-compliance such as financial penalties and disqualification from elections if properly implemented and enforced, can help level the playing field and promote greater gender equality in political representation.

Women's rights defenders, women's rights organisations, women's rights advocates and institutions should not only focus on the attainment of numbers, but also focus on the attainment of power by women once elected. This will ensure that women's voices in parliament are heard and considered in decision making tables.

Conclusion

Gender parity in parliaments is an important step towards gender equality when accompanied by broader structural and societal changes to ensure that women have equal opportunities, representation, and influence in shaping policies and institutions. Achieving numerical balance in parliamentary representation is not sufficient to address the complex and multifaceted challenges of gender inequality. The proposed necessary measures should be implemented to ensure that representation translates into meaningful participation, influence, and long-term change. By doing this, Kenya wiall have succeeded in moving women *from seats to voices.*

A socio-economic rights centred evaluation of Kenya's law and practice on sovereign debt acquisition, servicing and restructuring

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Abstract

This paper addresses Kenya's rising sovereign debt burden and its implications for socio-economic rights. Despite constitutional mandates to safeguard these rights, Kenya's debt accumulation and management practices seem to prioritise servicing obligations over citizen welfare. This study comprehensively analyses Kenya's debt landscape, specifically looking at: debt accumulation, the link between sovereign debt and socio-economic rights, the legal framework underpinning sovereign debt in Kenya and its flaws, and international best practices in dealing with sovereign debt. Through this, the study aims to inform decision-making for more equitable and sustainable debt management practices in Kenya, aligning with constitutional obligations and promoting the fulfilment of socio-economic rights. The insights in this paper are intended to form the groundwork for a socio-economic rights-centred approach to sovereign debt acquisition, servicing, and restructuring.

Keywords: sovereign debt, socio-economic rights, acquisition, servicing, and restructuring

* *Contributions to the 'General articles section' are double blind reviewed.*

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Introduction

In recent years, the question of Kenya's debt sustainability has emerged.[1] With it has arisen the question of the divergence between the states obligation to service its sovereign debt and its obligation to fulfil socio-economic rights. The Constitution of Kenya (2010) in Article 43 obligates the state to ensure protection and implementation of socio-economic rights.[2] However, in situations of a burgeoning debt burden, states undertake debt management practices to alleviate the situation.[3] Often, they do this through inventing new taxes, implementing fiscal consolidation, making budget cuts, or diverting (already scarce) national resources, all in disregard of socio-economic rights.[4]

Kenya's debt has over the past few years grown to include a complex mix of multilateral, commercial and domestic obligations. The International Monetary Fund (IMF) and World Bank debt distress models for Kenya have been in high-risk territory since 2020, despite its overall debt burden being deemed sustainable.[5] Under IMF pressure, Kenya included KES 3.4 trillion of parastatal and county loans in its national debt figures.[6] In response to the Corona Virus Disease (COVID-19), the Paris club granted Kenya a debt suspension agreement to mitigate economic and social impacts.[7] In April 2021, Kenya initiated a 38-month, $2.34 billion IMF programme, aimed at strengthening fiscal and debt management.[8]

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1 Economist Intelligence, 'Kenya faces a potential debt repayment crunch in 2024', 28 March 2023; Peter Mburu, 'Weak shilling raises Kenya debt repayment', *Business Daily*, 5 December 2023.

2 Constitution of Kenya (2010) Article 43.

3 Ilias Bantekas and Cephas Lumina, 'Sovereign debt and human rights: An introduction' in Ilias Bantekas and Cephas Lumina (eds) *Sovereign debt and human rights*, Oxford University Press, 2018, 4.

4 Bantekas and Lumina, 'Sovereign debt and human rights', 4.

5 African Sovereign Debt Justice Network, 'Ninety fourth sovereign debt news update: Kenya breaches its debt ceiling, anchors its debt to GDP', *Afronomics Law,* 4 September 2023.

6 Otiato Ouguyu, 'Kenya bows to IMF pressure on public debt disclosure', *Business Daily*, 10 January 2021.

7 'Paris club agrees to debt relief for Kenya', *Economist Intelligence Unit,* 18 January 2021.

8 International Monetary Fund, 'IMF Executive Board approves US$2.34 billion ECF and EFF arrangements for Kenya', Press Release No 21/98, 2 April 2021.

As 2022 approached, tightening global financial conditions caused Kenya to cancel a planned $1 billion Eurobond issuance due to high yields, straining foreign exchange reserves causing currency depreciation.[9] This intensified mid-year when the United States (US) monetary tightening and the Russia-Ukraine War triggered a surge in yields on Kenya's active Eurobonds, forcing another cancellation of a $1 billion Eurobond and depleting reserves amid rapid shilling depreciation.[10] Kenya sought debt service suspension from China but, the extension was rejected.[11] A temporary reprieve came in 2021 when an IMF disbursement boosted foreign exchange reserves, but economic pressures persisted.[12]

In 2023, the shilling's slide continued, stoking inflation and increasing debt servicing costs.[13] Throughout 2023, dwindling foreign exchange reserves prompted Kenya to seek financing from the World Bank, IMF programmes, and syndicated loans.[14] However, foreign exchange erosion persisted, posing long-term risks. Rising inflation in early 2023 compelled interest rate hikes. In March, Kenya issued an oversubscribed seven-year infrastructure bond at climbing interest rates as domestic debt took greater importance for budget financing amidst efforts to extend debt maturities.[15] To cope, Kenya scrapped its statutory debt limit for a GDP-based anchor.[16]

By June 2024, Kenya's domestic debt had risen to KES 5.41 trillion, a 5.8% increase from KES 4.832 trillion in June 2023. New local borrowings reached KES 577 billion, up from KES 545.2 billion the previous

9 'Kenya faces a potential debt repayment crunch in 2024', *Economist Intelligence Unit*.

10 'Kenya faces a potential debt repayment crunch in 2024', *Economist Intelligence Unit*.

11 Fergus Kell, 'Kenya's debt struggles go far deeper than Chinese loans', *Chatham House*, 31 May 2023.

12 World Bank Group, 'Kenya receives $750 million boost for COVID-19 recovery efforts', Press Release No 2021/158/AFR, 11 June 2021.

13 'Weak shilling raises Kenya debt repayment', *Business Daily*.

14 'Weak shilling raises Kenya debt repayment', *Business Daily*.

15 Kepha Muiruri, 'Seven-year infrastructure bond oversubscription eases cash jitters', *Business Daily,* 16 June 2023.

16 African Sovereign Debt Justice Network, 'Ninety fourth sovereign debt news update: Kenya breaches its debt ceiling, anchors its debt to GDP'.

year.[17] A critical factor was the looming $2 billion Eurobond repayment due in June 2024.[18] This mix of debt types has led to a complex situation where Kenya balances the benefits and drawbacks of each.

Effects of Kenya's recent debt accumulation

Between February and July 2022, overall inflation went up from 5.08% to 8.3%, while food inflation spiked even higher from 8.69% to 15.3%. The causes included rising global commodity prices, currency depreciation, and tax hikes aimed at reducing fiscal deficits.[19] This surge in food prices severely impacted the right to food security and freedom from hunger, especially for Kenya's poor and vulnerable populations.[20] Consequently, the right to education and health were also undermined.[21]

When President William Ruto's administration took over in August 2022 amid the pandemic's economic aftermath and global supply shocks, urgent liquidity needs prompted austerity measures.[22] These included slashing subsidies,[23] overhauling higher education funding,[24] and drastically increasing taxation through the 2023/24 Finance Bill.[25] This liquidity push aimed to service the mounting debt burden, espe-

17 Kabui Mwangi, 'Kenya's domestic debt up by Sh577bn in a year', *Nation*, Thursday 11 July 2024.

18 African Sovereign Debt Justice Network, 'Ninety fourth sovereign debt news update: Kenya breaches its debt ceiling, anchors its debt to GDP'.

19 Kenya National Bureau of Statistics, 'Consumer price indices and inflation rates', February to July 2022.

20 Francis Omondi and Perez A Onono-Okelo, 'Impact of debt servicing on social spending and wellbeing of low-income household in Kenya', Oxfam in Kenya, 24 March 2022.

21 Omondi and Onono-Okelo, 'Impact of debt servicing on social spending and wellbeing of low-income household in Kenya'.

22 Evelyne Musambi and Charles Gitonga, 'William Ruto: New Kenya president's bold move to scrap subsidies', *BBC News Nairobi,* 15 September 2022.

23 Musambi and Gitonga, 'William Ruto: New Kenya president's bold move to scrap subsidies'.

24 James Mbaka, 'Explainer: How new higher education funding model will work', *The Star,* 31 July 2023.

25 Charles Jaika Magotzwi, 'The Finance Bill of Kenya 2023 and its implications on financial inclusion,' *ICJ Kenya,* 6 June 2023.

cially the looming 2024 Eurobond maturity.[26] One of the most impactful tax measures was the introduction of a 16% VAT on fuel products like cooking gas, kerosene and petrol in 2023.[27] This pushed up prices of essential commodities even higher, deepening inequality and poverty while reducing economic activity – burdening many Kenyans who rely heavily on these fuel products.[28] Theoretically, revenues from projects funded by debt should service that debt. However, in reality the Kenyan government has shifted the debt servicing burden to taxpayers through fiscal consolidation measures aimed at raising more annual revenues.[29]

The 2024/2025 Finance Bill raised the measures introduced in the 2023/24 Finance Bill by several orders of magnitude. The proposed budget prioritised paying external creditors, accruing to a total KES 5.1 billion in interest and capital while spending less than 5% per person than it did in the year 2015.[30] The government would have spent more on sovereign debt interest payments than it would on education, childhood nutrition, clean drinking water and health.[31]

In June 2024, protests erupted against financial austerity measures imposed by the Finance Bill, 2024. On 25 June 2024, the protest was met with a heavily militarised response, with scores dying in the aftermath and in other instance since. This protest was also marked with abductions and disappearances, extra judicial killings, internet shutdowns, and threats of shutting down television stations covering the protest.

The first section of the paper is the general introduction to orient the reader in the magnitude and implications of the debt problem. Thereafter, this paper lays the analytical foundation by examining the relation-

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26 'Kenya faces a potential debt repayment crunch in 2024', *Economist Intelligence Unit*.

27 Kepha Muiruri, 'How 16pc fuel tax will hit households, motorists from July', *Business Daily*, 22 June 2023.

28 Muiruri, 'How 16pc fuel tax will hit households, motorists from July'.

29 Musambi and Gitonga, 'William Ruto: New Kenya president's bold move to scrap subsidies'.

30 James Thuo Gathii, 'Alternatives to Kenya's austerity and the militarised response to the Gen Z revolution', *Afronomicslaw,* 26 June 2024.

31 Gathii, 'Alternatives to Kenya's austerity and the militarised response to the Gen Z revolution'.

ship between sovereign debt and socio-economic rights in Kenya. Building on this conceptual base, I will evaluate the effectiveness of Kenya's existing legal framework in safeguarding socio-economic rights amidst rising sovereign debt levels, pinpointing gaps that enable or contribute to violations. To gain further insights, the following section will conduct a comparative analysis of debt management best practices across other countries, aiming to identify lessons that could improve Kenya's approach to balancing debt obligations with socio-economic rights protection. Finally, the last section synthesises the key findings and conclusions from the preceding analysis into actionable recommendations for legal, policy, and institutional reforms to better harmonise Kenya's sovereign debt strategies with its socio-economic rights commitments under the Constitution of Kenya 2010.

Why socio-economic rights?

This section showcases the link between the two concepts; sovereign debt and socio-economic rights and, why a socio-economic rights centred move towards curtailing the ease (and resulting flagrancy) with which the state can acquire and service its sovereign debt is necessary. There is general acceptance of human rights as inalienable fundamental entitlements that stem from the inherent dignity of every person by virtue of being human.[32] The Constitution of Kenya 2010 echoes this sentiment in stating that:

> The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.[33]

The choice of socio-economic rights as an analytical lens is chosen based on this paradigm and the idea that actions that damage the inherent dignity of human beings are a violation of their rights. As a class of

[32] Universal Declaration of Human Rights, 10 December 1948, General Assembly Resolution 217 A (III), Preamble, para 1.

[33] Constitution of Kenya (2010) Article 19(2).

rights, socio-economic rights generally tend to require relatively greater resource consumption in realising their fulfilment. Therefore, actions that impede resource flow towards their realisation have a massively larger impact on their realisation than other rights.[34] If we think of sovereign debt simply as deferred taxation, then the link and the arising problem become clear.[35] The way sovereign debt is acquired, managed, and repaid can directly divert the resources available for essential (tax funded) services such as healthcare, education, housing, and disaster relief.[36]

Another dimension of consideration that has led to the choice of socio-economic rights is the question of the 'sovereign' in sovereign debt. This question is particularly important because the questions of legitimacy and moral orientation of debtors is a core facet of international sovereign debt adjudication.[37] Simply set, if the state takes on sovereign debt in a manner non-conforming to its constitution, then is the debt legitimate?

The Constitution of Kenya (2010) explicitly states that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.[38] It follows thus, that when the intended beneficiaries of debt (the citizens of Kenya) are placed at a disadvantage by the practices of the state then they have a right to cry foul.

The link between socio-economic rights and sovereign debt in the laws of Kenya

The Constitution of Kenya (2010) enshrines socio-economic rights under Article 43, including rights to health care, housing, food, water,

34 Muhammad Bello, 'The place of socio-economic rights in sovereign debt governance', Unpublished PhD Thesis, University of the Free State, March 2020, 10.

35 Bello, 'The place of socio-economic rights in sovereign debt governance', 10.

36 Bello, 'The place of socio-economic rights in sovereign debt governance', 10.

37 Bello, 'The place of socio-economic rights in sovereign debt governance', 10.

38 Constitution of Kenya (2010) Article 1(1).

social security and education.[39] The state is obligated to take measures to progressively realise these rights.[40] This directly links the realisation of these rights not just to the state's available budgetary resources, but to the prioritisation of their funding. The Constitution's socio-economic rights provisions directly link their realisation to reasonable and justifiable allocation of state resources. However, rising public debt and debt servicing costs restrict the budgetary resources available for implementing these rights as legally required.

The Public Finance Management (PFMA) Act, 2012 regulates public debt management. Section 49 requires the National Treasury to ensure public debt remains sustainable, with adherence to the fiscal responsibility principles and the financial objectives set out in the most recent Budget Policy Statement; and the debt management strategy of the national government over the medium term.[41]

As earlier mentioned, the government has a legal obligation to take reasonable measures, within its available resources, to realise socio-economic rights.[42] Naturally, in the context of sovereign debt, the government should ensure that its borrowing decisions, management practices and strategies do not diminish the state's ability to fulfil its socio-economic rights obligations.[43] It follows that excessive or mismanaged sovereign debt can directly impact the government's ability to allocate resources for the realisation of socio-economic rights.

The question of progressive realisation

Although the Constitution of Kenya (2010) under Article 43 lists the socio-economic rights that every person in Kenya is entitled to, it

39 Constitution of Kenya (2010) Article 43.

40 Constitution of Kenya (2010) Article 21(2); *Mitu-Bell Welfare Society v Kenya Airports Authority and 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae),* Petition 3 of 2018, Judgement of the Supreme Court at Nairobi, 11 January 2021 [eKLR] para 15.

41 Public Finance Management Act (No 17 of 2022) Section 49.

42 Constitution of Kenya (2010) Article 43.

43 Bello, 'The place of socio-economic rights in sovereign debt governance', 10.

does not set out the implementation framework that is required for the realisation of these rights. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is therefore instrumental as it obligates State Parties to undertake steps both individually and with international assistance, particularly economic and technical, using their maximum available resources to progressively achieve full realisation.[44]

On its face, the concept of progressive realisation allows the state to decide, at will, the measures and the extent to which it will endeavour to fulfil its socio-economic rights obligations. However, on the issue of progressive realisation, General Comment 3 states that:

> It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for states parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.[45]

From the above passage we can also glean an implicit negative obligation not to take action that impedes the realisation of socio-economic rights. It follows, thus that even the concept of progressive realisation cannot be used in defence of (even sovereign debt based) actions that would impede the expeditious and effective movement towards the fulfilment of socio-economic rights.

The Committee on Economic, Social and Cultural Rights has through its General Comment No 3 reiterated the minimum core obligation of all states parties to ensure the satisfaction of, at the very least, minimum levels of each of the rights.[46] Therefore, Kenya has an immediate obligation to realise the minimum levels of these socio-econom-

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44 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 993, Article 2(1).

45 UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 3: The Nature of State Parties' Obligations (Article 2 Paragraph 1 of the Covenant) 14 December 1990, E/1991/23, CESCR, para 9.

46 General Comment 3, CESCR, para 10.

ic rights.[47] In the context of sovereign debt, this means the acquisition, servicing and restructuring of sovereign debt in a manner that would impede the realisation of socio-economic rights can be considered a violation of the state's obligations in Article 43.

The United Nations Guiding Principles on Foreign Debt and Human Rights explicitly emphasise the importance of progressive realisation stating that, states are required to take steps to progressively realise human rights, which include ensuring that their foreign debt obligations do not hinder this process.[48] When addressing debt, states should prioritise the fulfilment of human rights ensuring that budgetary resources are allocated in a way that promotes the progressive realisation of these rights.[49]

In essence, using socio-economic rights as an analytical lens highlights the critical relationship between sovereign debt management and the state's obligations to its citizens. Socio-economic rights which demand significant resource allocation, provide a valuable framework for assessing how borrowing decisions affect the well-being of the population. This perspective underscores that debt mismanagement or excessive borrowing can undermine the state's ability to meet its constitutional and international obligations, particularly to marginalised and vulnerable groups. A socio-economic rights-based analysis reveals that sovereign debt management is not merely a fiscal issue, but one deeply intertwined with human well-being.

Problems arising within the Kenyan sovereign debt framework and their effect on the realisation of socio-economic rights

As outlined in the previous section, sovereign debt can have profound implications for the realisation of socio-economic rights and

47 Attiya Warris, 'Financing the progressive realization of socio-economic rights in Kenya', 8(1) *University of Nairobi Law Journal* (2015) 17.

48 United Nations Guiding Principles on Foreign Debt and Human Rights, June 2012, A/HRC/20/23, Annex, para 15.

49 United Nations Guiding Principles on Foreign Debt and Human Rights, Annex, para 16.

sustainable development. The legal and institutional frameworks governing sovereign debt acquisition, management and restructuring play a pivotal role in shaping these outcomes. The current creditor-biased international paradigm has largely rejected proposals for a statutory sovereign debt framework, forcing indebted nations into a dilemma of simultaneously satisfying conflicting obligations.[50] This paradigm has persistently ignored interests outside the bilateral creditor-debtor matrix, including those of debtors' citizens.[51] Meanwhile, the internationalisation of regulatory institutions and complex regional integration has blurred the traditional relationship between states and their citizens.[52]

This section is structured to provide a comprehensive analysis of the problems, that are prevalent within the Kenyan legal and institutional framework pertaining to sovereign debt. It systematically examines the three key phases of the sovereign debt cycle: acquisition, management or servicing and restructuring. For each phase, the section outlines the relevant laws and policies governing that aspect of sovereign debt in Kenya. It then identifies and critically examines the specific problems and challenges that arise within the existing legal framework, highlighting how these issues adversely impact the realisation of socio-economic rights.

Acquisition of debt

The Constitution of Kenya (2010) requires the state to promote an equitable society through fair sharing of the burden of taxation and use of expenditure to promote equitable development of the nation,[53] as well as ensuring that financial management shall be responsible, and fiscal reporting clear.[54] Simply put the state is obligated to ensure that it does not unduly disadvantage its people when carrying out any

50 Bello, 'The place of socio-economic rights in sovereign debt governance', 9.

51 Bello, 'The place of socio-economic rights in sovereign debt governance', 9.

52 Bello, 'The place of socio-economic rights in sovereign debt governance', 44.

53 Constitution of Kenya (2010) Article 201(b).

54 Constitution of Kenya (2010) Article 201(e).

activities involving public finance, naturally including sovereign debt acquisition.

In accordance with the Public Finance Management Act (PFMA), the Cabinet Secretary in charge of finance is accorded authority to raise the loans from within and outside Kenya on behalf of the national government.[55] The PFMA further obligates the national government to ensure that its financing needs and payment obligations are met at the lowest possible cost in the market which is consistent with a prudent degree of risk, while ensuring that the overall level of public debt is sustainable.[56]

The Public Debt and Borrowing Policy exists to provide a strong accountability framework in the borrowing and management of the public debt portfolio.[57] The policy provides the purposes for which government may borrow, including financing government budget deficits, refinancing and pre-financing existing debts.[58] The policy states that in deciding whether or not to contract new debt, the government should consider firstly, the level of the existing public debt and secondly, the potential cost and risk of new debt against the fiscal space and the economy of the state.[59] This encompasses an analysis of the solvency indicators like debt to GDP ratio and debt service to revenue and exports.[60]

Further, to manage the cost and the risk, the policy requires the borrowing decision to be informed of the creditor's concentration specifically, repayment terms and the currency of the contract.[61] The Government is also obligated to resort to short-term borrowing to manage temporary cash flow and long-term borrowing for capital or developing expenditure to ensure that the benefits accrued to the project may repay the debt.[62]

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55 Public Finance Management Act (No 18 of 2012) Section 49.

56 Public Finance Management Act (No 18 of 2012) Section 50(1).

57 Public Debt and Borrowing Policy (2020) 1.1(2).

58 Public Debt and Borrowing Policy (2020) 4.1.

59 Public Debt and Borrowing Policy (2020) 4.2.

60 Public Debt and Borrowing Policy (2020) 4.3.

61 Public Debt and Borrowing Policy (2020) 4.3

62 Public Debt and Borrowing Policy (2020) 4.3.

Problems arising from acquisition of debt and their effect on socio-economic rights

Accountability and contractual transparency deficiencies

The Public Debt and Borrowing Policy reiterates the principles of public finance in the Constitution, applying them to the context of sovereign debt.[63] One principle that has suffered considerable disregard is the need for openness and accountability in the borrowing and management of public debt.[64] This position is based on the opaqueness and lack of contractual transparency manifested in Kenya's debt acquisition. Contractual transparency refers to the openness and availability of information in the contractual relations between a government and other entities.[65] In practical terms, it translates into greater availability of contractual terms, open publication of data related to government contracts, and informational disclosure during processes such as procurement.[66] In our context, this necessitates the disclosure and open publication of data on debt funded projects, aid and bonds.

The manifest disregard for these tenets of openness and accountability is displayed most explicitly in the Standard Gauge Railway (SGR) project. Over the last two decades, and mostly through the Chinese Export-Import Bank (China EXIM Bank), China has financed numerous infrastructural projects in Africa, with Chinese companies being awarded most of the contracts.[67] The most significant of these is Kenya's Standard Gauge Railway, awarded to the China Road and Bridge Corporation (CRBC). With the first phase alone estimated to cost around $3.6 billion,

63 Public Debt and Borrowing Policy (2020) 3.2.

64 Public Debt and Borrowing Policy (2020) 3.2(a).

65 Khalil Badbess and Cecil Abungu, 'The normative and constitutional requirements of contractual transparency: Reflections of Kenya's infrastructure projects with China and the United States of America', 6 *Kabarak Journal of Law and Ethics* (2022) 139.

66 Badbess and Abungu, 'The normative and constitutional requirements of contractual transparency: Reflections of Kenya's infrastructure projects with China and the United States of America', 139.

67 Badbess, and Abungu, 'The normative and constitutional requirements of contractual transparency: Reflections of Kenya's infrastructure projects with China and the United States of America', 139.

it is considered to be largest infrastructural project since Kenya's independence.[68] Yet, little is known about the details of this mega-project, raising concerns about contractual transparency.[69]

In 2019, the High Court ordered the government to provide the contract details to a civil society organisation, but the directive was defied, prompting the organisation to institute contempt of court proceedings against relevant government officials.[70] The idea of transparency is stressed numerous times in Kenya's Constitution and is listed as a national value that binds all state organs, state officers, public officers, and all persons in Kenya whenever they apply or interpret the Constitution. There is also an explicit constitutional requirement for public participation and access to information held by the state.[71]

Failure to manage the debt ceiling

The Public Finance Management Act (PFMA) grants Parliament the authority to set a public debt ceiling, which can be reviewed periodically.[72] Since borrowing is restricted by the debt ceiling set by the National Assembly, the National Treasury may request the National Assembly to review the debt ceiling to permit additional borrowing.[73] On 26 May 2022, the then Treasury Cabinet Secretary, published a legal gazette notice to amend Section 26 of the PFMA, 2015, raising the debt ceiling to KES 10 trillion.[74] This amendment came barely three years after the ceiling had been increased from KES 6 trillion to KES 9 trillion in

68 Railway Technology, 'Mombasa-Nairobi Standard Gauge Railway Project', *Railway Technology*, 17 January 2025.

69 Badbess, and Abungu, 'The normative and constitutional requirements of contractual transparency: Reflections of Kenya's infrastructure projects with China and the United States of America', 140.

70 Philip Muyanga, 'Court orders state to disclose secret Sh450bn SGR contract', *Business Daily,* 13 May 2022. See, *Khelef Khalifa and another v CS Transport and others*, Petition E032 of 2021, Judgement of the High Court at Mombasa, 13 May 2022 [eKLR] para 95.

71 Constitution of Kenya (2010) Article 10.

72 Public Finance Management Act (No 18 of 2012) Section 50(1).

73 Public Finance Management Act (No 18 of 2012) Section 50(1).

74 Public Finance Management (National Government) (Amendment) Regulations (2022) Section 2.

October 2019.[75] The then Leader of Majority, Amos Kimunya, initiated the debate on adjusting the debt ceiling, citing the 2022/2023 budget deficit as the reason for the change. The debt cap was raised again on 7 June 2022.[76]

The rapid increase in the public debt ceiling is manifestly problematic. Most evident is the fact that an easily adjustable debt limit is as good as no limit at all. This is showcased by the fact that, as shown above, the river of Kenya's debt has repeatedly burst its banks. Without a hard limit, the state is wont to forget that a higher level of public debt necessitates increased debt servicing costs, leading to reduced fiscal space for essential public services such as healthcare, education, and social protection.[77] The National Treasury has been submitting bloated supplementary budgets with higher deficit gaps during the implementation stage of every fiscal year.[78] It employs a technique of submitting these revised budgets towards the close of the financial year. A notable example is the Supplementary Estimates III in FY 2019/2020, which was submitted to the National Assembly merely seven days before the end of the financial year and allowed to sail through despite glaring legal shortfalls.[79]

Debt management and servicing

The National Treasury, in accordance with the Constitution of Kenya (2010) is given the responsibility of controlling the amount and makeup of the country's public debt as well as overseeing the Consolidated Fund.[80] The Public Financial Management Act of 2012 (PFMA) mandates the national treasury to ensure that the public debt is kept at a

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75 Edwin Mutai, 'MPs increase debt ceiling to Sh10 trillion', *Business Daily,* June 2022.

76 National Assembly, 'Hansard Report', 7 June 2022, 12; Mutai, 'MPs increase debt ceiling to Sh10 trillion'.

77 Mutai, 'MPs increase debt ceiling to Sh10 trillion'.

78 National Democratic Institute for International Affairs, 'The role of parliament in public debt oversight in Kenya', NDI Program Reports, July 2022, 19.

79 National Democratic Institute for International Affairs, 'The role of parliament in public debt oversight in Kenya', 19.

80 Constitution of Kenya (2010) Article 225.

level that can be sustained and that has been approved by parliament.[81] The Act also mandates the National Treasury to establish a framework for sustainable debt management and encourage openness, efficient management and accountability with regard to public finances, serving as the entity responsible for enforcing the principles of fiscal responsibility.[82] The Act places emphasis on the National Assembly's oversight role of ensuring that debt management is conducted in accordance with the established legal framework.[83]

Another notable instrument is the government Medium Term Debt Strategy (MTDS). The MTDS is presented to parliament as part of the budget documents by the Cabinet Secretary for Finance.[84] The principal objective of the Kenyan government debt management strategy is to meet the national government's financing requirements at the least cost with a prudent degree of risk. The secondary objective of the strategy is to facilitate the government's access to financial markets and support development of a well-functioning vibrant domestic debt market.[85] The strategy seeks to balance the cost and risk of public debt while taking into account the central government's financing needs. In addition, the strategy incorporates initiatives to develop the domestic debt market, seek new funding sources, support macro-economic stability and achieve debt sustainability.[86]

Problems arising from debt management or servicing and their effect on socio-economic rights

Disregard for meaningful public participation

The Constitution of Kenya (2010) specifically includes participation of the people as a national value and principle of governance.[87] Public

81 Public Finance Management Act (No 18 of 2012) Section 15.
82 Public Finance Management Act (No 18 of 2012) Section 15.
83 Public Finance Management Act (No 18 of 2012) Section 50(3).
84 Public Finance Management Act (No 18 of 2012) Section 33.
85 Republic of Kenya, Debt and Borrowing Policy (2020) 21.
86 Republic of Kenya, Debt and Borrowing Policy (2020) 21.
87 Constitution of Kenya (2010) Article 10(2)(a).

participation extends beyond mere consultation or information sharing. In *Robert N Gakuru and others v Governor Kiambu County and 3 others*, the Court was expressly clear in stating that:

> 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.[88]

Failure to allow for meaningful participation in this context is exemplified by the actions taken in 2019 by the then Transport Cabinet Secretary, James Macharia, who issued a directive mandating that all cargo handled at the Mombasa port be transported exclusively through the Standard Gauge Railway (SGR).[89] This does not seem at face value, to be a sovereign-debt issue. However, a deeper analysis shows the reasoning behind these actions. SGR was a debt funded by a Public Private Partnership (PPP) and upon completion, it came time to pay back the outstanding dues.[90] This is hardly an off-chance occurrence but rather the occurrence of what is termed as 'the cost of PPPs.'[91] A study commissioned by the County Government of Mombasa revealed that over 10,000 jobs were at stake.[92]

The possibility of losing these jobs threatened the right of Mombasa residents to the highest attainable economic and social standards, as guaranteed under Article 43(1) of the Constitution. Furthermore, the directive violated Article 6 of the International Covenant on Econom-

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88 *Robert N Gakuru and others v Governor Kiambu County and 3 others,* Petition No 532 of 2013 Consolidated with Petitions No 12 of 2014, 35, 36 of 2014, 42 of 2014 and 72 of 2014 and Judicial Review Miscellaneous Application No 61 of 2014, Judgement of the High Court of Kenya at Nairobi, 17 April 2014 [eKLR] para 75.

89 Gitogo Wandiri, 'All imported cargo to be transported via SGR', *The Kenyan Wall Street*, 6 August 2019.

90 Kennedy Ogollah and others, 'Assessment report of the socio-economic impact of the operationalisation of the Mombasa-Nairobi standard gauge railway on port city Mombasa', University of Nairobi, 2019, 2-3.

91 María José Romero and Bodo Ellmers, 'The financial and social cost of public-private partnerships' in Bantekas and Lumina (eds) *Sovereign debt and human rights*, 2018, 106-128.

92 Kennedy Ogollah and others, 'Assessment report of the socio-economic impact of the operationalisation of the Mombasa-Nairobi standard gauge railway on port city Mombasa', 11-12.

ic, Social and Cultural Rights (ICESCR), which safeguards individuals' right to choose their employment and ensures they are not unfairly deprived of job opportunities.[93]

Corruption and political interference

In the wake of the Covid-19 pandemic, the International Monetary Fund (IMF) approved a US$2.34 billion loan package to support Kenya's pandemic response and economic reform programme. This is after Kenya agreed to reduce its debt vulnerabilities by addressing weaknesses in state-owned enterprises, and strengthening the anti-corruption framework.[94] This deal was met with concerns from the citizenry that the issuance of this loan came despite a number of accountability issues relating to the management of earlier loans.[95] These concerns were warranted on accounts of how some procurement contracts were irregularly awarded, with inflated costs to a group of shady suppliers, with some supplying subpar personal protective equipment (PPEs), completely disregarding the plight and welfare of frontline health workers.[96]

A significant part of Kenya's real debt burden stems from rampant corruption, not the loans themselves.[97] Mismanagement and extraneous salaries for state officials drain public funds, leading to massive financial losses and creating shortfalls which are naturally made up for through debt.[98]

A special audit by Auditor General Nancy Gathungu revealed that the Kenyan government borrowed KES 1.13 trillion through 13 syndicated loans and sovereign bonds between July 2010 and December 2021, but cannot show evidence of specific projects funded by this money.[99] The

93 International Covenant on Economic, Social and Cultural Rights, Article 6.

94 Sheila Masinde, 'Fight on corruption is panacea to public debt crisis', Transparency International-Kenya, 8 April 2021.

95 Masinde, 'Fight on corruption is panacea to public debt crisis'.

96 Masinde, 'Fight on corruption is panacea to public debt crisis'.

97 Tee Ngugi, 'The real debt burden in Kenya is corruption', *The East African,* 16 April 2021.

98 Ngugi, 'The real debt burden in Kenya is corruption'.

99 Peter Mburu, 'No projects to show for Sh1 trillion borrowings', *Business Daily,* Wednesday, 10 July, 2024.

audit examined 39 commercial loans totalling KES 1.36 trillion, including 16 dollar-denominated loans valued at KES 1 trillion, 22 Euro-denominated loans worth KES 288 billion, and one South Korean Won-denominated loan of KES 102 million.[100] By December 2021, these loans had cost taxpayers KES 621.8 billion in debt service, with 63 percent (equivalent to $2.7 billion plus £325 million) going towards interest, commitment fees, and other charges. Interest alone accounted for 59.8 percent of the total debt service costs. The audit also found that 26 out of the 39 loans were taken without the required legal opinion from the Attorney General, potentially exposing the country to unfavourable terms.[101]

Fear of collateralisation

Kenya's mounting debt to China spurred the fear that in event of debt default, Kenya might lose control over critical national assets like the Mombasa port.[102] Such fears have been amplified by accusations of China engaging in 'debt-trap diplomacy'.[103] Researchers and analysts have dismissed these fears, stating that they may be based on a misinterpretation of the actual loan agreements and terms.[104] According to these analyses, the loan structures for projects like the Standard Gauge Railway (SGR) do not include provisions that directly sign away rights to seize assets like the Mombasa Port upon default.[105]

Nciko wa Nciko, in his work showcases how collateralisation can be done in a manner far more nefarious and far less straight forward as we expect.[106] He showcases how, in the Democratic Republic of Congo, a $509.43 million R4I contract between the government and a consortium of Chinese state-owned companies led to the construction of the

100 Mburu, 'No projects to show for Sh1 trillion borrowings'.

101 Mburu, 'No projects to show for Sh1 trillion borrowings'.

102 Kell, 'Kenya's debt struggles go far deeper than Chinese loans'.

103 Kell, 'Kenya's debt struggles go far deeper than Chinese loans'.

104 Kell, 'Kenya's debt struggles go far deeper than Chinese loans'.

105 Fergus Kell, 'Kenya's debt struggles go far deeper than Chinese loans'.

106 Nciko wa Nciko, 'China have mercy: The unacceptable collateralised sovereign debt burden that the Busanga hydropower plant places on the DRC', in James Thuo Gathii (ed) *How to reform the global debt and financial architecture*, Sheria Publishing House, 2023, 279.

Busanga HPP. [107] On paper, the DRC is using its copper and cobalt resources to reimburse the cost of the project, which was financed by the China Eximbank. However, the market value of the natural resources provided by the DRC as collateral exceeds the value of the infrastructure constructed.[108] This situation forces the DRC into an 'unsustainable collateralised sovereign debt position,' where the country receives little in return while the project primarily serves the interests of the Chinese consortium. The excess natural resources provided could have been used to meet other development goals in the DRC.[109]

The imbalance in this contract was made possible due to alleged corruption and illegal conduct by the Chinese consortium and the ruling clique under former President Joseph Kabila. In the Kenyan context, the state could have entered into such R4I contracts and as showcased in the section above on contractual transparency, the Kenyan citizenry would have no idea.[110] This could lead to an unsustainable debt burden and the diversion of valuable resources away from other development goals, undermining the realisation of socio-economic rights.[111]

Debt restructuring

Debt restructuring refers to a process where a debtor country renegotiates the terms of its outstanding debt obligations with its creditors.[112] This could involve extending the repayment period, reducing

[107] Nciko, 'China have mercy: The uncacceptable collaterised sovereign debt burden that the Basanga hydropower plant places on the DRC', 283.

[108] Nciko, 'China have mercy: The uncacceptable collaterised sovereign debt burden that the Basanga hydropower plant places on the DRC', 283.

[109] Nciko, 'China have mercy: The uncacceptable collaterised sovereign debt burden that the Basanga hydropower plant places on the DRC', 294.

[110] See Nciko, 'China have mercy: The uncacceptable collaterised sovereign debt burden that the Basanga hydropower plant places on the DRC', 294 on lack of transparency.

[111] Nciko, 'China have mercy: The uncacceptable collaterised sovereign debt burden that the Basanga hydropower plant places on the DRC', 294.

[112] Skylar Brooks, Domenico Lombardi and Ezra Suruma, 'African perspectives on sovereign debt restructuring', Cigi Papers No 43, September 2014, 1.

the interest rate, or even reducing the principal amount owed.[113] There is currently no comprehensive legal framework for sovereign debt restructuring in the world. However, African countries have considerable experience with sovereign debt restructuring, having undertaken a total of 317 debt restructuring processes between the early 1980s and 2014.[114]

Traditionally, African countries have borrowed mostly from multilateral lenders like the IMF and World Bank, and high-income bilateral creditors in the Paris Club. Consequently, when African countries have needed to restructure debts, they have done so through the Paris Club and specific debt relief initiatives like the Heavily Indebted Poor Countries (HIPC) Initiative.[115]

More recently, the composition of Africa's creditors has been shifting, with countries increasingly turning to international capital markets and new bilateral creditors like China for financing.[116] As a characteristic, debt restructuring tends to utilise austerity and fiscal consolidation measures to ramp up the revenue of the debtor state, often to the detriment of its citizens' needs. Zambia's restructuring for example has seen the state freeze wage bills, eliminate agricultural subsidies as well as fuel and electricity subsidies.[117] This shift in debt restructuring strategies has parallels with the structural adjustment programmes implemented in Kenya, highlighting the socio-economic impacts of austerity measures on citizens.

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113 Brooks, Lombardi and Suruma, 'African perspectives on sovereign debt restructuring', 1.

114 Brooks, Lombardi and Suruma, 'African perspectives on sovereign debt restructuring', 1.

115 Brooks, Lombardi and Suruma, 'African perspectives on sovereign debt Restructuring', 3.

116 Brooks, Lombardi and Suruma, 'African perspectives on sovereign debt restructuring', 3.

117 International Monetary Fund, 'Zambia: Staff report for the 2015 Article IV consultation', IMF Staff Country Report No 15/152, 16 June 2015.

Structural adjustment programmes in Kenya: A look into the effect of restructuring

Restructuring tends to be followed by austerity measures. One way to look at the socio-economic effects of a possible future restructuring in Kenya would be to analyse the structural adjustment programmes (SAPs) undertaken in Kenya during the 1980s and 1990s.[118] These programmes aimed to stabilise and restructure economies but often included austerity measures such as reducing public sector spending, privatising state-owned enterprises, and liberalising trade and investment policies.[119]

One of the most notable impacts was the forced privatisation of 139 out of 250 state-owned companies.[120] Many of these enterprises were profitable, but the privatisation was justified as a necessary step to reduce government expenditure. However, this process often benefited well-connected individuals and entities, raising serious concerns about transparency and fairness.[121]

Education and public services also suffered significantly. The introduction of cost-sharing in public universities meant that students were required to pay KES 6,000 annually, a sharp departure from the previous system of free higher education.[122] This policy imposed a heavy financial burden on many families and diminished the quality and accessibility of essential services like education and healthcare due to reduced government funding.[123]

The austerity measures also led to job cuts in the public sector, exacerbating unemployment and hindering the government's ability to support social welfare programmes. The resulting socio-economic impact was severe, alongside increased ethnic hatred, discrimination,

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118 Mwangi Githahu, 'Looking back at the SAPs processes of the early 1990s', *The Elephant,* 18 January 2024.

119 Githahu, 'Looking back at the SAPs processes of the early 1990s'.

120 Githahu, 'Looking back at the SAPs processes of the early 1990s'.

121 Githahu, 'Looking back at the SAPs processes of the early 1990s'.

122 Tomasz Milej, 'Slaughtering Kenyan public universities with a blue knife: The new IMF loan conditionalities', *AfronomicsLaw,* 10 May 2021.

123 Githahu, 'Looking back at the SAPs processes of the early 1990s'.

and welfare problems.[124] The IMF and World Bank's reforms focused on economic metrics at the expense of social welfare, often worsening the quality of life for ordinary citizens.[125]

The above analysis has highlighted the substantial gaps and shortcomings within Kenya's legal and institutional framework governing sovereign debt acquisition, management, and restructuring. There are persistent violations of constitutional principles for instance public participation, transparency, and accountability across all three phases. Rampant corruption, political interference, and a lack of enforceable debt ceilings undermine debt sustainability and divert resources away from socio-economic development.

The socio-economic consequences are severe – reduced fiscal space for essential public services, threats to livelihoods and employment, undermining of human rights like education and health, and an erosion of living standards for ordinary citizens. Kenya's experience with the structural adjustment programmes offers a sobering precedent of the potential adverse impacts. Addressing these legal and institutional gaps through comprehensive reforms is crucial to ensuring Kenya's sovereign debt is acquired and managed sustainably and that possible future restructurings uphold the socio-economic rights of the populace.

Popular solutions to the debt problem and their applicability in Kenya

As mentioned earlier, debt default is the norm instead of the exception.[126] More states in the world have defaulted on their sovereign debt.[127] Owing to the fact that there are as many debt management practices and solutions as there are states, this section aims to pick and analyse a few

[124] Githahu, 'Looking back at the SAPs processes of the early 1990s'.

[125] Githahu, 'Looking back at the SAPs processes of the early 1990s'.

[126] Carmen M Reinhart and Kenneth S Rogoff, 'This time is different: A panoramic view of eight centuries of financial crises', Working Paper 13882, National Bureau of Economic Research Cambridge, March 2008, 5.

[127] Reinhart and Rogoff, 'This time is different', 5.

solutions already utilised or studied for utility across the globe. From the onset it is important to state that debt abolition shall not form part of this section. This is because the geopolitical, historical and policy considerations necessary to analyse debt cancellation cannot be undertaken in a section alone. This paper is thus structured around the following solutions by which states, through their own action and initiative, used to move themselves away from the debt wall

Balanced budget amendments

A balanced budget amendment is a constitutional rule requiring government spending not to exceed its income over a given period of time (typically a fiscal year).[128] This would make it unconstitutional for the federal government to run annual budget deficits. When crafting the annual budget, projected expenditures on all government programmes and services cannot exceed the expected tax revenues and other receipts for that year.[129] However, the amendments generally build in some limited exceptions to the balanced budget requirement. Temporary deficit spending may be allowed during periods of national emergency for instance war, natural disaster, or economic recession when stimulus is needed.[130] Outside of crises, the amendment forces fiscal discipline as surpluses must be run during good economic times to offset any deficits incurred during downturns.[131]

The best-known application of a balanced budget amendment is Germany's *Schuldenbremse* (debt brake), introduced in 2009.[132] It limits the federal structural deficit to 0.35% of the GDP and prohibits state-level structural deficits since exceptions are allowed during emergencies,

[128] Peter G Peterson Foundation, 'Budget basics: Balanced budget amendment — pros and cons'.

[129] Peter G Peterson Foundation, 'Budget basics: Balanced budget amendment — pros and cons'.

[130] Peter G Peterson Foundation, 'Budget basics: Balanced budget amendment — pros and cons'.

[131] Peter G Peterson Foundation, 'Budget basics: Balanced budget amendment — pros and cons'.

[132] Alexander Thiele, 'The German way of curbing public debt', 11(1) *European Constitutional Law Review* (2015) 30.

such as economic crises or natural disasters.[133] The debt brake was created in the wake of the 2008 financial crisis with an excessive public deficit becoming one of the biggest German economic fears.[134] Other states with balanced budget provisions incorporated into their constitutions include Hong Kong, Italy, Poland, Slovenia, Spain, and Switzerland, as well as the constitutions of most US states. In the United States, the Republican Party has pushed for a balanced budget amendment to be added to the United States Constitution.[135]

Balanced budget amendments' flaws and challenges for implementation in Kenya

Germany's debt brake, introduced in 2009, requires the federal government and 16 states to balance their budgets without new borrowing. The federal government is allowed to borrow up to 0.35% of the GDP annually (about €13 billion in 2022, based on a GDP of €3.88 trillion).[136] The rule became binding for the federal government in 2016 and for states in 2020. From 2014 to 2019, Germany achieved balanced budgets. However, exceptions were made in 2020, 2021, and 2022 due to the COVID-19 pandemic and the Ukraine war, allowing borrowing in the 'three-digit billion-euro range' in 2022. A 2023 Constitutional Court ruling created a €60 billion shortfall in the 2024 federal budget. Amending the debt brake requires a two-thirds majority in the Bundestag(Germany's federal parliament), which is currently unlikely due to opposition from the Christian Democratic Union and Christian Social Union.[137]

Proponents of constitutionalised balanced budget provisions have argued that they have a significant effect in ensuring fiscal discipline.[138]

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133 Basic Law for the Federal Republic of Germany (Grundgesetz) of 23 May 1949, Article 109(3); Thiele, 'The German way of curbing public debt', 30.

134 Thiel terms this phenomenon as 'German Angst' and credits it with being foundational to the fiscal compact; See Thiel, 'The German way of curbing public debt', 32.

135 Richard Kogan, 'March constitutional balanced budget amendment poses serious risks', *Centre on Budget and Policy Priorities,* 16 March 2018.

136 Sabine Kinkartz, 'What is Germany's debt brake?', *Deutsche Well*, 29 November 2023.

137 Kinkartz, 'What is Germany's debt brake?'.

138 Joe Amick, Terrence L Chapman and Zachary Elkins, 'On constitutionalising a balanced budget', 82 *The Journal of Politics* (2020) 1092.

On the other hand, arguments against balance budget amendments stress issues on the following fronts. First, it would force damaging cuts to spending or tax increases during economic downturns, exacerbating recessions and job losses by eliminating the 'automatic stabilisers' that help cushion the economy.[139] Second, obtaining the supermajority votes needed to waive the balanced budget requirement would likely prove extremely difficult therefore delaying necessary action.[140]

Third, the amendment would prevent major programmes like social security from drawing on their accumulated reserves to pay benefits as intended, instead requiring sudden cuts.[141] Fourth, it could also undermine the government's deposit insurance and other financial backing by prohibiting funds from being paid out if doing so created a deficit.[142] Fifth, the amendment rests on a false analogy – states can borrow for capital projects and families take out loans, practices that would be unconstitutional for the federal government. Finally, serious questions also remain about how such an amendment would be enforced and what powers the president or courts might have to unilaterally cut spending or raise taxes.[143]

Applying a balanced budget amendment to Kenya's Constitution could face significant challenges. Kenya's heavy reliance on volatile foreign aid and borrowing for revenue makes consistently achieving budget balance difficult based solely on domestic tax receipts.[144] The country's already high public debt levels which are over 60% of GDP would also necessitate painful fiscal consolidation efforts before operating under the new rules.[145] Politically, amending the constitution requires substantial cross-party consensus that may prove elusive for ceding such fiscal powers. While promoting fiscal discipline is desired,

139 Kogan, 'March constitutional balanced budget amendment poses serious risks'.

140 Kogan, 'March constitutional balanced budget amendment poses serious risks'.

141 Kogan, 'March constitutional balanced budget amendment poses serious risks'.

142 Kogan, 'March constitutional balanced budget amendment poses serious risks'.

143 Kogan, 'March constitutional balanced budget amendment poses serious risks'.

144 Joseph Sirengo, 'Determinants of Kenya's fiscal performance', KIPPRA Discussion Paper No 91 September 2008, 7.

145 World Economics, 'Kenya debt to GDP ratio: 67.5%'.

an inflexible balanced budget amendment could undermine Kenya's developmental needs. A more gradual, flexible 'debt brake' approach may be more appropriate initially.[146] Further, it would hamper the government's ability to run deficits for developmental spending on crucial infrastructure and capital investments.

Debt for nature/climate swaps

A debt for nature swap (DFN) involves forgiving a portion of a country's sovereign debt in exchange for conservation commitments.[147] Typically, this takes the form of a locally financed and operated conservation fund, but can also include high-level policy commitments.[148] Debt forgiveness can result from a bilateral agreement between the debtor and creditor or a multi-party arrangement where philanthropic entities purchase the existing debt at a discount to fund conservation efforts.[149] In theory, it is a triple-win – reducing debt strain, financing environmental protection, and aligning a country's economic interests with conservation. Nations like Bolivia, Belize and Costa Rica have engaged in such swaps with creditors ranging from governments to environmental NGOs with Belize being cited as the most successful instance of a DFN by the African Development Bank in its report.[150]

Debt-for-climate and debt-for-nature swaps have been touted as innovative financial instruments that enable governments burdened by debt to invest in resilience against climate change and biodiversity loss without triggering fiscal crises.[151] They can also improve a country's

146 Constitution of Kenya (2010) Article 257.

147 African Natural Resources Management and Investment Centre, 'Debt for nature swaps – feasibility and policy significance in Africa's natural resources sector', African Development Bank Abidjan, Côte d'Ivoire, 2022, 21.

148 African Natural Resources Management and Investment Centre, 'Debt for nature swaps', 21.

149 African Natural Resources Management and Investment Centre, 'Debt for nature swaps', 21.

150 African Natural Resources Management and Investment Centre, 'Debt for nature swaps', 23.

151 Kristalina Georgieva, Marcos Chamon and Vimal Thakoor, 'Swapping debt for climate or nature pledges can help fund resilience', *IMF Blog*, 14 December 2022.

credit rating and generate additional revenue by protecting global public goods like carbon sinks.[152] Although swaps alone cannot resolve unsustainable debt, they can complement traditional debt relief and concessional finance, particularly in middle-income countries, by scaling up transactions, involving more third-party financing, and improving transaction terms. The International Monetary Fund can support these efforts through its Resilience and Sustainability Trust and other initiatives, helping countries integrate climate impacts into their macroeconomic frameworks and signalling policy ambitions to attract swap-related investments.[153] Despite this, scholars argue against the utility of debt for nature swaps in both alleviating African states debt burden and affecting climate change.

Debt for nature swaps' flaws and challenges for implementation in the Kenyan context

Salient concerns of debt for nature swaps include greenwashing, where creditors appear environmentally responsible without making substantial contributions.[154] This practice enhances their public image without real impact, diluting genuine environmental efforts. Thus, creditors can create the appearance of being environmentally conscious without taking meaningful action, benefiting from positive publicity while doing little to advance genuine sustainability goals.[155] In addition, inadequate monitoring, insufficient funding, and poorly designed initiatives have been cited as key obstacles. The focus on small-scale projects leads to minimal overall impact, with countries settling for minor

[152] Georgieva, Chamon and Thakoor, 'Swapping debt for climate or nature pledges can help fund resilience'.

[153] Georgieva, Chamon and Vimal Thakoor, 'Swapping debt for climate or nature pledges can help fund resilience'.

[154] Nciko Wa Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', in James Thuo Gathii, Adebayo Majekolagbe and Nona Tamale (eds) *Transforming climate finance in an era of sovereign debt distress,* Sheria Publishing House, 2023, 132.

[155] Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', 132.

concessions instead of substantial debt relief or significant environmental improvements.[156]

Nciko argues against debt for nature swaps, stating that they are simply a new ground for capital accumulation by the AfDB and by Paris Club creditors.[157] He argues that the historical receptivity of the Paris Club to swaps merely resurrects a dormant market to the detriment of African states.[158] This is grounded on the following bases. First that, as the AfDB admits, debt for nature swaps have had minimal applicability in the past.[159] Second, Belize's debt for nature swap has had negligible environmental impact, despite this being the selling point.[160]

In the context of Kenya, President Ruto has expressed keen interest in utilising 'debt-for-climate adaptation' swaps as an innovative way to manage the nation's $70+ billion debt pile while raising much-needed capital for climate resilience projects. It is an enticing proposition given Kenya's vulnerability to climate shocks and its fiscal constraints.[161] However, legitimate concerns persist around economic sovereignty, asset valuation and governance. Structuring such deals requires immense care, transparency and legislative oversight to ensure that the nation does not unwittingly compromise its long-term strategic interests through a short-sighted debt liability transfer.[162]

In April 2024, Wanjiru Gikonyo filed a case at the East African Court of Justice challenging its actions while considering, setting up,

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156 Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', 132.

157 Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', 125.

158 Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', 127.

159 Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', 131.

160 Nciko, 'Misery of others as a new site for capital accumulation: A critical assessment of the AfDB's stance on debt-for-nature/climate/swaps', 131.

161 Brian Ambani, 'Kenya eyes debt-for-nature swaps to construct water dams', *The East African*, 17 February 2023.

162 Adekunle Agbetiloye, 'Kenya considers debt-for-nature swap as $2 billion debt deadline looms', *Business Insider Africa,* 16 January 2024.

and implementing debt swap transactions, especially debt for nature swaps and debt for food security swaps to fund the budget deficit for Kenya's 2024/2025 financial year lacks transparency, accountability, and public participation.[163] The case centred on the state's failure to disclose any particulars on the details, transactions, actors and amounts involved in the debt swap arrangements.[164]

Citizen debt auditing

Citizen debt audits are comprehensive reviews of a country's public debt portfolio, conducted by independent commissions or citizen-led initiatives.[165] These audits aim to identify any irregularities, overpricing and lack of due process in the acquisition of debt, hence distinguishing between legitimate and illegitimate portions of the debt.[166] The concept of citizen debt audits originates from Ecuador, where in 2008, President Correa established a Debt Audit Commission to investigate the legitimacy of the country's debts.[167]

The Commission's findings led to the repudiation of significant portions ($3.2 billion of its external commercial debt) of Ecuador's external commercial debt that was deemed illegitimate, based on factors such as onerous terms and lack of transparency in the debt's origination.[168] The idea is rooted in the principle of odious debt, which asserts that debts incurred without the consent of the people and not used for their benefit should not be transferable to successor regimes. This concept dates back to the 19th century and emphasises the importance of accountability and

[163] *In the Matter of the Treaty for the Establishment of the EAC: Eugenia Wanjiru Gikonyo v Attorney-General of the Republic of Kenya*, 19, EACJ (2019).

[164] *In the Matter of the Treaty for the Establishment of the EAC: Eugenia Wanjiru Gikonyo v Attorney-General of the Republic of Kenya*, 19, EACJ (2019).

[165] Molly Scott Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis', SSRN, 2 June 2012, 10.

[166] Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis', 10.

[167] Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

[168] Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

transparency in debt management, empowering citizens to participate in democratic processes concerning public finances.[169]

In Spain and Greece, campaigns like 'We don't owe: We won't pay' and various advocacy groups challenged austerity policies and called for democratic debates on national debt consequences.[170] Similarly, Portugal emphasised the importance of thorough debt audits to produce technically reliable results and challenge societal pressures for debt repayment.[171] Meanwhile, in Egypt, Tunisia, and Ireland, campaigns aimed to suspend payment of inherited foreign debts, address questionable loans, and increase awareness about the necessity of economic democracy for political democracy.[172] In Ireland, academic audits prompted public rejection of government agreements supporting private banks, sparking debates on the relationship between the state, citizens, and overvalued assets from previous economic booms.[173]

Challenges faced by debt audits and their applicability to the Kenyan context

In 2015, the Debt Truth Committee in Greece flagged concerns over predatory lending practices by EU institutions like the European Central Bank (ECB) during the debt crisis. However, its findings had limited traction against powerful creditors.[174] In Sri Lanka, leftist National People's Power (NPP)'s proposal of a debt audit was completely disregarded by the main opposition.[175] In Pakistan Committee for the

[169] Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10; See also Andy Haldane and Mark Kruger, 'The resolution of international financial crises: Private finance and public funds', *Bank of Canada Review* (2001-2002) 1-12.

[170] Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

[171] Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

[172] Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

[173] Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

[174] Paris Gyparakis, 'The illegality of the Greek sovereign debt crisis: Contract law's response to the Greek government,' 16(1) *Journal of International Business and Law* (2016) 142.

[175] Imal Kotelawala, 'Sri Lanka's SJB slams NPP's 'debt audit' proposal, insists restructuring is essential,' *Economy Next,* 17 April 2024.

Abolition of illegitimate Debt (CADTM) and the Labour Relief Campaign Pakistan called for the formation of such a commission to audit Pakistan's foreign debt. In 2011, CADTM Pakistan argued that an independent debt audit commission should be formed to investigate the legitimacy of Pakistan's debt, however these recommendations where never acted upon.[176] Effective audits require truly independent bodies with public legitimacy overseeing the process, along with technical capacity and access to comprehensive data.[177] Support from major creditors is essential to translate findings into substantive debt relief measures.[178]

As at the writing of this paper, President William Ruto has appointed a public debt audit task force to investigate Kenya's national debt, which he claims is nearly 'drowning' the country.[179] The task force is expected to uncover the full extent of Kenya's public debt and how public funds were used, with the goal of preventing excessive debt burdens that could harm the economy.[180] The task force is set to report its findings within three months. However, the constitutionality of the task force is currently in question.[181] The High Court, through Justice Lawrence Mugambi, has issued a conservatory order suspending President Ruto's Gazette Notice appointing the task force.[182] The court order prohibits the task force from discharging any duties pending the hearing of a case challenging its establishment.

176 Anonymous Reporter, 'Independent debt audit commission sought', *Dawn*, 17 September 2015; Abdul Wahid, 'Pakistan's debt dilemma', *IMF PFM Blog,* 30 August 2023.

177 Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

178 Cato, 'Who owes whom? Citizens' audit as a response to the sovereign debt crisis?', 10.

179 Purity Wangechi, 'Ruto reassures Kenyans on public debt audit task force amid legal hurdles', *Capital News,* 14 July 2024.

180 Wangechi, 'Ruto reassures Kenyans on public debt audit task force amid legal hurdles'.

181 Wangechi, 'Ruto reassures Kenyans on public debt audit task force amid legal hurdles'.

182 Kenya Gazette, CXXVI (97) 5 July 2024, 8261; Purity, 'Ruto reassures Kenyans on public debt audit task force amid legal hurdles'.

Austerity

Austerity is defined as the deliberate deflation of domestic wages and prices through cuts to public spending.[183] Austerity measures are designed to reduce states' debts and deficits with advocates of austerity believing that slashing public spending spurs private investment.[184] This is because, ideally, it signals government unwillingness to add to its own debt burden and to crowd out the market through stimulus.[185] Most of Europe has been utilising austerity measures consistently for the years following the 2008 financial crisis, this is despite clear indicators that austerity failed to work as envisioned.[186]

In the aftermath of the 2008 financial crisis, which triggered a surge in public debt, numerous European nations steadfastly implemented austerity measures. However, the results were apparent and consistent: austerity was proven ineffective. Most economies on the fringes of the Eurozone experienced significant downturns from 2009, with the entire Eurozone contracting for the first time in the fourth quarter of 2012.[187]

According to Blythe, austerity is fundamentally flawed for three reasons. First, is the distributional dimension in that those at the bottom feel the effects of austerity more than those at the top.[188] This results in circumstances where:

> ...Those who can pay won't, while those who can't are being forced to do so.[189]

The second dimension is compositional. Everyone cannot cut their way to growth at the same time. If all states in a currency or economic union, which are each other's trading partners, cut their spending at the same time, the result can only be a contraction of the regional econ-

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183 Mark Blyth, 'The austerity delusion: Why a bad idea won over the West', 92(3) *Foreign Affairs*, (2013) 42.

184 Blyth, 'The austerity delusion: Why a bad idea won over the West', 42.

185 Blyth, 'The austerity delusion: Why a bad idea won over the West', 42.

186 Blyth, 'The austerity delusion: Why a bad idea won over the West', 42.

187 Blyth, 'The austerity delusion: Why a bad idea won over the West', 43.

188 Blyth, 'The austerity delusion: Why a bad idea won over the West', 43.

189 Blyth, 'The austerity delusion: Why a bad idea won over the West', 44.

omy.[190] The third dimension is logical, that is, the notion that slashing government spending boosts investor confidence assumes that consumers anticipate and incorporate all government policy changes in their spending, a notion that has been proven wrong.[191]

Austerity in Kenya

In the 1990s, Kenya, under pressure from the International Monetary Fund (IMF) and the World Bank, embarked on a series of austerity measures known as structural adjustment programmes (SAPs).[192] These programmes, aimed at economic and political reforms, significantly impacted various aspects of Kenyan society. They led to a wave of privatisations, with the government selling off numerous state-owned companies, including successful and profitable entities.[193] Additionally, there were drastic cuts to the civil service, job losses, and the introduction of cost-sharing policies in education, which shocked the populace and had far-reaching social and economic consequences.[194]

The SAPs were characterised by significant social and economic upheaval including increased income inequality, inflation, unemployment and retrenchments.[195] While touted as necessary for economic restructuring, they brought about widespread hardship for ordinary Kenyans and exacerbated existing socio-economic challenges. The IMF and World Bank, inspired by neoliberal policies of the time, imposed these measures as conditions for financial assistance, making Kenya a testing ground for policies that had profound and enduring impacts on its citizens.[196]

In 2023 the IMF's approval of nearly $1 billion in loans to Kenya, contingent on the implementation of extensive taxation measures, sparked widespread protests due to their regressive nature and adverse

190 Blyth, 'The austerity delusion: Why a bad idea won over the West', 45.
191 Blyth, 'The austerity delusion: Why a bad idea won over the West', 45.
192 Githahu, 'Looking back at the SAPs processes of the early 1990s'.
193 Githahu, 'Looking back at the SAPs processes of the early 1990s'.
194 Githahu, 'Looking back at the SAPs processes of the early 1990s'.
195 Githahu, 'Looking back at the SAPs processes of the early 1990s'.
196 Githahu, 'Looking back at the SAPs Processes of the early 1990s'.

impact on the population.[197] Despite government praise for the reforms, citizens took to the streets, highlighting the exacerbation of the cost-of-living crisis and the neglect of vulnerable groups.[198] The new tax regime features doubling Value Added Tax (VAT) on fuel and raising taxes on essentials like food, disproportionately affected the poor and small businesses, while leaving private wealth and corporations unaffected.[199] Critics argued that such austerity measures undermined economic growth and productivity, further entrenching Kenya in a cycle of debt dependency, as half of the projected revenues would go towards debt repayment, with debt already ballooning under President Ruto's tenure.[200]

Recommendations

Kenya can strengthen its sovereign debt management by implementing a series of comprehensive measures. Amendments to ensure fiscal discipline, such as a balanced budget amendment, can enforce prudent resource management while maintaining flexibility for emergencies. Enhancing accountability and transparency through reforms to the Public Finance Management Act (PFMA) would ensure greater openness in debt acquisition, including mandatory public disclosure of contractual terms and enhanced scrutiny of borrowing decisions.

Conducting independent citizen debt audits can help identify irregularities and distinguish between legitimate and illegitimate debts, potentially reducing the overall debt burden.

197 Bretton Woods Project, 'The IMF in Kenya: Regressive taxation as the new face of austerity', 4 October 2023.

198 Bretton Woods Project, 'The IMF in Kenya: Regressive taxation as the new face of austerity'.

199 Bretton Woods Project, 'The IMF in Kenya: Regressive taxation as the new face of austerity'.

200 Bretton Woods Project, 'The IMF in Kenya: Regressive taxation as the new face of austerity'.

In addition, strengthening anti-corruption measures and establishing independent oversight bodies can prevent the misuse of borrowed funds and reduce political interference in debt management processes.

Promoting meaningful public participation in debt-related decisions and mandating the open publication of government contracts and debt-funded projects can build public trust. Austerity measures should be implemented cautiously, protecting social welfare programmes and essential public services. Learning from past SAPs can help design more balanced and equitable restructuring programs. Adopting a socio-economic rights-centred approach in debt management and prioritising investments in critical public services can align debt management with sustainable development goals. Finally, ensuring transparent loan agreements, especially those involving significant assets, can mitigate fears of losing control over vital infrastructure.

Conclusion

The increasing accumulation of sovereign debt in Kenya significantly impacts the government's ability to fulfil its socio-economic obligations as enshrined in Article 43 of the Constitution of Kenya (2010). The analysis of the Kenyan legal framework reveals significant challenges in the acquisition, management, and restructuring of sovereign debt, adversely impacting the realisation of socio-economic rights. Corruption, political interference, and fears of collateralisation further complicate the situation, diverting valuable resources away from development goals and undermining the rights of Kenyan citizens. Ultimately, addressing these issues requires a holistic approach that considers the structural factors contributing to Kenya's debt dependency and implements policies that progressively consolidate socio-economic rights. By fostering an environment with ample opportunities for its citizens to flourish, Kenya can ensure a more sustainable and equitable economic future.

An assessment of the efficiency and effectiveness of compulsory mediation in Malawi

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Abstract

This article analyses the efficiency and effectiveness of mandatory judge-led mediation in Malawi. It discusses whether mandatory judge-led mediation meets the objectives of reducing costs, delay, and case backlog as provided for under the High Court Civil Procedure Rules, 2017. This article also analyses the benefits, challenges, and the parties' satisfaction with mandatory mediation. This study argues that although Malawi's mandatory mediation may resolve disputes expeditiously, reduce case backlog

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and costs, it threatens the parties' right to trial and infringes mediation principles including voluntariness, party self-determination, flexibility, and informality. Further, while the Constitution of Malawi recognises and promotes the use of alternative dispute resolution mechanisms such as mediation to enhance access to justice, Malawi lacks institutions, policies and comprehensive legislation which can sufficiently promote the use of mediation and help to decongest courts in Malawi.

Keywords: Malawi, access to justice, efficiency, effectiveness, judge-led mediation, court decongestion

Introduction

The Constitution of Malawi (1994) guarantees the right to access justice for all persons in Malawi.[1] To meet this objective, the Constitution recognises various dispute resolution mechanisms including alternative dispute resolution (ADR),[2] customary law, and litigation.[3] Ideally, considering the numerous challenges facing the Malawian judiciary, mediation and other ADR techniques should widen the access to justice for many Malawians. These challenges include high litigation costs, inadequate legal aid opportunities,[4] delay in litigation,[5] immense case backlog,[6] insufficient numbers of courts, lack of training for judicial officers, government underfunding, low education levels, and complex court procedures.[7]

To give effect to the constitutional provisions promoting the use of ADR, the judiciary introduced mandatory mediation of all civil cases coming to the commercial and general divisions of the high court.[8] Malawi first implemented judge-led mediation only in the commercial division of the high court in 2007.[9] The objectives of the mandatory mediation include: expeditious dispute resolution, reducing litigation costs and delay, and ensuring fairness and justice to parties.[10] The judiciary further seeks to reduce the courts' case backlog.[11]

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1 Constitution of Malawi (1994) Section 41.

2 Constitution of Malawi (1994) Section 13(l).

3 Constitution of Malawi (1994) Section 10(2).

4 Wilfried Scharf, Chikondi Banda, Ricky Rontsch, Desmond Kaunda, and Rosemary Shapiro, *Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums,* Dullah Omar Institute, 2002, 9.

5 Fidelis Edge Kanyongolo, 'Malawi: Justice sector and the rule of law', Open Society Initiative for Southern Africa, 2006, 28.

6 Kanyongolo, 'Malawi: Justice sector and the rule of law', 28.

7 Scharf and others, 'Access to justice to the poor of Malawi', 13-20.

8 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 1.

9 Commercial Division Mandatory Mediation Rules 2007, Order 1 Rule 3.

10 Courts (High Court) (Civil Procedure) Rules 2017, Order 13 Rule 2(1)(a).

11 Commercial Division Mandatory Mediation Rules 2007, Order 1 Rule 3.

Although the judiciary introduced the mandatory mediation of civil cases, the high court continues to experience delay in the conclusion of cases and heavy case backlog.[12] For example in the 2016-2017 fiscal year, the entire High Court received 5,219 civil cases and concluded only 1,677 cases representing 32 percent of the total cases resolved. The Commercial Division registered 364 cases during the same period and finalised 221 cases representing 60 percent of the resolved cases while the Industrial Relations Court disposed of 997 cases out of 1,415 cases reported thereby resolving 70 percent of the cases.[13] The figures paint a bad picture of the High Court in general. Furthermore, no evidence exists to suggest that Malawi's mandatory mediation has reduced costs for both the litigants and the courts.[14]

This paper seeks to analyse the efficiency and effectiveness of Malawi's mandatory mediation under the 2017 Rules. The paper assesses whether compulsory mediation in Malawi meets its objectives of reducing courts' delay in resolving disputes, costs, and ensuring fairness. Further, the paper analyses the processes, outcomes, settlement rates, satisfaction rates, compliance rates, benefits, and challenges of Malawi's compulsory mediation. To assess these issues, the study carried out in-person interviews between July and September 2021 of direct stakeholders in Malawi's court-ordered mediation, namely, judges, parties, and lawyers. The study picked respondents from the commercial and general divisions of the high court where mediation applies.

This research utilised purposive sampling which enables the researcher to pick respondents who are likely to provide answers to the study objectives.[15] Six judges, nine lawyers, and nine parties were interviewed. Among the parties, four were plaintiffs while five were defendants. The work experience of the judges ranged between one (1) year and twenty-five (25) years while the lawyers ranged between four years

12 Frank Edgar Kapanda, 'A critical evaluation of judicial mediation in Malawi', Unpublished LLM Dissertation, University of Cape Town, 2013, 51.

13 Suzgo Khunga, 'Judges shortage delaying justice', *Nation Online,* 2018.

14 Kapanda, 'A critical evaluation of judicial mediation in Malawi', 24.

15 Olive Mugenda and Abel Gitau Mugenda, *Research methods: Quantitative and qualitative approaches*, African Centre for Technology Studies, 1999, 86.

and twenty-five (25) years. The lawyers practiced law in various fields of law including in commercial matters, personal injury matters, land issues, and chieftaincy matters. The collected data was analysed using qualitative content analysis.[16]

This paper is organised into four sections. First, the paper discusses the concept of mediation, its purported advantages and disadvantages, the principles of mediation, types of mediation, and mandatory mediation. Second, the paper analyses the legal framework of mediation in Malawi. Third, the paper discusses mandatory mediation in the High Court. Under this section, the paper reports the findings from the interviews conducted on judges, lawyers and parties. The last part makes recommendations and serves as a conclusion.

The concept of mediation

Folberg and Taylor define mediation 'as the process by which the participants, together with the assistance of a neutral person[(s)] … isolate dispute issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs'.[17] Leonard Riskin defines mediation as a 'voluntary process in which a neutral third party, who lacks authority to impose a solution, helps participants reach their own agreement'.[18] The above definitions cover mediation principles including impartiality, voluntariness, and party self-determination but do not mention other mediation principles such as confidentiality, informality, and flexibility. This paper defines mediation as a flexible, informal, confidential, and voluntary dispute resolution mechanism in which an impartial third party helps parties reach a mutual agreement.

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16 Christen Erlingsson and Petra Brysiewicz, 'A hands-on guide to doing content analysis', 7(3) *African Journal of Emergency Medicine* (2017) 93 (stating that a content analysis technique aims at organising data, summarising it and finding themes).

17 Jay Folberg and Alisson Taylor, *Mediation: A comprehensive guide to resolving conflicts without litigation*, Jossey-Bass Publishers, 1984, 7.

18 Leonard L Riskin, 'The special place of mediation in alternative dispute processing', 37(1) *Florida Law Review* (1985) 6.

Principles of mediation

Mediation has specific principles that are different from litigation, which attract its users. The first characteristic of mediation is party self-determination and voluntariness. The elements of party self-determination include the party's freedom to choose mediation,[19] mediators, procedures, and the outcome.[20] Parties should also be free to withdraw from mediation if they so please.[21]

The second principle of mediation is confidentiality. Both the parties and the mediator are prohibited from revealing information they get during mediation sessions. The mediator and parties cannot bring such information during a subsequent litigation or arbitration. For instance, the American Arbitration Association's mediation standards provide that mediators should keep confidential all information relating to mediation and information coming from caucuses with the individual parties unless the parties otherwise agree.[22] In the same line, the EU Directive on Cross Border Mediation, 2008 states that 'mediation is intended to take place in a manner that respects confidentiality'.[23] Similarly, Malawi's High Court Civil Procedure Rules, 2017 provide that matters deliberated in the mediation process shall be confidential.[24]

The principle of confidentiality is important in mediation for various reasons. First, it enables parties to share more about their cases because they do not fear that such information will be used against them in subsequent litigation.[25] Second, it makes parties trust the mediator

[19] John Brand, Felicity Steadman, and Chris Todd, *Commercial mediation: A user's guide to court-referred and voluntary mediation in South Africa,* Juta Law, 2016, 24.

[20] Wahab, 'Court-annexed and judge-led mediation in civil cases', 61.

[21] Model standards of conduct for mediators, adopted by American Arbitration Association, American Bar Association, Association for Conflict Resolution, 2005, Standard 1(A).

[22] Model standards of conduct for mediators, Standard 5(A).

[23] Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 21 May 2008, Article 7.

[24] Courts (High Court) (Civil Procedure) Rules 2017, Order 13 Rule 7(1).

[25] Ronan Feehily, 'The development of commercial mediation in South Africa in view of the experience in Europe', Unpublished PhD Thesis, University of Cape Town, 2008, 145.

and the process.[26] Third, it protects the reputation of mediators as well as strengthens the impartiality of the mediators.[27] Moreover, parties may choose mediation due to the privacy it provides because they wish to avoid publicity.[28] For instance, business entities may prefer mediation to avoid tarnishing the image of the companies, which may lead to loss of shares or business. However, critics state that the confidentiality of mediation makes mediation unaccountable to the public.[29] The public is not able to assess whether the procedures and outcomes of mediation are just. As such, mediation may not protect weaker members of society.[30] Further, mediation does not generate precedents from which the society can learn; nor does it contribute to the development of law.[31]

The impartiality of mediators is the third principle of mediation. For example, the Model Standards of Conduct provide that 'a mediator shall conduct mediation in an impartial manner'.[32] However, while mediators are always required to be impartial, they may not have to be neutral at all times. This is because mediators have to be 'mindful of the fairness of any outcome; and aware of their professional role in ensuring the duty of care (to the parties)'.[33] Mediators cannot be neutral where they see injustice is likely to happen. For example, the Standards of Practice for Lawyer Mediators in Family Disputes stipulate that a mediator '…should be concerned with fairness…(and) has an obligation to avoid an unreasonable result'.[34]

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26 Law Reform Commission Report, 'Alternative dispute resolution: Mediation and conciliation', November 2010, 101.

27 Laurence Boulle and Alan Rycroft, *Mediation: Principles, process, practice,* Butterworths, 1997, 3.

28 Feehily, 'The development of commercial mediation in South Africa', 33-34.

29 Jacqueline Nolan-Haley, 'Mediation and access to justice in Africa: Perspectives from Ghana', 21(59) *Harvard Negotiation Law Review* (2015) 95.

30 Rodney S Webb, 'Court-annexed ADR- a dissent', 70(2) *North Dakota Law Review* (1994) 232.

31 Deborah Thompson Eisenberg, 'What we know and need to know about court-annexed dispute resolution', 67(2) *South Carolina Law Review* (2016) 246 -247.

32 Model standards of conduct for mediators, Standard II B.

33 Patricia Marshall, 'The partial mediator: Balancing ideology and the reality', 1 *ADR Bulletin of Bond University*, 2010.

34 National Alternative Dispute Resolution Advisory Council (NADRAC), 'Issues of fairness and justice in alternative dispute resolution', Canberra, November 1997, 24.

Similarly, Australian law provides that a mediator should ensure just outcomes and consider public interest in issues.[35] For instance, mediators cannot be neutral in cases of power imbalances where stronger parties attempt to take advantage of weaker parties. In such cases, the mediator may be obligated to assist the weaker party.[36] If mediators strictly remain neutral, the outcome may be unjust.[37]

What should mediators do to ensure justice in mediation? While many people may argue that mediators should not be concerned with substantive justice,[38] almost everyone agrees that mediators must ensure procedural fairness. The mediator can ensure procedural fairness by encouraging parties to have legal representation,[39] giving disputants equal and sufficient time to present their case, allowing the parties to resolve matters, ensuring voluntary mediation, and respecting the parties.[40] There should be 'no threat, compulsion or coercion to enter or stay in the process'.[41]

Fourth, mediation is informal and flexible.[42] Unlike litigation which is laden with evidential and procedural complexities, mediation procedures are simpler. Parties freely speak about their cases and choose for themselves the mediators, rules of procedure, and the outcome.[43] Moreover, disputants have a wide variety of options to resolve their dispute,[44]

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35 Law Reform Commission Report, 'Alternative dispute resolution', 42.

36 Boulle and Rycroft, *Mediation: Principles, process and practice*, 299-300.

37 Hilary Astor, 'Rethinking neutrality: A theory to inform practice - part 1', 11(2) *Australian Dispute Resolution Journal* (2000) 73.

38 Boulle and Rycroft, *Mediation: Principles, process and practice*, 196.

39 Joseph Stulberg, 'Mediation and justice: What standards govern?', 6 *Cardozo Journal of Conflict Resolution* (2005) 244.

40 Stulberg, 'Mediation and justice', 243.

41 NADRAC, 'Issues of fairness and justice in alternative dispute resolution', 21.

42 Office of Democracy and Governance (ODG), *Alternative dispute resolution practitioners guide*, Technical Publication series, 1998, 6.

43 Campell C Hutchinson, 'The case for mandatory mediation', 42(1) *Loyola Law Review* (1996) 85, 89.

44 Kariuki Muigua, 'ADR: The road to justice in Kenya', Paper presented at the Chartered Institute of Arbitrators, Kenya Branch, International Arbitration Conference held on 7 and 8 August 2014 at Sarova Whitesands Hotel, Mombasa, Kenya, 42.

including offering apologies. This enables the disputants to resolve the disputes according to what they need.

Types of mediation

There are three main types of mediation: facilitative, evaluative and transformative. According to Riskin, the facilitative mediator 'assumes that the parties are intelligent, able to work with their counterparts… capable of understanding their situations better than the mediator,' and 'can develop better solutions than any the mediator might create'.[45] Therefore, in a facilitative mediation, there is no element of adjudication on the part of the mediator.[46] The mediator does not give recommendations on how to resolve the case; nor does he or she express opinions to the parties on the strengths and weaknesses of their cases or predict the likely outcomes of such cases at trial.[47] The task of the mediator in facilitative mediation is to observe fair procedures, promote communication between the parties, and clarify issues.[48]

Facilitative mediation has the advantage of empowering disputants by enabling them to take full responsibility for dispute resolution. It promotes party self-determination.[49] However, critics of facilitative mediation argue that settlements delay because there is a lack of evaluation by the mediator.[50] Second, facilitative mediation often leads to no resolution or its outcomes may not meet the standards of justice. Further, they argue that mediators may not sufficiently protect the weaker

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45 Leonard L Riskin, 'Understanding mediator's orientations, strategies, and techniques: A grid for the perplexed', 1(7) *Harvard Negotiation Law Review* (1996) 24.

46 Carrie Menkel-Meadow, 'Lawyer negotiations: Theories and realities - what we learn from mediation', 56 *Modern Law Review* (1993) 367.

47 Murray S Levin, 'The propriety of evaluative mediation: concerns about the nature and quality of an evaluative opinion', 16(2) *Ohio State Journal on Dispute Resolution* (2001) 268.

48 Riskin, 'Understanding mediator's orientations, strategies, and techniques: A grid for the perplexed', 24.

49 Carole J Brown, 'Facilitative mediation: The classic approach retails its appeal', 4(2) *Pepperdine Dispute Resolution Journal* (2004) 283.

50 Levin, 'The propriety of evaluative mediation: Concerns about the nature and quality of an evaluative opinion', 270.

party since the facilitative mediator refrains from saying anything regarding the parties' rights and obligations.[51]

As for evaluative mediation, Leonard Riskin states that the mediator 'assumes that the participants want and need [them] to provide some guidance as to the appropriate grounds for settlement – based on law, industry practice or technology – and that [they are] qualified to give such guidance by virtue of [their] training, experience, and objectivity'.[52] Thus, the evaluative mediator has the task of 'finding facts by properly weighing evidence, judging creditability, allocating the burden of proof, determining and applying relevant law, rules, or customs, and rendering an opinion'.[53]

The evaluative mediator focuses on the rights and obligations of the parties rather than their needs and interests and evaluates the matters according to legal principles of fairness.[54] The evaluative mediator gives the strengths and weaknesses of the disputants' cases, predicts outcomes at litigation,[55] helps the disputants appreciate the advantages and disadvantages of engaging in mediation, and makes recommendations to the parties towards a settlement.[56]

Proponents of evaluative mediation argue that this mediation increases settlement rates, protects party rights more than facilitative mediation,[57] and decreases the possibility of settling for less in mediation.[58] However, critics contend that evaluative mediation breaches self-deter-

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51 Zena Zumeta, 'Styles of mediation: Facilitative, evaluative, and transformative mediation', *Mediate Everything Mediation*, 27 February 2018; Hilary Astor and Christine Chinkin, *Dispute resolution in Australia,* 2nd edition, LexisNexis, 2002, 26.

52 Riskin, 'Understanding mediator's orientations, strategies, and techniques: A grid for the perplexed ', 24.

53 Brown, 'Facilitative mediation', 283.

54 Brown, 'Facilitative mediation', 283.

55 Levin, 'The propriety of evaluative mediation: Concerns about the nature and quality of an evaluative opinion', 270.

56 Zumeta, 'Styles of mediation: Facilitative, evaluative, and transformative mediation'.

57 Kathy Douglas and Becky Batagol, 'The role of lawyers in mediation: Insights from mediators at Victoria's Civil and Administrative Tribunal', 764.

58 Douglas and Batagol, 'The role of lawyers in mediation: Insights from mediators at Victoria's Civil and Administrative Tribunal'.

mination of parties and mediator impartiality, encourages adversarial tendencies of litigation, and risks making parties lose trust in the mediator since a party may think that the mediator favours the party who has a stronger case.[59]

Finally, the transformative model emphasises the social and communicative view of conflicts. Transformative mediation 'is a process of assisting in conflict transformation [by] changing the quality of interaction' so that 'parties can recapture their sense of competence and connection, reverse the negative conflict cycle, re-establish a constructive interaction, and move forward on a positive footing with the mediator's help'.[60]

Bush and Folger argue that where there is a conflict there is a crisis of human interaction. The disputants' hostility towards each other results in negative and destructive interaction between them. In transformative mediation, which is party-driven and party-centred, the mediator helps the disputants understand each other and return to a positive and constructive interaction. The term 'transformative' is used to highlight the change which occurs when the relationship between the disputants changes from a hostile, negative, and destructive interaction to one which is positive and constructive. Such changes in the interaction between the disputants are important regardless of whether or not they lead to any settlement.[61] Critics argue that transformative mediation takes too long to resolve matters, may not lead to any settlement, is contrary to standards of fairness because the mediator does not intervene where injustice is being done, and may not protect weaker parties.[62]

Advantages of mediation

Mediation has advantages. Mediation maintains relationships. While litigation is adversarial because it 'polarises parties, creates ad-

[59] Kimberlee K Kovach and Lela P Love, 'Evaluative mediation is an oxymoron', 14(3) *CPR Institute for Disputer Resolution*, (1996) 31.

[60] Robert A Baruch Bush and Joseph P Folger, *The promise of mediation: The transformative approach to conflict,* 2nd edition, Jossey-Bass, 2004, 9-11.

[61] Bush and Folger, *The promise of mediation: The transformative approach to conflict,* 9-11.

[62] Zumeta, 'Styles of mediation: Facilitative, evaluative, and transformative mediation'.

ditional rifts and strains relationships to a point that future dealings are difficult if not impossible',[63] mediation is not combative. As such, mediation remains a useful tool in disputes where the parties wish to maintain future relationships, for instance, in family, commercial, and employment disputes. For example, countries such as Uruguay, Bolivia, Ukraine, and Thailand have promoted the use of mediation in commercial matters. South Africa encourages resolving labour issues through mediation and arbitration.[64] In England and Wales, marriage disputes concerning property, children, separation, and money are usually resolved through mediation.[65] Other countries that promote using mediation to resolve family matters include the United States (US), Norway, Sweden, Australia, Spain, South Africa and Zimbabwe.[66]

Proponents of mediation also contend that mediation reduces delay, case backlog, and cost.[67] The Malawi High Court Civil Procedure Rules, 2017 have similar objectives.[68] Studies have shown that mediation resolved disputes in the US faster than litigation.[69] One US study compared similar cases resolved through litigation and mediation and found that mediation resolved such matters within seven weeks before the court ever made their judgment on the same issues.[70] However, court-annexed mediation in the US appears to be affected by the same administrative complexities and costs in litigation.[71]

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63 Hutchinson, 'The case for mandatory mediation', 88.

64 Office of Democracy and Governance, *Alternative dispute resolution practitioners guide*, 12.

65 Thomas McFarlane, 'Mediation: The future of dispute resolution in contemporary Scots Family', 3 *Aberdeen Student Law Review* (2012) 52.

66 McFarlane, 'Mediation: The future of dispute resolution', 31, 32, 34.

67 Eisenberg, 'What we know and need to know about court-annexed dispute resolution', 246.

68 Courts (High Court) (Civil Procedure) Rules 2017, Order 13 Rule (2)(1)(a); Commercial Division Mandatory Mediation Rules, 2007, Order 1(3).

69 Office of Democracy and Governance, *Alternative dispute resolution practitioners guide,* 17.

70 Office of Democracy and Governance, *Alternative dispute resolution practitioners guide,* 17 citing Stevens H Clarke, Elizabeth D Ellen, Kelly McCormick, 'Court-ordered civil case mediation in North Carolina: An evaluation of its effects', North Carolina Administrative Office of the Courts, State Justice Institute, Institute of Government, University of North Carolina, 1995.

71 Office of Democracy and Governance, *Alternative dispute resolution practitioners guide*, 17.

Thus, it is not obvious that mediation will always reduce costs and time. There are many factors to consider when analysing these matters. Mediation may reduce time and costs when parties settle the matter. However, if the matter is unsettled, mediation elongates dispute resolution and makes it more expensive because parties will pay for both the mediation and the subsequent litigation. Other factors include whether parties paid costs for any sanctions, whether they paid the mediators, and whether the parties went for the mediation early enough after the dispute arose.

Disadvantages of mediation

Mediation also has disadvantages. For instance, the use of mediation usually focuses on the interests of the parties, and not those of the society as a whole. There are times when advancing individual interests may not benefit societal interests. For instance, resolving a consumer dispute through mediation whereby the owner of a chemist has been selling expired drugs to a customer may protect the reputation of the chemist. However, it is detrimental to the interest of the public because the wrongdoer may continue selling expired drugs to other customers. If such matters went to court, the public would be alerted. A second example is resolving cases of defilement through mediation to protect concerned individuals. The wrongdoer may continue committing such crimes because the public is not aware that they committed those crimes.

Mediation can be a threat to justice and legal rights especially for persons who do not have power, money, and access to legal representatives,[72] as it is difficult for the state to intervene. The presence of ignorance can make the weaker party bargain and settle for less.[73] Further, mediation's confidentiality hinders research and development of law and practice.[74] Mediation has no precedent from which society may

[72] Owen M Fiss, 'Against settlement', 93(6) *Yale Law Journal* (1984) 1076.

[73] Office of Democracy and Governance, *Alternative dispute resolution practitioners guide*, 24.

[74] Eisenberg, 'Court-annexed dispute resolution', 246.

learn something.[75] Due to these challenges of mediation, it is important to use mediation in appropriate cases.

Institutional and legal framework on mediation

Mediation is recognised at the international level as one of the dispute resolution mechanisms. The United Nations Charter prescribes that 'parties to any dispute… shall… seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.[76] However, the clause is not comprehensive enough because it fails to set up institutions at the international level to promote mediation and does not oblige states to set up legal and institutional frameworks on mediation. Further, the Singapore Convention, which seeks to recognise and enforce international commercial agreements,[77] is an important regulatory framework. However, the Convention's scope is too limited since it only deals with commercial matters.

At the national level, the Malawi Constitution recognises and encourages the use of mediation.[78] The main legislation governing court-ordered mediation in Malawi is the Civil Procedure Rules, 2017. The Rules apply to all civil cases in Malawi's High Court. The Rules provide that 'all proceedings (in civil matters) shall first go through mediation'.[79] The application of the Rules is not sufficient to promote the use of mediation and to significantly reduce case backlog in the Malawi courts. The Rules apply only to civil cases in the High Court and have no application in the other courts including the magistrates' courts and industrial relations court. The lack of mediation laws in other courts impedes the use of mediation.

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75 Office of Democracy and Governance, *Alternative dispute resolution practitioners guide*, 16.

76 United Nations Charter, 24 October 1945, 1 UNTS XVI, Article 33.

77 United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), 20 December 2018, UNTS 73/198, Article 1(1).

78 Constitution of Malawi (1994) Section 13 (1).

79 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 1.

The Rules exempt certain matters from mandatory mediation. The exemptions include 'a matter whose trial is expedited by law or practice', where a party applies for summary judgment or judgment on admission, or 'where the court in its discretion, so orders'.[80] However, some of the exemptions require further explanation. For instance, the clause should give examples of cases 'where by law or practice, the trial is expedited'. The other challenge is that the clause on exemptions does not provide any opportunity for parties themselves to avoid mediation when they have good reasons. Moreover, the provisions fail to give guidelines to judges on how to screen cases to determine whether to refer cases to mediation. In response to this, the Rules could provide for exemptions to mediation where there are power imbalances between the disputants, where the judiciary seeks to develop precedent and the law, or where public interest is at stake.

Further, mandatory mediation under the Rules has objectives. The Rules seek to 'reduce costs and delay in litigation' and ensure the 'fair resolution of disputes'.[81] Mandatory mediation also seeks to reduce case backlog in the court.[82] Nevertheless, the objectives under the Rules are not exhaustive. The Rules should include the objective of promoting the peaceful resolution of disputes and the maintenance of relationships. Further, the rules should include the objective of promoting party autonomy in resolving disputes and ensuring creative solutions.

Moreover, the Rules provide that participants to the mediation process include the parties, their lawyers and the mediators.[83] The Rules do not state what should happen if a party is physically unavailable for mediation. The Rules should allow unavailable people to take part in the mediation through video conferencing or phone calls. Furthermore, the Rules provide for the mandatory attendance of parties and their legal representatives in the mediation session.[84] Thus, parties may hire

80 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 1.

81 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule (2)(1).

82 Commercial Division Mandatory Mediation Rules, 2007, Order 1(2)(e) and (f).

83 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 4(1).

84 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 4(1).

lawyers to represent them at mediation. However, the clause fails to explain the role of lawyers at mediation. The clause is also silent on the obligation of the Malawian government to provide legal aid in mediation. In addition, the clause does not provide for the training of lawyers in mediation.

Mediators under the Rules are the judges of the High Court. A judge who handles a case in mediation is not allowed to handle the same case in litigation if the mediation fails to resolve the matter.[85] The Rules provide for the impartiality and independence of judges in conducting mediation.[86] However, the Rules fail to define the impartiality and independence of mediators. The Rules do not provide any guidelines to mediators to ensure impartiality. For example, the Rules fail to mention conflict of interest issues. They do not explain whether a judge should recuse himself or herself where there is a conflict of interest. Moreover, the Rules fail to provide for the training of judges in mediation. The Rules do not set up training and accreditation bodies. Further, they do not give guidelines to the judges for the conduct of mediation; nor do they explicitly provide for styles of mediation.

The Rules prescribe the time for mediation which takes place sevem days after the close of pleadings.[87] Parties are required to submit mediation bundles briefly stating the facts, legal issues, their position and interests.[88] The Rules also require the parties to tender their evidence.[89] The Rules further stipulate that parties to a mediation process should have the authority to settle.[90] The mandatory provisions further provide for sanctions where the parties fail to comply with provisions for mandatory mediation.[91] However, sanctions may tamper with the voluntary

85 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 9(1).

86 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 2(2)(a).

87 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 3(1).

88 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 3(3).

89 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 3(4).

90 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 5(1).

91 For any non-compliance such as failing to attend a mediation session without good cause, the judge may dismiss the claim if the non-complying party is a claimant, or strike out the defence where the non-complying party is the defendant or order a party

nature of mediation. The Rules require the parties and the mediator to sign a mediation settlement which the court considers as its own judgment and enforces it.[92]

The Rules further provide for the principle of confidentiality. The Rules provide that mediation matters are confidential.[93] The confidentiality rule covers communication between the parties, any documents and the judge's records.[94] Mediation matters cannot be used in a subsequent litigation by a judge-mediator or the parties.[95] In the case of *JF Investments Limited v First Merchant Bank Limited,*[96] the court confirmed the confidentiality of the mediation process.[97] However, the Rules do not give guidelines on whether a mediator can share information from caucuses to the other party. Moreover, the Rules do not mention whether third parties, experts or witnesses who may attend the mediation sessions are bound by the confidentiality rule. Malawi may learn from jurisdictions that require participants in mediation to commit to upholding confidentiality by signing a confidentiality agreement.[98]

While the Rules provide for the principle of confidentiality, they fail to provide for other principles of mediation. For instance, the Rules do not explicitly provide for the principle of self-determination of the parties. Under the Rules, a mediator 'shall facilitate communication between or among the parties in order to assist them in reaching a mutually acceptable resolution'.[99] The foregoing statement may imply the

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to pay costs or make any other order the court so finds fit. See Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 6(1).

92 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 8(3).

93 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 7(1).

94 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 7(1) and (2).

95 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 7(b).

96 Commercial Case No 55 of 2010, 19 March 2010 (unreported).

97 See also, *Trust Securities Ltd v Finance Bank of Malawi* (in Liquidation) (HC) Commercial Case No 51 of 2007 (unreported).

98 Edna Sussman, 'A brief survey of US case law on enforcing mediation settlement agreements over objections to the existence or validity of such agreements and implications for mediation confidentiality and mediator testimony', *IBA Legal Practice Division, Mediation Committee Newsletter*, April 2006, 32.

99 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 2(1)(b).

self-determination of parties. Nevertheless, the explicit mention of party self-determination together with its elements would have served better considering that party self-determination is a cardinal feature of mediation. Additionally, the Rules do not mention the informality and flexibility of mediation.

The practical experience of mandatory mediation in Malawi

Owing to the purported advantages of mediation, courts in many jurisdictions introduced mandatory mediation to enable the parties enjoy the benefits of mediation. Those in support of mandatory mediation give the following arguments. First, they contend that compulsory mediation provides opportunities for parties to enjoy the benefits of mediation. When mediation is voluntary, not many people choose it.[100] For instance, a study in England's London County courts discovered that out of 4,500 cases in which parties were free to choose mediation, only 160 chose mediation.[101] However, when England enacted the Civil Procedure Rules in 1977, encouraging mediation and giving sanctions for non-compliance, there was a dramatic increase of 141 percent of the number of commercial disputes referred to mediation.[102] A study found out that voluntary mediation has a lower uptake than compulsory mediation.[103]

Second, supporters of mandatory mediation argue that courts coercing parties into mediation is good since some may not want to initiate mediation for fear of seeming weak.[104] In *Remuneration Planning Corp Pty v Fitton,* the Supreme Court of New South Wales said:

> It has become plain that that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that

[100] Lord Chancellor Department, 'Alternative dispute resolution: A discussion paper', November 1999, Annex B.

[101] Lord Chancellor Department, 'Alternative dispute resolution'.

[102] Lord Chancellor Department, 'Alternative dispute resolution'.

[103] Safer Communities Directorate, 'Mediation in civil justice: International evidence review', *Scottish Government*, 25 June 2019.

[104] Hutchinson, 'The case for mandatory mediation', 88.

> showing willingness to do so may appear as a sign of weakness, yet engage in successful mediation when mediation is ordered.[105]

In such cases, compulsory mediation intervenes to help the parties enter mediation.

Third, commentators argue that mandatory mediation is justified because it helps to bring awareness to people about mediation and its benefits.[106] However, they argue that the courts should implement mandatory mediation only as a short-term measure.[107] When the courts create sufficient mediation awareness among the people, they should abandon mandatory mediation and implement voluntary mediation.[108]

Critics of mandatory mediation argue that mandatory mediation undermines party self-determination which is 'a core value of mediation'.[109] Self-determination includes the parties' freedom to choose mediation and the outcome.[110] When courts implement mandatory mediation, they undermine party autonomy and one questions whether the process deserves to be called mediation. Trina Grillo contends that self-determination of parties is 'fundamentally altered when mediation is imposed rather than sought or offered'.[111] Similarly, Richard Ingleby is of the opinion that 'mediation loses its defining characteristics if the parties do not enter of their own volition or if the process is institutionalised'.[112]

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105 (2001) NSWSC 1208 (14 December 2001) para 3.

106 Frank Sander, William Allen and Debra Hensler, 'Judicial misuse of ADR? A debate', 27 *University of Toledo Law Review* (1996) 885, 886.

107 Sander, Allen and Hensler, 'Judicial misuse of ADR? A debate', 886.

108 Dorcas Quek, 'Mandatory mediation: An oxymoron? Examining the feasibility of implementing a court-mandated mediation programme', 11(2) *Cardozo Journal of Conflict Resolution* (2010) 484; Sander, Allen and Hensler, 'Judicial misuse of ADR?', 886.

109 Mary Anne Noone and Lola Akin Ojelabi, 'Ethical challenges for mediators around the globe: An Australian perspective', 45 *Washington University Journal of Law and Policy* (2014) 165.

110 Brand, Steadman and Todd, *Commercial mediation,* 24.

111 Trina Grillo, 'The mediation alternative: Process dangers for women', 100 *Yale Law Journal* (1991) 1581.

112 Richard Ingleby, 'Court-sponsored mediation: The case against mandatory participation', 56(3) *Modern Law Review* (1993) 443.

Colleen Kotyk stresses that '[t]he very premise of mediation is its voluntary nature, which in theory makes the parties more willing to reach an agreement. When a court or statute mandates mediation, however, a cornerstone of its foundation is removed, causing serious structural flaws'.[113] Others argue that coercion into mediation infringes the parties' rights to trial.[114]

Furthermore, critics argue that it is not necessary to implement mandatory mediation because it does not produce many settlements as compared to voluntary mediation. Studies indicate that mandatory mediation has less settlements than voluntary mediation. For example, voluntary mediation in Birmingham (UK) in the years between 1999 and 2004 had a 60% settlement rate while in Exeter where the judge referred cases to mediation against the will of the parties, the settlement rate was only 30%.[115] Similarly, research carried out in New York showed that mandatory mediation produced much fewer settlements than voluntary mediation.[116]

Mandatory mediation's low settlement rate may be a result of the 'undue pressure' that the judge exerts on the parties to mediate,[117] or the threat of sanctions for non-compliance.[118] Such pressure has the potential of making the disputants less frank in mediation.[119] Mediation's success depends on the willingness of the parties to enter the mediation process, negotiate and compromise.[120] Commentators argue that mediation's voluntariness is what leads to more settlements and warrants the

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113 Colleen N Kotyk, 'Tearing down the house: Weakening the foundation of divorce mediation brick by brick', 6 *William and Mary Bill of Rights Journal* (1997) 309.

114 *Halsey v Milton Keynes Gen NHS Trust*, CA 11 May 2004, para 9.

115 Wahad, 'Court-annexed and judge-led mediation in civil cases', 73.

116 Sally Engle Merry, 'The myth and practice in the mediation process' in Martin Wright and Burt Galaway (eds) *Mediation and criminal justice: Victim, offenders and community,* Sage Publications, 1989, 244.

117 Quek, 'Mandatory mediation: An oxymoron?', 486-487.

118 Farhan Ahmad, 'Is mandatory mediation the future?', *The Barrister Group*, 26 September 2024.

119 Quek, 'Mandatory mediation: An oxymoron?', 487.

120 Michael P Carbone, 'Mediation strategies: A lawyer's guide to successful negotiation', *Mediate: Everything Mediation.com*, 9 August 2019.

disputants' satisfaction with the process. When parties are forced into mediation, they may not cooperate because mediation depends on their good will to participate. Moreover, when the parties are forced into mediation, they may not comply with the settlements ensuing from such agreements.[121]

Reasons for introducing compulsory mediation in Malawi

Owing to the purported advantages of mediation, courts in many jurisdictions introduced mandatory mediation to enable the parties enjoy the benefits of mediation. Those in support of mandatory mediation give the following arguments. First, they contend that compulsory mediation provides opportunities for parties to enjoy the benefits of mediation. When mediation is voluntary, not many people choose it.[122] For instance, a study in England's London County courts discovered that out of 4,500 cases in which parties were free to choose mediation, only 160 chose mediation.[123] However, when England enacted the Civil Procedure Rules in 1977, encouraging mediation and giving sanctions for non-compliance, there was a dramatic increase of 141 percent of the number of commercial disputes referred to mediation.[124] A study found out that voluntary mediation has a lower uptake than compulsory mediation.[125]

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121 Timothy Hedeen, 'Coercion and self-determination in court-connected mediation: All mediations are voluntary, but some are more voluntary than others', 26(3) *The Justice System Journal,* (2005) 281.

122 Lord Chancellor Department, 'Alternative dispute resolution: A discussion paper', November 1999, Annex B.

123 Lord Chancellor Department, 'Alternative dispute resolution: A discussion paper'.

124 Lord Chancellor Department, 'Alternative dispute resolution: A discussion paper'.

125 Safer Communities Directorate, 'Mediation in civil justice: International evidence review', *Scottish Government*, 25 June 2019.

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127 (2001) NSWSC 1208 (14 December 2001) para 3.

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129 Mary Anne Noone and Lola Akin Ojelabi, 'Ethical challenges for mediators around the globe: An Australian perspective', 45 *Washington University Journal of Law and Policy* (2014) 165.

130 Brand, Steadman and Todd, *Commercial mediation,* 24.

131 Trina Grillo, 'The mediation alternative: Process dangers for women', 100 *Yale Law Journal* (1991) 1581.

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133 Colleen N Kotyk, 'Tearing down the house: Weakening the foundation of divorce mediation brick by brick', 6 *William and Mary Bill of Rights Journal* (1997) 309.

134 *Halsey v Milton Keynes Gen NHS Trust*, CA 11 May 2004, para 9.

135 Wahad, 'Court-annexed and judge-led mediation in civil cases', 73.

136 Sally Engle Merry, 'The myth and practice in the mediation process' in Martin Wright and Burt Galaway (eds) *Mediation and criminal justice: Victim, offenders and community,* Sage Publications, 1989, 244.

137 Quek, 'Mandatory mediation: An oxymoron?', 486-487.

138 Farhan Ahmad, 'Is mandatory mediation the future?', *The Barrister Group*, 26 September 2024.

139 Quek, 'Mandatory mediation: An oxymoron?', 487.

140 Michael P Carbone, 'Mediation strategies: A lawyer's guide to successful negotiation', *Mediate Everything Mediation*, 9 August 2019.

disputants' satisfaction with the process. When parties are forced into mediation, they may not cooperate because mediation depends on their good will to participate. Moreover, when the parties are forced into mediation, they may not comply with the settlements ensuing from such agreements.[141]

The main reason why Malawi introduced compulsory mediation was to reduce the case backlog in the courts of Malawi.[142] Five out of the six judges[143] and seven out of the nine lawyers[144] interviewed explained that the Malawi judiciary implemented mandatory mediation to reduce the backlog of cases. For example, one judge said compulsory mediation commenced in the Malawi courts 'to reduce unnecessary workload of the courts'[145]. Similarly, one lawyer said that Malawi introduced mandatory mediation because 'the courts were flooded with cases'.[146]

Respondents explained that the case backlog increased in Malawi due to the advent of multi-party democracy in 1994 as more Malawians became aware of their rights and sued to enforce their rights.[147] They also attributed the increase of case backlog to the insufficient numbers of judges.[148] Further, about half of the judges and lawyers mentioned that Malawi introduced mandatory mediation to reduce delay in the courts[149] and save costs.[150] Some judges and lawyers explained that Ma-

141 Timothy Hedeen, 'Coercion and self-determination in court-connected mediation: All mediations are voluntary, but some are more voluntary than others', 26(3) *The Justice System Journal,* (2005) 281.

142 Interview responses from participant 1, participant 4, participant 5, participant 6, participant 7, participant 8, participant 9, participant 10, participant 11, participant 13, participant 14, and participant 15.

143 Interview responses from participant 10, participant 11, participant 13, participant 14, and participant 15.

144 Interview responses from participant 1, participant 4, participant 5, participant 6, participant 7, participant 8, and participant 9.

145 Interview response from participant 14.

146 Interview response from participant 1.

147 Interview response from participant 5.

148 Interview responses from participant 7 participant 4, and participant 8.

149 Interview responses from participant 2, participant 3, participant 4, participant 6, participant 10, participant 11, participant 12 and participant 15.

150 Interview response from participant 2, participant 3, participant 4, participant 10, participant 11, participant 12, and participant 15.

lawi introduced mandatory mediation because when mediation was voluntary the uptake was too low.[151]

The findings show that the main goal for introducing mandatory mediation in Malawi was to reduce the case backlog, not necessarily to promote the use of mediation due to its features including flexibility, informality, and party self-determination in resolving disputes. Further, while some of the reasons given by the lawyers and judges for implementing compulsory mediation are contained in the Rules as objectives, others are not.

The objective of the Rules is to ensure that 'the parties shall strive to reduce costs and delay in litigation, and facilitate the early and fair resolution of disputes'.[152] This provision fails to mention other benefits of mediation such as encouraging the peaceful resolution of disputes, reconciliation and the maintenance of relationships as provided for in the Malawi Constitution.[153] This article recommends that the 2017 Civil Procedure Rules should include these other benefits of mediation and mediation features. The inclusion of other benefits of mediation can help lawyers and judges appreciate and promote the use of mediation as a dispute resolution mechanism.

Court-connected mediation vis-a-vis judge-led mediation

Parties, lawyers, and judges made a comparison between court-connected mediation and judge-led mediation. The majority of the parties (six out of eight parties) preferred judge-led and compulsory mediation to court-connected or private mediation.[154] First, the parties found judge-led mediation more serious than court-connected or private mediation.[155] They found the authority of the judge important.[156] They bemoaned the

151 Interview response from participant 1, participant 10, and participant 13.

152 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 2(1)(a).

153 Constitution of Malawi (1994) Section 13(1).

154 Interview responses from participant 16, participant 17, participant 20, participant 21, participant 22, and participant 23.

155 Interview responses from participant 16 and participant 17.

156 Interview responses from participant 16 and participant 20.

lack of commitment of mediators in Malawi's court-connected mediation programme.[157] More often than not, mediators in court-connected mediation failed to turn up for mediation sessions.[158] Second, parties found judges more professional, respectful and impartial than private mediators.[159] Third, parties preferred judge-led mediation because the settlement is binding and enforced by the court as a court judgement while in private mediation, the settlement is not binding.[160]

Similarly, eight out of nine lawyers and all the six judges preferred judge-led mediation to court-connected or private mediation.[161] They explained that Malawi once implemented court-connected mediation in the High Court's general division and magistrates' courts from 2004 to 2016.[162] However, the judiciary abandoned the programme because it was not working.[163] They also explained that Malawi implemented judge-led mediation in the commercial division between 2007 and 2016.[164] This fared better than court-connected mediation of the general division. In court-connected mediation, parties had the freedom to choose mediators from a list of mediators maintained by the chief justice. [165]

Lawyers and judges explained that mandatory mediation of the general division and magistrates' courts faced many challenges. First, court-connected mediation produced fewer settlements than judge-led mediation.[166] Second, court-connected mediators were not trained and

157 Interview responses from participant 16 and participant 17.

158 Interview responses from participant 16 and participant 17.

159 Interview responses from participant 16, participant 20, participant 21 and participant 22.

160 Interview response from participant 16.

161 Interview responses from participants 1-15. Only participant 5 preferred court-connected mediation and private mediation to judge-led mediation. He stated that what is needed in Malawi is to improve the conduct of private and court-connected mediation so that these mediations become serious.

162 Kapanda, 'A critical evaluation of judicial mediation in Malawi'; Interview with Participants 1-15.

163 Interviews with participants 1-15.

164 Commercial Division Mandatory Mediation Rules, 2007, Order 1(5).

165 Interviews with participants 1-15.

166 Interview responses from participant 4, participant 11 and participant 12.

accredited and lacked competence to conduct mediation since Malawi has no accreditation body. Moreover, there were no ethical standards for mediators.[167] Third, although the chief justice was supposed to maintain a list of mediators from various professions, majority of the mediators were lawyers. This defeated the whole idea of having expert mediators handle specific matters. [168]

Fourth, participants took court-connected mediation casually.[169] Sometimes disputants selected mediators who were their friends thereby making the process casual.[170] Law firms would send clerks or secretaries to represent clients instead of lawyers.[171] At times, the parties themselves never attended the mediation.[172] Moreover, court-connected mediation usually failed to end within the ninety-day period stipulated within the law.[173] Without seriously engaging in the mediation, the mediators would issue certificates indicating that mediation had failed.[174]

Fifth, money was the main incentive for lawyer-mediators in court-connected mediation. By contrast, the judge as a mediator has no interest in mediation fees since parties do not pay the judge any fees. The Malawi government pays the judge the same salary regardless of whether the judge does mediation or not.[175]

Sixth, the mediator's lack of power to sanction parties for non-compliance was another challenge.[176] Where disputants failed to attend mediation sessions, the innocent parties had the right to request mediators to issue a certificate to show that a party had not complied with

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167 Interview responses from participant 4, participant 5, participant 7 and participant 8.

168 Interview responses from participant 1, participant 4 and participant 6.

169 Interview responses from participant 1, participant 4, participant 5, participant 6, participant 7, participant 12, participant 14 and participant 15.

170 Interview responses from participant 5 and participant 6.

171 Interview response from participant 6.

172 Interview response from participant 11.

173 Interview response from participant 1.

174 Interview response from participant 5.

175 Interview responses from participant 4, participant 9, participant 11, participant 13 and participant 15.

176 Interview responses from participant 12 and participant 15.

mediation. Innocent parties would submit to the court the certificate of non-compliance so that the court could issue sanctions but this was a long process. The lawyer-mediator lacked powers to act instantly when non-compliance occurred. By contrast, in judge-led mediation, the judge-mediators have power to sanction the defaulting party as soon as non-compliance happens.[177]

Further, the majority of judges and lawyers preferred compulsory mediation to voluntary mediation.[178] Respondents explained that when mediation is voluntary, very few people choose to go for it.[179] Sometimes parties may want higher compensation from litigation.[180] Respondents gave the example of what is currently happening in the magistrates' courts where mediation is voluntary and due to this, mediation is not practised anymore in those courts.[181] However, a few judges and lawyers acknowledged that implementing court-connected mediation would be ideal for Malawi if the country put in place mediation infrastructure. This is because court-connected mediation is consistent with mediation principles such as parties' self-determination, informality, and flexibility.[182] Similarly, a few parties preferred court-connected mediation because it would allow them to choose mediators who would be readily available to conduct the mediation as compared to a judge who may be too busy.

While the majority of the parties, lawyers and judges preferred judge-led mediation in Malawi, the practice of judges mediating cases attracts controversy. Critics of mediation bring up the following critiques of mediation. They contend that it is not the duty of judges to mediate but to decide cases as per rules of evidence, relevant law, and

177 Interview response from participant 6.

178 Interview responses from participant 1, participant 2, participant 3, participant 4, participant 5, participant 6, participant 10, participant 11, participant 12, participant 13, participant 14, and participant 15.

179 Interview responses from participant 1, participant 10, participant 12 and participant 13.

180 Interview responses from participant 2 and participant 3.

181 Interview response from participant 1.

182 Interview responses from participant 7, participant 8 and participant 9.

the available facts.[183] Moreover, allowing judge-led mediation would be departing from the adversarial Malawian legal system to a civil law system. Since judicial authority does not include mediating cases, it is inappropriate for the judge to engage in the mediation of cases coming to court.[184] Commenting on this matter, the District Court of Appeal of Florida said, 'Mediation should be left to the mediators and judging to the judges'.[185]

Second, judges are not trained to be mediators. Trying to train judges would drain state resources.[186] Third, giving the work of mediating cases to judges adds to the judge's workload. Mediation cases consume the judge's time supposed to be used for litigation, therefore, mediating cases deprives litigation of having sufficient judges. That is why it is better for the court to leave mediation to private providers so that it has sufficient time to concentrate on litigation, which is the court's main mandate.[187] Fourth, owing to their evaluative qualities and the desire to reduce case backlog, judges may be tempted to coerce parties to settle in certain ways, which destroys the parties' self-determination in deciding cases.[188]

Fifth, the court is a public justice system while mediation is a private justice system. The judiciary operates using tax-payers' money and its operations must be accountable and transparent to the public. When the judge engages in mediation, the public is not able to follow and assess their actions because of the confidentiality of mediation. No one assesses whether these mediation processes lead to just outcomes. Hence, judges should not engage in such private dispute resolution whose transparency is questionable. Judges should be transparent and accountable for their decisions.[189]

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183 Marilyn Warren, 'Should judges be mediators?', Supreme and Federal Court Judges' Conference Canberra, 27 January 2010, 5.

184 NADRAC, 'Issues of fairness and justice in alternative dispute resolution', 21.

185 *Evans v State*, 603 So 2d 15, 17 (Fla Dist Ct App 1992).

186 NADRAC, 'Issues of fairness and justice in alternative dispute resolution', 21.

187 Warren, 'Should judges be mediators?', 17.

188 Peter Robinson, 'Adding judicial mediation to the debate about judges attempting to settle cases assigned to them for trial', 2(1) *Journal of Dispute Resolution* (2006) 353.

189 Warren, 'Should judges be mediators?', 17.

Supporters of judicial mediation argue that judge-mediators help increase settlements in mediation because of the judges' evaluative qualities.[190] Where parties may not have legal representation, the judge-mediator can tell the parties the legal implications of their cases.[191] Others support the use of judges as mediators in the courts because 'mediation provides an opportunity to expand and develop the judicial role of judges to the mutual benefit of the judges and the community'.[192] The authors in this article believe that the foregoing arguments are worth considering when implementing judge-led mediation in Malawi. In light of the above, this article recommends that the Malawi judiciary takes measures to promote mediation principles including the self-determination of parties, flexibility, and informality.

Right to trial and compulsory mediation

Parties, lawyers and judges deliberated on whether mandatory mediation is consistent with the rights of the parties to trial and litigation as provided for in the Constitution.[193] All interviewees stated that mandatory mediation complies with the right of the disputants to litigation because judges do not force parties to settle the dispute during mediation. Where parties fail to settle, the judge terminates the mediation and parties proceed to trial.[194] Some interviewees perceived mediation as part of court procedures which parties ought to respect.[195] The respondents all noted that parties generally comply with the requirement for mediation as part of court procedures.[196]

190 Warren, 'Should judges be mediators?', 17.

191 Leonard L Riskin, 'Toward new standards for the neutral lawyer in mediation', 26 *Arizona Law Review* (1984) 330.

192 James Alfini and Gerald S Clay, 'Should lawyer-mediators be prohibited from providing legal advice or evaluations?', *Dispute Resolution Magazine* (1994) 148.

193 Constitution of Malawi (1994) Section 41(2) and 42.

194 Interview responses from participants 1-23.

195 Interview responses from participant 1, participant 5, participant 9, participant 11, participant 13 and participant 18.

196 Interview response from participant 11.

While asserting that mandatory mediation in Malawi complies with the parties' right to litigation, a few judges admitted that sanctions imposed by judge-mediators threaten the right of the parties to litigation.[197] These judges contended that sanctions are necessary to regulate party behaviour.[198] However, some of the sanctions under the Courts' Rules were draconian, including the sanction of judges dismissing claims or striking out defences from the parties.[199] All respondents acknowledged that judges have been imposing sanctions to defaulting parties.[200] Some judges and lawyers were of the view that judges should apply sanctions as the last resort.[201] Others argued that judges ought to arrange other sessions for the mediation as opposed to rushing to give sanctions.[202]

The imposition of sanctions in mediation is always a controversial matter. Sanctions are deemed to contravene the voluntariness of mediation, especially when they are excessive. Some commentators argue that heavy sanctions for non-compliance result to coercion in mediation because parties may go for the mediation because they fear those sanctions.[203] Others contend that excessive sanctions violate the right of the parties to trial.[204] Under Malawi's Court Rules, the powers of a judge to strike out defences or dismiss claims in mediation are excessive sanctions that violate the disputant's right to litigation and infringe mediation's voluntariness. Judges should not have such powers in mediation.

Under the Rules, the judge is empowered to order the payment of costs to parties for non-compliance,[205] but the clause fails to give guidelines to help the judges determine the amount of the costs, which gives

197 Interview responses from participant 12 and participant 13.

198 Interview responses from participant 1, participant 12 and participant 13.

199 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 6(1); participant 12; participant 13.

200 Interview responses from participants 1-23.

201 Interview responses from participant 10 and participant 13.

202 Interview responses from participant 10 and participant 13.

203 Quek, 'Mandatory mediation: An oxymoron?', 490.

204 William P Lynch, 'Problems with court-annexed mandatory arbitration: Illustrations for the New Mexico experience', 32(2) *New Mexico Law Review* (2002) 181.

205 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 6(1)(b).

too much discretion to the judge and may result in too much variation in practice. Some judges can abuse the clause by imposing heavy costs to a defaulting party while others may impose very minimal costs.

This article recommends amending the clause to specify the kind of costs to be paid by a defaulting party. For example, in some jurisdictions, a defaulting party may pay the lawyer's fees or the mediation costs incurred for the mediation that failed to take place because of the absence of that party.[206] The objective of such monetary sanctions is to compensate the innocent party and discourage future non-compliance.[207]

Judges and lawyers in this research argued that what is important for the parties is for the dispute to be resolved.[208] Nevertheless, commentators argue that dispute resolution through litigation is different from mediation because the two processes offer different kinds of justice. Litigation accords parties with justice 'based on objective legal norms' while mediation offers 'individualised justice based on subjective standards'.[209] At trial, a judge resolves disputes while in mediation, disputants themselves make decisions that resolve the dispute. When the court coerces parties to go for mediation, the law is no longer central in resolving the matter and the judge is no longer the person to make judgments.[210] Therefore, if parties desire justice offered through the trial process, courts must respect the choice of the parties to use litigation as much as possible. Similarly, where parties desire justice provided by

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206 *Dvorak v Shibata,* 123 FRD 608, 610 (D Neb 1988).

207 Quek, 'Mandatory mediation: An oxymoron?', 496.

208 Interview responses from Participant 4 who stated that mandatory mediation promotes the settlement of disputes through the courts. He further stated that settlement of disputes through the courts should not be understood to mean the passing of judgement at trial. He noted that the important factor is the resolution of the issue, therefore, it does not matter whether the resolution is through settlement or judgment; Participant 6 stated that mandatory mediation promotes the right of the parties to trial. Additionally, participant 6 sated that mandatory mediation promotes the use of ADR and enhances access to justice. Participant 7 stated that mandatory mediation assists Malawians enjoy the right to trial since it helps reduce the case backlog, which gives more people access to the courts.

209 Jacqueline Nolan-Haley, 'Court mediation and the search for justice through law', 74 *Washington University Law Quarterly* (1996) 51.

210 Nolan-Haley, 'Court mediation and the search for justice through law', 63-64.

mediation, courts should encourage the parties. Each dispute resolution mechanism has its own benefits and challenges and it is up to the clients to choose the mechanism they please.

The efficiency and effectiveness of compulsory mediation in Malawi

Lawyers and judges analysed whether Malawi's mandatory mediation meets its objectives of resolving disputes expeditiously, reducing costs and the backlog of cases. Although Malawi has not evaluated the impact of the mandatory mediation to get the right figures on this,[211] the general answer was that there is minimal impact of mandatory mediation because the High Court still experiences delay and case backlog.[212] However, mandatory mediation is preventing the situation from worsening. Respondents stated that were it not for mandatory mediation, the case backlog and delay would have been worse.[213]

First, with regards to cost reduction, nearly all the parties, judges, and lawyers stated that mandatory mediation in Malawi is meeting this objective. Eight of the nine lawyers[214] and five of the six judges[215] stated that Malawi's mandatory mediation meets the objective of reducing costs. Further, six out of the nine parties said mediation saves on costs.[216] The judges and lawyers explained that if parties reach a mediation agreement, the lawyers do less work and research and use less money for paper work, therefore, the lawyer's fees are reduced and the parties spend less money.[217] Similarly, the courts spend less on paper work if

211 Interview responses from participant 10, participant 13 and participant 15.

212 Interview responses from participant 4, participant 9 and participant 13.

213 Interview response from participant 4.

214 Interview responses from participant 1, participant 2, participant 3, participant 4, participant 6, participant 7, participant 8 and participant 9. Only participant 5 was unsure of whether mediation reduced costs.

215 Interview responses from participant 10, participant 11, participant 12, participant 14, and participant 15. Only participant 13 said that mediation did not meet the objective of reducing costs.

216 Interview responses from participant 16, participant 17, participant 18, participant 19, participant 20, participant 22 and participant 23. Only participant 21 was unsure of whether mediation reduced costs.

217 Interview responses from participant 6 and participant 10.

the matter is settled at mediation.[218] Further, when a matter is settled at mediation, the courts do not tax the costs.[219]

Some cases settled through mediation have high settlement rates. The matters that have high settlement rates are personal injury and commercial matters.[220] Respondents explained that personal injury matters are easily settled because it is easy to find the liable party.[221] Moreover, parties depend on their insurance covers to pay compensation.[222] A good number of commercial matters are also resolved in mediation because some parties want to preserve their business relationships.[223] Further, producing evidence in commercial matters is easier since parties can produce receipts to show payments.[224]

Second, on whether mediation is helping to resolve disputes expeditiously in the courts, lawyers and judges had different views. While nearly all judges (five of the six judges) stated that Malawi's mandatory mediation resolves disputes fast,[225] only four out of nine lawyers had the same sentiments.[226] Both the judges and lawyers agreed that mediation sessions take a short time to conclude – sometimes from 30 minutes to 3 hours or at least within a day for most cases.[227] However, the majority of the lawyers (seven out of nine) stated that some judges take too long to allocate mediation dates, which prolongs the time mediation takes to

218 Interview responses from participant 10.

219 Interview response from participant 4.

220 Interview responses from participant 4, participant 6, participant 7, participant 8, participant 9, participant 10, participant 11, participant 12 and participant 14.

221 Interview responses from participant 10 and participant 14.

222 Interview response from participant 14.

223 Interview response from participant 9.

224 Interview response from participant 1.

225 Interview responses from participant 10, participant 11, participant 12, participant 14 and participant 15. Only participant 13 did not believe that mandatory mediation helped reduce delay in the courts.

226 Interview responses from participant 3, participant 4, participant 7 and participant 8 showed that mandatory mediation reduced delay in the courts of Malawi. Those who said that mandatory mediation did not help reduce delay in the courts include participant 1, participant 4, participant 5, participant 6 and participant 9.

227 Interview response from participant 11.

resolve the dispute.[228] While a few lawyers thought some judges failed to allocate mediation dates on time for good reasons (including the fact that judges in Malawi are few and, therefore, very busy),[229] the majority of lawyers were of the view that some judges are indolent.[230]

Third, lawyers and judges were divided in opinion as to whether compulsory mediation reduces case backlog in Malawi. Most judges (five out of the six judges) said mediation reduces the case backlog.[231] Half of the lawyers were in agreement with this assertion, while the other half disagreed.[232] Those who said mediation reduces the backlog argued that there is a high settlement rate in some cases, which logically means that mediation reduces case backlog.[233] They contended that, generally, the cases that are settled are more than those that are not settled.[234] Further, some of these lawyers argued that if Malawi courts still have backlog, it is because more people are suing.[235] Despite all of this, one thing that the lawyers and judges agreed on was that the overall impact of mandatory mediation is not seen because delay and case backlog continue to rise in the High Court.[236] This means there must be other factors to consider to ensure that mediation produces good results.[237]

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228 Interview responses from participant 1, participant 2, participant 3, participant 4, participant 5, participant 6 and participant 9.

229 Interview response from participant 7.

230 Interview responses from participant 2, participant 3, participant 5 and participant 6.

231 Interview responses from participant 10, participant 11, participant 12, participant 14 and participant 15. Only participant 13 stated that mandatory mediation did not reduce the case backlog.

232 Those who said mandatory mediation did not reduce the case backlog include participant 1, participant 4, participant 5 and participant 9. Those who said mandatory mediation reduced case backlog include participant 2, participant 3, participant 6, participant 7 and participant 8.

233 Interview responses from participant 6, participant 7, participant 8, participant 9, participant 10, participant 11, participant 12 and participant 14.

234 Interview responses from participant 6, participant 7, participant 8, participant 9, participant 10, participant 11, participant 12 and participant 14.

235 Interview response from participant 4.

236 Interview responses from participant 4, participant 9 and participant 13.

237 Interview response from participant 13.

Respondent's interview response to the observance of the principles of mediation in relation to mandatory mediation

The respondents mentioned other benefits of mediation including the fact that it empowers parties themselves to make decisions to resolve the dispute.[238] However, some lawyers and judges acknowledged the impossibility of fully realising mediation principles in mandatory mediation.[239] For example, commentators argue that the self-determination of parties includes the free choice of disputants to opt for mediation.[240] Malawi does not meet this requirement since the Malawi judiciary coerces parties to go for mediation.[241] Moreover, self-determination includes the liberty of disputants to select mediators, mediation procedures, venues, and outcomes.[242] Every party should also be free to withdraw from mediation if he or she pleases to do so.[243] Respondents explained that in Malawi's mandatory mediation, disputants have no liberty to choose the judge as their mediator since the court allocates the judges to mediate cases.[244] They also explained that parties do not also have the freedom to choose the venue since the mediation occurs within court premises (in conference rooms, judges' chambers or other offices) and the judge decides which room to use for the mediation.[245]

Since mediation takes place within court premises and conducted by a judge, some parties may think that they are doing litigation.[246] This article recommends that Malawi courts should allow judges to conduct mediation outside the court premises in venues the parties request.

238 Interview responses from participant 5, participant 6, participant 7, participant 11 and participant 15.

239 Interview responses from participant 6, participant 7, participant 8, participant 9 and participant 14.

240 Brand, Steadman and Todd, *Commercial mediation,* 24; Participants 1-15.

241 Interview responses from Participants 1-23. All respondents acknowledged that they were forced to go for mediation in the courts.

242 Wahad, 'Court-annexed and judge-led mediation in civil cases', 61.

243 Model standards of conduct for mediators 2005, Standard 1(A).

244 Interview responses from participant 1, participant 5, participant 6, participant 8, participant 10, participant 11 and participant 14.

245 Interview responses from participant 6 and participant 9.

246 Interview responses from participant 1, participant 7 and participant 9.

However, the venue should not be too far from court premises to avoid transport expenses. Further, respondents stated that the parties do not have a lot of say on the date and time of the mediation since judges allocate this according to their schedules.[247] Furthermore, the authors of this article observe that the Rules have no clause giving the parties the possibility to withdraw from the mediation. All these factors diminish party autonomy, flexibility, and informality of mediation as an ADR process.

Factors leading to settlements in mandatory mediation

Respondents stated that what contributes to settlements is the parties' willingness to settle, the judges' competence and the skills of the lawyer. The lawyers and judges acknowledged that some clients are difficult, stubborn, see no value of talking to the other party, and want litigation.[248] The parties mentioned the following as contributing factors to reaching settlements: the acceptance of liability by one party, that party's readiness to pay compensation or any monies involved, and the parties' willingness to compromise.[249] The lawyers and judges also explained that the amount of money involved also matters; parties are reluctant to settle if huge sums of money are involved but are ready to settle if small amounts of money are at stake.[250]

Moreover, settlements of disputes in mediation also depend on the value the parties attach to the dispute's subject matter or its complexity.[251] For instance, most land, chieftaincy, defamation, and custody matters are unresolved at mediation because they are complex and the people attach so much value to them.[252] Further, mediation fails or succeeds depending on the amount of compensation the claimant demands. If the plaintiff is demanding too much compensation, the chances of the

247 Interview responses from participant 6 and participant 9.

248 Interview responses from participant 4, participant 5, participant 8, participant 9, participant 11 and participant 13.

249 Interview response from participant 21.

250 Interview response from participant 8.

251 Interview responses from participant 1, participant 5.

252 Interview responses from participant 1, participant 10 and participant 12.

mediation failing are high.[253] Mediation may also fail if one party sees that they have a much stronger case than the other party hence a higher chance of winning the case in litigation.[254] Defendants may also be opposed to settling the matter in order to buy time so that they can look for money to pay later in litigation since litigation takes long.[255] Some defendants might have invested their money and want to earn interest before they can compensate the other party. [256]

In addition, the lawyers and judges stated that the competence of the lawyer and judge led to the failure or success of the mediation process.[257] The judges and lawyers acknowledged that most judges in Malawi have not been trained in mediation.[258] While some judges are good at conducting mediation despite the lack of training, there are a few judges who conduct mediation poorly.[259] For instance, there are some judges who terminate the mediation too quickly without helping the parties deliberate sufficiently.[260]

Further, lawyers make the mediation fail or succeed depending on the advice they give to the clients.[261] Most lawyers in Malawi did not receive formal education in mediation in the law school and have less appreciation for mediation.[262] Due to the non-appreciation of mediation, some lawyers advise the parties not to settle because they believe that

253 Interview response from participant 6.

254 Interview responses from participant 2, participant 3, participant 4, participant 6 and participant 8.

255 Interview response from participant 5.

256 Interview response from participant 6.

257 Interview responses from participant 4, participant 5, participant 6, participant 8, participant 9, participant 12 and participant 13.

258 Interview responses from participant 4, participant 5, participant 8, participant 9, participant 12, participant 13 and participant 15.

259 Interview responses from participant 2, participant 3, participant 4, participant 5, participant 6, participant 9 and participant 13.

260 Interview responses from participant 2, participant 3, participant 5, participant 6, participant 9 and participant 13.

261 Interview responses from participant 4 and participant 5.

262 Interview responses from participant 4, participant 5, participant 7, participant 8, participant 11 and participant 13.

the parties have a good case and would win at trial.[263] Other lawyers advise their parties not to settle so that the parties can get more compensation at trial and the lawyers can get more legal fees or show off their litigation skills.[264]

Satisfaction with mediation settlements

The study asked the parties, lawyers, and judges about their satisfaction with mediation settlements. Nearly all the judges and lawyers were of the opinion that parties are satisfied with mediation settlements.[265] The judges and lawyers stated that parties are satisfied with mediation settlements since the parties themselves are the ones who make decisions in mediation.[266] They discuss in an open way and come to a consensus about the outcome.[267] The lawyer and judge-mediators do not force the parties to settle. Where a party does not feel comfortable with the suggested outcomes, they can refuse the suggestions and the mediator terminates the mediation so that the parties proceed to litigation. Therefore, if a party accepts a particular agreement, the assumption is that they are happy with it.[268]

The judges and lawyers explained that the parties must be satisfied with mediation agreements because the lawyers and judges guide them during the mediation. The lawyers explain to the clients the legal implications of their cases, the concept, and procedures of mediation at the court, and the reasonable compensation they can accept. Therefore, the parties should be satisfied with the decisions they make since they

263 Interview responses from participant 2, participant 3, participant 4, participant 6 and participant 8.

264 Interview responses from participant 4, participant 5, participant 7, participant 8, participant 10 and participant 11.

265 Interview responses from participant 4, participant 5, participant 6, participant 7, participant 9, participant 11, participant 12, participant, 13, participant 14 and participant 15.

266 Interview responses from participant 5, participant 6, participant 7, participant 11 and participant 15.

267 Interview responses from participant 2, participant 3, participant 5 and participant 13.

268 Interview responses from participant 6 and participant 13.

do not make them out of ignorance.[269] The judges and lawyers also stated that the parties must be satisfied with mediation because mediation helps them resolve the dispute quickly and attain a win-win remedy.[270] Moreover, parties must be satisfied since mediation helps them reach a settlement that meets their interests and needs.[271] For example, mediation gives parties the opportunity to apologise hence maintaining relationships.[272] The judges and lawyers further stated that they were satisfied with mediation outcomes for the same reasons above.[273]

Similarly, the majority of the parties (six out of the nine parties) said that they were content with the mediation settlements.[274] Those who were satisfied with mediation settlements stated that mediation is faster and cheaper than litigation.[275] They also stated that Mediation simple and allows the parties to make the decisions themselves,[276]while at the same time preserving relationships.[277] Some parties articulated that their satisfaction with mediation settlements is derived from adequate compensation by the defendant.[278] However, a few parties were not satisfied with mediation due to the delayed payment of compensation,[279] payment in instalments[280] and insufficient compensation.[281] Secondly, mediation led to arriving at compromised solutions.[282] For example, one party stated that she wanted to evict her tenant from her house but she failed to do so and ended up allowing the tenant to stay

[269] Interview responses from participant 4, participant 6, participant 9, participant 13 and participant 14.

[270] Interview responses from participant 11, participant 12 and participant 14.

[271] Interview response from participant 11.

[272] Interview response from participant 11.

[273] Interview responses from participant 5, participant 7 and participant 11.

[274] Interview responses from participant 16 and participant 17.

[275] Interview responses from participant 16 and participant 17.

[276] Interview response from participant 17.

[277] Interview response from participant 18.

[278] Interview responses from participant 18 and participant 23.

[279] Interview responses from participant 20 and participant 21.

[280] Interview response from participant 21.

[281] Interview responses from participant 18 and participant 23.

[282] Interview response from participant 19.

in the premises for one more year. She would have preferred litigation because she would have expelled that tenant from her premises.[283]

Challenges facing mandatory mediation

The lawyers and judges acknowledged that mandatory mediation in Malawi faces many challenges. First, the judges and lawyers stated that the Malawi judiciary lacks other mediation or ADR programmes to compliment the mandatory mediation programme in the High Court.[284] The application of mandatory mediation falls short of promoting the use of mediation countrywide because mandatory mediation is not used in the other courts. Apart from the Industrial Relations Court which encourages resolving labour disputes through arbitration,[285] there are no other ADR programmes in the other courts of Malawi. Malawi courts may learn from other countries that promote the use of many ADR programmes to widen access to justice. United States courts, for instance, promote the use of various dispute resolution mechanisms such as mediation, arbitration, early neutral evaluation, summary jury trials, and mini-trials.[286]

Second, Malawi lacks institutions and comprehensive legislation to promote the use of mediation and other ADR programmes. The country does not have mediation or any ADR accreditation committees and mediation or ADR centres. Additionally, Malawi has no parent statute on mediation. Further, the mandatory mediation programme of the High Court has no guidelines for the conduct of mediation and there is no ethical code for mediators and lawyers in the country. The lack of institutions and legislation on mediation and ADR hampers the growth of the use of mediation and other ADR mechanisms in the country.

Third, the respondents stated that the Malawi Judiciary has not monitored and evaluated mandatory mediation since the Rules came

283 Interview response from participant 19.

284 Interview responses from participants 1-15.

285 Malawi Labour Relations Act, 1996, Section 44(3).

286 Ettie Ward, 'Mandatory court-annexed alternative dispute resolution in the United States Federal Courts: Panacea or pandemic?', 81(77) *St John's Law Review* (2007) 84.

into effect.[287] Other challenges include the Malawi judiciary's lack of reporting on mediation and poor record keeping on mediation at the court registry since files at the registry are in a mess. Additionally, the Malawi judiciary has not digitised records.[288]

Fourth, only a few judges in Malawi received training in mediation through the assistance of international organisations including the World Bank.[289] Owing to the lack of training in mediation, the respondents stated that some judges were not good at mediation.[290] For example, the respondents explained how some of the judges at the General Division of the High Court terminate mediation without giving the parties the chance to try mediation.[291] Other judges take too long to allocate mediation dates, which may indicate their lack of appreciation for mediation.[292] Others schedule too many mediation exercises within the same morning, for example, 10-15 mediation exercises, and rush through the mediation without getting to the root causes of the matters.[293] Other judges enter judgements on liability the moment one of the parties is not present without making efforts to find that party.[294]

The lack of training for lawyers in mediation also poses a great challenge to the success of a mediation process.[295] Due to the lack of training, some lawyers do not appreciate mediation.[296] As a result, the respondents explained that the Law Society of Malawi and the Law Commission of Malawi do very little in promoting the use of mediation in Malawi, the enactment of mediation laws or the establishment of rel-

287 Interview responses from participant 10, participant 13 and participant 15.

288 Interview response from participant 13.

289 Interview responses from participant 4 and participant 7.

290 Interview responses from participant 2, participant 3 and participant 4.

291 Interview responses from participant 2, participant 3, participant 4, participant 5 and participant 6.

292 Interview responses from participant 1, participant 2, participant 3, participant 4, participant 5, participant 6 and participant 9.

293 Interview responses from participant 6.

294 Interview responses from participant 2 and participant 3.

295 Interview responses from participants 1-15.

296 Interview responses from participant 1, participant 8 and participant 9.

evant institutions.[297] Most lawyers do not encourage their clients to try mediation before proceeding to institute a lawsuit.[298]

Fifth, other sectoral actors have put minimal effort in promoting the use of mediation. Mediation programmes locally ran by the chiefs in the villages go unsupported. Additionally, governments and non-governmental organisations are not implementing any mediation programmes in the rural areas to promote access to justice to the local people through mediation. Companies and religious institutions in Malawi are also not committed to promoting the use of mediation.

Therefore, Malawi can borrow a leaf from United States' mediation practice. Private organisations in the US make great use of mediation. For example, professional bodies such as the American Bar Association (ABA), the American Arbitration Association (AAA), and the Association for Conflict Resolution (ACR) have been involved in promulgating ethical codes of conduct for mediators. In 1994, the ABA and AAA promulgated the Model Standards of Conduct for Mediators and revised them in 2005. Many US companies have signed the Conflict Resolution ADR pledge to use alternative dispute resolution mechanisms such as mediation.[299]

The Judicial Arbitration and Mediation Services (JAMS), the largest private organisation providing ADR services in the United States and other jurisdictions, has wide reach. JAMS has trained and specialised arbitrators, mediators, and early neutral evaluators, most of whom are retired judges, or skilled lawyers who offer services on any civil matter.[300] Christians, Muslims, and Jews maintain religious courts that use arbi-

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297 Interview responses from participant 1, participant 5, participant 7, participant 8 and participant 9.

298 Interview responses from participant 1.

299 For instance, the CPR website states that over 4000 corporations have signed its ADR pledge. International Institute for Conflict Prevention and Resolution, 'About CPR: History'.

300 Lucas Rozdeiczer and Alejandro Alvarez, de la Campa, 'Alternative dispute resolution manual: Implementing commercial mediation', Small and Medium Enterprise Department, World Bank Group, November 2006, 100.

tration, and mediation centres to resolve family matters.[301] Local communities also apply informal justice systems including mediation and consensus building to resolve land, environmental, budget, and cultural disputes.[302]

Moreover, some states in the United States require certification of mediators which makes mediation a profession and increases public confidence in mediation.[303] Individual lawyers and retired judges now offer mediation services and their names are now found in telephone directories in the United States. The mediators make adverts in legal newspapers and magazines. Law firms also advertise the kind of services they offer in mediation. The curriculum in law schools also includes dispute resolution courses such as mediation. Additionally, there are also mediation training programmes for lawyers.[304]

The respondent parties also mentioned other challenges facing Malawi's mandatory mediation. They noted the imbalance between parties in mediation due to illiteracy.[305] The parties explained that the literacy levels of the parties affect the reasoning and understanding of mediation proceedings.[306] Uneducated parties, for instance, are likely to settle for less because of their ignorance. Furthermore, illiteracy creates a communication problem.[307]

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301 Carrie Menkel-Meadow, 'Regulation of dispute resolution in the United States of America: From the formal to informal to the "semi-formal"', Georgetown University Law Centre, 2013, 440.

302 A Camacho, 'Mustering the missing voices: A collaborative model for fostering equality, community involvement and adaptive planning in land use decisions, instalment two', 24 *Stanford Environmental Law Journal* (2005) 274.

303 Online Master of Legal Studies, 'Court-certified mediator qualification: Requirements by state', May 2021.

304 Jay Folberg, 'Development of mediation practice in the United States', 17 *Iuris Dictio* (2015) 38.

305 Interview response from participant 16.

306 Interview response from participant 16.

307 Interview response from participant 16.

Recommendations

Considering the above challenges, this article makes the following recommendations to improve mediation practice in Malawi: first, the Malawi Parliament should enact a statute on mediation called the Mediation Act to strengthen the legal framework on mediation. Additionally, the 2017 Rules need amendment to expand the scope of mandatory mediation to include civil matters in the magistrates' courts and Industrial Relations Court. Second, Malawi needs to set up mediation and ADR institutions.

The Chief Justice of Malawi should also establish a Mediation Accreditation Committee whose duty will be to train, accredit mediators and formulate mediator ethical codes. The Ministry of Justice and Constitutional Affairs should establish a supreme ADR body that will oversee the implementation of all ADR programmes in Malawi. The supervisory ADR body should push for the establishment of ADR institutions as well as for the strengthening ADR centres and the ADR legal framework.

Third, there should be training of lawyers, judges, and magistrates in mediation. All judges and magistrates should be trained and accredited as mediators by taking refresher courses on mediation. Any new judges and magistrates ought to be trained in mediation before taking up their jobs. The Chief Justice of Malawi should spearhead the training of judges and magistrates while the Law Society of Malawi should spearhead the training of lawyers. Mediation should also be taught as an independent and compulsory course to all law students in Malawi. Furthermore, lawyers and judges should abide by ethical codes in mediation.

Fourth, the Malawi government should create public awareness of mediation. Creating awareness on mediation programmes and infrastructure may be done through radios, television, newspapers, magazines, and social media. Fifth, there should be monitoring and evaluation of mandatory mediation in Malawi to determine whether it meets its objectives. Finally, this paper recommends that the Malawi government increases funding for mediation programmes in each fiscal year.

Conclusion

Although there is no remarkable impact of mandatory mediation in reducing delay and case backlog in Malawi's High Court, the Malawi judiciary ought to consider the aforementioned challenges and recommendations to ensure its mediation programme significantly achieves its objectives. However, mandatory mediation prevents the situation from worsening by reducing costs even though mediation fails to achieve the settlement of some cases which end up going to trial.

Decolonising Kenya's legal system: The role of legal education, philosophical foundations, and constitutional interpretation

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Abstract

This paper investigates the vital roles of legal education, philosophical foundations, and constitutional interpretation in decolonising Kenya's legal system. It begins by contextualising decolonisation within historical frameworks of colonialism, highlighting the persistent influence of colonial structures on contemporary legal practices. The analysis reveals that legal education in Kenya has largely perpetuated colonial narratives, necessitating a shift towards inclusive pedagogies that integrate indigenous knowledge systems. Philosophically, the paper critiques simplistic notions of integrating indigenous practices, advocating instead for a nuanced approach that recognises the complexities of identity and culture in a post-colonial context. Furthermore, it examines how constitutional provisions can either support or obstruct the integration of customary laws into the national legal framework. Ultimately, this work underscores the necessity for comprehensive reforms across these domains to achieve a truly decolonised legal system in Kenya.

Keywords: decolonisation, legal education, constitutional interpretation, philosophical foundations

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Introduction

The word decolonisation comes from the word colonialism which was the practice of domination where one group subjugates another, often involving the exploitation of resources and imposition of foreign governance. It has roots in ancient times but became prominent during the European expansion from the 15th to the 20th centuries, peaking in the late 19th century when European powers controlled vast territories across Africa, Asia, and the Americas.[1] Despite occurring across several colonies, colonialism has been termed as not only a historical phase but also 'an ideology that perpetuates enslavement even without physical domination'.[2]

From this understanding, decolonisation evolved into a formal process of transferring governance to indigenous populations but also encompasses the broader endeavour of dismantling colonialist power structures.[3] This includes addressing the hidden institutional and cultural forces that sustained colonial dominance long after political independence was achieved.[4] As articulated by Ngugi wa Thiong'o in his 1986 work, *Decolonising the mind*, decolonisation extends beyond reclaiming land to liberating thought and culture.[5]

In recent years, discussions surrounding decolonisation have gained momentum across various fields, including education and legal systems. However, this trend faces criticism. Scholars like Eve Tuck and K Wayne Yang argue that using decolonisation as a metaphor undermines its true meaning, insisting that genuine decolonisation must involve the repatriation of indigenous lands and the restoration of sovereignty.[6]

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1 Stanford Encyclopedia of Philosophy, 'Colonialism', 17 January 2023.

2 Rakesh Sinha, *Swaraj in ideas: A quest for decolonisation of Indian mind*, Indian Policy Foundation, 2016, Preface, x.

3 Monica Butler, Kara Carroll, Patricia Roeser, Rose Soza War Soldier, Scott Walker and Lauren Woodruff, 'Decolonizing methodologies: Research and indigenous peoples by Linda Tuhiwai Smith: Peace, power and righteousness: An indigenous manifesto by Taiaiake Alfred', 29 *American Indian Quarterly* (2005) 289

4 Nasrullah Mambrol, 'Decolonisation', *Literary Theory and Criticism*, 4 October 2017.

5 Ngugi wa Thiongo', *Decolonising the mind,* Heinemann, 1986, 4-30.

6 Eve Tuck and K Wayne Yang, 'Decolonisation is not a metaphor', 1(1) *Decolonisation:*

The argument by Tuck and Yang, raises an important question: can the phrase 'decolonisation' be used as a metaphor in another context? To understand this better, one can give an example of the history of higher education in Kenya. Historically, the narrative surrounding slavery and colonialism has been intertwined with notions of inferiority among the colonised.[7] Olufemi Taiwo, in *Africa must be modern*, argues that Africans were systematically denied access to intellectual education due to the pervasive belief in their inferiority.[8] This framework effectively excluded them from higher learning opportunities, reinforcing the racial hierarchies established by colonial powers. Such dynamics were evident in colonial Kenya where education policies ranked Europeans at the top of the social ladder, followed by Asians, while indigenous Africans were relegated to the bottom.[9]

Moreover, Michael Kithinji asserts that the colonial restrictions on African education were primarily driven by the economic interests of European settlers. By prioritising vocational training over intellectual education, colonial governments ensured a steady flow of unskilled labour for the colonial economy. This was not a reflection of Africans' intellectual capabilities but rather a deliberate strategy to limit their potential and maintain a system that benefitted European settlers.[10]

Yuval Noah Harari echoes this theme in *Sapiens*, where he discusses how narratives of racial and intellectual inferiority were constructed by Europeans to justify their domination and exploitation of other peoples, including Africans. According to Harari, these narratives were not only economically motivated but also used to reinforce the image of Europe-

Indigeneity, Education and Society (2012) 2-4. See also, Richard Fosu, 'Towards a critical decolonial turn/theory: Beyond the binary of the west versus Africa', 0(0) *Africa Spectrum* (2024) 2.

7 Yuval Noah Harari, *Sapiens: A brief history of humankind,* Penguin Random House UK, 2015, 157.

8 Olufemi Taiwo, *Africa must be modern: A manifesto*, Indiana University Press, 2013, 115.

9 Michael Mwendwa Kithinji, 'History of higher education in Kenya', *Oxford Research Encyclopaedia of African History*, 19 April 2023.

10 Kithinji, 'History of higher education in Kenya'.

ans as 'pious, just, and objective'.[11] By framing Africans as intellectually inferior, Europeans could legitimise the inequalities and injustices of the colonial system, while portraying themselves as bringing 'civilisation' to supposedly lesser people. This false narrative provided a moral and ethical justification for exploitation and oppression.[12]

Tuck and Yang present an important argument by cautioning against the metaphorical use of 'decolonisation' and emphasising that it should entail the return of indigenous lands and restoration of sovereignty.[13] However, they fall short of acknowledging the broader structural and institutional dimensions that colonialism affected.[14] For example, in the history of higher education in Kenya, colonial powers did more than take land; they constructed an entire educational system designed to reinforce racial hierarchies, as Olufemi Taiwo[15] and Kithinji argue.[16]

Therefore, the argument by Tuck and Yang is limited. Decolonisation, especially in the context of education, cannot be confined to the repatriation of land alone.[17] It must address the deeper, institutional changes necessary to truly liberate a society from the intellectual and cultural dominance imposed by colonial rule.[18] While African nations gained independence, the retention of colonial educational frameworks suggests that the full decolonisation of education remains an ongoing challenge, not just a metaphor.

Consequently, this paper is structured into several key sections: it begins with an exploration of the role of legal education in perpetuating

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11 Harari, *Sapiens: A brief history of humankind,* 157.

12 Harari, *Sapiens: A brief history of humankind,* 157-161.

13 Tuck and Yang, 'Decolonisation is not a metaphor', 2-4.

14 Irene Wieczorek (ed) *Decolonising legal education at Durham Law School: An introduction to the field and a starting guide on decolonising the teaching of land law, climate change law and policy, and EU law*, Durham Law School, 2022, 7.

15 Taiwo, *Africa must be modern: A manifesto,* 115.

16 Kithinji, 'History of higher education in Kenya', 3-4.

17 Wieczorek, *Decolonising legal education at Durham Law School: An introduction to the field and a starting guide on decolonising the teaching of land law, climate change law and policy, and EU law,* 7.

18 Asikia Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualising the curriculum', 2(1) *Journal of Decolonising Disciplines*, (2020) 4.

colonial legacies, followed by a discussion on the philosophical foundations underpinning decolonisation, an examination of constitutional interpretation as a means to integrate customary laws, and concludes with recommendations for advancing decolonisation in Kenya's legal system. The objective is to demonstrate how addressing these interconnected areas – legal education, philosophical foundations, and constitutional interpretation – is crucial for dismantling colonial legacies and fostering a more inclusive legal framework reflective of Kenya's diverse cultural heritage. Through this analysis, the paper aims to contribute to ongoing discussions on decolonisation by offering insights into how Kenya can navigate its complex historical landscape while striving for a just and equitable legal system.

Colonial legacies in legal education: Tracing historical influence and modern implications

The role of law in colonialism has historically been fundamental to the dispossession and disenfranchisement of people globally, particularly in the African context. Law and its various institutions provided mechanisms for colonial, imperial and settler colonial programmes to be deployed, reinforced and sustained. Colonisation was justified on the basis that Africans were not as human as the white men. Therefore, they were expelled from jurisprudential subjectivity as in the colonial imaginary, only humans were 'subjects' to the law. Conclusively, indigenous people were not endowed with epistemological agency to philosophise about law because epistemic virtue was strictly a preserve of Europeans.[19]

Western colonising nations of Europe and their settler-colonial states have been sustained by the belief that their cultures, religions, and civilisation are superior to those of non-western peoples. This idea of European superiority legitimised the 'West's mandate to conquer the earth' and is a common theme in anticolonial, decolonial, and postco-

[19] Karibi-Whyte, 'Agenda for decolonising law in Africa', 2.

lonial critique. For this reason, the role of law is seen as 'a respected and cherished instrument of civilisation' and historically served as 'the West's most vital and effective instrument of [the] empire'. It imposed Europe's vision of truth on indigenous peoples worldwide. Euro-Western law and jurisprudence are deeply intertwined with colonial racism, dispossession, and violence.[20]

One would assume that after gaining independence, African countries would do away with the foreign laws. However, in the sixties, when most African countries gained independence, there were few African lawyers hence an urgent need to train lawyers to run courts and various government departments.[21]

Consequently, post-independence arrangements for legal education followed the pattern of colonial education present in the respective states.[22] Predominant in these states is that their legal academy is massively overshadowed by white academics.[23] According to Bizani, 'their whiteness is relevant to the extent that it denotes their structural racial power in knowledge production in the legal academy. Therefore, this whiteness forms the epistemic viewpoint through which they see and interpret the world'.[24] Moreover, African jurists, having been trained under historical colonial legal matrixes, remained keener on propagating the scholarly advancement of the Western thoughts as opposed to developing African customary law jurisprudence.[25]

There have been movements in the recent past like the *Rhodes must fall* in South Africa that sort to dismantle these legacies. It is important

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20 Adebisi Foluke, 'Decolonising the law school: Presences, absences, silences… and hope', 54(4) *The Law Teacher* (2020) 471-72 citing excerpts of a speech by Joel Modiri, 'Cacophony, autocritique and abolition: Impression points on decolonisation and the law school', 13 September 2019, University of Bristol, School of Law.

21 Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualisng the curriculum', 9.

22 Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualisng the curriculum', 9.

23 Aphiwe Bizani, 'Dismantling epistemic violence in South African law by decolonising jurisprudence', *The Perspective Online* (2019) 3.

24 Bizani, 'Dismantling epistemic violence in South African law by decolonising jurisprudence', 3.

25 Peter Onyango, *African customary law system: An introduction*, LawAfrica, 2013, xi-xii.

to note that in Kenya, unlike South Africa, the move for decolonising education is not as vibrant. However, this does not mean that such movements are absent.[26] In fact, teachers of law have taken upon themselves to decolonise their legal pedagogy. An example would be the hutians of Strathmore University; an intellectual movement known as 'the Hut' at the law school representing a significant departure from traditional legal education in Africa, particularly in its approach to decolonising the teaching of public international law. It serves as a space for critical discourse centred around Africa's triple heritage – indigenous, Islamic, and Western cultures – and its relevance to contemporary legal and societal challenges.[27]

This paper argues that educators play a crucial role in this decolonisation process at the micro-curriculum level. They can facilitate critical engagement and disrupt the reproduction of hegemonic knowledge structures. By fostering an environment where alternative knowledge systems are valued and included, educators can help develop a more just and inclusive academic landscape. This involves moving beyond superficial diversity initiatives and engaging deeply with the political, ontological, and metaphysical questions related to knowledge production and legitimacy.[28]

The decolonial turn in education offers the potential for creating a pluriversity that does not alienate or minoritise non-western perspectives. By centering African and other marginalised epistemologies and recognising the interconnected histories of imperialism and knowledge production, educators can contribute to a more equitable and pluralis-

[26] Liisa Laakso and Kajsa Hallberg, '"The unofficial curriculum is where the real teaching takes place": Faculty experiences of decolonising the curriculum in Africa,' 87 *Higher Education* (2024) 186.

[27] Nciko wa Nciko, 'The hutians: Decolonising the teaching of public international law in African law schools to address a real problem', *Afronomicslaw*, 17 September 2020, 4-5; Nciko wa Nciko, 'The hut at Strathmore: TWAIL for a culturally appropriate teaching of public international law in African law schools,' 6(1) *Strathmore Law Review* (2021) 41-69.

[28] Dina Zoe Belluigi, 'Why decolonising "knowledge" matters: Deliberations for educators on that made fragile' in Laura Czerniewicz and Catherine Cronin (eds) *Higher education for good: Teaching and learning futures*, Open Book Publishers, 2023, 147.

tic academic environment. This approach necessitates a collective effort and the agency of educators to navigate and negotiate the power dynamics within the university, promoting the common good and fostering a field of solidarities in knowledge production.[29]

Consequently, it is important to understand the current happenings pertaining to these legacies and the effect, if any, that it has and that can be improved if negative. The following section seeks to answer these questions.

What is the current situation?

Law school classrooms are one of the sites where the legacies of colonialism are perpetuated.[30] In Kenya, for example, the international law curricula adopted in various law schools is riddled with exclusions and distortions in its narrative and this results in a pedagogy that is less than ideal for students who ought to be engaging in critical thinking. Processes of exclusion in higher education are difficult to unpack as they are underscored by the complex dynamics of class, gender, and race.[31]

Second, Laakso and Adu argue that one of the challenges in decolonising the curriculum in Africa includes difficulties in finding and producing textbooks with locally relevant perspectives and bureaucratic obstacles to accepting new course content. From their studies, they indicated that some faculty bypassed these obstacles by tailoring their teaching to local contexts and examples in the lecture hall.[32]

Third, the prevailing hegemonic structures of global academia and the subordinate position of African universities are evident in the tensions between differing demands of relevance and excellence brought

[29] Belluigi, 'Why decolonising "knowledge" matters', 138.

[30] Florence Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya', 3(1) *Journal of CMSD* (2019) 16.

[31] Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya', 16.

[32] Laakso and Kajsa, 'The unofficial curriculum is where the real teaching takes place', 13.

by marketisation with its measurements, rankings, and competition. Quality assurance processes, although national in nature, have affected curriculum review, sometimes maintaining the status quo but also pressing faculty to be more competitive, develop international collaboration, and publish internationally.[33]

What is the consequence as a result?

An example can be given on the nature of the teaching of public international law in Kenya. Shako argues that the mainstream narrative currently dominating the curriculum reflects a colonial legacy, with a heavy focus on the historical background, sources, and fundamental concepts like state sovereignty.[34] Often, this narrative presents international law through a Eurocentric lens, perpetuating the idea that European culture, laws, and practices are the benchmarks of civilisation. Consequently, African perspectives, knowledge, and contributions are marginalised, reinforcing historical injustice where African states and societies were deemed uncivilised and thus excluded from the framework of sovereignty.[35]

To address these issues, Shako suggests incorporating Third World Approaches to International Law (TWAIL) into the curriculum and deconstructing western narratives. This approach involves critically examining the historical context and foundational concepts of international law from an African perspective, thus challenging the dominant Eurocentric viewpoints.[36]

Additionally, integrating African voices, knowledge, critiques, and scholars into the curriculum is crucial for providing a more inclusive and diverse understanding of international law. By adopting these methods, legal education in Kenya can foster a more critical and holis-

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33 Laakso and Kajsa, '"The unofficial curriculum is where the real teaching takes place": Faculty experiences of decolonising the curriculum in Africa', 13.

34 Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya', 18.

35 Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya', 18.

36 Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya'', 17.

tic approach, empowering African scholars and students to contribute meaningfully to global discourse and ultimately telling a more comprehensive and equitable story of international law.[37]

What is the ideal?

A decolonised legal education will have to show a move from a Eurocentric conception of law rooted in colonialism to a more inclusive legal culture. To counter this, there must be a re-orientation of African intellectuals through the production of knowledge.[38] This can be done through teaching an African lawyer what it is to be African and what is at stake in being African.[39] It will involve a critical recognition of the subjugation of Africa and the challenges Africans face in the form of pedagogical strategies and research methodologies. Inasmuch as the legal curriculum entails the same coursework, it should be tailored to include African perspectives on the same.[40]

It follows that the problems afflicting the African continent and Kenya in particular, are based on complex realities that should be approached at different levels (macro and micro) and by employing different methods and forms of knowledge. For local governments and international communities to find solutions to socioeconomic problems facing African states, there is a need to explore the contribution of culturally based knowledge resources as alternatives to local sustainable development. This requires understanding the capability of indigenous knowledge in the development process of communities, and the ways in which indigenous people strategise their own survival within specific settings.[41]

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37 Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya', 18.

38 Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualising the curriculum', 10.

39 Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualising the curriculum', 11.

40 Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualising the curriculum', 4.

41 Jenipher A Owour, 'Integrating African indigenous knowledge in Kenya's formal education system: The potential for sustainable development', 2(2) *Journal of Contemporary Issues in Education* (2007) 22.

Research has demonstrated that considering the learner's community and background enhances the effectiveness of learning.[42] An indigenous knowledge system not only has the potential for fostering democratic living but also for liberating individuals. The emancipatory aspect of any educational system is essential for transforming society. Thus, the advocacy for incorporating indigenous knowledge systems (IKS) is a proactive step towards empowering individuals through the utilisation of local knowledge.[43]

Decolonisation of legal education should therefore involve the critical inclusion of epistemologies, ways of knowing, lived experiences, texts, and scholarly works that have been excluded from our disciplines. It asks us to think critically about the relationship between the location and the identity of writers, and their subjects.[44]

Philosophical foundations of decolonisation: Navigating historical dilemmas and future pathways

Often times, when people hear the term decolonisation, there is a tendency to dismiss it for being backward looking and impossible to achieve. The question that becomes crucial is; what is or what should be the philosophy underlying decolonisation of legal systems? Following the discussion on legal education, this section argues that in order to foster a genuine decolonisation process, we must critically reassess legal education and embrace a philosophical approach that acknowledges the complexities of identity and culture. This understanding will guide us in addressing the challenges of integrating traditional values within modern legal frameworks.

It has been suggested by scholars in some post-colonial societies that a return to indigenous languages and practices can restructure at-

[42] Vuyisile Msila, 'Africanisation of education and the search for relevance and context', 4(6) *Educational Research and Review* (2009) 313.

[43] Msila, 'Africanisation of education and the search for relevance and context', 313.

[44] Karibi-Whyte, 'Agenda for decolonising law in Africa', 4.

titudes towards local and indigenous cultures.[45] This suggestion has been critiqued by the likes of Akaash Rathore who urges, in a lecture on decolonising jurisprudence, that major public intellectuals should recognise the absence of philosophical understanding at the heart of how they think.[46] Rathore critiques the notion that decolonisation should be 'backward-looking', aiming to return to an idealised past 'where all was well'. He challenges this view by posing critical questions: 'How feasible is this return to the past? Who actually desires this, and what era are we to return to? In a nation with diverse tribes and traditions, which culture would be chosen? And if one is indeed selected, could this not be seen as a form of re-colonisation?'[47]

Additionally, Gikandi has argued that there is an urgent need to question the ideological foundation on which the narratives of decolonisation were constructed and especially the assumption that African cultures and selves were natural and holistic entities that were repressed.[48]

The question of which direction decolonisation should take can be addressed in three ways: first, a return to indigenous culture or aspects thereof; second, abandoning the pursuit of decolonisation; and third, transcending these binaries. Regarding the third option, Rathore argues that rather than hastily trying to reconcile Eastern and Western perspectives by surpassing this binary, a more viable approach involves a dialectical process. This process would entail recognising the 'otherness' within us, acknowledging both our identities and differences without obscuring distinctions or assuming 'we are all the same' or that 'ideas have no geographical boundaries'.

Rathore believes there is merit in the desire to overcome this binary but emphasises that it should only be pursued after a thorough

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45 Mambrol, 'Decolonisation'.

46 Akaash Singh Rathore 'Decolonising jurisprudence: Contexts and methods', NALSAR University of Law YouTube channel, 1:13:49-1:14:49 –23 October 2019 https://www.youtube.com/watch?v=Y9VBEgi975Q.

47 Rathore 'Decolonising jurisprudence contexts and methods' 46:00-49:33 https://www.youtube.com/watch?v=Y9VBEgi975Q.

48 Mambrol, 'Decolonisation'.

understanding has been established.[49] This boils down to the cruel decolonising dilemma of which the subsequent section aims to clarify by addressing what the philosophy of decolonising legal systems – whether in legal education or the judiciary – should truly entail.

The cruel dilemma

In the complex landscape of post-colonial legal systems, the tension between cultural heritage and constitutional law often gives rise to difficult dilemmas. One such challenge, referred to as 'the cruel dilemma', is evident in Kenya's judicial history, where the interplay between African customary law and modern legal frameworks has led to significant legal and social conflicts. At the heart of this dilemma lies the question of how traditional values can coexist with contemporary constitutional mandates, particularly when these values are perceived to be at odds with human rights or national law.

The 'cruel dilemma' manifests within our judicial systems, particularly when legal frameworks have to balance between tradition and modernity. A striking example is found in Kenya's repealed constitution (1969 Constitution), which came into effect shortly after the country gained independence from British colonial rule. At the time, culture was central to the nation's identity and the 1969 Constitution permitted discrimination based on customary laws.[50] This can be clearly seen in the *SM Otieno* case which has been considered the most significant decision in the post-colonial era.[51] A family is torn by modernity; one side clinging to the their cultural beliefs while the other claiming that those beliefs were primitive and inapplicable to them since they were educated.[52] One of the impacts of this case on the African customary system

[49] Aakash Singh Rathore, *Indian political theory: Laying the groundwork for svaraj*, Routledge/Taylor and Francis, 2017, 149.

[50] Constitution of Kenya (1969) Section 82(1)(4).

[51] John Osogo Ambani and Ochieng Ahaya, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era', 1(1) *Strathmore Law Journal* (2015) 55.

[52] Roy Carleton Howel, 'The Otieno case: African customary law versus western jurisprudence' in Alison Dundes and Alan Dundes (eds) *Folk law*, Routledge, 2019, 829.

has been said to be the fact that it shows that African law could still have a place in Kenya's legal system.[53] However, it also raised lingering questions about the true significance and future position of African law within the broader legal framework.

While recognising culture as a foundation of the nation and as the cumulative civilisation of the Kenyan people, the Constitution of Kenya 2010 (the Constitution) mandates the state to promote all forms of national and cultural expression through traditional celebrations. Further, Article 159(1)(c) mandates the courts and tribunals to be guided by principles such as traditional dispute mechanisms.[54] This shows that the Constitution is pro-culture since Kenya boasts of many tribes with their own ways of living. However, Article 2(4) sets a limitation by stating that such customary laws should be consistent with the Constitution.[55] Further, the Judicature Act creates a hierarchy of norms in which African customary law is of least significance and a non-binding source of law.[56]

One such custom rendered void by Article 2(4) is female genital mutilation (FGM). In the case of *Dr Tatu Kamau vs Attorney General and others* (2017), one of the questions for determination was whether the Act prohibiting FGM was unconstitutional to the extent that it denied adult women the right to freely choose whether or not to undergo the rite before a trained medical practitioner. The court held that inasmuch as the Constitution grants the freedom to exercise one's culture, the latter has to be carried out in line with other constitutional provisions. Therefore, any expression that will cause harm to a person or by a person to another is unconstitutional.[57]

The court further concluded that despite the fact that FGM was central to the culture of some communities in Kenya including the Ki-

53 Ambani and Ahaya, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constituion era', 56.

54 Constitution of Kenya (2010) Article 159(1)(c).

55 Constitution of Kenya (2010) Article 2(4).

56 Judicature Act (No 16 of 1967) Section 3(2).

57 *Dr Tatu Kamau v Attorney General and 2 others; Equality Now and 9 others (Interested Parties); Katiba Institute and another (Amicus Curiae)* (Constitutional Petition 244 of 2019) Judgement of the High Court at Nairobi on 17 March 2021 [eKLR] para 215.

kuyu to which the petitioner belonged, the court was not convinced that one can choose to undergo such a harmful practice based on the medical evidence produced on both the long term and short-term effects of the practice.[58]

Cases like *SM Otieno* and *Tatu Kamau* illustrate the ongoing struggle to balance cultural heritage with constitutional principles within a legal system still influenced by its colonial past. This struggle raises a broader question: How should the decolonisation of legal systems be approached? To answer this, we must examine the philosophy of decolonisation and explore differing perspectives, such as 'thick' and 'thin' approaches to decolonisation, as potential pathways for reimagining legal systems rooted in African identities.

The thick and thin Svaraj

Understanding the approaches to decolonisation requires a nuanced consideration of both political and cultural dimensions. Just as legal frameworks must balance modernity with tradition, the philosophy of decolonisation must navigate the tension between cultural identity and governance reforms. Here, the concept of Svaraj, with its thin and thick interpretations, offers an insightful framework for understanding the balance between practical political sovereignty and a deeper reclamation of cultural identity.

Akaash Rathore defines Svaraj as a concept of self-governance and authentic autonomy that emphasises active participation and self-expression within modern contexts, equating it to decolonisation.[59] He further distinguishes between two approaches to *Svaraj*: a 'thick' and a 'thin' version. The thick version of Svaraj demands a deeper level of commitment, exemplified by Mahatma Gandhi. Gandhi drew a sharp contrast between what he saw as the opposing values of Western civilisation and Indian civilisation. In his view, Western civilisation promoted immorality and lacked religious grounding, while Indian civilisation

[58] *Kamau v Attorney General and 2 others,* para 215.

[59] Rathore, *Indian political theory*, 12.

was morally elevating and spiritually superior, likening Western ideals to a corrupting force and Indian values to a higher moral realm (God). [60]

In contrast, the 'thin' version of Svaraj is less demanding and more accessible, focusing primarily on political aspects rather than a comprehensive philosophy. Rathore points to Ambedkar's vision of Svaraj as an example of this approach, where he defines it as governance of, by and for the people. For Ambedkar, Svaraj is a tool for achieving a democratic society rather than an end goal. Its value lies in how it helps to build a society where government serves all – regardless of social status – and empowers them to participate in their own governance. A crucial point in Ambedkar's thought is that Svaraj is not about returning to an idealised past; rather, it is about traveling down to the present lived experiences of the masses and addressing their realities. [61]

A thick Svaraj in the African context would exhibit at least two or more of the following: exclusivist notions of spirituality, profound anti-modernity, exceptionalistic moralism, essentialistic nationalism and a purist orientation.[62] An example would be Negritude, a political and literary movement that was very instrumental in the liberation of Africa and the black world from colonial subjugation and racial segregation in the early 1930s through the 1960s.[63]

Leopold Sedar Senghor who gave Negritude its philosophical content articulated that it was the awareness, defence, and development of African cultural values. He further urges Africans to opt for Negritude and subscribe to it and by so doing, African people will contribute to the growth of Africanicity and the construction of 'civilisation of the universe'.[64]

However, Negritude has been heavily criticised for this same reason, being 'thick'. Its main critic is directed towards its presentation of

60 Rathore, *Indian political theory*, 10.

61 Rathore, *Indian political theory*, 12.

62 Rathore, *Indian political theory*, 17.

63 Beaton Galafa, 'Negritude in anti-colonial African literature discourse', 12(4) *The Journal of Pan African Studies* (2018) 287.

64 John S Mbiti, *African religions and philosophy*, Heinemann, 1990, 267.

Africa as a land free of social, economic and political squabbles before colonisation as opposed to the depiction of the West as a restless society that thrives on violence and racism against black people.[65] In fact Mphahlele argues that the image of Africa which simply shows pride in our ancestors and celebrates our purity and innocence is an image propagated by liars.[66]

Mbiti critiques Negritude on the basis of it being an elitist ideology. He says that 'nobody in the village understands or subscribes to its philosophical expression' and that Negritude is a comfortable exercise for the elite who wants, seeks and finds it when he looks at the African *[z]amani* and hopes for an African future.[67] He concludes that all the political and economic ideologies at the time like Negritude, Pan Africanism, African unity and socialism attempts, point to a progress being made in Africa: one that lacked concreteness, historical roots and a clear practical goal for the individual to be able to have a sense of direction worthy of personal identification and dedication.[68]

Additionally, Olufemi Taiwo, introduces the question of modernity. He argues, in the context of decolonisation, that colonialism enforced a hierarchical and static worldview that relegated Africans to the 'infancy of the human race'.[69] Colonial administrators denied Africans the possibility of self-determination and progress, framing them as incapable of managing their own affairs.[70] The tragedy, according to the author, is that postcolonial Africa has failed to fully interrogate this colonial legacy, mistakenly equating colonialism with modernity and rejecting both.[71] To truly decolonise, African societies must disentangle modernity from colonialism and reclaim the concept of progress, which involves constantly renewing and remaking both individual identities and societal structures in pursuit of a hopeful, dynamic future.[72]

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65 Galafa, 'Negritude in anti-colonial African literature discourse,' 295.

66 Mbiti, *African religions and philosophy,* 268.

67 Mbiti, *African religions and philosophy,* 268.

68 Mbiti, *African religions and philosophy,* 268-269.

69 Taiwo, *Africa must be modern,* 187.

70 Taiwo, *Africa must be modern,* 187-190.

71 Taiwo, *Africa must be modern,* 187-190.

72 Taiwo, *Africa must be modern,* 187-190.

In the context of law, Chikosa Mozesi Silangwe offers a thin approach: he argues that if the descriptor 'African' legal theory, jurisprudence or philosophy suggests a purist conception, then the intellectual enterprise so undertaken is futile and impossible.[73] He contends that it is more plausible to envision 'African' legal theory, jurisprudence or philosophy under Homi Bhabha's idea of 'cultures in between' which denies a purist conception of culture and emphasises the diversity of influence.[74]

With such an approach, scholarship must first acknowledge that the violence of modernity on knowledge or thought has been far reaching and deep rooted. Second, that the de-Europeanisation or de-Americanisation (decolonisation) in the authorship of African legal theory, jurisprudence or philosophy does not necessarily imply that the underlying conceptions of the resultant scholarship are not rooted in modernity.[75]

To effectively decolonise, Africa must balance both pragmatic governance reforms and deeper cultural transformations. The 'thin' approach, like Ambedkar's vision, focuses on political sovereignty and democratic governance, while the 'thick' approach, seen in movements like Negritude, emphasise cultural revival and identity. As seen above, these thick movements face criticism for idealising the past and alienating ordinary people.

Therefore, the question of how do we decolonise lies in striking a balance between these thick and thin approaches to decolonisation. The path forward for Africa, as Taiwo suggests, is not in rejecting modernity wholly but in reclaiming it. This requires a dual approach: addressing the structural legacies of colonialism through governance reforms while also engaging with the deeper cultural and philosophical transformations necessary to create a future rooted in African identity, values, and progress.

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73 Chikosa Mozesi Silangwe, 'On "African" legal theory: A possibility, an impossibility or mere conundrum?' in Oche Onazi (ed) *African legal theory and contemporary problems*, Springer, 2014, 17.

74 Silangwe, 'On "African" legal theory', 18.

75 Silangwe, 'On "African" legal theory', 19.

Constitutional interpretation: A 'thin' approach to decolonising constitutional interpretation in Kenya

As the discussion on decolonisation moves from the broader philosophical exploration to practical applications, it is important to ground these concepts in real-world frameworks. The tension between modernity and tradition, or between 'thick' and 'thin' approaches to decolonisation is particularly relevant in postcolonial legal systems like Kenya's. This balance is not only theoretical but also deeply practical, particularly in areas like constitutional interpretation, where colonial legacies still exert significant influence. Understanding how to decolonise legal structures in a country like Kenya involves navigating this tension. This is most evident in how legal systems interpret and enforce the constitution.

Therefore, in continuing the broader conversation on decolonisation, one must also consider the legacies of colonial structures that still shape the present. The Kenyan judiciary, as pointed out, remains deeply influenced by a colonial inheritance of the common law system.[76] This raises important questions: how do we reform such institutions to shed the vestiges of colonialism while retaining structures necessary for governance? Below is a discussion between former Chief Justice Professor Willy Mutunga and former Attorney General Professor Githu Muigai on whether there exists a theory of constitutional interpretation in the Constitution of Kenya (2010).

Mutunga vs Muigai: A theory of constitutional interpretation?

Constitutional interpretation refers to the process of 'clarifying the legal content or meaning of constitutional provisions' to resolve disputes.[77] For constitutional democracy to be legitimate, constitutional interpretation must be consistent; based on a sound theoretical founda-

[76] Karibi-Whyte, 'Agenda for decolonising law in Africa', 4.

[77] Maxwell Miyawa, 'The genesis of mainstreaming the theory of interpreting the Constitution of Kenya, 2010: An analysis', 15 *The Platform*, February 2016, 36.

tion.[78] Ambani and Ahaya argue that African customary law has been undermined since independence.[79] The requirement for consistency of customary laws with the Constitution marginalises African customary law, placing it at the bottom of the hierarchy.

This raises a crucial question: Can a theory of constitutional interpretation that promotes decolonising jurisprudence exist in Kenya?

The Mutunga argument

First and foremost, although this theory lacks a specific name, the author refers to it as decolonising jurisprudence. According to Mutunga, the theory aims to decolonise jurisprudence, and he outlines six ingredients intended to achieve this goal; this paper will focus on two. The first ingredient is Article 159 of the Constitution of Kenya (2010) which mandates the courts to carry out reforms tailored to Kenya's needs and aims at doing away with colonial and neo-colonial inefficiencies and injustice.[80] Second, the need to develop new, highly competent but also indigenous jurisprudence linked to the constitutional value of patriotism. Here, he proposes that judges are required to develop the law in a way that responds to the needs of the people and national interest that is robust, indigenous and patriotic as decreed by the Constitution and the Supreme Court of Kenya.[81]

According to him, Article 259 of the Constitution provides for its own theory of interpretation. This article states that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the bill of rights, permits development of the law, and contributes to good governance.[82] Further, that Section 3 of the Su-

78 Githu Muigai, 'Political jurisprudence or neutral principles: Another look at the problem of constitutional interpretation,' 1 *The East African Law Journal* (2004) 1.

79 Ambani and Ahaya, 'The wretched African traditionalists in Kenya', 48.

80 Constitution of Kenya (2010) Article 159.

81 Willy Mutunga, 'The Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions', 1 *Speculum Juris* (2015) 5.

82 Constitution of Kenya (2010) Article 259.

preme Court Act, 2011 obligates the Supreme Court to develop a rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.[83]

In the matter of the principle of gender representation in the National Assembly and Senate, Mutunga argued that when searching for principles or guidance on how to interpret the Constitution, one needs to look nowhere else than the open texture of the Constitution.[84] He emphasised that the Kenyan Constitution is unlike many constitutions since the framers intended that the courts would not have fashioned any requisite principle or approach or rules of constitutional interpretation aside from what is provided under Article 159(1) and (3).[85]

Furthermore, he argued that the constitutional theory does not favour a formalistic or positivistic approach as exemplified in Articles 20(4) and 259(1).[86] Second, it puts into consideration non-legal phenomena which, according to him, must be considered by judges while exercising their jurisdiction. These non-legal considerations are those values and principles articulated in the preamble, Article 10, Chapter 6 amongst others.[87]

Third, that it contributes to the development of both the prescribed norms and the declared principle or policy hence care should be taken not to substitute one for the other. He emphasises that 'such dichotomy of prescribed norms, values, principles, purposes and policy enriches the theory of interpreting the Constitution'.[88] Fourth, that it espouses a holistic approach as the interpretation involves contextual analysis of a

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83 Supreme Court Act (No 7 of 2011) Section 3.

84 *In the matter of the principle of gender representation in the National Assembly and the Senate*, Advisory Opinions Application 2 of 2012, Advisory Opinion of the Supreme Court at Nairobi on 11 December 2012 (with dissent – Willy M Mutunga, Chief Justice and President of the Supreme Court) [eKLR], Mutunga dissent, para 8.1 and 8.2.

85 *In the matter of the principle of gender representation in the National Assembly and the Senate*, Mutunga dissent, para 8.3.

86 Constitution of Kenya (2010) Articles 20(4) and 259(1).

87 This was emphasised in, *In the matter of the Interim Independent Electoral Commission*, Constitutional Application 2 of 2011, Ruling of the Supreme Court, 20 December 2011, para 86.

88 Mutunga, 'The Constitution of Kenya and its interpretation', 11.

constitutional provision, reading it alongside and against other provisions so as to maintain a rational explanation of what the Constitution must be taken to mean in light of its history of the issues in dispute and of the prevailing circumstances, this was espoused in the case; *In the matter of Kenya National Commission on Human Rights*.[89]

Additionally, 'constitution making does not end with its promulgation. It continues with its interpretation'.[90] However, the constitutional text and letter may not properly express the minds of the framers. Further, the minds and hands of the framers may fail to properly express the aspirations of the people. As such, the court must invoke the spirit of the Constitution as the guiding principle for illuminating and eliminating legal ambiguities. [91]

This emphasis was underscored in the case; *In Re the Speaker of the Senate and another v Attorney General and 4 others*.[92] As a result, the Supreme Court serves as the custodian and guardian of the Constitution, ensuring the coherence, certainty, harmony, predictability, uniformity, and stability of this theory. This mandate is derived from Article 163(7) of the Constitution, which stipulates that all courts other than the Supreme Court are bound by the decisions of the latter.[93]

Muigai's argument

Muigai blatantly states that there is no theory of constitutional interpretation.[94] He argues that the 'interpretation of the constitution has

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89 *In the matter of Kenya National Commission on Human Rights*, Advisory Opinion No 1 of 2012, Ruling of the Supreme Court on 27 February 2014 [eKLR] para 26.

90 Mutunga, 'The Constitution of Kenya and its interpretation' 13 citing *Speaker of the Senate and another v Attorney General and another; Law Society of Kenya and 2 others (Amicus Curiae)*, Advisory Opinion Reference No 2 of 2013, Advisory Opinion of the Supreme Court on 1 November 2013 [eKLR] (with dissent - NS Ndungu, SCJ) para 156.

91 Mutunga, 'The Constitution of Kenya and its interpretation', 13 citing *Speaker of the Senate and another v Attorney General and another*, para 156.

92 *Speaker of the Senate and another v Attorney General and another*, para 155.

93 Constitution of Kenya (2010) Article 163(7).

94 The great debate: Prof Githu Muigai vs Dr Willy Mutunga at UoN School of Law, 5 July 2019, YouTube https://www.youtube.com/watch?v=6Pxbvmr2IA4, 10:36 to 10:50.

been largely unprincipled, *ad hoc*, eclectic, vague, pedantic, inconsistent, contradictory and confusing'.[95] Furthermore, he cautions that 'without a coherent and principled approach to the interpretation of the Constitution, constantly changing and conflicting interpretation undermines its legal authority and political significance'.[96]

He articulates the importance of a comprehensive theory of constitutional interpretation, citing several compelling reasons: first, the absence of a coherent framework which undermines the legal authority and political significance of the Constitution due to fluctuating and conflicting interpretations. Second, the predominantly political nature of constitutional jurisprudence in Kenya, shaped by judges' personal preferences and public pressures. Third, the necessity for lawyers and judges to harmonise the judiciary's legal technical role with its inherent political dimensions to foster a robust constitutional jurisprudence in Kenya.[97]

He contends that the assertion that Article 259 establishes a theory of constitutional interpretation is unfounded. Article 259 stipulates that the constitution must be construed in a manner that fosters its objectives, values, and principles, upholds the rule of law, protects human rights, promotes good governance, and allows for legal development. He supports his stance by asserting that these principles align with the fundamental duties of any judge or court of law. His argument pivots on the premise that a theory of constitutional interpretation, applicable to any constitution, must possess clarity, coherence, objectivity, and be subject to critique.[98]

Despite the aforementioned considerations, he concedes to the challenges inherent in constitutional interpretation, by listing the following: first, he recognises the duality of the Constitution as both a legal instrument and a political manifesto, thereby presenting a potential for controversy in interpretation. Second, he acknowledges that controversy

95 Muigai, 'Political jurisprudence or neutral principles', 2.

96 Muigai, 'Political jurisprudence or neutral principles', 1.

97 Muigai, 'Political jurisprudence or neutral principles', 3.

98 The great debate: Prof Githu Muigai vs Dr Willy Mutunga, 28:11 to 28:41.

often arises from judicial interpretations given the counter majoritarian nature of courts which, by virtue of being unelected, possess the authority to review and potentially overturn actions of elected representatives, leading to debates on legitimacy. Third, he notes the complexity of the Constitution comprising doctrine, text, values, and institutional practices, thereby allowing for varied yet equally plausible interpretations. Fourth, he highlights the existence of conflicting provisions within the Constitution, necessitating the courts to reconcile inconsistencies and, in some instances, determine the hierarchy of institutions or values. Lastly, he points out situations where the Constitution may lack precision, contain vagueness, or exhibit gaps, requiring the courts to offer guidance on unarticulated aspects.[99]

Nevertheless, Muigai contends that the constitutional interpretation jurisprudence in Kenya is in urgent need of revitalisation. He asserts that the judiciary must recognise this need and cultivate a coherent and rational system of values, which can only be achieved through the adoption of an imperative theory of constitutional interpretation. He advocates for theories such as those propounded by Robert Bobbit, encompassing doctrinal, prudential, textual, and historical approaches to constitutional interpretation.[100]

A critique of both

The major problem with Mutunga's argument is that, although he speaks of a theory of constitutional interpretation being in existence, it is very difficult to conceive what the theory entails and its coherence. His argument that Article 259 entails a theory of constitutional interpretation has been dismissed for being what any ordinary judge in any ordinary court ought to do.[101]

However, he retaliates by arguing that there is always a danger that unthinking deference to cannons of interpretation, the rules of common

[99] Muigai, 'Political jurisprudence or neutral principles', 1.

[100] The great debate: Prof Githu Muigai vs Dr Willy Mutunga, 15:33 to 16:58.

[101] The great debate: Prof Githu Muigai vs Dr Willy Mutunga, 13:26 to 13:57.

law, statutes and foreign cases can subvert the theory of interpreting the Constitution. He buttresses this argument with the subject of judicial review in Kenya which is clearly outlined by Article 20(3) as a remedy to an aggrieved party or parties. He also refers to the case of *Marbury v Madison* and further warns against the development of a two tracked system of judicial review; one influenced by the old cases of the common law and the other influenced by the Constitution of Kenya (2010).[102]

On the other hand, Muigai's insistence on a lack of a theory of constitutional interpretation fails to take into consideration the known theories of constitutional interpretation, the fusion of several known theories or the creation, by people, of their own theories.

Despite the existence of these reasons mentioned by Muigai, compelling arguments persist: first, that any theory of constitutional interpretation that disregards consequences and solely fixates on text or original intentions is inherently flawed. Second, a theory that neglects either text or original intentions and prioritises consequences exclusively is similarly flawed. Third, certain contexts may favour one theory of constitutional interpretation over others. Fourth, a diverse composition of justices with varied interpretative approaches is essential, as a court devoid of dissenters fails to offer a comprehensive understanding of the implications of its decisions. Fifth, a pragmatist judge maintains that constitutional interpretation entails a creative engagement with the framers' intent rather than rigid adherence to their every dictate.[103]

Therefore, the debate on decolonising constitutional interpretation in Kenya reveals the challenge of balancing flexibility with coherence. While Mutunga advocates for a Kenyan-focused, adaptive approach, Muigai warns that a lack of structure risks inconsistent rulings. A hybrid model that draws on multiple interpretive frameworks while rooted in Kenya's unique context could provide the judiciary with both the adaptability and consistency needed to build a decolonised, legitimate legal system that reflects Kenya's postcolonial identity and aspirations.

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[102] Mutunga, 'The Constitution of Kenya and its interpretation', 15-16.

[103] Doug Linder, 'Theories of constitutional interpretation', *Exploring constitutional law*, 9 January 2023.

A theory of constitutional interpretation in Kenya

This theory, as evidenced above, encompasses the following: first, it does not endorse formalistic or positivistic approaches, as exemplified by Articles 20(4) and 259(1).[104] Second, it considers non-legal considerations that judges must weigh when exercising their jurisdiction. These considerations encompass the values and principles outlined in the Preamble, Article 10, Chapter 6, among others.[105] Third, it contributes to the evolution of both the prescribed norms and the declared principles or policies.

Care should be exercised not to conflate one with the other, as the dichotomy between 'prescribed norms, values, principles, purposes, and policies enriches the theory of constitutional interpretation'.[106] Fourth, it advocates for a holistic approach, whereby interpretation entails a contextual analysis of a constitutional provision. This involves reading it alongside and against other provisions to ensure a rational elucidation of what the Constitution ought to signify, considering its historical context, the issues in contention, and the prevailing circumstances.[107]

The theory described above is often referred to as purposive interpretation or teleological interpretation. This approach assigns meaning to the text in accordance with the purpose of constitutional provisions or the entirety of the Constitution.[108] Its theoretical foundation rests on the basis that every piece of legislation inherently serves a purpose; that is, it is crafted to achieve specific effects.[109]

According to Mutakha Kangu, this is the essence of the Kenyan Constitution. Referring to Mutunga's arguments, he recognises that the

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104 The Constitution of Kenya (2010) Article 259(1).

105 This was emphasised *In the matter of the Interim Independent Commission* (2011) para 86.

106 Mutunga, 'The Constitution of Kenya and its interpretation: Reflection from the Supreme Court decisions', 11.

107 *In the matter of Kenya National Commission on Human Rights*, para 26.

108 Zoltan Szente and Fruzsina Gardos Orosz, 'On the art of constitutional interpretation' in Fruzsina Gardos Orosz and others (eds) *Populist challenges to constitutional interpretation in Europe and beyond*, Taylor and Francis Group, 2021, 82.

109 Szente and Gardos, 'On the art of constitutional interpretation', 82.

theory is rooted in the aforementioned articles of the Constitution and is aimed at discerning the purposes, core values, and principles which the Constitution endeavours to realise, uphold, or safeguard.[110] Furthermore, he contends that this theory seeks to uncover the purpose behind each provision, rather than solely focusing on the literal meaning of the words used to convey those purposes. He also emphasises that it incorporates various other methods of constitutional interpretation, including grammatical, systematic, teleological, and historical approaches.[111]

Does the theory of constitutional interpretation further decolonise law?

The foundational philosophy of decolonising jurisprudence incorporates several key principles: It is not strictly purist, it acknowledges the profound impact of modernity's violence on thought, it remains grounded in modernity without being insular, and supports indigenous communities in developing their jurisprudence based on local needs and best practices, thereby reflecting its hybrid nature. The adoption of the approach to constitutional interpretation championed by Mutunga provides a viable and exciting path toward decolonising law since this approach aligns with the above principles.

Thus, the Supreme Court plays a central role in safeguarding this approach as its decisions set the standard for all other courts, ensuring consistency and fidelity to the constitutional spirit. Through this lens, the theory not only challenges traditional formalistic approaches but also embraces a more holistic and inclusive method of legal interpretation, one that is anchored in the lived experiences and needs of Kenyans.

110 John Mutakha Kangu, *Constitutional law of Kenya on devolution,* Strathmore University Press, 2015, 28-64.

111 Kangu, *Constitutional law of Kenya on devolution,* 28-64.

Roots of resistance

The judiciary

Given that the Constitution of Kenya (2010) under Article 259(1), mandates the judiciary to interpret the Constitution in a manner that promotes its purposes, values, principles, advances the rule of law, human rights, contributes to good governance, and permits the development of law, it follows that the judiciary bears the responsibility to interpret the constitution accordingly. Therefore, the discourse on decolonisation can only advance if judges engage in profound philosophical reflection on a theory that would further decolonise jurisprudence. Mutunga's suggestion of envisioning a progressive African jurisprudence based on our transformative constitutions, often referred to as the 'gospel' according to the Africans, underscores the need for a jurisprudential framework aligned with the transformative spirit of African nations.[112]

Law schools

Law schools play a pivotal role in shaping the future professionals of the legal field, including teachers of law, advocates, lawyers, paralegals, judges, chief justices, and leaders. It is imperative that law schools in Africa and former colonies undergo a transformation towards decolonised legal education. Law schools must tailor their curriculums to prepare students for this task. This shift entails moving away from a Eurocentric conception of law, which is deeply rooted in colonialism, towards a more inclusive legal culture.[113]

To meaningfully engage with decolonisation in Kenyan law schools, the approach must be comprehensive, touching on curriculum design, teaching methodologies, academic support, and institutional backing. Structured recommendations for Kenyan law schools to fos-

[112] Mutunga, 'The Constitution of Kenya and its interpretation: Reflections on the Supreme Court's decisions', 19.

[113] Karibi-Whyte, 'Agenda for decolonising law in Africa: Conceptualising the classroom', 10.

ter a decolonised, inclusive, and critical approach to legal education include: the contextual teaching of colonial-era laws in a way that includes their historical context, origin, and impact on marginalised communities rather than presenting them as neutral, universal principles. This can be done by addressing the social, political, and cultural dimensions of the law and its effects on Kenyan society.[114] Furthermore, expanding reading lists to include works by African scholars, authors from the Global South, and indigenous thinkers would expose students to alternative perspectives on subjects like property law, human rights, and sovereignty, offering a more inclusive narrative.[115]

Integrating critical legal theories is also essential. This includes Third World Approaches to International Law (TWAIL), postcolonial theory, and African legal philosophies, especially in international law, property law, and constitutional law courses.[116] A key aspect of this is encouraging lecturers to address the idea that law is not neutral, engaging students in questioning the interests that specific laws serve and the impact on different communities.[117]

Embracing a reflexive teaching approach, as recommended by Rigney, involves lecturers acknowledging their own educational biases and presenting the law with a critical lens. This can be achieved by comparing Kenyan law with jurisdictions from the Global North and South, fostering a more nuanced and relativistic understanding.[118] To deepen this contextual approach, legal education should integrate historical, political, and economic analyses, showing how these contexts shape and influence legal principles. For instance, a property law course

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114 Sandra Mogeni, Summer Ahmed and Chris Beran, 'Decolonising and diversifying land law: A critical analysis of current issues in the modern land law curriculum' in Wieczorek (ed) *Decolonising legal education at Durham Law*, 30.

115 Mogeni and others, 'Decolonising and diversifying land law: A critical analysis of current issues in the modern land law curriculum', 30.

116 Shako, 'Decolonising the classroom: Towards dismantling the legacies of colonialism and incorporating TWAIL into the teaching of international law in Kenya', 18.

117 Decolonising SOAS Working Group, 'Decolonising SOAS learning and teaching toolkit for programme and module conveners,' Decolonising SOAS, May 2018.

118 Wieczorek, *Decolonising legal education at Durham Law School,* 19.

could explore how colonial laws shaped land ownership and economic disparities in Kenya.[119]

Implementing project-based learning (PBL) in core modules allows students to examine legal issues from social, historical, and legal perspectives, promoting a comprehensive understanding of how laws intersect with societal issues.[120] Moving beyond traditional exams, alternative assessment formats, such as reflective essays, oral presentations, and critical analysis papers, gives students room to explore legal issues from decolonial perspectives. Adding self-assessment and peer review components further enables students to critically reflect on their learning journey, moving beyond exam-focused preparation.[121]

Decolonisation-focused modules should also be mandatory for first-year students, providing foundational knowledge on jurisprudence, critical theory, and the interplay between law and colonialism.[122] This early introduction ensures that all students start their legal education with a solid grounding in decolonial perspectives. Teaching about 'lawlessness' within legal education also highlights how laws can fail marginalised groups when enforcement is biased or absent, helping students critically assess gaps within legal systems and consider reforms for more equitable application of the law.[123]

Incorporating the experiences of laypeople and litigants, through panels or roundtables, brings real-world perspectives into the classroom. Such firsthand accounts deepen students' understanding of the lived impact of legal decisions, fostering empathy and practical aware-

[119] Natalie Ohana and others, 'Rationale and recommendations on decolonising the pedagogy and curriculum of the Law School at the University of Exeter', 56(4) *The Law Teacher* (2022) 544.

[120] Mogeni and others, 'Decolonising and diversifying land law: A critical analysis of current issues in the modern land law curriculum', 32.

[121] Mogeni and others, 'Decolonising and diversifying land law: A critical analysis of current issues in the modern land law curriculum', 35.

[122] Ohana and others, 'Rationale and recommendations on decolonising the pedagogy and curriculum', 543-544.

[123] Ohana and others, 'Rationale and recommendations on decolonising the pedagogy and curriculum', 544.

ness of the societal effects of law.[124] Ongoing faculty training on inclusive teaching methods, project-based learning, and facilitating sensitive discussions is crucial. Appointing a decolonising curriculum officer can further support faculty, providing resources and guidance for embedding decolonial practices.[125]

Finally, promoting the sharing of best practices among institutions through forums, workshops, and collaborative resources can create a supportive network for decolonising law curricula. This collaborative approach helps institutions exchange effective strategies, enhancing their collective capacity to deliver inclusive and critical legal education.[126]

Conclusion

This paper has critically examined the roles of law schools, philosophical foundations, and constitutional interpretation in the decolonisation of Kenya's legal system. The colonial legacy continues to influence legal education and practice, necessitating a comprehensive re-evaluation of how law is taught and understood in Kenya. As Ngugi wa Thiong'o articulates, true decolonisation extends beyond reclaiming land; it involves liberating thought and culture, particularly within educational frameworks that have historically marginalised indigenous perspectives.[127] This assertion highlights the need for transformative change in legal education to dismantle colonial ideologies that persist in contemporary curricula.

The analysis reveals that law schools are not merely institutions for training legal practitioners; they are pivotal sites for challenging and transforming colonial narratives embedded in legal education. Bizani

[124] Ohana and others, 'Rationale and recommendations on decolonising the pedagogy and curriculum', 544.

[125] Ohana and others, 'Rationale and recommendations on decolonising the pedagogy and curriculum', 545.

[126] Ohana and others, 'Rationale and recommendations on decolonising the pedagogy and curriculum', 545.

[127] Wa Thiongo, *Decolonising the mind*, 4-30.

emphasises that the dominance of white academics within these institutions perpetuates a Eurocentric epistemic viewpoint, undermining the development of African customary law jurisprudence.[128] Furthermore, Laakso and Adu identify significant challenges in decolonising curricula, including bureaucratic obstacles and the scarcity of locally relevant textbooks.[129] The philosophical exploration of decolonisation underscores the complexities inherent in reconciling traditional values with contemporary constitutional mandates.

The 'cruel dilemma' faced by Kenyan courts illustrates this tension, where cultural practices can clash with human rights standards. The Constitution of Kenya (2010) attempts to address these issues by promoting cultural expression while imposing limitations to ensure alignment with constitutional principles.[130]

In conclusion, the journey toward a decolonised legal system in Kenya is fraught with challenges but also rich with opportunities for transformative change. By reimagining legal education, embracing indigenous philosophies, and engaging in critical constitutional interpretation, Kenya can move closer to achieving a legal framework that is just, inclusive, and authentically representative of its diverse populace. This endeavour is essential not only for the advancement of justice but also for the broader goal of societal transformation in post-colonial contexts.

[128] Bizani, 'Dismantling epistemic violence in South African law by decolonising jurisprudence', 3.

[129] Laakso and Kajsa, '"The unofficial curriculum is where the real teaching takes place": Faculty experiences of decolonising the curriculum in Africa', 13.

[130] Constitution of Kenya (2010) Articles 11 and 2(4).

Towards a universal legal framework: The necessity of international legal regulation for surrogacy

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Abstract

The global rise of surrogacy, both as a medical practice and a commercial arrangement, has outpaced the development of international legal frameworks, leading to significant ethical, legal, and human rights concerns. Currently, surrogacy laws vary drastically across jurisdictions, ranging from outright prohibition to permissive commercial practices, often leaving surrogate mothers, intended parents, and children in vulnerable and uncertain legal positions. This paper argues that the absence of a cohesive international legal regime to regulate surrogacy exacerbates these disparities, fostering exploitation, forum shopping, and legal fragmentation, especially in cross-border surrogacy arrangements. Drawing upon comparative legal analysis and international human rights law, the paper advocates for the establishment of a universal legal framework that would harmonise surrogacy regulations across borders. Such a framework would address fundamental issues, including the protection of surrogate mothers from exploitation, the

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recognition and enforcement of parental rights across jurisdictions, and the safeguarding of the rights and welfare of children born through surrogacy. Through an analysis of existing frameworks and the evolving discourse, this paper argues that comprehensive international regulation is essential to address the global nature of surrogacy, while also balancing national autonomy with universal human rights protections.

Keywords: cross border surrogacy, international law, regulation, surrogacy, surrogacy agreements

Introduction

The debate over the enforceability of surrogacy agreements in the world is fraught with legal, ethical, and social complexities, reflecting deeper issues about human dignity, reproductive rights, and the evolving nature of family structures.[1] Surrogacy is dynamic in nature. The constant evolution of its legal concerns makes it hard to consistently legislate against surrogacy agreements.[2] Surrogacy challenges traditional notions of parenthood, family structures, and reproductive autonomy.[3] It involves a contractual arrangement where a woman, the surrogate, agrees to carry a pregnancy to term for another individual or couple who will become the child's legal parent(s) after birth.[4]

There are two primary forms of surrogacy: traditional and gestational.[5] In traditional surrogacy, the surrogate's egg is used, making her the biological mother of the child.[6] In contrast, gestational surrogacy involves the implantation of an embryo created through in vitro fertilisation (IVF), ensuring that the surrogate has no genetic link to the child.[7] Both types raise significant legal and ethical challenges, particularly when practiced across borders, often in jurisdictions with varying degrees of legal regulation or none at all.

Against this backdrop, this paper is divided into four parts that critically examine the complex legal and ethical dimensions of surrogacy, particularly in cross-border contexts. It begins by dissecting the four common global positions of surrogacy. Thereafter, the paper addresses

1 Robai Ayieta Lumbasyo, 'Towards a Kenyan legal and ethical framework on surrogacy', Unpublished MSc thesis, University of Witwatersrand, 2015.

2 John Pascoe, 'Sleepwalking through the minefield: Legal and ethical issues in Surrogacy', 30 *Singapore Academy of International Law Journal* (2018) 455.

3 Pascoe, 'Sleepwalking through the minefield', 455.

4 Yehezkel Margalit, 'In defense of surrogacy agreements: A modern contract law perspective', 20(2) *William and Mary Journal of Race, Gender and Social Justice* (2014) 426.

5 Dominique Ladomato, 'Protecting traditional surrogacy contracting through fee payment regulation', 23 *Hastings Women's Law Journal* (2012) 247.

6 Ladomato, 'Protecting traditional surrogacy contracting through fee payment regulation', 247.

7 Yale Medicine, 'Overview on surrogacy'.

the contested nature of legal parentage, exploring how different legal systems grapple with the question of who is recognised as the legal parent in surrogacy arrangements. The analysis highlights the inconsistencies across jurisdictions and the legal uncertainties that arise, especially when surrogacy agreements cross national borders. The discussion then shifts to the Global South, focusing on Kenya as a case study to explore the unique challenges that cross-border surrogacy presents in economically disadvantaged regions. Here, the legal gaps and economic inequalities expose surrogate mothers to exploitation, raising significant ethical and human rights concerns.

The paper proceeds to argue that the current fragmented legal landscape is ill-equipped to manage these complexities, making a compelling case for the establishment of an international legal framework based on Third World Approaches to International Law (TWAIL). Such a framework would harmonise surrogacy laws across jurisdictions, ensuring protection for surrogate mothers, intended parents, and children alike. The conclusion synthesises these arguments, reaffirming the necessity for a comprehensive international approach that not only clarifies legal parentage but also safeguards the human rights and dignity of all parties involved.

The four global positions of surrogacy and international surrogacy agreements

This discourse can be distilled into three primary perspectives and arguments, each with its own implications for the legal system and society at large. The surrogacy contract debate encompasses four main positions. First being the total prohibition of surrogacy contracts. Second, commercial surrogacy is prohibited but altruistic surrogacy is permitted and regulated. Third, commercial surrogacy is permitted and regulated, and lastly surrogacy is totally unregulated.[8]

[8] Hague Conference on Private International Law, 'A study of legal parentage and the issues arising from international surrogacy agreements', Preliminary Document No 3C, March 2014, 15.

The first and most conservative position advocates for the total prohibition of surrogacy contracts. Proponents of this view argue that surrogacy, by its very nature, commodifies human life, reducing the profound and intimate act of childbearing to a commercial transaction.[9] They contend that allowing surrogacy contracts to exist, let alone be enforced, undermines the intrinsic value of human life and risks exploiting women, particularly those from economically disadvantaged backgrounds.[10] This perspective is often rooted in a moral framework that sees surrogacy as a violation of human dignity, arguing that the human body should not be used as a vessel for profit.[11]

Furthermore, critics of surrogacy highlight the potential psychological and emotional harm to surrogate mothers and the children born out of such arrangements stating that it involves the sale of children.[12] While it is undeniably true that human rights violations have occurred within the surrogacy context, such abuses are not unique to surrogacy but are prevalent across various sectors.[13] Addressing these violations requires broad, systemic solutions rather than imposing restrictive measures on the entire field of Assisted Reproductive Technologies (ART).[14] Many countries overlook the fact that increased regulation can, in fact, worsen the issue of surrogacy trafficking by driving citizens to seek alternatives

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9 Margaret Jane Radin, 'Market inalienability', 100(8) *Harvard Law Review* (1987) 1850.

10 Yasmine Ergas, 'Thinking 'through' human rights: The need for a human rights perspective with respect to the regulation of cross-border reproductive surrogacy', in Katarina Trimmings and Paul Beaumont (eds) *International surrogacy arrangements*, Bloomsburry Publishing, 2013, 428.

11 Ergas, 'Thinking 'through' human rights', 428.

12 David M Smolin, 'Surrogacy as the sale of children: Applying lessons learned from adoption to the regulation of the surrogacy industry's global marketing of children', 43 *Pepperdine Law Review* (2016) 267 and 268.

13 American Bar Association (ABA) Section of Family Law, 'Report to the House of Delegates: American Bar Association position paper regarding a possible Hague Convention on Private International Concerning Children, Including International Surrogacy Arrangements', 2013.

14 ABA Section of Family Law, 'Report to the House of Delegates: American Bar Association Position Paper regarding a possible Hague Convention on Private International Concerning Children, Including International Surrogacy Arrangements'.

in other countries or through unregulated black markets, thereby exacerbating exploitation rather than curbing it.[15]

The second position in the surrogacy debate advocates for the legal enforceability of surrogacy agreements, framing it as an issue of reproductive autonomy and contractual freedom.[16] This is by prohibiting commercial surrogacy but permitting and regulating altruistic surrogacy. Proponents argue that in a modern liberal society, individuals should have the right to make personal reproductive choices and enter into agreements that reflect these desires, provided they are informed, consensual, and ethically sound decisions.[17] Legal enforcement would offer clarity and protection for all parties involved; ensuring that surrogates are fairly compensated, intended parents secure their parental rights, and that the welfare of the child is upheld.

Supporters of this view emphasise the state's role in establishing a robust legal framework that balances contractual freedom with safeguards against exploitation, coercion, and abuse.[18] Such a framework would respect individual autonomy while providing legal certainty and fairness.[19] However, this position also raises concerns about whether contract law alone can adequately address the power imbalances and ethical complexities inherent in surrogacy, particularly in cross-border contexts where socio-economic disparities often lead to the commodification of women's reproductive labour.

The third, a more nuanced position, suggests that while surrogacy contracts should be permitted, they should not be legally enforceable. This stance reflects a concern for the potential coercion and exploita-

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15 ABA Section of Family Law, 'Report to the House of Delegates: American Bar Association Position Paper regarding a possible Hague Convention on Private International Concerning Children, Including International Surrogacy Arrangements'.

16 Adeline Allen, 'Surrogacy and limitations to freedom of contract: Toward being more fully human', 41 *Harvard Journal of Law and Policy* (2018) 754.

17 Allen, 'Surrogacy and limitations to freedom of contract', 760.

18 Lois McLatchie and Jennifer Lea, 'Surrogacy, law and human rights', ADF International White Paper, 2022.

19 McLatchie and Lea, 'Surrogacy, law and human rights'.

tion that could arise in legally binding surrogacy arrangements.[20] Those who support this position argue that the complexities of pregnancy and childbirth, including the potential for a surrogate to change her mind about relinquishing the child, make it morally problematic to enforce such contracts through the legal system.[21] They contend that while surrogacy should not be outrightly banned due to the recognition of the legitimate desires of individuals to build families through these means, enforcing these contracts could lead to injustices, particularly for the surrogate.

These debates are what shape the policy for most countries in the world in regulating surrogacy. The surrogacy agreement itself is frequently the least complex aspect of the arrangement. International intended parents[22] often face far greater challenges in navigating the legal barriers of their home countries.[23] These challenges extend beyond merely executing the surrogacy agreement and encompass the difficult task of securing legal parentage and the desired citizenship status for the child once born.[24] In many instances, international intended parents are compelled to circumvent restrictive national laws, which complicate their ability to formally establish their parental rights and the child's legal standing in their country of origin.[25] This is what is termed as 'circumvention tourism', wherein they travel abroad to access services that are legal in their destination country but prohibited in their home jurisdiction.[26]

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20 Sarah Moratazvi, 'It takes a village to make a child: Creating guidelines for international surrogacy', 100 *The Georgetown Law Journal* (2012).

21 Jaden Blazier and Rien Janssens, 'Regulating the international surrogacy market: the ethics of commercial surrogacy in the Netherlands and India', 23 *Medicine, Health Care and Philosophy* (2020) 622.

22 Model Act Governing Assisted Reproductive Technology (American Bar Association Proposed Act 2008), Section 102(A) (19). The section defines an intended parent as, 'an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted or collaborative reproduction'.

23 Yehezkel Margalit, 'From Baby M to Baby M(anji): Regulating international surrogacy agreements', 24 *Journal of Law and Policy* (2015), 54-55.

24 Margalit, 'From Baby M to Baby M(anji)', 54-55.

25 Margalit, 'From Baby M to Baby M(anji)', 54-55.

26 Glenn Cohen, 'Circumvention tourism', 97 *Cornell Law Review* (2012) 1312.

International surrogacy agreements underscore profound economic, social, racial, and gender disparities between the surrogate mothers and the intended parents.[27] These disparities often manifest in cross-border surrogacy arrangements, where wealthier, typically Global North intended parents, engage the services of surrogates from economically disadvantaged regions.[28] Such dynamics raise significant ethical concerns, as they expose underlying inequalities that influence the power relations and terms of these agreements.[29]

These disparities not only shape the surrogacy process but also deepen questions around exploitation, autonomy, and justice in the global surrogacy industry, therefore, demanding a comprehensive and cohesive legal framework.[30] A well-structured legal framework will facilitate the continuation of international surrogacy agreements while rigorously safeguarding the best interests and human rights of all contracting parties, particularly the child.[31] Comprehensive regulation is the only means to effectively address and mitigate the ethical and legal concerns that have arisen in connection with cross-border surrogacy arrangements.[32]

A *locus classicus* case of this dilemma was in *Re: X and Y (Parental order: Foreign surrogacy)* decided by Hon Mr Justice Hedley. In this case, a British couple had for many years explored myriad avenues of parenthood but were not successful.[33] The couple was introduced to several potential surrogate mothers and ultimately entered into an agreement

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27 Emily Stehr, 'International surrogacy contract regulation: National governments and international bodies' misguided quests to prevent exploitation', 35 *Hastings International and Comparative Law Review* (2012) 256.

28 Usha Rengachary Smerdon, 'Crossing bodies, crossing borders: International surrogacy between the United States and India', 39 *Cumberland Law Review* (2008) 51–56.

29 Maya Unnithan, 'Thinking through surrogacy legislation in India: Reflections on relational consent and the rights of infertile women', 1(3) *Journal of Legal Anthropology* (2013) 288.

30 Unnithan, 'Thinking through surrogacy legislation in India', 288.

31 Margalit, 'From Baby M to Baby M(anji)', 43.

32 Margalit, 'From Baby M to Baby M(anji)', 43.

33 *Re X and another (children) (Parental order: Foreign surrogacy)* [2008] EWHC 3030 (Fam) (09 December 2008), para 2.

with a married Ukrainian woman who had already given birth to her own children.[34] Initially, she had expressed interest in becoming a surrogate for her sister, who was struggling with infertility. However, after her sister naturally conceived, the Ukrainian woman decided to offer her services as a surrogate for another couple.[35] The Ukrainian surrogate was implanted with embryos conceived using donor eggs (from an anonymous donor) and fertilised with the male applicant's sperm.[36] Over time, the relationship between the surrogate and the intended parents evolved into a genuine friendship. Eventually, the surrogate successfully conceived and gave birth to twins.

This marked the beginning of significant legal and logistical challenges, none of which were due to the actions of the surrogate or the intended parents.[37] The discrepancy was in the United Kingdom (UK) Human Fertilisation and Embryology Act, 1990.[38] In this case, the judge stated that this conflict made children be marooned stateless and parentless since the children could neither remain in any of the two countries.[39] The court legally recognised the twins as legitimate children of the intended parents, thereby granting them British citizenship stating that this is the best approach that the court should take for the interest of the children.[40] This decision highlights the court's emphasis on protecting the rights and welfare of the children born through surrogacy, as well as its recognition of the financial agreements involved, despite the complexities and legal uncertainties surrounding cross-border surrogacy arrangements.

34 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 4.
35 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 4.
36 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 4.
37 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 4.
38 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 8.
39 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 10.
40 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 25.

The contestation of legal parentage in domestic laws

Cross-border reproductive care has increasingly become a favoured option for prospective intended parents pursuing fertility treatments, driven by a wide range of factors.[41] For example, a foreign country may offer access to more advanced and innovative fertility treatments, whereas the intended parents' home country may impose legal, ethical, or religious restrictions on surrogacy. In addition to that, the cost of care may be significantly lower abroad and the intended parents may seek privacy,[42] genetic engineering options, specific genetic material or ethnicity that only certain countries provide.[43]

The regulation of surrogacy worldwide reveals a disjointed and often incoherent legal framework, symptomatic of deeper jurisprudential and policy failures to adapt to the realities of modern reproductive technologies.[44] The crux of the contestation is on birth registration which is a requirement for many states as provided in international instruments.[45] In the majority of jurisdictions, the woman who gives birth to a child is recognised as the legal mother by automatic operation of law, rooted in the principle of *mater semper certa est* 'the mother is always certain'.[46]

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41 Lisa C Ikemoto, 'Reproductive tourism: Equality concerns in the global market for fertility services', 27(2) *Law and Inequality Journal* (2009) 278.

42 American Society for Reproductive Medicine, 'Cross-border reproductive'.

43 Ikemoto, 'Reproductive tourism', 278.

44 Sally Howard, 'Taming the international commercial surrogacy industry', 349 *British Medical Journal* (2014) 1.

45 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 24(2); Convention on the Rights of the Child, Article 7.

46 The jurisdictions are as follows: Australia (NSW, VIC, QLD, WA, SA, TAS), Belgium, Canada (Alberta, BC, Manitoba, NWT), Chile, Croatia, Czech Republic, Denmark, Dominican Republic, El Salvador, Finland, Germany, Guatemala, Hungary, Ireland, Israel, Japan, Latvia, Lithuania, Madagascar, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Romania, Serbia, Slovakia, Spain, Sweden, Switzerland, Thailand, Turkey and Uruguay.

This legal presumption is codified in statutory law in some states, while in others, it emerges from established practice or common law principles.[47] However, certain civil law jurisdictions adopt a nuanced approach to this issue such as Quebec and the Republic of Korea. In these jurisdictions, legal maternity is not established solely by operation of law but requires the completion of formal registration procedures. Specifically, the legal relationship between the birth mother and child is contingent upon the 'act of birth', which involves the formal attestation of birth by the attending physician and a declaration by the mother.[48]

Only one state, Monaco, has expressly prohibited the use of Assisted Reproductive Technology.[49] Most states like Kenya are in the process of enacting laws on Assisted Reproductive Technology.[50] India, too, has attempted to tighten its surrogacy laws through the Assisted Reproductive Technology (Regulation) Act, 2021 which restricts surrogacy to altruistic arrangements for Indian nationals.[51] However, the Act has been widely criticised for its insufficient protections for surrogate mothers, who often remain vulnerable to exploitation, health risks, and inadequate post-birth support. This legislative failure exemplifies the inadequacy of national regulations in addressing the inherently transnational character of surrogacy.[52]

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47 *Marckx v Belgium* (judgement on merit), App No 6833/74, ECtHR (13 June 1979), para 42; Council of Europe's 2011 Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities, para 50 and 51.

48 Ikemoto, 'Reproductive tourism'.

49 Hague Conference on Private International Law, 'A study of legal parentage and the issues arising from international surrogacy agreements' (Preliminary Document No 3C, March 2014) 11.

50 Assisted Reproductive Technology Bill of 2022.

51 Assisted Reproductive Technology (Regulation) Act, 2021, Part IV and V.

52 Mamatha Gowda, Bobbity Deepthi and Kubera Nichanahalli, 'The Assisted Reproductive Technology Act, 2021: Provisions and implications', 61 *Indian Pediatrics* (2024) 675.

In Ukraine,[53] Georgia,[54] and South Africa,[55] surrogacy is not only legal but also heavily commercialised, though these countries only couch surrogacy as altruistic.[56] Despite being legally sanctioned, the commodification of reproductive labour raises critical ethical concerns regarding the exploitation of women, especially in economically disadvantaged regions.[57] By embedding surrogacy within a legal framework that treats it as a transactional service, these jurisdictions inadvertently validate practices that prioritise financial gain over the dignity and autonomy of surrogate mothers.[58] Such legal structures neglect to consider the long-term implications for both surrogates and children born through these arrangements, thereby undermining fundamental human rights principles.[59]

Conversely, nations like France, Italy, and Switzerland enforce blanket bans on surrogacy, refusing to recognise any legal relationship between children born through surrogacy abroad and their commissioning parents.[60] This absolutist approach, while ostensibly being protective of societal and moral values, creates untenable situations where children are rendered stateless or parentless, effectively punishing them for circumstances beyond their control. The rigid application of such laws ignores the rights of the child enshrined in international legal instruments such as the United Nations Convention on the Rights of the Child (CRC), which mandates the recognition of a child's identity,

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53 The Ukrainian Family Code (amended December 22, 2006, No 524-V), Article 123; Health Ministry of Ukraine, Order 24 and Order 771. The parties are free to choose the type of surrogacy they want; the only condition is that there has to be an informed consent from all the parties.

54 Hague Conference on Private International Law, 'A study of legal parentage and the issues arising from international surrogacy agreements' (Preliminary Document No 3C, March 2014) 58.

55 South Africa's Children Act No 38 of 2005 (Chapter 19).

56 Howard, 'Taming the international commercial surrogacy industry', 1.

57 Anne Louw, 'Surrogacy in South Africa: Should we reconsider the current approach?', 76 *Journal of Contemporary Roman-Dutch Law* (2013) 580-581.

58 Louw 'Surrogacy in South Africa', 580-581.

59 Louw, 'Surrogacy in South Africa', 580-581.

60 Howard, 'Taming the international commercial surrogacy industry', 1.

including their legal relationship to their parents.[61] This inconsistency between national laws and international human rights obligations illustrates a fundamental doctrinal failure to reconcile national sovereignty with global human rights standards in the context of surrogacy.

The United States (US),[62] and Australia present a more complex legal landscape, where surrogacy is regulated on a sub-national level, leading to a patchwork of contradictory laws. This lack of uniformity exposes the inherent risks of devolving regulatory authority to subnational entities, particularly in matters as ethically and legally significant as surrogacy. In the US, some states like California have embraced commercial surrogacy, enforcing contractual agreements that reduce gestational carriers to mere service providers.[63] However, other states like Nebraska and Louisiana (only allows altruistic surrogacy) criminalise the practice, creating a scenario where surrogacy arrangements that are legally valid in one state may have no recognition in another.[64] This fragmented regulatory approach not only undermines legal certainty but also facilitates cross-border surrogacy tourism, where individuals exploit legal loopholes to circumvent more restrictive laws. By failing to establish a cohesive national framework, these countries implicitly endorse legal arbitrage, thereby perpetuating inequalities in the access to reproductive services and protections.

In several EU countries, judges have devised legal solutions that confer legal parentage to children born through commercial gestational surrogacy, aligning them with their 'intended parents'. In a number of states, *ad hoc* and *ex post facto* remedies have been implemented to

61 United Nations Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, Article 7.

62 Charles P Kindregan and Danielle White, 'International fertility tourism: The potential for stateless children in cross-border commercial surrogacy arrangements', 36 *Suffolk Transnational Law Review* (2013) 534-35.

63 Creative Family Connections, 'California surrogacy laws: A comprehensive guide', 9 January 2025.

64 Circle Surrogacy, 'Surrogacy by state', 9 January 2025.

mitigate the negative effects of the legal limbo faced by these children.[65] These measures aim to address situations where the child has already been born and the surrogate mother, in most cases, does not wish to assume parental responsibilities, leaving the intended parents to care for the child. When regulating the use of surrogacy technologies and addressing their legal consequences, it is crucial to strike a fair balance between private and public interests, the European Court of Human Rights (ECtHR) has been playing a pivotal role in this process.[66]

Notably, in disputes involving surrogacy, the ECtHR has frequently ruled in favour of the intended parents. In the case of *Mennesson v France*, the Court emphasised that states should be granted broad discretion in making decisions about surrogacy, given the ethical complexities and the lack of consensus on the issue across Europe.[67] However, the Court noted that this discretion is more limited when it pertains to matters of parenthood, as such decisions impact fundamental aspects of an individual's identity.[68] In determining whether a fair balance was achieved between state interests and the personal interests of the individuals involved, the Court underscored the fundamental principle that the best interests of the child should always take precedence.[69]

India and Thailand have long been the epicentres of 'fertility tourism', driven by a combination of lax regulations and low costs.[70] However, scandals such as the *Baby Gammy case*,[71] (Thailand) where a child

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65 Oksana M Ponomarenko, Yuriy A Ponomarenko and Kateryna Yu Ponomarenko, 'Legal regulation of surrogacy at the international and national levels: Optimisation of permissions, prohibitions and liability' (2020) 73 (12 p II) *Wiadomości Lekarskie* 2879.

66 Ponomarenko and others, 'Legal regulation of surrogacy at the international and national levels', 2878.

67 Case of *Mennesson v France* (judgement on merit),65192/11, ECtHR (2014) para 78.

68 *Mennesson v France* (judgement on merit) ECtHR (2014) para 94.

69 *Mennesson v France* (judgement on merit) ECtHR (2014) para 99.

70 Cyra Akila Choudhury, 'The political economy and legal regulation of transnational commercial surrogate labor', 48(1) *Vanderbilt Journal of International Law* (2015) 4–5 (discussing the high costs of surrogacy and reproductive health care in the United States, particularly for those patients without insurance coverage, as compared to India, which offers similar care at a fraction of the cost).

71 *Farnell and another and Chanbua* [2016] FCWA 17.

with down syndrome was abandoned by his commissioning parents, have exposed the vulnerabilities inherent in these loosely regulated markets.[72] The Thai government's reaction preceding this case was to criminalise commercial surrogacy. This represents a piecemeal response to a systemic problem.[73] The legislative shift to altruistic surrogacy only for Thai nationals was a step towards addressing exploitation. However, the government failed to address the broader international implications, particularly in light of the global nature of surrogacy arrangements.[74] There is however a possibility that the ban may be lifted by the Thai government.[75]

China, one of the few countries in Asia to impose a strict ban on commercial surrogacy from the outset, presents an interesting counterpoint.[76] While the legal prohibition is clear, the rise of an underground surrogacy market suggests that such bans are not a viable solution in the globalised world.[77] China's approach reveals the limitations of legal prohibition in a context where demand remains high and alternative jurisdictions offer more permissive environments.[78] The persistence of black-market surrogacy highlights the failure of prohibitionist policies to address the root causes of the surrogacy market, including the growing demand for reproductive assistance and the economic disparities that drive women to become surrogates.

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72 Agence France Presse, 'Australia investigates "paedophile" father in Thai baby scandal', *NDTV World*, 6 August 2014.

73 Michelle Goodwin, 'Thailand bans foreign commercial surrogacy', *Petrie-Flom Center Blog*, 2 March 2015.

74 Jutharat Attawet, 'Reconsidering surrogacy legislation in Thailand', 90(1) *Medico-Legal Journal* (2022) 45-48.

75 Reuters, 'Thailand plans to legalise surrogacy for foreign couples', 1 March 2024.

76 Chinese Administrative Measures on Human Assisted Reproductive Technology, 2001, Article 3.

77 Shanyun Xiao, 'Uterus rental: Regulating surrogacy in China', 90(1) *Medico-Legal Journal* (2022) 41.

78 Xiao, 'Uterus rental: Regulating surrogacy in China', 41.

Legal and ethical considerations for cross border surrogacy in the Global South: A case study of Kenya

Surrogacy in Kenya occupies a legally ambiguous position, operating in a grey area where it is neither explicitly legal nor illegal.[79] It takes the position of being totally unregulated as presented by John Pascoe.[80] This legal vacuum arises from the absence of statutory provisions, policies, or regulatory frameworks to govern surrogacy arrangements.[81] Despite this lacuna, Kenya witnessed its first gestational surrogacy in 2006, with the birth of the first child from such an arrangement being in 2007. Presently, several prominent medical institutions facilitate for fertility treatment.[82] These include: Aga Khan Hospital,[83] The Nairobi IVF Centre, Myra IVF Centre, Nephromed Wings IVF Centre, Surrogate Mothers Kenya and Footsteps to Fertility.[84]

The legislation that purposes to regulate surrogacy in Kenya is the Assisted Reproductive Technology Bill of 2022 which is yet to be enacted into law. With the enactment of this bill, surrogacy in Kenya will be altruistic surrogacy requiring the payment of only legal expenses.[85] Nevertheless, a thorough reading of the Bill does not mitigate any instances of cross border surrogacy, with the Bill articulating that all surrogacy agreements will be deemed valid if entered into while in Kenya.[86]

The enforceability and legal standing of surrogacy agreements in Kenya have periodically been subject to judicial scrutiny, positioning the courts as pivotal in shaping the jurisprudential landscape surrounding surrogacy. Through these judicial interventions, surrogacy

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79 Naipanoi Lepapa, 'Hard labour: The surrogacy industry in Kenya: Part II', *The Elephant*, 29 May 2021.

80 Pascoe, 'Sleepwalking through the minefield', 455.

81 Pascoe, 'Sleepwalking through the minefield', 456.

82 Kenya IVF, 'What are the top 10 IVF best centres in Nairobi with high success rates in 2023', 9 January 2025.

83 Aga Khan Hospital, 'Fertility and reproductive endocrinology', 9 January 2025.

84 The Nairobi IVF Centre, 'The Nairobi IVF Centre', 9 January 2025.

85 Assisted Reproductive Technology Bill (2022) Section 28(7).

86 Assisted Reproductive Technology Bill (2022) Section 28(3)(b).

arrangements, though operating in a legal grey area due to the absence of comprehensive legislation, have nonetheless given rise to precedents that inform future adjudications. These rulings serve as a form of *de jure* regulation, guiding the resolution of disputes and providing the judiciary with a platform to articulate the enforceability of such agreements. Cases in Kenya surrounding the enforceability of surrogacy agreements have taken the trajectory of ensuring that the best interest of the child is protected.[87]

The case of *JLN and 2 others v Director of Children Services and 4 others*,[88] looked at the question of which party should be registered as a parent,[89] due to the birth notification requirement under the Births and Deaths Registration Act.[90] In this case, the petitioners, WKN and CWW, entered into a surrogacy arrangement with JLN, who consented to serve as a surrogate mother through the process of in vitro fertilisation (IVF).[91] After the birth of the children, a dispute arose regarding whether CWW should be registered as the mother on the acknowledgment of birth notification.[92] MP Shah Hospital, having notified the Director of Children Services of the circumstances surrounding the twins' birth, prompted the director to conclude that the children were in need of care and protection, resulting in their placement in a children's home.[93] Subsequently, the children were released to JLN, and the hospital proceeded to issue the birth notifications in JLN's name.[94] This sequence of events demonstrates the legal complexities inherent in surrogacy arrangements in Kenya, particularly concerning the recognition of parental rights and the registration of births.

87 Constitution of Kenya (2010) Article 53(2).

88 *JLN and 2 others v Director of Children Services and 4 others*, Petition 78 of 2014, Judgement of the High Court, 30 June 2014 [eKLR].

89 *JLN and 2 others v Director of Children Services and 4 others*, para 8.

90 Births and Deaths Registration Act (Chapter 149).

91 *JLN and 2 others v Director of Children Services and 4 others,* para 2.

92 *JLN and 2 others v Director of Children Services and 4 others,* para 2.

93 *JLN and 2 others v Director of Children Services and 4 others,* para 3.

94 *JLN and 2 others v Director of Children Services and 4 others,* para 3.

Pursuant to Section 10 of the Births and Deaths Registration Act, the obligation imposed upon those reporting a birth is to provide, to the extent of their knowledge and capacity, the requisite particulars of the new-born.[95] These particulars encompass critical identifiers such as the child's name, birth date, sex, type and nature of birth, location of birth, and the names of both the parents.[96] In addition to that, the identity of the individual receiving the notification is documented.[97] Upon the completion of this notification, the Registrar of Births and Deaths is responsible for issuing a birth certificate.[98]

In his judgment, the late Justice David Shikomera Majanja emphasised the state's obligation to establish a comprehensive legal framework governing surrogacy arrangements in the country.[99] He affirmed that a child's right to the identity of their genetic parents is paramount and, in principle, the registration of the genetic parents, rather than the surrogate mother, should be allowed.[100] Justice Majanja further held that the Children's Court's directive to register the intended (genetic) parents as the legal parents effectively upheld the surrogacy agreement, given that no dispute existed between the parties involved.[101] He clarified that, in cases where disputes do arise, it is incumbent upon either the Children's Court or the High Court to issue necessary directions, guided by the best interests of the child principle, thereby ensuring that the child's welfare remains the primary consideration in such legal determinations.[102]

A year later, the case of *AMN and 2 others v Attorney General and 5 others,*[103] decided by Justice Isaac Lenaola took a different trajectory

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95 Births and Deaths Registration Act (Chapter 149) Section 10.

96 Births and Deaths Registration Rules (1966) Form No 1.

97 Births and Deaths Registration Rules (1966) Form No 1.

98 Births and Deaths Registration Rules (1966) Rule 11.

99 *JLN and 2 others v Director of Children Services and 4 others,* para 41.

100 *JLN and 2 others v Director of Children Services and 4 others,* para 42.

101 *JLN and 2 others v Director of Children Services and 4 others,* para 42.

102 *JLN and 2 others v Director of Children Services and 4 others,* para 42.

103 *AMN and 2 others v Attorney General and 5 others*, Petition 443 of 2014, Judgement of the High Court, 13 February 2015 [eKLR].

from the one given by Justice Majanja. The learned judge held that a surrogate mother shall be registered as the mother of a born child pending legal proceedings to transfer legal parenthood to the commissioning parent.[104] The case centres on the issue on whether the surrogate mother or genetic mother should be registered as the mother of the child. In this case, there were three parties involved: X, a woman suffering from secondary infertility,[105] her partner Y, and the surrogate Z. After numerous miscarriages and a diagnosis preventing X from undergoing an embryo implantation, the couple turned to The Nairobi IVF Centre and, on 6 June 2012, entered into a surrogacy agreement with Z, who consented to the transfer of three embryos.[106] The surrogate successfully delivered twin babies on 5 February 2013.[107]

Upon the birth of the twins, Kenyatta Hospital, following advice from the Attorney General, issued a birth notification listing X and Y as the parents.[108] However, complications arose when the couple later sought UK citizenship for the children, and it was discovered that the birth notification was inaccurate.[109] Justice Lenaola observed that, under the current legal framework, the host woman (the surrogate) is presumptively recognised as the legal mother of the child in surrogacy arrangements until formal legal processes are followed to transfer legal motherhood to the commissioning woman.[110]

The court's decision highlighted that, despite the surrogacy agreement, Z retained her status as the legal mother until formal legal steps were undertaken to transfer parental rights.[111] The court further identified that the issuance of the birth certificate, which falsely listed X and Y as the biological parents, was unlawful and contrary to statutory re-

104 *AMN and 2 others v Attorney General and 5 others*, para 58.
105 *AMN and 2 others v Attorney General and 5 others*, para 3.
106 *AMN and 2 others v Attorney General and 5 others*, para 4.
107 *AMN and 2 others v Attorney General and 5 others*, para 4.
108 *AMN and 2 others v Attorney General and 5 others*, para 5.
109 *AMN and 2 others v Attorney General and 5 others*, para 6.
110 *AMN and 2 others v Attorney General and 5 others*, para 29.
111 *AMN and 2 others v Attorney General and 5 others*, para 46.

quirements.[112] This case underscored the urgent need for a robust legal framework to govern surrogacy not only in Kenya but the world and ensure proper registration and legal recognition of parental rights in surrogacy arrangements.[113] Justice Lenaola quoted the case; *In Re: X and Y (Foreign Surrogacy)* where the judges made references to the diversity of approaches taken by different countries and the conflict that arose between UK and Ukrainian laws.[114] This conflict made children be marooned stateless and parentless since the children could neither remain in any of the two countries.[115]

The conflict between Kenya's legal presumption and the commissioning parents' expectations, compounded by the complications in obtaining UK citizenship, underscores the need for a harmonised international legal framework.[116] Without such a system, surrogacy remains governed by inconsistent national laws that fail to account for the transnational realities of modern reproductive practices. This patchwork of regulations creates legal uncertainty for both parents and children, potentially leaving children stateless or in legal limbo.[117] An international law on surrogacy would establish uniform standards for the recognition of parenthood, protect the rights of surrogates, commissioning parents, and children, and prevent the kind of jurisdictional conflicts that this case exemplifies. The absence of such a framework allows for exploitation, confusion, and injustice, particularly when surrogacy agreements transcend national borders.

The case for an international legal framework

The absence of an international legal framework governing surrogacy is not merely a legislative gap but a profound failure of the global

112 *AMN and 2 others v Attorney General and 5 others*, para 45.

113 *AMN and 2 others v Attorney General and 5 others*, para 47.

114 [2008] EWHC.

115 *AMN and 2 others v Attorney General and 5 others*, para 27.

116 *AMN and 2 others v Attorney General and 5 others*, para 28.

117 Michelle Ford, 'Gestational surrogacy is not adultery: Fighting against religious opposition to procreate', 10 *Barry Law Review* (2008) 96.

legal order to respond to the evolving nature of reproductive technologies and their attendant ethical, legal, and human rights concerns.[118] Surrogacy, by its very nature, crosses national boundaries, making the development of a cohesive international regime not only desirable but essential.[119] The current fragmented legal landscape, where surrogacy practices range from outright prohibition to unrestricted commercialisation, leaves significant room for exploitation, legal uncertainties, and inequality.[120]

Some international courts such as the European Court of Human Rights (ECtHR), under the auspices of the Council of Europe, has issued numerous rulings on international surrogacy.[121] In addressing such cases, particularly those involving assisted reproductive technologies, the Court has employed the doctrine of the margin of appreciation to reconcile individual freedoms, such as the freedom of movement, with the varying moral frameworks of member states.[122] Notably, the ECtHR has affirmed the legal recognition of both the nationality and parentage for children born through international surrogacy, grounding its decisions on the child's right to private and family life.[123]

Despite the growing practice of international surrogacy, there remains a notable absence of specific international regulation addressing its legal complexities. Current legal instruments fail to provide ade-

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118 Howard, 'Taming the international commercial surrogacy industry', 1.

119 Noelia Igareda Gonzalez, 'Legal and ethical issues in cross-border gestational surrogacy', 113(5) *Fertility and Sterility* (2020) 916.

120 Katarina Primmings and Paul Reid Beaumont, 'International surrogacy arrangements: An urgent need for regulation at the international level', 7(3) *Private Journal of International Law* (2011) 627.

121 Esther Farnós Amorós, 'La reproducción asistida ante el Tribunal Europeo de Derechos Humanos: *De Evans c Reino Unido* a *Parrillo c Italia*', 36 *Revista de Bioética y Derecho* (2016) 93-111 cited in Gonzalez, 'Legal and ethical issues in cross-border gestational surrogacy', 918.

122 Amorós, 'Assisted reproductive technologies before the European Court of Human Rights', 94.

123 Claire Fenton-Glynn, 'International surrogacy before the European Court of Human Rights', 13(3) *Private Journal of International Law* (2017) 562; Eleonora Lamm, 'Gestacion por sustitucion: Realidad y derecho', 3 *Rev Anal Derecho* (2012) 1-49 cited in Gonzalez, 'Legal and ethical issues in cross-border gestational surrogacy', 918.

quate provisions to manage the challenges posed by cross-border surrogacy arrangements.[124] One potential regulatory model could be the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption,[125] which sets a minimum procedural standard among signatory states while acknowledging varying national legal approaches to adoption. However, some scholars underscore a critical distinction between surrogacy, as a form of assisted procreation, and adoption, which involves the legal transfer of parental rights.[126] In 2011, the Permanent Bureau of the Hague Conference on Private International Law released a Preliminary Report on International Surrogacy Arrangements.[127]

The Hague Conference on Private and International Law (HCCH) consisting of 91 members, 90 states and the European Union itself,[128] took steps to create a working group.[129] This group explores the 'feasibility of advancing work' on private international law issues related to the status of children, particularly those arising from international surrogacy arrangements.[130] While discussions continue regarding the adoption of a Hague Convention to regulate international surrogacy, it appears unlikely that a consensus on minimum standards will be achieved in the near future.[131] There was a working group meeting by

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124 Ponomarenko and others, 'Legal regulation of surrogacy at the international and national levels', 2877.

125 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, A-31922.

126 Chelsea Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 49 *University of Memphis Law Review* (2019) 847-882 cited in Gonzalez, 'Legal and ethical issues in cross-border gestational surrogacy', 918.

127 Preliminary Document No 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference. See also, Gonzalez, 'Legal and ethical issues in cross-border gestational surrogacy', 919.

128 Hague Conference on Private and International Law (HCCH), 'About HCCH' https://www.hcch.net/en/about accessed 9 January 2025.

129 Think Tank European Parliament, 'Regulating international surrogacy arrangements: State of play', 30 August 2018.

130 Think Tank European Parliament, 'Regulating international surrogacy arrangements: State of play', 4.

131 Noelia Igareda Gonzalez, 'Legal and ethical issues in cross-border gestational surrogacy', 919, commenting about this in 2020.

the working group on parentage/surrogacy, held between 8 April 2024 and 12 April 2024, and a third meeting in November 2024.[132] The complexity of reaching an agreement stems from the divergent legal, ethical, and cultural perspectives on surrogacy among states, which hinders the development of a unified regulatory framework.[133]

Katarina Trimmings and Paul Beaumont's seminal work is considered as a key reference for the doctrinal debate on international surrogacy arrangements.[134] In their arguments, the authors present what would be the ideal convention on international surrogacy arrangements aimed at harmonising private international law in the field.[135] They take an interventionist approach by arguing, 'the primary goals of the convention should be: to develop a system of legally binding standards that should be observed in connection with international surrogacy arrangements, to develop a system of supervision to ensure that these standards are observed and to establish a framework of cooperation and channels of communication between jurisdictions involved.[136]

Blauwhoff and Frohn provide for the same framework as provided by Trimmings and Beaumo. However, they emphasise that the determination of legal parentage in international surrogacy arrangements must be grounded exclusively in the best interests of the child, with no consideration given to the autonomy of the parties involved, as this is a matter of public order.[137] The authors extend their argument by pro-

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132 Working Group on Parentage/Surrogacy, 'Working group on parentage/surrogacy: Report of the second meeting (from 8 to 12 April 2024) Preliminary Document No 1 of April 2024', para 5. The third meeting occurred from 4-8 November and it will present a report on the progress of its work to the Council on General Affairs and Policy in March 2025, see, HCCH, 'Third meeting of the working group on parentage/surrogacy', 13 November 2024.

133 Reforming Surrogacy Law, 'International rights frameworks: Are the law commissions recommendations for reform conforming to international legal standards?', *Reforming Surrogacy Law Blog*, 3 July 2023.

134 Katarina Trimmings and Paul Beaumont 'International surrogacy arrangements: An urgent need for legal regulation at the international level', 7(3) *Journal of Private International Law* (2011) 627-647.

135 Trimmings and Beaumont 'International surrogacy arrangements', 630.

136 Trimmings and Beaumont 'International surrogacy arrangements', 636.

137 Richard Blauwhoff and Lisette Frohn, 'International commercial surrogacy arrange-

posing that where procedural standards are upheld and the child's best interests are ensured, a central authority should be responsible for issuing certificates of conformity.[138] This measure would serve as a legal safeguard by ensuring that surrogacy arrangements are conducted in accordance with established international standards and that the rights of the child are protected across jurisdictions.[139]

Regardless of the prioritised regulatory approach for international surrogacy arrangements, there is consensus on several key principles of paramount importance at the international level.[140] These include the best interests of the child, the legal status of both the child and the intended parents, and the protection of the surrogate mother's status.[141]

More crucially, cross-border surrogacy perpetuates a colonial legacy within international law that disproportionately impacts the Global South, a dynamic which can be critically examined through the lens of Third World Approaches to International Law (TWAIL). TWAIL scholars argue that international law, as is traditionally conceived, reflects the interests and values of powerful, developed states, often to the detriment of countries in the Global South.[142]

In the context of surrogacy, this dynamic manifests in the commodification of women's reproductive labour in economically disadvantaged regions, where local surrogates are often employed to serve the reproductive needs of wealthier, foreign couples.[143] Countries such as

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ments: The interests of the child as a concern of both human rights and private international law' in Christophe Paulussen, Tamara Takacs, Vesna Lazić and Ben Van Rompuy (eds) *Fundamental rights in international and European law: Public and private law perspectives*, TMC Asser Press, 2016, 211.

138 Blauwhoff and Frohn, 'International commercial surrogacy arrangements', 212.

139 Blauwhoff and Frohn, 'International commercial surrogacy arrangements', 241.

140 Jasmina Alihodžić and Anita Duraković, 'International surrogacy arrangements: Perspectives on international regulation', 2 *Medicine Law and Society* (2020) 15.

141 Alihodžić and Duraković, 'International surrogacy arrangements', 15.

142 Antony Anghie, 'Legal aspects of the New International Economic Order', 6(1) *Human Spring* (2015) 149.

143 Jyostna Agnihotri Gupta, 'Towards transnational feminisms: Some reflections and concerns in relation to the globalisation of reproductive technologies', 13(1) *European Journal of Women's Studies* (2006) 23-38.

India, Thailand, and, more recently, Mexico, have become central hubs for the so-called 'fertility tourism', driven largely by the demand from affluent Global North countries.[144] This dynamic, far from empowering women in the Global South, entrenches existing socioeconomic inequalities and exposes vulnerable populations to exploitation.[145] In fact, those countries have passed laws to limit surrogacy to their nationals or to use only the altruistic model: Thailand limited access to nationals in its Protection of Children Born Through Assisted Reproductive Technologies Act, 2015, while India limited access to nationals and only to altruistic surrogacy in its Surrogacy (Regulation) Act 2021.[146] The downside of this is that surrogates may be ferried to a different country that favours the intended parents circumnavigating this law.

Nevertheless, there is a lack of international regulation of surrogacy, because the existing legal instruments do not contain any provisions that could be applied to the potential legal problems of international surrogacy.[147]

A critical examination of international surrogacy through a TWAIL lens also exposes the inherent neo-colonial structures within the global reproductive industry.[148] The fact that wealthier countries can export their reproductive needs to poorer countries, while externalising the ethical and legal complexities, reflects a global system that prioritises the needs of the Global North at the expense of the Global South.[149]

An international legal framework would serve to equalise the playing field by ensuring that surrogate mothers, regardless of where they reside, are accorded adequate legal protection and that their labour is

144 Jyostna Agnihotri Gupta, 'Reproductive bio-crossing: Indian egg donors and surrogates in the globalized fertility market', 5(1) *International Journal of Feminist Approaches to Bioethics* (2012) 28.

145 Gupta, 'Reproductive bio-crossing', 28.

146 India's Surrogacy (Regulation) Act (No 47 of 2021).

147 Trimmings and Beaumont, 'international surrogacy arrangements', 627.

148 Claudia Flores, 'Accounting for the selfish state: Human rights, reproductive equality, and global regulation of gestational surrogacy', 23(2) *Chicago Journal of International Law* (2023) 391-450.

149 Flores, 'Accounting for the selfish state', 400.

neither undervalued nor exploited. It would mandate minimum standards for the treatment of surrogates, enforceable across borders, thus preventing the creation of legal vacuums that allow for exploitation. Moreover, such a framework would require stringent oversight of fertility clinics and surrogacy agencies, many of which currently operate with minimal accountability in developing nations. A globally recognised legal regime would impose mandatory health protections for surrogates, ensure fair compensation, and provide for post-birth support and legal recourse in case of contract breaches and protection of their rights.[150]

Beyond the immediate need to protect surrogates, an international legal framework would address the rights of the intended parents. Certain states have implemented policies that effectively deny specific groups the right to enter into lawful surrogacy contracts, raising significant questions about equity and access within reproductive rights.[151] Surrogacy makes it possible for LGBTQI+ persons who are unable to gestate a foetus to have biological children.[152] The rights of the LBTQI+ communities are safeguarded in international treaties and conventions.

The Inter-American Court of Human Rights (IACtHR) has delineated the fundamental rights to personal integrity and liberty, along-

[150] These include the right to privacy, health, and reproductive freedom. Under the Universal Declaration of Human Rights (UDHR), 10 December 1948, 217 A (III), Article 12, the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171, Article 17, the European Convention on Human Rights (ECHR) Article 8, the American Convention on Human Rights (ACHR), the Pact of San Jose, Costa Rica (B-32), 22 January 1969, Article 11; the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration Principles and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD), 18 November 2012, Article 21; women are protected against arbitrary and unlawful interferences with their privacy. Under the UDHR, Article 25 and International Covenant on Economic, Social, and Cultural Rights, 3 January 1976, UNTS/993, Article 12; women have the right to the highest attainable standard of health. See also CESCR, General Comment No 14: Article 12 on the Right to the Highest Attainable Standard of Health, 11 August 2000, UN Doc E/C 12/2000/4, para 8; CESCR, General Comment No 22: Article 12 on the Right to Sexual and Reproductive Health, 1 May 2016, E/C 12/GC/22.

[151] Christine Straehle, 'Is there a right to surrogacy?', 33(2) *Journal of Applied Philosophy* (2016) 3-4.

[152] Straehle, 'Is there a right to surrogacy?', 3-4.

side the right to family life, as essential components of human dignity.[153] Article 11 of the American Convention on Human Rights specifically safeguards couples' access to artificial reproductive technologies, thereby recognising the importance of reproductive autonomy.[154] In parallel, the European Court of Human Rights has underscored the imperative for states to evolve their regulatory frameworks concerning reproductive technologies, emphasising the necessity for legal systems to remain responsive to the dynamic interplay of social progress and scientific advancements.[155]

Furthermore the complex legal status of children born through surrogacy, who are often caught in a web of conflicting nationality and parentage laws could be resolved through an international law on surrogacy.[156] Under current conditions, children born in one country may not be recognised as legal citizens in another, leaving them stateless and vulnerable.[157] This outcome violates their rights under international human rights law, particularly the United Nations Convention on the Rights of the Child which mandates the protection of a child's right to nationality and identity.[158] Therefore, the absence of global regulations has, far-reaching implications on the human rights of children born through surrogacy, a situation that an international legal framework could rectify by standardising parentage recognition and citizenship rules.

Furthermore, an international surrogacy regime would force a re-evaluation of the role of the state in regulating reproductive rights, particularly in countries that have historically sought to control wom-

153 *Artavia Murillo and others v Costa Rica*, (preliminary objections, merits, reparations and costs) Inter-American Court Human Rights, Series C No 257 222–53 (28 November 2012) discussing whether embryos are protected as persons under international law.

154 *Artavia Murillo and others v Costa Rica*, para 142.

155 *SH and Others v Austria* (judgement on merits), 57813/00, Grand Chamber, ECtHR (3 November 2011); *Dickson v United Kingdom* (judgement on merits), 44362/04, Grand Chamber, ECtHR (4 December 2007) (finding a violation of Article 8, right to respect for private and family life, due to a denial of access to artificial insemination facilities to a prisoner).

156 *In Re: X and Y (Foreign Surrogacy)* [2008] EWCH.

157 *In Re: X and Y (Foreign Surrogacy)* [2008] EWCH.

158 Convention on the Rights of the Child, Article 7.

en's reproductive autonomy.[159] TWAIL scholars have long critiqued the imposition of Global North norms onto the Global South through international law, and the regulation of surrogacy is no exception. Therefore, the development of an international legal framework must be an inclusive process that involves meaningful participation from the Global South to ensure that any resulting regime reflects diverse values and legal traditions. This is particularly relevant given that many countries in the Global South have distinct cultural and religious perspectives on reproduction, family, and the role of women in society.[160] An international framework that does not account for these differences risks becoming another tool for neo-colonialism, enforcing Global North norms on surrogacy onto the Global South.

Potential challenges to implementation: Legal and political barriers

International regulation could infringe upon national sovereignty, particularly in states that have chosen to ban surrogacy altogether. However, the establishment of a multilateral framework need not impose a one-size-fits-all model. Instead, it could create a baseline of minimum protections and standards while allowing states to retain some regulatory flexibility. In practical terms, no jurisdiction fully governs the development of surrogacy practices.[161] Instead, private contracts largely dictate the arrangements, with the parties' understanding and the norms evolving from these agreements shaping the landscape.[162] This reliance on private agreements highlights the absence of comprehensive oversight and the resulting variability in how surrogacy is practiced across different legal systems.[163]

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159 Ikemoto, 'Reproductive tourism', 278.

160 Ikemoto, 'Reproductive tourism', 278.

161 June Carbone and Christina O Miller, 'Surrogacy professionalism', 31(1) Jo*urnal of the American Academy of Matrimonial Lawyers* (2018) 1.

162 Carbone and Miller, 'Surrogacy professionalism', 13.

163 Carbone and Miller, 'Surrogacy professionalism', 13.

The Hague Conference on Private International Law, in conjunction with the Hague Convention on Parental Responsibility and the Protection of Children, has been actively engaged in addressing the complex legal challenges posed by international surrogacy.[164] Their efforts aim to strike a delicate balance between the diverse legal and cultural positions of various countries, seeking to establish a framework that harmonises conflicting national approaches while safeguarding the rights and welfare of all parties involved, particularly the children born through surrogacy arrangements.[165] The expert group has chosen a more restrained and conservative strategy, proposing that the protocol, be limited to addressing the recognition of court rulings from foreign jurisdictions that stem from the execution of international surrogacy agreements.[166]

These complexities are compounded by issues of national sovereignty and fragmented domestic legal systems that make global consensus difficult to achieve.[167] The diversity in cultural and legal perspectives on surrogacy presents one of the most significant challenges to creating a global regulatory framework. Across the world, views on parenthood, family, and reproduction vary widely, shaped by historical, religious, and cultural factors.[168] In some jurisdictions, surrogacy is perceived as a matter of individual autonomy and contractual freedom, where people are free to make reproductive choices based on their own preferences.

The question of national sovereignty further complicates the development of a global surrogacy framework. Sovereignty remains one of the foundational principles of international law, with family law and reproductive rights traditionally falling within the purview of domestic legal systems. Consent is the cornerstone of international law, as no sov-

164 Lottie Park-Morton, 'International rights frameworks: Are the Law Commission's recommendations for reform conforming to international legal standards?', *Reforming Surrogacy Law Blog*, 9 January 2025.

165 Morton, 'International rights frameworks: Are the Law Commission's recommendations for reform conforming to international legal standards'.

166 Alihodžić and Duraković, 'International surrogacy arrangements', 19.

167 Kristiana Brugger, 'International law in the gestational surrogacy debate', 35(3) *Fordham International Law Journal* (2012) 678.

168 Brugger, 'International law in the gestational surrogacy debate', 678.

ereign state is obligated to adhere to a legal rule unless it has voluntarily consented.[169] The doctrine of consent reflects the fundamental principle of state sovereignty, ensuring that no external legal obligations can be imposed on a state without its agreement. However, this reliance on consent also raises critical questions about the legitimacy and enforceability of certain norms within international legal frameworks, particularly when customary law comes in.[170]

Additionally, commentators have expressed concerns regarding the potential influence of certain countries over international organisations.[171] A large, influential nation could obstruct the development of an international instrument by either refusing to sign it or by being reluctant to amend its domestic laws to safeguard surrogates in other countries, particularly if it believes that its existing laws already provide sufficient protection within its borders.[172] Even if a comprehensive international instrument were established, there remains a considerable risk of non-compliance, particularly within individual surrogacy operations in countries that lack either the capacity or the political will to monitor and enforce treaty obligations effectively.[173] This risk is especially pronounced in jurisdictions with limited regulatory frameworks or resources for overseeing cross-border surrogacy arrangements.[174]

In addition to states that explicitly prohibit surrogacy in their national legislation, there are also states where surrogacy is treated as a profitable enterprise.[175] It is likely that both categories of states would

169 Anghie, 'Legal aspects of the New International Economic Order', 150, where he discusses expropriation without compensation.

170 Anghie, 'Legal aspects of the New International Economic Order', 150.

171 Kal Raustiala, 'Form and substance in international agreements', 99(3) *American Journal of International Law* (2005) 584.

172 Brugger, 'International law in the gestational surrogacy debate', 684.

173 Brugger, 'International law in the gestational surrogacy debate', 684.

174 Brugger, 'International law in the gestational surrogacy debate', 684.

175 Konstantinos Rokas, 'National regulation and cross-border surrogacy in European Union countries and possible solutions for problematic situations', 16 *Yearbook of Private International Law* (2014) 302.

oppose any international convention regulating surrogacy.[176] States that prohibit surrogacy may resist efforts to legitimise or regulate the practice internationally, while those that benefit economically from commercial surrogacy may be reluctant to support restrictions or reforms that could affect their lucrative surrogacy industries.[177]

This fear is particularly pronounced in countries where surrogacy intersects with religious and moral values. For example, countries where religion strongly influences their legal systems, a good example being that countries following Sharia law, are unlikely to adopt international standards that contradict their domestic norms.[178] This is not merely a legal issue but a political one, as governments may face backlash from conservative segments of their population if they are perceived as ceding control over family law to an international body. Countries governed by Sharia law explicitly prohibit adoption and chose not to accede to the 1993 Hague Convention on Intercountry Adoption.[179] A similar issue could likely arise with any proposed protocol governing international surrogacy arrangements, particularly in states that explicitly ban surrogacy.[180]

Despite these challenges, there are ways to overcome resistance to the implementation of an international surrogacy framework. One approach is to use 'soft law' instruments which are non-binding guidelines or model laws developed by international organisations.[181] Soft law provides flexibility, allowing states to adapt international principles

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176 Rokas, 'National regulation and cross-border surrogacy in European Union countries and possible solutions for problematic situations', 302.

177 Rokas, 'National regulation and cross-border surrogacy in European Union countries and possible solutions for problematic situations', 302.

178 Neelam Chagani, 'Surrogacy in Islam: A complex and controversial issue', IVF Conceptions, 9 January 2025.

179 Cyra Akila Choudhury, 'Transnational commercial surrogacy: Contracts, conflicts and the prospects of international legal regulation', *Florida International University Legal Studies Research Paper Series*, No 16-18, 2016, 22.

180 Choudhury, 'Transnational commercial surrogacy: Contracts, conflicts and the prospects of international legal regulation', 22.

181 Richard Edwards Jr, 'Interpretation: The IMF and international law by Joseph Gold', 91(2) *American Journal of International Law* (1997) 405.

to their domestic legal systems without feeling that their sovereignty is being compromised.[182] This 'expressed preference' for specific conduct is designed to promote practical collaboration between nations, helping them collectively pursue common international objectives.[183] Organisations like the Hague Conference on Private International Law (HCCH) and the World Health Organisation (WHO) could play a leading role in developing soft law instruments that promote best practices in surrogacy while allowing for regional and cultural variation.

The Hague Conference has already initiated discussions on the feasibility of regulating international surrogacy arrangements, drawing on its experience with international adoption.[184] While surrogacy presents unique challenges, the success of the Hague Adoption Convention in creating a framework for the cross-border transfer of parental rights suggests that a similar approach could work for surrogacy. The key to this approach is flexibility. Rather than imposing a one-size-fits-all model, soft law allows states to implement international principles in a way that reflect their domestic, legal and cultural context.

Chelsea Caldwell proposed the idea of using international comity as a way of recognising cross-border surrogacy agreements.[185] Comity as defined in the *Black's Law Dictionary* to mean that a court will, through the principle of mutual benefit, agree to enforce or respect the decisions of other countries.[186] In fact, she argues that the parentage and citizenship challenges faced by international intended parents are not disputes between the intended parents and the surrogate, but rather conflicts between different national legal systems.[187] More precisely, the

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182 Edwards Jr, 'Interpretation: The IMF and international law by Joseph Gold', 405.

183 Cynthia Lichtenstein, 'Hard law v soft law: Unnecessary dichotomy?', 35(4) *The International Lawyer* (2001) 1433.

184 Think Tank European Parliament, 'Regulating international surrogacy arrangements: State of play'.

185 Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 878.

186 *Black's Law Dictionary* (12th edition 2024).

187 Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 879.

crux of the problem lies in the tension between the private surrogacy contract and the national laws of the intended parents' home countries, which can lead to the troubling issue of 'statelessness' for children born through such arrangements.[188]

The situation ultimately boils down to a clash of reform approaches with one side advocating for international regulation of surrogacy, drafted in a way that aligns with the policies of nations where surrogacy is considered contrary to public policy.[189] The opposing approach favours a principle of comity with no regulation, essentially saying, 'accept and enforce our decisions, even if they contradict your own laws', a method that benefits surrogacy-friendly countries.[190]

This tension underscores the broader debate between restrictive and permissive legal regimes in managing cross-border surrogacy.[191] A restrictive regulatory framework is not only destined to fail but also counterproductive. It will drive individuals to bypass formal regulations and seek out 'grey' or 'black' markets, thereby exacerbating the very risks of exploitation and trafficking that most nations are primarily concerned about in the context of surrogacy. In effect, such an approach may intensify the dangers it seeks to mitigate, undermining efforts to protect vulnerable parties and regulate surrogacy ethically.[192]

Another potential solution is to adopt a child-centric approach to surrogacy regulation. By focusing on the rights and welfare of the child, this approach avoids some of the more contentious issues surrounding reproductive autonomy and the commodification of women's bodies. A child-centric framework would prioritise the protection of children

188 Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 879.

189 Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 880.

190 Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 880.

191 Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 880.

192 American Bar Association Section of Family Law, 'American Bar Association draft position paper on proposed Hague surrogacy convention', 1 September 2013.

born through surrogacy from legal uncertainty, statelessness, and exploitation. This approach aligns with international human rights law, particularly the United Nations Convention on the Rights of the Child (UNCRC), which mandates that the best interests of the child should be the primary consideration in all legal matters.

A child-centric approach has the potential to garner broader international support, as it reframes the surrogacy debate in terms of protecting vulnerable individuals rather than imposing foreign values on national legal systems. By focusing on the child's rights to legal parentage, nationality, and protection from exploitation, this approach could create a common ground for international cooperation. States that are resistant to regulating surrogacy based on concerns about reproductive autonomy or sovereignty may be more willing to engage in international agreements if the focus is on protecting children's rights rather than regulating adult behaviour.

Incremental harmonisation through regional cooperation is another viable solution. While achieving global consensus on surrogacy may be difficult, regional agreements could serve as stepping stones toward broader international regulation. Regional organisations like the European Union, the African Union, and ASEAN could facilitate cooperation among member states, allowing for the gradual harmonisation of surrogacy laws. For example, the European Union could develop regional standards that provide for the mutual recognition of parental rights in surrogacy arrangements, ensuring that children born through surrogacy are not left in legal limbo when their parents move between member states.

Similarly, regional organisations in Africa, Asia, and Latin America could play a role in promoting regulatory convergence among neighbouring countries with shared legal traditions or cultural values. Regional cooperation offers the advantage of addressing surrogacy regulation in a way that is sensitive to local norms and values while still promoting greater consistency across borders. Over time, these regional agreements could serve as models for a more comprehensive global framework.

Finally, incentivising states to participate in international surrogacy agreements through reciprocal treaties could help overcome resistance. Bilateral or multilateral treaties that simplify the legal process for intended parents and surrogates, while ensuring that parental rights and citizenship are recognised across borders, could encourage states to align their domestic laws with international standards. These treaties would provide much-needed legal certainty for all parties involved, reducing the risks associated with cross-border surrogacy arrangements.

Conclusion

The international surrogacy industry, in its current form, is a patchwork of inconsistent laws and ethical vacuums, where the most vulnerable, surrogate mothers in the Global South and children born through cross-border arrangements, are inadequately protected.[193] The absence of a global legal framework exacerbates these inequities, allowing the exploitation of women's reproductive labour to flourish and leaving children stateless and legally unrecognised.[194] Through the lens of TWAIL, it becomes evident that the Global South disproportionately bears the burdens of this unregulated industry, perpetuating a neo-colonial dynamic where the reproductive needs of the affluent Global North are met at the expense of economically disadvantaged women.

An international legal framework is not only necessary but urgent. Such a regime would harmonise the diverse and fragmented national laws governing surrogacy, providing clear protections for all parties involved. It would set minimum standards that ensure surrogate mothers are treated with dignity, paid fairly, and afforded full legal rights. Children born through surrogacy would be granted the security of legal parentage and nationality, eliminating the threat of statelessness. Moreover, it would address the structural inequalities that allow wealthier individuals to exploit legal loopholes in the Global South, ensuring that all jurisdictions operate on a level playing field.

193 Ford, 'Gestational surrogacy is not adultery', 96.

194 Howard, 'Taming the international commercial surrogacy industry', 1.

However, as TWAIL scholars argue, this framework must not become another tool of domination by Global North states. The creation of an international surrogacy regime must be an inclusive process, where the voices of the Global South are heard and respected. Any framework that emerges must take into account the diverse cultural, legal, and ethical perspectives on reproduction and family life, ensuring that it is not simply an imposition of western norms on the rest of the world.

Ultimately, the establishment of an international legal framework for surrogacy is not just a matter of law, but of ensuring justice. It represents a necessary step towards ensuring that reproductive technologies serve the interests of all humanity, rather than perpetuating global inequalities. A standardised global regime, informed by the principles of fairness, human rights, and inclusivity, would be a decisive move toward protecting the dignity of surrogate mothers and safeguarding the future of children born through surrogacy, irrespective of the borders that currently divide them.

While the implementation of an international legal framework for surrogacy faces significant legal, political, and cultural barriers, these challenges are not insurmountable. Through the use of soft law instruments, a child-centric approach, regional cooperation, and reciprocal treaties, it is possible to create a framework that respects national sovereignty while promoting ethical and protective regulations for surrogacy arrangements. Achieving this goal will require sustained international effort and careful negotiation, but it is essential for ensuring that the rights and dignity of surrogates, intended parents, and children are protected in the increasingly globalised practice of surrogacy.

Ama Ata Aidoo: Celebrating her legacy in the twenty-first century

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Abstract

Renowned as Ghana's foremost woman writer, Ama Ata Aidoo has built a distinguished career that spans decades of post-independence African history. A pioneer among African women writers, Aidoo is celebrated for her feminist contributions to postcolonial literature. Her body of work offers a nuanced exploration of African women's experiences, revealing the layered challenges they face in colonial and postcolonial contexts. This essay explores her fictional works highlighting how her fictional characters confront local traditions, societal expectations, and issues of race, class, and gender inequality, particularly within transnational and Western frameworks.

Keywords: Ama Ata Aidoo, fictional works, postcolonial perspectives, feminist expression

* *Contributions to the 'Honouring our Elders section' are single blind reviewed.*

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Introduction

Ama Ata Aidoo is Ghana's foremost woman writer whose distinguished career spans several decades post-independence in Africa. Her literary contribution places her amongst the first generation of African women writers as a leading feminist voice within postcolonial writing. Through a feminist lens, her literary corpus provides much insight into the complexities of African women's lives in the colonial and postcolonial landscape of competing and challenging experiences in society. Her fictional works portray women characters who navigate local norms and expectations for women, customs and traditions, and the challenges of race, class, and gender inequalities within transnational spaces in western settings. For over twenty years, my research, scholarship and teaching has explored the literature of African women writers, including Aidoo's work, to highlight their experiences in society and to celebrate their remarkable contributions to women's and gender studies through literary expression.

Aidoo is a pioneering figure of immense significance through the creation of Africa's first dramatic work in English by an African woman, *The dilemma of a ghost* in 1965 followed by her second play *Anowa* in 1970.[1] As a commanding literary figure, Aidoo repositioned women's writing within a male-dominated canon in African literature during the mid-1960s. Her novels *Our sister killjoy: or reflections of a black-eyed squint* (1977) and *Changes: A love story* (1991) disrupted stereotypical portrayals of African women that were common in male-authored African texts written during the twentieth century.[2] In both novels, Aidoo crafted female protagonists who were strong, intelligent, and outspoken as a form of 'writing back' to reclaim women's voices from the margins to centre stage in the African literary world. Important themes in Aidoo's works include postcolonial perspectives, feminist expression, the inter-

[1] Ama Ata Aidoo, *Dilemma of a ghost*, Longman, 1965; Ama Ata Aidoo, *Anowa*, Longman, 1970.

[2] Ama Ata Aidoo, *Our sister killjoy: Or reflections of a black-eyed squint*, Longman, 1977; Ama Ata Aidoo, *Changes: A love story*¸ Women's Press, 1991.

play of tradition and modernity, and the relationship between Ghana and the African diaspora among other compelling issues of postcolonial discourse.

Her creative artistry has woven a tapestry of literature across genres of poetry, drama, novels, short fiction, essays, and literary criticism. Her short fiction includes *No sweetness here* (1970), *The eagle and the chickens and other stories* (1986), *The girl who can and other Stories* (1997), and *Diplomatic pounds* (2012).[3] Her poetry collections include *Someone talking to sometime* (1985), *Birds and other poems* (1987), *An angry letter in January* (1992), and *After the ceremonies: New and selected poems* (2017).[4] Like many African writers in the past and the present, Aidoo's literary style draws heavily upon African oral traditions and a combination of prose and poetry that is best illustrated in her iconic novel, *Our sister killjoy*.

Ama Ata Aidoo was born on March 23, 1940, in southern Ghana to a royal family among the Fante ethnic community. Encouraged by her father to pursue Western education, she began writing at age fifteen. After completing secondary school at Wesley Girl's School in Cape Coast, she attended the University of Ghana at Legon, where she majored in English literature. While at University she participated in the Ghana Drama Studio and published her first play, *Dilemma of a ghost* in 1965. Her teaching career began in 1970 and lasted for over a decade at the University of Cape Coast but the unfavourable political climate in the country failed to nurture her creative talent. In 1982 she was appointed Minister of Education by the then head of state, Jerry J Rawlings. She resigned from her position in less than two years and migrated to Zimbabwe where she resumed writing and teaching. She subsequently taught in the United States at the University of Richmond and at Brown University until her retirement in 2012.

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3 Ama Ata Aidoo, *No sweetness here*, Longman, 1970; Ama Ata Aidoo, *The girl who can and other stories*, Sub-Saharan Publishers, 1997; Ama Ata Aidoo, *The eagle and the chickens and other stories*, Tana Press, 1986; Ama Ata Aidoo, *Diplomatic pounds*, Ayebia Clarke, 2012.

4 Ama Ata Aidoo, *Someone talking to sometime,* College Press, 1985; Ama Ata Aidoo, *Birds and other poems*, College Press, 1987; Ama Ata Aidoo, *An angry letter in January*, Dangaroo Press, 1992; Ama Ata Aidoo, *After the ceremonies: New and selected poems*, University of Nebraska, 2017.

Her works have received critical acclaim and robust scholarly engagement by writers and literary critics. Among these are *Emerging perspectives on Ama Ata Aidoo* (1999), *The art of Ama Ata Aidoo*: Documentary film (2014), *Essays in honour of Ama Ata Aidoo at 70: A reader in African cultural studies* (2012) and *The art of Ama Ata Aidoo: Polylectics and reading against neocolonialism* (1994).[5]

I am fortunate to have experienced a rewarding friendship with Ama Ata Aidoo that began at the African Literature Association annual conference in 2012. I will always cherish the memory of her warmth and hospitality as well as her insightful perspectives on contemporary women's issues in Ghana and the African diaspora. One of the memories that I cherish deeply is the sense of acceptance that she created in me whenever I visited her home. She never made me feel like an outsider to Ghana or Africa. There were no awkward discussions about my life as an African diaspora person and no suggestion that I was a 'lost' person because I could not speak an African language. Ama Ata respected me for my passion, research, and scholarship on African literature. She welcomed me as well as my daughters into her home as a mark of friendship and warmth for which the nation is famous for throughout the African continent and beyond. Each time I visited her we exchanged gifts, shared wonderful Ghanaian food and much laughter. In the early years of my career as a literary scholar, her fiction inspired my scholarly engagement with women's identity, and experiences in the works of African women writers as well as my approach to feminist inspired African texts through critical analysis of her novel *Changes*: *A love story*, the short story collection *No sweetness here* and the play *Anowa.*[6]

In her iconic fictional works, Ama Ata Aidoo presents paradoxical outcomes for women characters as they respond to patriarchy, urbanisation, and conflicting demands of modernity in the colonial and post-

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[5] Ada Uzomaka Azodo and Gay Wilentz, *Emerging perspectives on Ama Ata Aidoo*, Africa World Press, 1999; *The art of Ama Ata Aidoo:* A film by Yaba Badoe, 2014; Anne V Adams, *Essays in honor of Ama Ata Aidoo at 70: A reader in African cultural studies*, Ayebia, 2012; Vincent Odamtten, *The art of Ama Ata Aidoo: Polylectics and reading against neo-colonialism,* University Press of Florida, 1994.

[6] Aidoo, *Changes*: *A love story*; Aidoo, *No sweetness here*; Aidoo, *Anowa*.

colonial landscape of Ghana. The novel *Changes* skilfully examines the complexities of Ghanaian women's difficult choices and responsibility for one's destiny in life. In the novel, Aidoo investigates the extent to which a woman who follows her own path ends up better off than the woman who bends to the status quo through obedience to conventional norms in society. The stories in *No sweetness here* portray Ghanaian women faced with choices that challenge conventional norms and expectations as well as realities of the modern world of social flux and changing identities. Among Aidoo's short-fiction collections, *No sweetness here* has been the most discussed among scholars and critics.

In her role as an outspoken voice for women, Aidoo articulates the impact of social, economic, and political forces on the lives of African women. Aidoo asserts that, 'on the whole, African traditional societies seem to have been at odds with themselves as to what exactly to do with women'.[7] This dilemma lies at the crux of Aidoo's feminist perspectives expressed in her writing and underscore the pressing need for social transformation and women's equality.

In her 1998 essay titled 'The African woman today', Ama Ata Aidoo states emphatically that she is a feminist and asserts the conviction that 'every woman and every man should be a feminist-especially if they believe that Africans should take charge of African land, African wealth, African lives, and the burden of African development'.[8]

An overview of *Dilemma of a ghost*

Ama Ata Aidoo has left behind a powerful legacy, and the significance of her literary oeuvre is evident through the issues and topics that shape her works. Her plays are especially relevant and timely in the global age marked by increased mobilities, transformation and flux. To illustrate, *Dilemma of a ghost* explores the relationship between Ghana

7 Ama Ata Aidoo, 'Essay: The African woman today', *The Black Agenda Review*, 2021 (first published by *Dissent Magazine* in 1992).

8 Aidoo, 'Essay: The African woman today'.

and the diaspora, women's identity, home and return for both Africans, and African descended people, the value of western education, and tradition and modernity. These represent salient themes that are equally, if not more important than they were in 1965 when the play was published.

In *Dilemma of a ghost,* Eulalie is the African American woman who returns to Ghana as the wife of a Ghanaian man and her journey represents the diasporic search for belonging that is fraught with paradoxical realities, romanticised perceptions, and lack of Ghanaian cultural knowledge.

The play interrogates the nature of the dichotomy that exists between Africans and diasporans whose ancestors were displaced through enslavement. Interestingly, Ghana has made strong efforts to reconnect and welcome diaspora people. For example, 2019 was named the 'Year of Return' which drew thousands of visitors to pay homage and connect to African origins that were erased during slavery.[9] In the documentary *The art of Ama Ata Aidoo,* Aidoo notes emphatically that 'the relationship between Ghana and the diaspora is charged'.[10] These tensions are skilfully portrayed in the play through family conflict fuelled by misunderstanding by all parties as a result of the disruptions of slavery and poor communication. Into this mix, Aidoo questions the role of women in society that reflect her deep commitment to feminism as a theme that pervades her works.

Another important idea in *Dilemma of a ghost* that plays out in the twenty-first century are the tensions experienced by many African immigrants who must navigate uncertain relationships to the 'home' they left behind in search of education and opportunities abroad in Western spaces. Sometimes family relationships suffer as 'returnees' have acquired Western education and attendant values that may conflict with norms and expectations of local culture. The conflictual nature of this

[9] Ghana Tourism Authority, 'About Year of Return, Ghana 2019,' Ghana Tourism Authority, 2019; Year of return, Ghana 2019: 400-year anniversary', 12(6) *Africology: The Journal of Pan African Studies* (2018) 247-248.

[10] *The art of Ama Ata Aidoo:* A film by Yaba Badoe, 2014.

dilemma may be understood through the 'been to' phenomenon in the world of migrant Africans. In the play, Ato Yawson returns to his people with values and behaviours that are unacceptable in his community and a major source of family discord in the play. Ato is the 'ghost' at the centre of the play who is torn between the past and the present, tradition and modernity, rural Ghanaian life and Western culture.

The play is framed by Ato's dilemma over whether he should go to Cape Coast or Elmina which represent the modern city and the old slave port along the coast of Ghana. By the end of the Play, he remains undecided while the early rift between his wife and his family is abated. The final scenes of the play suggest reconciliation and acceptance of Eulalie into his family. Critical responses to *Dilemma of a ghost* examine the attitudes and behaviours of Ato, but Eulalie is equally ghost-like because of her disconnection to Ghanaian cultural moorings.

This idea is a sub-text of the work as it suggests that as a displaced African, she is like a ghost of her former (lost African) self. Her ignorance is not her fault but rather an accident of history. Ato's family displays ignorance as well and thinks of her as a slave, seemingly unaware of the formation of the African diaspora through the dispersal of captured Africans. As an overarching theme, the clash of cultures is almost a character in the play as it takes on a life of its own in the unfolding events.

Feminist energies infuse Eulalie's character as she struggles against conformity and acceptance of Ghanaian cultural norms and expectations. Her romanticised ideals fall away as she becomes a stranger in a strange land. Eulalie's identity as a woman is challenged as she grapples with her own 'dilemma' of what it means to be a Ghanaian wife. The play is still one of Aidoo's most well-known and popular dramatic works whose ideas reoccur in her novels, poetry and short stories that define her as one of Africa's greatest playwrights and literary figures.

An overview of *Anowa*

The setting of *Anowa* is nineteenth century colonial Ghana where feminist themes emerge through the actions of the female protagonist. Anowa rebels against parental authority and traditional roles for women by marrying a man her family has rejected, resulting in tragic outcomes. Aidoo is noted for her use of Ghanaian oral traditions and *Anowa* is based on an old Ghanaian legend that serves as a cautionary tale for women in society. Along with feminist expression in the work, Aidoo writes about the sensitive and controversial topic of slavery that sparks a mixture of silence and conflict on both sides of the Atlantic.

Aidoo's outspoken nature, critique of society and the willingness to examine difficult and conflictual issues is a defining characteristic of her legacy. The play is unique in the exploration of ethical issues that underpin Ghana's complicity in slavery as the largest instance of forced migration in history. The tragic ending of the play portends disaster for individuals and for society; when greed and moral corruption fuel the forces of oppression among African people.

An overview of *Diplomatic pounds*

Diplomatic pounds was published in 2012 as Ama Ata Aidoo's third collection of short fiction that comprises 12 stories about female characters who traverse the boundaries of Ghanaian women's identity within diaspora spaces of the twenty first century. The stories in *Diplomatic pounds* mirror the complex changes within a globalised landscape and Ama Ata Aidoo revisits themes of 'home and return' to Africa through a gendered lens. Aidoo's collections of short stories has re-centred the African short story from the periphery of African literary production to counter the prominence of the novel in the past. Contemporary stories in the collection are linked through the examination of de-centred and culturally dislocated behaviours that re-define what it means to be an African woman at home and abroad.

The stories resonate paradoxical bonds and entanglements, discontinuity, and hybrid identities of the female protagonists who are torn between London and Ghana. The narrative structure of each story chronicles the appropriation of behaviours and ideas that simultaneously alienate Ghanaian women from African cultural norms and familial connections to *home* while offering new spaces to contest their subjectivities in Africa and the diaspora. The stories in the collection uncover problematic behaviours and questionable outcomes of women's disconnection to *self* and to Africa. The diasporic subjectivity of the female protagonists illustrates a mosaic of contested identities expressed through themes of cultural confusion, and the absence of coherent meaning in the lives of migrant Ghanaian and African women.

In most of the stories in *Diplomatic pounds,* a gendered lens mirrors these elements through hybridity as a focal point of interlocking themes of disquieting re-connections to home, generational conflict, and inter-racial relationships. Postcolonial literary theory frames *Diplomatic pounds* and the author's perspectives resonate the critical gaze of Sissie, the protagonist in *Our sister killjoy* who notes the un-African behaviours of her fellow Ghanaians in Europe. The women in the stories share characteristics of ambiguity, problematic views of cultural identity and socially disruptive family relationships. Moreover, Ghanaians and other African nationals living abroad who disconnect from their homeland is a compelling motif that intersects in the stories in *Diplomatic pounds* as a metanarrative of diaspora angst in the twenty first century. Relocating to western nations represents a space for opportunity and self-actualisation. However, transcultural identities are fluid and frequently irreconcilable with African cultural norms and expectations.

Inter-textual elements of the stories profile women that detach themselves from Ghana as homeland, never to return as in *In new lessons* and *Funnyless.* In *Diplomatic pounds* and *Mixed messages* women appropriate narcissistic obsessions of the western world and succumb to twenty first century 'nervous conditions' through severe emotional distress. The most significant and cautionary theme in the collection is that women feel 'lost' and alienated when they return home to Ghana.

Diplomatic pounds suggests a caveat for African women's response to transnational identity that engages new affiliations and entanglements that confound their Ghanaian identities.

An overview of *Our sister killjoy:* Or *reflections of a black-eyed squint*

Our sister killjoy: *Or reflections of a black-eyed squint* was published in 1977 and is widely acknowledged as a postcolonial classic that contributes to Aidoo's distinguished legacy. She is one of the first generation of African writers to craft stories about diasporic experiences of Africans as transnational subjects. Similar to other reoccurring themes that appear in her works, diasporic landscapes are a compelling site of engagement that resonate in the outpouring of literary works of leading authors in the global age. Thus, Aidoo is a forerunner of African immigrant fictional works, feminist writing, and postcolonial perspectives. Aidoo's creative talent has woven a tapestry of prose and poetry to convey the protagonist's journey to Europe where she casts her gaze on neo-colonial Ghana, patriarchy and relationships to Ghana.

Sissie is a young Ghanaian female at the centre of the work whose 'squint' is a finely textured critique of her fellow Ghanaians at home and abroad as well as the European colonial intruders into Africa and the attendant cultural imperialism. Sissie is a student who visits both Germany and London and she comes of age to racial otherness, alienation and culture shock. She is comfortable in her own skin despite the exotification of her appearance by German people in public spaces. When Sissie visits London she casts a bold and caustic gaze upon her fellow Ghanaians whom she perceives as pitiable, wretched, and shabby. She cannot understand why they remain in Europe after completing their studies. From the vantage point of Europe, especially in the United Kingdom as Ghana's former colonial power, Sissie's vision is clear-sighted, penetrating and brutally honest. Among Aidoo's female characters, Sissie is undeniably empowered by her authentic sense of African womanhood,

self-acceptance and her ability to unpack the vestiges of the colonial encounter in post-independence Ghana.

Conclusion

As a consummate storyteller, the corpus of Aidoo's writings capture the dynamism of Ghanaian and African women's lives through strong women characters that exhibit intelligence, strength, and agency in the search for happiness and success in their lives. Ama Ata Aidoo's legacy may be seen in the outpouring of African literature in the twenty-first century by women authors who now dominate the African literary landscape. A new generation of leading women writers from Africa owe their inspiration to Ama Ata Aidoo and other pioneers like Flora Nwapa, Buchi Emecheta and Mariama Ba who broke barriers for women as literary godmothers of feminist expression and innovative ways of telling the African story, beginning in the twentieth century.

I am honoured to have known her and her literary works are among the iconic literature that I share with students. Her penetrating insight into Africa's and women's issues is the hallmark of her talent and creative artistry. Ghana and the world have lost a commanding presence on the literary stage and her works will remain as cherished classics in African and world literature.

Transforming African diplomacy: Salim Ahmed Salim's vision of non-indifference and the evolution from OAU to AU

Antony Karol Muma*

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Abstract

Dr Salim Ahmed Salim, a prominent Tanzanian diplomat, played a crucial role in transforming the Organisation of African Unity (OAU) into the African Union (AU) during his tenure from 1989 to 2001. This paper explores his transformative role in reshaping African diplomacy, focusing on his vision of moving from the principle of non-interference to non-indifference. During his tenure as Secretary General of the Organisation of African Unity (OAU) from 1989 to 2001, Salim advocated for proactive humanitarian intervention and collective responsibility among African nations, laying the foundation for the African Union (AU). His advocacy emphasised the importance of addressing internal crises, promoting human rights, and advancing mechanisms for conflict resolution. Salim's legacy, particularly his influence on the AU's adoption of the principle of non-indifference, continues to inspire governance and human rights protection across the continent.

Keywords: Organisation of African Unity (OAU), African Union (AU), non-interference, non- indifference

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Introduction

Salim Ahmed Salim, a distinguished Tanzanian diplomat and politician, left an indelible mark on the Organisation of African Unity (OAU) from 1989 to 2001.[1] His early academic life was significant in shaping his august diplomatic career and intellectual outlook. Salim was born into a culturally rich family; his father was of Omani descent, and his mother had Afro-Arab roots. This diverse background instilled in him a profound understanding of the complexities of African identity. His early education began at the Lumumba College in Zanzibar, followed by higher studies, in St Stephen's College at the University of Delhi, India, where he completed his undergraduate studies between 1965 and 1968. Later, in January 1975, Dr Salim obtained a Master's Degree in international affairs from the prestigious School of International and Public Affairs at Columbia University in New York.[2] This academic foundation equipped him with the analytical skills necessary for his future roles in international relations. He was later awarded six *honoris causa* doctorate degrees from universities in Africa, Asia and Europe.[3]

Salim's diplomatic career began at an early age when he became the youngest ambassador in Africa at just 22 years old, serving as Zanzibar's ambassador to Egypt. Following the 1964 revolution that united Zanzibar and Tanganyika into Tanzania, he transitioned to become

1 Global Leadership Foundation, 'Salim Ahmed Salim: Prime Minister, Tanzania 1984-1985, Secretary-General of the OAU, 1989-2001'.

2 The United Republic of Tanzania embassies and diplomatic missions, 'Ambassadors: Dr Salim Ahmed Salim'.

3 The United Republic of Tanzania embassies and diplomatic missions, 'Ambassadors: Dr Salim Ahmed Salim'; Lucy Shule and Gaudens P Mpangala, 'Salim in Tanzania', in Jakkie Cilliers (ed) *Salim Ahmed Salim: Son of Africa*, Institute of Security Studies, 2014, 32-33 and 44. The six honorary doctorate degrees are: Doctor of Laws, the University of Philippines at Los Baños (1980), Doctor of Humanities, University of Maiduguri, Nigeria (1983), Doctor of Civil Law, University of Mauritius (1991), Doctor of Arts in International Affairs, University of Khartoum, Sudan (1995), Doctor of Philosophy in International Relations, University of Bologna, Italy (1996), and Doctor of Laws, University of Cape Town, South Africa (1998).

Tanzania's first ambassador to Egypt. His formative experiences significantly influenced his perspective on global affairs.[4]

In 1970, Salim was appointed as Tanzania's permanent representative to the United Nations (UN). During his decade-long tenure at the UN, he emerged as a vital advocate for African liberation movements. He chaired the UN Special Committee on Decolonisation from 1972 to 1980, playing a pivotal role in supporting independence efforts across Africa. His leadership was instrumental in advancing resolutions condemning colonialism and apartheid, particularly aiding movements such as the African National Congress (ANC) in South Africa. Salim's commitment to African liberation extended beyond advocacy as he actively worked to secure international support for various liberation movements. He chaired the UN Security Council committee on sanctions against Rhodesia during its struggle for independence and served as president of the UN General Assembly during its 34th session in 1979.[5]

In 1989, Salim was elected Secretary General of the Organisation of African Unity (OAU), a position he held until its transformation into the African Union (AU) in 2001. His leadership marked a significant shift for the OAU, moving its focus from colonial issues to contemporary challenges such as conflict resolution and democratic governance. Under Salim's guidance, the OAU evolved into a more proactive body aimed at fostering regional integration and promoting peace across Africa. He championed initiatives that emphasised African solutions to African problems, advocating for mechanisms that addressed conflicts within the continent.[6]

After leaving the OAU, Salim continued his engagement with various international organisations focused on peace and development in Africa. He served on numerous boards and panels, including as chair-

4 Shule and Mpangala, 'Salim in Tanzania', 36.

5 Vasu Gounden and Daniel Forti, 'Salim and Africa's liberation', in Jackie Cilliers (ed) *Salim Ahmed Salim: Son of Africa*, 9-19.

6 Nkosazana Dlamini Zuma, 'Foreword: Celebrating Salim Ahmed Salim, a committed Pan-African', in Cilliers (ed) *Salim Ahmed Salim: Son of Africa*, Institute of Security Studies, 2014, 3-4.

person of the Mwalimu Nyerere Foundation and member of the AU's Panel of the Wise (PoW). His work included mediating conflicts in regions like Darfur and leading election observer missions across Africa.[7] Salim has also been involved with global initiatives aimed at promoting governance through organisations like the Mo Ibrahim Foundation, which focuses on good governance and leadership across Africa.[8] As an elder statesman, Salim continues to inspire new generations of leaders committed to advancing Africa's interests on both regional and global stages.

This paper adds onto the oeuvre of literature discussing the life and contributions of Salim. I focus on Salim's role in recognising the pressing need to re-evaluate the principle of non-interference in the context of Africa's complex political realities. His critique for this principle together with his advocacy for a shift towards non-indifference, has been instrumental in shaping a more proactive approach to human rights and humanitarian intervention within the African Union (AU). He left behind a legacy that is knowledgeable and erudite. His contribution to the OAU led to the very establishment of the AU.[9]

The paper is divided into four parts. This first section introduces the paper. The second section covers his diplomatic legacy, focusing on his role in transforming the Organisation of African Unity into a proactive body centred on human rights and conflict resolution. The third section explores his advocacy for shifting from non-interference to non-indifference, stressing collective responsibility among African nations to prevent atrocities. The last section critiques the inconsistent application of this principle, particularly within the African Union, and calls for a more inclusive, culturally sensitive human rights framework.

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7 The United Republic of Tanzania Embassies and Diplomatic Missions, 'Ambassadors: Dr Salim Ahmed Salim'.

8 Hallelujah Lulie and Jakkie Cilliers, 'Salim at the Organization of African Unity', in Cilliers (ed) *Salim Ahmed Salim: Son of Africa*, Institute of Security Studies, 2014, 85.

9 Ian Taylor, 'African unity at 50: From non-interference to non-indifference', E-International Relations, 25 June 2013, 1; Lulie and Cilliers, 'Salim at the Organization of African Unity', 72.

Salim Ahmed Salim's vision of non-indifference

The principle of non-indifference posits that African nations have a collective obligation to protect their citizens from atrocities committed within their borders.[10] Salim's proposal of the Organisation of African Unity's principle of non-indifference, which is the key area of this research, has greatly influenced dispute resolution in the African continent.[11] In July 1990, Salim presented his vision for reforming the continental organisation through a report titled, *On the fundamental changes taking place in the world and their implications for Africa: Proposals for an African response*.[12] This report sparked a lively debate at the council of ministers. He recognised that the principle of non-interference often led to the neglect of human rights abuses and internal conflicts within member states. Writing this report as the Secretary-General of the OAU, he articulated the need for a transformative approach centred on non-indifference, advocating for a more compassionate response to crises affecting African nations.[13]

In the past, the Organisation of African Unity often fell short of expectations when it came to addressing conflicts in the African continent, largely due to a lack of political will among member states.[14] This reluctance was compounded by a strict adherence to the principle of

10 Marina Sharpe, 'From non-interference to non-indifference: The African Union and the responsibility to protect', International Refugee Rights Initiative, September 2017, 4.

11 Taylor, 'African unity at 50', 1.

12 Organisation of the African Union (OAU), 'Report of the Secretary-General on the fundamental changes taking place in the world and their implications for Africa', June 1990. Later presented as a lecture at the Command and Staff College, Tanzania Military Academy, Arusha, on 1 February 2002, Salim Ahmed Salim, 'On the fundamental changes taking place in the world and their implications for Africa: Proposals for an African response', 1 February 2002.

13 Said Djinnit, 'Dr Salim Ahmed Salim: An African transformational leader and a consensus builder', Action for Community Organisation, Rehabilitation and Development (ACCORD) 10 February 2022 citing OAU, 'Report of the Secretary-General on the fundamental changes taking place in the world and their implications for Africa'.

14 Fatsah Ouguergouz, 'The African Charter on Human and Peoples' Rights' (1981)', Max Planck Encyclopedia of Public International Law, para 4; John J Hogan, 'Shame, exasperation, and institutional design: The African Union as an emotional security community', 22 *African and Asian Studies* (2023) 89-90.

'non-interference in the internal affairs of member states' which limited the OAU's ability to intervene in domestic issues, even as internal conflicts in Angola, Liberia, the Democratic Republic of the Congo (DRC), Sierra Leone, and South Sudan, and the genocide in Rwanda began to rise, particularly in the early 1990s.[15]

Furthermore, the OAU Charter did not address terrorism and never identified it as a problem in Africa. This is largely due to the fact that colonial rulers had branded liberation fighters as terrorists hence Africans had mixed reactions when it came to using the word.[16] Recognising these limitations, Salim, in his 1990 report, proposed that member states should leverage the established permanent institutions within the Organisation to facilitate the resolution of disputes. He further suggested that member states should consider utilising the good offices of the Secretary General, more effectively in conflict resolution efforts, underscoring the need for a more proactive and unified approach within the OAU to address the growing challenges facing the continent.[17]

The principle of non-interference was enshrined in the OAU Charter as a means to protect the sovereignty and territorial integrity of member states.[18] While this principle was intended to shield African nations from colonialism and external aggression, it often resulted in a detrimental culture of inaction regarding gross human rights violations.[19] The OAU's commitment to non-interference meant that when crises arose – such as the Rwandan genocide in 1994 – there was little

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15 Tim Murithi, 'The African Union's transition from non-intervention to non-indifference: An *ad hoc* approach to the responsibility to protect? The AU's doctrine of non-indifference', 1 *Internationale Politik und Gesellschaft Online: International Politics and Society* (2009) 91 and 94.

16 Martin Ewi and Anton Du Plessis, 'Counter-terrorism and pan-Africanism: From non-action to non- indifference' in Ben Saul (ed) *Research handbook on international law and terrorism*, Edward Elgar Publishing, 2014, 734.

17 Djinnit, 'Dr Salim Ahmed Salim: An African transformational leader and a consensus builder'.

18 Charter of the Organization of African Unity (OAU), 25 May 1963, 479 UNTS 39, Article 3(2).

19 Sharpe, 'From non-interference to non-indifference: The African Union and the responsibility to protect', 4.

recourse for intervention. This failure to act allowed horrific atrocities to occur without accountability.[20]

Salim's tenure at the OAU coincided with some of Africa's most tumultuous periods. He witnessed first-hand how the rigid adherence to non-interference prevented meaningful action against leaders who perpetrated violence against their own citizens.[21] In his 1990 report to the OAU Council of Ministers, Salim poignantly stated, '[w]hile the principle of non-interference in the internal affairs of member states should continue to be observed, it should, however, not be construed to mean or used to justify indifference on the part of the OAU'.[22] This critical perspective laid the groundwork for a necessary evolution in how African states engage with one another regarding human rights.[23]

Salim's advocacy for a transition from non-interference to non-indifference was not just theoretical; it was a call to action based on moral responsibility.[24] He argued that while respecting state sovereignty is crucial, it should not lead to indifference towards humanitarian crises and gross human rights violations. Nelson Mandela held a similar view arguing that Africans have both the right and the responsibility to intervene in situations of conflict to eliminate tyranny. In an address at the final seminar of the International Independent Commission (IICK) on Kosovo, he observed that:

> [A]t a time when the quest for peace demands greater accountability from both states and international organisations for their actions, this pursuit has also heightened the need for deeper dialogue on the global stage.[25]

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20 Sharpe, 'From non-interference to non-indifference: The African Union and the responsibility to protect', 5.

21 Salim Ahmed Salim, 'Twenty years after: Taking stock of the implementation and enforcement of the African Charter on Human and Peoples' Rights', Human Rights Seminar in the University of Dar es Salaam, 7 February 2002, 9-11.

22 Djinnit, 'Dr Salim Ahmed Salim: An African transformational leader and a consensus builder'.

23 Lulie and Cilliers, 'Salim at the Organization of African Unity', 67-79.

24 Djinnit, 'Dr Salim Ahmed Salim: An African transformational leader and a consensus builder'.

25 Nelson Mandela, 'An address delivered by the former President Nelson Mandela at the final seminar of the international independent commission on Kosovo', Johannesburg, South Africa, South African Institute of International Affairs, 2000.

Salim Ahmed Salim's vision of non-indifference and the African Union's commitment to collective security and conflict prevention

Salim's vision of non-indifference seems to align with the fundamental idea that states must safeguard their citizens from mass atrocities and that the international community has a role to play when governments fail in this duty.[26] His vision was instrumental in establishing mechanisms within the AU that would allow for intervention in such cases.[27] The AU's Constitutive Act explicitly permits intervention when there are serious violations occurring within the borders of member states,[28] reflecting Salim's belief that sovereignty must coexist with accountability. Salim's critique of non-interference has had profound implications for human rights advocacy across Africa. His focus on non-indifference reflects a transformative approach aimed at tackling key issues, including combating impunity, promoting human rights as core African values, and strengthening collective security.[29]

One of Salim's central arguments was that adherence to non-interference often perpetuated a culture of impunity among leaders who committed gross human rights violations. By advocating for non-indifference, he sought to establish accountability mechanisms that would deter leaders from acting with impunity.[30] Salim emphasised that human rights should not be viewed as western impositions but rather as integral values that resonate within African cultures and traditions. He argued that promoting democracy and human rights is essential not only for ethical governance but also for economic recovery and sustainable development across the continent.

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26 Sharpe, 'From non-interference to non-indifference: The African Union and the responsibility to protect', 4.

27 African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 9 July 2002, Article 4(j) and (k); Constitutive Act of the African Union, 11 July 2000, Article 4(h) and (j).

28 Constitutive Act of the African Union, Article 4(h).

29 Djinnit, 'Dr Salim Ahmed Salim: An African transformational leader and a consensus builder,'.

30 Djinnit, 'Dr Salim Ahmed Salim: An African transformational leader and a consensus builder,'.

Scholars like Makau Mutua argue contrary to Salim. He argues that, international human rights law is predominantly shaped by western ideals, which can marginalise non-western perspectives and experiences. He asserts that the human rights movement often masquerades as a universal moral imperative while imposing a set of culturally biased norms on diverse societies.[31] He critiques this framework for failing to account for indigenous traditions and cultural contexts, which are essential for creating a genuinely universal conception of human rights.[32]

This critique is echoed in the broader Third World Approaches to International Law (TWAIL) literature, which posits that international law has historically been used to legitimise colonialism and imperialism. Scholars argue that international law was constructed in a manner that favoured Western interests, perpetuating inequalities between the Global North and South.[33]

Human rights are argued to have been historically located in the western view of its predestination over the globe. For instance, it has been noted that international law often legitimised acts of exploitation and subjugation in colonised regions by framing these actions within a narrative of civilising missions.[34] By framing human rights as universal values rooted in African identity, Salim seems to assume that these human rights incorporate an African perspective, therefore, suggesting their imposition in non-western nations would be justified – a view many TWAIL scholars have contested. However, it is important to acknowledge that Salim's vision of non-indifference emphasised empowering citizens and respecting fundamental freedoms within Africa's

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31 Makau Mutua, 'Critical race theory and international law: The view of an insider-out sider', 45 *Villanova Law Review* (2000) 850-51; See also, Makau Mutua, 'Human rights: A TWAILBlazer critique', 52(2) *Denver Journal of International Law and Policy* (2024) 192-196 (on the mirage of universality).

32 Makau Mutua, 'Savages, victims, and saviors: The metaphor of human rights', 42 *Harvard International Law Journal* (2001) 205.

33 Antony Anghie, *Imperialism, sovereignty and the making of international law*, Cambridge University Press 2004, 4.

34 Bhupinder Chimni, *International law and world order: A critique of contemporary approaches*, Cambridge University Press, 2006, 351.

unique context, though I do not share his view on the universality of human rights.[35]

The move towards non-indifference allows African nations to collaboratively address security threats posed by internal conflicts and humanitarian crises.[36] By fostering regional cooperation and solidarity, Salim envisioned an Africa where member states could collectively respond to crises without fear of undermining each other's sovereignty. This approach would enhance regional stability and promote peacekeeping efforts across borders.[37]

This principle has often been compared to interventionist doctrines developed to prevent mass atrocities, yet their application has faced criticism for reflecting eurocentric foundations.[38] This critique is important in viewing how Salim's principle of non-indifference interacts with such doctrines and highlights the challenges posed by their underlying assumptions. Anghie argues that international law, including human rights law, has historically been used to legitimise colonialism and imperialism.[39] The imposition of western legal norms often disregards local contexts and traditions, leading to interventions that may not align with the realities on the ground.[40] Can the axe that felled the tree now teach it how to stand, or the hand that forged the chains truly show the path to freedom?

The 1990 Report on Fundamental Changes emphasised the critical need for permanent institutions and mechanisms to address the chal-

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35 Salim, 'Twenty years after: Taking stock of the implementation and enforcement of the African Charter on Human and Peoples' Rights', 9-10.

36 Murithi, 'The African Union's transition from non-intervention to non-indifference', 94.

37 Salim Ahmed Salim, 'Challenge to Africa of the new millennium: The perspective of the OAU', A statement by Dr Salim Ahmed Salim, the Secretary General of the OAU, United Nations Economic Commission for Africa, 24-28 October 1999.

38 Rose Parfitt, *The process of international legal reproduction: Inequality, historiography, resistance* Cambridge University Press, 2019, 72 (where she discusses the civilising mission in the Abyssinia context).

39 Anghie, *Imperialism, sovereignty and the making of international law*, 135.

40 Makau Mutua, 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties', 35 *Virginia Journal of International Law* (1995) 341.

lenges of conflict and instability plaguing Africa.[41] In response, the subsequent OAU Declaration underscored the urgency of building Africa's capacity for the peaceful and swift resolution of conflicts. The Declaration aimed to position Africa at the forefront of efforts to manage and resolve its own conflicts, stressing that the continent held the primary responsibility for addressing its challenges, while acknowledging the importance of seeking and receiving international solidarity and support in these efforts.[42] Internal conflicts within African states are often deeply rooted in historical grievances, ethnic tensions, and socioeconomic disparities.[43] As such, interventions can be complex and potentially counterproductive if not handled delicately.[44] Salim recognised that while intervention may be necessary, it must be approached with careful consideration of local contexts and dynamics.

Balancing sovereignty and responsibility: The AU's dilemma

Salim Ahmed Salim's vision of non-indifference and the African Union's evolving approach to intervention seem to raise key questions: Should intervention protect a regime – democratically elected or not – or protect the people from the regime? A government's refusal to cede power after losing an election often leads to chaos, and Sturman and Baimu argue that AU intervention policies risk prioritising state security over human security.[45]

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41 OAU, 'Report of the Secretary General on the fundamental changes taking place in the world and their implications for Africa'.

42 Organisation of African Union, Declaration on the political and socio-economic situation in Africa and the fundamental changes taking place in the world, AHG/Decl.1 (XXVI) 1990, 1990, para 11-13; Julius Kambarage Nyerere, *Freedom and liberation: A selection from speeches, 1974–1999*, Oxford University Press, 2011; Julius Kambarage Nyerere, *Our leadership and the destiny of Tanzania*, African Publishing Group, 1995.

43 Ministry of Foreign Affairs Japan, Tokyo Statement of Principles for Peace and Development.

44 Emmy Godwin Irobi, 'Ethnic conflict management in Africa: A comparative case study of Nigeria and South Africa', Beyond Intractability, May 2005.

45 Evarist Baimu and Kathryn Sturman, 'Amendment to the African Union's right to intervene: A shift from human security to regime security', 12(2) *African Security Review* (2003) 5.

Furthermore, interference must be geared towards the AU's core principles as reflected in the Constitutive Act, the African Peer Review Mechanism (APRM), and Pan-African institutions. Sustaining the rule of a corrupt regime, human rights abuser or the one that is manipulating elections through interventions is in contradiction to these principles. The Peace and Security Council (PSC), organised to be decisive in crises, should not abandon its human security principle. Besides, The AU Assembly decides on interventions by consensus or a two-thirds majority and is not bound to allow a state to veto. It can intervene under its mandate if a government's refusal to leave power threatens regional security.[46]

The AU's principle of non-indifference challenges absolute state sovereignty, prioritising human security. But should sovereignty be redefined as responsibility rather than entitlement?

Conclusion

Dr Salim Ahmed Salim's diplomatic efforts were instrumental in the evolution of African diplomacy from non-interference to non-indifference. His leadership in transforming the OAU into the AU emphasised collective responsibility and proactive intervention in crises, reshaping Africa's approach to conflict resolution and governance. Salim's contributions have left a lasting impact on the continent, particularly through the AU's focus on humanitarian intervention and the protection of human rights, laying the groundwork for ongoing efforts to build a more peaceful and just Africa.

[46] Ben Kioko, 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention', 85(852*) International Review of the Red Cross* (2003) 816 - 817.

An update of the Kianjokoma brothers' case and the struggle for police accountability in Kenya

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Introduction

> I am not unmindful that some of you have come here out of great trials and tribulations. Some of you have come fresh from narrow jail cells. Some of you have come from areas where your quest for freedom left you battered by the storms of persecution and staggered by the winds of police brutality. You have been the veterans of creative suffering.[1]

These were the words of Martin Luther King Jr in his 'I have a dream' speech, delivered on 28 August 1963, on the steps of the Lincoln Memorial. Yet, more than 61 years after this speech was made, police brutality is still a plague in most countries, especially in Kenya.

This paper begins with a heartfelt narration of the author's sentiments in relation to the loss of a close friend through police brutality. Thereafter, it traces the history of police brutality in Kenya from the colonial period when its primary mandate was to oppress the native Africans. Subsequently, it exposes the existing structural weaknesses in

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* *Contributions to the 'Kianjokoma brothers tribute: The police accountability review' are single blind reviewed.*

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1 Martin Luther King Junior, 'I have a dream', Speech delivered on 28 August 1963, NPR, 16 January 2023.

the law enforcement agencies that enable police brutality. Further, this paper argues that the political class is also a huge enabler of police brutality. In conclusion, the paper pinpoints the efforts made and challenges faced in combating police brutality and makes recommendations on how to combat them.

Tribute to Emmanuel Mutura Ndwiga and Benson Njiru Ndwiga

It is nearly three years since two brothers, Emmanuel Mutura and Benson Njiru Ndwiga, lost their lives in the hands of the Kenya Police 'Service' officers. The two brothers were allegedly murdered on 2 August 2021 by police officers.[2] To a rather shocking but unsurprising turn of events, six (6) police officers: Benson Mputhia, Consolata Kariuki, Nicholas Cheruyiot, Martin Wanyama, Lilian Cherono and James Mwaniki were arrested on 16 August 2021 for the murders.[3] This was yet another incident of police murders experienced in Kenya following the much-publicised murder of lawyer Willie Kimani and his client.

I cannot ignore the pain I feel in my gut while writing this paper; losing someone close to you is never easy on anyone. Especially when the circumstances of their death are mulled with impunity and the degenerate behaviour of persons charged with the responsibility of protecting them.

I invite you to picture the events of that night: Six police officers from the Kianjokoma police station brutally bludgeoning two innocent young men. Their mistake? Being outside during the COVID 19 curfew. A curfew that was imposed countrywide to protect citizens from COVID 19 and that had claimed many lives. Sadly, for the Ndwiga brothers, COVID 19 was not the enemy, it was the police.[4] At the hands of the

[2] George Munene, 'Slain Embu brothers buried in emotional ceremony', *Nation*, 15 August 2021.

[3] Paul Ogemba, 'Kianjokoma murder cops finally charged after day of drama', *The Standard*, 2 September 2022; Samson Muchiri, 'The Kianjokoma brothers: A clarion call to never forget', 1 *Kabarak Law Review* (2022) 180.

[4] Terry Moraa, 'Police brutality: The familiar and recurrent evil', *Kabarak Law Review Blog*, 8 August 2023.

police, they stood no chance. There was no room to fight back as the officers stepped on them with their government-issued boots and battered them with their police batons bought with taxpayers' money. That night, the dangerous virus was the police officers.

The six (6) police officers who killed the Ndwiga brothers were charged in September 2021 under case number E061 of 2021 and since then, the case is still ongoing with no significant progress.[5] This translates to more than three years of agony, pain and delayed justice, not just for the family but for the majority of Kenyans who relate to the pain of losing their loved ones in the hands of police officers. The wheels of justice in this case have been braked for a number of times owing to delays occasioned by a number of aspects within the Kenyan judicial system.

In 2022, six (6) prosecution witnesses testified including the parents of the deceased boys, their uncle and two friends who were present with them on that fateful night before their murders.[6] The court in this case sat for a hearing in November 2023. However, in 2023, the subsequent hearing was postponed to a later date due to the transfer of the trial judge, Honourable Daniel Ogembo.[7] Unfortunately, the case has since stalled and there has been little to no progress in the conclusion of the matter.[8] The case came up for mention several times for nearly two years with the parties seeking the allocation of a trial judge. This forced the civil society groups such as the International Justice Mission (IJM), the Independent Medico-Legal Unit (IMLU), the Law Society of Kenya (LSK), the Federation of Women Lawyers (FIDA-Kenya) and the Independent Policing Oversight Authority (IPOA) to push the judiciary to allocate a judge to the case.[9]

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5 *Prosecutor v Benson Mputhia, Consolata Njeri Kariuki, Martin Msamalia Wanyama, Nicholas Sang Cheruiyot, Lilian Cherono Chemuna and James Mwaniki,* Criminal Case E061 of 2021.

6 Information received from personal conversation with Mr David Njoroge who is leading the team of the victims' counsel representing civil societies such as Law Society of Kenya (LSK), Federation of Women Lawyers (FIDA-Kenya), International Justice Mission (IJM) and Independent Medico-Legal Unit (IMLU).

7 Information received from personal conversation with Mr David Njoroge.

8 Information received from personal conversation with Mr David Njoroge.

9 Information received from personal conversation with Mr David Njoroge.

It is only on 23 January 2025 that the principal judge of the Criminal Division at Milimani Law Courts allocated Justice Muigai the case.[10] However, the Judiciary is yet to produce the typed proceedings of the hearing conducted in 2022 which should be sent to the new trial judge to get acquainted with those proceedings.[11]

It is sad that bureaucracy and administrative procedures are responsible for the delay in the delivery of justice in such a crucial case. Whilst this paper is not focused on the inadequacies of the judiciary, it is clearly evident that justice is a mirage when it comes to the Kenyan judicial system. It is commonly said that the wheels of justice may be slow but surely grind for truth to prevail. However, when the wheels of justice are too slow as in this case, then the effects of the grinding may be otiose. These actions and inactions by both the judiciary and the Office of the Director of Public Prosecutions (ODPP) enable police brutality by delaying justice.

In addition to bureaucracies in the judiciary that delay justice in cases of police brutality, other factors perpetuate police brutality in Kenya beginning with the colonial history of the police force.

The colonial history of the police force

The current outfit of the Kenya Police force is an exact replica of the colonial police force that was established by the colonial government when Kenya was a British Protectorate. Whereas the Kenya Police Service was established by Article 243 of the Constitution of Kenya (2010) (the Constitution) and the National Police Service Act (Chapter 84), their modus operandi has not changed.[12]

In 2005, Harvard professor Caroline Elkins released her book, *Imperial reckoning: The untold story of Britain's gulag in Kenya* which highlighted the atrocities meted on Kenyan natives by the British soldiers in an

[10] Information received from personal conversation with Mr David Njoroge.

[11] Information received from personal conversation with Mr David Njoroge.

[12] Nanjala Nyabola, 'Decolonise da police: How brutality was written into the DNA of Kenya's police service', *African Arguments*, 2016.

effort to quell the Mau Mau uprising.[13] In her book, Elkins narrates how persons who were captured were placed in detention centres from 1951-1960 where they were tortured. She quotes confessions by former British officers who were managing the camps in Kenya of how they used the 'dilution technique' whose purpose was to break the Mau Mau fighters.[14] According to the former British officers interviewed by Elkins, the dilution technique involved use of brutal force against the Mau Mau fighters to get them to conform to colonial rule. The book paints a picture of the massive use of torture and further insinuates that hundreds of lives were lost during this period.

Whilst many found Elkins' work to be revolutionary and groundbreaking, some critics questioned the findings and the narrations. Bethwel Ogot, a Kenyan scholar, critiqued Elkins' work on the grounds that it was solely based off the 50-year-old memories of former detainees and some former colonial British soldiers.[15] This essentially sought to cast doubt on the accuracy of the memories of the interviewees in Elkin's work. Furthermore, he questions the motive of the interviewees asking whether they were solely being driven by the desire for money.

In the wake of the exposé of the *Hanslope files* following the *Ndiku Mutua and others v Foreign Commonwealth Office* court case instituted by some of the victims of British colonial rule in Kenya, Elkins's work seems to have been validated.[16] The admission by the British govern-

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13 Kennell Jackson, 'Reviewed work: Imperial reckoning: The untold story of Britain's Gulag in Kenya by Caroline Elkins', 39(1) *The International Journal of African Historical Studies* (2006) 158-160.

14 Caroline Elkins, *Imperial reckoning: The untold story of Britain's Gulag in Kenya*, Henry Holt and Company, 2005, 10.

15 Bethwell Ogot, 'Reviewed work(s): Histories of the hanged: Britain's dirty war in Kenya and the end of empire by David Anderson: Britain's gulag: The brutal end of empire in Kenya by Caroline Elkins', 46(3) *The Journal of African History* (2005) 493.

16 David Anderson, 'Mau Mau in the High Court and the "lost" British empire archives: Colonial conspiracy or bureaucratic bungle', 39(5) *The Journal of Imperial and Commonwealth History* (2011) 708; Caroline Elkins, 'Alchemy of evidence: Mau Mau, the British empire, and the High Court of Justice', 39(5) *The Journal of Imperial and Commonwealth History* (2011) 742. See also, Anmol Gulecha, '*Ndiku Mutua, and others v The Foreign and Commonwealth Office*', 14 *Jindal Global Law Review* (2023) 297-304, discussing the importance of historical documents in the preliminary determination of the case.

ment that the British colonial rule used torture against natives in Kenya was certainly a win in the fight for justice.

Even though the Mau Mau fighters won their case against the British government, the colonial imprint of police brutality and use of torture is still present in Kenya.[17] During the colonial period, the British recruited and trained African security forces to combat the Mau Mau rebellion. The African security forces continued with the tradition of brutality even after independence.[18] An example of this is the rampant detention without trial and torture used during the Moi regime to silence dissent in the infamous 'Nyayo House'.[19] In the 1970s, at the height of the clamour for multipartyism in Kenya, the police were heavily used to fight the people and the proponents of multipartyism.[20] Many were tortured and arrested including senior politicians like Raila Odinga and James Orengo.

During the 2007 post-election violence, Kenyans were met with unspeakable horror from the police force.[21] Hundreds of lives were lost,[22] houses were torched[23] and families were separated. Unsurprisingly, this disdain for the people by police officers can be traced back to the colonial period.[24] The colonial police force comprised of both the British and also native Africans who had collaborated with the British.[25] These collaborators would allow themselves to be used to torture and exert force

17 Commission of Inquiry into Post Election Violence (CIPEV), 'Report of the Commission of Inquiry into Post Election Violence', 2008, 24.

18 Eck, Kristine, 'The origins of policing institutions: Legacies of colonial insurgency', 55(2) *Journal of Peace Research*, 147–60.

19 See for example the case of *Wachira Weheire v Attorney General*, Miscellaneous Civil Case 1184 of 2003, Judgement of the High Court of Kenya on 16 April 2010 [eKLR], which discussed compensation due to torture at the infamous Nyayo House.

20 CIPEV, 'Report of the Commission of Inquiry into Post Election Violence', 2008, 25.

21 CIPEV, 'Report of the Commission of Inquiry into Post Election Violence', 418-420.

22 CIPEV, 'Report of the Commission of Inquiry into Post Election Violence', 392.

23 CIPEV, 'Report of the Commission of Inquiry into Post Election Violence', 304.

24 Moina Spooner, 'Kenyan police and protests: Researchers on a violent, corrupt security force that's beyond reform', *The Conversation*, 25 June 2024.

25 John Kamau, 'How service has changed from colonial time guards', *Daily Nation,* 5 July 2015.

against their own people.[26] This very scenario with the collaborators is what the political class adopted by using police officers to oppress the people.[27]

Nearly 60 years later, the same playbook used by the colonial government and Moi's regime is still at play.[28] Torture and extrajudicial methods are still the order of the day and hundreds of Kenyans have either died or been maimed because of this.[29] The postcolonial Kenyan government not only adopted all the laws and systems left in place by the colonisers but also adopted their DNA for brutality.[30] Additionally, structural and systemic weaknesses in the Kenyan police force model further perpetuate police brutality.

Structural weaknesses in the current Kenyan police force regime

In establishing the Kenya Police Service, the National Police Service Act, 2014 gave effect to Articles 238, 239, 243, 247 and 244 of the Constitution of Kenya (2010). In the Act, the functions of the police include among others, the protection of life and the maintenance of law and order.[31] In performing this mandate, the Constitution requires the members of the 'Service' to comply with the rule of law, democracy, human rights and fundamental freedoms.[32] However, there exists structural limitations within the institution of the police to enforce these constitutional requirements.

The Constitution of Kenya (2010) under Article 26 provides for the right to life as a fundamental right and only allows the intentional dep-

26 Faith Kasina and Gathanga Ndung'u, 'Kenya and its unreformable police force', *The Elephant,* 11 March 2023.

27 Kamau Wairuri, 'Kenyan police use excessive force because they're serving political elites, not the public – policy analyst', *The Conversation*, 27 June 2024.

28 Thomas Mukhwana, 'Maimed by my Government', *Africa Uncensored*, 26 February 2025.

29 Mukhwana, 'Maimed by my Government'.

30 CIPEV, 'Report of the Commission of Inquiry into Post Election Violence', 24.

31 National Police Service Act (No 19 of 2014) Section 24.

32 Constitution of Kenya (2010) Article 238(b).

rivation of this right as authorised by the Constitution. The National Police Service Act, 2014 aims to put in place measures to prevent the unjust deprivation of life and mechanisms for reporting such incidents when they occur.[33] However, the Act fails to provide strict procedures for ensuring those aims are met. First, it does not automatically prescribe the automatic suspension of any police officer who is involved in a questionable incident leading to the loss of life of a civilian. This then allows the officers to use their powers to sabotage any investigations and intimidate witnesses.

Secondly, the Act provides for the establishment of an Internal Affairs Unit (IAU) with the mandate to investigate and take action against police officers who commit an offence in the Act.[34] However, the recently established Internal Affairs Unit seems manifestly inefficient. This arm is still within the control of the Inspector General,[35] who, in the interest of the image of police during his tenure, would suppress any investigation that castigates his 'perfect' image.[36] It is evident that cases which elicit public uproar and receive media coverage are majorly investigated by police, however, incidences which receive less attention go unaddressed.[37]

In addition, the 'Service' has not created general public awareness on how incidences of police excesses can be reported. In most cases, common citizens do not know who to approach when police officers usurp their powers. You would have to be fully appraised with the justice system to know that an Internal Affairs Unit exists within the police. This is not the reality of most Kenyans who are virtually deprived of pertinent information on good governance and available recourse in instances of injustice.

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33 National Police Service Act (No 19 of 2014) Sections 87-95A.

34 National Police Service Act (No 19 of 2014) Section 87.

35 National Police Standing Orders, 9 June 2017, Chapter 5, Section 1.

36 Ann Veronicah, 'IG Koome accuses Azimio of hiring dead bodies during protests', *The Standard*, (Nairobi, 3 August 2023),

37 Maurice Oniang'o, 'Media coverage of police brutality in Kenya's informal settlements', *Thomson Reuters Foundation*, 2022.

While many may argue that the Internal Affairs Unit is a step in the right direction, this paper argues that Kenyans deserve much better than a bureaucratic institution that has little impact. In the recent protests by Kenyan youths in June 2024, the silence of the Internal Affairs Unit has been very loud. No word was issued, no investigations in were put in place and no single arrest has been made in relation to the well documented incidents of police brutality.

The political expediency of the Kenya police

The political class has historically used the Kenya police for political expediency, particularly in ways that have undermined their independence and professionalism. By 1964, the police force had already become a tool of the executive, eroding its autonomy.[38] This pattern of political interference persisted until the 2010 constitutional reforms, which sought to reshape the police into a service-oriented institution, moving it away from being a tool for political repression.[39]

During the post-election violence of 2007-2008, the police were accused of being ill-prepared to handle the unrest and, in some cases, were seen to actively participate in the violence.[40] In some appalling situations, the police were seen to act on behalf of certain political factions.[41] This crisis exposed the extent to which the police had been used to serve political interests rather than uphold public safety and law enforcement.[42] Despite reforms aimed at increasing the police's accountability and professionalism, political manipulation has persisted. The

38 Douglas Kivoi, 'Policing reforms to enhance security in Kenya', Kenya Institute for Public Policy Research and Analysis, Discussion Paper No 237, 2021, 6.

39 Kivoi, 'Policing reforms to enhance security in Kenya', 11.

40 Okia Opolot, 'The role of the police in the post election violence in Kenya 2007/08,' 28(2) *Journal of Third World Studies*, 259–75; See also CIPEV, 'Report of the Commission of Inquiry into Post Election Violence', 369.

41 Kivoi, 'Policing reforms to enhance security in Kenya', 22.

42 CIPEV, 'Report of the Commission of Inquiry into Post Election Violence', 369-372.

police have often been seen as enforcers of the will of those in power, particularly during politically charged events such as elections.

In 2017, during the protests against the presidential election results, Human Rights Watch reported the excessive use of force by the police to suppress protests in opposition strongholds.[43] Similarly, the Kenya National Commission on Human Rights reported that police brutality specifically targeted opposition strongholds, particularly in areas perceived to support the National Super Alliance (NASA) coalition, such as Nyanza, Kisumu, and parts of Nairobi.[44] In these regions, heavy police deployment led to violent operations that included indiscriminate assaults and sexual violence. For example, in Kisumu and Nairobi informal settlements, civilians were subjected to police raids, where officers verbally abused them for supporting opposition leader Raila Odinga, and used excessive force, including physical beating and sexual assault.[45] Women and children were especially vulnerable, with reports of sexual violence committed by police officers during house-to-house operations.

These targeted attacks were concentrated in opposition strongholds, with security forces viewing these regions as hostile due to their political affiliations.[46] The brutality was a response to the contested election results, and opposition-dominated areas suffered disproportionately from police violence.[47] The findings indicated that this violence was politically motivated, with the police acting to suppress dissent and punish opposition supporters.[48]

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43 Human Rights Watch, 'Kenya: Post-election killings, abuse', 27 August 2017.

44 Kenya National Commission on Human Rights (KNCHR), 'Silhouettes of brutality: An account of sexual violence during and after the 2017 general election', 2017 Election Series.

45 Kenya National Commission on Human Rights, 'Silhouettes of brutality: An account of sexual violence during and after the 2017 general election', 13-14.

46 Kenya National Commission on Human Rights, 'Silhouettes of brutality: An account of sexual violence during and after the 2017 general election', 13-14.

47 Kenya National Commission on Human Rights, 'Silhouettes of brutality: An account of sexual violence during and after the 2017 general election', 19.

48 Kenya National Commission on Human Rights, 'Silhouettes of brutality: An account of sexual violence during and after the 2017 general election', 20.

The same amount of violence was evident in the post-election protests in 2022-2023.[49] Similarly, the same amount of force was used in 2024 during the youth-led protests that were not politically motivated but rather an agitation for economic reforms.[50] Even with the well documented records of police excesses, often the police get away because they have political backing.[51] Their ready availability to run errands for the political elites eludes accountability.[52] The political class, stemming from the Presidency, shields the police from accountability thus enabling police brutality. For instance, during the election campaigns towards the 2022 General Elections, one of the contentious issues used to criticise the incumbent government was the use of the police to settle political scores.[53]

Efforts in combating police brutality

The Constitution of Kenya (2010) has made significant efforts to safeguard the Kenyan citizenry from the excesses of the Kenyan police. This is evident from the provisions of the Bill of Rights under Chapter 4 with the inclusion of the right to life, human dignity, freedom and security of the person, rights of arrested persons among others. Similarly, the legislature has also sought to regulate police conduct by the enactment of the Independent Policing Oversight Authority (IPOA) Act in 2011. The Authority has various functions listed under Section 6 of the IPOA Act.[54]

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49 Armed Conflict Location and Event Data, 'Kenya's political violence landscape in the lead-up to the 2022 Election', 9 August 2022. See also; ENACT, 'Muted violence in Kenya's 2022 elections masked seething dissent,' 24 April 2023.

50 Anne Soy, 'Batons, tear gas, live fire - Kenyans face police brutality', BBC, 23 July 2024.

51 Wairuri, 'Kenyan police use excessive force because they're serving political elites, not the public – policy analyst'.

52 Wairuri, 'Kenyan police use excessive force because they're serving political elites, not the public – policy analyst'.

53 Collins Omulo, 'Kenya's politics of score-settling and 'threats' that won't go away', *Nation,* 23 October 2024.

54 Independent Policing Oversight Authority Act (No 35 of 2011) Section 6; The functions include: investigating deaths and serious injuries caused by police action, investigating police misconduct, monitoring, reviewing and auditing investigations and actions

These functions, coupled with the mandate given to the Internal Affairs Unit of the Kenya Police Service, are among the efforts towards regulating police excesses. The checks and balances coined in our laws, though insufficient, have addressed a number of reported cases of police misconduct.

On the other hand, many civil society organisations including the Law Society of Kenya, Katiba Institute and Haki Africa among others have been on the forefront of calling out police excesses. These institutions have become the people's watchdogs and have even gone to the lengths of following up on cases to ensure that justice is delivered against rogue police officers. In a concerted effort to curb the rising cases of police misconduct, the general public has been active in this regard and has taken up initiatives to address this issue. Many Kenyans have recorded incidents of police misconduct and broadcasted the same on social media therefore bringing to light the darkness that mars our security organs.

Challenges faced by IPOA in prosecuting police excesses and recommendations for reform

The conviction rate of the Independent Policing Oversight Authority (IPOA) against police excesses is relatively low. According to the 2024 IPOA report, the Authority had achieved only 33 convictions since its inception.[55] Despite investigating many cases of police misconduct, this low number highlights significant challenges.

Some of the key challenges cited by IPOA in the report include inadequate annual budget allocations, limiting its ability to carry out investigations effectively and attend court sessions; non-cooperation by

by Internal Affairs Unit of the police, conducting inspections of police premises, reviewing the functioning of the internal disciplinary process, monitoring and investigating policing operations and deployment.

55 Policing Oversight Authority Board, 'The 2018-2024 IPOA Board end term performance report', IPOA, 2024, 17.

some witnesses and police officers, which hinders investigations and emboldens officers to continue with misconduct; parallel investigations by IPOA, the Internal Affairs Unit, and the Directorate of Criminal Investigations (DCI), leading to inefficiencies and duplication of efforts; and staffing shortages, which result in delays in handling complaints and investigations.

In addressing these challenges, IPOA has made several recommendations, including increasing budget allocations to provide for the efficient running of the Authority and facilitate smooth investigations. Secondly, IPOA proposed harmonising of the mandates of IPOA, IAU, and DCI thus avoiding parallel investigations that do not amount to meaningful convictions. Lastly, it proposed enhancing outreach programmes through campaigns to build public awareness on the role of IPOA and ways to report the arbitrary use of force or abuse by police officers.

Recommendations

In agreement, this paper endorses the proposal to consolidate the roles of investigation in one independent institution, preferably IPOA. This will provide an impartial institution charged with the responsibility of putting the police in check. In the alternative, the Internal Affairs Unit should be disjointed from the direct control of the Inspector General. As argued above, the Inspector General of Police is not an impartial party in these cases and as such should not be involved in the investigations of the use of excessive force by his officers.

Furthermore, this paper recommends that the Authority should be granted prosecutorial roles. The delay caused by waiting for the Office of the Public Prosecution (ODPP) to approve cases against police officers curtails this role of police oversight. The success of police oversight will be realised when the conversion rates from investigations to convictions is higher. It therefore remains a hurdle to ensure full accountability of police in order to prevent police brutality if these and many other recommendations are not implemented.

Owing to the delays in court cases against rogue police officers due to administrative formalities in the judiciary, this paper urges the Judicial Service Commission (JSC) to prioritise the delivery of justice over administrative roles. The constant transfer of judges from one station to another is a major setback towards the efforts against police excesses. The procedure, however important it may be, should be done while factoring in its net effect on the delivery of justice. It is shameful and untenable that a murder case such as the one on the Ndwiga brothers can take more than three years in court. I dare ask, is that the Kenyan idea of justice?

A critique of police response to the right to peaceful assembly, demonstration, and picketing in light of the 2024 Finance Bill protests

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Abstract

The events of June 2024 have brought to light a simmering dissent now emerging where it was once almost unheard of, among the 'Gen Z' youth. Kenyan youth have embraced their right to picket and peacefully assemble while seeking to dismantle the status quo. Yet, beneath this facade of a people's sovereignty lies a troubling reality of state repression. This paper aims to critique the inappropriate use of police force especially by using live ammunition during protests and abducting and torturing demonstrators during the 2024 Finance Bill protests, particularly in relation to the implementation of Article 37 of the Constitution of Kenya. It also affirms the role of democracy in strengthening sovereignty and empowering a people in times of dissent.

Keywords: Finance Bill 2024, protests, police brutality, police response, right to peaceful assembly, Constitution of Kenya Article 37, democracy and sovereignty

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* *Contributions to the 'Kianjokoma brothers tribute: The police accountability review' are single blind reviewed.*

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Introduction

The concept of the right to express dissent is fundamental to democratic governance, reflecting the notion that power lies with the people. This principle is embedded in Article 37 of the Constitution of Kenya 2010, which safeguards the right to peaceful assembly, demonstration, and picketing. Protests through demonstrations play a crucial role in safeguarding human rights within a country's democracy. As a state party to the 1966 International Covenant on Civil and Political Rights (ICCPR), Kenya is required to recognise and uphold the right to peaceful assembly.[1] Kenya is also party to the 1981 African Charter on Human and Peoples' Rights that amplifies that every individual has the right to freely assemble with others.[2] However, there have been reports of non-compliance to the stated standards, particularly regarding freedom of expression and assembly.[3]

The exercise of the freedom and right to picket and demonstrate is not absolute as it is subject to certain restrictions that must, among other things, align with the law and be deemed necessary for maintaining public safety.[4] However, these limitations must be carefully enforced to ensure that there is no loophole that undermines the essence of the right itself. This was opined in the *Ferdinand Ndung'u Waititu and 4 others v Attorney General and 12 others*, where the late Justice Joseph Onguto pointed out that public demonstrations and assemblies are regulated by the Public Order Act (Chapter 56 of the Laws of Kenya) adding that it was strictly up to the protestors to ensure peaceful demonstrations. The Court also emphasised that the police had an obligation to maintain peace and order during demonstrations, protecting both participants

1 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 21.

2 African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217, Article 11.

3 Civic Space, 'Kenya: Harmonise legal framework on free expression with ICCPR recommendations', 28 May 2021.

4 International Covenant on Civil and Political Rights, Article 21.

and non-participants, ensuring security, public safety, and the observance of law during demonstrations. [5]

This commentary starts off with a review of the history on police conduct during public demonstrations arguing that the police misconduct specifically during protests in Kenya has been a prevalent challenge. The second section dwells on the 2024 Finance Bill protests and argues that the actions were an affirmation of the people's sovereignty. Thereafter, I will discuss police responses to the protests showing the specific police responses that are unconstitutional in nature. The fourth section discusses the Kenyan youth's fight for the democracy juxtaposed with the government's continual abnegation of democracy through police brutality.

A historical review of police conduct during protests

The historical context of police responses to public demonstrations in Kenya reveals a troubling pattern of repression and violence that undermines constitutional protections. Mutuma Ruteere observes that Kenya's fledgling democratic experiment has been perpetually challenged by the problem of ineffective and unaccountable policing.[6] He adds that historically, the Kenyan policing paradigm has been characterised by the disproportionate use of force against citizens who are deemed subversive.[7]

This line of thought can be traced to the establishment of the Kenya Police in 1906, which was initially created to enforce British colonial rule. However, its organisation and structure 'mirrored military organisation', rather than that of an institution supposed to actualise peace and

5 *Ferdinand Ndung'u Waititu and 4 others v Attorney General and 12 others*, Petition 169 of 2016, Ruling of the High Court at Nairobi, 6 June 2016 [eKLR] para 38.

6 Mutuma Ruteere and Patrick Mutahi, 'Policing protests in Kenya', Centre for Human Rights and Policy Studies 2019, 1.

7 Ruteere and Mutahi, 'Policing protests in Kenya', 1.

order to its people.[8] Thus, instead of serving public interest as required, the police force often prioritised control and suppression, a legacy that seemed to linger even after independence.

The Kenyan police force also have a history of responding repressively to peaceful protests, which as Mutuma Ruteere asserts is deeply rooted in the fundamental structure of both the police force and the state itself.[9] Police interventions in protests having often been marked by fatalities, the use of indiscriminate force, firearm abuses, and unlawful arrests, all under the guise of maintaining law and order. In 1922, a group of Kenyan workers gathered to demand the release of Harry Thuku, who was then a political leader. By the end of the peaceful demonstrations, 100 people had been shot dead by the police for demonstrating.[10]

This tragic event marked one of the earliest and most brutal examples of police violence against unarmed civilians in Kenya, cementing a deep-seated mistrust in the police force that would resonate through future generations.

Political leaders have also used the police to advance their own interests, further exacerbating the problem of police brutality and impunity.[11] Notably, Kenya's first president, Jomo Kenyatta, was reported to having used police force to silence dissenting voices. A prime example was during the 1969 Kisumu Massacre when police fired into a crowd protesting the president's visit, killing at least 11 people.[12] More of the same brutality was experienced during the start of multi-partyism during the late President Moi's tenure. During protests against electoral injustices following the 2007 presidential elections, police brutality escalated dramatically. Reports indicated that over 1,200 people were

8 Joan Kamere, 'The psychology of misconduct in the Kenyan police', *The Elephant*, 3 July 2024.

9 Ruteere and Mutahi, 'Policing protests in Kenya', 1.

10 Gilbert Mwangi, 'Remembering Muthoni Nyanjiru and the women who helped fight colonialism', *The Standard*, 22 March 2022.

11 Ruteere and Mutahi, 'Policing protests in Kenya', 1.

12 Anokhee Shah, 'Reopening old wounds, the never-ending tale of police brutality', *Lacuna Magazine*, 24 March 2021.

killed during this period, with many fatalities attributed directly to police shootings.[13]

These repressive responses were sharply scrutinised following the violence that erupted after the 2007 presidential election results were announced. The Commission of Inquiry into Post-Election Violence (CIPEV), found that the police's management of the 2007 demonstrations was 'inconsistent with basic legal provisions, jeopardised citizens' lives, and often involved grossly unjustified use of deadly force'.[14] These instances show that there has been a consistent misuse of power by the police officers, often orchestrated by the executive, at the peril of Kenyan citizens.

The Finance Bill, 2024 protests and a search for sovereignty

The June 2024 protests against the Finance Bill, 2024 have exposed a troubling disconnect between Article 37's constitutional guarantee and the reality of state tyranny. Police response to these protests, characterised by excessive force, including the use of live ammunition, torture, and abductions, raises critical questions about the protection of people's liberties and the genuine exercise of sovereignty by the Kenyan people.

Introduced in the National Assembly on 9 May 2024, the Finance Bill of 2024 aimed to tax essential commodities amidst a sluggish economy.[15] This move was widely viewed as unfair and punitive, especially for those already burdened by the high cost of living. Randy Barnett's assertion that resistance signifies a lack of government consent is par-

13 Shah, 'Reopening old wounds, the never-ending tale of police brutality'.

14 Commission of Inquiry into Post-Election Violence, the Waki Report, Part IV, 417; see also Martin Mavenjina, 'Protest in Kenya: Repressive and brutal policing has become normalised', Open Democracy, 3 December 2017.

15 Power Shift Africa, 'Explainer: Finance Bill 2024 chaos. How did Kenya get here?', 28 June 2024. For a detailed view of some of the taxes proposed see, Mercy Jebaibai, 'Highway or high cost? Unpacking the implications of Kenya's motor vehicle tax reform', *Kabarak Law Review Blog*, 14 July 2024.

ticularly relevant when examining the recent protests.[16] The widespread demonstrations were not just a display of dissatisfaction but a profound statement by the Kenyan youth, signalling their rejection of a government policy perceived as unjust and burdensome. Beyond the desire for an end to suffering from heavy taxation, unemployment, and blocked social mobility, most Kenyan youths embraced this unity of purpose, seeing a need to address their needs in a free democratic space.

The forceful police response, characterised by violence and repression, further highlighted the disconnect between the government and the governed, reinforcing Randy Barnett's argument that true consent cannot be coerced but must be freely given and maintained through just governance.

The protests against the Finance Bill of 2024 represented a critical moment in which the youth of Kenya sought to reclaim their sovereignty and assert their rights within a system that has historically marginalised their voices through police brutality during demonstrations. This struggle for genuine sovereignty was not merely about opposing specific policies in the Bill; but it later morphed to also challenging a broader system of governance that perpetuates inequality and alienation.[17] In *The law*, Frederic Bastiat posits that 'men naturally rebel against the injustice of which they are victims'.[18] This encapsulates the essence of the struggle for genuine sovereignty; justifying inherent human response to injustice and the lengths to which individuals and groups will go to reclaim their rights and influence the systems that govern them.

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16 Randy E Barnett, *Restoring the lost constitution: The presumption of liberty*, Princeton University Press, 2004, 21.

17 Wycliffe Muia, 'New faces of protests - Kenya's Gen Z anti-tax revolutionaries', *BBC News Nairobi*, 20 June 2024.

18 Fredrick Bastiat, *The law*, 1850, Translated from French by Dean Russell, Foundation for Economic Education, 1998, 7.

Police responses during the Finance Bill, 2024 protests

Using live ammunition

The Constitution of Kenya 2010 guarantees every person the right to picket and demonstrate and the right to life which remains inherent and can only be deprived lawfully.[19] However, many police officers have become oblivious to this fact, and have taken it upon themselves to shoot protesters.[20] On 20 June 2024, Rex Kanyike was allegedly shot and killed by a police officer during the Finance Bill protests on his way home from work.[21] It was reported that police fired live ammunition at protestors, killing and injuring many despite human rights groups raising concerns on the conduct of police.[22]

In Nairobi alone, Amnesty International reported that more than 200 individuals suffered gun wound injuries while some were referred for specialised treatment in hospital.[23] The Kenya National Commission on Human Rights (KNCHR) indicated to having recorded twenty-two deaths and 300 injured victims.[24] A young boy was also caught up in the fracas, shot eight times and killed instantly by police, as state law enforcers strived to contain the anti-finance bill protesters.[25] Paradoxically, the National Police Service Act decrees that a police officer shall make every effort to avoid the use of firearms, especially against children.[26]

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19 Constitution of Kenya (2010) Article 26(3) and Article 37.

20 Thomas Mukoya and Monicah Mwangi, 'One killed as Kenyan anti-government protests intensify again', *Reuters*, 17 July 2024.

21 Daniel Ogetta and Winnie Onyando, 'Rex Masai: What went wrong? Mystery of night bullet that claimed young life', *Nation*, 21 June 2024.

22 Deutsche Welle (DW), 'Kenya: Police fire live rounds amidst tax protests,' 25 June 2024.

23 Ogetta and Onyando, 'Rex Masai: What went wrong? Mystery of night bullet that claimed young life'.

24 France 24, 'Kenya's Ruto says tax bill to be withdrawn after anti-protest deaths', *France 24*, 26 June 2024.

25 Nyaboga Kiage, 'Anti-tax protests: Kin of boy shot 8 times in Rongai seek justice', *Nation*, 5 July 2024.

26 National Police Service Act (No 11A of 2011) Sixth Schedule, B (3).

The National Police Service Act serves as a cornerstone for policing in Kenya, establishing a comprehensive legal framework aimed at transforming the police from a force into a service that is accountable, community-oriented, and respects human rights.[27] The Kenya police includes, *inter alia*, the Kenya Police Service, the Administration Police Service, and the Directorate of Criminal Investigations.[28] The Internal Affairs Unit also plays a role in police oversight. [29] Separately, the Independent Policing Oversight Authority (IPOA) was established under its own legislation to provide civilian oversight of police conduct, ensuring accountability and transparency in their operations.[30]

Torture and abductions

Torture has been defined as '…any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person…'.[31]As the Finance Bill demonstrations morphed into anti-government protests, one Denzel Omondi's body was found dumped in a quarry, Denzel Omondi was allegedly abducted by police after the finance bill protests.[32] In a similar case, Joshua Okayo, a student leader from the Kenya School of Law, shared a harrowing account of his abduction and torture owing to his role in the Finance Bill demonstrations.[33] The International Commission of Jurists – Kenya (ICJ-K) also demanded

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27 National Police Service Act, Section 3.

28 National Police Service Act, Section 4.

29 This is through their power to investigate police misconduct and recommend action to IPOA. See Release Political Prisoners Trust, 'Your guide to: the National Police Service Act, the National Police Service Commission Act and the Independent Policing Oversight Authority Act', *Release Political Prisoners Trust*, June 2012, 26.

30 Independent Policing Oversight Authority Act (No 35 of 2011) Section 5(b).

31 Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Article 1.

32 'JKUAT students hold demos over abduction and death of Denzel Omondi,' *Citizen TV* Kenya, 12 July 2024, 0:01 to 0:20.

33 'Rais wa chuo cha Kenya School of Law – Joshua Okayo, asimulia alivyotekwa nyara na polisi kwa kushiriki maandamano,' *NTV Kenya*, 9 July 2024, 9 July 2024, 5:53 to 14:53.

and called for an end to police brutality and torture.[34] Additionally, the chair of the Law Society of Kenya confirmed that there had been incidents of police abducting protesters, torturing them, and holding some incommunicado for several days.[35]

This backdrop of police brutality raised critical questions about the facade of a people's sovereignty. While the Constitution asserts that all sovereign power belongs to the people, the violent suppression of peaceful protests suggested a disconnect between constitutional ideals and the lived experiences of citizens. As the Kenyan populace grapples with the implications of such police actions, it becomes imperative to critically analyse police conduct and the protection of civil liberties, among them being the National Police Service Act, 2011 that governs the behaviour of the police when using a firearm. In Agenda No 4 of the National Dialogue and Reconciliation Agreement, police reforms were among the long-term measures and solutions identified as needed to promote peace and reconciliation in the country.[36]

Kenyan youth exercise of democracy versus the government's continual abnegation of duty through police brutality

For the youth in Kenya, democracy is seen to represent more than just a system of governance; it is a powerful tool for transformation and progress. It provides young people with a platform to voice their ideas, advocate for their rights, and actively participate in shaping the future of their nation. Through democratic processes, the youth can challenge the status quo, drive social and political reforms, and push for policies that address their unique challenges. As agents of change, they play a crucial role in ensuring that democracy continues to evolve, reflecting

[34] Sophie Opondo, 'ICJ [sic] commands release: DCI and Police IG ordered to produce detained Finance Bill protesters', *TV47 digital*, 22 June 2024.

[35] X communication from Faith Odhiambo, 'Law Society of Kenya statement on the state of the nation', 25 June 2024.

[36] Christopher Gitari Ndung'u, 'Failure to reform: A critique of police vetting in Kenya', *International Centre for Transnational Justice*, 21 November 2017.

the aspirations and needs of future generations. Through social media, technology played a dual role in shaping the political discourse among Kenyan youth. While it served as a platform for mobilisation and expression, it was exemplified by movements like #Tribeless #Leaderless and #Partyless.[37]

The introduction of the contentious Finance Bill of 2024 thus provided many Kenyan youths an opportunity to exercise their right to protest from the heavy taxation imposed by the Finance Bill. Unity has been described as one of the most important aspirations of Africans especially unity across contemporary political frontiers.[38] And it so happened that on 18 June 2024, in a powerful display of unity, a number of Kenyan-youth in major cities, marched to the streets, peacefully demonstrating against the bill and exercising their democratic right to demonstrate and picket. [39] What started as anger on social media spaces – TikTok, Facebook and X – morphed into a street revolt with the youth armed with only their cell phones, live-streaming the intense confrontations with the police.[40] This became a defining moment to assert their voices and fight for a free democratic space. Their collective action underscoring the enduring power of peaceful protests in driving change.

The disconnect between the government's obligation to uphold democratic rights and the reality of police brutality is a critical issue that undermines the very foundations of democracy in Kenya. This is because Article 37 explicitly reflects the government's obligation to protect civil liberties. However, the persistent incidents of police violence during protests starkly contrast this constitutional promise, revealing a troubling gap between legal frameworks and their implementation.

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37 Africa Uncensored, 'Kenya protests: Gen Z show the power of digital activism – driving change from screens to the streets', June 2024.

38 Leslie Rubin and Brian Weinstein, *Introduction to African politics: A continental approach*, Praeger Publishers, 1977, 191.

39 Constitution of Kenya (2010) Article 37.

40 Muia, 'New faces of protests'.

This discrepancy manifests in various forms, including the excessive use of force, arbitrary arrests, and even torture. Such actions not only violate individual rights but also instil fear among citizens, discouraging them from exercising their constitutional rights to dissent and assemble. The brutal tactics employed by law enforcement serve to reinforce a culture of repression, where the state prioritises control over the protection of fundamental freedoms.[41]

Moreover, this disconnect raises critical questions about the accountability mechanisms in place for the law enforcement officers. The lack of effective oversight and the absence of stringent consequences for police misconduct contribute to a climate of impunity, where officers may act without fear of repercussions. This situation not only erodes public trust in the police but also undermines the legitimacy of the government, as citizens perceive a failure to uphold their rights.

Conclusion

The recent protests against the Finance Bill, 2024 underscored the critical importance of upholding the right to peaceful assembly enshrined in Article 37 of the Constitution. The violent police response to these demonstrations not only violated fundamental human rights but also highlighted systemic issues within the law enforcement framework that threatened the principles of democracy and the rule of law.

It is imperative that comprehensive reforms are implemented within the police force, emphasising accountability, human rights training, and adherence to constitutional protections. When police use methods that do not mete out brutal force to protestors, Kenyan citizens can be empowered to actively participate in governance, ensuring that sovereignty truly resides with the people.

41 Catherine Wambua-Soi, 'Kenya is not asleep anymore: Why young protesters are not backing down', *Al Jazeera*, 24 July 2024.

In the end, the true measure of Kenya's democracy will be defined not by the absence of dissent, but by the strength of its commitment to justice and the unwavering belief that every voice can ignite the flame of change; while resolutely putting an end to police violence that seeks to silence the very essence of our democratic spirit.

A critique of the High Court's ruling in *FOA v RAO and 2 others* in reinstating Section 12 of the Births and Deaths Registration Act

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Abstract

This case review critically examines the High Court's decision in FOA v RAO and 2 others, which authorised the removal of a father's name from a birth certificate after questioning the petitioner's biological paternity. The case relies on Section 12 of the Births and Deaths Registration Act, a provision the High Court invalidated in LNW v Attorney General and 3 others, marking a troubling judicial departure that revives the application of an unconstitutional provision. Hence, this paper explores the inconsistencies in judicial reasoning regarding the rights of children born out of wedlock, focusing on the implications of the unconstitutionality of Section 12 of the Births and Deaths Registration Act.

Keywords: Birth and Deaths Registration Act, judicial reasoning, unconstitutional provisions, *stare decisis*

* *Contributions to the 'Case commentary section' are single blind reviewed.*

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Introduction

The question of identity – who one is, particularly in familial terms – serves as a fundamental element of human existence.[1] For many, the inquiry into paternity is a simple matter; for others, it can lead to profound emotional and legal dilemma. This case review explores the legal reasoning and consequent implications stemming from the High Court's decision in *FOA v RAO and 2 others*,[2] juxtaposing it against the earlier ruling in *LNW v Attorney General and 3 others*.[3] The central question being; how does the court's recent ruling affect the rights of children born out of wedlock and the constitutional principles designed to protect them?

In *FOA v RAO,* the court grappled with the legitimacy of removing a father's name from a child's birth certificate after doubts surrounding biological paternity emerged. While the court's decision to recognise the need for removing the name of a non-biological father aligns with the best interests of the child, it paradoxically relied on the controversial Section 12 of the Births and Deaths Registration Act[4] – a provision that was previously deemed unconstitutional in *LNW v Attorney General*.[5] This reliance not only revives an invalidated statutory provision but also raises critical concerns regarding the judicial precedent and the doctrine of *stare decisis*.

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1 Martin Woodhead and Liz Booker, 'A sense of belonging', *Early childhood matters,* 2008, 3.

2 *FOA v RAO and 2 others,* Miscellaneous Civil Application E195 of 2023, Ruling of the High Court at Kisumu, 10 June 2024 [eKLR].

3 *LNW v Attorney General and 3 others; Kenya National Commission on Human Rights (KNCHR) (Amicus Curiae); Law Society of Kenya (Interested Party)*, Petition 484 of 2014, Judgement of the High Court at Nairobi, 26 May 2016 [eKLR].

4 Section 12 of the Births and Deaths Registration Act provides that no person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognised custom.

5 *LNW v Attorney General and 3 others,* para 111.

This case review is structured to examine the implications of the ruling in *FOA v RAO* on the rights of children born out of wedlock, scrutinising the constitutional and legal inconsistencies that arise from the court's approach. First, it will provide a hypothetical background that provides an example of the lived realities of children in Kenya who undergo this challenge which will form a basis of the discussion. Second, it will analyse how the court's interpretation of Section 12 conflicts with the constitutional protections afforded to children under Articles 27, 28, and 53 of the Constitution of Kenya (2010). Third, the discussion will illuminate the administrative and procedural challenges that render the court's directive impractical. Finally, this critique will address the implications of relying on outdated and unconstitutional legal provisions, ultimately arguing for a consistent application of constitutional protections and the necessity for legislative reform to safeguard the rights of all children. Through this analysis, this case review aims to advocate for a legal system that not only recognises but also actively protects the identity and rights of all children, irrespective of their circumstances of birth.

Hypothetical background of Maina and his mother Wanjiku

Imagine an innocent seven-year-old boy. For purposes of identification let us call him Maina as it is his constitutional right.[6] Maina has just returned from school where, during a show-and-tell session, his friend proudly displayed a family tree project. Maina, eager to replicate the same, asks his mother, 'Mummy, who is my father?'. His mother, startled and saddened, can only glance at the row of continuous X marks on the birth certificate where the father's name should have been. The innocent question hangs in the air, heavy with unspoken truths and societal judgments. Maina's wide, curious eyes gaze up at her mother, Wanjiku, who feels her heart constrict with a mixture of love, pain, and frustration. How can she explain to her son that the law – the very sys-

[6] Constitution of Kenya (2010) Article 53(1)(a).

tem meant to protect and serve its citizens – has deemed Maina's existence less worthy of recognition than his peers?

Wanjiku's mind races back to that fateful day at the registry office. She had gone, full of hope, to register Maina's birth, only to be met with cold bureaucracy and archaic legislation. The registrar's words still echo in her ears, 'I am sorry, madam, but according to the Registration of Births and Deaths Act, Section 12, we cannot enter the father's name without the consent of both parents or proof of marriage'. As Wanjiku looks into her son's eyes, she sees not just curiosity, but the reflection of countless other children born out of wedlock across Kenya – children whose identities have been partially erased by a stroke of the legislative pen, their rights diminished simply because of the circumstances of their birth.

If Maina and Wanjiku had not just existed in my head, that would have been their experience eight years ago. That was before the High Court pronounced Section 12 of the Registration of Births and Deaths Act unconstitutional in *LNW v Attorney General and 3 others*.[7] The finding of the court was founded on the inconsistency of the Section with Articles 27, 28 and 53 of the Constitution of Kenya (2010) because of its discrimination against children born out of wedlock and its failure to respect the inherent dignity of such children by failing to recognise that every child has a constitutional right to a name.

This finding was further reiterated in *NSA and another v Cabinet Secretary Ministry of Interior and Coordination of National Government and another*.[8] Nevertheless, the High Court in a recent ruling, *FOA v RAO and 2 others* departed from its previous finding and relied on the long-repudiated provision. This ruling reignites the debate over the rights of children born out of wedlock and the role of the judiciary in protecting those rights.

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7 *LNW v Attorney General and 3 others*, para 111.

8 *NSA and another v Cabinet Secretary Ministry of Interior and Coordination of National Government and* another, Petition 17 of 2014, Judgement of the High Court at Kakamega, 7 February 2019 [eKLR] para 62.

The return of Section 12 of the Births and Deaths Registration Act in *FOA v RAO and 2 others*

In the case, *FOA v RAO and 2 others*, FOA, a man hailing from Kisumu County, sought to erase his name from the birth certificate of a child, JMO, who he once believed to be his own. Initially convinced by his former lover, RAO, of his paternity, FOA had dutifully inscribed his name on the child's birth certificate. However, doubts gnawed at him, prompting a clandestine DNA test that shattered his assumptions: he was not the father. RAO vehemently disputed this, asserting that their relationship and co-parenting had been harmonious and that the DNA test, performed without her consent on their autistic child, was invalid. Amidst legal skirmishes and missed court dates by RAO, a second DNA test was done which only corroborated the first. The Court, granted FOA's plea to sever his legal ties to the child.

At paragraph 25, the Court noted that the applicant admitted to allowing his name to be used for registering the child during the issuance of the Birth Certificate. However, the Court found no evidence of a joint request for including his name as the child's father in the register of births, as required by Section 12 of the Births and Deaths Registration Act.[9] Further, at paragraph 30, the Court cited the outdated and unconstitutional Section 12 of the Births and Deaths Registration Act and ordered JMO's birth certificate to be recalled. It then directed the second and third respondents to issue a new birth certificate for JMO under the provisions of Section 28(1) and (2) of the Births and Deaths Registration Act, with or without the name of JMO's biological father.[10]

The Court's decision to order the correction of the minor's birth certificate by removing the erroneously listed father's name was ultimately correct. This action aligns with the best interests of the minor, as established by legal precedent. In *FKK and another v Attorney General*

[9] Births and Deaths Registration Act (Chapter 149) Section 12.

[10] *FOA v RAO and 2 others*, para 25-31.

and others,[11] the applicants sought the removal of the second applicant's name from the birth certificate after a DNA test confirmed that the second applicant was not the biological father of AKM, the minor. The child's mother, FKK, had registered the birth and named KLM, the second applicant, as the father, under the belief that he was the biological parent. Following the revelation of the DNA test results, both applicants requested the Court to amend the birth certificate. The court granted this request, affirming that the correction served the child's best interests.[12]

However, in *NSA and another v Cabinet Secretary Ministry of Interior and Coordination of National Government and another*, the Court rejected the first petitioner's prayer for an order directing the first respondent to reissue the first petitioner's children with new birth certificates bearing the name of their father. The Court held that before such names (names of fathers of children born out of wedlock) are entered into the register there has to be some regulations in place.[13] This was after the Court had found Section 12 of the Births and Deaths Registration Act unconstitutional.

The Court relied on the judgement of Lady Justice Mumbi Ngugi in *LNW v Attorney General and 3 others*, the case that had initially declared Section 12 of the Registration of Births and Deaths Act unconstitutional. When the Lady Justice Mumbi Ngugi invalidated the provision of Section 12 of the Births and Deaths Registration Act, she directed the Registrar of Deaths and Births, the second respondent, to within forty-five (45) days, put into place mechanisms to facilitate the entry into the birth register of names of the fathers of children born outside wedlock.[14]

Regretfully, the same has not been complied with eight years down the line. Bearing this in mind, in line with the provision of Section 28 of the Births and Deaths Registration Act that mandates the Principal

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11 *FKK and another v Attorney General and 2 others*, Civil Suit No 3 of 2014, Ruling of the High Court at Nairobi, 19 November 2014 [eKLR].

12 *FKK and another v Attorney General and 2 others*, 2.

13 *NSA and another v Cabinet Secretary Ministry of Interior and Coordination of National Government and another*, para 60.

14 *LNW v Attorney General and 3 others*, para 117.

Registrar to correct any errors in any register or index but not erase the original entry, and the orders made in *FOA v RAO and 2 others*, it would be impossible to implement the order directing the second and third respondents to issue a new birth certificate for JMO, with or without the name of JMO's biological father.[15]

Practical implications and administrative challenges of enforcing the court orders

The enforcement of the order to issue JMO a new birth certificate with or without the biological father's name raises significant practical implications and administrative challenges. First, if the second and third respondent were to issue JMO a new birth certificate with the name of his biological father, what procedure would be followed? Section 28 of the Births and Deaths Registration Act allows the Principal Registrar to correct any error or omission in any register or index, provided the Births and Deaths Registration Rules, 1996 are followed and the prescribed fee is paid (which the Principal Registrar may waive at their discretion in specific cases).[16]

These corrections must be made without erasing the original entry and must be authenticated by the Principal Registrar's signature.[17] These rules only lay out the procedure for registering new births,[18] and new deaths,[19] but do not lay out the procedure for the correction of an error.

This observation was also made by Lady Justice Rose Ougo in *FKK and another v Attorney General and 2 others*.[20] Therefore, if the name of the biological father is to be included, the lack of clear regulations and

15 Births and Deaths Registration Act, Section 28(1) and (2).
16 Births and Deaths Registration Act, Section 28(1).
17 Births and Deaths Registration Act, Section 28(1).
18 Births and Deaths Registration Rules (1996) Part III.
19 Births and Deaths Registration Rules (1996) Part IV.
20 *FKK and another v Attorney General and 2 others*, 2.

mechanisms to facilitate this inclusion, means that the implementation of such an order is fraught with uncertainty and potential administrative chaos.[21] This not only burdens the Principal Registrar but also sets a precarious precedent for future cases, where similar orders might be issued without the necessary legislative and administrative frameworks in place.

A quintessential case illustrating the labyrinthine technicalities encountered in rectifying errors on birth certificates is *HBAAA and another v Registrar of Births*.[22] In this matter, the petitioners sought the removal of an incorrect entry of the father's name of their child, HH and substitution with the correct name. The error originated when the minor's mother, the second petitioner, provided an inaccurate name while recuperating from a caesarean operation. Her condition impeded her ability to furnish precise information during the registration process. Despite persistent attempts to amend the error, the registrar steadfastly refused, insisting on a court order. Even after the first petitioner established paternity through a DNA test, upon request by the registrar, the registrar's resistance persisted, necessitating judicial intervention to resolve the matter. Ultimately, it was only through litigation that the applicants found relief.

Conversely, in the case at hand, if the second and third respondents were to issue JMO a new birth certificate without the name of his biological father, then that would open the floodgates of numerous violations of the child's rights enshrined in the Constitution of Kenya (2010) and other instruments.[23]

Every child has the right to a name which assigns the child an iden-

[21] This was highlighted in *NSA and another v Cabinet Secretary Ministry of Interior and Coordination of National Government and another,* para 60.

[22] *HBAAA and another v Registrar of Births*, Miscellaneous Application E15 of 2021, Judgement of High Court at Nairobi, 2 December 2022 [eKLR].

[23] Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, Articles 7 and 8; African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49 (1990), Article 6; General Comment No: Article 6 on the right to a name, registration at birth, and to acquire a nationality, 16 April 2014, ACERWC/GC/02 (2014), ACERWC.

tity.[24] One might ask, what is a name? As answered elsewhere with regards to children born out of wedlock, it is everything.[25] Erasing the father's name from the child's birth certificate is equivalent to partially erasing the identity of the child.[26] Having a father's name on a child's birth certificate guarantees the child that they shall be cared for by both parents.[27] It also creates a bridge to access and enjoy a host of rights and privileges which cannot be enjoyed by a child who does not know who the father is. For example, the right to inherit property from both parents.

A father's name also creates a foundation for nationality and citizenship for the child in a situation where the mother is not a Kenyan citizen.[28] Furthermore, it is in the best interests of a child to know who their father is. In *Re R (a Child) (Surname: Using Both Parents')*, the court held that a child has the right to know about their parentage.[29] This has now developed to be an internationally recognised right.[30]

Implications of judicial inconsistency from the case

The ruling in *FOA v RAO and 2 others* starkly contrasts with the progressive stance the High Court has taken in *LNW v Attorney General and 3 others* and, *NSA and another v Cabinet Secretary Ministry of Interior and*

24 Constitution of Kenya (2010) Article 53(1)(a).

25 Susan Kimani, '*LNW v Attorney General, Registrar of Births and Deaths and 2 Others (Petition No 484 of 2014)*', *AfricanLii*, 23 August 2016.

26 Brian Machina, 'Promoting the best interests of the child: Kenyan High Court breathes life into the right to a name and an identity', *Oxford Human Rights Hub* (*OHRH) Blog*, 28 September 2016.

27 *LNW v Attorney General and 3 others*, para 110 and 105.

28 Article 14(1) of the Constitution of Kenya 2010 provides that a person is a citizen of Kenya by birth if on the day of the person's birth, either the mother or father of the person is a citizen. In a situation where the birth certificate of the minor does not indicate the father's name, who is Kenyan, then the child will not be recognised as a citizen by birth if the mother is not Kenyan. For a longer discussion, see, Julie Lugulu, 'The child's right to a nationality in Kenya under the Children Act of 2022', 7 *Kabarak Journal of Law and Ethics* (2023) 53-68.

29 *Re R (a Child) (Surname: Using Both Parents')* [2001] EWCA Civ 1344, para 14.

30 See, Convention on the Rights of the Child, Article 7.

Coordination of National Government and another. In the latter cases, the Court upheld the rights of vulnerable individuals and set a precedent to protect the constitutional rights of children. By relying on Section 12 of the Registration of Births and Deaths Act, the Court not only resurrected an unconstitutional provision that should have remained a legislative ghost, but also undermined the earlier jurisprudence that sought to safeguard the fundamental rights of children. This decision is akin to reopening legislative wounds that the High Court has previously sought to heal through a judicious interpretation of the law. It regresses from the path of justice and equality, leaving children vulnerable to the very injustices that the court had previously worked to rectify. Such inconsistency perpetuates a cycle of legal uncertainty and social injustice.

To comprehend the gravity of this judicial regression, we must first revisit the constitutional principles that were upheld in *LNW v Attorney General*. Articles 27, 28, and 53 of the Constitution of Kenya (2010) which enshrine the rights to equality, dignity, and protection of every child. The High Court's declaration of Section 12 as unconstitutional was a beacon of hope, signalling a shift towards a more inclusive and just society. The provisions set out in Section 12 of the Births and Deaths Registrations Act were discriminatory to children born out of wedlock. This judgement recognised that every child, irrespective of the circumstances of their birth, deserves recognition and protection under the law.

Disregarding these constitutional protections, the court in *FOA v RAO and 2 others* puts the children born out of wedlock in harm's way. Moreover, the ruling is troubling as it disregards the doctrine of *stare decisis*, which upholds the consistency and predictability of the law. Judicial decisions are meant to build upon each other, creating a coherent and stable legal framework. When a court departs from an established precedent without a compelling justification, it shows confusion and uncertainty.[31] In this case, the High Court's decision to reference and apply Section 12, despite its prior invalidation, destabilises the legal pro-

[31] *Housen v Nikoaisen* (2002) 2 SCR as cited in *Geoffrey Asanyo and 3 others v Attorney General*, Petition 7 of 2019, Judgement of the Supreme Court at Nairobi, 10 January 2020 [eKLR] para 26.

tections for children born out of wedlock. This inconsistency not only erodes public confidence in the judiciary but also signals to lower courts that adherence to previous precedence is optional.

The legislature should repeal the unconstitutional provision

In legal discourse, it is often assumed that when a court declares a statute unconstitutional, that statute is effectively nullified.[32] Judges and public officials frequently use terms like 'struck down' or 'void' to describe the court's decision, as if the offending law is immediately erased from the statute books.[33] This perception, however, is a misconception. While a court may declare a statute or certain provisions unconstitutional, this judicial declaration does not erase the law from existence. The statute remains on the books until it is formally repealed by the legislative body that enacted it.[34]

The notion that courts possess the power to 'strike down' laws is deeply ingrained in our legal and political culture. Yet, the judiciary does not have the authority to veto, suspend, or physically remove a statute from the statute books. Courts can refuse to enforce a law in a specific case, but the statute continues to exist until the legislature decides otherwise. Consequently, laws deemed unconstitutional by judicial opinion often linger in the legal system, unaddressed and unenforced, but still technically in force.

The responsibility for formally repealing unconstitutional provisions lies with the legislative branch, not the judiciary. Despite courts occasionally directing the Attorney General to take action to rectify unconstitutional statutes, these directives are not always implemented on time. As a result, unconstitutional laws can continue to masquerade as valid, undermining the integrity of our legal system. It is imperative that lawmakers act decisively to eliminate these remnants of unconstitu-

32 Jonathan F Mitchell, 'The writ-of-erasure fallacy', 104(5) *Virginia Law Review* (2018) 3.

33 Mitchell, 'The writ-of-erasure fallacy', 3.

34 Mitchell, 'The writ-of-erasure fallacy', 3.

tional legislation. They must ensure that all legal provisions reflect and uphold the constitutional principles of equality, dignity, and protection for all individuals. This is not just a matter of legal correctness but a moral imperative to safeguard the rights and freedoms of every citizen. Courts must also unequivocally reject reliance on invalidated laws and instead draw upon the progressive principles established by precedent, fostering a just and equitable legal system.

Conclusion

In examining the High Court's ruling in *FOA v RAO and 2 others*, this case review underscores a significant problem in the legal framework governing paternity and the registration of births: the need for clarity and constitutional adherence in protecting the rights of children born out of wedlock. The ruling raises the essential question about the implications of reviving an unconstitutional provision from the Births and Deaths Registration Act, which not only undermines previous judicial decisions but also threatens to erode the legal protection that safeguards the identity and rights of children.

This review has shown that the High Court's reliance on outdated legal provisions is inconsistent with the principles enshrined in the Constitution, particularly concerning the rights of children under Articles 27, 28, and 53. By situating its decision within a problematic legal context, the court risks perpetuating systemic injustices that affect children and their families.

To protect the rights of all children, there is an urgent need for legislative reform that aligns birth registration processes with the constitutional mandate. Such reform should aim to create a clear, fair, and consistent legal framework that acknowledges the diverse realities of modern families. By doing so, the law can foster a more inclusive environment where every child is recognised and protected, ultimately reinforcing the foundational principles of justice and equality in our society.