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An African Union fit for the next 25 years?

Reflecting on the first

KABARAK LAW REVIEW

Volume 4 (2025)

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Foreword

Judge Ben Kioko*

It was with immense honour and gratitude that I accepted the invitation of the student editors of *Kabarak Law Review* Volume 4 (2025) to write this Foreword.

As noted by James Thuo Gathii, '*Kabarak Law Review* has emerged as an important scholarly journal publishing cutting edge scholarship from its students, faculty and leading scholars'.[1]

During the webinar held on 7 August 2025, marking the 'International Law Month at Kabarak 2025: Reflecting on 25 years of the African Union Constitutive Act', I was honoured to deliver a presentation on the drafting history, legal philosophy, adoption and early implementation process of the Constitutive Act, which is featured in this volume. Professor Hajer Gueldich, AU Legal Counsel made a presentation on the first 25 years of the AU Constitutive Act. Ibrahima Kane, independent consultant, former Head of AU Advocacy at Open Society Foundation presented on the Governance Architecture under the AU Constitutive Act. Additionally, Dr Apollin Koagne Zouapet, Legal Officer, International Court of Justice presented on 'The AU Constitutive Act and the progress of an "African international law" or African approaches to international law'. Mr Don Deya, Chief Executive Officer of Pan African Lawyers Union made the closing remarks. Noteworthy, the session was

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* Former AU Legal Counsel (2001-2012); Judge (2012-2024) and Vice President (2016-2021) at the African Court on Human and Peoples' Rights.

1 'Foreword: *Kabarak Law Review* as a vanguard of radical legal scholarship', 2 *Kabarak Law Review* (2023) vii.

ably moderated by Elvis Mogesa Ongiri, a student at Kabarak University Law School, who also serves as Editor-in-Chief of the student-led *Kabarak Law Review* (2025).

Although I have not set foot at Kabarak Law School, from my interactions with some faculty members and students, I got the sense that it must be an exciting place to be as students are not only engaged in research production but also play a critical role in the organisation and management of seminars and conferences. The fact that the articles in this volume are authored predominantly by students is a powerful testament to the vibrant intellectual life of Kabarak Law School community. Kabarak University Press (KABU Press) is also distinguishing itself as a notable publisher of academic writing.

I have also learned that in terms of the physical space, Kabarak Law School is a state-of-the-art facility comprising of two magnificent auditoriums, two Supreme Court level moot courtrooms, research centres, several ultra-modern classrooms and an outdoor amphitheatre. I believe that every lawyer of our generation would wish that as students they had been exposed to such facilities and more importantly to research production and conference management, which are innovative and effective methods of learning and enquiry.

I must confess that when I postulate that Kabarak Law School must be an exciting place for students, my judgment may be clouded by other extraneous considerations. Chief among these is the fact that my most favourite teacher and an accomplished scholar and practitioner of international repute, a principled man and a reformer in the person of Professor Willy Mutunga CJ, is associated with this School. I am also aware of the immense work done by other members of faculty including Professor John Osogo Ambani, Humphrey Sipalla, Melissa Mungai and others.

The strength of this law review lies in the critical role that Kabarak Law School students have taken in advancing legal scholarship through rigorous research, thoughtful analysis, and dedicated effort, showcasing their intellectual curiosity and sophisticated legal reasoning. From

being passive recipients of knowledge, they have emerged as dynamic producers of original research, challenging existing paradigms and contributing fresh perspectives to complex legal debates.

For example, Raphael Okochil's article on the African Union and south-south cooperation in the Israel-Palestine conflict, examines a topical issue that has been predominant in the media especially in the last two years. Undoubtedly, this conflict along with the Russian/Ukraine war, has demonstrated the limitations and shortcomings of the international legal order as we know it and how dependent it is on the good will of states to play by the rules.

If international law is built on a system of norms, values, and standards that govern the interactions between states and other international actors, what is the recourse when a state or a group of states flagrantly disregard them or fail to take up their obligations under international law? If some states can fragrantly disregard their treaty obligations, why would others be expected to respect them? And how does this situation impact on the future of international law?

These two conflicts must have been in the back of the mind of Udo Jude Ilo, presently Chief Executive Officer at the Hague Institute for Innovation of Law (HiiL), when he asserted that '*we are now in a situation where the identity of the aggressor or the identity of the victim determines how the world responds, and you cannot maintain an international framework of protection if it is available à* la carte'.[2]

While the article is very well researched, I would suggest that since the position of African Union is determined by the Assembly of Heads of State and Government (the supreme organ of the Union), future enquiry on this issue could be directed at whether the Assembly has been consistent on the Palestine question since the time when the Palestine Liberation Organisation (PLO) was granted a unique and special status within the Organisation of the African Unity (OAU), with the exception-

[2] See, Patrick Wintour, 'Why US double standards on Israel and Russia play into a dangerous game', *The Guardian*, Tuesday 26 December 2023 referring to Udo Jude Ilo's quote.

al right for the President of the PLO and later the Palestinian National Authority or his High Representative to address the Assembly at each of its ordinary sessions. A good starting point would be the 1975 landmark Assembly decision.[3]

Anopa Tamuka's similarly well researched article relating to the relations between the African Union and regional economic communities (RECs) speaks to a vexing issue that has defied a solution for many years, despite numerous studies, retreats, meetings and decisions at all levels. Resultantly, thousands of pages of situational reports and policy recommendations later, the magic bullet has been elusive as to how to balance and cohere the programmes and activities of the RECs as the building blocks of the Union with the overarching vision of continental integration.

As rightly observed by the author, there are many interests and tensions at play that have made a suitable formula difficult to come by. There is no doubt that if member states were to conjure the necessary political will, as they make decisions at the level of RECs and the AU, the differences on subsidiarity, lack of effective coordination and overlapping memberships that contribute to the current stalemate, would be quickly resolved.

The article by Sarah Muhonja Andambi on '"Don't agonise, organise": Analysing modern-day Pan-Africanist thought through Tajudeen Abdul-Raheem' evokes in me memories of my professional and personal interactions with this colossus of a man, whose convictions on how Africa should be organised and managed were unshakeable. The acknowledgement of the contribution of Tajudeen to Pan Africanist thought is very appropriate.

[3] See decision of Assembly of Heads of State and Government of the Organisation of African Unity, 'Resolution on the Question of Palestine', AHG/Res. 77 (XII), 12th Ordinary Session, Kampala, 1 August 1975, by which it asserted that the cause of Palestine is an African cause and that the PLO is the sole legal representative of the Palestine people and their legitimate struggle. Accordingly it undertook to provide full and effective support to the Palestine people in their legitimate struggle to restore their national rights, to work in all domains to concretise recognition of these rights and ensure respect for them. However, the commitment to sever political, cultural, and economic relations with Israel seems to have fizzled out.

Apart from the many contributions he has made, those who now enjoy easy access to Ethiopia have Tajudeen to thank for. During an open session of the AU Assembly, Tajudeen publicly challenged the then Prime Minister Meles Zenawi by demonstrating the absurdity of that country's restrictive visa policy for Africans, which resulted in a swift change not long after that. Tajudeen came out as a man on a mission who, like Martin Luther King Jr, did not seek to be a conformist.[4] His big shoes have never found a new wearer in the space of civil society engagement with the AU. For me personally, I will always remember him as the man who refused to refer to me by my name and stuck to his standard salutation of 'bureaucrat'.

In this volume, there are also articles relating to domestic law in Kenya and Cameroon. James Mulei's article, 'A reply to Tekin Saeko: From Kianjokoma to Kajiado, police brutality and the cross-border crisis of accountability' seeks to link Saeko's reflection on the killing of the Kianjokoma brothers to that of Pakistani journalist Arshad Sharif on 23 October 2022 at Kajiado, police brutality and the cross-border crisis of accountability in Kenya.

The faculty members at Kabarak University Law School that had the vision of unleashing the creative, research production and managerial skills of the students should be encouraged by the words of John Quincy Adams: '*If your actions inspire others to dream more, learn more, do more and become more, you are a leader*'.[5]

The students' proactive engagement in research and conference organisation, particularly in the inaugural African student-led law reviews conference held on 31 October 2025, reflects a profound dedication to legal excellence and a clear vision for the future of the legal profession. Moreover, the extraordinary student-driven initiatives have

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4 'I would rather be a man of conviction than a man of conformity', Martin Luther King Jr., *The autobiography of Martin Luther King, Jr.*, Clayborne Carson (ed), Warner Books Inc., 1998, 331.

5 This quote is generally attributed to Mr Adams who served as the sixth president of the United States from 1825 to 1829. Other sources however suggest it was wrongly attributed to him and the original author is unknown.

become a hallmark of Kabarak University Law School. This generation of legal scholars is not waiting for a seat at the table; they are building their own.

As a last note, I congratulate the Editorial Board of *Kabarak Law Review* for being accredited by the African Journals Online (AJOL). This is a huge feat!

My sincerest congratulations go to all the student authors, editors, and conference organisers whose contributions brought this volume to fruition. I am confident that readers will find the articles both informative and thought-provoking.

Johannesburg, November 2025

Foreword by the Dean

The *Kabarak Law Review* occupies a central place in my vision for the intellectual and pedagogical transformation of Kabarak University School of Law. From the outset of my deanship, I identified student publishing as a foundational academic habit – indeed, a keystone practice – with the power to reorient how students learn, how faculty teach, and how the School positions itself within the broader African and global legal academy. Alongside our other formative pillars – clinical legal education, mooting, simulated mediation and negotiation – student publishing offers a uniquely demanding yet profoundly enriching pathway into the world of ideas.

When executed with seriousness and integrity, student publishing embeds a culture of rigorous research, disciplined writing, and scholarly curiosity across the entire institution. It challenges students to approach law not merely as a collection of rules, but as a dynamic field of inquiry that demands analytical depth and intellectual leadership. It challenges faculty too, for it is impossible to teach students who are developing publication indices without renewing one's own scholarly commitments. Through this reciprocal pressure, student publishing elevates the quality of academic engagement throughout the School.

What we envisaged when establishing the *Kabarak Law Review* four years ago has been exceeded, by far. The journal has flourished with a speed, ambition and quality that few could have anticipated. Under the stewardship of exceptionally dedicated student editors, the *Kabarak Law Review* has become regular, robust and respected. Its contributors are drawn not only from our student body, as was our initial intention, but now include leading scholars and practitioners from across jurisdic-

tions. In its editorial culture, one finds lessons in leadership, excellence and self-discipline: only students of the highest calibre have joined its editorial board, and every one of them has grown intellectually and professionally through the experience.

The ripple effects within the School have been remarkable. The editors' weekly writing seminars have transformed student engagement with scholarship. Their achievements have energised the entire student body. Beyond our gates, *Kabarak Law Review* has begun to shape a continental community of emerging scholars, drawing in counterparts from other African universities and fostering an ethos of collaborative intellectual uplift. The recent conference organised by *Kabarak Law Review* to strengthen other student-run law reviews across Africa stands as a testament to their outward-looking vision and their belief in shared scholarly advancement.

Another important achievement is the accreditation of *Kabarak Law Review* at African Journal Online (AJOL). This is a testament of the robust commitment that these student editors have put in.

I could catalogue many more achievements, but the point is unmistakable: *Kabarak Law Review* has become one of our School's most treasured accomplishments. It embodies our aspirations, sharpens our academic culture, and reflects the best of what our students can achieve when given opportunity, guidance and responsibility.

To Prof (as I have prophesied) Elvis Mogesa Ongiri and your team of exceptional student editors, I extend my deepest gratitude. This new volume with the issue theme of 'Reflecting on 25 years of the African Union's Constitutive Act', is not merely another instalment; it is the icing on a magnificent and ever-growing cake of excellence. May the work of your hands continue to flourish.

God bless the *Kabarak Law Review*.
God bless Kabarak University.

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

Preface

Punches of an invisible fist, Part Two: Between despair and purgatorial dystopia

Humphrey Sipalla

In his scathing[1] 1986 critique of the then burgeoning African 'ivory tower', Okot p'Bitek decries the arrogance of African scholars, their attachment to a false exceptionalism and their inevitable lack of utility to African society in the following tongue lashing:

> [a] Kenyan historian, has, for example uttered what appears to me as arrogant words: 'For some reason best known to themselves, many members of the public think that anybody can study and write history'.
>
> We can only say with Dewey[2]: For historians to believe that they are endowed with unique powers giving them access to special truths or historical knowledge is a gross piece of self-delusion. Historians are gifted with no special powers of insight into the past denied to other mortals but unless historians recognise this, until they accept their common humanity with good grace *and without any mental reservations,* they cannot hope to perform any intelligent function and make history a living thing, a progressive force in our common human life.[3]

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1 Lubwa pChong describes Okot thus: 'Okot was alive, sincere and sensitive: he continually provoked as he advised, lamented, pitied, challenged, questioned and criticised with his *scorpion-tail tongue and razor sharp pen* throughout his fifty-one years of life'. Lubwa p'Chong 'Foreword' in Okot p'Bitek *Artist the ruler: Essays on art, culture and values,* East African Educational Publishers, 1996, viii.

2 Here, p'Bitek recalls the cautionary words of John Dewey to philosophers in similar tone and paraphrased wording.

3 Okot p'Bitek 'The African historian' in *Artist the ruler,* 47. [Emphasis added]

One would easily replace 'historian' for 'legal scholar/lawyer' – or any other elite professional in Kenya for that matter - quite easily.

What is the nature and import of Adam Smith's proverbial invisible hand on the African – Kenyan – academy?[4] What happens when the cold valueless and unprincipled computations of seventeenth and eighteenth century great power avarice is imbedded into the operational logic of a public good like higher education? What happens to human relations - to comity and solidarity, courtesy and community - when cold individualistic calculations and an artificial intellect is mainstreamed as operating principle in something so delicate as the intellectual vocation?

In 2005, Kéba Mbaye lamented that human society was headed towards 'a world without ethics: a world where the human conduct is guided by money, power and force …'.[5] Mbaye contends that 'ethics ought [to] be adopted … as the standard of all things, for along with human work, it is the condition *sine qua non* for social peace, national harmony, solidarity and development.'[6] The incorrigible idealist, Mbaye, insists that ethics should govern everything:

> … not only science and technology[7] but, *equally*, governmental power: the executive, legislature and judiciary, education and the behaviour of students, the role of the teacher, the functions of the administrator, economic activities of the primary, secondary and tertiary sectors, politics in general, political contests, governance, relations between the various members of the political scene, the relations between the governors and the governed, the behaviour of the governed, communication, the family, the neighbourhood, sports, culture, international relations, relations between rich and poor countries,… indeed, the totality of human endeavour taken individually and collectively, but also of states, and their representatives.[8]

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4 Humphrey Sipalla 'Foreword: Punches of the invisible fist: Intra- and inter-personal relations in the neo-liberalised African university' 4 *Strathmore Law Journal* (2020) vii-xvi.

5 'L'éthique, aujourd'hui' in Cheikh Yérim Seck, *Kéba Mbaye: Parcours et combats d'un grand juge* Karthala, 2007, 202. [Author's translation]

6 'L'éthique, aujourd'hui' in Seck, *Mbaye*, 200.

7 Mbaye makes this reference with respect to the Universal Declaration on the Human Genome, which he had served in its drafting committee.

8 'L'éthique, aujourd'hui' in Seck, *Mbaye*, 201-2.

But I digress. p'Bitek.

p'Bitek – this bull in a china shop thinker – is perturbed that the African intelligentsia is beginning to internalise certain superiority complexes which one would infer to have been begotten from the colonial example. Scholars are special because they can think better than our compatriots, such scholars think of themselves. p'Bitek is convinced that nothing intellectually potent or socially good can come from such arrogance.

One wonders now whether we are living the world Mbaye feared was to come, and what this means in the p'Bitekian considerations of academic humility and service to society.

I must say.

It is utterly impossible to run a rigorous double-blind peer reviewed journal in an irredeemably corrupt society.

What is corruption?

Corruption is the desecration of discretionary power.

Discretionary power is sacred. It is veritably *imago Dei,* the part of us, human beings, that is divine.

In the Six-Day War that is creation, as allegorised in Genesis – this is the first of Genesis' two creation stories – all one sees is rules. Immutable rules. All nature is bound to immutable rules. All nature follows rules. In fact – Islamic theology defines this even more clearly than Christian – even the angels are bound to rules. They have immateriality – oh, if only! –, have some free choice, and they certainly are intelligent. But they lack free will. It is in this regard that Allah commands the angels to bow down to Adam. It is free will, that is, discretionary power, that puts Man above all creation, and worthy of angelic deference.

Discretion is *imago Dei.*

So, what does all this nonsensical theology mean for our definition of corruption? Noting especially that often language fractures under the weight of transcendence, and these fractures tend not to failures but to disclosures.

Discretionary power is superior to the immateriality of angels. So difficult it is to describe it! We all know it when we see it but cannot quite imprison it in lexicology. It is the darkness that brings forth life. We can only recognise its absence, never its eternal presence. We cannot articulate it in advance but when it is abused, we immediately can *feel* a revulsion! An irk so elemental our soul smirks, even if our faces remain stoic, paying homage to the *rules* – ah!, rules again – of social propriety. But internally, even our Guardian Angel turns her face away! As if terrified to have glanced at burning Sodom or the nakedness of a drunk father! The abuse of discretionary power is precisely such a curse.

It is impossible to lay down human laws to regulate the misuse of so divine, so immaterial a power. In fact, it seems that even the Divine has struggled to lay down divine or natural law to regulate the misuse of discretionary power.

Why is this so? Is this a blasphemous statement? Does God lack omnipotence if unable to devise – ah, a better verb is divine – immutable law to regulate this, core, image of the Divine? No. God is omniscient and in this all-knowing, vests the regulation of discretion in precisely that free will that he then radically democratises to all human beings! Not a few well-placed scholars, but all human beings! God is such a radical democrat!

Discretionary power is leadership. The choices, the value judgments one makes, *ordain* one to be followed by another. Discretion leads. In small choices and grand designs, it refines direction. It becomes the meaning of meaning.

It is the self-righteousness of the African scholar as described by p'Bitek that engenders the corruption of the *imago Dei.* Like Rodion Romanovich Raskolnikov, himself an ex-law student, the African scholar's pride deludes him to think himself above morality by sheer weight of rational justification.

But narcissistic intent is usually couched, beguilingly so, behind procedural rules that pretend a world without nuance. Procedure makes automatons of *imago Dei,* bludgeons out creativity and consideration, and punishes thought and good will. Such sacrilege!

~ xx ~

Procedure makes Vogons[9] of these creatures of the Trandescent, rubbishes this great work of creation, which is good. Even when it is not brought up in administrative minutiae, even on a short visit to Vogonsphere, one is constantly whacked for an independent thought. One quickly learns to not think. Procedural minutiae conditions Pavlov to smile every time the dog salivates to the bell ring.

It is probably for this reason that p'Bitek and Mbaye both shudder at the thought that arrogance and individualistic intent could be the meaning of meaning, the manifestation of discretion, the corporeality of the *imago Dei*.

I must say.

It is utterly impossible to run a rigorous double-blind peer reviewed journal in an irredeemably corrupt society. And "…here, I would merely like to speak about angels, and not about hope."[10]

The scholar must submit the privilege of scholarship to the duty to history: The usual housekeeping

The office of Editor is a solemn judicious office, as one gatekeeps by the mere function of their value system, knowledge, and with this office, one withholds passing from human to humans or allows transmittal from fleeting mind to black-ink-on-white paper immortality, the one thing we humans share with the angels: intellect, thought.

A philosopher friend, whom decency demands that I not name, insists that the office of Editor is a custodianship borne of duty. Not like an all seeing distanced hawk, ready to pounce of unsuspecting life, but like an ant on an anthill, equal in size and posture, and standing on the collective effort of the whole community. It is like duty to the communion of saints. To the Living-Dead and to the Not-Yet-Born.

---

9 Douglas Adams, *A hitchhiker's guide to the galaxy,* 1985.

10 László Krasznahorkai, 2025 Nobel Prize Lecture in Literature, 7 December 2025.

A lot of this duty is exercised in discretion. This has been dealt with above. The other part is exercised in mundane – profane – housekeeping.

In his excellent editorial, this volume's Editor-in-Chief, Elvis Mogesa Ongiri, has laid down a theory on the place of the student editor, and journal he runs in community. I align myself to these insights.

The midwifery of editors demands that they care for that which will never be theirs as if it were. The judicial function demands doing duty before the widow incessantly knocks on the window of the hard hearted judge. To perform the justice in open court. To abide by the determination of the jury of peer reviewers. To confidentially manage this blind intercourse between author and jury. To taper the harshness of an unjust jury. And to compel the correction of the recalcitrant author.

To do this, these editors forgo any part in the publication. Like the midwife, they must find their own children elsewhere, of their own completely distinct effort. Surely, one cannot benefit where they exercise discretion.

I am particularly thankful to the precision we have added to this issue of *Kabarak Law Review*, to the 'Honouring Our Elders' section. It is quite perturbing that the term of craft 'Living-Dead' is quite unknown to the African academy beyond philosophers and their fraternal twins, theologians. No term captures so dearly this closely beloved tradition of listening to the discourse of our ancestors, to the principles of intergenerational equity, to the duty to history than the Living-Dead. Along with the Not-Yet-Born, this transcendental community is core to our African traditions. Individualistic modernity has advanced the notion of the inutility of the intangible. The corollary of this notion is that it is only useful to celebrate our thinkers when they are alive. This is in part true.

But a world without nuance is a cruel brutal world. And without nuance we have no knowledge. So yes, we can both honour the Living-Dead, while celebrating the living and considering the Not-Yet-Born. I am most thankful to Caroline Gatonye for her Introduction to this important precision in our journal.

In lieu of concluding

In times of insanity, irredeemable corruption, and despair, it is useful to flee to the counsel of our Living-Dead. Such a one, and eminently so, is Tori Morrison:

> "Once upon a time there was an old woman. Blind but wise." Or was it an old man? A guru, perhaps. Or a griot soothing restless children. …Once upon a time there was an old woman. Blind. Wise.
>
> …
>
> She is convinced that when language dies, out of carelessness, disuse, indifference and absence of esteem, or killed by fiat, not only she herself, but all users and makers are accountable for its demise.[11]

I started in despair. I end in purgatorial dystopia. Another Ugandan of yore, Milton Obote, contemplated his super-potent station in Ugandan society as President of the political state, and at then glanced at his modest station in history, and spoke in praise[12] of the one who outlasts contemporary potency by means of nothing but the howling recognition of history – howling as do sounds across a valley in the dusk. And this is why the solace of the intellectual, the man of letters, as Obote calls him, exists at best in purgatorial dystopia. An indefinite end to the despair is nonetheless promised. And promise is hope. Hope is divine.

Toni Morrison's blind but wise old woman was confronted by some young people in her lonesome house:

> They stand before her, and one of them says, "Old woman, I hold in my hand a bird. Tell me whether it is living or dead."
>
> She does not answer, and the question is repeated. "Is the bird I am holding living or dead?"
>
> Still she doesn't answer. She is blind and cannot see her visitors, let alone what is in their hands. She does not know their colour, gender or homeland. She only knows their motive.

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11 Toni Morrison, Nobel Prize Lecture in Literature, 7 December 1993.

12 Speech delivered at the Makerere Arts Festival, November 1968 by President Milton Obote, published in *Ghala*, in January 1969.

The old woman's silence is so long, the young people have trouble holding their laughter.

Finally she speaks and her voice is soft but stern. "I don't know", she says. "I don't know whether the bird you are holding is dead or alive, but what I do know is that it is in your hands. *It is in your hands*." [13]

Humphrey Sipalla
Editor-in-Chief, Kabarak University Press
Kabarak, 2026

[13] Toni Morrison, Nobel Prize Lecture in Literature, 7 December 1993.

Editorial

The positionality of student-editors is a peculiar problem. Some, through an elitist lens, view student-editors as unqualified in their tasks due to lack of the required depth of knowledge that faculty have, and their inexperience in editing scholarly work. A contrastingly, yet deeply profound view, is for student-editors, their lack of knowing is their super power – their epistemic advantage. That, as a *carte blanche*, in chasing the errant footnote of that highly complex paper, they consistently edify themselves and evade any implicit biases that come with knowing.[1]

A third view that I align myself with is, student-editors, similar to the framing of grassroots movements of women groups, workers unions, indigenous groups as 'international law from below',[2] work within the space of 'academic scholarship from below'. Here is my reason. The composition of a student-run editorial board is filled with amateur students, with the most qualified having four years' experience.[3] With high turn-over rates, student-editors rarely develop proper expertise in the art and science of editing. The crucial point however is, as these grassroots movements are involved in norm creation and furtherance in international law, such is the role and ability of student-editors. This means, they are an important cog in the machinery of academic publishing in any continent, as any other cog.

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1 This is a view propounded by Humphrey Sipalla, Editor-in-Chief of the Kabarak University Press and a mentor to *Kabarak Law Review*.

2 Balakrishnan Rajagopal, *International law from below: Development, social movements and Third World resistance,* Cambridge University Press, 2003, 1.

3 This is assuming that the editor has been in the law review since their first year of law school and has been increasingly involved throughout the years.

This question of positionality has plagued me throughout my three years in the *Kabarak Law Review*. A suggestion that I propose is, as student-editors, we occupy a structurally *liminal location*, neither fully inside nor outside academic authority. We are entrusted with gatekeeping functions such as selection, evaluation, curation, while lacking the enduring institutional authority that typically underwrites such roles. Our editorial authority is therefore delegated, temporary, and procedural. This liminality shapes how decisions are made, justified, and experienced. Only in understanding this position, can we then fully be able to fulfill our sacred editorial duties.

It is within our positionality that the *Kabarak Law Review* Editorial Board 2024-2025 presents its fourth volume. The issue theme of volume four is, 'Reflecting on 25 years of the African Union Constitutive Act'. The study of African Union law, or the Public law of Africa is neglected in most undergraduate law programmes in Africa. Rarely is the undergraduate student exposed to this large corpus of law within the classroom, and only in liberated zones such as moot court competitions, book clubs, and in this case, a law review, are they able to engage with this field of knowledge that governs our continent. Thus, this volume both commemorates this foundational anniversary of the African Union and critically engages with the successes, failures and future prospects in years to come.

Kabarak Law Review volume four has a total of twelve (12) pieces. Three (3) full-length, double-blind reviewed papers, three (3) single-blind reviewed essays which alongside two of the full-length papers lay the ground for this year's theme. One (1) essay in the 'Honouring our elders: Conversations with the Living-Dead' section reflecting on the contributions of the Pan-Africanist, Tajudeen-Abdul Raheem and in furtherance of our issue theme. In relation to our now four-year-old tradition of paying tribute to Emmanuel Ndwiga, a former Kabarak University law student and his brother Benson Njiru who were killed by rogue police officers on 1 August 2021, we publish two (2) pieces on police accountability. Lastly, we close the volume with three (3) timely case commentaries.

Opening the volume is Anopa Tamuka's paper, *Between supranationality and intergovernmentalism: Re-evaluating the relationship between the African Union and regional economic communities*. Tamuka relooks the trajectory of the precarious relationship between the AU and regional economic communities (RECs) and argues for subsidiarity and complementarity over direct oversight. Tellingly, he proposes the African Continental Free Trade Area Agreement (AfCFTA Agreement) as a foundational model for establishing a robust framework for the REC-AU relationship.

Still within the AU's mandate, Raphael Okochil's paper *Strategic silence? The AU and South-South solidarity in the Israel-Palestine question* foregrounds a key and timely question. Compellingly, he contends that although the African Union's foundational principles affirm commitments to human rights and solidarity, there remains a pronounced disjuncture between these normative ideals and its diplomatic conduct in relation to the Palestinian question. He further maintains that the AU's strategic silence does not reflect principled neutrality, but rather emerges as a calculated outcome of internal divisions among member states, the securitisation of foreign policy, and the influence of powerful external geopolitical forces.

Thereafter, Ben Kioko's essay, *The search for African unity: A dream deferred* discusses the two foundational African legal instruments, the Constitutive Act of the African Union and the Charter of the Organisation of African Unity, noting the reasons that necessitated the change from the latter to the former. This insider relooking brings to life some aspects of the process of this change and the main issues or challenges, including during the early implementation of the Constitutive Act. He also discusses aborted processes for a Union government and African Union Authority from 2005 to 2013. His overall argument is deeper unity in Africa is in effect a 'deferred dream'.

In similar vein, Hajer Gueldich in *Reflecting on 25 years of the African Union Constitutive Act: Drafting history, legal philosophy and broad objects of the renewal of Africa's continental body* traces the aspirations and tensions that have shaped the African Union's legal and institutional

evolution since Lomé. She presents the Constitutive Act not merely as a treaty but as a bold normative project grounded in non-indifference to atrocities, democratic governance, and an integrated vision of peace and development, while highlighting its broader influence on global legal norms through instruments such as the African Charter on Democracy Elections and Governance, and the AU Transitional Justice Policy. At the same time, she confronts the persistent challenges of coups, insecurity, and eroding political will, concluding with a call for a renewed AU whose transformative promise is collectively owned by citizens and the wider Pan-African community.

Closing the issue theme papers section is Don Deya's essay, *Reflecting on 25 years of the African Union Constitutive Act: Unconstitutional changes of government*. Based on the oral remarks he made during the International Law Month at Kabarak 2025 webinar of 21 August 2025, this essay discusses the perennial problem of unconstitutional changes of government laying down its legal regime and insisting that political courage and active citizenry engagement are feasible steps to combating the conundrum.

Daniel Chemorei in the general full-length papers section puts forth a profound legal and philosophical dissection of spousal rape in Kenya. Titled *Deconstructing the legal treatment of spousal rape in Kenya*, his paper interrogates Kenya's exemption of spouses from the definition of rape under Section 43(5) of the Sexual Offences Act, showing how the law's denial of marital rape rests on the assumption that consent, once given, is irrevocable. As both theory and method, he draws on Jacques Derrida's critique of hierarchical binaries and Spivak's account of subalternity, to demonstrate how marital consent is framed in rigid oppositions that obscure a woman's capacity to withdraw consent and render her voice legally unintelligible. The paper concludes by calling for a reorientation of legal understandings of consent as ongoing and situated, and by proposing interpretive and reform strategies that make visible voices long excluded from legal recognition.

Next is our now famed 'Honouring our elders: Conversations with the Living-Dead' section.[4] *Kabarak Law Review* has committed to celebrating the ideas of African great thinkers and true to Franz Fanon, we aim to read them both sympathetically and critically.[5] As visibly noticeable, we have retitled this section. Caroline Gatonye starts this section with an intriguing introduction. She brilliantly lays down the intellectual animations that necessitated this change in the name; tellingly through John S Mbiti's philosophy of the Living-Dead. Following this, Sarah Muhonja Andambi in *'Don't agonise, organise': Analysing modern-day Pan-Africanist thought through Tajudeen Abdul-Raheem* explores the oeuvre of the great Pan-Africanist intellectual and activist, Tajudeen Abdul-Raheem. Andambi examines the Pan-African legal and political thought of Tajudeen Abdul-Raheem (1961-2009), showing how his institutional leadership and writings translated Pan-African ideals into practical frameworks for legal reform, democratic accountability, and continental integration.

She argues that Abdul-Raheem's emphasis on citizen-driven governance anticipated the African Union's contemporary commitments in instruments such as the Constitutive Act, Agenda 2063, and the AfCFTA, while also exposing the limits of an AU still constrained by elite dominance and cautious integration. Situating this African ancestor as an embodiment of Pan-African unity in the tradition described by Wal-

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[4] I would like to thank Dr Harrison Otieno Mbori for originally recommending the changing of title of the section from 'Know your elders'. Further, I thank both Mwalimu Humphrey Sipalla and Caroline Gatonye for suggesting this further revision to 'Honouring Our Elders: Conversations with the Living-Dead'. This change fully reflects the journal's aim to honour African intellectual elders who although departed, continue to live on through their ideas. This reflects John Mbiti's philosophy and more truly, several African societies ontology of celebrating the Living-Dead.

[5] 'Each generation must discover its mission, fulfill it or betray it, in relative opacity… *[W]e must shed the habit of decrying the efforts of our forefathers or feigning incomprehension at their silence or passiveness. They fought as best they could with the weapons they possessed at the time, and if their struggle did not reverberate throughout the international arena, the reason should be attributed not so much to a lack of heroism but to a fundamentally different international situation*'. Fanon, 'On national culture', *The Wretched of the Earth*, 1959, 160. See also this discussion in Christopher Gevers, 'Literal 'decolonisation': Re-reading African international legal scholarship through the African novel', in Jochen von Bernstorff and Phillip Dann (eds) *The battle for international law in the decolonisation era*, Oxford University Press, 2019, 383-84.

ter Rodney of a model public intellectual, the paper positions his legacy as a continuing blueprint for reimagining African jurisprudence as a people-centred and emancipatory project.

Following this is the 'Kianjokoma Brothers' tribute: The police accountability review' section. Eugène Pascal Parfait and Arsène Stéphane Zindi in *Insights into the realities of police custody and remand to custody in Cameroon* examine police custody and remand in custody in Cameroon as liberty-depriving measures that are legally grounded in human dignity but, in practice, frequently function as instruments of humiliation and dehumanisation within a repressive institutional system. Using legal analysis, they identify the constitutional and international protections afforded to detainees while demonstrating the persistent non-compliance of state authorities despite the existence of oversight and sanctioning mechanisms. Ultimately, they seek to raise public awareness of detainees' rights and available legal remedies, arguing that their effective enforcement is essential to the reality of the rule of law in Cameroon.

In a rather striking and equally philosophy-grounded essay, James Mulei problematises the patterns of delayed justice, institutional weakness, and political expediency that plague the accountability of police brutality. In *A reply to Tekin Saeko: From Kianjokoma to Kajiado, police brutality and the cross-border crisis of accountability*, he responds to Tekin Saeko's tribute to the Kianjokoma brothers, situating the prior analysis of delayed justice and institutional weakness within broader philosophical questions of violence, legitimacy, and accountability. It draws connections between the Kianjokoma murders and the killing of journalist Arshad Sharif, illustrating how Kenya's policing system operates as a 'dysfunctioning functioning system' where procedural compliance masks substantive failure, and where political expediency perpetuates impunity. By engaging with insights from postcolonial theory, the paper argues that justice in Kenya is often endlessly deferred, transforming victims' families into subjects of temporal and bureaucratic violence, while oversight bodies like IPOA perform accountability theatrically rather than effectively, leaving substantive disclosure and remedial action largely absent.

Lastly, the volume closes with three salient case commentaries. First, Ana Cristina Vasquez in *Climate justice unpacked: Breaking down the 2025 Inter-American Court of Human Rights and International Court of Justice advisory opinions on environment, human rights and state obligations*, analyses Advisory Opinion OC-32/25 of the Inter-American Court of Human Rights (IACtHR) alongside the ICJ's 2025 climate change advisory opinion, arguing that climate inaction now constitutes a breach of due diligence and a human rights violation under international and regional law. It shows how the IACtHR transforms general principles of state responsibility, customary law, and UNCLOS obligations into enforceable duties within the American legal system, particularly by linking transboundary harm, private actor regulation, and extraterritorial responsibility to substantive and procedural human rights. In relation to Caribbean Small Island Developing States, the paper demonstrates how these opinions provide unprecedented legal leverage for climate justice, loss and damage claims, and protection of vulnerable populations, while acknowledging persistent enforcement gaps rooted in unequal state capacities.

Harrison Otieno Mbori in *Proportionality on the 'lite': The Kenyan Supreme Court's fatalism in the* Fatma Athman Abud (FAAF) *case* discusses this 2025 precedent by the Kenyan apex court that caused upheaval from various fronts. He situates this case at the intersection of religious pluralism and equality, and argues that the Court, alongside the Court of Appeal and, to a large extent, the High Court, failed to properly apply Islamic law, influenced by a lingering colonial framing of Islamic law as a retrogressive culture subject to the doctrine of repugnancy. It further contends that the Court's conflation of constitutional limitations and derogations, coupled with its introduction of the four-part proportionality test through a 'side-door', distorted the analytical framework and casts doubt on an outcome widely celebrated as progressive.

Closing the volume is Daniel Ominde's case commentary that reviews the jurisprudence of criminal defamation in *Jacqueline Okuta and another v AG and others* and *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others* furthering that the former precedent serves as the

proper conclusion on the status of criminal defamation, particularly in this digital age. He argues that 'criminal defamation – when unrelated to state security or public peace – cannot be properly categorised as a constitutionally legitimate limitation on the right to freedom of expression'.

The creation of this journal was only achievable by a collective convergence of efforts by different people. My Editorial Board has served both as the engine and comradeship in this sacred duty. First, I would like to thank the Managing Editor, Patience Chepchirchir, who spear-headed the editorial training programme, a vital limb of our institution that ensures perpetuity. James Mulei, the Peer Review Editor deserves a standing ovation. From the wide array of reviewers contacted to the timely delivery of all communications, you exemplified this role.

I equally am grateful to Jimmy Wambua, the Partnerships Editor, who tirelessly worked to fulfil his duty with the pinnacle being the Inaugural Annual African student-led law reviews conference held on 31 October 2025. Jimmy with the help of several Board members, was able to bring together 16 law reviews and a knowledgeable array of panellists to establish collaborative frameworks for editorial excellence, ethical publishing practices, and mutual recognition across African jurisdictions, with the goal ultimate goal of consolidation and longevity of student-led law reviews as vital contributors to African legal knowledge production. Jimmy also ensured we continue our altruistic duty (that which was done to us, so should we do to others), of helping establish and/or revive student-led law reviews in Kenya: Kisii University Editorial Committee, *Daystar Law Review*, *Moi University Law Journal* that recently published its latest volume and most recently Catholic University of East Africa. I thank you Jimmy!

Special thanks to the different section editors – Victoria Ogochukwu Okeke, George Njogu Murimi, Pawi Sylvian Fortune, Laetitia wa Nciko Nabintu – who took up their new roles with zeal and ensured that the manuscripts in their various sections were well-edited and relevant for our journal. Particularly, I thank Gabriel David Jimenez Benavides for your consistent commitment and striking editorial reviews as

our first Associate Editor outside of Kabarak University. You and Elena Catalina Villarreal Sánchez, are fruits of our project to internationalise the Editorial Board and you have truly been a wonderful addition.

Alongside the Editorial Board, our Advisory Board, 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 volume. Immense gratitude to our esteemed Advisory Board members: Chief Justice (Emeritus) Prof Willy Mutunga, Lady Justice Teresia Matheka, Dr Jonathan Rimdolmsom Kabré, Hon Yusuf Shikanda, Dr Rosemary Mwanza, Mr Abdullahi Ali, Mr Arnold Nciko, Prof John Osogo Ambani and our two new members, Ms Ilana le Roux and Mr Isaac Ibikunle. Your availability, consistent commitment, support and wisdom have been the driving force behind this volume as has been in previous volumes.

It would be remise not to thank the indomitable Humphrey Sipalla, our publisher, guardian, and mentor. You unrequitedly hold our hands and guide our paths in this sacred duty of editing. Through endearment, you mould us and advise us. We sincerely thank you! Special thanks to Laureen Mukami Nyamu, former Editor-in-Chief (Volume 2) and KABU Press graduate intern for 2025, and Salome Cheptoo Tonui the incoming KABU Press graduate intern for 2026, for your revise-edits of this volume. We truly indebted to you. I also thank Judge Ben Kioko for penning down the Foreword to this volume. Your words inspire us. I thank you for putting up with my many questions about our issue theme and my many reminders on submitting the Foreword. We are eternally grateful.

Lastly, this tireless journey would not have succeeded without the guidance of our esteemed Dean, Professor John Osogo Ambani, who has nurtured the *Kabarak Law Review* from its earliest foundations, witnessing it grow, strengthen, and find its stride as a thriving publication. Thank you for equally consistently penning down forewords to all the previous volumes and this one included.

I close with a word of encouragement to the 2026 Editorial Board, associates, and editorial trainees. Our positionality as student-editors, is liminal, precious yet still, taxing. We ought to understand this. Many a time, you will tire, the thoughts of stepping back will tempt you but I write this to buoy your spirits. This commitment you undertake is not merely a duty; it is a craft, a cultivation of rigour, resilience, and vision. There will be long nights, debates that test patience, and moments when progress feels slow, yet each challenge is a step toward mastery and collective impact. Remember that your labour shapes not just a journal, but a legacy of thought, discourse, and integrity – civilisation. When weariness comes, let it remind you not of the burden, but of the significance of the path you tread. Stand firm, support one another, and let the weight of the task remind you of its value, for it is in enduring the trials that your contributions will shine brightest.

Elvis Mogesa Ongiri
Editor-in-Chief, *Kabarak Law Review*, Volume 4
Kabarak, December 2025

Editorial: Tribute to our peer reviewers

Peer review is the quiet architecture of scholarly quality. We therefore start this tradition of paying tribute to our peer reviewers separate to the larger Editorial. In total, this volume had twenty-three (23) peer reviewers for the different sections of the journal.

With this in mind, I thank the wide array of peer reviewers: Dr Vellah Kigwiru, Ms Chepkorir Sambu, Dr Donnet Rose Odhiambo Adhiambo, Dr Paul Juma, Dr Beryl Orao, Dr Edwin Bikundo, Mr Joe Kobuthi, Prof Narnia Boller-Müller, Prof Gautam Bhatia, Dr Evelyne Asaala, Dr Nerima Were, Dr Ijeoma Anozie, Dr Buluma Bwire, Dr Tom Kabau, Mr Walter Khobe Ochieng, Mr Denis Moroga, Mr Abdullahi Ali, Ms Ndanga Kamau, Dr Salawu Morufu, Mrs Foluke Akinmoladun, Dr Mugambi Laibuta, Dr Harvey Ambe and Prof Reginald Oduor.

On behalf of the Editorial Board, I extend our sincere gratitude to these colleagues who served as peer reviewers for *Kabarak Law Review* in the fourth volume. Your diligence and expertise are the foundation of the journal's credibility. We thank you for sharing your time and keeping up with our constant reminders, late-night emails, and tight deadlines. Your careful reading and rigour strengthened every manuscript we handled, whether or not it ultimately appeared in these pages.

Thank you!

Elvis Mogesa Ongiri,
Editor-in-Chief, *Kabarak Law Review* Volume 4 (2025)

Between supranationality and intergovernmentalism: Re-evaluating the relationship between the African Union and regional economic communities

Anopa Tamuka*

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Abstract

The Casablanca-Monrovia debate outlined two possible paths for African regional development. These were: pursuing regional integration through a supranational organisation, or fostering regional cooperation via an intergovernmental framework. This raises an important question about the relationship between regional economic communities (RECs) and the African Union (AU). This article argues that direct control of RECs by the AU is not a practical solution to this issue. Through a thorough historical and legal analysis of regional development in Africa, this paper illustrates that the trajectory of regional economic development has always favoured an intergovernmental relationship characterised by subsidiarity and complementarity between the RECs and the AU. Historically, RECs in Africa

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were never designed to be under direct oversight. Instead, a relationship based on subsidiarity and complementarity was and is preferred. Thus, this paper proposes the Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement) as a foundational model for establishing a robust framework for the REC-AU relationship. While not perfect, the AfCFTA Agreement recognises the region-specific interests of RECs and is sufficiently flexible to accommodate them, yet concrete enough to define the relationship.

Keywords: subsidiarity, complementarity, direct control, regional economic communities, African Union, AfCFTA Agreement, Organisation of African Unity, African Economic Community, supranationality, intergovernmentalism, African integration

Introduction

This article illustrates the evolving relationship between regional economic communities (RECs) and the African Union (AU). It argues that this relationship has largely favoured subsidiarity and complementarity over direct oversight of the former by the latter.[1] In this paper, subsidiarity and complementarity are understood as characteristics of intergovernmentalism. They describe a cooperative relationship among member states within an international organisation, where no single state has authority over the others. Where a chain of command does exist, power is decentralised.[2] This allows individual states to maintain a degree of decision-making autonomy.

This stands in contrast with direct control, which denotes a supranational arrangement characterised by a clear decisional hierarchy among member states, with authority centralised at the top.[3] The pursuit of points of common interest informs the nature of regional cooperation with Africa. As such, intergovernmentalism proves favourable as it gives RECs and their member states decision-making power to tailor

1 AU Commission and others, 'Memorandum of Understanding on Cooperation in the Area of Peace and Security Between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa', 2008, Article 4(iv); Herpolsheimer, 'AU-REC Relations: The practices of inter-regionalism between ECOWAS and the African Union', 33(1) *Comparativ* (2023) 75.

2 Sheriff Ghali Ibrahim, David Ogbedi and JW Adams, 'An intergovernmentalist approach to regional integration in Africa: The efficacy of the African Union', 1(1) *International Journal of Multidisciplinary Research and Modern Education* (2015) 462; Klaus Detterbeck and Eve Hepburn, 'Introduction to the handbook of territorial politics', in Klaus Detterbeck and Eve Hepburn (eds) *Handbook of territorial politics*, Edward Edgar Publishing, 2018, 6; Anastassia V Obydenkova and Phillippe C Schmitter, '"Real existing democracies", and "real existing autocracies": Their relation to regional integration and regional cooperation', 16(1) *Taiwan Journal of Democracy* (2020) 5.

3 Peter Hay, *Federalism and supranational organisations: Patterns of a new legal structure*, Urbana, University of Illinois Press, 1966, 69; Babatunde Fagbayibo, 'Common problems affecting supranational attempts in Africa: An analytical overview', 16(1) *Potchefstroom Electronic Law Journal* (2013) 33; Obydenkova and Schmitter, '"Real existing democracies" and "real existing autocracies": Their relation to regional integration and regional cooperation', 5.

the integration process to their specific needs, rather than supranationalism, which would undermine it.

The objective of this paper is not to conduct a comparison of the advantages and disadvantages between supranationalism and intergovernmentalism. Rather, it intends to demonstrate a trend within the trajectory of regional development in Africa in which intergovernmentalism is preferred instead of supranationalism and to provide reasons thereof.[4] It further demonstrates that any regulatory framework defining the REC-AU relationship must account for the reasons behind this trend.

To effectively build my argument, I will conduct a historical-legal analysis of African RECs. This analysis will demonstrate that they emerged organically in response to region-specific interests rather than as a result of a mandate from the Organisation of African Unity (OAU). This indicates that from their inception, RECs did not view themselves as extensions of the OAU but rather independent organisations. Additionally, through a comprehensive examination of the various instruments that define the relationship between RECs and the AU, this paper aims to show a trend in which RECs resist supranational control.

This paper further argues that, while it appears increasingly evident that RECs prefer a relationship of subsidiarity and complementarity over direct control, it is essential to clearly define their relationship with the AU.[5] Therefore, any viable attempt at creating a robust legal

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4 Discussions on the feasibility of a supranational AU have been discussed extensively by Babatunde Fagbayibo. See, Babatunde Fagbayibo, 'A supranational African Union? Gazing into a crystal ball', *De Jure* (2008) 493-503; Babatunde Fagbayibo, 'Looking back, thinking forward: Understanding the feasibility of normative supranationalism in the African Union', 20(3) *South African Journal of International Affairs* (2013) 411-426; Fagbayibo, 'Common problems affecting supranational attempts in Africa: An analytic overview', 32-69.

5 Commentators such as Herpolsheimer, 'AU-REC Relations', 74, have questioned the nature of the relationship of the AU and RECs and conducted similar research, although, with a focus on coordination between the AU and RECs in the context of peace security and conflict management. Richard Frimpong Oppong 'The African Union, African Economic Community and Africa's regional economic communities: Untangling a complex web', 18(1) *African Journal of International and Comparative Law* (2010) 92-103.

framework outlining the relationship between RECs and the AU effectively must account for this resistance. In this regard, the Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement) serves as a blueprint for such a model legal framework.

The foregoing analysis is built on the background of what has been termed the 'spaghetti bowl'.[6] The 'spaghetti bowl' phenomenon is characterised by a multiplicity of regional trade agreements (RTAs) and overlapping memberships within RECs, resulting in members facing overlapping and often conflicting obligations.[7] For James Thuo Gathii, this phenomenon represents the diverse and flexible nature of African regional trade agreements and RECs as they exist as 'flexible legal regimes'.[8] Where the needs of states are vast, ranging from sharing of ports and water basins, and access to trade routes to security concerns, these flexible legal regimes allow for states to derive benefits from multiple RECs than they would under a single REC.[9]

Gathii, however, acknowledges that this multiplicity of RECs has become a hindrance to the establishment of the African Economic Community (AEC).[10] Considering that, in the context of establishing the AEC, RECs are supposed to be the building blocks, their erratic and often poorly regulated establishment suggests further fragmentation rather than the consolidation of RECs to form the AEC.[11]

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6 Peter Draper, Durrel Halleson and Philip Alves, 'SACU, regional integration and the overlap issue in Southern Africa: From spaghetti to cannelloni?', Trade Policy Report No 15 (2007) 7. Term originally coined by Jagdish N Bhagwati in 'Preferential trade agreements: The wrong road', 27 *Law & Policy in International Business* 865 (1996).

7 Barbara Kolbeck, 'Legal analysis of the relationship between the AU/AEC and RECs: Africa lost in a "spaghetti bowl" of legal relations?', Unpublished LLM Dissertation, University of Cape Town, 2014, 52.

8 James Thuo Gathii, 'African regional trade agreements as flexible legal regimes', 35(3) *North Carolina Journal of International Law and Commercial Regulation* (2010) 571.

9 James Thuo Gathii, *African regional trade agreements as legal regimes*, Cambridge University Press, 2011, 65-66. Kolbeck, 'Legal analysis of the relationship between the AU/AEC and RECs', 52.

10 Gathii, '*African regional trade agreements as legal regimes*', 76.

11 Kolbeck, 'Legal analysis of the relationship between the AU/AEC and RECs', 52.

Currently, there are 15 RECs on the African continent, including the newly formed Alliance of Sahel States (AES).[12] However, as of 2006, the AU only recognised eight in an attempt to curb the further formation of RECs.[13] Draper, Halleson and Alves report that Southern and Eastern Africa register the highest number of RECs.[14] Apart from Mozambique, all the other countries belong to more than one REC.[15] The United Nations Economic Commission for Africa, in its 2006 report, argued that there is a need to coordinate and align the various activities and programmes of RECs.

The report highlighted that the current status quo was ineffective, as it failed to provide a solution for the overlapping memberships and duplication of obligations that arose from RECs. Kolbeck posits that, without a clear regulatory framework between RECs and the AU, its intergovernmental or supranational institutions remain fragile and incapable of establishing an AEC.[16] This speaks to the central question of this paper: In light of this spaghetti bowl phenomenon, what should be the nature of the relationship between RECs and the AU?[17]

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12 Draper, Halleson and Alves, 'SACU, regional integration and the overlap issue in Southern Africa', 7; Osuchukwu Cynthia Nkechi, Iteke Wilson Chibuzor and Emesiani Ifeanyi Godspower, 'The Alliance of Sahel States and the future of West African regional integration', 13(1) *Direct Research Journal of Social Science and Educational Studies* (2024) 32-33. A list of African RECs include: Alliance of Sahel States, Arab Maghreb Union, Common Market for Eastern and Southern Africa, Community of Sahel-Saharan States, East African Community, Economic and Monetary Union of Central Africa, Economic Community of the Great Lakes Countries, Economic Community of West African States, Indian Ocean Commission, Intergovernmental Authority on Development, Mano River Union, Organisation for the Harmonisation of Business Law in Africa, Southern African Development Community, Southern African Customs Union, and West African Economic and Customs Union.

13 African Union, 'Decisions and declarations: Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs)', AU Doc Assembly/AU/Dec. 112 (VII), Assembly of the African Union, Seventh Ordinary Session, para 3.

14 Draper, Halleson and Alves, 'SACU, regional integration and the overlap issue in Southern Africa', 9.

15 Draper, Halleson and Alves, 'SACU, regional integration and the overlap issue in Southern Africa', 9.

16 Kolbeck, 'Legal analysis of the relationship between the AU/AEC and RECs', 4-5.

17 Herpolsheimer, 'AU-REC Relations', 74.

This paper is structured into four sections. First, it draws the historical trajectory of the development of RECs from the OAU through the Casablanca-Monrovia debate, arguing that direct control of the AU on the RECs was not envisaged. Thereafter, using the viewpoints of the EAC, Economic Community of West African States (ECOWAS), and South African Development Community (SADC), it argues that RECs developed as independent institutions addressing region-specific challenges and interest. A trend that continues in their current practice. And so, the actions of the RECs aim to maintain a degree of decisional autonomy and subjecting them to the direct oversight of the AU would undermine this autonomy.

Section three analyses the pre-AfCFTA Agreement instruments that is: Treaty Establishing the African Economic Community (the Abuja Treaty), the Constitutive Act of the African Union, and the 2008 Protocol under Treaty Establishing the African Economic Community on Relations between the African Union (AU) and the Regional Economic Community (RECs), arguing that they succeed to the extent that they are intergovernmental and fail to the extent that they attempt to be supranational. The final section, serving as the crux of the paper, posits the AfCFTA Agreement as the blueprint for a conscious agreement that appreciates the nuances behind why RECs prefer a relationship based on subsidiarity and complementarity as opposed to being subjected to direct control.

A historical analysis of regional development under the Organisation of African Unity

Granting the AU direct control over RECs as a solution to the question regarding the nature of their relationship deviates significantly from the historical trajectory of regional development in Africa since the establishment of the OAU. A thorough historical analysis reveals that the idea of direct control by the AU over RECs was never fully envisioned, especially to any considerable degree. To underscore this point, I

must acknowledge that the OAU was fundamentally designed to foster regional cooperation rather than regional integration. Although some commentators posit that these two concepts are interchangeable,[18] they carry distinct connotations.

Regional cooperation is characterised by a voluntary commitment among states to collaborate in pursuit of shared objectives, whether political, social, or economic, while maintaining their political independence.[19] In contrast, regional integration envisions a progressive unification of states, where they gradually converge into a singular socio-political entity, compromising some degree of their sovereignty.[20]

The historical Casablanca-Monrovia debate best contextualises the argument; that the OAU operated more as a mechanism for regional cooperation rather than for regional integration. Two contrasting schools of thought emerged among African leaders. The Casablanca group advocated for a bold and transformative approach toward regional integration, envisioning the creation of a single political entity across the African continent. In contrast, the Monrovia group endorsed a more tempered strategy of regional cooperation that emphasised the preservation of state sovereignty, while still enabling nations to collaborate in achieving collective socio-political goals.[21]

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18 Willie Shumba, 'Towards the African Economic Community: Legal and historical perspectives', 26 *Potchefstroom Electronic Law Journal* (2023) 5.

19 Obydenkova and Schmitter, '"Real existing democracies" and "real existing autocracies": Their relation to regional integration and regional cooperation', 5; Detterbeck and Hepburn, 'Introduction to the handbook of territorial politics', 6; Viet Bachmann and James D Sidaway, 'African regional integration and European involvement: External agents in the East African Community', 92(1) *South African Geographical Journal* (2010) 1. Bachmann and Sidaway use regionalism to mean regional cooperation as proposed by Julius Nyerere, and continentalism to refer to regional integration as proposed by Kwame Nkrumah.

20 Hay, *Federalism and supranational organisations*, 69; Fagbayibo, 'Common problems affecting supranational attempts in Africa', 33; Obydenkova and Schmitter, '"Real existing democracies" and "real existing autocracies": Their relation to regional integration and regional cooperation', 5; Ibrahim, Ogbedi and Adams, 'An intergovernmentalist approach to regional integration in Africa', 462.

21 Gerrit Olivier, 'Regionalism in Africa: Cooperation without integration?', 32(2) *Strategic Review for Southern Africa* (2010) 27; Kwame Nkrumah, *The autobiography of Kwame Nkrumah*, International Publishers, 1957, 164 where he famously states, 'seek ye first the political kingdom'.

Leading the Casablanca Group was Kwame Nkrumah, who championed a supranationalist framework and argued fervently for the concept of a united Africa. He believed that this unity was crucial for attaining true independence and ensuring the efficient utilisation of Africa's vast resources, both material and human, for the advancement of its people.[22] However, this vision faced considerable opposition, as it necessitated that newly independent states relinquish their hard-won autonomy and submit to a continental governing authority.[23] This proposition was a steep price that most African leaders were unwilling to pay, as they resonated more with the Monrovia Group's perspective.

The Monrovia approach, propagated by statesmen such as Nnamdie Azikiwe of Nigeria, championed a state-centric, transnational organisation that fostered cooperation among sovereign states without compromising their independence.[24] It is important to note that from the time of the Casablanca-Monrovia debates to the adoption of the OAU Charter, the role of RECs was never considered at length.

Julius Nyerere of Tanzania was equally a major proponent for regional organisations for greater Pan-African Unity, but I must stress that this was more in connection with the East African Community (EAC). For Nyerere, RECs such as the EAC served as a foundational basis for the realisation of a United States of Africa.[25] Kamata concludes that Nyerere started as a nationalist (championing a state-centred ap-

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22 Kwame Nkrumah, *Africa must unite*, New York, Frederick A Praeger Publishers, 1963, xvii.

23 Leila J G Farmer, 'Sovereignty and the African Union', 4(10) *The Journal of Pan African Studies* (2012) 97. The countries that sided with Nkurumah included, the Algerian provisional government, Egypt, Guinea, Libya, Mali and Morocco.

24 Maano Ramutsindela, 'Gaddafi, continentalism and sovereignty in Africa', 91(1) *South African Geographical Journal* (2009) 1-3. For a comprehensive discussion on the Monrovia-Casablanca debates, see Constantinos Berhutesfa Constantinos, 'Monrovia, Casablanca and Addis Ababa: The struggle, the story and legacy of African unity', 9(18) *Respublica Literaria* (2017) 4-9.

25 Ng'wanza Kamata, 'Julius Nyerere: From a territorial nationalist to a Pan African nationalist', 11(46) *The African Review* (2019) 317; J Hatch, *Two Africa statesmen: Kaunda of Zambia and Nyerere of Tanzania*, London, Secker and Warburg Publishers, 130.

proach to African regional development) and spent much of his political career as a Pan-Africanist preaching a collective unity for Africa.[26]

I argue that the question has never been whether Africa should be united or not, but rather what form that unity must take. An intergovernmental approach, upon which the OAU was founded did not necessarily negate this unity. For Nyerere, the formation of the EAC was a regional necessity that would have future continental implications, which informed his stance on African regionalism.[27] I believe that meaningful discussions about the role of RECs emerged much later, particularly when the need for their contribution to Pan-African unity and regional economic development became apparent, not at the inception of the OAU.[28] This may have been so because at the time of the establishment of the OAU, on 25 May 1963, over 21 countries were still under colonialism.[29] The focus was strongly on ensuring countries attained independence and that such independence was protected.[30]

In furtherance to this, the wording of the OAU Charter itself supports this notion. Nowhere are RECs mentioned in the OAU Charter. The word 'cooperation' – not integration – is listed under objectives of the OAU.[31] Article II(1) and (2) of the OAU Charter is structured in

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26 Kamata, 'Julius Nyerere', 329.

27 Kamata, 'Julius Nyerere', 318. Kamata relies on an extract from a letter from Jomo Kenyatta to Julius Nyerere, 'we have at the moment a situation where all the people of East Africa are conscious of and believe in Federation, and have the enthusiasm necessary to make it succeed. Indeed, I see in them a readiness not only to federate, but even to merge our different political parties into one Federal Party – and this readiness has great meaning, because it is the nationalist parties which are the channelling focus for the people's enthusiasm'.

28 Organisation of African Unity, 'Monrovia Declaration of commitment of the heads of state and government of the Organisation of African Unity on guidelines and measures for national and collective self-reliance in social and economic development for the establishment of a new international economic order', AGH/ST.3 (XVI) Rev.1, 1979, para 1-2.

29 B O Agara and Morris K O Edogiawerie, 'African Union and governance in Africa', 1(1) *Journal of Social Sustainabillty Impact* (2023) 18.

30 Babatunde Fagbayibo, 'Rethinking the African integration process: A critical politico-legal perspective on building a democratic African Union', 36(1) *South African Yearbook of International Law* (2011) 213; Kamata, 'Julius Nyerere', 318.

31 Charter of the Organisation of African Unity, 25 May 1963, 479 UNTS 39, Article II.

such a way that suggests that socio-political and economic cooperation among African states was a necessary means to ensure the attainment and safeguarding of independence, state sovereignty, and territorial integrity of all African countries to better the lives of all African people.

Pursuant to regional cooperation as the form in which African regional development was to take place under the OAU, Article III(3) of the OAU Charter emphasised that the OAU was to be built on, amongst others, the principle of non-interference with the domestic affairs of member states. This further reinforces the notion that RECs had no defined place within the OAU, and direct control of the RECs would inevitably clash with the principles of non-interference, as it would entail the OAU exercising power over the affairs of the RECs and their member states.

About 16 years after the establishment of the OAU there began a paradigm shift in the objectives of regional development in Africa. Member states began to look into securing regional economic development, having been influenced in part by the United Nations Economic Commission of Africa (UNECA),[32] in conjunction with securing the independence of African countries. In 1979, at the sixteenth Ordinary Session of the OAU, the Monrovia Declaration was adopted. It was a pronouncement by heads of state and government of the OAU of their commitment towards the implementation of guidelines and measures that would ensure socio-economic development and the establishment of a new economic order.[33]

This marked the first OAU declaration expressly pledging a commitment to regional 'economic integration' as a means to ensure self-reliance and self-sustenance on the continent.[34] From the Monrovia

[32] Shumba, 'Towards an African Economic Community', 5; Francis Mangeni and Calestous Juma, *Emergent Africa: Evolution of regional economic integration*, Headline Books Terra Alta, 2019, 49.

[33] OAU, 'Monrovia Declaration of commitment of the Heads of State and Government, of the Organisation of African Unity on guidelines and measures for national and collective self-reliance in social and economic development for the establishment of a new international economic order', para 1-2.

[34] OAU, 'Monrovia Declaration of commitment of the Heads of State and Government, of the Organisation of African Unity on guidelines and measures for national and col-

Declaration emerged the Lagos Plan of Action for the Economic Development of Africa, 1980-2000 (Lagos Plan of Action).[35] This was a policy document that provided a framework by which the economic development of Africa was to be realised.

The Lagos Plan of Action acknowledged the urgent need for the regional economic integration of Africa as a gateway to economic development and self-sufficiency.[36] It is through this instrument that the notion of RECs, although not expressly referred to in the Lagos Plan of Action, first appeared in an OAU instrument.[37] The Lagos Plan of Action called for the establishment of regional and sub-regional institutions as vehicles for fostering economic development and self-sufficiency in Africa.[38] However, despite its extensiveness, the Lagos Plan of Action remained silent on what these regional or sub-regional institutions (RECs) were and their relationship with the OAU.[39] The document merely expressed a need for such institutions to exist.[40]

Notably, RECs had already begun to form before the Lagos Plan of Action was enacted.[41] Additionally, the plan was never implemented due to several reasons, including lack of political will amongst signatory states.[42] However, I argue that a more compelling reason for the failure to implement the Lagos Plan of Action is the vast array of region-specific challenges that were faced by countries across Africa. Focus was therefore placed on solving these problems on a regional level; hence the independent emergence of RECs and not on a continental

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lective self-reliance in social and economic development for the establishment of a new international economic order', para 1-2.

35 Organisation of African Unity, Lagos Plan of Action for the Economic Development of Africa, 1980-2000, Preamble, para 2.

36 Lagos Plan of Action, Preamble para 2-3.

37 Lagos Plan of Action, Preamble para 3(iii).

38 Lagos Plan of Action, Preamble para 3(iii).

39 Shumba, 'Towards an African Economic Community', 6.

40 Shumba, 'Towards an African Economic Community', 6.

41 Some examples: East African Community (EAC) 1967, the Economic Community of West African States (ECOWAS) 1975, Southern Africa Development Coordination Conference (SADCC) 1980.

42 Shumba, 'Towards an African Economic Community', 6.

level through a unified framework. This will be further explored in the later sections of my analysis.

Case studies of the emergence of RECs in Africa: the EAC, SADC, and ECOWAS

To build on the previous discussion, I will examine the emergence of three RECs: the EAC, the ECOWAS, and the SADC. My objective is to support the earlier arguments that RECs developed as independent institutions addressing region-specific challenges and that this trend continues in their current practice. Thus, as will be elaborated further in the analysis, the actions of the RECs aimed at maintaining a degree of decisional autonomy.

East African Community

Like the other RECs under discussion, the EAC must be understood within its unique context. It was initially constituted in 1967 to establish a unified voice for addressing socio-economic and political issues among its member states: Kenya, Uganda, and Tanzania.[43] These three countries share a common colonial heritage of integration under British rule. Lily Njenga traces East African regional integration back to the establishment of British colonial presence in East African in the 19th century, at the time Frederick Lugard worked for the Imperial British East African Company.[44]

Between 1905 and 1940, Britain adopted an institutional approach by establishing common structures, such as the East African Currency Board, the East African Court of Appeal, and the East African Gover-

[43] Joana Bar 'East African Communities (1967-1978, 1999) and their activity for political stability of the region', 15(5) *Politeja* (2018) 252-53.

[44] Lily N Njenga, 'Legal status of the East African Community', 22(3) *RUDN Journal of Law* (2018) 370-71.

nors' Conference, to maintain its dominance in the region.[45] Efforts to integrate Kenya, Tanganyika (now Tanzania), and Uganda began about 1919.[46] Under British administration, a customs union for the three countries was formed.[47] In 1948, the East African High Commission (EAHC) was formed to implement common initiatives, including economic integration schemes.[48]

After Tanganyika gained independence in 1961, the EAHC was replaced by the East African Common Service Organisation (EACSO).[49] The EACSO was tasked with facilitating coordination between the three East African countries within a post-colonial context.[50] As a structure, EACSO was criticised for its closeness to the former colonial structures.[51] Nonetheless, Njenga highlights a series of achievements under EACSO, such as the appointment of the new President of the East African Court of Appeal, Sir Samuel Quashie-Idun. This followed the retirement of the previous President, Sir Ronald Sinclair, who had been appointed by the British colonial government.[52]

Arguably, East Africa's rich colonial history of integration under British colonialism served as a template for the conceptualisation and establishment of the EAC. Its formation, like that of the other RECs under discussion, came from a point of common interest. Having shared a common colonial history, the question among the three countries revolved around defining the nature of their post-colonial relationship. As stressed by Bar, following Uganda's independence in 1962 and Kenya's independence in 1963, there were calls for continued cooperation and integration within the region.[53]

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45 Bar, 'East African Community', 251.

46 Stefan Reith and Ritz Boltz, 'The East African Community: Regional integration between aspiration and reality' *Konrad-Adenauer-Stiftung International Reports* (2011) 92.

47 Reith and Boltz, 'The East African Community', 92.

48 Bar, 'East African Community', 251.

49 Reith and Boltz, 'The East African Community', 92.

50 Bar, 'East African Community', 252.

51 Reith and Boltz, 'The East African Community', 92.

52 Njenga, 'The legal status of the East African Community', 372.

53 Bar, 'East African Community', 252.

The discussions leading up to the formation of the EAC occurred about the same time as the Monrovia-Casablanca debate leading up to the formation of the OAU. Sena Eken submits that talks for the establishment of the EAC began in 1961.[54] This is about 2 years before the establishment of the OAU in 1963. Acknowledging that the primary focus of the OAU was to ensure and preserve the independence of African nations,[55] it becomes clear that there was no alignment between the regional needs of the EAC and the continental needs of the OAU.

In contrast to the primary objective of the OAU, Eken posits that the formation of the EAC was largely premised on securing economic integration within the region. Regional instruments such as the Kampala Agreement of 1964, which provided for quotas for intra-EAC trade as a means to remedy trade imbalances between the three countries, serve as a testament to this contrast in objectives between the OAU and the EAC.[56] In addition, although discussions around establishing a political federation emerged, no substantial plans were formed, and such a union ultimately did not materialise. This fact further supports the argument that from a point of common interest, the EAC concerned itself primarily with economic integration. Other than that, the three countries had significantly different political ideologies.[57]

Driven by a shared desire for regional economic integration, the Treaty for East African Cooperation of 1967 (the EAC Treaty of 1967) was signed and adopted. However, this project only lasted a decade before it collapsed in 1977.[58] The disintegration of the Community has been attributed to several factors, including the unequal distribution of benefits, its purely intergovernmental structure – which meant EAC decisions could not effectively bind state parties – and the irreconcilable

54 Sena Eken, 'Breakup of the East African Community', *Finance and Development* (1979) 38.

55 Fagbayibo, 'Rethinking the African integration process', 213; Agara and Edogiawerie, 'African Union and governance in Africa', 18.

56 Eken, 'Breakup of the East African Community', 37.

57 Bar, 'East African Community', 252; Eken, 'Breakup of the East African Community', 37.

58 Eken, 'Breakup of the East African Community', 38.

ideological differences between Tanzania's president, Julius Nyerere and Uganda's president, Idi Amin.[59]

The Treaty had been signed at a time when cooperation and integration seemed natural, given the countries' shared history of cooperation and integration under British colonialism. However, as time progressed, their interest diverged. For instance, Kenya championed a pro-private and foreign investment economic domestic policy while Tanzania championed a more socialist-centred economic domestic policy.[60] These ideological differences became a source of friction within the EAC. The more divergent the objectives, the more difficult it became for the EAC to make and implement decisions.[61]

The efficacy of the success of the EAC rested on the member states having points of common interest. As previously alluded, the EAC and the OAU focused primarily on different objectives; hence, at their inception, a relationship between them was not defined, and they acted independently. Once the member states of the EAC took on diverging political and economic interests, the REC collapsed. In the later parts of my analysis, I will further demonstrate how the success of the Treaty Establishing the African Economic Community (Abuja Treaty), by extension the AfCFTA Agreement can be attributed to shared common interests (universal trade interests) between RECs and their members.

The EAC would only reconstitute in 1999 in response to the pressing need for regional economic development highlighted by the Abuja Treaty and the guidelines established at the Conference on Security, Stability, Development, and Cooperation (the Kampala Conference).[62] The new EAC was formed from a place of common interest and the three countries shifted from regulating their economic affairs through multi-

59 Reith and Boltz, 'The East African Community', 92-93; Eken, 'Breakup of the East African Community', 38.

60 Reith and Boltz, 'The East African Community', 93; Eken, 'Breakup of the East African Community', 38.

61 Eken, 'Breakup of the East African Community', 38.

62 Bar, 'East African Community', 252.

lateral agreements to establishing the EAC.[63] The Preamble of the Treaty Establishing the East African Community (EAC Treaty of 1999) states that the Treaty draws its mandate from the history of regional integration efforts in East Africa, including the East African High Commission of 1948, the East African Common Services Organisation of 1961, and the Treaty of East African Cooperation of 1967.[64] This augments the idea that RECs arise to further the common goals of their member states.

A primary goal of the EAC Treaty of 1999, which serves as a common objective for the Community, is to ensure that the partner states progressively establish a customs union, a common market, and ultimately a political union.[65] In this context, the EAC Treaty of 1999 outlines various provisions centred on economic and political integration such as the establishment of a customs union protocol that aimed at the elimination of internal tariffs and non-trade barriers (NBTs), the establishment of a common external market, rules of origins, dumping regulations, competition regulations, subsidies and countervailing duties, and the progressive establishment of a common foreign and security policy pursuant to the realisation of a political union.[66]

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63 Reith and Boltz, 'The East African Community', 93.

64 Treaty Establishing the East African Community, 2144 UNTS 215, 30 November 1999, Preamble. The treaty's Preamble recognises the Community's history of regional integration. It acknowledges the colonial regional integration framework that saw the establishment of, among others, the East African Customs Union in 1919, the East African High Commission in 1948 and the East African Common Services Organisation in 1961. The wording suggests that the 1999 EAC Treaty is a continuation of a long line of regional integration efforts within the region and acknowledges the various agreements that the party states entered into leading up to its establishment. These include: the East African Community Mediation Agreement of 1984 and the Agreement for the Establishment of a Permanent Tripartite Commission for Co-operation Between the Republic of Kenya, the Republic of Uganda and the United Republic of Tanzania for the establishment of the Permanent Tripartite Commission for Co-operation of 1993.

65 Treaty Establishing the East African Community, Article 5(2); Wanyama Masinde and Christopher Otieno Omolo, 'Road to East African integration', in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds) *East African Community: Institutional, substantive and comparative EU aspects*, Brill Nijhoff, 2017, 13.

66 Treaty Establishing the East African Community, Articles 5(2), 75, 76 and 123.

Membership in the Community is premised on the compatibility of a state with these common objectives. For a foreign country to be considered for membership, the Community will consider, amongst other factors, its adherence to acceptable principles within the Community, its geographical contiguity to the other partner states, its potential to contribute to the Community's regional integration agenda and the compatibility of its socio-economic policies with those of the EAC.[67] Evidently, at the heart of the EAC is its concern for advancing the Community's shared goals.

In the pursuit of its goals, the EAC Treaty does not position itself as a subordinate of the AEC, and by extension, the AU. Instead, it articulates a vision for a united Africa and emphasises a cooperative relationship (subsidiarity and complementarity) with the AU in pursuit of their shared goals.[68] This supports my argument that RECs prefer a relationship of subsidiarity and complementarity with the AU to advance their common objectives instead of being subjected to the direct control of the AU.

Economic Community of West African States

My analysis of ECOWAS reveals findings similar to those regarding the EAC discussed above. At its core, ECOWAS is a REC that formed organically in response to specific challenges in the region, independent of the supranational control of the OAU. Founded on 25 May 1975, ECOWAS aimed primarily to promote economic cooperation and integration among West African states.[69] The formation of ECOWAS co-

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67 Treaty Establishing the East African Community, Article 3. Current membership of the East African Community has increased to include the republics of Rwanda, Burundi, the South Sudan, the Democratic Republic of the Congo and the Federal Republic of Somalia.

68 Treaty Establishing the East African Community, Article 130(2) and (4).

69 Treaty of the Economic Community of West African States (ECOWAS Treaty, 1975), 1010 UNTS 18, 28 May 1975, Article 2(1); Samuel O Oloruntoba, 'ECOWAS and regional integration in West Africa: From state to emerging private authority', 14(7) *History Compass* (2016) 295; John Abiodun Babalola, 'ECOWAS historical assessments and future legacies', Unpublished Masters Dissertation, Istanbul Kultur University, 2021, 28;

incides with the period when the West African states started gaining independence.[70]

The purpose of ECOWAS was to enhance development within the region by facilitating the free movement of goods and people across borders.[71] It emerged from a shared desire by both francophone and anglophone states to be economically and politically self-reliant from their former colonial masters.[72]

Theirno Thiam argues that, while the realisation that individual domestic markets of West African countries could not successfully compete in an international environment – dominated by large trading blocs – was pivotal to the formation of ECOWAS, it was the realisation that these economic goals could only be achieved in a secure region that added a security dimension to ECOWAS.[73] I must note that West Africa serves as among the most conflict-ridden regions in Africa.[74]

Obiora Chinedu Okafor and Okechukwu Effoduh, 'The ECOWAS Court as a promising resource for pro-poor activism', in James Thuo Gathii (eds) *The performance of Africa's international courts: Using litigation for political, economic and social change*, Oxford University Press, 2020, 110.

70 Cynado CNO Ezeogidi, 'The historical overview of the problems of ECOWAS in effective economic integration and conflict management in West Africa', SSRN, 2020, 2.

71 ECOWAS Treaty, 1975, Preamble; Okafor and Effoduh, 'The ECOWAS Court', 110; Babalola, 'ECOWAS historical assessment', 28; Nneoma Nwogu, 'Regional integration as an instrument of human rights: Reconceptualising ECOWAS', 6(1) *Journal of Human Rights* (2007) 347-48.

72 ECOWAS (Economic Community of West African States) was the first regional economic community (REC) to unite countries with diverse colonial backgrounds. Currently, ECOWAS has twelve member states, which include five French-speaking nations, five English-speaking nations, and two Portuguese-speaking nations. The current member states are Benin, Cape Verde, Côte d'Ivoire, Nigeria, The Gambia, Ghana, Liberia, Senegal, Sierra Leone, Togo, Guinea, and Guinea-Bissau. As of January 2025, Mali, Niger, and Burkina Faso have formally left ECOWAS to form the Alliance of Sahel States (AES). This marks the second significant exit from ECOWAS since Mauritania left in 2000.

73 Theirno Thiam, 'The emergence of the Economic Community of West African States (ECOWAS) and the limits of the paradigms of international politics', 29(3) *Politeia* (2010) 45.

74 Thiam, The emergence of the Economic Community of West African States (ECOWAS) and the limits of the paradigms of international politics', 46.

Consequently, the formation of ECOWAS arose to address this challenge in its bid to foster regional economic integration.

This is not to say that other RECs do not concern themselves with regional security. They do, but not to the same extent as ECOWAS.[75] This emphasis on regional security dates back to the aftermath of the Nigerian civil war, 1967-1970.[76] It is noteworthy that ECOWAS states entered into defence agreements on three occasions; in 1978 and 1981, they signed the Protocol on Mutual Assistance on Defence, and in 1999, they signed the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.[77]

Important to West African states is their proclivity to violent conflict.[78] After the collapse of Liberia due to civil war in 1989, a consensus grew to transform ECOWAS into a security community.[79] Thiam makes the case that it was the Liberian conflict in 1989 that saw the emergence of a specialised military group, the ECOWAS Monitoring Group (ECOMOG), the *de facto* military wing of the Community.[80] In establishing ECOMOG, ECOWAS became among the first REC to mobilise its members to establish an institution for mobilising military forces to address

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75 Thiam, 'The emergence of the Economic Community of West African States (ECOWAS) and the limits of the paradigms of international politics', 46. For a comprehensive discussion on peacekeeping efforts and regional security structures of other RECs see, Eric G Berman and Katie E Sams, 'Peacekeeping in Africa: Capabilities and culpabilities' United Nations Institution for Disarmament and Research Geneva, Switzerland and Institute of Security Studies, Pretoria, South Africa, 2000.

76 Ezeogidi, 'The historical overview of the problems of ECOWAS in effective economic integration and conflict management in West Africa', 2.

77 Morison Siaffa Gbaya, 'The legal framework for regional organisations in Africa and the proactive role in addressing threats to international peace and security', 2(8) *International Journal of Law and Policy* (2024) 16.

78 Thiam, 'The emergence of the Economic Community of West African States (ECOWAS) and the limits of the paradigms of international politics', 46.

79 Thiam, 'The emergence of the Economic Community of West African States (ECOWAS) and the limits of the paradigms of international politics', 46.

80 Thiam, 'The emergence of the Economic Community of West African States (ECOWAS) and the limits of the paradigms of international politics', 47; Oloruntoba, 'ECOWAS and regional integration in West Africa', 296.

a collective security matter.[81] This securitisation further supports the notion that RECs emerged organically to deal with their region-specific matters.

As such, understanding the conflict-ridden context in which ECOWAS was formed is critical in understanding its relationship with the AU. Jens Herpolsheimer agrees with the findings here but focuses specifically on conflict management. He notes that it was not until 2019 that the establishment of a more regular coordination between ECOWAS and the AU in matters of conflict management occurred.[82] This is despite the existence of various instruments that articulated a relationship between ECOWAS and the AU, such as the Protocol Relating to the Establishment of the Peace and Security Council of the African Union.[83]

Before, this relationship was characterised by 'informal contacts and personal relationships'.[84] This means that these interactions were largely informal, interconnected relationships among the staff and personnel of the RECs and the AU.[85] This observation supports the assertion that RECs generally prefer to retain their decision-making power. The efforts to formalise the cooperative relationship between the ECOWAS and the AU in practice are a formalisation of these informal channels. The aim is to establish, among others, formal communication channels, institutionalised meetings, and proper record keeping.[86] They do not contemplate direct control of RECs by the AU.

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81 Margaret Aderinsola Vogt, 'The involvement of ECOWAS in Liberia's peacekeeping', in Edmond J Keller and Donald Rothchild (eds) *Africa in the new international order: Rethinking state sovereignty and regional* security, Lynne Rienner Publishers, 1996, 165-183.

82 Herpolsheimer, 'AU-REC Relations', 72 and 86; African Union Commission, 'Report on the division of labour between the African Union, regional economic communities and member states', 4th mid-year coordination meeting between the African Union, the Regional Economic Communities and the Regional Mechanisms, Lusaka, Zambia, 17 July 2022, MYCM/AU/7(IV)Rev.1, para 2.

83 Herpolsheimer, 'AU-REC Relations', 75. See also, African Union, *Memorandum of Understanding on Cooperation in the Area of Peace and Security between the AU, the RECs and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa*, African Union, 2008.

84 Herpolsheimer, 'AU-REC Relations', 85.

85 Herpolsheimer, 'AU-REC Relations', 85-86.

86 Herpolsheimer, 'AU-REC Relations', 86.

Furthermore, the Treaty of the Economic Community of the West African States of 1975 (ECOWAS Treaty) conceptualised ECOWAS as an organisation independent of the OAU. Its relationship with regional and/or continental organisations like the OAU was premised on the extent to which such a relationship is compatible with the objectives of the Treaty.[87] It is only with the advent of the Revised Treaty of the Economic Community of the West African States of 1993 (Revised ECOWAS Treaty) that it set an objective to ensure that its objectives align with those of the AEC.[88] I argue that the progress of the AEC, as reflected in initiatives such as the AfCFTA, stems from common interests shared by RECs and their member states.

Therefore, the influence of the Abuja Treaty on ECOWAS, similar to that on the EAC, is undeniable. This relationship proved effective to the extent that it was intergovernmental, but fell short where it sought to be supranational. While common objectives are a key driving force behind establishing a defined REC-AU relationship, credence must be placed on the reality that RECs prioritise preserving their decision-making autonomy. I will discuss these points in greater detail in the sections to follow.

South African Development Community

This sub-section discusses the emergence of the SADC to illustrate a recurring theme in the analysis; that as a REC, it developed independently in response to challenges its member states faced. Similar to the previous case studies discussed above, the formation of the Southern African Development Coordination Conference (SADCC), the precursor to SADC, formed on 1 April 1980, occurred independent of the direct influence of the OAU. Established through the Lusaka Declaration titled, 'Southern Africa: Towards economic liberation', the SADCC was a response to the hegemonic influence that apartheid South Africa

87 ECOWAS Treaty, 1975, Article 59.

88 Revised Treaty of the Economic Community of West African States, 24 July 1993, 2373 UNTS 233, Article 78.

had on the region. Maxi Schoeman submits that the SADCC was a 'politically motivated defence mechanism'.[89]

The objectives of the organisation set out under the Lusaka Declaration included: reducing the economic dependency of member states on South Africa, rehabilitating transport, telecommunication and infrastructure, mobilising resources, and securing support for SADCC projects.[90] The SADCC arose from a place of common interest as heighted from the objectives above. Moreover, the SADCC operated on a loose cooperation basis in that, member states were not explicitly legally bound by the organisation. Rather the organisation relied upon member states voluntarily subjecting themselves to its objectives.[91] SADCC favoured cooperation over integration and this could be argued to have been aimed at preserving their sovereignty. At no point did the SADCC contemplate being subjected to direct control by the OAU.

Tapiwa Shumba points out that the formation of SADC, replacing the SADCC, shifted its objectives from promoting economic self-sufficiency as a 'defence mechanism' against apartheid South Africa, under the SADCC, to promoting, *inter alia*, economic growth and socio-economic development, to enhance the quality of life for all persons within the region.[92] Further, unlike its predecessor, SADC is a legally binding REC rather than a loose cooperation agreement.

In connection with the previous case studies, a trend can be observed where the RECs emphasise economic integration to advance the AEC, either implicitly or expressly, an extension of the AU.[93] All three

89 Maxi Schoeman, 'From SADCC to SADC and beyond: The politics of economic integration', Alternative-regionalism.org, 2009, 2.

90 Bernard Weimer, 'Southern African Development Coordination Conference: Past and future', 21(2) *African Insight* (1991) 79.

91 Dawn Nagar and Mark Peterson, 'History of regionalism in Southern Africa: From SADCC to SADC', Centre for Conflict Resolution, 2013, 10.

92 Tapiwa Shumba, 'Rising from its ruins? The Southern African Development Community Tribunal', 26 *Law Democracy and Development* (2022) 289.

93 Revised of the Economic Community of West African States, Article 78; Treaty Establishing the East African Community, Article 130; Treaty of the Southern African Development Community, TRT/SADC/001, 17 August 1992, Article 24, read with Article 3(1) and Article 6(1).

treaties currently in force, namely the EAC Treaty (1999), the Revised ECOWAS Treaty (1993), and the SADC Treaty (1992), were established in the aftermath of the adoption of the Abuja Treaty on the African Economic Community in 1991.[94]

While the SADC Treaty does not explicitly state the goal of advancing the realisation of the AEC, it was enacted around the time the Abuja Treaty was adopted. In addition to this, its member states are part of the Abuja Treaty's framework, which identifies RECs as 'building blocks' of the AEC. This provides a clear implication of a connection.[95] It also a shift from their independent emergence with a region-specific focus to the acknowledgement of the need to tackle matters of common interest on a continental level. Hence, the start of a relationship between RECs and the OAU, later AU.

A distinct feature of SADC is its intergovernmental operational framework. This arguably demonstrates the clearest example of a REC resisting supranationalism both internally and in a continental context. This contrasts with both the EAC and the ECOWAS, which, albeit formerly intergovernmental bodies, have supranational leanings. The supranational structure recognises a separation of powers consisting of three branches: the executive, made up of heads of state; the legislative, composed of parliamentarians; and the judiciary, which includes independent judges.[96] The aim of this supranational structure is transfer and/or share of national sovereignty and the direct application of legal effects.

SADC's intergovernmental framework can be explained by the fact that the legislative and executive power is concentrated in the Summit and the Council of Ministers, to which all members have equal deci-

94 Abuja Treaty was adopted on 3 June 1991.

95 Treaty Establishing the African Economic Community, Reg No 55375, 3 June 1991, Article 6; African Union, 'Decisions and declarations: Decision on the moratorium on the recognition of Regional Economic Communities (RECs)', AU Doc. Assembly/AU/Dec. 112 (VII), Seventh Ordinary Session, para 3; Kolbeck, 'Legal analysis of the relationship between the AU/AEC and RECs', 52; Oppong, 'The African Union', 2.

96 Treaty Establishing the East African Community, Article 9; Revised Treaty of the Economic Community of West African States, 1993, Article 6.

sion-making power.[97] Efforts for a separate legislative body have been noted with the agreement establishing the SADC Parliament signed on 11 July 2024, however, it is yet to be seen whether the REC is prepared to surrender legislative power to a parliament.[98] Presently, there exists the SADC Parliamentary Forum which is predominantly advisory.[99]

Aside from the Parliamentary Forum, the events leading up to the abolition of the SADC Tribunal reveal that SADC member states are not willing to surrender their sovereignty and adhere to supranational judicial authority. In 2010, the SADC Summit of Heads of State suspended the SADC Tribunal, its judicial arm, following the ruling against the Zimbabwean government in *Mike Campbell and others v Zimbabwe*.[100] In 2015, a SADC Administrative Tribunal was established, but its jurisdiction is limited to labour disputes within the SADC Secretariat and its institutions.[101] This highlights SADC's reality of legislative and executive power being concentrated in the Summit of Heads of State – a tendency towards an intergovernmental operational framework.

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97 Treaty of the Southern African Development Community, Articles 10 and 11.

98 SADC, 'SADC Parliamentary Forum transforms into Parliament', 11 July 2024.

99 Treaty of the Southern African Development Community, Articles 9(2) and 10(6); Constitution of the SADC Parliamentary Forum, 2004 (before amendments), Articles 5 and 8(3).

100 *Mike Campbell (Pvt) Ltd and others v Republic of Zimbabwe,* (2/2007), [2008], SADCT 2, (28 November 2008). This case involved a challenge by Mike Campbell and about 77 other Zimbabwean white farmers, of Amendment 17 of the Constitution of Zimbabwe that permitted the government to seize agricultural land for resettlement purposes. The Applicants argued that the law was designed on a racial basis to dispose of white farmers of their land. The Tribunal held in favour of the white farmers that Zimbabwe had violated the prohibition on racial discrimination. Others have argued that this decision failed to take into account of the history and politics of race in that former settler colony. See E Tendayi Achiume, 'Transformative vision in liberal jurisprudence on racial equality: Justice Moseneke's legacy' in Penelope Andrews, Dennis Davis and Tabeth Masengu (eds) *A warrior for justice: Essays in honour of Dikgang Moseneke*, Juta Press, 2018, 13-14; E Tendayi Achiume, 'The SADC Tribunal: Socio-political dissonance and the authority of international courts' in Karen Alter, Laurence Helfer and Michael Rask Madsen (eds) *International court authority*, 2018, Oxford University Press, 135-140, what she describes as 'socio-political dissonance'; Constitution of Zimbabwe Amendment Act (No 17 of 2005) Section 2. Compare with, Laurine Nathan, 'Solidarity triumphs over democracy: The dissolution of the SADC Tribunal', The Development Dialogue December 2011, United Nations and Regional Challenges, 2011, 124 and 126.

101 SADC, 'SADC Administrative Tribunal'.

Similar to the EAC and ECOWAS, the SADC Treaty does not purport to be subordinate to the AU. SADC, as a distinct legal entity, is committed to maintaining good relations, cooperating with and entering into agreements with other states and regional or international organisations (such as the AU), as long as their objectives align.[102] It identifies itself as a distinct organisation, not an extension of the AU.

I propose that a cooperative relationship between the RECs and the AU is preferable because it allows the RECs to guide their integration process, which may not always align with the AU's perspective. This is reminiscent of Gathii's argument about African RTAs being flexible legal regimes designed to allow countries to join multiple RECs in line with their best interests.[103] Likewise cooperative relationship between the AU and RECs will similarly allow for a degree of flexibility in which RECs retain their decision-making autonomy in line with their best interests.

It is evident from my analysis of these case studies that the EAC, ECOWAS, and SADC have significantly different experiences of regional integration. Any framework aimed at accurately defining this relationship must account for these differences. As will be discussed in the following sections regarding the Abuja Treaty and the AfCFTA Agreement, their effectiveness in defining and implementing the relationship between RECs and the AU largely depends on the intergovernmental nature of this relationship that emphasises areas of common interest. They succeed in cooperation but fall short when trying to establish a supranational framework.

[102] Treaty of the Southern African Development Community, Article 24, read along with Article 3(1) and 6(1).

[103] Gathii, 'African regional trade agreements as flexible legal regimes', 571.

An evaluation of the pre-AfCFTA Agreement instruments affecting the relationship between RECs and the AU

To further strengthen the arguments made earlier, I will now analyse some of the instruments adopted prior to the adoption of the AfCFTA Agreement, that is: the Abuja Treaty, the Constitutive Act of the African Union, and the 2008 Protocol under Treaty Establishing the African Economic Community on Relations between the African Union and the Regional Economic Community, that have defined the relationship between RECs and the AU. As will be shown, these instruments succeed to the extent that they are intergovernmental and fail to the extent that they attempt to be supranational.

Treaty Establishing the African Economic Community

The Lagos Plan of Action, previously mentioned, did not achieve its intended goals. However, as Shumba argues,[104] it laid the groundwork for the adoption of the Abuja Treaty. I posit that the Abuja Treaty, evident in both its text and implementation, defines the relationship between the AU and RECs. This relationship is grounded in the principles of 'subsidiarity' and 'complementarity', rather than direct control of the RECs by the AU.[105]

As I previously alluded, 16 years after the formation of the OAU, the enactment of the Monrovia Declaration represented a significant shift among African countries, moving their focus from merely securing political independence to pursuing regional economic development.[106] Similarly, the Abuja Treaty marked a key milestone by establishing a framework for how the continent would approach regional development from both regional and continental perspectives. This treaty is noteworthy as it was the first regional instrument to define the relation-

104 Shumba, 'Towards an African Economic Community', 7.

105 Herpolsheimer, 'AU-REC', 75.

106 Shumba, 'Towards an AEC', 5; Mangeni and Juma, 'Emergent Africa', 49.

ship between the AU and RECs. It positions the AEC to which RECs are to be 'building blocks' as a subsidiary of the AU with separate legal personality.[107]

This subsidiary relationship exists despite the AEC and the AU sharing a common Secretariat. Klaus Detterbeck and Eve Hepburn emphasise that the principle of subsidiarity dictates that 'decisions are best taken at the lowest, most appropriate' level.[108] They argue that anything achievable at the lowest level should remain within that level.[109] In the same light, Paul Craig, in his analysis of the European Commission, posits that under the principle of subsidiarity, decisions suitable for national levels ought to be left to the members.[110] Despite a shared Secretariat, it is the Council of Ministers (the Council), which derives its authority from the Assembly of Heads of State and Government (the Assembly), that oversees the operations of the AEC.[111] This structure establishes a hierarchy in which power is delegated from the Assembly to the Council and ultimately to the AEC through its Secretary-General. Consequently, although the AEC derives its authority from the AU, it operates with a certain degree of independence, making decisions in accordance with the stipulations of the Abuja Treaty.

This subsidiarity-based framework extends to RECs. The Abuja Treaty identifies RECs as the foundational elements of the AEC.[112] It expresses a need to strengthen existing RECs and establish new ones where they are lacking.[113] The treaty further places an obligation on member states to take steps for the progressive enhancement of cooperation between RECs and the AEC.[114]

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107 [Abuja] Treaty Establishing the African Economic Community, 3 June 1991, Articles 1, 4 and 11.

108 Detterbeck and Hepburn, 'Introduction to the handbook of territorial politics', 6.

109 Detterbeck and Hepburn, 'Introduction to the handbook of territorial politics', 6.

110 Paul Craig, 'Subsidiarity: A political and legal analysis', 50(1) *Journal of Common Markets* (2012) 73.

111 Treaty Establishing the African Economic Community, Article 11.

112 Treaty Establishing the African Economic Community, Article 4.

113 Treaty Establishing the African Economic Community, Articles 4 and 5.

114 Treaty Establishing the African Economic Community, Articles 4 and 5.

The Abuja Treaty is conscious of this subsidiary relationship between RECs and the AEC, and by extension, the AU. It leaves room for member states at the regional level to lead in the regional integration and/or cooperation process. This approach allows member states some autonomy to tailor the process according to their specific needs. Thus, given the subsidiarity-based framework underpinning the AEC, the idea of direct control marks a significant departure from existing legal norms. Implementing this concept would necessitate a complete overhaul of African regional instruments, which would likely be more challenging than simply building upon the current framework.

I must point out that despite RECs being identified as building blocks of the AEC, neither the Abuja Treaty nor the Constitutive Act of the African Union provides a clear indication of how these 'building blocks' would establish the AEC. Outside the references made above that illustrate a subsidiary relationship between the RECs and AEC, the treaty does not provide specific details about the nature of this relationship.

I argue as before that this is by design to afford discretion to RECs as self-governing entities to regulate and build on to regulate and build on the AEC according to their unique interests. I will demonstrate later in this paper that the relationship between the RECs and the AEC mentioned above has further developed under the AfCFTA Agreement. This indicates a continued devolution of decision-making power as outlined in the Abuja Treaty. It shows that, in terms of cooperation between the RECs and the AEC, the RECs, through their member states, are responsible.

Apart from the textual analysis of the Abuja Treaty above, an investigation into its implementation indicates, as I previously noted, RECs favour a subsidiary relationship with the AEC as opposed to direct control of the former by the latter. In the case of the Abuja Treaty, the behaviour of RECs is more concerned with safeguarding individual interests than with what was collectively agreed. For instance, while the Abuja Treaty outlines a subsidiary relationship between the RECs and AEC as indicated above, it further envisions a supranational relationship in the long term.

The treaty proposes a eurocentric, Vinerian market-based integration formula consisting of six sequential stages.[115] This framework anticipates an evolution from the intergovernmental subsidiary structure to a more supranational structure within 40 years of its entry into force.[116] The first stage entails consolidating existing RECs and establishing new ones where they do not exist, to be achieved between 1994 and 1999.[117] This is followed by stabilising and eliminating tariff and non-tariff barriers (NBTs) within RECs as well as coordinating and harmonising their activities, which was to be implemented between 2000 and 2007.

After this, free trade areas (FTAs) and customs unions (CUs) were to be established in each REC, between 2007 and 2017. Thereafter, a continental CU would be established between 2018 and 2019.[118] This would be followed by the establishment of an African Common Market, which would include rights to establishment, residence, and movement between 2020 and 2023.[119] Lastly, the creation of a single currency and institutions for implementing the AEC is expected between 2024 and 2028.[120]

Shumba notes that only the first three have been achieved.[121] By 1999, each region had an REC.[122] Also, significant work has been done

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115 James Gathii, 'African regional trade agreements as flexible legal regimes', 579-587. For a comprehensive discussion on the Vinerian market-based integration, see the following: CA Cooper and BF Massell, 'Toward a general theory of customs unions for developing countries', 73(5) *Journal of Political Economy* (1965) 475; Amr Sadek Hosny 'Theory of economic integration: A survey of the economic and political literature', 2(5) *International Journal of Economy Management and Social Science* (2012) 133-155; Bela Balassa, 'Types of economic integration', in Fritz Machlup (ed) *Economic integration: Worldwide regional and sectoral,* International Economic Association, 1976, 18-21; Richard Frimpong Oppong, *Legal aspects of economic integration in Africa*, Cambridge University Press, 2011, 6-29.

116 Nagu, 'From OAU to AFCTA', 2019; Treaty Establishing the African Economic Community, Article 6(5).

117 Treaty Establishing the African Economic Community, Article 6.

118 Treaty Establishing the African Economic Community, Article 6(2)(d)

119 Treaty Establishing the African Economic Community, Article 6(2)(e).

120 Treaty Establishing the African Economic Community, Article 6(2)(f).

121 Shumba, 'Towards an African Economic Community', 11.

122 Shumba, 'Towards an African Economic Community', 11.

through these RECs to lower tariffs and NTBs, and FTAs and CUs have been formed.[123] These instances further supports my assertion that RECs are resistant to supranational control. The implementation of the Abuja Treaty was successful to the extent it was intergovernmental and failed to the extent it was supranational. For African countries and their RECs, what is important is that they cooperate on points of common interest without having to yield decision-making autonomy. If my argument holds, then one cannot envision a supranational body such as the AU having direct control of RECs because that would be contrary to how RECs in Africa behave.

Constitutive Act of the African Union

I will now provide additional support for my argument that RECs and their member states prefer to maintain their decision-making authority rather than submit to supranational control. My focus will shift from the AEC to a discussion of the AU in particular. The AU formally replaced the OAU in 2002. This was in response to the OAU's inadequacy to deal with challenges facing the continent at the time.[124]

John Mukum Mbaku notes that by the middle to late twentieth century, the continent faced a host of challenges such as economic mismanagement, poor economic performance, political turmoil, and political and bureaucratic corruption.[125] To Mbaku, post-independent Africa gave the ruling elite enough opportunity to undermine national laws for their self-interest at the expense of their people.[126]

It is this class of people that thinkers such as Peter Ekeh termed the African 'bourgeois' class, characterised by wielding significant economic

123 Shumba, 'Towards an African Economic Community', 11.

124 Ibrahim Yusuf, 'Has the African Union outlived its relevance?: A retrospective and introspective analysis', 8(3) *Journal of African Union Studies* (2019) 36 and 38-39.

125 John Mukum Mbaku, 'Providing a foundation for wealth creation and development in Africa: The role of the rule of law', 38(3) *Brooklyn Journal of International Law* (2013) 2.

126 Mbaku, 'Providing a foundation for wealth', 6.

and political control at the expense of the rest of the population.[127] What had emerged as an independence movement aimed to liberate African peoples turned into an opportunity for post-colonial politicians to capture state machinery and use it to redistribute wealth in their favour.[128]

For instance, Uganda, under Idi Amin Dada, was an autocratic government characterised by arbitrary killings and other extreme human rights violations.[129] It would appear that the OAU gave legitimacy to these actions through its principle of non-intervention.[130] To add salt to the wound, the same Idi Amin Dada became chairperson of the OAU.[131] This vividly outlined a disregard for human rights, which the AU, through the principle of non-indifference, sought to remedy.

The principle of non-difference articulates a collective responsibility on African states to protect their citizenry from atrocities committed within their borders.[132] Anselmo Otavio, Guilherme Ziebell de Oliviera and Nilton Cesar Fernandes Cardoso point out that the transformation of the OAU into the AU was less a mere name change and more a fundamental paradigm shift on the issue of security on the continent.[133] This

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127 Peter P Ekeh, 'Colonialism and the two publics in Africa: A theoretical statement', 7(1) *Comparative Studies in Society and History* (1975) 94; Franz Fanon, *The wretched of the earth,* Grove Press, 1963, 149-150.

128 Mbaku, 'Providing a foundation for wealth', 6.

129 Khabele Matlosa, 'Pan-Africanism, the African Peer Review Mechanism and the African Charter on Democracy, Elections and Governance: What does the future hold?' Occasional Paper No 190, The South African Institute of International Affairs (SAIIA), June 2014, 8.

130 Matlosa, 'Pan-Africanism, the African Peer Review Mechanism and the African Charter on Democracy, Elections and Governance', 8.

131 Matlosa, 'Pan-Africanism, the African Peer Review Mechanism and the African Charter on Democracy, Elections and Governance', 8.

132 Marina Sharpe, 'From non-interference to non-indifference: The African Union and the responsibility to protect', International Refugee Rights Initiative, 4 September 2017. See, 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; Constitutive Act of the African Union, Article 4(h); Antony Karol Muma, 'Transforming African diplomacy: Salim Ahmed Salim's vision of non-indifference and the evolution from OAU to AU', 3 *Kabarak Law Review* (2024) 237.

133 Anselmo Otavio, Guilherme Ziebell de Oliviera and Nilton Cesar Fernandes Cardoso, 'The limits of the African Union's non-indifference principle: A critical analysis', 2(1)

manifested in a commitment to intervene in instances of human rights abuse.[134] This would imply that a member state's sovereignty was limited to the extent its citizens were not subjected to human rights atrocities.

However, despite the several conflicts that occurred between 2002 and 2021, the AU has intervened in few conflicts with notable ones in Burundi, Sudan, and Somalia.[135] As previously noted by Herpolsheimer, most of the groundwork in conflict management in Africa is left to the RECs despite the existence of formal legal frameworks guaranteeing AU intervention.[136]

I must reiterate that this relationship has been characterised as largely informal, based on subsidiarity and complementarity, with the AU playing a more technical role instead of providing on-the-ground support.[137] I argue that despite the shift in focus to a more interventionalist approach, the reality has largely been different. African countries seldom yield their sovereignty, and although the rationale behind the formation of the AU was to safeguard human rights, this is difficult to execute through supranational organs.

Unlike under the OAU, there appears to be support for the proposition that the AU was designed to be a supranational body aimed at spearheading African regional integration.[138] The dispute, however,

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Journal of African Peace and Security (2024) 17; Abdulqawi Yusuf, 'The right of intervention by the African Union: A new paradigm in regional enforcement action?' 11 *African Yearbook of International Law* (2003) 3-4.

134 Otavio, de Oliviera and Cardoso, 'The limits of the African Union's non-indifference principle', 17.

135 Otavio, de Oliviera and Cardoso, 'The limits of the African Union's non-indifference principle', 17. I acknowledge that the issues of military, humanitarian, preventive and peacekeeping efforts in Africa are more nuanced than portrayed above, but the illustration still makes the point. An in-depth discussion would have been beyond the scope of this research. For a comprehensive discussion of peacekeeping in Africa, see, Andrew E Yaw Tchie, 'Generation three and a half peacekeeping: Understanding the evolutionary character of African-led peace support operations', 32(4) *African Security Review* (2023) 421-439.

136 Herpolsheimer, 'AU-RECs', 80-81.

137 Herpolsheimer, 'AU-RECs', 80-81; Tchie, 'Generation three and a half peacekeeping', 426.

138 Constitutive Act of the African Union, Article 3.

rests on whether, in its operations, it has done so, especially relating to its relationships with RECs. Article 6(2) of the AU Constitutive Act provides that the Assembly of Heads of State and Government shall serve as the supreme organ of the AU. Article 4 outlines the principles of the AU by which member states are bound. They include *inter alia*: sovereignty and interdependence of members, good governance and observance of the rule of law, and the right of the Union to interfere in a member state in grave instances such as crimes against humanity and genocide. The principles of the AU sought to remedy the shortcomings of the OAU.

However, despite the existence of supranational characteristics within the AU Constitutive Act, the organisation largely operates as an intergovernmental body.[139] I concur with Babatunde Fagbayibo that the organisation has consistently exhibited little political will to evolve into a supranational entity.[140] This reiterates my point that RECs and their member states generally avoid supranational control. For example, despite the existence of the Pan-African Parliament (PAP), member states of the AU have not granted it any legislative powers, either fully or partially.[141] Additionally, although the AU's Constitutive Act establishes a Court of Justice of the Union, member states have not taken steps to operationalise it. Most notably, there has been a failure to create a regulatory framework aimed at harmonising the RECs.[142]

After the Abuja Treaty and the AU Constitutive Act, there have been efforts to come up with a regulatory framework exclusively for the relationship between RECs and the AU. These have chiefly been through the 2008 Protocol on Relations between the RECs and the AU (the Protocol on Relations) and the Memorandum of Understanding on Cooperation in the Area of Peace and Security between the AU, RECs

139 Fagbayibo, 'Looking back, thinking forward', 414.

140 Fagbayibo, 'Looking back, thinking forward', 414.

141 Fagbayibo, 'Looking back, thinking forward', 414; Constitutive Act of the African Union, Article 17.

142 Fagbayibo, 'Looking back, thinking forward', 414. Constitutive Act of the African Union, Article 18.

and the Regional Standby of Brigades of Eastern and Northern Africa (the MoU on Cooperation).[143]

2008 Protocol on AU-RECs Relations

Before the 2008 Protocol on AU-RECs Relations came into effect, there was the 1998 Protocol on Relations.[144] However, for purposes of this paper, I will only discuss the 2008 Protocol on Relations as it is currently in force and its impact is readily assessable. The Protocol on Relations came into force on 10 November 2021 after being signed by the Chairperson of the AU Commission and the Chief Executives of three RECs.[145] At present, four RECs are signatories to the Protocol on Relations: the Economic Community of Central African States (ECCAS), the Community of Sahel-Saharan States (CENSAD), SADC, and the Common Market for Eastern and Southern Africa (COMESA).[146]

As has been a recurring theme in my paper, African RECs tend to avoid a formal regulatory framework, binding them to a supranational body such as the AU. Only four RECs from the eight recognised by the Abuja Treaty are party to the Protocol on Relations in about 17 years of its existence, with the latest, COMESA, signing on 4 February 2022.[147] The Protocol on Relations defines a REC as a regional grouping of African states, established by treaty to achieve social and economic integration.[148] This definition supersedes the eight recognised by the

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143 Gerhard Erasmus and Trudi Hartzenberg, 'How relevant is the Protocol on Relations between RECs and the AU?' *Tralac Blog*, 2022.

144 Centre of Conflict Resolution 'The AU and Africa's Regional Economic Communities', 1 August 2016.

145 Protocol under Treaty Establishing the African Economic Community on Relations between the African Union (AU) and the Regional Economic Community (RECs), 27 January 2008, Article 33.

146 Protocol on Relations between the African Union (AU) and the Regional Economic Community (RECs), Article 33.

147 Muzinge Chibomba 'COMESA signs the AU Protocol to consolidate relations' 6 February 2022.

148 Protocol on Relations between the African Union (AU) and the Regional Economic Community (RECs), Article 1.

Abuja Treaty, meaning out of the 19 RECs in Africa that are arguably eligible to become signatories to the Protocol on Relations, only four are signatories.[149]

Given that it seems to be the norm for African RECs to resist subjecting themselves to supranational bodies such as the AU, it seems unlikely to envision direct control of RECs by the AU. Rather, the solution rests in a regulatory framework flexible enough to accommodate the individual interests of RECs and concrete enough to define the nature of the relationship between RECs and the AU. That subsidiarity, instead of direct control, is the solution to a successful regulatory framework between RECs and the AU is not the question. Rather, how best can this framework be adopted to make it most effective? The answer lies in the African Continental Free Trade Area (AfCFTA).

The AfCFTA Agreement as a blueprint for a legal framework establishing the relationship between the AU and RECs

So far, I have shown that RECs tend to resist direct control by the AU in favour of a more intergovernmental relationship based on subsidiarity and complementarity. My argument in favour of intergovernmentalism has been premised on the fact that the trajectory of African regional development has evolved along the lines of intergovernmentalism and not supranationalism. This is to preserve their decision-making autonomy and allow them to tailor the regional integration and/or cooperation process to their region-specific needs.

As such, any legal framework that seeks to articulate a relationship between the AU and RECs must be cognisant of this reality. I now move to illustrate why the AfCFTA Agreement serves as the blueprint for a conscious agreement that appreciates the nuances behind why RECs prefer a relationship based on subsidiarity and complementarity as opposed to being subjected to direct control.

[149] Centre of Conflict Resolution 'The AU and Africa's Regional Economic Communities', 1 August 2016.

I will first provide a brief background of the AfCFTA Agreement. It primarily establishes the AfCFTA.[150] It seeks to promote, among others, intra-African trade through the elimination of tariffs and non-tariff barriers, progressively liberalise trade in services, and cooperation in all trade-related matters amongst its membership.[151] Nagu views the AfCFTA Agreement as intrinsically linked to the Abuja Treaty.[152] He opines that establishing a continental free trade area corresponds to establishing an AEC.[153] Although the Abuja Treaty does not mention the creation of a continental FTA, it can be implied from the linear steps of economic integration it employs that an FTA comes first before a CU.[154] This conclusion leads Shumba to assert that the AfCFTA Agreement is an initiative of the AU that pursues the principles of the Abuja Treaty.[155]

I draw the reader's attention to the point I made earlier that the Abuja Treaty is successful to the extent it is intergovernmental and fails to the extent it is supranational. The AfCFTA Agreement illustrates how, as an initiative of the AU in pursuit of the principles of the Abuja Treaty,[156] it continues to follow this trajectory of intergovernmentalism characterised by subsidiarity instead of direct control.[157] This will be further expanded on below.

Part III of the AfCFTA Agreement contemplates a subsidiary relationship between the AfCFTA and the AU, similar to the relationship between the AEC and the AU. Under Article 10 of the AfCFTA Agreement, the Assembly of Heads of State and Government of the African Union (the AU Assembly) has oversight and is tasked with giving strategic guidance to the AfCFTA. In line with the principle of subsidiarity,

150 Agreement Establishing the African Continental Free Trade Area, 21 March 2018, Articles 2 and 3.

151 Agreement Establishing the African Continental Free Trade Area, Article 4.

152 Nagu, 'Implementing the African Continental Free Trade Area Agreement', 68.

153 Nagu, 'Implementing the African Continental Free Trade Area Agreement', 68. Abuja Treaty, Article 4(2)(d).

154 Shumba, 'Towards an African Economic Community', 22.

155 Shumba, 'Towards an African Economic Community', 22.

156 Shumba, 'Towards an African Economic Community', 22.

157 Tralac, 'African Continental Free Trade Area Agreement (AfCFTA) legal texts and policy documents', *Tralac Blog*.

it is the Council of Ministers, although reporting to the AU Assembly, that is tasked with making decisions per the AfCFTA Agreement.[158]

Such decisions are binding on state parties. Article 13 of the AfCFTA Agreement, unlike the Abuja Treaty, provides that the AfCFTA Secretariat shall function independently of the AU. This indicates a deeper devolution of powers from the AU to the AfCFTA and supports the argument that, unlike the AEC, the AfCFTA functions far more independently than it would have under the Abuja Treaty. As will be demonstrated below, the subsidiary relationship between the AU and AfCFTA trickles down to RECs.

The speed at which the AfCFTA Agreement was negotiated, adopted, and entered into force is indicative of the presence of sheer political will in the creation of a continental FTA in Africa. Following a series of deliberations, the AU Assembly, in 2012, moved to implement measures to boost intra-African trade and map out a plan for the establishment of a continental FTA.[159] The 25th Ordinary Session of the Assembly of Heads of State and Government commenced discussions around achieving concrete advances towards the establishment of an AEC in line with the Abuja Treaty.[160]

This paved the way for the commencement of negotiations for the establishment of the AfCFTA. On 21 March 2018, the AfCFTA Agreement was adopted and signed by 44 AU member states.[161] As of August 2024, all 55 AU member states except Eritrea had signed into the AfCF-

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158 Agreement Establishing the African Continental Free Trade Area, Article 11(3)(a).

159 AU Assembly of Heads of State and Government Eighteenth Ordinary Session, 'Decisions and declarations of the Assembly: Decision on boosting intra-African trade and fast tracking the continental free trade area', Assembly/AU/Dec.394(XVIII), AU Doc EX.CL/700(XX), 2012, para 1-9.

160 AU Assembly of Heads of State and Government Twenty-Fifth Ordinary Session, 'Decisions and declarations of the Assembly: Decision on the launch of continental free trade area negotiations', Assembly/AU/Dec.569(XXV), AU Doc Assembly/AU/11(XXV), 2015, para 1-8.

161 Vera Songwe, Jamie Alexander Macleod and Stephen Karingi, 'The African Continental Free Trade Area: A historical moment for development in Africa', 8(2) *Journal of African Trade* (2021) 12.

TA Agreement, 48 of which had ratified it.[162] The AfCFTA Agreement came into force on 30 May 2019.[163]

Given that the central argument of this section is that the AfCFTA Agreement provides a blueprint for a robust framework outlining the relationship between RECs and the AU, the question then becomes, what makes the AfCFTA Agreement different from its predecessors?

Firstly, the AfCFTA follows a strong intergovernmental framework. Gerhard Erasmus and Trudi Hartzenberg note that it is a member-driven organisation and does not contemplate supranational authority over its members.[164] This makes the AfCFTA Agreement more compatible with RECs and member states' tendencies to resist supranational control and is reflected in the eminence support the AfCFTA Agreement has received.

Moreover, the Abuja Treaty, in contrast to the AfCFTA Agreement, was too ambitious in its objectives.[165] The Abuja Treaty advocated for deep integration at a pace that Africa was and arguably still is not prepared for. This is evidenced by how the latter three stages of the Abuja Treaty have not been implemented. The establishment of a CU, Common Market, and a single currency require a deep level of integration that African states and RECs are not prepared for. As previously stated, African states are seldom willing to sacrifice their sovereignty, and RECs tend to resist supranational control. As such, any legal framework seeking to outline a relationship between the RECs and AU must account for this resistance. The AfCFTA serves as a blueprint for such an agreement by establishing a free trade area based on its member states' abilities.[166]

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162 Tralac 'African Continental Free Trade Area Agreement (AfCFTA) legal texts and policy documents'. As of 2025, the status of signing and ratification has not changed.

163 Shumba, 'Towards an African Economic Community, 20-21.

164 Erasmus and Hartzenberg, 'How relevant is the Protocol on Relations between RECs and the AU?'.

165 Erasmus and Hartzenberg, 'How relevant is the Protocol on Relations between RECs and the AU?'.

166 Katrin Kuhlmann and Akinyi Lisa Agutu, 'The African Continental Free Trade Area: Toward a new legal model for trade and development', 51(4) *Georgetown Journal of International Law* (2020) 758.

Another advantage that the AfCFTA has over its predecessors is its timing. It came at a time when there was almost a consensus amongst African countries that an African free trade area was needed. Mold and Mukwanya note that at the Tripartite Free Trade Area (TPFTA) Kampala Summit of 2008, SADC, the EAC, and the Common Market for Eastern and Southern Africa began negotiations towards building a grand free trade area on the continent.[167] By June 2015, the three RECs established the TPFTA, the largest free trade area at the time, making up about 54% of the continent's gross domestic product and over 58% of the continent's population.[168]

Together with the evidence of immense political will from African states, it is not a coincidence that three years later, an African continental free trade area was established. Songwe, Macleod, and Karingi take the view that the establishment of the AfCFTA was long overdue.[169] To them, discussions for a possible continental free trade area can be traced as far as the 1963 Summit Conference of Independent African States, where the idea was first discussed. Citing the first consignment of goods traded under the AfCFTA, containers of cosmetics and drinks from Ghana to South Africa, on 5 January 2021, there appears to be undoubted support for the AfCFTA.[170] I argue that the conditions seem to have been ripe for the formation of an African free trade area. This contrasts with the implementation and success of its predecessors. For instance, the Abuja Treaty advocated for deep integration without accounting for whether African countries where ready for such a commitment.

Furthermore, as Katrin Kuhlmann and Akinyi Lisa Agutu argue, by design, the AfCFTA Agreement adopts an incremental approach that prioritises the tailored needs of its negotiating members.[171] Through

[167] Andrew Mold and Rodgers Mukwaya, 'Modelling the economic impact of the Tripartite Free Trade Area: Its implications for the economic geography of Southern, Eastern and Northern Africa', 3(1) *Journal of African Trade* (2016) 57.

[168] Mold and Mukwanya, 'Modelling the economic impact of the Tripartite Free Trade Area', 57.

[169] Songwe, Macleod, and Karingi, 'The African Continental Free Trade Area', 12.

[170] Songwe, Macleod and Karingi, 'The African Continental Free Trade Area', 12.

[171] Kuhlmann and Agutu, 'The African Continental Free Trade Area: Toward a new legal model for trade and development', 758.

flexible and variable geometry,[172] the AfCFTA Agreement allows incremental implementation based on a country's needs and capabilities, periodic review of the Agreement every 5 years,[173] and flexibility to negotiate additional instruments to form an integral part of the Agreement.[174]

Kuhlmann and Agutu point out that the flexible nature of the AfCFTA Agreement draws parallels to the flexible nature of African RTAs.[175] This further buttresses the point that RECs best respond where their interests are best catered for and their decision-making power is preserved. Not only does this make the AfCFTA somewhat more compatible with RECs, but it also indicates a more intimate relationship between itself and RECs absent from its counterparts.

In doing so, the AfCFTA Agreement identifies RECs as its building blocks.[176] It places itself as a facilitator of investment initiatives and development within state parties and RECs.[177] Where the AfCFTA provides a Committee of Senior Trade officials tasked with, *inter alia*, the implementation of the Council of Ministers' decisions, RECs shall be represented within the Committee, albeit in an advisory capacity.[178] This, in part, remedies the reality that RECs respond to matters within their region-specific interests. As such, a platform for REC interests in the implementation of the AfCFTA Agreement is provided. The AfCFTA Agreement's Protocol on Trade in Goods further provides that in the implementation of the Protocol, the Secretariat shall work with state parties and RECs.[179]

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172 These principles are recognised and used within some of the RECs, for example, Treaty for the Establishment of the East African Community, Articles 1 and 7(1)(e).

173 Agreement Establishing the African Continental Free Trade Area, Article 28.

174 Agreement Establishing the African Continental Free Trade Area, Article 8.

175 Kuhlmann and Agutu, 'The African Continental Free Trade Area', 758. See, Gathii, 'African regional trade agreements as flexible legal regimes', 572-573.

176 Agreement Establishing the African Continental Free Trade Area, Article 5(b).

177 Agreement Establishing the African Continental Free Trade Area, Article 3(c).

178 Agreement Establishing the African Continental Free Trade Area, Article 12(5).

179 Protocol on Trade in Goods under the Agreement Establishing the African Continental Free Trade Area, 21 March 2018, Article 29(1).

The AfCFTA Agreement, although acknowledging that RECs are the building blocks of the AfCFTA, is conscious of the potential conflict of laws and inconsistencies arising from RTAs. It provides that where a conflict arises between an RTA and the AfCFTA Agreement, it takes precedence to the extent of that inconsistency.[180] The AfCFTA Agreement goes a step further by acknowledging that some RECs have attained higher levels of integration than others; through the *acquis* principle,[181] it maintains that in such circumstances, these higher levels of integration are to be maintained.[182] This demonstrates a very intimate relationship between RECs and the AfCFTA and, by extension, the AU, that is built on subsidiarity. Although not perfect, the degree of political will that has led to the Agreement's adoption serves as a testament to its favourability amongst African countries and RECs.

Conclusion

This paper contends that a subsidiary relationship between RECs and the AU is preferable to direct oversight of the former by the latter. Through a historico-legal investigation, the study has demonstrated that the OAU functioned through an intergovernmental framework to which supranational control over its membership was never envisaged. Even after it was succeeded by the AU, member states have pushed back against its supranational institutions, in favour of a more intergovernmental-leaning framework. This behaviour has also manifested in RECs who have demonstrated a preference for a subsidiary relationship with the AU as opposed to being subjected to its direct oversight.

The paper has established that RECs were developed independently to address region-specific challenges. An analysis of the 2008 Pro-

[180] Agreement Establishing the African Continental Free Trade Area, Article 19(1).

[181] The term *acquis* is derived from French meaning 'that which has been agreed'. In the context of regional integration, the principle holds that agreements must not start from afresh but rather build on what already exists. See, Gerhard Erasmus, 'AfCFTA parallelism and *acquis*', *Tralac Blog*, 10 February, 2021.

[182] Agreement Establishing the African Continental Free Trade Area, Article 19(2).

tocol on AU-RECs Relations highlighted the reluctance of RECs to engage, indicating their resistance to supranational authority. Only four out of the eight RECs recognised by the AU have signed this protocol. Furthermore, a review of the Abuja Treaty revealed that while it envisions a subsidiary relationship between RECs and the AU, the treaty's final three stages, encompassing a customs union, common market, and monetary union, necessitate a level of supranational control over RECs and their member states. This requirement contrasts with the actual behaviour of RECs and their member states, as they rarely concede to supranational oversight.

The AfCFTA Agreement has been presented as a blueprint for defining the relationship between RECs and the AU. As a subsidiary of the AU, the AfCFTA positions RECs as foundational elements beneath it. This framework emphasises its nature as an intergovernmental organisation rather than a supranational one, which accounts for the tendency of RECs and their member states to resist any form of supranational oversight.

Additionally, the Agreement addresses a significant concern for RECs: the establishment of a continental free trade area, a goal that RECs and their member states were keen to achieve. With the Tripartite Free Trade Area having been formed in 2015 by the EAC, SADC and COMESA, the creation of the AfCFTA in 2018 was a natural progression. The AfCFTA Agreement also recognises the diverse economic capacities of its member states, incorporating a principle of variable geometry to facilitate their integration into the Agreement based on their individual capabilities.

I do not seek to argue that the AfCFTA is perfect, rather, I argue that, evidenced by the immense political support it has gained, lessons can be drawn from it as a template for developing a robust legal framework outlining the relationship between the AU and RECs. One that is based on subsidiarity.

Strategic Silence? The African Union and South-South cooperation in the Israel-Palestine conflict

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Abstract

This article critically evaluates the African Union's (AU) response to the Israel-Palestine conflict, interrogating whether its foreign policy exemplifies the values of Pan-Africanism, South-South cooperation (or solidarity), and human rights as enunciated in the AU's Constitutive Act. The AU's foundational principles entrench respect for human rights and solidarity, yet a significant gap exists between these normative commitments and its diplomatic practice regarding the Palestinian cause. Based on a qualitative analysis of AU communiqués, summit resolutions, and historical records, this study contrasts the AU's current posture with that of its more vocally aligned predecessor, the Organisation of African Unity (OAU). This article argues that the AU's strategic silence is not a position of principled neutrality but a calculated consequence of internal fragmentation among member states, the securitisation of foreign policy, and powerful external

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geopolitical pressures. This trend erodes the AU's historical commitment to South-South cooperation and undermines its moral authority on the global stage. This article concludes by proposing concrete pathways toward a more coherent and principled AU policy, including the robust use of Palestine's existing observer status and the appointment of a Special Envoy to revitalise African diplomatic engagement.

Keywords: African Union, Israel-Palestine conflict, Pan-Africanism, South-South cooperation, foreign policy, Organisation of African Unity

Introduction

At the zenith of the global struggle against apartheid in South Africa, the African continent, unified under the institutional banner of the Organisation of African Unity (OAU) and projected a voice of remarkable moral clarity.[1] This collective conscience, forged in the crucible of its own anti-colonial struggles, was unshaking in its commitment to justice, liberation, and self-determination.[2] The OAU, the direct predecessor of today's African Union (AU), not only offered diplomatic shelter but also provided material and political support to liberation movements across the continent, viewing their fight as an indivisible part of Africa's own quest for freedom.[3] Today, while the AU issues public statements in support of Palestine, its solidarity often depends on the political interests of individual member states thereby undermining a unified position.[4]

The Israeli-Palestinian conflict persists as one of the most intractable and morally charged issues in contemporary international relations. Most devastating is the dispossession and subjugation of the Palestinian people, who have endured a military occupation, punctuated by recurring military assaults, an asphyxiating blockade and the denial of fundamental human rights.[5]

The Gaza Strip, a narrow and densely populated coastal enclave that is home to over two million people,[6] has been subjected to a debilitating land, air, and sea blockade for more than sixteen years.[7] This

1 Simon Stevens, 'The external struggle against apartheid: New perspectives', 7 *Humanity: An International Journal of Human Rights, Humanitarianism and Development* (2016) 295.

2 Saoud Khalaf, 'Nelson Mandela, boycotts, and the right side of history' *The New Arab*, 17 July 2023.

3 Virginia Morris, *Organisation of African Unity: Declarations, resolutions and decisions*, African Institute of International Law, 2023, xxi-xxii.

4 Kribsoo Diallo, 'African attitudes to, and solidarity with, Palestine: From the 1940s to Israel's genocide in Gaza', *Transnational Institute*, 26 July 2024.

5 Human Rights Watch, '"Hopeless, starving, and besieged": Israel's forced displacement of Palestinians in Gaza', *Human Rights Watch* (2024) 19, 146.

6 Khalid Manzoor Butt and Anam Abid Butt, 'Blockade on Gaza Strip: A living hell on earth', 23(1) *Journal of Political Studies* (2016) 164.

7 Butt and Butt, 'Blockade on Gaza Strip: A living hell on earth', 158.

policy has been condemned by the Independent Commission on Inquiry established by the United Nations Human Rights Council as a deliberate infliction of 'conditions of life calculated to bring about its physical destruction in whole or in part'.[8] The Commission of Inquiry's September 2025 Report details how Israel has weaponised the withholding of life-sustaining necessities by cutting off supplies of water, food, electricity, fuel and other essential items. This is a strategy that began on 9 October 2023 when the then Minister of Defence of Israel declared a 'complete siege' against what he termed 'human animals'.[9]

This reality on the ground has prompted serious legal scrutiny. The UN Commission of Inquiry found that by July 2025, over 53,000 Palestinians had been killed, of whom more than 83 percent were civilians, with Israeli forces directly and intentionally targeting civilians, including children holding white flags, along evacuation routes and in designated safe zones.[10] Former UN Special Rapporteur Michael Lynk concluded that the situation in the occupied territories meets the legal definition of apartheid under international law.[11]

In addition to this, through a historic and globally resonant move in 2023, the Republic of South Africa, a nation uniquely positioned to speak with authority on the crime of apartheid, instituted proceedings against the State of Israel at the International Court of Justice (ICJ), accusing it of committing acts of genocide against Palestinians in Gaza.[12]

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8 'Legal analysis of the conduct of Israel in Gaza pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide: Conference room paper of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel' 16 September 2025, UN Doc A/HRC/60/CRP.3, 46.

9 Independent Commission of Inquiry, 'Legal analysis of the conduct of Israel in Gaza' 35.

10 Independent Commission of Inquiry, 'Legal analysis of the conduct of Israel in Gaza' 55, 63.

11 Michael Lynk, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967' Human Rights Council, A/HRC/49/87, 12 August 2022, para 52.

12 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel),* (Application, instituted 29 December 2023) General List No 192, ICJ, para 1.

This accusation has now been substantiated by the UN Commission on Inquiry, which concluded that the State of Israel is responsible for committing genocide against the Palestinians in Gaza.[13]

Despite the gravity of these allegations and Africa's own historical experience with the evils of racial and colonial domination, the AU's collective response has been characterised by a notable and persistent fragmentation.[14] A clear illustration of this disunity emerged in 2021 with the decision made by the AU Commission Chairperson to unilaterally grant Israel observer status.[15] This move was met with immediate opposition from nearly half of the AU's 55 member states, including regional heavyweights like South Africa, Algeria, and Nigeria.[16]

The ensuing diplomatic chaos threatened to derail the 2022 AU Summit and was only defused by suspending the decision.[17] This is a clear testament to the deep ideological gaps that fracture the continent on this issue. This division is unlike the principled unity showcased by the OAU on matters liberation.

The AU, established by the Constitutive Act of 2000, was envisioned as a transformative project, designed to be more than a simple successor to the OAU. It was conceived as the institutional embodiment of a renewed and people-centric Pan-Africanism.[18] Its founding treaty

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13 Independent Commission of Inquiry, 'Legal analysis of the conduct of Israel in Gaza', 254-55.

14 Shola Lawal, 'Israel-Gaza war: Why is Africa divided on supporting Palestine?', *Al Jazeera*, 14 October 2023.

15 Shewit Woldemichael, 'Israel's accreditation to the AU is dividing Africa' *Institute for Security Studies*, 9 September 2021; Al Jazeera, 'Israel granted official observer status at the African Union', 23 July 2021.

16 Department of International Relations and Cooperation (DIRCO), 'South Africa objects to the African Union Commission decision to grant Israel observer status' 28 July 2021, noting that this decision was unilateral and, '[t]he African Union cannot be a party in any way to plans and actions that would see the ideal of Palestinian statehood reduced into balkanised entities devoid of true sovereignty, without territorial contiguity and with no economic viability'; Lawal, 'Israel-Gaza war: Why is Africa divided on supporting Palestine?'.

17 Al Jazeera, 'African Union says Israel's observer status suspended' 20 February 2023.

18 Gilbert Kimutai, 'OAU-Pan-Africanism: AU-missing ideology?', in Thomas Otieno Juma (ed) *African international relations: Thematic analysis*, Exceller Books, 2021, 128.

is a repository of bold and forward-looking principles, committing the Union to the promotion of democratic governance, sustainable development, regional integration, and, most critically, the protection of human and peoples' rights.[19]

The Act's most revolutionary provision, Article 4(h), grants the African Union the explicit right to intervene in a member state in respect of grave circumstances such as war crimes, genocide and crimes against humanity.[20] On paper, these commitments signal a shift from an era of strict non-interference to one of collective security.[21] In practice, however, their application remains inconsistent, frequently undermined by the persistent sovereignty concerns of member states, crippling financial dependencies on external partners, and the huge political divisions that continue to fracture continental unity.[22]

This article argues that the AU's ambivalent and often muted position on the Israel-Palestine conflict reveals a significant and damaging inconsistency with its own foundational principles.[23] The analysis is framed by two key conceptual lenses. Strategic silence is employed here to describe the AU's deliberate policy of quietness and avoidance in diplomatic matters, a posture that this paper contends is driven not by principled neutrality but by an array of factors such as the competing national interests, economic incentives, and geopolitical pressures.

The second lens, South-South cooperation,[24] while often defined in developmental terms as 'a common endeavour of peoples and countries of the South … born out of shared experiences and sympathies, based on their common objectives and solidarity' among Global South nations,[25]

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19 Kimutai, 'OAU-Pan-Africanism: AU-missing ideology?', 128.

20 Constitutive Act of the African Union, 11 July 2000, 2158 UNTS 3, Article 4(h).

21 Johnson Mayamba, 'Where are African solutions to Africa problems?', *GCHuman Rights Preparedness*, 8 February 2024.

22 Mayamba, 'Where are African solutions to Africa problems?'.

23 Woldemichael, 'Israel's accreditation to the AU is dividing Africa'.

24 This paper will use cooperation and solidarity interchangeably.

25 UN Office for South-South Cooperation, 'About South-South and triangular cooperation', *UNOSSC,* 2025.

possesses a deeper political and normative dimension that is central to this paper's argument.

As the UN Office for South-South Cooperation (UNOSSC) describes, South-South cooperation as 'born out of shared experiences … based on … solidarity',[26] a framework first given expression at Bandung in 1955, when anti-colonial leaders tied development to sovereign equality and united opposition to foreign domination.[27] As Mohsen al Attar and Nciko wa Nciko argue, there is an 'unbroken bond' linking liberation movements, founded on the recognition that 'all anti-colonial struggles are indeed interconnected' and that the 'settler-colonial violence inflicted on the Palestinians is intrinsically tied to the neocolonial violence Africans continue to face'.[28]

This is arguably a normative obligation for the AU member states. Trésor Makunya contends that the 'liberation ethos' of the African Charter on Human and Peoples' Rights, especially its call for states to assist any people in their 'liberation struggle against foreign domination', has an extraterritorial reach that extends to Palestine.[29] This paper postulates that the AU has allowed its collective voice (once a powerful instrument of South-South cooperation) to be muted by these countervailing forces, signalling a concerning departure from the value-based, anti-imperialist

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[26] UN Office for South-South Cooperation, 'About South-South and triangular cooperation'.

[27] Reality of Aid Network, 'On South-South cooperation: Assessing its political relevance and envisioning a future beyond technical cooperation' *Reality of Aid*, 26 October 2023. *See generally*, Luis Eslava, Michael Fakhri and Vasuki Nesiah, 'The spirit of Bandung', in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds) *Bandung, global history, and international law: Critical pasts and pending futures*, Cambridge University Press, 2017, 3; Harrison Otieno Mbori, 'International trade solidarity governance split: Bretton Woods solidarity vs Bandung solidarity' Cecilia Bailliet (ed) *Research handbook on international solidarity and the law*, Edward Elgar Publishing, 2024, 184-186.

[28] Mohsen al Attar and Nciko wa Nciko, 'Unbroken bond: Tracing the ties between African and Palestinian anti-colonial struggles – Symposium introduction', *Opinio Juris*, 29 July 2024.

[29] Trésor Muhindo Makunya, 'Symposium on unbroken bond: Tracing the ties between African and Palestinian anti-colonial struggles – Peoples' rights without borders? The significance of the African Charter's liberation ethos to the Palestinian struggles', *Opinio Juris*, 8 August 2024.

diplomacy envisioned not only in the spirit of the Bandung Conference but also within its own human rights framework.

The primary objective of this paper is, therefore, to interrogate the AU's obligations under its founding treaty in light of its contemporary diplomatic practice regarding the Palestinian conflict. It seeks to assess whether the AU's evolving foreign policy reflects a pragmatic adaptation to a changing global order or a deeper erosion of Pan-Africanism as a viable doctrine for pursuing global justice.

The paper proceeds as follows: the present part serves well to introduce the discussion. Part two will present a normative framework based on Pan-Africanism and a reading of the Constitutive Act to argue for a duty of solidarity of the AU towards Palestine. This part will also show the distinction between the OAU and the AU to show how the former institution took up this duty of solidarity by condemning imperialism's manifestations, including in Palestine. The third part unearths the geopolitics of silence due to differing national positions, fuelled by economic incentives and external pressure. This paper then concludes by proposing concrete pathways toward a more coherent and principled AU policy, including the robust use of Palestine's existing observer status and the appointment of a Special Envoy to revitalise African diplomatic engagement.

The normative framework: Pan-Africanism, the Constitutive Act and the duty of solidarity

The Constitutive Act of the African Union is, by any measure, a revolutionary legal document, primarily because its core objective is 'to achieve greater unity and solidarity between the African countries and the peoples of Africa'.[30] It was meticulously crafted to overcome the perceived institutional weaknesses of the OAU and its Charter, particularly its rigid adherence to the principle of non-interference, which had often

[30] Constitutive Act of the African Union, Article 3(a).

been used as a shield by authoritarian regimes to deflect criticism of domestic human rights abuses.[31]

The Constitutive Act's drafters envisioned a more integrated, proactive and assertive Africa, capable of addressing its own conflicts and speaking with a unified, powerful voice on the world stage.[32] Articles 3 and 4 of the Act lay out a comprehensive legal framework, committing the Union and its member states to a wide array of principles, including the promotion of peace and security, the advancement of democracy and good governance, and, most critically, the promotion and protection of human and peoples' rights.[33] This framework is not merely aspirational; it imposes clear legal and moral imperatives on the institution and its members, forming the very bedrock of the AU's institutional identity.

There is often a wide gap between what the AU promises on paper and what it does in practice. The bold ideas in the Constitutive Act are usually watered down. Leaders and bureaucrats interpret them cautiously to avoid upsetting member states.[34] This caution reflects the different interests and foreign policies across the continent. It represents a significant departure from the Act's original and more ambitious intent, which was to reawaken and institutionalise a sense of Pan-African dignity, shared destiny and collective autonomy for the twenty-first century.[35]

While the African Union has demonstrated a capacity for decisive diplomatic action in certain continental crises (such as its swift suspension of member states following unconstitutional changes of govern-

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31 Ben Kioko, 'The right to intervention under the African Union's Constitutive Act: From non-interference to non-intervention', 85 *International Review of the Red Cross* (2003) 812-13; Ottilia Anna Maunganidze, 'Human rights and constitutionalism in Africa: Progress has been achieved, but more is needed', 52 *The Cairo Review of Global Affairs* (2024).

32 Hoolo 'Nyane, 'An analysis of the African Union's Constitutive Act: Has the Act "constitutionalised' the Union?', 12(2) *Journal of African Union Studies* (2023) 6.

33 Constitutive Act of the African Union, Articles 3 and 4.

34 Hubert Kinkoh, 'Why the African Union should weigh in on the Gaza crisis', *Institute for Security Studies Today*, 10 July 2024.

35 'Nyane, 'An analysis of the African Union's Constitutive Act', 6.

ment[36] or its strong diplomatic intervention in the Sudanese conflict[37]) it remains conspicuously silent and passive when confronted with the Israeli-Palestinian conflict. Its response has been largely limited to sporadic and often weakly worded press statements,[38] with no sustained, high-level diplomatic initiative to match the gravity and urgency of the situation on the ground.[39]

A tale of two Unions: The AU's reticence and the OAU's principled and uncompromising stand

To fully appreciate the extent and significance of the AU's current reticence, it is essential to compare it with the clear and consistent historical precedent set by the OAU. Though often criticised for its institutional weaknesses and its inability to prevent intra-African conflicts,[40] the OAU was rarely, if ever, afraid to speak out boldly and unequivocally against external oppression, colonialism, and racial injustice.[41] Born in the era of decolonisation in the early 1960s, its very identity was inextricably linked to the global struggle for liberation.

The OAU was at the vanguard of the international diplomatic and material campaign against apartheid in South Africa and Portuguese colonialism in Angola, Mozambique, and Guinea-Bissau.[42] It recognised national liberation movements like the South West Africa People's Organisation (SWAPO) and the African National Congress (ANC) as the

36 Human Rights Watch, 'World report 2025: African Union', *Human Rights Watch*, 2025.

37 African Union, 'The Sudan war calls for our relentless collective action: High Level Dialogue on Sudan concludes', *Press release*, 11 February 2025.

38 African Union Commission, 'Joint statement by the African Union Commission and the General Secretariat of the League of Arab States on the grave situation in Gaza', 15 October 2023.

39 Kinkoh, 'Why the African Union should weigh in on the Gaza crisis'.

40 Mohammed Faal, 'The OAU and conflict management in Africa: The post-cold war era', Unpublished PhD thesis, University of Southampton, 2001, 92.

41 Faal, 'The OAU and conflict management in Africa: The post-cold war era', 92; Charter of the Organisation of African States, 25 May 1963, Article II (1).

42 Mohamed El-Khawas, 'The quiet role of OAU in Africa's liberation', 5(2) *New Directions* (1978) 16.

sole legitimate representatives of their people, granting them observer status and providing them with critical diplomatic platforms and material assistance, even as they were being branded as terrorist organisations by powerful Western states.[43]

This sense of solidarity was not confined to the geographical boundaries of the African continent. The OAU's Pan-African ideology fostered a worldview that saw the Palestinian struggle as a natural and indivisible extension of its own anti-colonial project.[44] The legal and political parallels between apartheid South Africa and the situation in the occupied Palestinian territories were frequently and explicitly drawn by African leaders.[45]

In the early 1970s, the OAU passed AHG/Res.76 (XII), 'Resolution on the Middle East and Occupied Arab Territories', which declared its unequivocal support for the Palestinian people's inalienable right to self-determination and the recovery of their homeland.[46] In 1974, in a move of symbolism and political weight, the OAU formally recognised the Palestinian Liberation Organisation (PLO) as the sole legitimate representative of the Palestinian people.[47]

The 1975 OAU summit in Kampala, Uganda, marked the zenith of this solidarity; PLO Chairman, Yasser Arafat, was welcomed as a fellow freedom fighter,[48] and the organisation passed a landmark resolution endorsing the controversial UN General Assembly Resolution 3379, which determined that 'zionism is a form of racism and racial discrimination'.[49] While this resolution was later revoked by the UN in 1991 due

43 El-Khawas, 'The quiet role of OAU in Africa's liberation', 16.

44 OAU 'Resolution on the Middle East and the occupied Arab territories' CM/Res. 468 (XXVI) (1976).

45 Khalaf, 'Nelson Mandela, boycotts, and the right side of history'.

46 Virginia Morris, *Organisation of African Unity: Declarations, resolutions and decisions*, African Institute of International Law, 2023, 205.

47 OAU 'Resolution on the Middle East and the question of Palestine', CM/Res. 573 (XXII) (1974).

48 Hanan Jarrar, 'Israel must not have a place at the African Union until it ends its occupation of Palestine', *Middle East Monitor*, 26 September 2021.

49 Organisation of African Unity (OAU), 'Resolutions on the Question of Palestine Adopt-

to intense pressure from the United States,[50] the OAU's endorsement at the time signaled an uncompromising and principled alignment with the Palestinian cause, positioning Africa as a moral standard-bearer for the entire Global South. For decades, Palestine was a central and non-negotiable pillar of Pan-African foreign policy.

The AU's legal, moral, and normative obligations

The AU's ethical compass, by contrast, appears to have been significantly recalibrated by the powerful forces of post-Cold War geopolitics and economic globalisation.[51] As Jan Vanheukelom argues, the AU's very creation was driven by a post-Cold War imperative to manage internal conflicts, a shift that aligned with the security interests of external partners like the US and the EU.[52] This alignment has led to a financial dependency, where donors finance the majority of the AU's peace operations.[53]

Despite these powerful external influences, the Constitutive Act provides the necessary legal authority and moral responsibility for the AU to act decisively on issues of global injustice. Article 4(h) of the Act grants the Union the unprecedented 'right to intervene in a member state' in respect of grave circumstances such as genocide and crimes against humanity.[54]

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ed by the Assembly of Heads of State and Government at its twelfth Ordinary Session, Kampala, Uganda July 28 – 1 August 1975', AHG/Res. 71-78 (XII), 1975; United Nations General Assembly, Resolution 3379 (10 November 1975) UN Doc A/RES/3379(XXX).

50 Yoav Tenembaum, 'Remember when the UN said "Zionism equals racism"?', RealClearHistory, 31 March 2025.

51 George Okello, 'Economic dependency as a basis of co-operation and political compliance in inter-state relations: A case study of Kenya's foreign policy towards Britain, 1963-1988', Unpublished MA thesis, University of Nairobi, 1992.

52 Jan Vanheukelom, *The political economy of regional integration in Africa: The African Union (AU) report,* European Centre for Development Policy Management, 2016, 3.

53 Vanheukelom, *Political economy of regional integration in Africa,* 5.

54 Constitutive Act of the African Union, Article 4(h).

While some argue that the scope of this provision is strictly limited to member states,[55] and cannot be invoked to justify intervention in a non-member territory like Palestine, the *spirit* of Article 4(h) (the revolutionary principle of 'non-indifference' to mass atrocities) establishes a powerful normative expectation for the AU to act.[56] It is true that the chief architect of this principle, Salim Ahmed Salim, primarily envisioned it as an intra-African tool to overcome the OAU's paralysis in the face of atrocities within its own member states, such as the Rwandan Genocide.[57] His focus was on ensuring that state sovereignty would no longer serve as a shield for internal repression.

However, the foundational *moral logic* of non-indifference, that a community of nations has a collective responsibility to act in the face of mass atrocities, resonates far beyond the continent's borders.[58] This principle has just been recently substantiated by the UN-mandated Commission of Inquiry which formally concluded that the State of Israel is responsible for committing acts of genocide in Gaza, including the mass killing of civilians, the destruction of the healthcare system and the deliberate imposition of famine.[59]

The report explicitly finds that top Israeli officials, including the President, Prime Minister and the then Defence Minister, engaged in direct and public incitement to commit genocide.[60] This finding places an unavoidable moral and legal challenge before the AU, testing the

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55 Gabriel Amvane, 'Intervention pursuant to Article 4(h) of the Constitutive Act of the African Union without United Nations Security Council authorisation', 15 *African Human Rights Law Journal* (2015) 283.

56 Kwesi Aning and Frank Okyere, 'The African Union', in Alex J Bellamy and Tim Dunne (eds) *The Oxford handbook of the responsibility to protect,* Oxford University Press, 2016, 356-58.

57 Antony Karol Muma, 'Transforming African diplomacy: Salim Ahmed Salim's vision of non-indifference and the evolution from OAU to AU', 3 *Kabarak Law Review* (2024) 233 237.

58 Antony Karol Muma, 'Transforming African diplomacy', 238.

59 Independent Commission of Inquiry, *Legal analysis of the conduct of Israel in Gaza,* UN Doc A/HRC/60/CRP.3, 68.

60 Independent Commission of Inquiry, *Legal analysis of the conduct of Israel in Gaza,* UN Doc A/HRC/60/CRP.3, 71.

very credibility of its commitment to Article 4(h). This principle, combined with the Preamble's call for a unified Africa to face 'the challenges of a globalised world',[61] provides a firm normative basis for the AU to deploy its established diplomatic arsenal, including leveraging the authority of its Peace and Security Council, appointing high-level special envoys, and leading mediation efforts, on behalf of the oppressed, regardless of their geographical location.

This moral obligation is further deepened and reinforced by the AU's commitments under general international law. As a regional organisation under Chapter VIII of the UN Charter, the AU shares a collective responsibility for the maintenance of international peace and security through actions deemed 'as appropriate for regional action'.[62] While this does not imply military intervention in a non-member territory, it creates a clear mandate for strong diplomatic engagement.

Furthermore, the principles enshrined in their own human rights instruments, most notably the African Charter on Human and Peoples' Rights (the Banjul Charter), are universal in their aspiration and application.[63] This universalist commitment is explicit in the Banjul Charter. As Makunya argues, the rights enshrined in Articles 19 and 20 (affirming the equality of 'all peoples' and their right to assistance in liberation struggles) are not confined to Africans.[64] The deliberate omission of the qualifier 'African' in these Articles, he contends, creates a positive obligation for member states to support the Palestinian people's struggle against foreign domination, giving the Charter's liberation ethos an explicit extraterritorial reach.[65] These are not merely African rights;

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61 Constitutive Act of the African Union, Preamble.

62 Charter of the United Nations, 26 June 1945, 1 UNTS XVI, Article 52.

63 African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, Articles 19 and 20(3).

64 Makunya, 'Symposium on unbroken bond: Tracing the ties between African and Palestinian anti-colonial struggles – Peoples' rights without borders? The significance of the African Charter's liberation ethos to the Palestinian struggles'.

65 Makunya, 'Symposium on unbroken bond: Tracing the ties between African and Palestinian anti-colonial struggles – Peoples' rights without borders? The significance of the African Charter's liberation ethos to the Palestinian struggles'.

they are universal human rights that the AU has solemnly pledged to champion on the global stage.

The call for solidarity is increasingly understood as a foundational principle for addressing complex, transboundary challenges such as mass atrocities, a norm embodied in doctrines like the responsibility to protect.[66] It is as an expression of unity by which peoples and individuals enjoy the benefits of a peaceful, just and equitable international order.

As the former UN Independent Expert on International Solidarity, Obiora Okafor, argues, the 'interconnectedness' of contemporary global challenges, from pandemics to climate change to systemic poverty, means that the 'enjoyment of human rights across the world is to be optimised', and the fortunes of Africans are 'deeply tied to the fate of other humans and populations'.[67] This perspective powerfully echoes the foundational warnings of Pan-African visionaries like Kwame Nkrumah, who famously asserted that Ghana's independence was 'meaningless unless it is linked up with the total liberation of Africa'.[68]

Yet, the AU's contemporary approach appears to subordinate this foundational principle to the pursuit of narrow economic and security partnerships, a trend epitomised by the growing normalisation of relations with Israel by several member states.[69] This, is not just a political choice; it is an indicator of deep structural vulnerabilities within the institution, most notably its financial dependency on external partners who often have strategic interests that are directly aligned with Israel.[70]

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66 Michael W Doyle, 'The politics of global humanitarianism: R2P before and after Libya', in Alex J Bellamy and Tim Dunne (eds) *The Oxford handbook of the responsibility to protect*, Oxford University Press, 2016, 675-76.

67 Obiora Chinedu Okafor, 'International solidarity, human rights and life on the African continent 'after' the pandemic', 5(1) *Strathmore Law Journal* (2021) 217.

68 Kwame Nkrumah, *Africa must unite,* Frederick A Praeger, 1963, 136.

69 Michael Bishku, 'Israel's relations with the East African states of Kenya, Uganda, and Tanzania from independence to the present', 22(1) *Israel Studies* (2017) 88-92.

70 Frank Mattheis, Dimpho Deleglise and Ueli Staeger, 'African Union: The African political integration process and Its impact on EU-AU relations in the field of foreign and security policy', Policy Department for External Relations, Directorate General for External Policies of the Union, European Parliament, Study PE 702.587, May 18 ,2023.

This dependency erodes not only the AU's autonomy but also its institutional memory, creating a clear and poignant contradiction with the powerful declaration of Nelson Mandela: 'We know too well that our freedom is incomplete without the freedom of the Palestinians'.[71]

The geopolitics of silence: Internal fragmentation and external pressures

The AU's silence is not accidental but the result of internal divisions among member states and external geopolitical pressures.[72] It is true that individual states can take positions that are different from the AU's collective stance without this necessarily constituting an institutional failure. However, this perspective overlooks the unique political economy of the AU, where the collective will of the Union and the operational capacity of its Commission are fundamentally dependent on the political and financial backing of its most influential members.

When these key regional actors are divided on an issue, as they are on Palestine, their competing interests do not simply represent a diversity of opinion but rather create an institutional deadlock that results in inaction. Therefore, to understand the AU's inaction on the Israel-Palestine issue, we must look at both the differing foreign policies of these key regional actors and the wider global context that shapes them.

A fractured continent: The divergent policies of member states

The cherished ideal of a unified African foreign policy, a central tenet of Pan-Africanism, is frequently undermined by competing national interests.[73] The AU's position on the Israel-Palestine conflict serves as a

[71] Nelson Mandela, 'Address by President Nelson Mandela at the International Day of Solidarity with the Palestinian people', Pretoria, 4 December 1997.

[72] Mattheis, Deleglise and Staeger, 'African Union: The African political integration process and its impact on EU-AU relations in the field of foreign and security policy', 18.

[73] George Okello, 'Economic dependency as a basis of co-operation and political compliance in inter-state relations: A case study of Kenya's foreign policy towards Britain, 1963-1988', 9.

textbook case of this fragmentation, where the collective stance of the Union is effectively held hostage by the divergent policies of its most influential members.[74] It is crucial to distinguish these individual state policies from the official stance of the AU; indeed, they are the primary cause for the conspicuous lack of a coherent and unified institutional position.

Egypt: The indispensable but constrained balancer

Egypt, once the epicentre of Arab nationalism and a fierce, uncompromising advocate for the Palestinian cause under the charismatic leadership of Gamal Abdel Nasser, has long since recalibrated its foreign policy toward one of cautious, pragmatic balancing.[75] The 1979 Camp David Accords, the landmark peace treaty with Israel, fundamentally and irrevocably altered its regional posture.[76]

While many in the Arab world viewed the treaty as a profound betrayal of the Palestinian cause, it repositioned Egypt as an indispensable regional mediator, a role it continues to play to this day.[77] Cairo has been central to brokering numerous ceasefires between Israel and Hamas and has hosted countless, often fruitless, Palestinian unity talks.[78]

However, this peace-making role is underpinned by a cold, hard-headed realism. Israel is a crucial and irreplaceable security partner for Egypt, particularly in managing the volatile and insurgency-plagued Sinai Peninsula, where cross-border militancy poses a direct

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74 Woldemichael, 'Israel's accreditation to the AU is dividing Africa'; Ayodele Oluwafemi, 'South Africa, Namibia, Algeria reject Israel's African Union observer status', *The Cable*, 30 July 2021.

75 Michael Sharnoff, 'Nasser and the Palestinians', 28 *Middle East Quarterly* (2021) 1.

76 Mohammad Bani-Salameh, Mohammed Torki Bani Salameh and Mohammad Kanoush Al-Shra'h, 'The Camp David Accords: Lessons and facts', 9(2A) *Arab Journal for Arts* (2012) 41-66.

77 Bani-Salameh, Torki Bani Salameh and Kanoush Al-Shra'h, 'The Camp David Accords', 45.

78 Bani-Salameh, Torki Bani Salameh and Kanoush Al-Shra'h, 'The Camp David Accords', 60.

and persistent threat to its national security.[79] This strategic necessity has led to quiet but essential security and intelligence cooperation between the two former adversaries.[80]

The geography of the Gaza Strip places Egypt in an impossible strategic and humanitarian bind: sealing the Rafah border crossing exacerbates the devastating humanitarian crisis for the two million Palestinians trapped inside, while opening it without stringent controls risks the uncontrolled flow of weapons and instability into its own territory.[81] This deep-seated conflict of interest ensures that Egypt's official, rhetorical support for the Palestinian cause is always tempered by its overriding and non-negotiable security concerns. Within the AU, Egypt's influential voice is consistently one of caution, restraint, and de-escalation.[82] This posture often sets the tone for other North African and Arab-African states and contributes significantly to the Union's overall inertia and reluctance to take a strong, principled stand.

Morocco: Normalisation in the service of territorial ambition

In a move that sent shockwaves across the region, Morocco, in 2020, became one of several Arab nations to normalise diplomatic relations with Israel as part of the US-brokered Abraham Accords: Declaration of Peace, Cooperation and Constructive Diplomatic and Friendly Relations.[83] The move was overtly and unapologetically transactional. In exchange for re-establishing full diplomatic ties with Tel Aviv, the United States under the Trump administration, formally recognised Moroccan sovereignty over the long-disputed and resource-rich terri-

79 Al Jazeera, 'Israel seizes key Gaza border crossing as it launches assault on Rafah', *Al Jazeera*, 7 May 2024.

80 Erlanger Steven, 'US and Israel sign military aid deal', *The New York Times*, April 2004.

81 Al Jazeera, 'Israel seizes key Gaza border crossing as it launches assault on Rafah', *Al Jazeera*, 7 May 2024.

82 Lawal, 'Israel-Gaza war: Why is Africa divided on supporting Palestine?'.

83 US-Department of State, 'Abraham Accords: Declaration of Peace, Cooperation, and Constructive Diplomatic and Friendly Relations (Israel-Bahrain)', 15 September 2020; Henelito Sevilla, 'The Abraham Accords and peace in the Middle East: Regional reception and implications', 17(1) *Center of Middle Eastern Studies* (2024) 5.

tory of the Western Sahara.[84] This decision was widely and vehemently condemned across the Arab and African worlds as a cynical trade-off, a blatant sacrifice of a principled stance on Palestinian self-determination for strategic territorial gain.[85]

The Abraham Accords simply brought these shadowed, long-standing ties into the full light of day. Within the AU, the effects of this normalisation have been deeply corrosive to continental unity. Morocco, which controversially came back to the Union in 2017 after a 33-year absence, has skilfully used its renewed diplomatic clout to weaken collective statements on Palestine and to build a silent coalition of states favourable to Israel.[86]

When Israel was controversially granted observer status in 2021, Morocco was a quiet but powerful supporter of the move, conspicuously choosing not to object together with states like South Africa and Algeria.[87] Morocco's unapologetic realpolitik approach, while perfectly rational from a narrow national interest perspective, has dealt a severe and perhaps irreparable blow to the possibility of a unified and principled Pan-African position on the conflict.

Kenya: The technocratic and security-focused partner

Kenya exemplifies a growing and influential trend among many Sub-Saharan African nations: the deliberate prioritisation of pragmatic, technocratic and economic partnerships over historical, ideological, or solidarity-based allegiances.[88] Kenya's burgeoning relationship with Israel is not driven by the complicated politics of the Middle East but by

84 Sevilla, 'The Abraham Accords and peace in the Middle East', 5.

85 Mohamed Chtatou, 'Abraham Accords: Romancing a new Middle East – Analysis', *Eurasia Review*, 26 January 2022.

86 David Jacobs and Thomas Isbell, 'Rejoining the AU, Moroccans bring decidedly mixed attitudes toward regional integration' *AfroBarometer*, 28 March 2017.

87 Oluwafemi, 'South Africa, Namibia, Algeria reject Israel's African Union observer status'.

88 Edward Mogire, 'Balancing between Israel and the Arabs: An analysis of Kenya's Middle East relations', 97(397) *The Round Table* (2008) 561.

a clear-eyed and relentless pursuit of modernisation, national security, and economic growth.[89]

This relationship is one of the most established and multifaceted in East Africa. Though formal diplomatic relations were severed in the wake of the 1973 Yom Kippur War, they were quietly re-established in 1988 and have since flourished into a deep strategic partnership.[90]

Nairobi views Jerusalem not just as a political ally but as a crucial development and security partner, particularly in the vital sectors of agriculture (advanced drip irrigation technology), cybersecurity, water management, and, most critically, counter-terrorism.[91] Israeli intelligence, training, and technology have been invaluable to Kenya's protracted efforts to combat the persistent threat from the Somalia-based militant group *Al-Shabaab,* especially in the aftermath of high-profile attacks like the 2013 Westgate Mall siege.[92]

This support, however, comes with a price. Kenya adopts a deliberately neutral and studiously ambiguous public stance on the conflict, employing generalist and non-committal language about 'dialogue' and 'peaceful co-existence' while carefully avoiding any direct condemnation of the Israeli occupation or its policies.[93] This posture of strategic ambiguity contributes significantly to the fragmented and often muted position of the AU on the Palestinian cause.

South Africa: The unwavering and principled voice of dissent

In evident and often lonely comparison to these interest-driven positions, South Africa remains the most unapologetic, consistent and

[89] Victor Raballa, 'Kenya, Israel seal agricultural partnership to boost food production', *Nation Africa*, 29 August 2024; Aggrey Mutambo, 'Kenya, Israel agree to enhance cooperation on health and security', *The East African*, 29 July 2021.

[90] Martin Gasper, 'The making of the modern Middle East', in Ellen Lust (ed) *Middle East*, 13th edition, Sage Publications, Washington, 2014, 1.

[91] Edward Mogire, 'Balancing between Israel and the Arabs', 567.

[92] Patrick Gathara, 'The Westgate Mall attack and Kenya's national amnesia', *Al Jazeera*, 21 September 2021.

[93] Oluwafemi, 'South Africa, Namibia, Algeria reject Israel's African Union observer status'.

principled defender of Palestinian rights on the African continent.[94] This unshaking stance is organically informed by its own painful history with state-sanctioned racial discrimination, leading it to draw powerful and deliberate parallels between the system of apartheid and contemporary Israeli policies in the Occupied Palestinian Territory.[95]

This position is supported by other legal scholars as well.[96] By grounding its foreign policy in the moral authority of its own liberation struggle, South Africa has positioned itself as the *de facto* moral conscience of the AU on this issue, even at the cost of considerable diplomatic friction and isolation.[97] When the AU Commission controversially granted Israel observer status, it was South Africa that led the vociferous and ultimately successful campaign to have the decision suspended.[98] This principled stance is a direct legacy of the African National Congress's (ANC) historical and fraternal alliances with liberation movements across the world during the anti-apartheid years.[99]

South Africa has consistently backed its powerful words with concrete action, downgrading its embassy in Tel Aviv to a liaison office and relentlessly calling for international sanctions, boycotts, and investigations into Israel's conduct, culminating in its historic case at the ICJ.[100] South Africa's actions have been corroborated by the findings of the UN Commission of Inquiry.

The Commission's report, using a high standard of proof, independently reached the same grave conclusion: that the only reasonable

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94 Raef Zreik, 'Palestine, apartheid, and the rights discourse', 34(1) *Journal of Palestine Studies* (2004) 68.

95 Zreik, 'Palestine, apartheid, and the rights discourse', 68.

96 John Dugard and John Reynolds, 'Apartheid, international law, and the occupied Palestinian territory', 24(3) *European Journal of International Law* (2013) 867.

97 Dugard and Reynolds, 'Apartheid, international law, and the occupied Palestinian territory', 868.

98 Oluwafemi, 'South Africa, Namibia, Algeria reject Israel's African Union observer status'.

99 Rajini Srikanth, 'South African solidarity with Palestinians: Motivations, strategies, and impact', 27(1) *New England Journal of Public Policy* (2015) 10.

100 Mayibongwe Maqhina, 'Downgrading of SA embassy in Tel Aviv not finalised, Ramaphosa reveals', *Independent Online*, 14 October 2019.

inference from Israel's pattern of conduct (like mass killings of civilians and attack on hospitals) is genocidal intent to destroy the Palestinians in Gaza as a group.[101] However, this moral clarity has not translated into continental consensus. In fact, South Africa's outspoken advocacy has often served to highlight, rather than bridge, the deep ideological rifts within the AU, serving as a constant and often uncomfortable reminder of the Union's significant departure from its anti-colonial and liberationist roots.

External pressures and the geopolitics of aid and security

The internal fragmentation of the AU is significantly worsened by a range of powerful external geopolitical pressures that shape and constrain the foreign policy choices of its member states. Africa's diplomatic orientations are not forged out of thin air; they are often heavily influenced by the unforgiving realities of global power dynamics, economic dependency, and the increasingly securitised nature of international relations.

The enduring influence of the United States

The United States, Israel's most powerful and steadfast ally, wields immense and often decisive influence over the foreign policy calculations of many African states.[102] This influence is exerted in the form of diplomatic pressure, extensive security assistance, and potent economic incentives.[103] The African Growth and Opportunity Act (AGOA), which provides eligible Sub-Saharan African countries with coveted duty-free access to the vast US market, stands as a good example of the US' economic leverage.[104] While its eligibility criteria are ostensibly technical,

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101 Human Rights Council, *Legal analysis of the conduct of Israel in Gaza,* UN Doc A/HRC/60/CRP.3, 64.

102 Dov Waxman and Jeremy Pressman, 'The rocky future of the US-Israel special relationship', 44(2) *The Washington Quarterly* (2021) 75.

103 Waxman and Pressman, 'The rocky future of the US-Israel special relationship', 75.

104 Siphelele Dludla, 'SA's legal action against Israel's Palestine actions could derail AGOA deal, expert warns', *Independent Online*, 15 January 2024.

focusing on governance and market reforms, alignment with US foreign policy priorities is often an implicit, if unstated, condition.[105]

Diverging from the US position on sensitive issues like Israel creates significant diplomatic friction for African states.[106] US influence is traditionally channelled through massive foreign aid programmes like USAID, but this leverage is politically volatile. The prospect of an 'America First' administration dismantling such aid, a scenario projected to terminate up to 86% of USAID awards and stop life-saving programmes in healthcare such as PEPFAR, forces a clear choice upon African leaders.[107]

This 'cold-turkey approach'[108] creates a dynamic where aid is not just a tool for development, but a potential instrument of political compliance. Alongside this conditional aid, a web of crucial security and counter-terrorism partnerships provides a more consistent form of leverage. For many African states, the strategic necessity of maintaining a favourable relationship with Washington, whether for aid or security, often outweighs ideological commitments to solidarity with the Palestinian cause.

The rise of alternative global powers: China and Russia

The rapidly growing presence and influence of China and Russia in Africa offers an alternative to traditional, often conditional, Western partnerships, creating a more complex and multipolar geopolitical landscape on the continent. Both Beijing and Moscow often position themselves as allies of the Global South, and their stated opposition to West-

105 Dludla, 'SA's legal action against Israel's Palestine actions could derail AGOA deal, expert warns'.

106 Deborah Munganga, 'The effectiveness of US development assistance in fostering sustainable development in Sub-Saharan Africa', 10(10) *McNair Scholars Research Journal* (2017) 119; Reuters, 'US tariffs threaten 35,000 citrus jobs in South Africa, farmers say', 8 April 2025.

107 Ramona Godbole, 'Analyzing USAID program disruptions: Implications for PEPFAR programming and beneficiaries', Center for Global Development (CGD Note 391, 2025), 3.

108 Hannah Atkins, 'USAID cuts: Six months on', *Africa Practice*, 23 July 2025.

ern imperialism and unilateralism resonates deeply with the historical tenets of Pan-Africanism. Both have frequently used their platforms at the UN Security Council to vote in favour of resolutions supporting the Palestinian cause.[109] However, their engagement in Africa is also driven by clear-eyed and pragmatic strategic interests.[110]

China is now, by a significant margin, Africa's largest trading partner, its biggest bilateral creditor, and the dominant force in infrastructure development through its ambitious Belt and Road Initiative (BRI).[111] While it maintains a consistently pro-Palestinian rhetorical stance in international forums, its overriding priorities in Africa are economic; ensuring stability, securing access to natural resources and expanding markets for its goods and services.[112] Its official and much-vaunted doctrine of 'non-interference' in the internal affairs of its partners provides a convenient and welcome justification for many African states to adopt a similarly cautious and non-committal approach to divisive international issues, thereby prioritising the tangible benefits of economic partnership over the risks of taking a principled, and potentially costly, political stand.[113]

Russia, on the other hand, has been methodically expanding its influence in Africa primarily through the security sector by leveraging arms sales, the deployment of private military contractors, and strategic political outreach to prop up friendly regimes, particularly in the Sahel region.[114] While Russia has, on several occasions, been sharply critical

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[109] United Nations, 'Security Council fails to adopt resolution on imperative of immediate, sustained ceasefire in Gaza, owing to vetoes cast by China, Russian Federation – Resolution (S/2024/239)', *UN News*, 22 March 2024.

[110] Samuel Ramani, 'Russia and China in Africa; Prospective partners or asymmetric rivals?', *SAIIA Policy Insights*, December 2021.

[111] David Landry, 'More problems more money? Does China lend more to African countries with higher credit risk levels?', 4 *Global Studies Quarterly* (2024) 10.

[112] Maria Papageorgiou and Mohammad Eslami, 'The Israel-Palestine conflict and China's actorness in the Middle East: A challenge to US influence', *Georgetown Journal of International Affairs*, 28 October 2024.

[113] Papageorgiou and Eslami, 'The Israel-Palestine conflict and China's actorness in the Middle East: A challenge to US influence'.

[114] Adeleke Ogunnoiki, Ifeanyi Ani, and Innocent Iwediba, 'The trajectory of Russia-

of Israeli actions against Palestinians, its primary focus in Africa is on securing strategic footholds and challenging Western influence.[115] Its relationships are often nakedly transactional and not rooted in any ideological commitment.[116]

The presence of these powerful alternative actors provides African states with greater diplomatic manoeuvrability and leverage, but it does not necessarily incentivise a revival of principled Pan-African solidarity. Instead, it creates a crowded and competitive geopolitical marketplace where African states can artfully balance competing interests, a dynamic that ultimately reinforces and legitimises the AU's strategic silence on sensitive and polarising issues like Palestine.

Conclusion: Revitalising Pan-Africanism for global justice

The strategic silence of the African Union on the Palestinian cause represents a big departure from the principled, anti-colonial solidarity that once defined its predecessor, the OAU.[117] This paper has argued that this silence is not a posture of neutrality but a consequence of an immeasurable internal fragmentation, the pervasive influence of powerful geopolitical actors, and the ascendant prioritisation of narrow, short-term national interests over the collective, long-term values of Pan-Africanism and South-South solidarity.

The divergence between the vocal states like South Africa and the pragmatic, ones like Egypt, Morocco, and Kenya effectively paralyses the Union, rendering its collective voice on this critical issue of South-South solidarity weak, inconsistent, and, ultimately, inconsequential on the world stage.[118] The AU needs to do something, especially after the

Africa relations: Highlighting continuity and discontinuity', 9(2) *Nnamdi Azikiwe Journal of Political Science* (2024) 64.

115 Moscow Times (AFP), 'Russia's Foreign Ministry condemns Israel's renewed bombardment of the Gaza Strip', 18 March 2025.

116 Ogunnoiki, Ani and Iwediba, 'The trajectory of Russia-Africa relations', 64.

117 Faal, 'The OAU and conflict management in Africa: The post-cold war era', 92.

118 Lawal, 'Israel-Gaza war: Why is Africa divided on supporting Palestine?'.

UN Commission of Inquiry report has just concluded that Israel's actions committed against the Palestinian people are genocidal.[119]

This negates the AU's own framework that is based on the universal principles of self-determination, human rights, and solidarity with the oppressed.[120]

By failing to adopt a coherent and consistent position on Palestine, the AU risks tarnishing its hard-won legacy as a champion of justice and a moral leader in the Global South.[121] The plight of the Palestinian people is an undeniable continuation of the same universal struggle for dignity, freedom, and self-determination that defined and animated Africa's own liberation movements.

Despite these massive challenges, the African Union holds the latent potential to reclaim its moral leadership and forge a more coherent, principled and impactful foreign policy. This would necessitate a concerted and courageous effort to move beyond the fragmented and often self-interested positions of individual member states to develop a unified and proactive institutional approach grounded in its own founding values. Several concrete and viable pathways exist to begin this process of revitalisation.

A foundational step would be for the AU to more effectively and strategically leverage Palestine's existing observer status.[122] This underutilised platform, could be transformed from a symbolic gesture into a meaningful diplomatic engagement. The AU Peace and Security Council, the continent's primary organ for conflict resolution, could hold regular, high-level consultations with Palestinian representatives. The outputs of these consultations could inform joint statements, formal resolutions, and dedicated agenda items at AU summits, thereby elevating the issue from the diplomatic periphery to the institutional core.

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119 Independent Commission of Inquiry, *Legal analysis of the conduct of Israel in Gaza*, 71.

120 Faal, 'The OAU and conflict management in Africa: The post-cold war era', 92.

121 John Dugard and John Reynolds, 'Apartheid, international law, and the occupied Palestinian territory', 24(3) *European Journal of International Law* (2013) 867-913.

122 PanAfrican Parliament, *Resolution on conferment of observer status in the PanAfrican Parliament on the Parliament of Palestine*, 18 May 2017.

Such a move would not only formalise Africa's solidarity but also help to consolidate a unified continental position that could be wielded with greater effect in global forums like the United Nations. While this proposal would undoubtedly face political hurdles from member states with close and growing ties to Israel, the cost of continued inaction – the steady erosion of the AU's collective influence and moral authority – is far greater.

Furthermore, the African Union could and should establish an independent fact-finding mission to Palestine, modelled on its previous successful missions to conflict zones on the continent, such as Darfur and South Sudan.[123] Such a mission, composed of respected African jurists, diplomats, and human rights experts, would be mandated to independently assess and report on the human rights conditions on the ground and the impact of the prolonged occupation. This would be a powerful diplomatic, but not an interventionist tool, providing the Union with its own verified, African-led analysis, free from the political biases that often colour the reports of other international bodies. Such a mission could build upon, verify, and amplify the grave findings of existing UN reports, including the 2025 Commission of Inquiry report, thereby lending a distinctly African voice to the global call for accountability.

Anchoring AU policy in credible, first-hand evidence would not only enhance its legitimacy but would also reflect the spirit of its mandate under the Constitutive Act,[124] to respond meaningfully to situations involving serious violations of international law. The findings of such a mission could provide the empirical basis for a stronger and unified diplomatic strategy.[125]

Finally, following its established and effective practice of appointing special envoys to mediate in specific conflict areas, the AU should

[123] AU Peace and Security Council, *Report of the Commission of Inquiry on South Sudan* (2014) PSC/PR/2(DXXVII).

[124] Constitutive Act of the African Union, Article 4(h).

[125] African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 'Fact-finding missions', 2025.

consider the appointment of a high-profile Special Envoy for Palestine.[126] This individual, a respected and experienced African statesperson, would serve as a dedicated and sustained high-level link between the AU, Palestinian authorities, and other key international actors. The envoy's mandate would be to pursue a proactive diplomatic agenda, working to amplify Africa's voice in international peace discussions, coordinating the positions of AU member states, and ensuring that the issue remains a priority for the Union.

The creation of such a post would signal a renewed and serious commitment from Africa to play a constructive role in resolving one of the world's most enduring injustices.

Ultimately, the revitalisation of the AU's role in the world depends on its willingness to consistently and courageously act upon the principles for which it was founded. The struggle for freedom is universal, and the AU's credibility is intrinsically and irrevocably linked to its willingness to defend this principle, not just for Africans, but for all oppressed peoples.

[126] African Union Commission, 'Special envoys of the AUC chairperson', *African Union*, 2024.

The founding of the African Union and the search for African unity: A dream deferred

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Abstract

These reflections are based on a presentation made by Judge Ben Kioko during the International Law Month @ Kabarak webinar on Reflecting on 25 years of the African Union Constitutive Act, organised by the Kabarak University Press on 7 August 2025. The essay discusses the two foundational African legal instruments – the Charter of the Organisation of African Unity and the Constitutive Act of the African Union, noting the reasons that necessitated the change from the former to the latter. This unique insider reflection of this transformational period highlights some aspects of the process of this change and the main issues or challenges, including during the early implementation of the Constitutive Act. It also shares some perspectives on the aborted processes for a Union Government and African Union Authority from 2005 to 2013.

Keywords: OAU Charter, AU Constitutive Act, proposed Union Government, proposed African Union Authority, African unity

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** This article has undergone single blind review.

Introduction

The Charter of the Organisation of African Unity (OAU Charter) was the product of a consensus between two groups. The first was the Casablanca Group led by Kwame Nkrumah of Ghana – which included leaders of Algeria, Egypt, Ghana, Guinea, Libya, Mali, and Morocco, that advocated for a politically unified federation of African states.[1] The second was the Monrovia Group, led by Léopold Sédar Senghor of Senegal – which included leaders of Ethiopia, Liberia, Nigeria, Senegal, and most former French colonies, who preferred a loose alliance based on gradual economic integration. Evidently, the latter group prevailed in the framing the OAU Charter.[2]

However, the vision then and subsequently has always been that the integration process would ultimately lead to the United States of Africa. Indeed, some African constitutions make provisions giving up sovereignty in favour of continental unity.[3] Unfortunately, every new initiative on African unity since then has come with its own timelines, resulting in the earlier goal posts being kicked further down the road.

In this piece, I will seek to briefly sketch out the fundamental differences between the two foundational legal instruments – the OAU Charter and the Constitutive Act of the African Union (AU Constitutive), discuss what motivated the change, highlight some aspects of the process and the main issues or challenges, including during the early implementation of the Constitutive Act. I will also share some brief perspectives on the aborted processes for a Union Government and AU Authority from 2005 to 2013.

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1 Taslim Olawale Elias, 'The Charter of the Organisation of African Unity', 59(2) *American Journal of International Law* (1965) 243-245.

2 Elias, 'The Charter of the Organization of African Unity', 243-245.

3 See for example, Constitution of the Republic of Senegal (2001, as amended to 2009) Article 96; Constitution of the Republic of Mali (1992) Article 117; Constitution of Burkina Faso (1991) Article 146. Other countries include Ghana and Guinea.

Differences in two African foundational legal instruments

While the two foundational legal instruments, the OAU Charter and the AU Constitutive Act, share similar goals, they differ significantly in scope, vision, and approach. I see three main areas, namely: the core principles, the new organs that were created, and the institutional powers.

Objectives and core principles

The OAU Charter's main objectives were to rid the continent of colonisation and apartheid, to promote state-centric unity and solidarity, and safeguard the sovereignty and territorial integrity of member states.[4] Continental integration was state-centric and to be carried out gradually with states retaining full sovereignty. On peace and security, the OAU Charter envisaged mostly diplomatic solutions and mediation.[5] Significantly, the OAU Charter, like the UN Charter, accorded primacy to the Westphalian principles of sovereignty and non-interference in internal affairs.[6]

The Constitutive Act, on the other hand, envisages comprehensive integration encompassing political, economic, social, cultural, and security realms including plans for common currency, single market, and infrastructure.[7] It also sets out broader objectives and principles and has strong provisions on democratic principles, rule of law, and promotion and protection of human rights, good governance and human security. It also emphasises people-centered development and greater enforcement and judicial mechanisms, all of which were not in the OAU Charter.[8] Additionally, the Constitutive Act, while respecting sovereignty,

4 Organisation of African Unity (OAU) Charter, 25 May 1963, 6947 UNTS 70, Article II(1)(a)(c) and (d).

5 OAU Charter, Article II(2)(a).

6 OAU Charter, Article III.

7 Constitutive Act of the African Union, 11 July 2000, 2158 UNTS 3, Article 3(c)-(f).

8 See generally, Constitutive Act of the African Union, Articles 3 and 4.

allows intervention in member states to prevent mass atrocities such as war crimes, genocide, and others under Article 4(h).[9]

New organs created

Under Article 7 of the OAU Charter, four organs were created, namely, the Assembly of Heads of State and Government; the Council of Ministers; the General Secretariat; and, the Commission of Mediation, Conciliation and Arbitration.[10]

On the other hand, Article 5 of the AU Constitutive Act has retained the Assembly, and the Ministerial Council with a new name – the Executive Council, removed the Commission of Mediation, Conciliation and Arbitration, but created the following new organs: the Pan-African Parliament; the Court of Justice; the Commission (to replace the OAU General Secretariat); the Permanent Representatives Committee; the Specialised Technical Committees (ministerial); the Economic, Social and Cultural Council; and the Financial Institutions.[11]

It should be noted that all the new organs set out in Article 5 of the Constitutive Act had been created by the Abuja Treaty except the AU Commission, the Permanent Representatives Committee and the Economic, Social and Cultural Council, which is an organ for civil society engagement.[12] However, Article 5(2) in the Constitutive Act, empowering the Assembly to create other organs that it may deem necessary, without the need to amend the treaty, was neither in the Abuja Treaty nor the OAU Charter.[13]

For avoidance of doubt, it should be noted that other treaty bodies that are not set out in Article 5, such as the Peace and Security Council,

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9 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) 807.

10 OAU Charter, Article VII.

11 See generally, AU Constitutive Act, Article 5.

12 Treaty Establishing the African Economic Community (Abuja Treaty), 3 June 1991, I-55375 UNTS, Article 7.

13 Constitutive Act of the African Union, Article 5.

the African Court on Human and Peoples' Rights, and the African Commission on Human and Peoples' Rights, are organs of the Union.

Institutional powers

The Charter envisioned the OAU as a weak intergovernmental organisation, with no enforcement powers for its decisions and no judicial arm. It was essentially an alliance of independent states with the Assembly as the supreme organ and the single source of power. No sovereign power was donated to the OAU or to the General Secretariat.

The AU on the other hand has some supranational elements with the ultimate objective of being a supranational authority with multiple sources of power. The AU can impose sanctions for unconstitutional changes of government under Article 30. This also includes failure to comply with the decisions and policies of the Union such as denial of transport and communications links with other member states and other measures of a political and economic nature as provided for in Article 23(2) of the Constitutive Act.

It is worth noting that some policy organs such as the Peace and Security Council, the Assembly and the judicial bodies make binding decisions. Furthermore, the Peace and Security Architecture has institutionalised responses with early warning systems and peacekeeping capability. However, while the sanctions for unconstitutional changes of government have been implemented, those for failure to comply with decisions and policies remain aspirations as the guidelines for their application have never been adopted.

Why the change from OAU to AU?

The debate about transforming the OAU to the AU was informed by the belief that the fundamentally changing circumstances required a new collective way of doing things, including an agreement on shared

values which had not been articulated in the 1963 OAU Charter.[14] I hold the view that the transformation of the OAU to the AU, was informed by a multiplicity of factors, beyond the end of the decolonisation agenda. I will highlight only five.

Frustration with the slow pace of review of the OAU Charter

By late 1970s, much of Africa had been liberated from colonialism except for the racist regimes in South Africa, Zimbabwe, and Namibia. In light of this, the OAU Assembly meeting in Monrovia, Liberia, in July 1979 established the OAU Charter Review Committee – composed of 14 States, to make a detailed study and to re-examine the provisions of the Charter in light of the changes and realities in Africa and make specific proposals.[15]

Interestingly, by May 1982, the Committee had completed its work but for reasons that are unclear, no action was taken to consider and formalise the Committee's recommendations. In its Report, the Committee had made new proposals, *inter alia,* on respect and protection of human and peoples' rights; and unreserved dedication to the promotion and achievement of political unity and economic integration of Africa were made. Proposals for establishment of an African Court of Justice, an African Defence Force, and inclusion of the African Commission on Human and Peoples Rights in the Charter were considered by the Committee.

By mid-1990s, the Committee's recommendations had been overtaken by events especially by completion of the decolonisation agenda with the democratic elections in South Africa in 1994. Accordingly, in 1996, a government experts meeting was convened to review the work of the Committee considering the new developments. Although the review was completed, implementation of the Abuja

[14] Corinne A Packer and Donald Rukare, 'The new African Union and its Constitutive Act', 96(2) *American Journal of International Law* (2002) 366-367.

[15] OAU Decision on the Review of the Charter, June 1979, AHG/Dec.111 (XVI) Rev.1, para 1.

Treaty and new initiatives on African unity made it necessary to cease the Charter review process.[16]

Perceived inability to speak with one voice

Africa was not speaking with one voice at international fora and was also faced with linguistic, geographical, and other divisive tendencies in internal deliberations. State representatives would attend international fora and take positions completely inimical to the African Common Position, often at the behest of neo-colonial powers.

Frustration with the slow pace of political and socio-economic integration and especially the implementation of the Abuja Treaty

The Abuja Treaty was adopted in 1991 and came into force on 12 May 1994. It envisioned a phased continental integration process, in six stages of variable duration spanning 34 years, involving the coordination, harmonisation, and progressive integration of existing and future regional economic communities (RECs) as building blocks.

The Treaty was adopted in implementation of key frameworks and strategies such as the Monrovia Declaration (1979),[17] the Lagos Plan of Action (1980), and the Final Act of Lagos (1980). The Abuja Treaty provides for six key stages:

> strengthening and establishing RECs within a period not exceeding five (5) years (like SADC, COMESA);[18]
>
> stabilising trade barriers and non-tariff barriers, customs duties and taxes within a period not exceeding eight (8) years;[19]

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16 See generally Packer and Rukare, 'The new African Union and its Constitutive Act', 366-370.

17 OAU Monrovia Declaration of Commitment of the Heads of State and Government of the Organization of African Unity on Guidelines and Measures for National and Collective Self-Reliance in Social and Economic Development for the Establishment of a New International Economic Order, 20 July 1979, AHG/ST.3 (XVI) Rev.1.

18 Abuja Treaty, Article 6(2)(a).

19 Abuja Treaty, Article 6(2)(b).

> establishing a free trade area and the customs union by adopting a common external tariff within a period not exceeding ten (10) years;[20]
>
> within a period not exceeding two (2) years, coordination and harmonisation of tariff and non-tariff systems among the RECs and adoption of a common external tariff;[21]
>
> within a period not exceeding four (4) years, establishing a common market with free movement of people and the rights of residence through the adoption of common policies and harmonisation of monetary, financial and fiscal policies;[22]
>
> within a period not exceeding five (5) years, integration of all the sectors and the establishment of a single domestic market, a Pan-African Economic and Monetary Union, the African Central Bank and a single African currency.[23]

The Assembly was empowered to determine, when the objectives of a particular stage had been attained and to approve the transition to the next stage. Significantly, the six key stages would have moved Africa from a free trade area to a customs union, to a common market with free movement of people and the rights of residence to a single domestic market, a Pan-African Economic and Monetary Union, (the African Central Bank and a single African currency by 2028. In other words, three years from now, we should have been close to the European Union model of integration.

Faced with the end of the Cold War and a globalising world, the continent was forced to take stock of these developments and act accordingly

The OAU Summit of July 1990 was held against the background of the fall of the Berlin Wall on 9 November 1989, the end of the Cold War and the tendency towards regional integration in Europe and the Americas. The Summit, therefore, focused on the implications for Africa from this changing global landscape, including democratisation in Eastern Europe and the emergence of the process of globalisation, with

[20] Abuja Treaty, Article 6(2)(c).

[21] Abuja Treaty, Article 6(2)(d).

[22] Abuja Treaty, Article 6(2)(e).

[23] Abuja Treaty, Article 6(2)(e).

its various opportunities and threats, based on the Report of the OAU Secretary-General, Dr Salim Ahmed Salim.[24]

The outcome was the landmark Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World.[25] The Summit took note of the establishment of trading and economic blocs as well as the advances in science and technology.[26] These they found constituted major factors which should guide Africa's collective thinking about the challenges and options before her in the 1990s and beyond, in view of the real threat of marginalisation of the continent.[27] The Declaration outlined the impact of the new reality on Africa, the challenges faced, their root causes, and the imperative to look for solutions from within, including finding peaceful and speedy resolution of all the conflicts on the continent.[28]

On unity, the Heads of State and Government agreed to strengthen the OAU so that it may also become 'a viable instrument in the service of Africa's economic development and integration … with greater determination to be masters of our destiny'.[29] They reaffirmed that Africa's development is the responsibility of our governments and peoples, and their commitment to maintain and strengthen unity and solidarity and to pool resources and wisdom. This was in order to face the challenges of the decade of the 1990s and beyond, change the bleak socio-economic

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24 Antony Karol Muma, 'Transforming African diplomacy: Salim Ahmed Salim's vision of non-indifference and the evolution from OAU to AU', 3 *Kabarak Law Review* (2024) 237-238.

25 Declaration of the Assembly of Heads of State and Government of the Organisation of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, 11 July 1990, AHG/Decl.1 (XXVI), 1990.

26 OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, para 2.

27 OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, para 2.

28 OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, para 11.

29 OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, para 12.

prospects of our continent and guarantee a better life for all peoples and future generations yet unborn.

On democracy, they recommitted themselves to the 'further democratisation of societies, to the consolidation of national democratic institutions and asserted that democracy and development should go together and should be mutually reinforcing'.[30] They agreed to promote 'democratic governance, popular participation, human rights, rule of law, and high standards of accountability and popular-based political processes which ensure the involvement of all including in particular women and youth in the development efforts'.[31]

These conclusions were subsequently amplified in several landmark declarations addressing emerging challenges such as the OAU Mechanism for the Prevention, Management and Resolution of Conflicts (1993);[32] and Relaunching Africa's Economic and Social Development: The Cairo Agenda of Action (1995), which underlined the need to address the internal challenges of governance, the root causes of conflicts, and respect for human rights.

Other instruments included the Grand Bay (Mauritius) Declaration and Plan of Action on Human Rights in Africa (1999);[33] the Constitutive Act of the African Union (2000); the New Partnership for Africa's Development (NEPAD) (2001); and the Solemn Declaration on the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) (2000);[34] which adopted a memorandum on civil society participation, transparency, and principles of action in four key areas known as

30 OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, para 10.

31 OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, para 10.

32 OAU Declaration of the Assembly of Heads of State and Government on the establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, 28-30 June 1993, AHG/Decl.3 (XXIX).

33 Grand Bay (Mauritius) Declaration and Plan of Action on Human Rights in Africa (1999).

34 OAU Solemn Declaration on the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), 10-12 July 2000, AHG/Decl.4 (XXXVI).

'the four calabashes', namely: i) collective security; ii) stability; iii) development; and iv) cooperation.

The Solemn Declaration was followed by a Memorandum of Understanding also adopted at the first AU Summit in Durban in 2002, binding member states to key performance indicators, a framework of implementation and monitoring performance. As an example, on cooperation, the Assembly agreed to establish a firm and binding commitment by all member states for all the regional economic blocs to attain full customs union status by 2005, and full common market status by 2010, and to adopt an investment code by 2005, and the implementation of the Yamoussoukro Declaration concerning the Liberalisation of Air Transport Markets in Africa by 2005. All the targets were never met.

The 1994 genocide in Rwanda

Another watershed moment was the 1994 genocide in Rwanda which, undoubtedly, was a loud wake up call for Africa. The OAU had tried but failed to prevent the genocide through the Arusha process of negotiations, whose outcome was not implemented.

In 1998, the OAU created the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events (IPEP) composed of seven eminent African and non-African individuals.[35]

[35] OAU, Establishment of the Panel of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events, July 1998, CM/2063 (LXVIII). The members of the Panel were: HE Sir Ketumile Masire, former President of Botswana, Chair; HE General Amadou Toumani Toure, former Head of State of Mali; Ms Lisbet Palme, Sweden, then Chairperson of the Swedish Committee of UNICEF, Expert on the UN Committee on the Rights of the Child; Ambassador Stephen Lewis, Canada, former Ambassador and Permanent Representative of Canada to the UN and then Deputy Executive Director of UNICEF; Ms Ellen Johnson-Sirleaf, Liberia, former Government Minister and then Assistant Administrator and Executive Director, Regional Bureau for Africa of the UNDP; Ambassador Hocine Djoudi, Algeria, Member of the National Council and Vice-President of Foreign Affairs Commission; Justice RN Bhagwati, India, former Chief Justice of the Supreme Court of India and Vice-Chairman, UN Human Rights Committee.

The Panel had a wide mandate: '[T]o investigate the genocide in Rwanda and the surrounding events ... as part of efforts aimed at averting and preventing further wide-scale conflicts ...'. The Panel was 'to establish the facts about how such a grievous crime was conceived, planned, and executed, to look at the failure to enforce the Genocide Convention in Rwanda and in the Great Lakes Region, and to recommend measures aimed at redressing the consequences of the genocide and at preventing any possible recurrence of such a crime'.[36]

The Panel was also required specifically to investigate the 1993 Arusha Peace Agreement, the 1994 killing of Rwandan President Juvenal Habyarimana, the genocide that followed, and the subsequent refugee crisis as well as 'the role, before, during, and after the genocide', of the UN and its agencies, the OAU, internal and external forces, and NGOs, and 'what African and Non-African leaders and governments individually or collectively could have done to avert the genocide'.[37]

The Report was presented at the OAU Summit in Lomé, Togo in July 2000. The International Panel of Eminent Personalities Report highlighted the failures of the OAU itself and its member states, the neighbouring countries in the Great Lakes region, successive Rwandese governments and the UN and Western powers, especially, the influence and responsibility of several European states and the USA. Noteworthy, its intention was not to determine the guilt of various actors. The Panel made many recommendations aimed at ensuring this never happens again, which were duly adopted. The commitment to ensure this never happens again no doubt influenced the establishment of the African Security Architecture.

[36] OAU, *Rwanda: The preventable genocide*, 2002, para 2.

[37] OAU, *Rwanda: The preventable genocide*, Annex A, part II.

The how: Sirte Declaration and negotiation, adoption and early implementation of the Constitutive Act

The main process towards the realisation of the AU started at the OAU Algiers Summit in 1999. At that Summit, Colonel Muamar Gaddafi submitted a proposal to hold an extraordinary meeting on the issue of the transformation of the OAU and specifically 'to discuss ways and means of making the OAU effective so as to keep pace with political and economic developments taking place in the world'. After due deliberations, the OAU Assembly endorsed the proposal vide Decision AHG/Dec.140 (XXXV) on the Convening of an Extraordinary Session of the OAU Assembly in accordance with Rule 33(5) of its Rules of Procedure.[38]

The Extraordinary Session of the Assembly was convened in Sirte, Libya on 9 September 1999. It was preceded by meetings of government experts/ambassadors, and the Council of Ministers.[39] At those preparatory meetings, the Secretariat submitted, as is the usual practice, documentation it had prepared in anticipation of the possible outcomes of the Summit.

These documents were duly considered and recommendations made to the Assembly. However, at the Assembly level, Colonel Gaddafi submitted directly to the Summit, two alternative proposals, which the delegates and the Secretariat were unaware of until a few minutes before the commencement of the Assembly Session.[40] The proposals were on the establishment of the United States of Africa (the USA model) and the establishment of the Union of African States (the former Soviet Union model).

During the deliberations on the Gaddafi proposals, the predominant opinion was that Africa was not yet ready for a federation or

[38] OAU Decision on the Convening of an Extraordinary Session of the OAU Assembly of Heads of State and Government in accordance with Article 33(5) of its Rules of Procedure, 1999, AHG/Dec. 140 (XXXV), para 2.

[39] Packer and Rukare, 'The new African Union and its Constitutive Act', 370.

[40] Ilias Luursema, 'Muammar Gaddafi and the African Union: For a United Africa!', *The Collector*, 12 April 2023.

confederation. Instead, it was agreed to establish the African Union. Accordingly, in the Sirte Declaration, the Assembly called for the establishment of the African Union in conformity with the ultimate objectives of the OAU Charter and the provisions of the Abuja Treaty.[41]

The Assembly also decided to accelerate the process of implementing the Abuja Treaty, in particular to: shorten the implementation periods of the Abuja Treaty;[42] ensure the speedy establishment of all the institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of Justice and, in particular, the Pan-African Parliament;[43] strengthen and consolidate the RECs.[44]

The Sirte Declaration also tasked the Ministers together with the Secretariat to prepare the constitutive legal texts of the Union, and to submit its report to the June 2000 Assembly Session.[45] To this end, the OAU Secretary-General, Dr Salim Ahmed Salim established an Inter-Departmental Task Force led by the Assistant Secretary General for Political Affairs. In addition, a multi-disciplinary team of expert consultants with backgrounds in politics, law, economic integration, and international relations were also hired, and met in Addis Ababa over a one-month period, to develop the preparatory documents.

In the end, the team submitted a draft Constitutive Act that proposed pyramid type of institutional framework with the AU and the AEC at the bottom of the pyramid and OAU at the top. This was no doubt a misunderstanding of the Sirte Declaration. It seems the consultants were misled by the words 'in conformity with the ultimate objectives of the OAU Charter and the provisions of the Abuja Treaty'. A small internal drafting team, which I chaired, was quickly set up within the Inter-Departmental Task Force, to redraft the texts submitted by the consultants.

41 Packer and Rukare, 'The new African Union and its Constitutive Act', 370-371.

42 Sirte Declaration, 9 September 1999, Article 8(ii)(a).

43 Sirte Declaration, Article 8(ii)(b).

44 Sirte Declaration, Article 8(ii)(c).

45 Sirte Declaration, Article 8(iii).

The updated texts were later submitted to member states and to two consecutive meetings of Experts and Parliamentarians, held in in Addis Ababa in April 2000, and in May 2000 in Tripoli, Libya, respectively. Thereafter, a ministerial session held in Tripoli, Libya from 31 May to 2 June 2000, reviewed the draft Constitutive Act and decided to establish a member states' working group together with the Secretariat to further elaborate on the draft Act.

The working group submitted the revised draft Constitutive Act to the Council of Ministers at its session held in Lomé, Togo from 6 to 8 July 2000. The Council of Ministers reviewed the draft Constitutive Act again and after further deliberations, approved it on 8 July 2000 and recommended it for consideration and adoption by the OAU Assembly. The Assembly meeting at the same venue from 10 to 12 July 2000, formally adopted the Constitutive Act on 12 July 2000 and urged OAU member states to ratify it as soon as possible.

The launch of the African Union

The political birth of the African Union was proclaimed at an Extraordinary Session of the OAU Assembly Sirte, Libya 1-2 March 2001, upon signing of the Act by majority of the member states.[46] Regarding the legal birth, the Summit noted that the Constitutive Act would enter in to force 30 days after the deposit of the instruments of ratification by two-thirds of the member states of the OAU, as provided for in Article 28 of the Constitutive Act. It also instructed that other necessary legal instruments should be prepared.

At the subsequent and ultimate OAU Summit held in Lusaka, Zambia in June 2001, the Assembly noted that the Constitutive Act had entered into force on 26 May 2001.[47] This mandated the OAU Secretary-General to undertake consultations on the modalities and guidelines for the launch of the organs of the African Union. Additionally, it

[46] Packer and Rukare, 'The new African Union and its Constitutive Act', 370-372.

[47] Packer and Rukare, 'The new African Union and its Constitutive Act', 365-367.

was to prepare the draft rules of procedure for these organs in consultation with the ambassadors and a ministerial committee.[48] The Assembly prioritised the launch of the key organs, namely: the Assembly, the Executive Council, the Commission, and the Committee of Permanent Representatives, and requested the Secretary General to submit proposals concerning the structure, functions, and regulations of the Commission.[49] The Assembly also declared a transitional period of one year.

The Constitutive Act entered into force on 26 May 2001, and the African Union (AU) Assembly of Heads of State and Government held its first Ordinary and Inaugural Session in Durban, South Africa, in July 2002.[50] The Public Inaugural Session of the Union took place at the FNB Stadium in Durban on 9 July 2002.

At that session, the Assembly reviewed and adopted other necessary legal instruments of the Union such as the Rules of Procedure of the Assembly, of the Executive Council and the Permanent Representatives Committee as well as the Statutes of the Commission. It also adopted the Protocol on the Peace and Security Council. The Assembly also declared a one-year interim period.

Gaddafi's proposals for amendments to the Constitutive Act

Strangely, as the Assembly was holding its inaugural session, Colonel Gaddafi presented proposed amendments to the Constitutive Act.[51] The main proposals included, *inter alia,* deletion of the article on withdrawal from the Union as according to him, it constituted an invitation to states to withdraw.[52] There were also other proposals including one

48 Congressional Research Service (CRS) Report for Congress, 'The African Union', Order Code RS21332, 30 April 2003, 3.

49 CRS Report for Congress, 'The African Union', 3.

50 CRS Report for Congress, 'The African Union', 3.

51 African Union Assembly, Decision on the Proposed Amendments to Articles of the Constitutive Act, Assembly/AU/Dec.3(I), First Ordinary Session, Durban, 9-10 July 2002.

52 African Union Assembly, Decision on the Proposed Amendments to Articles of the

discouraging member states from concluding any treaty or alliance that is incompatible with the principles and objectives of the Union.[53] This item was deferred. Colonel Gaddafi also proposed the establishment of a Single African Army.

The Summit did not accept the proposal for a Single African Army. However, it stressed the need for a common African Defence and Security Policy and requested the Chairperson of the Assembly to establish a group of experts to examine all aspects related to the establishment of a Common African Defence and Security Policy and submit recommendations for the consideration of the next ordinary session of the Assembly.[54] This proposal evolved to the adoption of the AU Non-Aggression and Common Defence Pact in Abuja, Nigeria on 31 January 2005.

After the Summit, the Interim Chairperson of the AU Commission, Amara Essy, led a delegation to meet Colonel Gaddafi to persuade him that it was too soon to start amending the Act. On the proposal to delete the provision on withdrawal, we explained that deletion could not stop a state from withdrawing its membership, as Indonesia once did at the United Nations based on the provisions of the Vienna Convention on the Law of Treaties and customary international law. We failed to convince him and instead helped to redraft the proposals to align with Union procedures.

Constitutive Act, Assembly/AU/Dec.3(I), First Ordinary Session, Durban, 9-10 July 2002. See also Vienna Convention on the Law of Treaties, 1155 UNTS 331, 22 May 1969, Articles 54-56, Libya opposed the inclusion of an express withdrawal clause, arguing that it symbolically facilitated exit, even though withdrawal would remain possible under general international law.

53 African Union Assembly, Decision on the Proposed Amendments to Articles of the Constitutive Act, Assembly/AU/Dec.3(I), 1st Ordinary Session, Durban, 9-10 July 2002. See also African Union, Protocol on Amendments to the Constitutive Act of the African Union, July 2003; Constitutive Act of the African Article 4. Among the Libyan proposals were suggestions to amend the withdrawal provisions of the Constitutive Act, on the basis that an express exit clause undermined the permanence of the Union, as well as proposals aimed at limiting member states' ability to enter into treaties or alliances incompatible with the Union's principles and objectives.

54 African Union Assembly, Decision on the Proposed Amendments to Articles of the Constitutive Act, Assembly/AU/Dec.3(I); Decision on a Common African Defence and Security, 1st Ordinary Session, Durban, 9-10 July 2002, para 1-2.

Resultantly, the proposed amendments were encapsulated in a Draft Protocol on Amendments prepared by the AU Commission which was reviewed by meetings of experts and Permanent Representatives, and later ministers and formally adopted by the Assembly in July 2003. The Protocol is not yet in force 22 years later, as it requires ratification by two thirds majority of states (37) but has so to date obtained only thirty ratifications.[55]

This man Gaddafi

Before moving to another section on the early implementation of the Constitutive Act and Union Government Project, I feel compelled to say something about Colonel Gaddafi, not only because of his role in the establishment of the AU, but also his many proposals whose deliberations disrupted the normal equilibrium during the Assembly sessions due to his deeply uncompromising stance. Although some of his proposals were often misguided, there is no doubt he was committed to African unity.

His approach reminds me of the words of Thomas Sankara, a Pan-Africanist revolutionary who served as the President of Burkina Faso from 1983 until his assassination in 1987:

> You cannot carry out fundamental change without a certain amount of madness. In this case, it comes from nonconformity, the courage to turn your back on the old formulas, the courage to invent the future. It took the madmen of yesterday for us to be able to act with extreme clarity today. I want to be one of those madmen. We must dare to invent the future.[56]

It seems to me that those sentiments were inherent in Colonel Gaddafi's DNA. Gaddafi was no doubt a complex man who could not be defined by a single identity or experience and who meant many things to different people. At the personal level, he was kind and considerate,

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[55] Protocol on the Amendments to the Constitutive Act of the African Union, Assembly of the African Union, Maputo, 11 July 2003, Article XIII, Status as at 15 December 2025.

[56] Thomas Sankara, *Thomas Sankara speaks: The Burkina Faso revolution 1983-87,* Pathfinder, 1988, 144.

spoke good English and loved to tell stories. At the same time, he was ruthless and unforgiving to his opponents just like any other dictator. He supported every shade of terrorist and rebel groups in Africa and abroad.[57]

On African unity, I believe Gaddafi wanted to be remembered as a unifier and champion of African unity who succeeded where Nkrumah failed. It is likely that he turned his attention to Africa after many failed attempts to bring about unity in the Arab world.[58] Every single initiative on African unity was conceived by him personally, with his close advisers just taking notes.

Strangely, according to his close advisers, Gaddafi was not bothered or interested in the briefings about the continental shelf dispute between Libya and Malta at the International Court of Justice (ICJ). When he was AU Chairperson for one year, 2009 to 2010, he summoned and sent an aircraft to pick the AU Commission Chair, Jean Ping, to go to Libya 14 times (I accompanied him on some of those trips). That year he also travelled to the AU headquarters in Addis Ababa three times, often without or at extremely short advance notices.

Early implementation of the Constitutive Act and the African Union government project

Since the Constitutive Act abrogated and replaced the OAU Charter and any inconsistent provisions of the Abuja Treaty of 1991, it is pertinent to ask whether it advanced and shifted the OAU towards a more integrated continental body. Evidently, the Constitutive Act introduced a new normative framework and strengthened continental institutions. However, it seems to me that the stated intention to shorten the implementation periods of the Abuja Treaty was not achieved.

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57 See for example the Lockerbie bombing of Pan Am Flight 103 on 21 December 1988, which took off from Heathrow Airport in London bound for New York City, with 259 passengers and crew and 190 Americans, and which came down in Lockerbie Scotland. Libya took responsibility and paid compensation to the victims.

58 For example, the Union of Arab Republics 1971 (Libya, Egypt, and Syria) and the Arab Islamic Republic 1974 (a proposed union of Libya and Tunisia), all failed to take off.

Where the Abuja Treaty provided for SMART – specific, measurable, achievable, relevant, and time-bound – goals, the Act settled for general objectives without any timelines. This has allowed a situation where the original timelines in the Abuja Treaty have been surpassed and the goals and aspirations in other subsequent initiatives have simply kicked the can down the road. Neither the African Continental Free Trade Area (AfCFTA) nor Agenda 2063, can possibly be said to have shortened the implementation periods of the Abuja Treaty.

One noteworthy development though, from the implementation of the Constitutive Act was the adoption of the first AU Strategic Plan 2004 to 2008, with agreed strategic objectives, pillars and strategies; mission, vision and shared values, and activities.[59] To implement the new programmes and activities, a new budget of US$ 260 million was adopted, a big jump from the last OAU budget of US$43 million. This budget allowed the AU to undertake more activities, including in the peace and security cluster, although it remains largely funded by partners.

African Union Government project

The long running African Union Government project arose from the submission by Libya of four interrelated items in the agenda of the sessions of the Executive Council and the Assembly held in Abuja, Nigeria, in January 2005.[60] The items proposed, *inter alia*, the creation of the posts of Ministers of Defence, Foreign Affairs, Transport and Communications, Foreign Trade and the cancellation of customs, and harmonisation of custom tariffs among member states.

The debate on these straightforward proposals went on for six years and evolved into deliberations on how to strengthen our common institutions with various options metamorphosing from a strengthened

[59] African Union, 'Commission of the African Union: 2004-2007 strategic plan', 2 *Strategic Framework* (2004).

[60] Tim Murithi, 'Introduction: Contextualising the debate on a Union Government for Africa', in Timothy Murithi (ed) *Towards a Union Government for Africa: Challenges and opportunities*, Pretoria, Institute for Security Studies (ISS), 2008, 5.

Commission, into a Union government and an AU Authority. Out of those six years, four years were devoted to deliberations around the Union government and two years around the African Union Authority.

Over those four years, the Assembly held eight ordinary sessions, two extra ordinary sessions and two special sessions devoted to the issue of the Union Government. There were also three successive Committees of Heads of State one chaired by President Yoweri Museveni, then President Olusegun Obasanjo, then President Jakaya Kikwete with each holding at least two meetings in different places.[61]

In addition, the Ordinary Session of the Assembly held in Accra Ghana in July 2007 was unusually devoted to one single agenda item, the Grand Debate on the Union Government.[62] On the other hand, the Executive Council held eight ordinary sessions, four extra ordinary sessions, and three ministerial retreats in different places devoted to this issue.[63] Several sessions of the ministerial committees were also held. In its various sessions, the Assembly reaffirmed that the ultimate goal of the African Union was full political and economic integration leading to the United States of Africa. Conceptually, therefore, the Union Government was supposed to be a bridge towards the ultimate goal of establishing the United States of Africa.

Some of the issues addressed in the various sessions, included the following: the steps needed for the realisation of this objective; the structure; the process; the nature of the consultations to be undertaken; identification of the contents of the Union Government concept; identification of domains of competence and their impact on the sovereignty of member states; identification of the relationship between the Union Government and the RECs; elaboration of the roadmap together with timeframes; and identification of additional sources of financing the activities of the Union.

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61 Tim Murithi, 'From Pan-Africanism to the Union of Africa', *Pambazuka News,* 20 June 2007.

62 Murithi, 'Introduction: Contextualising the debate on a Union Government for Africa', 5-6.

63 Murithi, 'From Pan-Africanism to the Union of Africa'.

The outcome of the Grand Debate in Accra, in July 2007, was the Accra Declaration by the Assembly. Its preambular and substantive provisions were telling:

> One, it expressed its conviction that 'the ultimate objective of the African Union is the United States of Africa with a Union Government as envisaged by the founding fathers of the Organisation of African Unity and, in particular, the visionary leader, Dr Kwame Nkrumah of Ghana'.[64]
>
> Two, 'the Union Government should be built on common values that need to be identified and agreed upon as benchmarks'.[65]
>
> Three, by 'involving the African peoples to ensure that the African Union is a Union of peoples and not just a "Union of states and governments", as well as the African Diaspora in the processes of economic and political integration of our continent'.[66]

Furthermore, the Accra Declaration stressed the need 'to conduct immediately, an Audit of the Executive Council in terms of Article 10 of the Constitutive Act, the Commission as well as the other organs of the AU in accordance with the Terms of Reference adopted by the 10th Extraordinary Session of our Executive Council held in Zimbali, South Africa on 10 May 2007'.[67]

The Declaration also purposed 'to establish a ministerial committee to examine the following: identification of the contents of the Union Government concept and its relations with national governments; identification of domains of competence and the impact of the establishment of the Union Government on the sovereignty of Member States; definition of the relationship between the Union Government and the regional economic communities (RECs); elaboration of the roadmap together with timeframes for establishing the Union Government; and identification of additional sources of financing the activities of the Union'.[68]

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64 Accra Declaration, 3 July 2007, (Assembly/AU/Decl.2(IX)), Preamble para 1.

65 Accra Declaration, Preamble para 4.

66 Accra Declaration, Preamble para 5.

67 Accra Declaration, para 2(b); Constitutive Act of the African Union, Article 10.

68 Accra Declaration, para 1(c).

Subsequently, a High-Level Panel for the Audit of the African Union was set up led Professor Adebayo Adedeji, as Chair of the Panel. The Panel's Report containing 159 recommendations to galvanise the integration process, outlined eight benchmarks which were crucial to the realisation of the African Union Government project. These benchmarks were:

> revamping the institutions of the Union; popularising and internalising Africa's core values; mobilising and engaging the peoples of Africa for the Union Government project; free movement of the peoples of Africa; rationalisation of the RECs; fast-tracking the move towards an African Common Market and the African Economic Community; establishment of continental financial and monetary institutions; developing African entrepreneurial elite towards regional and continental investment projects that advance unity and integration.[69]

In the deliberations that followed, the issue of the appropriate integration model that Africa should adopt was also discussed. Suggestions were made that Africa could learn from integration models of societies such as Europe, USA, Brazil, and India. However, these models developed around the economic, ideological, and political imperatives of those societies which might be different from Africa's own peculiarities. There was a general consensus that as much as possible, Africa should design its own model of integration. At the same time, it was agreed that Africa cannot continue to drag its feet on the need for greater integration. Furthermore, the people of the continent deserved leadership on this matter, and should be involved in the integration processes.

The process for a Union Government was underpinned by many studies and wide-ranging consultations with stakeholders such as member states and the regional economic communities, and especially by ECOSOCC and civil society organisations that submitted detailed proposals. These consultations were undertaken at the political level as well as the technical level. There were also base studies undertaken by consultants followed by many validation workshops. The base study, *inter alia,* proposed that:

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[69] African Union High Level Panel, 'Audit of the African Union', 18 December 2007, para 488.

> The Union Government will be a political transitory arrangement towards the United States of Africa. As such, it should consist of a more focused Assembly in terms of its work, and an Executive Council backed by an effective Permanent Representatives Committee, and result-oriented Specialised Technical Committees as may be required. In addition, the Union Government would have a Commission with Executive authority on matters totally or partially delegated by Union Members. Finally, it would be supported by more effective parliamentary and judicial systems, as well as efficient continental financial institutions and an adequate participatory framework for non-state actors.[70]

While this was ongoing, at the Ordinary Session of the Assembly held in Sirte, Libya from 4 to 5 July 2005, Libya submitted three new proposals: To revise the symbols and emblems inherited from the OAU; the establishment of a Pan-African Stock Exchange; and the establishment of a mechanism for participation in Bilateral Summits between Africa and Certain States.[71]

Appellation of Union Government was a misnomer

At the end of it all, after backs and forths, and all the meetings and deliberations over a period of four years that I have outlined above, the Assembly decided at its Session in Addis Ababa in February 2009, that the appellation of Union Government was a misnomer.[72] The central argument was that having two governments in Addis Ababa, one a Federal Government for Ethiopia and another for the continent, would create confusion.

The Assembly therefore decided that, rather than a Union Government, it should be renamed African Union Authority. The Authority should be a strengthened Commission with a structure comprising of the President, the Vice President, and Secretaries with portfolios based on areas of shared competencies as agreed upon. This decision was tak-

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70 African Union, 'Study on an African Union government: Towards the United States of Africa', 2006, 6, paras 15-17.

71 African Union Decision on the Proposals by the Great Socialist People's Libyan Arab Jamahiriya, EX.CL/Dec.274(VIII), 2005, 1-4.

72 African Union Assembly Decision on the Special Session of the Assembly on the Union Government, Assembly/AU/Dec.233(XII), Twelfth Ordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia, February 2009, 1-3.

en even though the Assembly had constantly echoed and re-echoed the point that the need for the Union Government was no longer a question, but rather 'what to establish' and accept as the 'structural and or operational and administrative content' of the Union Government. Indeed, at its January 2008 session, the Executive Council, agreed not to reopen the debate on the merits and demerits of the Union Government because this was the essence of the Grand Debate in Accra, leading to the establishment of the Audit Panel and the Ministerial Committee on the Union Government.

At its July 2009 session in Sirte, Libya, the Commission was requested to prepare legal instruments for amendments to the Constitutive Act, the Rules of Procedure of the Assembly, the Executive Council, the Peace and Security Council, the Permanent Representatives Committee (PRC), and the Statutes of the Commission related to the Creation of the African Union (AU) Authority, and to submit to a meeting of government experts to consider them. In addition, the Commission was to submit proposals on the structure of the new AU Authority, and the financial implications of the transformation of the Commission into the AU Authority, in collaboration with the PRC.

Pursuant to the Assembly's request, the Commission prepared consequential amendments to 11 legal instruments and convened four different meetings of government experts and ambassadors, and subsequently submitted the outcome to the Executive Council and the Assembly.

Reconsideration of decision

At the Assembly's session in July 2009, Libya requested for a 'Reconsideration of the Decision on the Transformation of the African Union Commission into the African Union Authority'. This proposal was rejected.

During the armed conflict that began with peaceful protests against Gaddafi's regime, and which escalated into a full-blown civil war up to October 2011 when Colonel Gaddafi was assassinated, this issue took

a back burner. Consideration of the legal instruments for the establishment of the African Union Authority, was deferred several times, and later laid to rest in January 2013, when the Assembly decided to set aside the process of converting the AUC into an Authority and, instead, to strengthen the existing Commission.

Concluding remarks

As I had said earlier, the Abuja Treaty envisaged that by 2028, 34 years after its entry into force and about three years from now, we should have had full integration of all the sectors and the establishment of a single domestic market, a Pan-African Economic and Monetary Union, the African Central Bank and a single African currency, and free movement of people. The AfCFTA Agreement is no doubt an improved and more elaborate version of the Abuja Treaty, with respect to trade matters. However, neither the AfCFTA nor Agenda 2063, can possibly be said to have shortened the implementation periods of the Abuja Treaty. The inescapable conclusion, therefore, is that we are nowhere near reaching the goal of deeper unity and integration set out in the Sirte Declaration. All the new initiatives have just kicked the ultimate goal down the road without any immediate timelines.

The continental integration process has been a compromise between those who preferred a revolutionary approach and those who preferred a gradualist approach. According to President Thabo Mbeki, during the debate on Sirte Declaration of 9 September 1999, the difference in approach was 'between those that wanted to run and those who wanted to walk'. Evidently, most of our leaders prefer walking and walking slowly for that matter. However, I would suggest that there was a third group composed of Presidents Obasanjo, Abdelaziz Bouteflika, and Abdoulaye Wade, among others that also preferred walking but briskly.

It is a truism that every major cause must have a leader. In Europe, Jean Monnet was the unifying force behind the birth of the European

Union. In Africa, it was undoubtedly Kwame Nkrumah in the late 1950s and early 60s until the coup of 1966. In the 90s and the early 2000s it was Colonel Gaddafi. During those two periods, there were other leaders who shared that vision but none as strongly. However, with the assassination of Gaddafi in October 2011, and the exit from the stage of some leaders who favoured walking quickly, the vision and momentum for real and meaningful political and socio-economic integration seems to have lost steam and left abandoned, unattended in the African wilderness.

To end on a positive note, I believe that a new generation of visionary leaders will ascend to power and take up the baton of Pan-Africanism where the leaders of yesterday left it. As John C Maxwell once said, 'everything rises and falls on leadership'.[73]

[73] John C Maxwell, *The 21 irrefutable laws of leadership: Follow them and people will follow you*, Thomas Nelson, 1998.

Reflecting on 25 years of the African Union Constitutive Act: Drafting history, legal philosophy and broad objects of the renewal of Africa's continental body*

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Abstract

This reflection by Hajer Gueldich, delivered during Kabarak University Press' International Law Month, 2025 revisits the African Union Constitutive Act 25 years after its adoption. It traces the hopes and contradictions that have shaped the AU's legal and institutional journey since Lomé. The Constitutive Act is presented not simply as a treaty, but as a bold statement of Africa's determination to imagine a different future, one grounded in non-indifference to atrocities, a commitment to demo-

* Speech delivered during a webinar on 7 August 2025 at the Kabarak University Press' International Law Month at Kabarak 2025, titled 'Reflecting on 25 years of the African Union Constitutive Act (Webinar 1): Drafting history, legal philosophy and broad objects of the renewal of Africa's continental body' on Zoom - 2:00-4:00 pm (East African Time). A recording of the webinar is available on https://www.youtube.com/watch?v=97KlBcgExlk&t=4831s

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cratic governance, and an integrated approach to peace and development. Gueldich reflects on the Act's unique innovations. More so, its influence on global legal norms, and the ways Africa has defined its own place in international law through instruments such as the African Charter on Democracy and the AU Transitional Justice Policy. At the same time, she acknowledges the difficult realities of coups, insecurity, and weakened political will that threaten this vision. The reflection ends with a call to action – that the AU's renewal must be shared with citizens and the wider pan-African community if the promise of a peaceful, just, and people-driven Africa is to be realised.

Keywords: Constitutive Act of the African Union, 25th anniversary, non-indifference, unconstitutional changes of government, regional constitution, Africa's contribution to international law, African legal renewal

Introduction – The Constitutive Act: The birth of a new normative order

The adoption of the Constitutive Act in Lomé in 2000 signified more than a rebranding of the Organisation of African Unity (OAU).[1] It was, in essence, a rupture with the past, a legal emancipation from the rigid non-interventionist paradigm of the post-colonial era. From a legal-positivist perspective, it marked a paradigmatic shift in the architecture of African regionalism.

The principle of non-indifference, enshrined in Article 4(h), constitutes a rare normative evolution in international law. It empowers the African Union to intervene, without invitation, in a member state in cases of war crimes, genocide, and crimes against humanity. This formulation departs from the classical interpretation of sovereignty under Article 2(7) of the UN Charter and gives rise to new understandings of the limits of domestic jurisdiction when confronted with mass atrocities.[2]

This provision has been praised in legal scholarship as an early articulation of what would later be accepted as the responsibility to protect (R2P).[3] However, it is also grounded in Africa's own jurisprudential heritage, including the African Charter on Human and Peoples' Rights and the historical experience of post-colonial armed conflicts. In this regard, the Constitutive Act not only aligns with but also contributes to the progressive development of customary international law.

Distinctive legal features in comparative perspective

Several provisions of the Constitutive Act render it a *sui generis* legal text among the foundational documents of regional organisations.

1 Constitutive Act of the African Union, 11 July 2000, 2158 UNTS 3.

2 Charter of the United Nations, 26 June 1945, 1 UNTS XVI, Article 2(7).

3 Jared Genser, 'The United Nations Security Council's implementation of the responsibility to protect: A review of past interventions and recommendations for improvement', 18(2*) Chicago Journal of International Law* (2018) 422-423.

First, regarding democratic legitimacy as a legal requirement, Article 30 codifies the illegitimacy of governments that come to power through unconstitutional means.[4] This is not a political declaration but a legally binding provision, operationalised through decisions of suspension and sanctions. Further, in some instances, it is also operationalised through referral to the AU Peace and Security Council. It marks a departure from the permissiveness of earlier international practice and reinforces the principle that legitimacy derives not merely from effective control but from constitutional and democratic processes.

Yet, this innovation has not been free from contradiction. Firstly, the inconsistent application of Article 30, influenced by geopolitical alliances, varying political will, and institutional constraints, threatens to erode its normative force. The proliferation of unconstitutional changes of government in recent years, including *coups d'état* and power grabs under the guise of constitutional reform, exposes the fragility of our enforcement architecture.[5]

Secondly, on institutional equality and anti-hegemony within the AU, it is perhaps the only continental organisation that constitutionally enshrines the equality of all its member states without privileging any with veto powers or permanent seats.[6] This reflects the Pan-African aspiration to a horizontal, non-hierarchical order in international relations. However, this egalitarian design also places considerable pressure on consensus-building processes, often resulting in protracted negotiation and diluted decision-making.[7]

Thirdly, the Constitutive Act's integrated mandate blends human rights, peace and security, economic development, and social justice

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4 Constitutive Act of the African Union, Article 30.

5 Nneka Okuchukwu, 'Unconstitutional change of government in Africa (AU); The fragility of the African governance agenda: A crisis of legitimacy', *The European Centre for Development Policy Management (ECDPM)*, 30 October 2023, 2-4.

6 Constitutive Act of the African Union, Article 4(a).

7 Bakare Adebola Rafiu, 'African Union and the developmental transformation of Africa: Challenges, achievement and prospects', 3(1) *European Journal of Sustainable Development* (2014) 79-81.

into a single legal instrument.[8] This contrasts with the segmented mandates seen in other regions. It affirms the indivisibility of rights and the interdependence of policy domains, an approach reflective of both African jurisprudence and the holistic philosophy embedded in instruments such as the African Charter on Human and Peoples' Rights.

Additionally, the constitutional hierarchy of the Act functions not only as a treaty but as a constitutional order. It establishes foundational principles, institutional competences, and binding values.[9] In this regard, its status resembles that of a regional constitution, setting it apart from mere intergovernmental charters. Its supremacy over other AU instruments is recognised in AU practice and jurisprudence.

Africa's contribution to the evolution of international law

Africa has not merely adopted the norms of global international law; it has refined and redefined them. The Constitutive Act is part of a larger normative constellation that includes: a) the Lomé Declaration (2000), advancing legal accountability for unconstitutional governance; b) the African Charter on Democracy, Elections and Governance (2007), which provides enforceable standards on democratic norms; c) the AU Transitional Justice Policy (2019), which integrates local justice mechanisms and community-based reconciliation; and d) the Malabo Protocol (2014), establishing criminal jurisdiction over international crimes at the regional level, including corruption, terrorism, and environmental crimes.[10]

8 Constitutive Act of the African Union, Articles 3(e)-(j) and 4(m)-(o).

9 Constitutive Act of the African Union, Articles 6, 9 and 23.

10 Organisation of Africa Unity, Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, Assembly of Heads of State and Government, 36th Ordinary Session, Lomé, Togo, AHG/Decl.5 (XXXVI), 12 July 2000 (Lomé Declaration); African Charter on Democracy, Elections and Governance, Reg No I-55377, 30 January 2007; African Union, African Union Transitional Justice Policy, 32nd Ordinary Session, Addis Ababa, 12 February 2019.

Moreover, through the African Union Commission on International Law (AUCIL), Africa is asserting its capacity to codify and progressively develop its own legal order. This is contributing to the universality of international law while preserving legal pluralism.[11] However, this contribution faces existential threats. The crisis of non-adherence to Pan-Africanism, precipitated by shifting global geopolitics and internal democratic decline, has intensified. The continent grapples with a resurgence of terrorism, transnational crime, violent extremism, and the displacement of populations on an unprecedented scale.[12] These phenomena expose the chasm between the Constitutive Act's normative ambition and the often-grim reality on the ground.

The role of civic actors in legal renewal

To bridge this gap, the implementation of the Constitutive Act must be democratised. The youth, civil society, and media must become co-guardians of its principles. The future of African integration will depend not only on intergovernmental processes but on civic constitutionalism which comprises of the reappropriation of the AU's foundational values by its peoples. Legal education, public litigation, and participatory policymaking are all mechanisms that can breathe life into dormant provisions. The African citizen, as envisaged in the Preamble of the Constitutive Act, must become the subject and not merely the object of integration.[13]

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11 Statute of the African Union Commission on International Law, 1 February 2009, Article 5.

12 Bakare Adebola Rafiu, 'African Union and the developmental transformation of Africa: Challenges, achievement and prospects', 3(1) *European Journal of Sustainable Development* (2014) 79-81.

13 Constitutive Act of the African Union, Preamble.

The path forward: Constitutional realism and transformative will

This 25th anniversary is not only a historical milestone, but also a moment of reckoning. The AU must consolidate its legal foundations through the reinforced compliance mechanisms for Article 30.[14] Furthermore, we must operationalise the Malabo Protocol,[15] and ensure greater justiciability of AU law through expanded access to legal recourse, and the continued evolution of institutional frameworks. All of which can respond flexibly to complex, transnational crises. But above all, the Constitutive Act must remain a living instrument, capable of interpreting Africa's ever-evolving needs while rooted in its foundational principles – unity, solidarity, justice, and dignity.

Conclusion

Let me end with the foundational vision embedded in the Constitutive Act which is:

> An integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena.[16]

This is not merely a political aspiration. It is a constitutional promise. One that imposes duties on states, empowers institutions, and affirms the agency of the African peoples. In the spirit of legal renewal and civic hope, let us recommit ourselves to building an AU not just worthy of its name, but true to its normative foundations.

I thank you for your kind attention and for taking the time to read this reflection.

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14 Constitutive Act of the African Union, Article 30.

15 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014 (not yet entered into force) (Malabo Protocol).

16 African Union, 'Agenda 2063: The Africa we want', 2015, 4.

Reflecting on 25 years of the AU Constitutive Act: Unconstitutional changes of government

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Abstract

This essay is a write-up of the oral reflections by Donald Deya on 25 years of the Constitutive Act of the African Union (AU), interrogating its achievements, limitations, and the reforms necessary to revitalise continental governance. It delineates a broad historical and normative trajectory, from the transition from the Organisation of African Unity (OAU) to the AU, to the development of the norms, institutions, and practices governing unconstitutional changes of government. This essay argues that the AU's credibility has been steadily eroded by inconsistent implementation of its own standards. The AU has made significant progress in norm-setting and institutional design. This has included the adoption of the African Charter on

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** This article has undergone single blind review.

Democracy, Elections and Governance (ACDEG) and the establishment of the AU Peace and Security Council. However, it has struggled to address constitutional manipulation by incumbents with the same vigour applied to military coups. As global democratic recession and weakened continental institutions intensify political instability, the essay calls for a repoliticised AU and procedural reforms that enable early and principled intervention. Ultimately, it argues that addressing both military and civilian coups with consistency and courage is essential if the AU is to reclaim moral authority and advance democratic governance on the continent.

Keywords: Constitutive Act of the African Union, unconstitutional changes of government, civilian coups, military coups, electoral justice, democratic governance, political courage

Introduction

The year 2025 marks a quarter-century since the adoption of the Constitutive Act of the African Union (AU).[1] This landmark instrument has redefined continental governance by shifting the African project from the Organisation of African Unity's (OAU) doctrine of non-interference to the AU's ethos of non-indifference.[2] The transformation reflects a continental resolve to respond more robustly to conflict, human rights violations, and unconstitutional changes of government. These issues had long undermined Africa's political stability.[3] Yet, as the continent reflects on this 25-year journey, persistent challenges, new geopolitical realities and institutional fatigue raise critical questions about the effectiveness and future of the AU's governance architecture.

This essay, as a write-up of my insights during the International Law Month webinar convened by Kabarak University Press and the Pan-African Lawyers Union on 21 August 2025,[4] revisits the historical and political foundations of the AU's approach to unconstitutional changes of government. It situates the contemporary crisis within broader global trends, including democratic recession, the rise of new geopolitical actors, weakened multilateralism, and declining external support for human rights norms. It further considers how internal dynamics, ranging from constitutional manipulation by incumbents to institutional depopulation within the AU Commission, have hampered the operationalisation of continental norms.

I must sincerely thank, appreciate, and congratulate Kabarak University Press for hosting the International Law Month 2025, and also for the work you are doing in anchoring Pan-Africanism, African unity,

1 Constitutive Act of the African Union, 11 July 2000.

2 Ben Kioko, 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention', 85(852) *Revue Internationale de La Croix-Rouge/International Review of the Red Cross* (2003) 807-814.

3 Kioko, 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention', 807-810.

4 Reflecting on the first 25 years of the Constitutive Act of the African Union: Webinar 2, Kabarak University Press YouTube Channel, 21 August 2025, https://www.youtube.com/watch?v=4HWyH26UO4I.

and regional integration. Not only from an academic platform, but also one that engages the public so robustly. It is really, really needed at the time we find ourselves.

The discussion proceeds in three parts. First, it traces the AU's normative evolution, from the 1990 Declaration on the Political and Socio-Economic Situation in Africa to the African Charter on Democracy, Elections and Governance (ACDEG). Second, it assesses the institutions created to support these norms, including the Peace and Security Council, the African Court on Human and Peoples' Rights, and the African Governance Architecture. It highlights both their successes and the inconsistencies that have weakened their authority. Third, it interrogates the contemporary recurrence of coups, military, electoral, and civilian, and examines how selective enforcement has diminished the AU's legitimacy and emboldened unconstitutional actors.

The paper concludes by proposing concrete reforms such as recalibrating election observation as an early warning tool, strengthening the interface between citizens and continental organs, enhancing the role of regional economic communities (RECs), and revitalising Pan-African civic solidarity. These measures, it is argued, are urgently required if the AU is to reclaim its founding promise of promoting democratic governance, peace, and constitutionalism across the continent.

The legal regime and action on unconstitutional changes of government

The prior webinar[5] discussed the dilemmas, debates, and divergences around the Casablanca group and the Monrovia group in African history in the early 1960s.[6] Those divisions have continued to plague

[5] Reflecting on the first 25 years of the Constitutive Act of the African Union: Webinar 1, Kabarak University Press YouTube Channel, 7 August 2025, https://www.youtube.com/watch?v=97KlBcgExlk

[6] Gerrit Olivier, 'Regionalism in Africa: Cooperation without integration?', 32(2) *Strategic Review for Southern Africa* (2010) 27; Kwame Nkrumah, The autobiography of Kwame Nkrumah, International Publishers, 1957, 164 where he famously states, 'seek ye first the political kingdom'.

the continent, and they are partly responsible for where we find ourselves today on unconstitutional changes of government in Africa.

There were those who pushed for faster unity and stronger institutions. There are those who advocate for slower unity, and I believe there were actually actors who did not want unity at all. We are not often courageous enough to state that or call it out. Had we achieved unity more quickly, had we had stronger and more powerful institutions, especially the AU in Addis, along with many other organs and institutions of the AU, we might have been able to deal with the issue of unconstitutional changes of government more robustly.

The second foundational premise I will present is that unconstitutional changes of government are part of the AU's very foundation. This issue animated the transformation and transition from the OAU to the AU, and has been central to the AU's engagement ever since. I would argue that the lack of a concrete breakthrough on how to handle this issue on the continent is part of the reason for the malaise the AU suffers from to this day.

When I describe the various steps and norms we have developed, you will see why I say that unconstitutional changes of government, are part of the very umbilical cord that animated the transformation from the OAU to the AU. This shift marked a move from non-interference to non-indifference, bringing us to where we are now.[7] However, we must also consider the broader context.

What is the context in which we are discussing unconstitutional changes of government in 2025? Globally, there is a general trend towards democratic regression or recession, and Africa is not immune. Over the past 20 years, the rising influence of China, and more recently Russia, has shifted the dynamics around how we discuss democracy, governance, human rights, and peoples' rights. At the same time, the influence of colleagues from Europe and North America, who once

[7] Kioko, 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention', 807-810.

contributed significantly to democratisation and human rights efforts on the continent, has waned.

In recent years, the rise of the far-right in Europe has further undermined the global standing of human and peoples' rights. This context shapes the AU's efforts on unconstitutional changes of government. When assessing what the AU has done, or can do, on unconstitutional changes of government (UCGs), I usually frame it as a journey in three steps: norm setting, institution building, and implementation.

From the year 2000, when we adopted a new set of norms, an effort both Professor Hajer, the AU Legal Counsel, and Honourable Kioko, former AU Legal Counsel, elaborated on last week,[8] we have typically followed the process of setting norms, then building institutions, and finally implementation. Reflecting on the continent's norm-setting journey regarding UCGs, we begin with the 1990 Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World. Then came the 1995 Cairo Agenda for the Relaunch of Africa's Economic and Social Development.

In 1999, the Algiers Declaration on Unconstitutional Changes of Government was adopted, followed in 2000 by the Lomé Declaration for an OAU response to unconstitutional changes.[9] This pivotal moment marked the transition from the OAU to the AU, also in Lomé. In 2002, we saw the Declaration on the Principles Governing Democratic Elections in Africa.[10] Then in 2003, several important legal instruments were introduced, most notably the Protocol Relating to the Establishment of the Peace and Security Council of the African Union.[11]

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8 Reflecting on the first 25 years of the Constitutive Act of the African Union: Webinar 1, Kabarak University Press Youtube Channel, 7 August 2025, https://www.youtube.com/watch?v=97KlBcgExlk

9 Chidi Odinkalu, 'A ruler's shield? Re-evaluating the norm against unconstitutional changes of government in Africa', 25(1) *African Human Rights Law Journal* (2025) 27.

10 Chidi Odinkalu, 'A ruler's shield? Re-evaluating the norm against unconstitutional changes of government in Africa', 14.

11 Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 1st ordinary session of the AU Assembly, 9 July 2002.

All of these efforts were consolidated in 2008 with the adoption of the African Charter on Democracy, Elections and Governance (ACDEG), a seminal legal instrument for the AU. The AU has, in practice, implemented this Charter across the continent, even in countries that have not ratified it. We can jump ahead to 2014, which marked the beginning of the Silencing the Guns Initiative.[12] Originally aimed at silencing the guns by 2020, the timeline has since been revised to 2030. Unfortunately, the guns are not growing silent; they are, in fact, becoming louder.

Another turning point was in 2014 with the adoption of the Malabo Protocol.[13] This Protocol aimed to expand the jurisdiction of the African Court to include international crimes, particularly by criminalising unconstitutional changes of government.[14] It is worth noting that discussions on unconstitutional change of government were one of the issues that delayed adoption of the Malabo Protocol from 2011 until 2014. Some states expressed misgivings about the treatment of popular uprisings, arguing that citizens exercising constituent power should not be criminalised. Eventually, a compromise was reached.

In 2015, the African Union adopted Agenda 2063, which emphasised good governance and the rule of law as fundamental pillars. On the institutional side, we can refer to the establishment of the African Union Commission during the interim period starting in 2000, and the election of Professor Alpha Oumar Konaré, himself the retired president of the Republic of Mali, as its first substantive chairperson.[15] This period also saw the creation of the AU Peace and Security Council and a strengthening of the African human rights system.

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12 Victor H Mlambo, 'Silencing the guns in Africa beyond 2020: Challenges from a governance and political perspective', 7(1) *Cogent Social Sciences* (2021) 3.

13 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), 27 June 2014.

14 Ssenyonjo Manisuli, 'The crime of unconstitutional change of government and popular uprisings in Africa: Issues and challenges', 28(3) *African Journal of International and Comparative Law* (2020) 434-438.

15 Ofeibea Quist-Arcton, 'Africa: Alpha Oumar Konare elected new chairperson of AU Commission', *AllAfrica*, 11 July 2003.

Key continental human rights institutions include the African Court on Human and Peoples' Rights in Arusha, Tanzania; the African Commission on Human and Peoples' Rights in Banjul, The Gambia; and the African Committee of Experts on the Rights and Welfare of the Child, initially based in Addis Ababa and now relocated to Maseru, Lesotho. Beginning in 2010, further institutions were established, such as the African Governance Architecture, the African Peace and Security Architecture, and the African Governance Platform. These bodies were designed to coordinate all AU organs and specialised agencies involved in democracy and good governance.

In terms of implementation, the AU Peace and Security Council initially responded robustly to military coups, suspending affected countries and engaging to ensure a prompt return to democracy. Typically, countries were given a six-month window to implement necessary reforms and hold democratic elections. There have been notable successes, such as The Gambia in 2017, where the AU, the Economic Community of West African States (ECOWAS), and the UN aligned to remove an incumbent who had rejected election results and to install the rightful winner.[16]

However, there have also been significant failures. The AU has sometimes applied its norms inconsistently, especially regarding unconstitutional changes of government. This selective enforcement has undermined the credibility of these norms. Cases in point include Egypt in 2013, Burundi in 2015, Zimbabwe in 2017, and Chad in 2021.

The Burundi case stands out. When President Pierre Nkurunziza sought a third term, interpreting the Constitution to allow a third term, the AU Commission under Dr Nkosazana Dlamini-Zuma initially responded decisively.[17] They refused to send an election observation mission due to the unfavourable conditions, a rare move. The Peace and

[16] African Union, 'Joint Declaration by the Economic Community of West African States (ECOWAS), the African Union (AU) and the United Nations (UN) on The Gambia', AU Press Release, 25 May 2017.

[17] Tasnim News Agency, 'Burundi President unexpectedly sworn in for third term', *Tasnim News Agency*, 20 August 2025.

Security Council's Permanent Representatives Committee even authorised intervention in Burundi in December 2015.[18] Unfortunately, the AU Summit in January 2016 reversed this decision, weakening the AU's response to such constitutional manipulation.

Beyond Addis Ababa and the AU's political organs, judicial institutions like the African Court on Human and Peoples' Rights have taken meaningful steps. In 2016, the Court ruled in Application No 001/2014 (*APDH v Côte d'Ivoire*), asserting its role in interpreting and applying core human rights instruments within electoral contexts.[19] This decision led to Côte d'Ivoire and Benin withdrawing their Article 34(6) Declarations, revealing resistance to judicial scrutiny over democratic processes. We have also litigated related issues at the East African Court of Justice and the African Court concerning Burundi. The AU Peace and Security Council has repeatedly discussed unconstitutional changes of government, yet key challenges remain.

One of the most persistent issues is the AU's failure to address unconstitutional power retention by incumbents. While the AU has often responded quickly to military coups, it has been slow and ineffective in addressing incumbents who manipulate constitutions and institutions to remain in power, practices that are clearly unconstitutional. This disparity has damaged the AU's credibility and emboldened soldiers to justify coups, arguing that if citizens cannot change leadership through the ballot, they must resort to the bullet. This sentiment is evident in instances where citizens celebrate coups, not because they support military rule, but because they see no other viable alternative for change.

The AU's influence has waned since a hopeful period between 2000 and 2015, when there was optimism about institutional reform and stronger continental leadership. Over time, the African Union Commis-

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[18] African Union PSC, 'AU Peace and Security Council, 'Communiqué of the 565th Meeting of the PSC on the Situation in Burundi', PSC/PR/COMM.(DLXV), 17 December 2015, para 13.

[19] *In the matter of Actions pour la protection des droits de l'homme (APDH) v Côte d'Ivoire*, Application 001/2014, Judgment of the African Court on Human and Peoples' Rights at Arusha, 18 November 2016.

sion, a vital but not sole actor, has become increasingly bureaucratic and depoliticised. Rather than proactively driving action, it has become reactive, waiting for instructions from political leaders.

A further issue is the depopulation of the AU. The 2016 Summit's reform mandate, led by President Paul Kagame from 2017, focused heavily on streamlining and downsizing. As a result, crucial departments now lack analysts, legal experts and early warning capacities, thus undermining the AU's ability to take preventive action.

Looking ahead

Looking ahead, we must acknowledge that we have failed Africa. The legal instruments exist and are relatively well-articulated, and the institutions have the authority and a record of action. However, over time these institutions have grown weaker, lost their courage, and failed to act decisively. This has contributed to democratic backsliding across the continent.

We must *repoliticise* the AU and the RECs so they can offer real political leadership. Regarding rules, it is essential to refine procedures for dealing with unconstitutional changes of government, particularly when incumbents are involved. This may not require amendments to the Constitutive Act or the Peace and Security Council Protocol, but rather new procedural rules that promote predictability and enable early, meaningful action. These could take the form of AU Peace and Security Council rules or the operationalisation of the African Court of Justice, which is designed to ensure compliance across the full spectrum of AU law, not just human rights.

A concrete recommendation is to overhaul the AU's approach to election observation. Observation missions must be used to trigger early intervention, well before voting day, when undemocratic practices are already apparent. We must return to the letter and spirit of AU instruments and declarations. I believe the current AU leadership, under HE Mahamoud Ali Youssouf, still has the opportunity to make a lasting impact. This could be a pivotal moment for the organisation.

Institutional reform amidst lack of political will

With respect to the problem of institutional reform in the context of the poor political will discussed above, we face two major challenges. First is the ratification of legal instruments, painstakingly developed, negotiated and adopted by the 55 member states. The second challenge is implementation. Implementing decisions, policies, and common African positions that originate from AU policy organs in Addis Ababa or from African international courts and tribunals.

Both ratification and implementation are national responsibilities. I would like to turn this challenge back to the citizens, especially those acting within their countries. It is up to us to push our governments to ratify and implement these instruments. There's often an unspoken assumption that these decisions will enforce themselves, but they won't.

So, the big question is: When we come together as national actors, how do we effectively push our governments? How do we influence our executive branches, legislatures and other stakeholders to ensure ratification and implementation? This might involve developing ratification strategies, submitting motions, working through foreign affairs ministries, line ministries, or parliamentary committees. Most countries require parliamentary approval for ratification, so these are key steps.

I know that the Economic, Social and Cultural Council of the African Union (ECOSOCC), which serves as the AU's civil society body, is actively working on rolling out national chapters.[20] I also know that countries undergoing African Peer Review Mechanism (APRM) assessments are required by law to form national peer review structures that must include citizen participation.[21]

So how can we use these processes to push for action? That, I think, is the real opportunity. As for the AU's relationship with the RECs, this

[20] See Report of the African Union Economic, Social and Cultural Council (ECOSOCC), EX.CL/1261 (XXXVIII), 38th ordinary session of the AU Executive Council, 3-4 February 2021, Addis Ababa, Ethiopia, para 20.

[21] APRM Secretariat, 'Guidelines for countries to prepare for and to participate in the African Peer Review Mechanism (APRM)', November 2003, 12, para 36.

is ultimately a matter of political leadership and courage. We need the political leaders at the AU level to foster meaningful conversations, not just bureaucratic or ceremonial ones. We need political courage on the part of the leadership of these institutions.

Much of this responsibility falls on the Chairperson of the AU Commission, the chief international civil servant of the AU, and their deputies and commissioners. They must be more proactive and courageous in pushing the various organs, institutions, and member states to act.

On 'soft coups'

'Soft coups' involve a quick change of power that does not follow legitimate processes. If the AU is supposed to be the institution that recognises legitimate versus illegitimate governments, what role should the AU play in addressing these situations?

I reiterate. It is the AU's inconsistency in implementing its own norms on unconstitutional changes of government has led to a situation where the AU lacks legitimacy, influence, and authority to intervene effectively.

We have seen cases where the AU has been able to act when soldiers take power in a military coup. However, when it is the incumbent leader engaging in clearly unconstitutional acts, what you might call a 'civilian coup', the AU tends to remain silent.

For example, as Mr Ikechukwu Uzoma mentioned,[22] when an incumbent manipulates the system to bar key opponents who have a strong chance of defeating them at the ballot box, this is an unconstitutional act. Yet the AU often does not respond, especially when it's done through the electoral commission or legal channels controlled by the incumbent.

[22] Making reference to a preceding discourse by Ikechukwu Uzuoma. Reflecting on the first 25 years of the Constitutive Act of the African Union: Webinar 2, Kabarak University Press YouTube Channel, 21 August 2025, https://www.youtube.com/watch?v=4HWyH26UO4I.

Some regimes declare opponents ineligible or use the courts to persecute them, securing convictions that disqualify them from running for office. This is what Hon Macky Sall attempted in Senegal last year, not entirely successfully, but it is the same strategy currently being used by those around Paul Biya in Cameroon, and similarly by allies of Alassane Ouattara in Côte d'Ivoire. These patterns are unfolding without any visible intervention from the AU or the RECs, even though either one can and should act. It is not an either/or situation, both have the mandate and capacity to initiate action.

We should see, for instance, the AU's Panel of the Wise deploying delegations to affected countries. These delegations must engage with all stakeholders, not just the incumbent, but also the political opposition, faith-based leaders, civil society organisations, trade unions, and ordinary citizens. They should make it clear that the AU is aware of what is happening, that such actions are unacceptable, and, where possible, work to broker political solutions.

The problem lies in the inconsistency of both the AU and the RECs when it comes to intervening, especially when incumbents are clearly abusing the law and the power of their office. This inconsistency has brought us to the current situation. The path forward requires our institutions to demonstrate greater political courage, and for citizens to be empowered to demand action, not only from their governments, but also from the AU and the RECs.

We must build solidarity across borders. If it is Cameroon today, then citizens from all 55 African countries must speak out in support of Cameroonians. If it is Côte d'Ivoire tomorrow, or Tanzania or Uganda, where we are currently facing serious challenges, it must be a collective response. The people of Africa and its diaspora must push together, using every tool and platform available.

Concluding reflections

As I conclude, let me speak to the question of to which component of the AU is most concerned with acting to ameliorate the situation described above. Are we asking the AU to do more, or are we asking more from its many organs, institutions, specialised agencies and ad hoc mechanisms, even its high-level panels? The answer is both yes and no. It is important to recognise that all of these components still form part of the AU. The AU Assembly is the African Union. The heads of state can speak directly to one another to prevent situations from worsening. For instance, in 2011, a delegation of five heads of state came together to speak with Muammar Gaddafi in Libya.[23] Although they were ultimately unsuccessful, their efforts were still significant.

An important precedent set was that heads of state can proactively form delegations to engage one of their peers to prevent a complete breakdown. We should think of the AU in this way.

But I also want to challenge us, the people. At times when we lack leaders who are strong or courageous enough to initiate action, it is up to us, the citizens, to explore the various ways we can intervene. Consider the same Libyan situation: in 2011, Libyan citizens went to the African Commission on Human and Peoples' Rights and submitted a complaint under Article 58, stating that there were serious and massive violations of human and peoples' rights in their country.[24]

Upon receiving the complaint, the Commission immediately referred it to the African Court on Human and Peoples' Rights, a perfect example of complementarity. The Court, even without a specific request to do so, issued provisional measures against the Gaddafi administra-

[23] African Union, 'Visit of the African Union High-Level ad hoc Committee on the situation in Libya to Tripoli', AU Press Release, 10 April 2011.

[24] Judy Oder, 'The African Court on Human and Peoples' Rights' order in respect of the situation in Libya: A watershed in the regional protection of human rights?', 2(2) *African Human Rights Law Journal* (2011) 496-498.

tion.[25] Gaddafi promised to engage with them. This demonstrated how the system, even with its imperfections, can still work.

We saw a similar situation in Ethiopia. In February 2022, Ethiopian citizens approached the African Commission on Human and Peoples' Rights, highlighting serious and massive violations occurring in the Tigray region.[26] They invoked Article 58 of the African Charter on Human and Peoples' Rights. Within 10 months, the Commission issued provisional measures,[27] instructing the Ethiopian administration to protect all citizens in Tigray and elsewhere, and to report on the actions being taken. We believe this partly influenced the Pretoria Agreement that followed a few weeks later.

These are examples of what we, as citizens, can do. But we should not limit ourselves to court action. How can we, for example, organise ourselves to engage the Pan-African Parliament to discuss specific country situations or broader thematic issues? We must show that we care, and we can send recommendations or demands to member states or other AU organs and institutions.

How do we, as academics or public intellectuals, engage with the African Union Commission on International Law to propose draft rules on issues such as unconstitutional changes of government? These proposals can then be submitted to the relevant policy organs to begin formal discussions, rather than waiting passively.

My final thought is that we need a resurgence of Pan-Africanism, especially among the people of Africa and the African diaspora. We need to build, or rebuild, strong solidarity across the continent so that

[25] Oder, 'The African Court on Human and Peoples' Rights' order in respect of the situation in Libya: A watershed in the regional protection of human rights?', 499.

[26] Lawyers of Africa, Press Release on seizure and provisional measures in case concerning Tigray', Lawyers of Africa, 14 October 2022.

[27] Letter of "Request for Provisional Measures under Article 100 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (2020), sent by Commissioner Remy Ngoy Lumbu, Chairperson of the African Commission on Human and Peoples' Rights, to HE Mr Abiy Ahmed, Prime Minister of the Federal Democratic Republic of Ethiopia, on 28 September 2022, with Reference: ACHPR/PROVM/ETH/782/22/933/22 (on file with the Author).

we are invested in one another's struggles, and we collectively push the system to function effectively.

We must intensify our demands for good governance and for the realisation of economic, social, and cultural rights. In the context of global crises, this is a crucial moment for African leaders and citizens to assert moral and political leadership, speaking truth to power and demanding a rules-based international order. Civil society must lead this charge.

We have a rich legacy of civic leaders such as Tajudeen Abdul-Raheem. Faith-based organisations can lead too; we have the legacy of Archbishop Desmond Tutu. Artists also have a role, think of Miriam Makeba, Fela Kuti, Angelique Kidjo, and others. The youth must also be at the forefront. Generation Z in Kenya, Nigeria, and elsewhere are bringing energy and experience to this struggle.

We must fight for economic sovereignty, for a fair global economic system, and for greater domestic resource mobilisation. These resources must be used to deliver essential goods and services, not to be looted. I celebrate the leadership of organisations like Tax Justice Network Africa, led by my sister Chenai[28] and others, who are fighting illicit financial flows, working to reform the global tax order, and addressing sovereign debt.

In two weeks, we will meet in Accra, Ghana, led by African Forum and Network on Debt and Development (AFRODAD), to discuss sovereign debt and its impact on our continent. Following that, ITUC Africa, the International Trade Union Confederation, will lead a large citizen rally and demonstration on Friday, 29 August 2025, focusing on sovereign debt.

We must also use the AU's theme of the year, Reparations for Africans and Persons of African Descent, as a powerful mobilising tool. This is a moment to build stronger solidarities across the continent and throughout the diaspora, in the Caribbean, South America, and the Global North, to push the system to work for us.

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[28] Chenai Mukumba also spoke at this webinar. Reflecting on the first 25 years of the Constitutive Act of the African Union: Webinar 2, Kabarak University Press YouTube Channel, 21 August 2025, https://www.youtube.com/watch?v=4HWyH26UO4I.

Beyond the vows: Deconstructing the legal treatment of spousal rape in Kenya

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Abstract

This paper examines the effects of Kenya's exemption of spouses from the definition of rape under Section 43(5) of the Sexual Offences Act. While the law criminalises rape, it denies that possibility within marriage, reflecting deeper assumptions about consent, that once given, it cannot be withdrawn. Building on Jacques Derrida's critique of hierarchical structures, the paper shows how the law treats marital consent through rigid binaries, such as consent and refusal, husband and wife, that ultimately mask a woman's capacity to withdraw consent. Further, Gayatri Spivak's work on subalternity is used to show how the married woman, though formally present in law, is denied meaningful recognition when she attempts to speak against sexual violence in marriage. Rather than treating legal reform as a matter of

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updating language alone, the paper calls for a broader shift in how the law understands consent: as something ongoing and situated. It ends by proposing legal and interpretive strategies that make room for voices that have long been erased or ignored.

Keywords*:* marital rape, consent, subaltern, deconstruction, sexual offences, legal reform, gender-based violence, Spivak, Derrida, logocentrism, différance

Introduction

In most legal systems, rape is characterised as engaging in sexual intercourse or other types of sexual penetration with a victim without their consent.[1] The definition of rape varies among governmental health organisations, law enforcement agencies, healthcare providers and legal professionals.[2] In *Prosecutor v Anto Furundžija*, the International Criminal Tribunal for the former Yugoslavia defined rape as sexual penetration without genuine consent, emphasising that consent must be given freely and considered within the full context of the circumstances.[3] This definition was later upheld in *Prosecutor v Kunarac*, where the Appeals Chamber clarified that the use of force is not required, as long as true consent is lacking.[4] Rape, according to the 1998 International Criminal Tribunal for Rwanda, is a sexual bodily invasion committed under coercion.[5]

In this case, the victim's free will must be evaluated in light of the facts and the consent must be freely provided. The desire to carry out this sexual penetration and the awareness that it takes place without the victim's consent are known as *mens rea*. In certain cases, rape has been substituted in legal terms by phrases such as sexual assault or illegal sexual conduct.[6] Clearly, different bodies and societies define this menacing issue differently.

Finding a universal definition of rape seems difficult given the different legal frameworks that exist in countries; however, the absence

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1 Meril Smith, *Encyclopedia of rape*, Greenwood Press, 2004, 169-170.

2 Shana Maier, '"I have heard horrible stories...": Rape victim advocates' perceptions of the revictimisation of rape victims by the police and medical system', 14(7) *Violence against women* (July 2008) 787.

3 *Prosecutor v Anto Furundžija* (Judgment), ICTY-95-17/1-T, 10 December 1998, para 185 and 271.

4 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Appeal Judgment), ICTY-96-23 & ICTY-96-23/1-A, 12 June 2002, para 129.

5 *Prosecutor v Akayesu* (Judgment), ICTR-96-4-T, 2 September 1998, para 598.

6 Dawn Beichner, 'Rape or sexual assault as crime' in George Ritzer (ed) *The Blackwell encyclopaedia of sociology*, Wiley-Blackwell Publishing, 2007, 4.

of consent is fundamental to the definition of rape.[7] Sexual consent is defined as the voluntary and informed agreement of all individuals involved in a sexual activity.[8] In marriage, consent could be inferred from mutual actions. However, the fact that there is no objection does not automatically translate to consent, as the silence could be influenced by factors such as fear.

While some cultural or traditional views may treat consent within marriage as implied or irrevocable, from actions like cohabitation, expressions of affection, or general marital intimacy, this assumption is not supported by Kenyan constitutional law. Under Article 43(1)(a) of the Constitution of Kenya, every person has the right to the highest attainable standard of health,[9] which includes the right to reproductive health care. This embeds the right to control over one's body and reproductive autonomy, a concept that necessarily includes the right to give or withhold consent to sexual activity, even within marriage.

Additionally, Article 28 guarantees the right to human dignity,[10] and Article 29(d)[11] affirms the right to freedom and security of the person, including freedom from all forms of violence from either public or private sources, which directly rebuts any legal presumption that silence or passive submission in marriage can stand as valid consent. Drawing from this, affirmative and clear consent is essential.

In 1994, Mexico's Supreme Court of Justice ruled that marital rape should not be classified as a form of rape but rather an undue exercise of conjugal rights. It was further stated that because the purpose of marriage is procreation, forced sex in marriage should be allowed if the end

7 Christina M Tchen, 'Rape reform and a statutory consent defence', 74(4) *Journal of Law and Criminology* (1983) 1519.

8 Sonya S Brady and others, 'Communication about sexual consent and refusal: A learning tool and qualitative study of adolescents' comments on a sexual health website', 17(1) *American Journal of Sex Education* (2022) 2.

9 Constitution of Kenya (2010) Article 43(1)(a).

10 Constitution of Kenya (2010) Article 28.

11 Constitution of Kenya (2010) Article 29.

goal is to realise that purpose.[12] After 11 years, the chamber was petitioned to reconsider its stance, and it subsequently reversed its previous decision.[13] In Canada, before 1893, it was feasible for a husband to engage in non-consensual sexual activity with his wife without legal repercussions or objection.[14] Both Canada and Mexico initially held supportive stances toward marital rape but subsequently revised their positions on the issue.

In Kenya's legal context, rape is defined as the intentional and unlawful penetration of the genitals without the victim's consent, regardless of whether initial consent was given, and whether force or intimidation was used.[15] Furthermore, Section 43(5) of the Sexual Offences Act states that this definition does not encompass individuals who are legally married to each other.[16] This clause may encourage the commission of these crimes, leaving married women with no way to flee the violence they face.[17] Significant proof shows reported 728 rape cases in 2021; with no reports of spousal or marital rape submitted at the time.[18] Thus, gender-based violence and rape committed by alleged trustworthy spouses in married houses can be disguised.[19]

Ostensibly marital rape does not fall within the same scope as rape in our Kenyan society. This is because it is believed that a man cannot rape his spouse. Nalia Sohrat argues that marital rape has historically

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12 Suprema Corte de Justicia de la Nación, Primera Sala, *Contradicción de tesis 5/92* (Tesis 1a./J. 10/94), 1 de mayo de 1994, Gaceta S. J. F. 77 (Mayo 1994) 18 as cited in Alejandro Madrazo and Estefanía Vela, 'The Mexican Supreme Court's (sexual) revolution?', 89 *Texas Law Review* (2011) 1872.

13 Supreme Court of Justice of the Nation (Mexico), Solicitud de modificación de jurisprudencia 9/2005, 16 November 2005 as cited Madrazo and Vela, 'The Mexican Supreme Court's (sexual) revolution?', 1872.

14 Constance Backhouse, *Carnal crimes: Sexual assault law in Canada, 1900-1975*, Irwin Law/ The Osgoode Society for Canadian Legal History, 2008, 144-145.

15 Sexual Offences Act (No 3 of 2006) Section 3(1).

16 Sexual Offences Act (No 3 of 2006) Section 43(5).

17 Sexual Offences Act (No 3 of 2006) Section 43(5).

18 Stephanie Wangari, 'Rift Valley, Nairobi had the highest number of rape, defilement cases last year', *The Standard*, 5 January 2022.

19 Angeline Ochieng and Ondari Ogega, 'Marital rape: Day women refused to suffer in silence', *The Nation*, 10 December 2023.

been regarded as a contradiction in terms, often escaping classification as an offence due to the prevailing belief that defining consent within the confines of marriage presents inherent complexities.[20] However, it is important to note that while Nalia Sohrat accentuates this view, she does not do so in a Kenyan context. Her view was shaped by the climate in Bangladesh. Nonetheless, it still highlights the view which is synonymous with that which operates in Kenya's society.

A comprehensive discussion of spousal rape in Kenya remains restricted. Nonetheless, Winifred Kamau and others provide some perspective, stating that in Kenya's quest of gender equality, combating gender-based violence has surfaced as a major concern.[21] They go on to note that marital rape represents a type of gender-based violence and serves as an indication of the prevailing inequalities in social dynamics between men and women.[22] In her research, Theresa Fus observes that many nations have come to the consensus that rape constitutes a singular offence irrespective of whether it occurs within the institution of marriage.[23] This achievement has been realised through legislative and judicial measures implemented by various countries.[24] Nevertheless, similar actions ought to be undertaken on a global scale to address this issue.[25]

Marital rape is inadequately addressed within Kenya's legal framework, highlighting a critical gap in its recognition and enforcement. This paper seeks to explore the factors underlying this deficiency. Katherine Frank once asked how we might rescue African women like

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20 Tasbiha Nalia Sohrat, 'Marital rape: Victimisation of Bangladeshi women within wedlock', 10(2) *ASA University Review* (2016) 6.

21 Winifred Kamau, Patricia Nyaundi and Jane Serwanga, 'The legal impunity for marital rape in Kenya: A women's equality issue', *Equality Effect,* April 2013, 5.

22 Kamau, Nyaundi and Serwanga, 'The legal impunity for marital rape in Kenya: A women's equality issue', 5.

23 Theresa Fus, 'Criminalising marital rape: A comparison of judicial and legislative approaches', 37(2) *Dutch Journal of Legal Studies* (2006) 516.

24 Fus, 'Criminalising marital rape: A comparison of judicial and legislative approaches', 516.

25 Fus, 'Criminalising marital rape: A comparison of judicial and legislative approaches', 517.

Flora Nwapa, Ama Ata Aidoo, and Margaret Ogot from the footnotes of male-authored African literary history.[26] Her critique applies just as sharply to legal scholarship, where women's voices on issues like marital rape are often overshadowed.

As a male author writing on this subject, this work does not claim to speak for women but to engage with the issue from a position of critical awareness, drawing on the voices and frameworks of African women who have long articulated the intersections of gender, law, and power. At the same time, I am mindful of Gayatri Spivak's reminder that when we try to recover the subaltern woman's voice, what comes through is always shaped by the lenses of power and never complete.[27] My task, then, is not to pretend I can fully recover that voice, but to show how law and culture keep pushing back on the silence.

Furthermore, although Section 43(5) of the Sexual Offences Act is gender-neutral, this paper focuses on its impact on married women.[28] This is not because only women experience marital rape, but because the exemption operates within a legal and cultural context in Kenya where marriage has traditionally been shaped by gendered expectations of sexual duty and submission. The analysis engages with how these structures make it especially difficult for women to assert sexual refusal or be heard when they do.

This paper adopts a doctrinal approach and unfolds in five main sections, each building on the last to explore the legal and social treatment of marital rape in Kenya. It is important to note that this is not a philosophy paper with law as a case study. Rather, it is legal analysis that uses Jacques Derrida's deconstruction to expose the structural silencing of married women in Kenyan law. The present section introduces the issue, outlining how Kenya's laws currently handle (or fail to handle) non-consensual sex within marriage, and why this matters.

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[26] Katherine Frank, 'Feminist criticism and the African novel', 14 *African Literature Today* (1984) 44.

[27] Gayatri Spivak, 'Can the subaltern speak?', in Cary Nelson and Lawrence Grossberg (eds) *Marxism and the interpretation of culture,* University of Illinois Press, 1988, 274.

[28] Sexual Offences Act (No 3 of 2006) Section 43(5).

Section two lays out the theoretical foundation, drawing on subaltern studies and African feminism(s). These frameworks help us understand how law, culture, and power shape our understanding of consent in marriage.

Section three forms the heart of the paper. It takes a two-part approach: first, it looks at the beliefs and histories, both legal and cultural, that have shaped the way marital rape is perceived and treated in Kenya. Then, it takes a closer look at how the law itself is written and interpreted. Using Derrida's ideas, it shows how married women are silenced, not just in practice, but in the very language of the law. Section four offers both legal and cultural recommendations. These range from repealing the exemption that protects spouses from rape charges to practical steps like better training for law enforcement and public education around consent. Finally, Section five brings everything together, arguing that addressing marital rape is not just about changing laws, it is about changing how we think about consent, voice, and justice in intimate relationships.

Theoretical framework

The subaltern

Perhaps a suitable point of departure is defining subalternity. The concept of the 'subaltern' was initially introduced by the Italian Marxist theorist Antonio Gramsci in his essay *'Notes on Italian history'*, which was later incorporated into his influential work, *Prison notebooks*, written during his imprisonment between 1929 and 1935.[29] His deft definition succinctly captures the essential contours of the concept. He simply defines subaltern groups as those structurally excluded from political

[29] El Habib Louai, 'Retracing the concept of the subaltern from Gramsci to Spivak: Historical developments and new applications', 4(1) *African Journal of History and Culture* (2012) 5.

power.[30] His reflections on subalternity were shaped by his imprisonment under Mussolini's fascist regime and the failure of the Italian working class to unite as classical Marxism predicted.[31] Gramsci's conception is particularly important for anyone trying to understand the roots of subalternity. This is because it moves away from the rigid, economically-focused interpretations typical of traditional Marxist theory.[32]

He focused on the culture and consciousness of subaltern groups as a way to accentuate their voices and challenge the narratives imposed by the state and ruling classes.[33] He argued that subaltern groups, fragmented by nature, cannot achieve unity or historical visibility until they acquire the capacity to act as a cohesive political force. As such, their history remains entangled with that of civil society and state formations.[34]

This is something that will also be captured in Spivak's critique of Gramsci's conceptualisation of the subaltern. Gramsci's conceptualisation sculpts 'the subaltern' as if they are all the same hiding the diversity of struggles and voices within that category. Reducing the subaltern to one essence allows one to be caught in the trap of ignoring situational realities.

Ranajit Guha drew on Gramsci's ideas from the *Prison notebooks* and pushed them further.[35] He brought attention to the ways marginalised people have acted and resisted, challenging histories that usually only focus on the elites. Guha described Subaltern Studies as a way of understanding the broad condition of subordination in South Asian society, whether that subordination stems from class, caste (a hereditary system that divides people into hierarchical groups), gender, age, in-

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30 Antonio Gramsci, *Selections from the prison notebooks*, Quintin Hoare and Geoffrey Nowell Smith (ed and trans), Lawrence and Wishart, 1971, 52.

31 Louai, 'Retracing the concept of the subaltern from Gramsci to Spivak', 5.

32 Louai, 'Retracing the concept of the subaltern from Gramsci to Spivak', 5.

33 Gramsci, *Selections from the prison notebooks*, 52.

34 Gramsci, *Selections from the prison notebooks*, 52.

35 Ranajit Guha (ed), Subaltern studies I: Writings on South Asian history and society, Oxford University Press, 1982; Ranajit Guha, Elementary aspects of peasant insurgency in colonial India, Oxford University Press, 1983.

stitutional position, or other forms of social inequality.[36] For Guha, the subaltern refers specifically to the distinct social group that represents the demographic gap between the entire Indian population and those identified as the elite.[37]

The idea of the subaltern became even more complex with the influential work of Indian-American postcolonial feminist Gayatri Chakravorty Spivak. Her landmark 1988 essay, 'Can the subaltern speak?', questioned the core assumptions of the Subaltern Studies group and challenged how voice, agency, and representation are understood and defined.[38] Spivak rethought the idea of the subaltern in light of changing global conditions, where capitalism suppresses dissent and the global division of labour breaks apart any unified revolutionary voice.[39] She challenged Gramsci's essentialism of the subaltern, arguing that it wrongly assumes the subaltern is a single, unified group with a clear, collective identity. She also critiqued the Subaltern Studies Group for relying on frameworks, Marxist or otherwise, that inevitably fall into essentialism when trying to define who the subaltern is. For Spivak, the strength of the term lies in its situational nature; it cannot be fixed or universally defined.[40]

In trying to unpack what it really means to be subaltern, Spivak focused on the gendered silence of Indian women during colonial rule, particularly through the practice of Sati. She showed how these women were trapped between two powerful narratives: the British portraying themselves as rescuers of oppressed women, and traditional Hindu discourse framing self-immolation as an act of female agency. Trapped

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36 Ranajit Guha, 'On some aspects of the historiography of colonial India' in Guha (ed) *Subaltern studies I*, 5.

37 Guha, 'On some aspects of the historiography of colonial India', 6-8.

38 Louai, 'Retracing the concept of the subaltern from Gramsci to Spivak', 7.

39 Louai, 'Retracing the concept of the subaltern from Gramsci to Spivak', 7.

40 Gayatri Chakravorty Spivak, 'Theory in the margin: Coetzee's *Foe* reading Defoe's *Crusoe/Roxana*', in Jonathan Arac and Barbara Johnson (eds) *Consequences of theory: Selected papers of the English Institute 1987-88*, Johns Hopkins University Press, 1991, 154.

between 'white men saving brown women from brown men' and claims of willing sacrifice, the subaltern woman's voice disappeared entirely.[41]

In her analysis, Spivak showed how women involved in Sati were caught between two conflicting stories. On one side, the British cast themselves as saviours, claiming to rescue oppressed women. On the other hand, traditional Hindu narratives portrayed these women as choosing to sacrifice themselves out of devotion.[42] Ultimately, the Hindu woman does not vanish into silence by mere absence but is consumed by a violent back-and-forth, a symbolic struggle between competing discourses of tradition and modernity.

This 'violent shuttling', as Spivak puts it, captures the fate of the Third World woman, the Kenyan woman, whose identity is not her own, but rather a battleground where opposing ideologies clash.[43] Like the woman in the Sati tradition, she is not given the chance to speak for herself, others speak on her behalf. Her silence is not simply about being erased, but about being pushed aside and replaced by other voices.

By uncovering the forgotten histories of women, Spivak takes the idea of the subaltern further than what Guha and others originally imagined. She brings attention to the ways women's struggles, across class and background, have been silenced. Both colonial and nationalist stories often turned women into symbols, not real people with voices of their own. For Spivak, if the subaltern is already unheard, then the subaltern woman is pushed even further into silence, left out of history not just once, but twice.[44]

In Kenya, married women, especially those living in rural areas or under customary law, often experience what it means to be subaltern. They are frequently denied the legal standing to challenge non-consensual sex within marriage, since the Sexual Offences Act specifically exempts spouses, effectively closing the door to any legal action against

41 Spivak, 'Theory in the margin: Coetzee's *Foe* reading Defoe's *Crusoe/Roxana*', 93.

42 Spivak, 'Can the subaltern speak?', 296-97.

43 Spivak, 'Can the subaltern speak?', 306.

44 Spivak, 'Can the subaltern speak?', 307.

marital rape.[45] This legislative gap stems from the colonial-era inheritance of British common law and Hale's doctrine, which presumed irrevocable consent upon marriage and defined rape as legally impossible between spouses.[46] These doctrines were intentionally retained in Kenyan jurisprudence, effectively criminalising non-consensual sex in marriage only under lesser charges such as assault, rather than rape.[47]

Feminist theory

Feminism encompasses a spectrum of socio-political movements and ideologies to define and achieve parity between genders in political, economic, personal, and social domains.[48] Mary Wollstonecraft is usually considered a feminist pioneer, owing chiefly to her 1792 work, *A vindication of the rights of woman*. In this book, she argues that discrimination against women is based on class differences and private property ownership. She fights for equal rights for women, claiming that they are equally deserving of these rights as men.[49]

Feminist theorists characterise marital rape as a mechanism for exerting social control and dominance over women within the patriarchal family structure.[50] It was well put by Sara Deer, that rape is not merely a metaphorical component of colonisation but an integral aspect of it.[51]

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45 Sexual Offences Act (No 3 of 2006) Section 43(5).

46 Rebecca Ryan, 'The sex right: A legal history of the marital rape exemption', 20(4) *Law & Social Inquiry* (1995) 947.

47 Jurg Helbling, Walter Kälin and Prosper Nobirabo, 'Access to justice, impunity and legal pluralism in Kenya', 47(2) *The Journal of Legal Pluralism and Unofficial Law* (2015) 351.

48 Javeed Ahmad Raina, 'Feminism: An overview', 4(13) *International Journal of Research* (2017) 3372.

49 'The original suffragette: The extraordinary Mary Wollstonecraft', *The Guardian*, 5 October 2015. See generally, Mary Wollstonecraft, *A vindication of the rights of woman: With strictures on political and moral subjects*, Joseph Johnson, 1792.

50 Elaine Martin, Casey Taft and Patricia Resick, 'A review of marital rape', 12(3) *Aggression and Violent Behaviour* (2007) 332.

51 Sara Deer, 'Decolonising rape law: A native synthesis of safety and sovereignty', 24(2) *Wicazo Sa Review* (2009) 150.

Deer here attempts to demonstrate it as a tool of oppression by drawing parallels to colonialism. Some feminists employ various terms, including 'patriarchal terrorism' and 'license to rape', to describe the exertion of social control by men over women.[52]

A branch of feminists that aggressively approach the issue of rape is the Radical feminists. Radical feminism is a philosophical viewpoint that emphasises how patriarchy is fundamental to the unequal power dynamics between the sexes, with a focus on how women are societally subjugated by men.[53] They argue that the subjugation of women is the most fundamental type of oppression, persisting since the beginning of human civilisation.[54] Ti-Grace Atkinson argued that the male class' desire for power drives them to oppress the female class, suggesting that men's perceived necessity to fulfil the role of the oppressor is the root and basis of all human oppression.[55]

In 1984, Katherine Frank questioned how African women writers like Flora Nwapa, Ama Ata Aidoo, and Grace Ogot could be rescued from the margins of male-dominated African literary history.[56] While her critique was important, it focused mainly on male exclusion and did not fully consider how Western feminism also misrepresented African women's voices.[57] Later scholars, such as Mary Kolawole, pointed out that African women are often caught between two dominant frameworks: Western feminist interpretations and African male criticism.[58] Therefore, the question of marital rape in Kenya demands a lens attuned to African realities – one that Western feminism alone cannot provide.

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52 Martin, Taft and Resick, 'A review of marital rape', 332.

53 Jone Johnson Lewis, 'What is radical feminism?', *ThoughtCo*, 7 June 2024.

54 Martha Shelley, 'Lesbianism and the women's liberation movement', in Barbra A Crow (ed) *Radical feminism: A documentary reader*, New York University Press, 2010, 305-307.

55 Ti Grace Atkinson, 'Radical feminism', in Crow (ed), *Radical feminism*, 82-85.

56 Frank, 'Feminist criticism and the African novel', 44.

57 John Mike Muthari Kuria, 'The challenge of feminism in Kenya: Towards an Afrocentric worldview', Unpublished PhD dissertation, University of Leeds, 2001, 1.

58 Mary E Modupe Kolawole, *Womanism and African consciousness*, Africa World Press, 1997, 10.

This brings us to African feminism(s). Glory Joy Gatwiri and Helen Jacqueline McLaren, describe it as both personal and political, born out of African women's lived realities and grounded in their cultural knowledge systems.[59] For them, it is a way of challenging colonial thinking while staying rooted in African ways of knowing. Njoki Wane also sees African feminism as part of a broader decolonising journey, one that involves turning inward, questioning dominant Western ideas, and reclaiming indigenous perspectives that better speak to African women's experiences.[60]

Carole Boyce Davies and Anne Adams Graves go further to frame African feminism as a political philosophy that acknowledges the shared struggle with African men against colonialism, but also insists on recognising the specific forms of oppression faced by women.[61] They argue that while African feminism respects traditional roles like motherhood, it questions the rigid expectations around them.[62] What ties these thinkers together is a common commitment to grounding feminism in African realities. As Wane puts it, it is about retrieving and revitalising African indigenous thought to confront social issues from within.[63]

This was further articulated by Sylvia Tamale. For her, African feminism demands the creation of its own theories and discourses rooted in African realities.[64] Her work critiques mainstream Western feminist ideals, such as 'gender equality', for often being disconnected from the African context and argues for an alternative framework in the form of *ubuntu*.[65] The same sentiments are shared by Melissa Mungai as she

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59 Glory Joy Gatwiri and Helen Jacqueline McLaren, 'Discovering my own African feminism: Embarking on a journey to explore Kenyan women's oppression', 17(4) *Journal of International Women's Studies* (2016) 266.

60 Njoki N Wane, 'African indigenous feminist thought: An anti-colonial project', in Njoki N Wane, Arlo Kempf, and Marlon Simmons (eds) *The politics of cultural knowledge*, Brill, 2011, 7.

61 Carole Boyce Davies and Anne Adams Graves, *Ngambika: Studies of women in African literature*, Africa World Press, Trenton NJ, 1986, 9.

62 Davies and Graves, *Ngambika: Studies of women in African literature*, 9.

63 Wane, 'African indigenous feminist thought: An anti-colonial project', 8.

64 Sylvia Tamale, *Decolonisation and afro-feminism*, Daraja Press, 2020, xiii.

65 Tamale, *Decolonisation and afro-feminism*, 15.

notes that Western feminism often operates in a 'cultural vacuum' that silences African feminisim(s).[66]

Awa Thiam reminds us that gender relations in many African societies are shaped by entrenched hierarchies, two social classes, men and women, in a dynamic of domination and subordination.[67] This Derridean lens is essential when examining the experiences of Kenyan women, particularly in contexts where sexual and reproductive violence is normalised.

For instance, as per the work by the Samburu Women Trust, 'girl child beading' is a cultural practice in which Samburu men of 'warrior' age enter into non-marital sexual relationships with underage girls who are not yet eligible for marriage – often between nine and 15 years old.[68] Similarly, practices such as child marriage, female genital mutilation (FGM), and unsafe abortions inflicted on young girls, often before they are considered eligible for formal marriage, continue to enforce strict control over female sexuality.[69] These practices do not occur in isolation; they form part of what Thiam calls a broader culture of gendered violence.

Thiam points out that one does not need to be a feminist to recognise the many forms of oppression women face, both obvious and subtle. Marital rape fits within this continuum of violence: a form of control often masked by culture and overlooked by the law, yet no less harmful in its impact on women's autonomy and dignity.

This author thus believes that this is a menacing issue that must be revisited through a deconstructive lens. The best approach to this

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66 Melissa Mungai, 'An epistemic "imposition" of decolonial ecofeminisms on women and agriculture in Kenya', in John Osogo Ambani and Melissa Mungai (eds) *Harvesting equality: Gender, governance, stewardship, and decolonial futures in Kenyan agriculture*, Kabarak University Press, 2025, 5.

67 Awa Thiam, *Speak out, black sisters: Feminism and oppression in black Africa*, Dorothy S Blair (trans), Pluto Press, London, 1986, 13.

68 Samburu Women Trust, 'Silent sacrifice: Girl-child beading in the Samburu community of Kenya', Samburu Women Trust, 2012, 5.

69 UNICEF Kenya, 'Baseline study report on female genital mutilation or cutting and child marriage among the Rendille, Maasai, Pokot, Samburu and Somali communities in Kenya', UNICEF Kenya, 2017, 93.

would be to first understand how each factor contributes to the prevailing perception and perhaps what we can do about it from there. I have resisted the urge to simply address the issue as unconstitutional as that effectively circumvents the real problem. This analysis will reveal the real issues rather than pasting the classic sticker: 'it is unconstitutional'.

Investigating the perception

Factors

To completely understand the intricacy of Kenya's challenges, we must first consider a few basic variables that are at the root of the current predicament. These elements, while not exhaustive, provide a basic understanding of the complex issues at hand. Exploring these areas allows us to begin to find patterns and linkages that contribute to the country's legal treatment of the matter. This investigation will also assist in building a more diverse perspective, providing insights critical for developing effective solutions.

The contract

To understand why the perception exists, we must recognise how 18th-century legal scholars, who developed and supported this rationale, conceptualised the marriage contract.[70] William Blackstone framed the marital relationship as part of the legal domain of private economic relations. In his analysis, the union of husband and wife was not treated as a purely emotional or spiritual bond, but rather as a structured legal relationship comparable to other domestic hierarchies, such as those between master and servant or parent and child. By placing marriage alongside these other relationships, Blackstone emphasised its role in maintaining social order and legal coherence within the household.[71]

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70 Ryan, 'The sex right: A legal history of the marital rape exemption', 943.

71 William Blackstone, *Commentaries on the laws of England*, George Sharswood (ed), JB Lippincott and Co., 1896, 325.

In modern usage, the terms 'master' and 'parent' often suggest figures of clear and unquestioned authority. However, within the legal context Blackstone operated in, these roles were part of a broader framework of reciprocal obligations and structured hierarchies. Rather than implying absolute control, they reflected a system in which authority was accompanied by defined responsibilities, particularly within the household and other private relationships.[72] In other relationships, there was a discourse of rights, but the ideology shaping this discourse in the marital contract set it apart from other private relationships.[73] Which ideology creates this disparity? Coverture, that is, unity of persons.

The principle of 'unity of persons' posits that husband and wife are considered a single entity, being one flesh and blood.[74] That through marriage, the legal existence of the woman is suspended or merged into that of the man, rendering them one entity under the law.[75] In essence, coverture restricted the legal status of a married woman by placing her personhood and property under the authority of her husband.[76] A married woman under coverture lacked the ability to enter into contracts, engage in property transactions, initiate legal actions, retain ownership of her earnings, or create wills.[77]

Coverture was more than a mere assumption of women's inferiority to men; it was intended to almost entirely subsume a wife's identity into that of her husband.[78] Medieval European society viewed marriage as a hierarchical structure in which the husband had authority over his

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72 Ryan, 'The sex right: A legal history of the marital rape exemption', 943.

73 Ryan, 'The sex right: A legal history of the marital rape exemption', 943.

74 Henry de Bracton, *On the laws and customs of England*, George E Woodbine (ed), Samuel E Thorne (trans), Harvard University Press, 1968, 335.

75 Blackstone, *Commentaries on the Laws of England*, 441.

76 Tim Stretton and Krista J Kesselring, 'Introduction: Coverture and continuity', in Tim Stretton and Krista J Kesselring (eds) *Married women and the law: Coverture in England and the common law world*, McGill Queen University Press, 2013, 6.

77 Hazem Alshaikhmubarak, R Richard Geddes and Shoshana A Grossbard, 'Single motherhood and the abolition of coverture in the United States', 16(1) *Journal of Empirical Legal Studies* (2019) 94-95.

78 Lisa Forman Cody, 'Marriage is no protection for crime: Coverture, sex, and marital rape in eighteenth-century England', 61(4) *Journal of British Studies* (2022) 810.

wife's financial assets and public conduct, and could also exert his will through physical force.[79]

However, before we proceed, it is important to discern the finer complexities within the Kenyan context. While hierarchical conceptions of marriage were especially pronounced in medieval Europe, where husbands exercised control over their wives' property, conduct, and physical autonomy, similar patterns of male dominance have historically manifested in diverse cultural settings around the world. These structures, though shaped by different social and normative logics, often placed women in subordinate positions within the marital relationship, including in some customary systems in Kenya and in other African communities.

Importantly, we cannot disregard studies that show that in the precolonial era, women could participate in public and domestic spheres even if these societies were not entirely egalitarian; colonialism, however, imposed rigid patriarchal hierarchies that intensified women's subordination.[80] What we observe, then, is a broader historical pattern: marriage functioning as a normative framework through which gendered subordination was institutionalised.

How is it that in one of the most intimate and personal of human relationships, the legal and moral discourse of equality was long eclipsed by an ideology that not only tolerated but entrenched women's systemic exclusion from rights and recognition?

What implications did coverture have for the contract besides restricting the autonomy of a woman? It simply meant that the man had total control over the woman. That the man was supposedly 'more important', dealing with the more complicated issues, while the woman would handle 'less complex issues' like domestic chores. This was reinforced by the separate spheres theory.

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79 Jill Bennett, *Women in the medieval English countryside: Gender and household in Brigstock before the plague*, Oxford University Press, 1987, 103.

80 Tamale, *Decolonisation and afro-feminism*, 21.

The patriarchal concept of distinct spheres, rooted in beliefs about inherent gender roles or patriarchal religious teachings, asserts that women should steer clear of the public sphere, which includes politics, employment, business, and law.[81] The notion that these separate spheres can be understood as a dichotomy, with gender-specific domains perceived as entirely distinct, serves to reinforce the ideology of gender segregation and inequality.[82]

In many historical contexts worldwide, rape was viewed as a crime or harm against a man's property, typically his wife or daughter. This perspective meant that the offence was legally perceived as damage not to the victim herself, but rather to the property of her father or husband.[83] They are property, as evidence suggests, that even after girls are subject to sexual abuse, some guardians are quick to negotiate with the perpetrators so that, in the end, it is a win-win situation.[84] These exchanges include land, livestock, or large sums of money for the sake of their children's dignity.[85] Simply put, women are property transferred from one man's hand to another's. Consequently, under this definition, it was legally inconceivable for a husband to commit rape against his wife since she was his property.[86]

Most African countries, including Kenya, were colonised by European powers. These powers often imposed their legal systems on their colonies,[87] not merely as administrative tools, but as part of a grand Eurocentric makeover.[88] This makeover was handed down from colonial

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81 Ashlyn K Kuersten, *Women and the law: Leaders, cases and documents*, Bloomsbury Publishing, 2003, 16-17.

82 Michelle Z Rosaldo, 'A theoretical overview', in Michelle Z Rosaldo, *Woman, culture, and society*, Stanford University Press, 1974, 17-18.

83 Stretton and Kesselring, 'Introduction: Coverture and continuity', 6.

84 Njeri Rugene, 'Where fathers hash out blood money for their abused girls', *Daily Nation*, 2 December 2013.

85 Rugene, 'Where fathers hash out blood money for their abused girls'.

86 Jonathan Herring, *Family law: A very short introduction*, Oxford University Press, 2014, 35.

87 Richard A Webster and others, 'Western colonialism', *Encyclopedia Britannica*, 11 April 2025.

88 Makau Mutua, 'Savages, victims, and saviours: The metaphor of human rights', 42 *Harvard International Law Journal* (2001) 204.

administrators and later continued by human rights actors promoting Western ideals as if it were the only proper way to govern.[89]

As a result, indigenous legal orders were sidelined in favour of a system privileging European standards and biases; anything outside the 'blueprint' was labelled as primitive.[90] During this era, English law was enforced among the 'native' communities, leading to a legal situation characterised by plurality, where customary law coexists alongside state law.[91] Ideas akin to coverture, while not explicitly codified in law, may have shaped perceptions of marital rights.

Sexual violence is one of the most explicit manifestations of women's subjugation and oppression based on gender.[92] Patriarchy, as a social structure, typically supports male supremacy and control over women, which may result in different types of gender-related violence, such as marital rape.[93] It is intricately connected to the broader subordinate status of women in society.[94]

The continuance of marital rape is also reinforced by general cultural norms and customs that tend to favour male sexual entitlement and privilege. All too frequently, such norms can discourage the victims from denouncing abuse and taking measures in court, as such actions can be perceived to challenge the well-established structure of patriarchy.[95] Some of these women will not see any issue with the case unless there is violence involved.[96] These rooted cultural values make females fail to view their experiences as those of sexual victimisation.[97]

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89 Mutua, 'Savages, victims, and saviours: The metaphor of human rights', 204-05.

90 Mutua, 'Savages, victims, and saviours: The metaphor of human rights', 207, 214.

91 Kamau, Nyaundi and Serwanga, 'The legal impunity for marital rape in Kenya' 5.

92 Kamau, Nyaundi and Serwanga, 'The legal impunity for marital rape in Kenya' 1.

93 Danielle Cusmano, 'Rape culture rooted in patriarchy, media portrayal, and victim blaming', *Writing across the curriculum*, April 2018, 2.

94 Kamau, Nyaundi and Serwanga, 'The legal impunity for marital rape in Kenya' 1.

95 Jeniffer Shore, 'The role of patriarchy in domestic violence', *Focus for Health*, 2 October 2019.

96 Michael Freeman, '"But if you can't rape your wife, who can you rape?": The marital rape exemption re-examined', 15(1) *Family Law Quarterly* (1981) 6.

97 Susan Brownmiller, *Against our will: Men, women and rape*, Penguin, 1975, 380.

Maybe another 'argument' advanced in support of marital rape is the feeling that the attachment was not for intimacy purposes. In some cultures, marriages are set up to make reproduction possible.[98] In such cases, people are not necessarily allowed to offer their consent in marriage, and this is where forced marriages come in.[99] Adult women face various violations, such as being coerced into marriage and subjected to non-consensual sex within marriage, without the chance to provide their consent.[100] The coercion of one person by another violates numerous human rights guaranteed to everyone but systematically denied to girls in many nations.[101]

Despite the potential impact of various international instruments,[102] the circumstances for many married women remain unchanged.[103] Furthermore, women who exit their marriages encounter a vast array of challenges, from social ostracism and violent assaults, including rape, to economic hardship.[104]

How do these elements relate to the current situation in Kenya? Kenya's legal system has been reluctant to properly acknowledge marital rape as a criminal offence, reflecting profoundly ingrained patriarchal beliefs. These ideas regard marriage as a hierarchical structure in which the husband has authority over his wife, similar to the ancient notion of coverture, in which a married woman's legal rights were subsumed beneath those of her husband. This antiquated viewpoint still

98 Jennifer R Wies and Hillary J Haldane, 'Cross-cultural studies of gender-based violence: Holistic approaches for marital rape research', in Kersti Yllö and M Gabriela Torres (eds) *Marital rape: Consent, marriage and social change in global context*, Oxford University Press, 2016, 29.

99 Wies and Haldane, 'Cross-cultural studies of gender-based violence', 30.

100 Mariam Ouattara, Purna Sen and Marilyn Thomson, 'Forced marriage, forced sex: The perils of childhood for girls', 6(3) *Gender and Development* (1998) 27.

101 Ouattara, Sen and Thomson, 'Forced marriage, forced sex: The perils of childhood for girls', 27-28.

102 Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13.

103 Ouattara, Sen and Thomson, 'Forced marriage, forced sex: The perils of childhood for girls', 27-28.

104 Ouattara, Sen and Thomson, 'Forced marriage, forced sex: The perils of childhood for girls', 28.

exists in Kenya's legal and social structures, influencing how marital rights are viewed. The failure to criminalise marital rape not only perpetuates gender inequity, but also weakens efforts to defend women's rights and dignity in marriage.

Implied consent?

It is Sir Matthew Hale who argued that a husband cannot be prosecuted for raping his wife due to the mutual consent and marital contract wherein the wife has committed herself to the husband in this aspect, an irrevocable commitment.[105] Although this was merely an opinion stated in a legal treatise, and not a ruling or binding precedent, it became highly influential and was widely adopted in common law reasoning, effectively entrenching the marital rape exemption for centuries.[106]

It is vital to appreciate the fact that the doctrine of Lord Hale was never based on legal determinations.[107] The immunity that has traditionally been attached to husbands who physically abuse their wives to force them to submit to sexual acts traces its roots far back in the past, to the time of the archaic Biblical expression 'unlawful carnal knowledge'.[108] According to our biblical ancestors, all sex outside marriage was 'unlawful', and all sex inside marriage was, by definition, 'lawful'.[109]

According to Duran Bell, to offer a universally available concept of marriage, the roles of husband and wife have to be outlined, as well as the difference between a spouse and a romantic partner.[110] There exists an extra layer of obligatory nature within the periphery of marriage compared to that of just being a romantic partner. From this viewpoint,

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105 Ryan, 'The sex right: A legal history of the marital rape exemption', 947.

106 Jennifer A Bennice and Patricia A Resick, 'Marital rape: History, research, and practice', 4(3) *Trauma, Violence & Abuse* (2003) 230.

107 Mark A Small and Pat A Tetreault, 'Social psychology, "marital rape exemptions," and privacy', 8(2) *Behavioural Sciences & the Law* (1990) 143.

108 Brownmiller, *Against our will: Men, women and rape*, 380.

109 Brownmiller, *Against our will: Men, women and rape*, 380.

110 Duran Bell, 'Defining marriage and legitimacy', 38(2) *Current Anthropology* (April 1997) 238.

marriage is an institution that socially legitimises men's rights over women.[111]

He goes on to say that marriage is a social arrangement where one or more men are joined to one or more women, granting the men the entitlement to sexual access within a domestic setting, while designating the women as obliged to fulfil the specific men's sexual demands.[112] Common beliefs in society indicate that women in intimate relationships or marriages typically do not openly communicate their sexual desires, allowing men to dominate sexual decision-making.[113] In fact, in certain cultures, consent is not considered within the individual wife's control. The families organising the marriage guarantee her consent for life.[114]

Although the doctrine of Lord Hale and the arguments from which it has been coined seem archaic, its implications are far-reaching in contemporary life, not just in Kenya. Even though the Constitution of Kenya (2010) guarantees equal rights to men and women,[115] entrenched patriarchal attitudes could still perceive women as being in the position to provide sexual favours to their husbands, again echoing Bell's observation on how society condones male privilege.[116]

According to research, these beliefs contribute to Kenya's culture of silence regarding marital rape.[117] This silence undermines efforts to hold offenders accountable and promotes an environment in which crime goes unpunished.[118] By analysing assumptions and discourses about marriage and gender roles, we can uncover biases and power dynamics that marginalise marital rape in Kenya.

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111 Bell, 'Defining marriage and legitimacy', 238.

112 Bell, 'Defining marriage and legitimacy', 238.

113 Zhenqi Li, 'Marital rape as structural violence in the legal system', 42(1) *Lecture Notes in Education Psychology and Public Media* (2024) 147.

114 Yllö and Torres, 'Introduction', in Yllö and Torres (eds) *Marital rape: Consent, marriage and social change in global context*, 7.

115 Constitution of Kenya (2010) Article 27.

116 Bell, 'Defining marriage and legitimacy', 238.

117 Amnesty International, 'Kenya: Rape – The invisible crime, March 2002, 1.

118 Amnesty International, 'Kenya: Rape – The invisible crime', 1.

Derrida's deconstruction

Before turning to his work, it is pertinent to address the question of why Jacques Derrida? Unlike the other frameworks discussed here, deconstruction is not a theory in the strict sense, but a way of reading that unsettles texts and exposes what they exclude. Derrida himself has found problems completely describing 'deconstruction'; he says that his essays have been an attempt to find that definition.[119]

According to Derrida, deconstruction is not the same as analysis, critique, or technique.[120] He resisted defining it as a theory, emphasising instead its role as a practice of questioning language.[121] This makes it useful for the present paper because the problem of marital rape in Kenya is not only one of enforcement or culture, but also of how the law itself is worded. Deconstruction, therefore, serves here as a 'tool' for examining the language of Section 43(5) of the Sexual Offences Act, without pre-judging what that examination will reveal.

This sub-section operationalises a three-stage deconstructive algorithm to interrogate the legal construction of marital consent in Kenya. The first step is to notice how the law treats the wedding vow 'I do' as if it were a permanent grant of consent. This is what Derrida calls logocentrism: the reliance on a single, fixed origin point. The second step is to see how this idea is then written into the statute, turning consent into something static and unchanging. Finally, when we read closely, contradictions begin to appear. Each clause of the law both hides and depends upon the possibility of refusal, revealing gaps that the text itself cannot fully cover up.

These stages are then deployed across four analytical modules: the binary opposition module (sovereign husband v submissive wife and its haunting trace of refusal); the supplement module (logocentric origin,

[119] Jacques Derrida, 'Letter to a Japanese friend', in Peggy Kamuf (ed) *A Derrida reader: Between the blinds*, Columbia University Press, 1991, 270.

[120] Robert Bernasconi, 'The trace of Levinas in Derrida', in David Wood and Robert Bernasconi (eds) *Derrida and différance*, Northwestern University Press, 1988, 15.

[121] Bernasconi, 'The trace of Levinas in Derrida', 15.

necessary addition, and myth of permanent consent); the subaltern trace module (the silenced wife's emergent voice in court); and the différance module (the Janus-faced law promising and deferring protection).

Binary oppositions and the haunting trace of refusal

A suitable point of departure would be defining what binary oppositions are and what would be the binary in this case. Derrida argues that much of Western thought is structured around binary oppositions, pairs of concepts in which one term is privileged while the other is subordinated.[122] In *Of grammatology*, we can extract an example from his explanation, where he critiques the speech and writing binary, where speech is seen as natural, present, and authentic, while writing is treated as artificial, derivative, and secondary.[123] These oppositions do not merely describe differences; they create hierarchies.[124] One term is elevated as original or self-sufficient, while the other is cast as a lesser copy; necessary but denied equal value.

However, this shall be further elaborated on in the next sub-section. For the sake of this paper the pertinent matter that brings out this structure, though not directly, is the exemption clause, which has been cited numerously in this paper. Section 43(5) of the Sexual Offences Act excludes spouses from the rape provision.[125] To bring out the implicit binary opposition, we also have to consider the culture. The effect intersection of the two, law and culture, cannot be ignored and to do so would be to err. The culture of patriarchal dominance and the silence on the matter further reinforces the opposition.

These oppositions are not innocent; they are hierarchical structures that enforce authority by marginalising what they depend on.[126] This hierarchy is not natural; it is built on the suppression of the wife's agen-

[122] Jacques Derrida, *Of grammatology*, Gayatri Chakravorty Spivak (trans), John Hopkins University Press, 1997, 35.

[123] Derrida, *Of grammatology*, 35.

[124] Derrida, *Of grammatology*, 11, 16.

[125] Sexual Offences Act (No 3 of 2006) Section 43(5).

[126] Derrida, *Of grammatology*, 35.

cy. Yet, as Derrida teaches, the dominant term in any binary depends on what it excludes for its coherence.[127] It is here that the trace emerges: not as a presence nor a full absence, but as the mark of the other within the structure of the sign. Derrida suggests that the trace does not merely signal the fading of an original source; rather, it reveals that what we consider an origin was never pure or self-contained in the first place.[128] The so-called origin only comes into being through its relationship with what it excludes or defers, its 'non-origin'. In this way, the trace destabilises the very idea of an independent beginning.[129]

The trace thus inhabits both terms of a binary, undermining their opposition by showing that each is contaminated by the other. The privileged term (such as speech or the masculine subject) only appears autonomous because it effaces the trace of its supplement (which we shall discuss below), yet that trace is always already there, making the binary itself unstable and open to deconstruction. The husband's legal authority assumes the wife's submission, but that submission only has meaning if refusal is possible. In this way, the law's attempt to erase the wife's 'no' leaves a mark, it creates what Derrida calls the *trace*, the remainder of a refusal the law cannot admit but cannot fully eliminate either.

Logocentrism, the supplement and the myth of permanent consent

Derrida's critique of logocentrism, the privileging of speech, presence, and self-sufficient origins, exposes how Western thought, including and especially law in this case, is structured around a fiction: that meaning is immediate, stable and whole. However, before going deep into the critique of the labyrinth that Derrida tries to efface, it is best to define it.

Logocentrism is bound up with the metaphysics of presence, the belief that meaning is fully present, stable, and self-contained when con-

127 Derrida, *Of grammatology*, 35.
128 Derrida, *Of grammatology*, 61.
129 Derrida, *Of grammatology*, 61.

veyed through voice and reason.[130] It is the propensity to attach meaning to a single, authoritative point.[131] This is belief in a foundational moment or meaning, an unmediated 'source' from which truth flows without ambiguity or remainder, sustaining what Derrida calls the illusion of presence; a naive faith in presence.[132]

In the legal context of marriage, this origin is embodied in the wedding vow. The law treats the phrase 'I do' as a definitive speech-act that, once uttered, establishes permanent consent; a self-contained moment of consent. But as Derrida insists, origins are never pure. What seems like a self-contained beginning is always supported by something outside itself, something it needs but tries to exclude. This is what he calls the supplement: 'It is a surplus ... But the supplement supplements. It adds only to replace. It intervenes ... as if one fills a void'.[133] The marital 'yes' appears final, but it relies on what it excludes, such as the possibility of future refusal or ambiguity.

Of course, that brings us back to the idea of trace. Derrida explains that the origin is never pure; it only exists through its relation to what it excludes; what he calls the trace.[134] The marital vow, then, is not a final truth but a moment shaped by absence and uncertainty. When the law treats it as fixed, it erases this trace, the reminder that meaning always depends on what is left out.

This leads to Derrida's claim that writing is violence: not because it is destructive, but because it imposes a structure on fluid meaning.[135] To inscribe consent into law as a once-and-for-all event is not neutral; it is juridical violence that forecloses the possibility of later refusal. The idea that meaning can ever be fully present is, as he puts it, 'a teleological

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130 Derrida, *Of grammatology*, 11-12.

131 Catherine Turner, 'Jacques Derrida: Deconstruction', *Critical Legal Thinking*, 27 May 2016.

132 Derrida, *Of grammatology*, 35-36.

133 Derrida, *Of grammatology*, 144-145.

134 Derrida, *Of grammatology*, 61.

135 Derrida, *Of grammatology*, 112.

and eschatological mythology'.[136] The law operates here as myth-making: it constructs a world where meaning does not evolve, where the subject does not change, and where the possibility of saying 'no', no longer exists.

The trace of the subaltern wife

Gayatri Spivak's question, 'Can the subaltern speak?', remains a useful provocation for understanding the legal position of married women under Section 43(5) of Kenya's Sexual Offences Act. Spivak defines the subaltern not simply as someone who is silenced, but as one whose speech is excluded from dominant frameworks of intelligibility.[137] The wife who says 'no' to her husband in a legal system that does not recognise marital rape becomes such a figure: her refusal exists, but it cannot be heard as legally meaningful. Her voice is not absent, but structurally inaudible.

Derrida's concept of the trace helps to explain this kind of exclusion. He argues that origins are never pure or complete but always formed in relation to what they exclude.[138] The marital vow, treated in law as a full and final moment of consent, functions as such an origin. But the wife's later refusal is the trace: the remainder that unsettles the apparent completeness of the original 'yes'. The law's refusal to register her dissent preserves what Derrida calls the myth of presence; the belief that meaning, once spoken, remains stable and self-contained.[139]

While data on marital rape reporting and prosecution in Kenya is limited, the legal text itself reveals a discursive structure that displaces the wife's refusal.[140] Without a statutory offence, her experience may be reframed through other legal categories: assault, cruelty, or domestic conflict. This kind of reclassification mirrors Derrida's point that rep-

136 Derrida, *Of grammatology*, 112.

137 Spivak, 'Can the subaltern speak?', 285-287.

138 Derrida, *Of grammatology*, 61.

139 Derrida, *Of grammatology*, 11-13, 36.

140 Sexual Offences Act (No 3 of 2006) Section 43(5).

resentation often seeks to restore a lost presence while denying the instability of the original.[141] The law, in this sense, maintains a teleological narrative: that consent was freely given at marriage and remains unchanged.[142]

Spivak and Derrida remind us that silence is not always the absence of speech; it can be the effect of a system that refuses to listen. The wife speaks, but the law does not understand her. Her refusal lingers as a trace, a quiet disturbance that marks the edges of what the law can name.

Différance and the fluidity of consent

Derrida coins différance to show that meaning arises only through two inseparable movements: difference, each sign defined against other signs, and deferral, its sense endlessly postponed along a chain of signification. Because every sign's identity depends on what it is not and on meanings yet to come, no meaning is ever fully present; each moment of understanding already carries the mark of absence.[143] Applied to law, whether a marriage vow or a statutory provision, différance reveals that legal meaning is never final but always open to new distinctions and delays, giving the law its Janus-faced character of promising both closure and perpetual reopening.

Derrida's concept of différance emphasises how meanings are not fixed, but rather constantly altering and evolving as a result of the interaction of differences.[144] In patriarchal societies such as Kenya, conventional traditions that prioritise male authority and sexual entitlement frequently dictate the meaning of consent in marriage.[145] Such a callous reading does not take into account consent and personal autonomy as they stand today, more specifically concerning marriage.[146]

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141 Derrida, *Of grammatology*, 36.

142 Derrida, *Of grammatology*, 62.

143 Derrida, *Of grammatology*, 63.

144 Turner, 'Jacques Derrida: Deconstruction'.

145 Shore, 'The role of patriarchy in domestic violence'.

146 Kamau, Nyaundi and Serwanga, 'The legal impunity for marital rape in Kenya', 3.

There are incongruities and contradictions within the construction of marital consent that is put forth towards promoting the acceptability of spousal rape. The first tension is that between personal autonomy and marital obligation. The concept of 'body autonomy' is that every person has an inherent right to choose their own bodily identity.[147] Marital responsibility was historically construed as meaning that married persons had a duty to perform all obligations of marriage, including sexual intercourse.[148] Assuming that a spouse, typically the wife, gave continued assent to sexual behaviour by becoming married, this thought supported the concept of permanent consent inside the marriage.[149]

In fine, the marital rape exemption in Kenya reflects the government's systemic discrimination against women who experience sexual violence within marriage.[150] The Convention on Equality and Discrimination against Women (CEDAW) defines discrimination against women as any distinction, exclusion, or restriction based on sex that undermines women's equal recognition, enjoyment, or exercise of human rights, regardless of marital status.[151] The marital rape exemption constitutes discrimination by the government, as it creates a 'distinction', 'exclusion', and 'restriction' against victims of spousal rape.[152]

Section 43(5) of the Sexual Offences Act explicitly alienates these victims, denying them equal legal protection afforded to other sexual assault survivors.[153] This disagreement is dangerous because it goes against the transformative goal described in our Constitution's Article 27(3) by denying a spouse the ability to revoke permission at any time.[154]

147 Nina Roxburgh, 'Whose rights are the most right? The dilemma of autonomy in a society: On abortion, women, and human life', *Australian Institute of International Affairs*, 23 July 2016.

148 Martin, Taft and Resick, 'A review of marital rape', 332.

149 Martin, Taft and Resick, 'A review of marital rape', 332.

150 Emma Nyaboke Nyabicha, 'Exploring the boundaries of conjugal rights: Marital rape as a criminal offence in Kenya', Unpublished undergraduate dissertation, Strathmore Law School, 2017, 27.

151 Convention on the Elimination of All Forms of Discrimination against Women, Article 1.

152 Nyabicha, 'Exploring the boundaries of conjugal rights', 28.

153 Sexual Offences Act (No 4 of 2006) Section 43(5).

154 Constitution of Kenya (2010) Article 27(3).

Recognising marital rape as a breach of the right of persons, regardless of their marital status, to have control over their own bodies forms the basis for the argument that each one should be allowed to make autonomous decisions regarding their bodies.

From Derrida to Paglia: Restoring body to interpretation

Camille Paglia offers a very important reminder of what can slip out of view when we rely too heavily on a purely textual method. She argues that post-structuralism sometimes turns into 'pernicious' 'word-worship' that forgets the real people whose lives sit behind any text.[155] For her, 'behind every book is a certain person with a certain history'.[156] How do this matter for marital rape? The offence is about a violation of the body. If interpretation focuses only on the instability of language, it risks losing sight of the lived harm the law is supposed to address. Paglia helps bring back that embodied reality.

Even if Paglia positions herself as a critic of post-structuralism, her refusal to let interpretation drift away from the body makes her a vital companion in thinking about marital rape. Derrida shows us how the law's language slips; Paglia insists we remember the bodies that suffer when it does. The challenge to be confronted, or rather the opportunity to be seized, is to let these two sit at the same table, each correcting the other, so that the critique of Section 43(5) can speak both to text and to lived harm.

In search of a way forward

We do not have to choose between black letter fixes and perpetual uncertainty. Drawing on Derrida's idea of *différance*, that meaning only

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155 Camille Paglia, *Sexual personae: Art and decadence from Nefertiti to Emily Dickinson*, Yale University Press, 1990, 34.

156 Paglia, *Sexual personae*, 34.

emerges through both difference and delay,[157] we can chart a path that protects women now while keeping the law open to new voices later. In practice, that means pairing straightforward legal reforms with more ambitious, deconstructive measures that make visible the very *supplements*[158] and *traces*[159] the current statute erases.

General reforms

The application of the existing laws, as currently in force in Kenya, most probably due to the still prevailing patriarchal beliefs and attitudes, needs a complete overhaul in dealing with marital rape. This specifically applies to the exemption clause in Section 43(5) of the Sexual Offences Act. Real change requires not only fixing the law but also addressing the cultural norms that continue to excuse marital rape. This may be in the form of revising legislation that weakens women's autonomy and indirectly normalises marital rape. Doing away with the discriminatory exemption found in Section 43(5) of the Sexual Offences Act would be one step in the right direction.[160] This would allow the realisation of the two prerequisites highlighted above.

In light of the foregoing and given the difficulty of proving the absence of consent, some of the legal and procedural steps that may be taken with respect to marital rape cases are as follows: in-camera trial in cases of marital rape to facilitate the deposing of the victim without the fear of public exposure and stigma. The laws of evidence can also be modified to permit indirect corroboration, such as testimony of prior threats of violence or violence in the marriage, physical evidence of injury or coercion, or expert testimony of counsellors or medical personnel. This shift is supported by the Supreme Court's recent ruling in *Ruth Wanjiku Kamande v Republic*, where the Court held that while the battered woman syndrome is not a standalone defence, it may be admitted as contextual evidence within existing defences like self-defence or du-

157 Derrida, *Of grammatology*, 62-63.

158 Derrida, *Of grammatology*, 145.

159 Derrida, *Of grammatology*, 61.

160 Nyabicha, 'Exploring the boundaries of conjugal rights', 44.

ress, specifically recognising that testimony of prior threats or violence is highly relevant to assessing the complainant's state of mind and her ability to withhold consent.[161]

Establishing an affirmative consent standard can help further strengthen legal protections based on ensuring mutual responsibility among interacting parties for active and enthusiastic consent to engage in sex, rather than relying on lack of resistance.

Furthermore, cultural transformation is critical. It requires education and awareness for both men and women to question the patriarchal beliefs that support marital rape and the sense of its meaning, which is consent, bodily autonomy, and gender equality within marriage.[162] In addition, compliance with international human rights conventions would provide a legal framework for Kenya, under both the ratified conventions of the Convention on the Elimination of All Forms of Discrimination against Women to uphold women's rights within marriage.[163]

Other African states have taken a step in the right direction. The first point of reference is South Africa, where they abolished the marital rape exemption through Section 5 of the Prevention of Family Violence Act of 1993.[164] Secondly, Nigeria's Violence against Persons (Prohibition) Act of 2015 broadened the definition of rape and most notably did not provide an exemption clause; a purposive interpretation (that respects the spirit of the law) would lead to the conclusion that it includes spouses.[165]

The reforms demonstrate that Kenya could follow the path already charted while remaining attentive to its situational reality, which Spivak

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161 *Ruth Wanjiku Kamande v Republic*, Petition No E032 of 2023, Supreme Court of Kenya at Nairobi (2025) eKLR, paras 75-81.

162 Fareda Banda, '"If you buy a cup, why would you not use it?" Marital rape: The acceptable face of gender based violence', 109 *American Journal of International Law: Unbound* (2015) 324-25.

163 Eyerusalem Jima Haile, 'Addressing marital rape in Ethiopia: An alternative approach', 10(1) *Harayama Law Review* (2021) 19.

164 Prevention of Family Violence Act (No 133 of 1993) (South Africa) Section 5.

165 Violence against Persons (Prohibition) Act, 2015, Laws of the Federation of Nigeria Section 1.

advises, the voices and conditions of the subaltern cannot be subsumed under universal categories.[166] This risks the essentialism which militates against the core of this paper.

Deconstructive (Derridean) intervention

To move beyond the law's habit of treating marital consent as a single, unchanging event, the statute itself must acknowledge the supplement, that every 'yes' implies what it leaves out.[167] First, we ought to amend the Sexual Offences Act to repeal Section 43(5) and replace it with a simple, clear definition: rape is any non-consensual sexual act, irrespective of marital status. This removes the finality of the wedding vow and acknowledges that consent is always conditional, not a one-time guarantee.[168]

Second, we ought to build consent education into existing health and community services. During routine maternal-child health visits, clinics can provide brief, culturally sensitive sessions on mutual sexual autonomy, normalising conversations about ongoing consent rather than a single vow. This practical step anchors the idea that consent must be continually negotiated, and it reaches women and men in spaces they already trust.

Finally, establish specialised domestic violence units within police stations, staffed by officers trained to recognise marital rape. These units would apply a bias-awareness module in their ongoing professional development, using real case studies to dismantle assumptions of permanent spousal consent and to spot patterns of control and coercion that often go unnoticed. This ensures our laws remain robust enough to protect women now yet adaptable enough to heed tomorrow's voices, embodying Derrida's lesson that true justice always outstrips any fixed code.

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166 Spivak, 'Theory in the margin: Coetzee's *Foe* reading Defoe's *Crusoe/Roxana*', 154.

167 Derrida, *Of grammatology,* 145.

168 Derrida, *Of grammatology*, 145.

Conclusion

This paper has argued that the marital rape exemption in Kenya's Sexual Offences Act is not merely a statutory oversight but a symptom of deeper structural logics that render women's sexual autonomy unintelligible within law and culture. Drawing on Derrida's concept of *deconstruction*, the analysis revealed how marital consent is treated as a fixed, originary act, anchored in the wedding vow, and how this fiction suppresses the trace of future refusal, the supplement of ambiguity, and the *différance* that makes meaning always contingent and open. At the same time, Spivak's notion of the subaltern helped frame the married woman not as voiceless, but as structurally unheard: she speaks, yet the law does not recognise what she says as meaningful refusal.

Across the lenses of feminist theory and African feminism, this paper has shown how the law is not simply neutral but embedded in historical and cultural hierarchies that sustain male dominance. From the enduring legacy of coverture and Hale's doctrine to the local cultural norms that define consent as irrevocable, Kenyan law has inherited and naturalised a deeply patriarchal model of marriage in which rape becomes invisible. This paper has thus re-centred the question of consent as not merely legal, but ontological (hence deconstruction): what does it mean to be a legal subject if one's 'no' is never recognised? It does this while being alive to Paglia's reminder that marital rape is an embodied harm.

The recommendations offered aim to intervene at both levels. The general legal and cultural reforms provide essential protections: repealing Section 43(5), affirming ongoing consent, expanding admissible evidence, and aligning with international norms. But equally vital are the deconstructive interventions: reforms that do not merely replace one rule with another, but that unsettle the law's own assumptions.

Ultimately, this paper calls not only for criminalisation but for transformation, a shift from seeing consent as a closed category to understanding it as a dynamic, relational, and repeatable act. Through Derrida, we see that justice cannot be codified once and for all. It lives

undecided, in the open, and in the responsibility to hear what was once unheard. For Kenyan law to honour women's autonomy, it must learn to listen differently. The trace of the subaltern wife remains, not erased, but waiting to be recognised.

An introduction to *Honouring our elders: Conversations with the Living-Dead* section

Caroline W Gatonye*

In his famous critique of Joseph Conrad's *Heart of darkness*, Chinua Achebe begins with a warning on ignorance. He recalls a British historian, a professor, who once suggested that Africa had no history. Achebe admits that such ignorance might be excusable in a young man, but in a scholar, it becomes a moral failure.[1] For history is not just a record of events; it is proof that a people have lived and have mattered. Thus, to deny Africa her own history is to deny her humanity.

It is from this Achebean insight that I turn to John Mbiti's African philosophy and the notion of the *Living-Dead*.[2] At first glance, the phrase may seem to echo any American horror film, where the dead rise as empty souls, dragged by crumbs of memory, wandering back to old places, driven by hunger and decay. This Western concept of the living-dead terrifies because they are bodies without souls, or rather, memory without meaning.

But Mbiti's description of African beliefs offers optimism. Africa's Living-Dead come out as memory with breath and breadth, and a history

* Incoming Section Editor, Honouring our elders: Conversations with the Living-Dead Section, *Kabarak Law Review* (2026).

1 Chinua Achebe, 'An image of Africa: Racism in Conrad's *Heart of darkness*', Montclair State University.

2 John S Mbiti, *Introduction to African religion*, Heinemann Educational Books Ltd, 1975, 72

that does not die, as long as they are remembered.[3] The African living-dead are ancestors, those who have died in body but remain present *in memory, in names, in rituals, in speech, and in the wisdom they taught us*. They *are still* members of the community. They advise, they bless, they watch, but only die when they are forgotten.[4]

Perhaps because legal education in Kenya remains insular, my own ignorance of the term Living-Dead made my lecturer pause,[5] much as Achebe confronted colonial ignorance. We readily learn statutes and cite cases, yet forget our own intellectual inheritance. So when Mbiti's concept of the Living-Dead enters a law classroom, it sounds foreign, even though it is profoundly ours.

> Amadou Hampâté Bâ gives us the most haunting expression of this truth: 'In Africa, when an old man dies, a library burns'.[6]

He warned that while physical monuments like the Nubian stone structures might endure for decades, the last generation of oral scholars risked disappearing, and with them, their accumulated knowledge.[7] This, in simple terms, means 'memory burns'. The wisdom, stories, songs, proverbs, and praise-names of elders: the living archives of a people, are carried in speech and ritual. But it is through writing that they endure. Every word recorded is a life remembered, a library rescued from oblivion.

Mbiti teaches that the dead continue to live as long as they are named and remembered. But again, memory is fragile. Voices fade. Stories scatter. And in writing, we remember. Writing thus becomes a second ritual of remembrance. It preserves names, deeds, songs, and proverbs so that generations yet unborn may still encounter the ancestors.

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3 John S Mbiti, *African religions and philosophy*, Praeger Publishers, 1969, 32.

4 Mbiti, *African religions and philosophy*, 162.

5 This piece was propelled by conversations with Mwalimu Humphrey Sipalla.

6 Diélika Diallo, 'Hampâté Bâ, The Great Conciliator' The UNESCO Courier, January 1992.

7 Diélika Diallo, 'Hampâté Bâ, The great conciliator' The UNESCO Courier, January 1992.

Ngũgĩ wa Thiong'o understood this deeply. While he insisted that African languages are the true vessels of culture, he also knew that writing itself is an act of resistance against forgetting. When he cautioned that 'ignorance of one's own language …should not become a thing for positive pride',[8] he was mourning silenced ancestors.

In conclusion, African literary giants like Achebe, Saro Wiwa, Biko, Soyinka, Ngũgĩ, and Hampâté Bâ have shown us that writing is not merely an art form but a ritual through which we preserve the memories of the living and the dead. Books, poems, and plays become 'living libraries', where ancestors continue to teach, correct, and inspire.

To write, then, is to refuse the second death.

To write is to say:

You are gone, but you are not silent.
You are dead, but you are not erased.

'In Africa, when an old person dies, a library burns'.[9] This thus becomes Mbiti in one sentence.

And every time we write, we save a shelf from the fire.

Every word written in tribute to those who came before us is a hand extended across time, and a sacred act: the living honouring the dead, the Living-Dead living in the pages we hold.

This is why this section of our journal is sacred. We rename it: *Honouring our elders: Conversations with the Living-Dead*

[8] Ngũgĩ wa Thiong'o , *Writers in politics*, Heinemann Educational Books, 1981, 55.

[9] UNESCO, 'Amadou Hampâté Bâ: Guardian of African heritage'.

‘Don’t agonise, organise’: Analysing modern-day Pan-Africanist thought through Tajudeen Abdul-Raheem

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Abstract

This paper examines the Pan-African legal and political thought of Tajudeen Abdul-Raheem (1961-2009), analysing how his vision offers critical insights for contemporary African legal systems and governance reform. Drawing from extensive archival research and analysis of his institutional leadership, this study positions Tajudeen as an important figure who translated Pan-African ideals into practical frameworks for legal transformation and democratic accountability. Through his roles as General Secretary of the Pan-African Movement, Director of Justice Africa, and Deputy Director of the UN Millennium Campaign for Africa, Tajudeen articulated a transformative approach to law that challenged postcolonial legal fragmentation and elite capture while advocating for grassroots participation and continental integration. This paper demonstrates how Tajudeen’s critique of postcolonial legal orders, which he viewed as trapped by colonial borders,

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external dependencies, and serving elite rather than popular interests, provides a blueprint for reimagining African jurisprudence. This study contributes to contemporary debates about African governance by positioning Pan-Africanism as a living legal and institutional imperative rather than merely a historical memory or political ideal. Tajudeen's legacy offers crucial guidance for current efforts to deepen democracy, promote continental integration, and develop legal frameworks that serve African peoples' needs while challenging global structures of dependency and inequality.

Keywords: Pan-Africanism, Tajudeen Abdul-Raheem, African legal systems, governance reform, postcolonial legal orders, democratic accountability, continental integration

Introduction

Tajudeen Abdul Raheem (1961-2009) was a renowned Pan-Africanist pushing for African unity and a strong believer of decolonisation. He was not just a Pan-Africanist by ideology – he approached Pan-Africanism with urgency, and recognised contradictions such as 'defining Africa, corruption, resources, imperialism, struggle, gender justice and equality'.[1] His life serves as a living critique of Africa's leadership failings and a call to the continent's potential.[2]

Tajudeen Abdul-Raheem was an Afro-optimist whose Pan-African vision on what the goals and approach of Pan-Africanism should be in the 21st century are the kind of Pan-African ideals that should be passed down to future generations.[3] His commitment to African unity was anchored in a practical critique of the postcolonial legal order; a system that remains deeply shaped by colonial borders, external dependencies, and elite capture.[4] Through his writings, public advocacy, and leadership of institutions like Justice Africa and the Pan-African Movement, he articulated a vision of law as a tool for social justice, not just state power.[5]

By situating Tajudeen – as he was fondly called – within the broader tradition of Pan-African legal thought, this reflection seeks to reframe Pan-Africanism as more than a political ideal or historical memory. Rather, it positions it as a living legal and institutional imperative that

1 Dana Wagner, 'A day for Tajudeen's truth and Africa's power', *Pambazuka News*, 26 May 2010.

2 United Nations Economic Commission for Africa (UNECA), 'Democracy, governance and the Pan-African idea: Whither Africa? In honour of the late Tajudeen Abdul Raheem', Report of colloquium, UNCC Conference Centre, 24 May 2012, 2.

3 Global Pan African Movement, '8th Pan-African Congress and legacy of Tajudeen Abdul-Raheem', Global Pan African Movement.

4 UNECA, 'Democracy, governance and the Pan-African idea: Whither Africa? In honour of the late Tajudeen Abdul Raheem', 10; Richard Dowden, 'Tajudeen Abdul-Raheem: Thinker, writer and prodigious orator who campaigned for the peaceful unification of Africa', *The Independent*, Friday 29 May 2009.

5 Wilson Idahosa Aiwuyor, 'Tajudeen Abdul-Raheem and African liberation: Don't agonise, organise', *OurLegaci*, 2011.

calls for structural transformation, grassroots engagement, and the re-imagination of sovereignty itself.[6] His legacy challenges African lawyers, policymakers, and scholars alike to rethink how the law can serve the people, not merely the state. This reflection is equally grounded within the search of a practice of Pan-Africanism.

This paper is divided into four parts with the present part being the introduction. The second part explores how Tajudeen's life experiences, education, and ideological commitments shaped a legal worldview grounded in continental unity. The third part analyses how Tajudeen translated this vision into practice through his institutional leadership, public advocacy, and efforts. It seeks to understand whether his vision for Africa has been fulfilled. The last part serves as the conclusion, highlighting key areas African leaders and their citizenry could enhance Pan-African values within their capacities.

Constructing a Pan-African jurisprudence

Tajudeen was born in 1961 to a Nigerian family in Futuna.[7] He attended Madrassah alongside Catholic School during his developmental years.[8] Upon completion of his secondary education, he joined Bayero University in Kano. He later proceeded to St Peter's College Oxford where he won a scholarship as a Rhodes Scholar to pursue doctoral work. Afterwards, he served as General Secretary of the Pan-African Movement, Director of Justice Africa, and Deputy Director of the UN Millennium Campaign for Africa. His life was cut short after he was involved in a fatal car crash in Nairobi on 25 May 2009.[9]

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6 Paul Nantulya, 'Pan-Africanism reborn?', Africa Center for Strategic Studies, 19 March 2024.

7 'Tajudeen Abdul-Raheem', 3(1) *The Journal for Pan-African Studies* (2009) 242.

8 Dowden, 'Tajudeen Abdul-Raheem: Thinker, writer and prodigious orator who campaigned for the peaceful unification of Africa'.

9 Fatoumata Toure, 'Celebrating Tajudeen: Horace Campbell reflects on Pan-Africanism', *Pambazuka News*, 26 July 2012.

Tajudeen pursued his undergraduate studies in Political Science at Bayero University Kano, graduating with First Class Honours in 1982.[10] His academic excellence earned him the Nigerian government's Merit Award as the best political science student between 1980 and 1982.[11] At Bayero, he was actively involved in student political debates and youth activism, sharpening his ideological commitments to decolonisation and governance reform amidst Africa's post-independence struggles.[12] His university years coincided with a generation of African intellectuals who sought to marry scholarship with active political engagement.

A defining moment in his early intellectual journey was his successful application for the prestigious Rhodes Scholarship to St Peter's College, Oxford. During his scholarship interview, Tajudeen famously arrived dressed in traditional African attire and challenged the Selection Committee by asking why he should desire association with Cecil Rhodes: a symbol of British imperialism and colonial oppression in Africa.[13]

This act was both a courageous critique of imperial legacies and an assertion of African dignity and identity. Despite this bold stance, he was selected, highlighting his extraordinary intellect and the compelling force of his political convictions. His challenge also reflects a wider movement in African thinking that questions colonial history and demands respect for African identity and self-rule.

At Oxford, Tajudeen deepened his critical engagement with Pan-African thought and global decolonial scholarship.[14] He earned his PhD in Politics, immersing himself in debates on sovereignty, legal reform, and African unity.[15] He also served as President of the University's Africa Society, invigorating intellectual discourse with sharp political analysis,

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10 Alfred B Zack-Williams, 'Tributes to Tajudeen Abdul-Raheem (1961-2009)', 36(122) *Review of African Political Economy* (2009), 637.

11 'Tajudeen Abdul-Raheem', *The Journal for Pan-African Studies* 242.

12 Zack-Williams, 'Tributes to Tajudeen Abdul-Raheem (1961-2009)', 637.

13 'Tajudeen Abdul-Raheem', *The Journal for Pan-African Studies* 242.

14 Adagbo Onoja, 'Tajudeen Abdul-Raheem: A warrior goes home', *Daily Trust*, 6 June 2009.

15 Kaye Whiteman, 'Tajudeen Abdul-Raheem', *The Guardian*, 10 June 2009.

humour, and irrepressible optimism.[16] At Oxford, his engagement with the Africa Society and exposure to Eurocentric academic structures further sharpened his conviction that African perspectives had to be centred and defended against exclusion.[17] This intellectual rigour and political awareness fortified his lifelong dedication to bridging theory and practice in Pan-Africanism.

During his formative years, Tajudeen forged a vision of Pan-African unity not as enforced uniformity but as a pluralistic federation grounded in diversity and federalism. He famously argued, 'Whether you call it *majimbo* or devolution … Unity instead must be expressed through the multiplicities of diversities'.[18] This was matched by his institutional advocacy where he urged the African Union to adopt mechanisms that empowered ordinary Africans, including women and civil society, to participate in governance.[19]

He challenged post-colonial legal and academic orthodoxies, criticising Western social science for replicating imperial fractures under the guise of neutrality.[20] In his encounters with policymakers, he rejected development blueprints imposed from afar, insisting on strategies rooted in local realities and empowering ordinary citizens to become agents of change.[21]

Tajudeen's character and convictions were consistently demonstrated through personal anecdotes and public acts. Beyond academia, he inspired younger activists and civil society actors. Further, he was also known for his humour, sharp critique, and his refusal to spare

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16 Global Voices Online, 'Africa: Remembering Dr Tajudeen Abdul-Raheem', *Hungry for truth, peace and justice Blog*, 29 May 2009.

17 Dowden, 'Tajudeen Abdul-Raheem: Thinker, writer and prodigious orator who campaigned for the peaceful unification of Africa'.

18 Horace Campbell, 'Tajudeen Abdul-Raheem and the tasks of Pan-Africanists', *Pambazuka News*, 16 July 2009.

19 'AU must be relevant to Africans', *The New Humanitarian,* 10 July 2002.

20 Kayode Fayemi, 'Tajudeen Abdul-Raheem (1961-2009): A celebration of a life in full', *Pambazuka News,* 10 July 2009.

21 Aiwuyor, 'Tajudeen Abdul-Raheem and African liberation: Don't agonise, organise'.

even friends or powerful leaders from scrutiny.[22] His life embodied the Pan-African maxim 'don't agonise, organise,' (which he regularly used in his Thursday Postcard writings and speeches) reflecting a dedication to pragmatic, action-oriented solidarity.[23]

Law in action: Institutions, mobilisation, and reform

Tajudeen's most significant contribution to Pan-African legal thought lay not in theoretical formulations alone, but in his practical efforts to translate Pan-African principles into institutional reality. His leadership across multiple organisations demonstrated how continental unity could be operationalised through strategic institution-building, grassroots mobilisation, and targeted legal reform initiatives. The life and thought of Tajudeen point to a broader project: realising Pan-African ideals through law and policy. In his final writings, he repeatedly emphasised that Africans must work collectively to change the system, not merely rehearse old debates.[24] And importantly, Tajudeen's jurisprudential thought was fundamentally shaped by his understanding of how colonial legal systems continued to operate in postcolonial Africa.

Tajudeen insisted that African states remain burdened by 'artificial states' created by European colonialism, referencing Somalia, and Nigeria as products of arbitrary borders drawn by colonial powers.[25] These observations resonate with broader critiques that Africa's legal systems, particularly rule of law, are often harnessed by elites, sustaining dependency rather than serving ordinary citizens.[26] His critique extended

22 Dowden, 'Tajudeen Abdul-Raheem: Thinker, writer and prodigious orator who campaigned for the peaceful unification of Africa'.

23 Whiteman, 'Tajudeen Abdul-Raheem'.

24 Chidi Odinkalu and Alex de Waal, '"Don't agonise, organise!" Remembering Tajudeen Abdul-Raheem's advocacy on Sudan', *African Arguments*, 30 May 2023.

25 Tajudeen Abdul-Raheem, 'Globalisation and recolonisation', 490 *African Transitions*, 2000.

26 Paul Tiyambe Zeleza, 'The rule of law in Africa: A reappraisal', *The Elephant,* 20 December 2024.

beyond formal legal structures to encompass the broader political economy of law in Africa.[27]

During his time as Secretary General of the Pan-African Movement, Tajudeen played an important role in organising the Seventh Pan-African Congress in Kampala, 3-8 April 1994, which brought together delegates from 47 countries. He served as the Secretary General of the Secretariat of the seventh Pan-African Congress.[28] This Congress marked a crucial turning point in contemporary Pan-Africanism, shifting focus from purely ideological debates toward practical questions of governance, democracy, and social progress.[29] The meeting's theme, 'Africa: Facing the future in unity, social progress and democracy', reflected Tajudeen's commitment to grounding Pan-African ideals in concrete political action.[30]

The Kampala Congress introduced several innovations that would become central to Tajudeen's approach to Pan-African organising. First, it established the Pan-African Women's Liberation Organisation (PAWLO) demonstrating commitment to gender equity as fundamental to African liberation.[31] Second, the Congress confronted difficult questions about inclusion and identity within Pan-Africanism, particularly regarding Sudan's place in the movement and the centrality of the grassroots women in the movement for freedom.[32]

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27 Campbell, 'Tajudeen Abdul-Raheem and the tasks of Pan-Africanists'.

28 Tajudeen Abdul-Raheem, 'Introduction: Reclaiming Africa for Africans – Pan-Africanism, 1900-1994', in Tajudeen Abdul-Raheem (ed) *Pan Africanism: Politics, economy and social change in the twenty-first century*, New York University Press, 1996, 1; Global Pan African Movement, 'The road to the 7th Pan-African Congress in Kampala 1994', Pan African Congress, 2023; Horace Campbell, 'Rebuilding the Pan-African Movement: A report on the 7th Pan-African Congress', 1(1) *African Journal of Political Science / Revue Africaine de Science Politique* (1996) 8.

29 Campbell, 'Rebuilding the Pan-African movement: A report on the 7th Pan-African Congress', 5.

30 Websolve, 'In memoriam: Tajudeen Abdul-Raheem', *African Arguments,* 25 May 2009.

31 Global Pan African Movement, '8th PAC and legacy of Tajudeen Abdul-Raheem'.

32 Campbell, 'Rebuilding the Pan-African movement: A report on the 7th Pan-African Congress', 2-3, 5-6.

This emphasis on gender justice aligns with the African Union's institutional commitments, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),[33] and the AU's Solemn Declaration on Gender Equality in Africa.[34]

Perhaps most significantly, the Congress, which was held 3-8 April 1994, was forced to grapple with the Rwanda genocide, which tragically began during the seventh Pan African Conference. This crisis compelled Tajudeen and other Pan-Africanists to take principled positions against genocide and genocidal violence, establishing precedents for how Pan-African institutions should respond to mass atrocities.

Tajudeen personally accompanied a delegation to Rwanda for first-hand assessment of the situation, embodying his belief that Pan-Africanism required direct engagement with Africa's most pressing challenges.[35] Notably, at the time of writing this paper, the African Union Peace and Security Council had held its 1,272 meeting, commemorating the Rwandan genocide. During this session, the Council underscored the urgent need for member states that have not yet done so to enact legislation and establish national institutions aimed at preventing and combating hate ideology, hate crimes, and the risk of genocide.[36]

Justice Africa and governance reform

As a Director of Justice Africa, founded in 1999,[37] Tajudeen helped build an organisation deeply rooted in Pan-African principles. Justice

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33 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003, 3268 UNTS 26368.

34 African Union Solemn Declaration on Gender Equality in Africa, 6 July 2004, Assembly/AU/Decl 12 (2004).

35 Global Pan African Movement, '8th PAC and legacy of Tajudeen Abdul-Raheem'.

36 African Union Peace and Security Council, 'Press Statement of the 1272nd meeting of the Peace and Security Council, held on 2 April 2025, during an open session on the theme: "Hate crimes and fighting genocidal ideology in Africa" and the 31st anniversary commemoration of the genocide against the Tutsi in Rwanda', AUPSC, 2 April 2025, PSC/PR/PS.1272.

37 'Tajudeen Abdul-Raheem', *The Journal for Pan-African Studies* 242, 244.

Africa's mission involves working with civil society and local communities to develop inclusive judicial and governance systems, epitomised by its guiding principle, 'nothing for me, without me'.[38] In this role, he operationalised Pan-African ideals, designing institutional structures that elevated ordinary Africans rather than elite interests establishing a living legal-political framework, not just aspirational rhetoric.[39]

Through Justice Africa and in his influential *Postcards*, Tajudeen called for a shift in African solidarity; from the OAU's passive principle of 'non-interference' to a more active ethos of 'non-indifference,' asserting that what happens within any African country is a legitimate concern for others.[40] This shift reflects a foundational transformation in regional governance, embraced in doctrine and structure by the AU's Constitutive Act, which now enables intervention in cases of mass atrocity.[41]

Tajudeen's activism helped push this change by challenging old ideas and calling for stronger action from African institutions. This evolution is grounded not just in legal architecture but in Pan-African ethical conviction where activists like Tajudeen helped bring into political life. The institutional pivot was cemented by figures like Salim Ahmed Salim, whose diplomatic leadership helped reframe African solidarity toward accountability.[42]

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38 Justice Africa's mission is to promote human rights, democracy, and justice, Justice Africa, 'Overview of Justice Africa', Justice Africa.

39 Fayemi, **'**Tajudeen Abdul-Raheem (1961-2009): A celebration of a life in full'.

40 Abdul-Raheem, 'Introduction: Reclaiming Africa for Africans – Pan-Africanism, 1900-1994', 19, where he comments on colonial borders accepted by the founding fathers and how this works hand-in-hand with the logic of non-interference; Tajudeen Abdul-Raheem**, '**Pan-African perspectives and the African Union', *Pan-African Postcard*, 1 February 2007. See generally, Arthur Gakwandi, 'Towards a new political map of Africa', in Abdul-Raheem (ed) *Pan Africanism: Politics, economy and social change in the twenty-first centur*y, 181-192.

41 Constitutive Act of the African Union, 11 July 2000, Article 4(h).

42 Salim Ahmed Salim, 'OAU and the future', in Abdul-Raheem (ed) *Pan Africanism: Politics, economy and social change in the twenty-first centur*y, 234. See also, Antony Karol Muma, 'Transforming African diplomacy: Salim Ahmed Salim's vision of non-indifference and the evolution from OAU to AU', 3 *Kabarak Law Review* (2024) 237.

A concrete example of this approach was his analysis of Sudan's failed bids to chair the African Union.[43] Tajudeen observed that 'the isolation of Sudan on the Darfur issue also demonstrates how dialogue between civil society activism and progressive African governments, union bureaucrats and other concerned Africans can yield positive results.[44] He argued that this represented a fundamental evolution in African governance, where 'a new sense of shame has arrived'.[45] This reflected the emergence of a new sense of political shame, whereby misconduct by leaders and states is no longer shielded by diplomatic discretion but is instead exposed to public critique and institutional rebuke.[46]

The weekly Pan-African Postcards columns published in newspapers across the continent were one of Tajudeen's most innovative contributions to Pan-Africanism which were easily readable, sharp political analysis.[47] These postcards were a practical manifestation of his belief that popular education was the bedrock for meaningful political mobilisation and substantive legal reform.

The postcards addressed pressing continental issues while maintaining focus on how ordinary Africans could engage with and influence political processes. Topics ranged from analyses of AU summits and regional integration initiatives to critiques of specific governance

43 For context, Sudan's successive attempts to secure the rotating chairmanship of the African Union were repeatedly blocked: in 2005-06, concerns over the Darfur conflict led to the extension of Nigeria's President Obasanjo's term; in January 2006, Sudan was again passed over, despite hosting the summit, in favour of President Sassou Nguesso of Republic of Congo; in January 2007, Sudan lost out to President Kufuor of Ghana; and in January 2008, even when East Africa's turn arrived, the chair was awarded to President Jakaya Kikwete of Tanzania, underscoring Sudan's continued isolation. See, Open Society Initiative for Southern Africa (OSISA) and Oxfam, 'Strengthening popular participation in the African Union: A guide to AU structures and processes', Open Society Initiative for Southern Africa (OSISA) and Oxfam, 2009, 8.

44 Abdul-Raheem, 'Pan African perspectives and the African Union'.

45 Abdul-Raheem, 'Pan African perspectives and the African Union'.

46 Abdul-Raheem, 'Pan African perspectives and the African Union'.

47 Salim Ahmed Salim, 'Preface', in Tajudeen Abdul-Raheem, *Speaking truth to power: Selected Pan-African postcards*, Compiled by Ama Biney and Adebayo Olukoshi, Pambazuka Press, 2010, x, where he notes, 'What will never cease to amaze Taju's friends, comrades and acquaintances was how he found time to write' a testament to his calling as a political activist and thinker.

failures and celebrations of democratic innovations.[48] Through this work, Tajudeen modelled how Pan-African intellectuals could maintain rigorous analytical standards while remaining accessible to broad popular audiences. This approach to political communication reflected his broader understanding that sustainable legal and governance reform required informed citizen engagement. He recognised that technical legal reforms would remain superficial unless accompanied by popular understanding of their significance and ongoing citizen mobilisation to ensure their implementation.[49]

The UN millennium campaign and mass mobilisation

As Deputy Director of the UN Millennium Campaign for Africa (his last job),[50] Tajudeen helped translate Pan-African organising into continent-wide mobilisation while keeping a firm link to grassroots activism. In October 2006, the Campaign's 'Stand Up Against Poverty' action drew about 3.6 million participants in Africa as part of more than 23 million globally, demonstrating how African-led civic pressure could be scaled to a global arena.[51] He publicly wrote and spoke about pressing leaders on poverty, accountability and the Millennium Development Goals, and engaging civil society networks across the continent.[52] Subsequent iterations of the campaign expanded dramatically, with UN records noting over 116 million participants worldwide in 2008.[53]

The Millennium Campaign work revealed Tajudeen's sophisticated understanding of how domestic African governance connected to broader patterns of global dependency and inequality. He recognised

48 Abdul-Raheem, *Speaking truth to power: Selected Pan-African postcards*, 197-199, 93-96, 45-47, 23-26.

49 Abdul-Raheem, *Speaking truth to power: Selected Pan-African postcards,* 226-227.

50 'UN millennium campaign loses deputy director', *MyJoyOnline*, 25 May 2009.

51 Gumisai Mutume, 'Millions of activists for a day', United Nations, 2007.

52 Abdul-Raheem, '*Speaking truth to power: Selected Pan-African Postcards',* 218-227.

53 United Nations Information Service (UNIS Vienna), 'More than 116 million people – nearly 2 per cent of World's population – stand up and speak out against poverty and for the Millennium Development Goals', United Nations, 23 October 2008.

that achieving the Millennium Development Goals required not just technical interventions, but fundamental changes in how African states related to international financial institutions, donor countries, and global markets.[54] This analysis led him to advocate for alternative sources of financing for African regional institutions.[55]

He argued that dependence on external funding compromised African institutions' ability to pursue policies that genuinely served continental interests, echoing broader critiques of how aid dependence often undermines accountability, distorts domestic priorities, and sustains corrupt elites.[56] All this notwithstanding, he emphasised that through mutual accountability, both of African leaders and leaders of the West, Africa could realise the set Millennium Development Goals.[57]

Throughout his institutional leadership, Tajudeen maintained that meaningful legal and governance reform required genuine grassroots participation. His approach to organising centred on mobilising ordinary Africans, ensuring that continental institutions like the African Union reflected popular needs rather than elite or donor priorities.[58] This commitment to participatory governance, reflected Tajudeen's understanding that postcolonial legal systems had failed precisely because they excluded ordinary Africans from meaningful participation in their design and implementation. He therefore consistently argued for governance structures rooted in grassroots participation,[59] gender equity,[60] and transformative approaches to democracy as essential foundations for Africa's liberation.

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54 Tajudeen Abdul-Raheem, 'Africa's challenges to deliver on the MDGs', *Zim Standard*, 2006.

55 His critique anticipated institutional responses like the African Union's 2016 decision on financing of the Union (Assembly/AU/Dec.605(XXVII)), which introduced a 0.2% levy on eligible imports to reduce reliance on donor funding. This encourages developing countries to strengthen domestic resource mobilisation.

56 Abdul-Raheem, *Speaking truth to power: Selected Pan-African postcards*, 177-78.

57 Abdul-Raheem, *Speaking truth to power: Selected Pan-African postcards,* 223.

58 Abdul-Raheem, *Speaking truth to power: Selected Pan-African postcards,* 175-178, 241-243.

59 Abdul-Raheem, *Speaking truth to power: Selected Pan-African postcards*, 175-178.

60 Abdul-Raheem, *Speaking truth to power: Selected Pan-African postcards,* 1-14.

Tajudeen conceived of participation not simply as casting ballots but as the continuous involvement of citizens in shaping policies, monitoring public resources, and holding leaders accountable.[61] He argued that when communities are directly engaged in governance, they develop a stronger sense of ownership, and governments in turn become more responsive to their needs.[62] For him, this people-centred vision sought to transform modern institutions to serve democratic and developmental goals.[63]

Pan-African legacy and the African Union's evolution

Tajudeen's Pan-African vision remains relevant to the African Union (AU) today. His insistence on citizen-driven governance and broad popular participation anticipated the AU's current emphasis on citizen inclusion and integration.[64] Likewise, his critique of elite capture and external dependency finds echoes in debates over neo-colonial influences and unaccountable leadership in Africa. Contemporary continental frameworks, notably Agenda 2063, explicitly invoke Pan-African ideals, portraying integration as the Pan-African drive for unity, self-determination, freedom and collective prosperity.[65] Similarly, the African Continental Free Trade Area (AfCFTA) is justified as advancing a Pan-African vision of an integrated, prosperous, peaceful continent.[66] These developments suggest that many of Tajudeen's core themes, from grassroots empowerment to continental unity, are now part of official AU policy.

In practice, the AU has adopted several measures aligned with Tajudeen's ideas, though implementation has been uneven. Agenda 2063, adopted in 2015, calls for deep political and economic integration. This

61 Abdul-Raheem, *Speaking truth to power: Selected Pan-African postcards,* 175-178.

62 Whiteman, 'Tajudeen Abdul-Raheem'.

63 Campbell, 'Tajudeen Abdul-Raheem and the tasks of Pan-Africanists'.

64 'AU must be relevant to Africans', *The New Humanitarian*.

65 African Union, 'Agenda 2063: The Africa We Want', 2015, Aspiration 2.

66 Ernest Toochi Aniche, 'African Continental Free Trade Area and African Union Agenda 2063: The roads to Addis Ababa and Kigali', 41(4) *Journal of Contemporary African Studies* (2023) 385-386.

includes the creation of a federal or confederate united Africa and the eradication of poverty; explicitly linking these goals to an African renaissance and Pan-Africanism.[67] As one of its flagship projects, Agenda 2063 advanced the AfCFTA, whose trading objective of a single market and customs union is framed as fulfilling the Pan-African vision enshrined in the Constitutive Act and Agenda 2063.[68]

Other concrete innovations echo his thinking: at the 2016 AU Summit in Rwanda, the African Union announced the possibility of a new AU passport to promote free movement as a symbolic act of Pan-Africanism. Although the AU aimed to roll out the passport in 2020 to all citizens in African countries,[69] this is yet to happen. The AU under Article 3(q) of its Constitutive Act (as amended), has also moved to engage its diaspora more fully; through inviting Africans abroad to participate as a sixth region of the Union, and an African Diaspora High Council has been established to coordinate diaspora input to AU affairs.[70]

Visibly, Tajudeen's vision exceeds these accomplishments, and many aspirations remain unrealised. For example, he fervently argued (as at the 2007 AU Summit in Ghana) that true Pan-African unity must be the end-point of continental politics.[71] In Accra he noted that 'unity has always been the destination' of the AU's predecessors.[72] In reality, however, AU member states have consistently postponed union in favour of loose regionalism. As one analysis observes, at that 2007 Sum-

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67 African Union, 'Agenda 2063', Aspiration 1, 'We are determined to eradicate poverty in one generation' and Aspiration 2, 'An integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa's renaissance'.

68 African Union, 'The African Continental Free Trade Area'; Agreement Establishing the African Continental Free Trade Area, 21 March 2018, Preamble para 4 and Article 3(a).

69 Kieron Monks, 'United States of Africa? African Union launches all-Africa passport', *CNN World*, 19 July 2016.

70 African Union African diaspora sixth region High Council, 'About us'. The description of the Council's main task to unite the African diaspora globally to implement Article 3(q) of the Protocol on Amendments to the Constitutive Act of the African Union and related programmes.

71 Global Pan African Movement, '8th PAC and legacy of Tajudeen Abdul-Raheem'.

72 Al Jazeera, 'AU summit debates unity', *Al Jazeera,* 2 July 2007.

mit leaders rejected the idea of full unification and opted to strengthen regional blocs instead.[73] To date the Pan-African Parliament remains only consultative with no binding lawmaking power and the AU lacks a central budget funded by independent taxes. Many continental decisions still rely on voluntary national contributions or external donors, undercutting Tajudeen's call for African self-reliance. Only in recent years has the AU begun urging full African financing of its budget and peace operations.[74]

Moreover, Tajudeen's emphasis on linking ideas with grassroots organisation evidenced by his motto 'don't agonise, organise', highlights an area where the AU falls short. The AU's institutional architecture remains highly intergovernmental and distant from ordinary citizens. At the same time, contemporary African youth are reviving Pan-African ideals outside official channels. Young Africans today are notably active in national and transnational movements that embody solidarity, justice, and calls for inclusive governance.[75] These developments reflect Tajudeen's argument that sustainable change requires popular participation. In line with his vision, several recent AU initiatives such as the African Youth Charter[76] and Agenda 2063's flagship projects explicitly endorse youth engagement and cross-border exchange. But critics note that these instruments often lack teeth in practice, and real influence by youth remains limited.[77]

In sum, the AU of 2025 is partially the Union that Tajudeen envisioned: it has embraced many of his slogans and goals[78] in its founding Act and subsequent policies. Agenda 2063 and AfCFTA explicitly trans-

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73 Global Pan African Movement, '8th PAC and legacy of Tajudeen Abdul-Raheem'.

74 African Union, 'African Union passport launched during opening of 27th AU summit in Kigali', Press Release, 17 July 2016.

75 Joshua Muhammed, 'Pan-Africanism reimagined: Youth, culture and social movements', *African Leadership Magazine*, 2025.

76 African Youth Charter, 2 July 2006, Reg No I-55376, Article 11.

77 Hannah Mukami, 'Unlocking youth potential for peacebuilding in Eastern Africa', Mashariki Research and Policy Centre, 24 June 2025.

78 Goals such as Pan-African unity, integrated markets and justice frameworks. See, African Union, 'AU theme of the Year 2025: Justice for Africans and people of African descent through reparations', African Union, 29 January 2025.

late Pan-African ideals into planned institutions. However, the reality remains that the AU is not yet a true union of peoples in Tajudeen's sense. Power is still held by postcolonial political elites and integration is cautious and incremental. Achieving the Union he dreamed of could be advanced through policy steps such as: empowering the Pan-African Parliament, establishing genuine fiscal autonomy for the AU, fully implementing diaspora representation, and enshrining direct citizen participation, for example, by constitutionalising referenda or participatory budgets. Only by closing the gap between its constitutive promises and on-the-ground practice can the AU fulfil the Pan-Africanist agenda that Tajudeen championed.

Conclusion

Tajudeen Abdul-Raheem's life and work offers an illustrative case study for how Pan-African thought can address contemporary challenges in African legal systems and governance. His institutional leadership demonstrated that Pan-Africanism need not remain a historical memory or abstract ideal, but can serve as a practical framework for legal reform, democratic innovation, and continental integration.

Tajudeen's critique of postcolonial legal orders remains particularly relevant as African countries continue to grapple with the legacies of colonial legal systems and external dependency. His vision of law as a tool for social justice rather than state power provides important guidance for legal reformers seeking to develop more responsive and accountable governance systems.

Perhaps most importantly, Tajudeen's emphasis on grassroots participation and popular mobilisation offers crucial insights for contemporary efforts to deepen democracy and promote good governance across the continent. His work demonstrates that sustainable legal reform requires not just technical institutional changes, but fundamental shifts in the relationship between citizens, law, and political power.

The institutional innovations that Tajudeen pioneered, from continental organising frameworks to mechanisms for civil society engagement in governance, continue to influence contemporary Pan-African initiatives. His legacy challenges current generations of African lawyers, activists, and scholars to maintain the same combination of analytical rigor and practical commitment that characterised his approach to Pan-African organising.

He speaks directly to the African Union's current struggles with financing, enforcement and citizen participation. His principles point to concrete measures, stronger civil society input, more transparent oversight and genuine inclusion in initiatives like the AfCFTA and Agenda 2063, that could help the AU move from elite-driven integration to people-centred governance. His legacy thus offers not just inspiration but a practical template for meeting the Union's present and future challenges.

As Africa continues to navigate questions of sovereignty, integration and democratic governance, Tajudeen Abdul-Raheem's advanced the principle of 'organise, don't agonise' which remains as relevant. His work provides both inspiration and practical guidance for those seeking to realise the Pan-African vision of a continent governed by and for its peoples, where law serves justice rather than domination, and where vanity enhances rather than diminishes popular participation in shaping Africa's future.

Insights into the realities of police custody and remand in custody in Cameroon

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Abstract

In practice, police custody and remand in custody are measures that deprive individuals of liberty and human dignity. They are often a means of humiliation and dehumanisation of people; a method that is organised by institutions and actors of a repressive system. Through desktop research, this paper identifies protections that persons in police custody and those remanded in custody have under Cameroonian law. It exposes that, in practice, there is minimal compliance with the state's obligation – the obligation to respect, protect, and fulfil the rights of persons held in police custody and those detained – under the Cameroonian and international law. This paper aims at making Cameroonians aware of their rights in all circumstances and urging them to defend the rights through available legal actions.

Keywords: Cameroon judicial system, human dignity, police custody, remand in custody, public freedoms, personal liberty, human dignity

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Introduction

After 50 days in police custody, the non-governmental organisation, Mandela Center International, criticised the deprivation of liberty of suspects Jean Bertrand Mboudou and Owoundi Ndongo. These two are Cameroonian citizens who have been held in the detention rooms of the Centre Gendarmerie Legion in Yaoundé since 16 March 2025.[1] This critique exposes the tension between the illegal exercise of state authority and the full enjoyment of legally enshrined rights and freedoms. Several administrative acts[2] and institutional activities[3] have deplored such abuses and prescribed the adoption of strategies to put an end to them.

In line with the thinking of Jean Rivero, 'effective protection of public freedoms would, in absolute terms, make it impossible for both public authorities and individuals to violate them. But this radical prevention is a myth: in our society, and no doubt in any human society, men do not hesitate, when they find it to their advantage, to infringe the freedoms of others'.[4]

Mr Luc Ndjodo, *Procureur Général* at the Supreme Court of Cameroon, noted that police and gendarmerie officers, magistrates of the legal department, and examining magistrates 'are sometimes called upon to restrict individual freedoms, in particular, by ordering the arrest and

1 Mon'Esse, 'Cameroun: 50 jours de garde à vue abusive de 2 citoyens à la légion de gendarmerie', *World Top News*, 5 May 2025.

2 Message from the Secretary of State for Defence in charge of the National Gendarmerie dated 13 November 2024 addressed to all commanders of the Gendarmerie legions with the subject, 'Gardes a vue et detentions abusives dans unites gendarmerie nationale', 13 November 2024.

3 Annual meeting of the heads of the Courts of Appeal and the regional delegates of the Prison Service on 10 December 2018, chaired by the Minister of State, Minister of Justice, Keeper of the Seals, on the following topics: 'Gardes à vue et détentions provisoires abusives: état de droit, état des lieux, mesures préventives et curatives envisageables' and 'le rôle de l'Administration pénitentiaire dans la lutte contre les détentions provisoires abusives', 10 December 2018.

4 Jean Rivero, 'Preface', in Stavros Tsiklitiras, *La protection effective des libertés publiques par le juge judiciaire en droit français*, LGDJ, 1991, 16.

detention of a suspect, or the remand in custody of an accused person'.[5] However, this 'power remains firmly framed by the law, with the state, the guarantor of all freedoms, ensuring that measures restricting freedom do not exceed the limits set by the legislature. The particular attention paid by the public authorities to the judicious application of measures restricting freedoms stems from the obligation of civil servants to respect the principle of the presumption of innocence, … and [the obligation] to ensure the protection of human rights in general'.[6]

Remand in custody is 'an exceptional measure which shall not be ordered except in the case of a misdemeanour or a felony. It shall be necessary for the preservation of evidence, the maintenance of public order, protection of life and property, or to ensure the appearance of an accused before the examining magistrate or the court'.[7] Police custody, for its part, is 'a measure whereby, for purposes of criminal investigation and the establishment of the truth, a suspect is detained in a judicial police cell, wherein he remains for a limited period available to and under the responsibility of a judicial police officer'.[8] Police custody is not only a judicial measure, it is also an administrative measure under Cameroonian law.[9]

These measures, which deprive people of their liberty, are intended by the legislators to restrict the mobility of individuals. Their misuse significantly undermines the rule of law, and in the process profoundly

5 Luc Ndjodo, 'Submissions of the Procureur General at the Supreme Court at the Solemn Opening session of the Supreme Court', Solemn Reopening of the Supreme Court of Cameroon, 21 February 2025, 10.

6 Ndjodo, 'Submissions of the Procureur General at the Supreme Court', 10.

7 Criminal Procedure Code, Section 218(1).

8 Criminal Procedure Code, Section 118(1).

9 Law No 90/054 of 19 December 1990 on the maintenance of public order, Section 2.

erodes the credibility of the judicial institution,[10] and reinforces the idea of a police state.[11]

The purpose of the law – humanity[12] in the sense of '*hominum causa omne jus constitutum*'[13] – constitutes a principle of legal policy. This principle structures our understanding of the criminal justice phenomenon,[14] by promoting a legislative attitude that reveres humanity and calling for rigorous application of the rule of law, while always bearing in mind respect for human dignity.

Putting criminal law and repressive administrative law in the Cameroonian context allows us to appreciate the contours of the empirical complexity of the ideological debate opposing individualism and collectivism. The aim of this doctrinal position is to achieve an objective of allowing 'the best human development in the individual and the social'.[15] However, the risk lies in the potential legitimisation of inhumanity in the name of protecting society.[16]

The situation of detainees in prisons is precarious, unlike those who find themselves there as a result of a final criminal conviction. At the end of 2022, there were 19,054 detainees compared with 18,987 in 2021, and 13,944 convicted prisoners compared with 11,580 in 2021.[17]

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10 According to the Chief Justice of the Supreme Court of Cameroon, Daniel Mekobe Sone: '[W]e must guarantee the right to justice and offer citizens an image that will reassure them and win back their trust. All those involved in the judicial sector must take the measure of the frustrations of litigants and the resurgence of private justice'. See Daniel Mekobe Sone, 'Address of the Chief Justice of the Supreme Court', Solemn Reopening of the Supreme Court, 21 February 2024, 13.

11 Steve Tametong and Pierre-Claver Kamgaing, 'Cameroun, un État policier? À propos de la garde à vue administrative', July 2021.

12 Catherine Le Bris, 'Esquisse de l'humanité juridique', 69(2) *Revue interdisciplinaire d'études juridiques* (2012) 2.

13 This Latin phrase means: 'the law is instituted entirely for men'.

14 Jean Pradel, *Principes de droit criminel*, *Tome1 : Droit pénal général*, Éditions Cujas, 1999, 20.

15 Adolphe Minkoa She, *Droits de l'homme et droit pénal au Cameroun*, Economica, 1999, 11.

16 Bambé Djorbélé, 'Humanité et droit pénal au Cameroun', 1 *Cahiers juridiques et politiques* (2024) 92.

17 Ministry of Justice, 'Report of the Ministry of Justice on Human Rights in Cameroon in 2022', December 2023, 227.

The daily routine of police custody and remand in custody in Cameroon is a waltz of humiliation and dehumanisation, fuelled by illegality and driven by ignorance of the victims of abuse. Individuals – initially defendants, suspects, or detained persons in relation to a criminal offense or a breach of public order – are often turned into victims of police, judicial, or administrative misconduct. This transformation happens through a tenuous connection established in disregard for the law and driven by the pursuit of power interests.

It has become so common to see the authorities of the judicial and administrative chain of repression trample on individual rights. There is therefore urgency of examining compliance with provisions of national and international instruments regarding rights of persons in custody.

This study is structured in two main parts: the first part examines how the rights of detainees, though formally enshrined, are often trampled under repression. It considers both the guarantees meant to protect defendants and the safeguards of due process, before turning to the ways these rights are systematically violated – whether by the very structure of the repressive system or by its practices. The second part addresses the restoration of these rights through punishment, outlining the remedies available when violations occur. It reviews the role of administrative and judicial sanctions in protecting detainees, and further considers the accountability mechanism of those responsible whether through state liability or penalties imposed on individual officials.

The rights of detainees trampled underfoot by repression

In a state governed by the rule of law, the limitation of freedoms cannot justify the suspension of human dignity.[18] However, in Cameroon, the conditions of police custody and remand in custody are marred

[18] Josette Nguebou, 'La détention provisoire dans l'avant-projet du code camerounais de procédure pénale', Unpublished doctoral thesis in law, University of Yaoundé, 1982, 492.

with a series of serious and systematic violations of fundamental rights.[19] Police, judicial, and administrative repressions tend to overshadow the guarantees provided by national and international legal instruments,[20] reducing the person in police custody or remand in custody to an entity devoid of any human consideration.[21] Although these rights are enshrined in several legal instruments, they are consistently violated. The first section of this part will discuss the rights of detained persons and the second section will expound on how these rights are consistently violated.

Rights of persons held in police custody and detainees

According to the provisions of the Cameroonian Criminal Procedure Code (CPC), police custody should not exceed 48 hours.[22] This period is renewable only once, and may be exceptionally extended twice with authorisation made in writing by the state counsel.[23] Reasons for extending police custody include: the need to hear new witnesses for the prosecution or defence, the production by experts of evidence such

[19] Statement of the Cameroon Human Rights Commission on the occasion of the seventh edition of the Africa pre-trial detention day, 25 April 2022; Report of the Ministry of Justice on Human Rights in Cameroon in 2019, June 2021; Report of the Ministry of Justice on Human Rights in Cameroon in 2020, February 2022; Report of the Ministry of Justice on Human Rights in Cameroon in 2021, February 2023, Report of the Ministry of Justice on Human Rights in Cameroon in 2022, December 2023.

[20] Universal Declaration of Human Rights, A/RES/217 A(III), 10 December 1948; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966; African Charter on Human and Peoples' Rights, CAB/LEG/67/3, 21 October 1981; Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984.

[21] Cameroon's prison system faces numerous challenges, including chronic overcrowding (173% on average). Alarming rates reach as high as 500% in some facilities. This critical situation is primarily due to a high rate of remand in custody, affecting 58% of inmates, some of whom wait several years for their trial. Judicial delays, exacerbated by an overburdened and underfunded administration, compound this problem. Armand Ougock, 'Cameroon: Prison overcrowding, remand in custody and corruption in Cameroonian prisons, at the heart of civil society challenges', *Koaci*, 27 September 2024.

[22] Criminal Procedure Code Section 119(2)(a).

[23] Criminal Procedure Code Section 119(2)(a) and (b).

as forensic certificates, autopsy results, ballistic analysis results, and the production of results from cybernetic data processing. It should be noted that, administrative police authorities may at any time order administrative police custody for a renewable period of 15 days as part of the fight against organised crime.[24]

The period of remand in police custody shall not be extended solely for the purpose of recording the statement of a witness. Also, except in cases of felonies or misdemeanours committed *flagrante delicto*,[25] remand in police custody shall not be ordered on Saturdays, Sundays, or public holidays. Where the remand in police custody has commenced on a Friday or on the eve of a public holiday, it may be extended as provided for in the law. Moreover, the period of remand in police custody shall be extended, where applicable, having regard to the distance between the place of arrest and the police station or the gendarmerie brigade where such remand has to be effected. The extension shall be 24 hours for every 50 kilometres.[26]

The CPC also provides for special custody,[27] which should not exceed 24 hours. Judicial police officers shall check the identity and situation of any suspected person, in accordance with the provisions of Section 32,[28] and where necessary, may detain him in special police custody. Upon the expiry of this period, the detained person shall be released, unless further detention is justified on other legal grounds. A judicial police officer who fails to adhere to this may be prosecuted under the provisions of Section 291 of the Penal Code.[29]

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24 Law No 90/54 of 19 December 1990 on the Maintenance of Public Order Section 2.

25 This translates to, 'in the act of committing the offence' or 'in blazing offence'.

26 Criminal Procedure Code Section 120.

27 Criminal Procedure Code Section 86, 'Judicial police officers shall be empowered to check the identity and situation of any suspected person, in accordance with the provisions of Section 32, and where necessary, may detain him in a special police custody for not longer than 24 hours'.

28 'Any officer or agent of the judicial police may, in a public place or a place open to the public, and subject to the provisions of Section 83(3), arrest the author of a simple offence who either refuses to disclose his identity or discloses an identity suspected to be false and, where necessary, detain him for not longer than twenty-four hours'.

29 Section 291 of the Penal Code provides that '(1) Whoever in any manner deprives an-

A state counsel or examining magistrate may order remand in custody, which can last up to six months. This period may be extended by reasoned order for a maximum period of 12 months in the case of a felony and six months in the case of a misdemeanour.[30] In practice, however, these time limits are very widely exceeded without the authorisation of the state counsel, illustrating a worrying tolerance for arbitrariness, disregard for rights of the defendant and the requisite procedure.

A detained person is entitled to both substantive and procedural rights. These rights will be discussed in the next two subsections.

Detainees' substantive rights

The defendant benefits from certain legal guarantees aimed at preserving his fundamental rights. Under Cameroonian law, the presumption of innocence is the starting point for this protection.[31] The Cameroonian Constitution, the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights and the Criminal Procedure Code guarantee this presumption.[32] The presumption of innocence means that any person accused of an offence must be considered innocent until proven guilty according to law,[33] thereby structuring all other procedural rights. It also implies that the person being prosecuted must be treated with dignity, without prejudice or discrimination.

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other of his liberty shall be punished with imprisonment for from 5 to 10 years and with fine of from CFAF 20,000 (twenty thousand) to CFAF 1,000,000 (one million); (2) The punishment shall be imprisonment for from 10 to 20 years in any of the following cases: a) where the deprivation of liberty lasts for more than a month; b) where it is accompanied with physical or mental torture; or c) where the arrest is effected with the aid of a forged order from a public authority or of a uniform unlawfully worn, or pretending an appointment not held'.

30 Criminal Procedure Code, Section 221(1).

31 Supreme Court, Judgment No 13/P of 1 March 1979, BACS, No 40, 6011.

32 Law No 96/06 of 18 January 1996 revising the Constitution of 2 June 1972, amended and supplemented by Law No 2008/001 of 14 April 2008, Preamble; International Covenant on Civil and Political Rights, Article 11; African Charter on Human and Peoples' Rights, Article 7(1)(b); Criminal Procedure Code, Section 8.

33 Léon Chantal Ambassa, 'La présomption d'innocence en matière pénale', 58 *Juridis* périodique (2004) 43-51.

Once admitted to police custody, the detained person has the right to be examined by a medical doctor. The exercise of this right is at the discretion of the state counsel. It may however be effected upon request of the person in police custody. Such medical examination shall be carried out within 24 hours after the request.[34] It should be noted that, if the detained person himself, his counsel, or his family members requests to have medical examination conducted at the end of the police custody, the medical examination must be done but at his expense and by a doctor of his choice.[35] In all cases he shall be informed of this discretion. The report of the commissioned medical officer shall be put in the suspect's case file and a copy thereof given to him. It may be counter-signed by the medical officer chosen by the person so remanded, who may, where necessary, endorse it with his views.[36]

Detained persons also have the right to receive visits from their lawyer and members of his family or any other person during working hours.[37] Such persons may provide the detained persons with the means of subsistence and other necessities.[38] This is notwithstanding the state's responsibility of feeding persons remanded in police custody.

At the same time, the state has an obligation to guarantee the detained persons the right to human dignity and to physical and moral integrity throughout the proceedings. The Cameroon Constitution, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the African Charter on Human and Peoples' Rights prohibit the use of torture and inhuman and degrading

34 Criminal Procedure Code, Section 123(1) and (2). The importance of the medical examination for at least two reasons: a) on the one hand, the conditions of the arrest, which require that the health of the person in custody be assessed and monitored, in their own interest and in the event that the judicial police officers are subsequently implicated; b) on the other hand, the apparent or known state of health of the person placed in police custody, in particular when they have apparent injuries or report physical suffering or poor health, or when they have significant mental disorders.

35 Criminal Procedure Code, Section 123(3).

36 Criminal Procedure Code, Section 123(3) and (4).

37 Criminal Procedure Code, Section 122(3).

38 Criminal Procedure Code, Section 122(4).

treatment.[39] Suspects must therefore be treated humanely, both materially and morally.[40]

Suspects should not be subjected to any physical or mental constraints, or to torture, violence, threats or any pressure whatsoever, or to deceit, insidious manoeuvres, false proposals, prolonged questioning, hypnosis, the administration of drugs or to any other method which is likely to compromise or limit his freedom of action or decision, or his memory or sense of judgment.[41] Therefore, police officers are prohibited from forcefully extracting confessions from suspects, which can also be denounced before the judge.[42]

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39 African Charter on Human and Peoples' Rights, Article 5.

40 Criminal Procedure Code, Section 122(1)(a).

41 Criminal Procedure Code, Section 122(2). The following circulars from the Minister of Justice are worth mentioning: Circular No 0026/03/032/AP/DAPG of 15 April 2022, prescribing the protection of the physical integrity and image of suspects; Circular No 39/CD of 28 May 2002, requesting state counsels to submit to the Minister of Justice all decisions concerning torture.

42 The case of *The People v Julienne Tonfack and Robert Kamdem* (Judgment No 69/00 of 21 September 2000) illustrates the fact that Cameroonian judges cancel legal proceedings when it is established that they are based on confessions obtained under torture. In this land dispute between Robert Kamdem and Julienne Tonfack, the latter complained to the Dschang investigation brigade, where her brother-in-law, Brigadier Richard Djutio, served as second-in-command, claiming that Kamdem had threatened her and her child with a locally made pistol, firing into the air to intimidate her. Richard Djutio arrested Robert Kamdem. The evidence presented during the trial showed that Richard Djutio subjected Robert Kamdem to inhuman treatment because of his relationship with Ms Julienne Tonfack. The accused was held in police custody for 20 days. This was longer than the legal limits. The accused was beaten several times in a fit to force him to confess. Injured, he eventually confessed. The conditions under which these confessions were obtained constitute a blatant example of a clear and manifest violation of human rights. The court ordered the cancellation of the proceedings against Robert Kamdem pursuant to Instruction Order No 073/MINDEF/062, issued in July 1999 by the Minister Delegate at the Presidency in charge of Defence, and the immediate release of the accused.

In *The People v Mengue Junette and Djessa Jean Dennis* case, the defendants were held in remand in custody for eight days for a theft. During their detention, Ms Mengue was tortured and confessed to committing the offense. The Court of first instance of Abong-Mbang, citing Cameroon's international commitments and domestic law, cancelled the proceedings in a Judgment (No 182/COR) issued on 24 February 2005.

In the case of *The People v Ava Gabriel* (Police Inspector), the defendant was accused of torture. At the hearing on 18 April 2006, he was found guilty by the Court of first

The Cameroonian Criminal Procedure Code also recognises the right to be tried without undue delay.[43] What is regrettable is that detention is becoming the norm[44] and tends to become an early sentence.[45] The CPC specifies the time limits for renewing remand in custody orders, however, it is frequently ignored. This is due to the fact that, the CPC and the other legal texts fail to provide reasonable grounds upon which an examining magistrate may continue to detain a suspect after the expiration of the extended period of detention, thereby leaving the proviso, '… detained for other reasons'[46] open to arbitrariness.

In conclusion, the rights of the accused are not just abstract principles. They are essential safeguards to ensure justice and prevent abuses.

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instance of Garoua and sentenced to six months imprisonment, suspended for three years, and ordered to pay 150,000 CFA francs in damages. This judgment was final.

43 Criminal Procedure Code, Section 221.

44 *Legal Department and Ngouemeni Brigitte v Yamdjeu Marceline*, (unreported), High Court of Wouri, Refusal Order of the 31 May 2022. Indeed, in this order, the examining magistrate closed the preliminary inquiry by stating the sufficient charges against the accused, of having committed forgery of an official act and aggravated false pretences provided for and punishable by Penal Code, Sections 74, 144, 318 (1) (c) and 321. Further, the examining magistrate ordered her referral to the High Court of Wouri, to be tried in accordance with the law. The complaint raised against this decision is that it was issued with great levity, violating Criminal Procedure Code, Section 257 according to which, the no-case ruling shall state clearly and concisely the reasons for the existence or non-existence of evidence against the defendant, as it is provided by Section 7 of Law No 2006/015 of 29 December 2006 as amended and supplemented by Law No 2011/027 of 14 December 2011 on the judicial organisation. Also, nowhere in this decision is it possible to find a reasoning which alludes to the characteristics of the offences retained.

45 The following cases are relevant: Chukwuemeka Nwaoudou Augustine (Nigerian), Remand warrant ordered on 20 April 2023 by the state counsel of the Court of First Instance of Douala-Bonanjo (the trial was still ongoing as of 31 March 2024); Danra Dieu Béni Héritier (Central African), Remand warrant ordered on 22 March 2023 by the state counsel of the Court of First Instance of Douala-Bonanjo (the trial was still ongoing as of 31 March 2024); Mohamed Diallo (Central African), Remand warrant ordered on 28 June 2023 by the state counsel of the Court of First Instance of Douala-Bonassama-Bonaberi (the trial was still ongoing as of 31 March 2024). In this last specific case, it is difficult to understand the remand in custody in a case of illegal immigration for a Central African in Cameroon. This is because there is a free movement of persons instituted by the modified Treaty of the Economic and Monetary Community of Central Africa of 30 January 2009, the Additional Act No 08/CEMAC-CEE-SE of 29 June 2005 relating to the free movement of persons in the EMCCA zone.

46 Criminal Procedure Code, Section 221(2).

However, their effectiveness depends on a political and administrative will, a tight institutional framework and a human rights culture to be developed within the judicial police units[47] and courthouses.

Detainees' procedural rights

Once a person is placed in police custody, they must be informed immediately of the charges against them,[48] and of their fundamental rights. The detained person must be informed of the reason for arrest, their right to remain silent, to legal counsel, and to communicate with family. This obligation to be informed of the charges is a guarantee against arbitrary arrest. The charges shall be given in a language the defendant understands and within a reasonable time to organise their defence. Without legal assistance, the defendant is very vulnerable, exposed to abuse of all kinds, coercion, and unjust judicial decisions.

Judicial police officers must, under the penalty of nullity, note on the police report[49] that these procedural rights have been made known. Additionally, the police report should ensure that both the investigator and the suspect adhere to certain formalities.[50] The same applies to searches.[51] The failure to comply with these formalities shall render the search and seizure null and void.

A person in detention must be brought before the state counsel or the judge within a fairly short timeframe. This right is often not adhered to. There have been instances of persons spending a week or more in police custody without being brought before the state counsel, nor the latter visiting police cells within their jurisdiction to ensure no irregularities are taking place.[52]

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47 Félix Onana Etoundi, 'La responsabilité des membres de la police judiciaire depuis le nouvel Article 132 (bis) du Code de procédure sur la torture', 1 *CADH Intégrité physique et dignité humaine* (1998) 135-148.

48 Criminal Procedure Code, Sections 119(1)(a) and 122(1)(a).

49 Criminal Procedure Code, Section 116.

50 Criminal Procedure Code, Section 90.

51 Criminal Procedure Code, Section 100.

52 Complaint of Mr Lucien Watou addressed to the procureur general to the Court of Appeal of Littoral on the 29 January 2018. Complaint of Mr Hermann Djomo Njanpa

Once detained, the person concerned has the right to appeal against the remand order. They may introduce an appeal before the Inquiry Control Chamber of a competent Court of Appeal[53] or apply for release.[54] This right encourages an objective review of the legality and appropriateness of the custodial measure.[55] In some cases, the Supreme Court even goes so far as to review the decisions of the courts or the judicial investigation. For example, in *Pierre Fabo v Legal Department and Ernest Kontchou* (unreported), after having quashed and annulled the judgment of the trial court, the Supreme Court annulled the order of dismissal of the investigating magistrate, and ordered the resumption of the judicial investigation.[56]

Violation of the rights of persons held in police custody and detainees

Police custody and remand in custody are generally practised in flagrant violation of the fundamental rights of those detained. They are part of a pattern made possible and even encouraged by the configuration of a repressive system. A system is marked by an imbalance between law enforcement powers and jurisdictional guarantees, which creates fertile ground for violations. These two aspects are discussed in turn.

addressed to the procureur general to the Court of Appeal of Littoral Province on the 16 May 2018.

53 Criminal Procedure Code, Sections 267 to 287.

54 François Anoukaha, 'Droit pénal et démocratie en Afrique francophone: L'expérience camerounaise', 22 *Juridis infos* (1995) 71-86.

55 *Ngos Ngos Jacques v Mbadi Banack Luc Destin*, (unreported), Court of Appeal of Centre, Judgment No 36/CI of 11 June 2015; *Succession Mboudou v Ekani Ferdinand and Others*, (unreported), Court of Appeal of Centre, Judgment No 26/CI of 4 June 2015; *Legal Department v Bikie Estelle and Kim Chang Deck*, (unreported), Court of Appeal of Centre, Judgment No 01/CI of 9 January 2014; *General Hospital of Yaounde v Awono Awono*, (unreported), Court of Appeal of Centre, Judgment No 21/CI of 10 August 2010.

56 Supreme Court, Judgment No 30/P of 16 July 2009.

Violations occasioned by the structure of the repressive system

Violations of the rights of people in police custody and remand in custody are not just isolated acts or individual abuses, they are systemic.

The centralised and hierarchical organisation of the criminal justice system[57] concentrates considerable power in the hands of judicial police officers[58] and state counsel,[59] without offering sufficient checks and balances. The state counsel, who is supposed to guarantee the legality of proceedings, often acts as an unjustified accuser rather than a defender of society's interests. This complicity with the judicial police officer[60] fosters a form of connivance that weakens the mechanisms for controlling police custody and remand in custody.[61]

Furthermore, the weakness of jurisdictional guarantees is reflected in the marginal role given to the liberty and custody judge, whose powers are limited and sometimes non-existent in practice. The absence of effective and independent control over decisions to detain or keep in custody prevents a balanced regulation between the imperatives of public order and the protection of individual freedoms. As a result, remand in custody becomes a penal measure, applied systematically, despite the judicial supervision enshrined in the CPC.[62]

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57 The repressive system is made up of all the actors involved in the punishment of criminal offences and the related procedures. Among the actors, we have civil or military courts (bench and legal department, magistrates and court registrars), and the auxiliaries of justice (bailiffs, lawyers, public notaries, judicial police officers). In fact, the repressive system is 'a real theatre where everyone is called upon to play their role properly', N Messanga Atangana, *Pratique des greffes*, Edition MINOS, 2002, 60. See also, LD Ntimba, *Le greffe dans le système répressif camerounais*, Editions Universitaires Européennes, 2011.

58 Criminal Procedure Code, Sections 116-117.

59 Criminal Procedure Code, Section 127.

60 This is an observation based on the lived reality of the authors' respective experiences.

61 *Legal Department v Ngo Dikam Jeanne spouse Mbock Massoda*, (unreported), High Court of Sanaga-Maritime, Refusal Order of 14 June 2023; *Legal Department v Lowe Ngatchou Valmi*, (unreported), Holding Charge of the state counsel of the High Court of Wouri, 13 August 2025. These cases speak to the mechanisms for controlling police study or remand in custody.

62 Criminal Procedure Code, Sections 246-250.

The allocation of budgetary funds to the Ministry of Justice also deserves to be questioned. The funds are often insufficient to enable the various public legal department offices to carry out their supervisory roles effectively.[63] In rural areas, the deputy state counsels are asked to sacrifice this prerogative on the authority of their limited financial and material resources. For the most dedicated, they organise this control at irregular periods, then, the head of the judicial police unit becomes automatically a master of individual freedoms.

In addition, the structure of prison institutions has inherited the martial law logic of the colonial administration. The prison system was conceived not as a system for rehabilitating and preserving the dignity of people who had not yet been found guilty, but as anticipated punishment.[64]

As a result of the treatment meted out by the repressive system, the accused person is socially perceived as guilty. In practice, this means that they are socially marginalised, which justifies denying them their rights when entering and leaving prison. Detainees are not distinguished from convicts, either by the places where they are held or by the treatment they receive. This shift from the presumption of innocence to the presumption of guilt fuels a climate of impunity for the authorities and resignation for those subject to the law. The 2005 Criminal Procedure Code heavily relies on common law elements, notably incorporating *habeas corpus* and an accusatory justice system instead of the predominant French civil law inquisitorial framework, which shifts the burden

63 Law No 2024/013 of 23 December 2024 to lay down the finance law of the Republic of Cameroon for the financial year 2025 Section 78, Chapter 8, provides for a budget of XAF 88,377,782,000 to be divided between the Ministry of Justice and all the national civil courts with the exception of the Supreme Court of Cameroon.

64 Nanfack Cyril Kenfack, 'Le maintien de l'ordre public au Cameroun: Une continuité de la doctrine française de maintien de l'ordre 1955-1971', *Revue d'Études Décoloniales* (2019); J Kingue Mbang Bang 'L'Algérie et le Cameroun dans les guerres de libération nationale de 1954 à 1971: Circulation des hommes, des idées et soutiens logistiques', Unpublished Ph.D Thesis, University of Yaounde I, 2014; E Mvié-Meka, 'La politique camerounaise de défense et de sécurité nationale, 1920-1991: Conceptualisation et dynamique d'un système africain', Unpublished Ph.D Thesis, University Paul-Valery Montpellier III, 1992.

of proof from the accused to the accuser. We have a good illustration in Sections 8,[65] and 584[66] of the Code.

As the bedrock of fair trial criminal proceedings, the principle of presumption of innocence, holds that the prosecution must prove the accused's guilt before a conviction can occur. While the general principle holds that the burden of proof for the accused's guilt lies with the prosecution, there are instances in which the law may require the accused to prove specific facts, as recognised by common law and integrated into Cameroon's harmonised Criminal Procedure Code.

In the case of *Tajuoleen Alabic v State*,[67] for instance, the appellant was convicted of armed robbery by a trial judge who found the evidence insufficient to establish their innocence; however, the Supreme Court later overturned the conviction, emphasising that the presumption of innocence is a fundamental right that does not require the accused to prove their innocence, unlike the previous inquisitorial approach used in the francophone regions of Cameroon.

Notwithstanding the existence of the concept of presumption of innocence, the Law No 97-19 of 7 August 1997 relating to the Control of Narcotic Drugs, Psychotropic Substances and Precursors and to Extradition and Mutual Legal Assistance in Matters of Illicit Traffic in Narcotic Drugs, Psychotropic Substances and Precursors – in flagrant violation of the Constitution and relevant international conventions – establishes presumption of guilt.[68]

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[65] '(1) Any person suspected of having committed an offence shall be presumed innocent until his guilt has been legally established in the course of a trial where he shall be given all necessary guarantees for his defence. (2) The presumption of innocence shall apply to every suspect, defendant and accused'.

[66] '(1) The President of the High Court of the place of arrest or detention of a person or any other judge of the said court shall have jurisdiction to hear applications for immediate release based on grounds of illegality of arrest or detention or failure to observe the formalities as provided by law. (2) He shall also have jurisdiction to deal with applications filed against administrative remand measures. (3) The application shall be filed either by the person arrested or detained or detained or on his behalf by anyone else. Such application shall be unstamped'.

[67] (1993) NWLR (pl 307) 511 and 531.

[68] Section 102(1) provides: '[n]otwithstanding the provisions of Articles 91 and 93, those

The lack of independence of certain courts, coupled with the absence of any real popular or parliamentary control over law enforcement agencies, reinforces this tendency towards systemic and systematic violation of individual rights.[69] Appeal mechanisms remain inaccessible, poorly known and often ineffective.[70]

The laws themselves are often vaguely worded, leaving room for a liberal interpretation by the public authorities, allowing arrests on vague grounds such as 'insulting an official', 'undermining state security', or 'apology for terrorism'. This ambiguity reinforces the discretionary power of the administrative authority, which can arbitrarily decide to take people into custody, sometimes for reasons that have nothing to do with organised crime.[71] All of which considerably weakens the ability of citizens to challenge their deprivation of liberty.

Furthermore, there is duplication of offences in existing laws. Such duplication often causes confusion since the different laws give differ-

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who unlawfully possess, purchase or cultivate plants or substances classified as narcotic drugs or psychotropic substances which, due to their small quantity, can be considered to have been intended for personal consumption, shall be punished [...]'.

69 Annie Minko Ella, 'Le contrôle de privation de liberté des mineurs dans la phase préliminaire du procès pénal au Cameroun', 4(8) *Les Cahiers de l'ACAREF* (2022) 153-167; JB Dikongue,'Les privations de la liberté individuelle au cours du procès pénal en droit camerounais', Unpublished Ph.D Thesis, University of Poitiers, 2000; United Nations Information Service in Geneva, 'Experts of the Committee against Torture Praise Cameroon's Efforts to Prevent Gender-Based Violence, Ask about Alleged Violations of Rights of Journalists and Human Rights Defenders and Prison Overcrowding', United Nations, 14 November 2024.

70 Cameroon second periodic report due on 1992 (Additive), 'Committee against Torture, Consideration of reports submitted by States parties under Article 19 of the Convention, Cameroon, UN Doc CAT/C/17/Add.22 (2000)', 20 November 1999; Marc Stéphane José Mgba Ndjie, 'De l'application du principe du double degré de juridiction en procédure pénale camerounaise', 10(13) *Revista Misión Jurídica* (2017) 93-108; Dominique Junior Zambo Zambo, 'Le nouveau Code de procédure pénale et la victime de l'infraction: À propos de l'enrichissement du «parent pauvre» du procès pénal camerounais', 63(1), *Revue internationale de droit comparé* (2011) 69-108.

71 'The legislator gives no precise definition of organised crime. This begs the question of whether '*organised crime*' *is the* same as '*petty crime*'. What is the criterion for differentiating and assessing such a concept? Does banditry become '*large*' because of the seriousness of the offences committed, the size of the gang of alleged bandits, or the repetition over time of offences of the same nature?' Tametong and Kamgaing, 'Cameroun, un État policier?', 2.

ent punishments for similar offences. The Law No 2014/28 of 23 December 2014 of the Suppression of Acts of Terrorism,[72] for example, duplicates offence of 'non-denunciation of terrorism' which is already in the Penal Code.[73] In the Penal Code, the penalty for the offence is one to five years imprisonment and/or a fine of between CFA francs 50,000 and 5,000,000. In the Law No 2014/28 of 23 December 2014, the punishment is 20 years imprisonment.[74]

The violations of rights in relation to police custody and remand in custody cannot be understood without analysing the violations orchestrated by a repressive system.

Violations orchestrated by the repressive system

Violations of the rights of persons in police custody or remand in custody are not isolated malfunctions of the judicial system. They reveal a deeper reality: the use of the criminal justice system as an instrument of social and political control. Far from being aberrations, these infringements appear to be structural in the operation of the judicial system, which is used to serve the stability of power and the maintenance of the established order. These measures are also manipulated to satisfy the hegemonic fantasies of certain public or private figures.[75]

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72 Law No 2014/28 of 23 December 2014, Sections 7, 9, and 16.

73 Penal Code, Section 107.

74 Ahmed Abba, a Hausa-language journalist at *Radio France International*, was arrested on 30 July 2015, in Maroua while investigating the conflict with Boko Haram in the far north of Cameroon. He was held incommunicado for three months. His trial began on 29 February 2016, before the Military Court of Yaoundé. He was found guilty on 20 April 2016, and sentenced to 10 years of imprisonment on 24 April, under 2014 Cameroon's anti-terror law ('non-denunciation of terrorism' and 'laundering of proceeds of terrorism') and, after nearly two years in custody. After the trial in appeal, the Court of Appel of Centre (in Yaoundé) seating in the military chamber on 21 December 2017, overturned the 10 years' sentence. It reduced his sentence to 24 months, which he has already served. The Court acquitted him of the charge of 'laundering of proceeds of terrorism' but upheld the charge of 'failure to report acts of terrorism'.

75 Criminal Procedure Code, Section 118(2) provides that: '[a]ny person with a known residence may *not*, except in the case of a flagrant crime or offence and where there is serious and corroborating evidence against him, be held in police custody'.

Police custody, an exceptional investigative measure in principle, is deployed in Cameroonian practice as a weapon for neutralising, muzzling, and intimidating any form of dissent. The arrests of protesters, political activists, journalists, or ordinary citizens expressing discontent, illustrate the preventive and punitive but illegal use of this measure. People are usually arrested without a warrant, in complete contravention of the CPC and violation of individual rights.[76]

Police violence often goes unpunished. In the 2008 fuel-price protests, the 2016 strikes by lawyers in Bamenda and Buea, the 2016-2017 anglophone demonstrations, and the 2018 protests by members of the Cameroon Renaissance Movement (CRM), mass arrests and reports of *incommunicado* detentions were documented. Thousands of individuals were detained without any information regarding their whereabouts being disclosed. Some were eventually released weeks, months, and even years later without undergoing any proper trial process, while others continue to suffer in prison.[77]

Numerous young individuals have been apprehended by law enforcement, even from the safety of their own homes, and taken to undisclosed locations. Families have invested significant amounts of money in efforts to locate their loved ones, whose detentions appear to be politically driven.[78]

Judicial police officers, state counsels, and some upper-class citizens often use detention as a tool to settle personal scores. For example, if a young man engages in consensual sex with the upper-class citizens' daughters – both of them being above the age of majority – and she becomes pregnant, the young man is placed in police custody. There are also cases of people[79] being held in police custody without any com-

[76] Amnesty International, 'Cameroun: Des voix réduites au silence', 2023.

[77] Harvey Awah Ambe, 'The trial process under Cameroon criminal law: A critical analysis of constitutional and statutory rights', 8(1) *National Journal of Criminal Law* (2025) 56-73.

[78] Ambe, 'The trial process under Cameroon criminal law: A critical analysis of constitutional and statutory rights', 56-73.

[79] See the cases of Mr Happi Happi Faustin at the Regional Judicial Police Unit of Littoral in March 2023; Mr Bayebeck Jean Baptiste at the 2nd Region of Gendarmerie in July 2024.

plaint or denunciation, and even more so in the absence of a hearing for the complainant.

Remand in custody has been transformed into a silent burial mechanism, making it possible to keep anyone deemed to be a 'nuisance' out of the public sphere. Individuals are thus held in detention for months, even years, before a court finally renders a judgment. A case in point is the one of 'Operation Epervier' detainees where the detainees were held for years without trial.[80] This was contrary to the provisions of the 2011 law,[81] which states that the Special Criminal Court has a maximum of six months to render its decision and may extend by a maximum of three months by order of the President of the Court.[82]

In the case of *The People v Hermann Djiagam,* the High Court of Wouri gave an order for extension of the remand warrant of 13 August 2025. In this case, the examining magistrate in his order reasoned as follows: 'in this case, the preliminary inquiry has not come to an end; that certain inquiry acts necessary to reveal the truth still remain to be carried out; that there is reason to order the extension of the remand warrant order of the above-mentioned person for a period of six months'.[83]

Magistrates of the legal department, judges, and ministers of justice and military justice[84] as well as police and gendarmerie commanders

[80] Gervais Mendo Ze, prosecuted for embezzlement of public funds, was sentenced the 19 March 2019 in Yaoundé by the Special Criminal Court to 20 years in prison and a fine of 15 billion CFA francs to be paid to the public treasury. He was arrested in November 2014 and held in remand in custody at Kondengui Central Prison in Yaoundé. He was found guilty of embezzling 18 billion CFA francs from the National Television Station's operating budgets in 2004 and 2005. Arrested on 29 July 2016, for embezzlement of public funds, the former General Manager of the Cameroon Radio Television (CRTV), Amadou Vamoulké had spent 2 000 days in remand in custody as of 19 January 2022. This situation gave rise to, Opinion No 1/2020 of 29 April 2020 of the Working Group on Arbitrary Detention of the Human Rights Council.

[81] Law No 2011/028 of 14 December 2011 establishing the Special Criminal Court, amended and supplemented by Law No 2012/011 of 16 July 2012.

[82] Law No 2011/028 of 14 December 2011 establishing the Special Criminal Court, Section 10(6).

[83] *The People v Hermann Djiagam*, High Court of Wouri, 13 August 2025.

[84] Interview of Mr Jean de Dieu Momo, Minister Delegate to the Minister of Justice, Keeper of the Seals, on Canal 2 International, Médiatude CMR.

and heads of judicial police departments with special jurisdiction, are often lax or passively complicit in practices that violate the rights of people in police custody[85] or remand in custody. Very few investigations are opened into cases of torture, illegal detention, or police violence. Sometimes, they are insignificant and result in ineffective sanctions.[86]

While repression tends to erode the fundamental rights of detainees, it does not exhaust the legal framework that is supposed to protect them. In response to transgressions, the judicial system and institutional control mechanisms are a determining factor. In this way, violations of fundamental rights and freedoms call, by a mirror effect, for a concrete normative and judicial response. It is from this perspective that the question of restoring rights through sanctions arises, with the aim of not only repairing the damage suffered but also consolidating the rule of law.

Legal sanctions for violation of the rights of detainees and persons held in police custody

Even when detained, the human person enjoys rights.[87] This is what obligates the judicial and administrative police authorities to protect the rights and freedoms of all citizens and not just those of the complainant to the detriment of those of the defendant.

In Cameroon's criminal law, certain reparations are available for violations of the rights of persons in police custody and detainees, thus

85 Circular No 00708/SESI/S of 21 June 1993 relating to abuse and inhuman treatment in police stations; Service note No 01958/SESI/DPJ/S of 1 November 1993 relating to abuse of persons in police custody.

86 Law No 2011/028 of 14 December 2011 establishing the Special Criminal Court Section 10(6).

87 'All life is life,
Any harm caused to a life requires reparation.
Therefore,
Let no one harm his neighbour gratuitously,
Let no one harm his neighbour,
Let no one martyr his fellow man', JAGA (Agence pour la Gouvernance en Afrique), 'La Charte du Mandén'.

giving full meaning to the matrix idea of the rule of law. The next two sections will discuss the punishment for the acts and for the actors, respectively, of violations of rights of persons in police custody and detainees.

Penalties for violations of the rights of persons held in police custody and detainees

The judicial and administrative police operate according to the hierarchical model that structures the centralisation of the Cameroonian administration. The public authorities who exercise these powers must carry out their general supervision, coordination, and control of the activities of staff placed under their authority. The judicial and administrative courts have powers to put an end to arbitrary police custody and remand in custody.[88] These two points are discussed below.

Reparations through the administrative authorities

Under the terms of Section 133 of the CPC, the *Procureur Général* at the Court of Appeal is the Director of Criminal Investigations within their jurisdiction. They report directly to the Minister of Justice. They supervise the work of both judicial procedure officers and state counsels.

In practice, there has been a notable increase in the number of requests for intervention before the legal department, to condemn persistent cases of abusive police custody. As a result, when the defendant or their counsel finds that their rights have been violated by the investigating officers, and in the face of inertia on the part of the state counsel, the defendant may refer the matter to the *Procureur Général*, who issues instructions, pursuant to Sections 133 and 134 of the CPC, to release the applicant. In some offices of the *Procureur Général*, such as those in the Central and Littoral regions, a second reading of the transfer proceedings is carried out to ensure that the state counsel and their judicial police officers are complying with criminal law.

[88] Circular No 90/62 of 18 October 1989 from the Minister of Justice relating to remand in custody.

The *Procureur Général* and state counsels also instruct their deputies and their non-magistrate colleagues to make a positive discrimination in favour of urgent requests concerning the preservation of individual freedoms and complaints of abuses of police custody and remand in custody. In the same vein, prison inspections are carried out by the *Procureur Général* accompanied by the state counsel, to check on the state of detention conditions.[89]

It is also common for various offices of the *Procureur Général* to receive correspondences from the Minister of Justice, whose attention has been drawn to the situation of rights in detention facilities, with instructions to put an end to any violations.

As far as the administrative police are concerned, the governor is the regional director of the administrative police, under whose authority the senior divisional and the sub-divisional officers fall, and whose hierarchy is the minister in charge of territorial administration. In the event of a violation by the authorities under their authority, the governor may issue an order to amend a decision ordering the administrative custody of persons, either issued by a senior divisional officer or a sub-divisional officer.

If the authorities with hierarchical power fail to act, judicial sanction should be considered.

Reparations through the courts

Deprivation of liberty before trial may be sanctioned by judicial or quasi-judicial bodies.

In Cameroon, *habeas corpus* proceedings are instituted before the president of the High Court with territorial jurisdiction or any other judge designated by them. This is done on the basis of a petition lodged by an arrested or detained person alleging that the arrest or detention was unlawful or that the formalities prescribed by law were not observed.[90] The president of the High Court also has jurisdiction to hear

89 Report of the Ministry of Justice on Human Rights in Cameroon in 2022, 236-238.

90 Law No 2006/015 of 29 December 2006 on Judicial organisation, amended and supplemented by Law No 2011/027 of 14 December 2011, Section 18(2)(b).

appeals against administrative custody orders.[91] Administrative action also appears to be a legal means available before the judicial courts to punish the violation described.[92]

The administrative court may hear actions for cancellation of an administrative custody orders on the grounds of violation of a legal provision or regulation and abuse of authority.[93] It may also hear actions for compensation for damage resulting from the illegality of such individual administrative decisions.[94]

The reality on the ground is that the administrative authority interferes in the management of the judicial police in breach of Section 135(3) of the CPC,[95] and leads to reprehensible abuses. For example, by Order No 001480/AP/JO6/SP of 6 August 2025, the Senior Divisional Officer of Mfoundi (seat of the Institutions of Cameroon), ordered administrative custody for 15 days, renewable, for 29 Cameroonian citizens, starting from 4 August 2025, on the grounds that 'the persons concerned are liable to be prosecuted for disturbing public order; gathering; rebellion and incitement to revolt (Monday, 4 August 2025 in Yaoundé)'.

This Order is all the more remarkable in that it is founded upon a mere contingency rather than a legal or factual certainty. According to the Senior Divisional Officer, 'the parties concerned are liable to be prosecuted for …'. Such language amounts to a tacit admission by the administrative authority that it lacks the legal competence to adopt such a measure in the circumstances of the case.

One must further contemplate the scenario where the state counsel – who alone holds the prerogative to exercise prosecutorial discretion – were to conclude that these individuals cannot be prosecuted for any

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91 The *habeas corpus* procedure is set out in Criminal Procedure Code, Sections 584 to 588.

92 Republic of Cameroon, 'Government responses to the Committee against Torture, March 2010', 7; Law No 2006/022 of 29 December 2006 to lay down the organisation and functioning of the Administrative Courts, Section 3(2).

93 Law No 2006/022 of 29 December 2006, Section 2(3)(a).

94 Law No 2006/022 of 29 December 2006, Section 2(3)(b).

95 'Any administrative authority so informed shall be bound to bring such information to the knowledge of the nearest State Counsel or judicial police officer'.

criminal offence whatsoever (whether by reason of a total absence or insufficiency of evidence). In such a situation, what lawful purpose would have been served by this measure of administrative detention?

By so formulating such a decision, the senior divisional officer effectively conditions the legitimacy of his Order upon the mere possibility that the state counsel may, at some later stage, elect to institute criminal proceedings. This reading is confirmed by Article 2 of the Order in question, pursuant to which the Senior Divisional Officer directed the Central Commissioner No 1 of the city of Yaoundé to transmit the file arising from the execution of this measure to the competent state counsel.[96]

In any event, the punishment of acts of violation of the conditions of deprivation of liberty before trial goes hand in hand with that of the different actors.

Punishment of the authors of violations of the rights of persons held in police custody and detainees

Through the misconduct of its agents, the state of Cameroon may be held liable at national and international levels. This liability does not prevent the state from taking action against its agents. It can do this through penalising civil servants. In the next two subsections, this paper will expound on state sanctioning and the state penalising civil servants for violations committed.

Sanctioning the state

The Commission for Compensation of Victims of Illegal Detention,[97] housed at the Supreme Court, hears claims against the state for compensation for the harmful consequences resulting from the misconduct of

[96] Eugène Pascal Parfait Nkili Mbida, 'Et si c'était l'autorité préfectorale qui trouble l'ordre public?', Nk Blog, 18 September 2025.

[97] Criminal Procedure Code, Section 237, the procedure to be followed before it is set out in Sections 236 and 237 of the same Code.

civil servants to whom the law has entrusted the power to order police custody and remand in custody.[98]

At the international level, bodies such as the African Commission on Human and Peoples' Rights, the United Nations Human Rights Committee,[99] are competent to sanction the aforementioned violations. These institutions call into question Cameroon's state responsibility within the relevant human rights instruments.

Penalties for civil servants

Where the state of Cameroon has been held liable by an administrative judge or an international body, it may take action. This allows the state, which has made good the damage in the place of its agent, to take action against the latter in order to obtain reimbursement of the sums paid.

Police officers,[100] gendarmes,[101] forestry and wildlife officers,[102] mining officers,[103] water officers,[104] and environmental officers[105] are considered civil servants. They are subject to the disciplinary regime set out in the General Statute of the Civil Service.[106] Civil servants who exceed

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98 These cases are insightful: *Abate Thomas Magloire v State of Cameroon (Ministry of Justice)*, Application No 07/CI/CS/2020; *Assoualaye Elias v State of Cameroon (Ministry of Defence)*, Application No 31/CI/CS/2020; *Ndode Jeremiah Ebong v State of Cameroon (Ministry of Justice)*, Application No 23/CI/CS/2019; *Boukar Adirtimi v State of Cameroon (Military Justice)*, Application No 42/CI/CS/2020; *Mahamat Bichara v State of Cameroon (Ministry of Defence)*, Application No 35/CI/CS/2020; *Alhadji Tchari Blama Oumate v State of Cameroon (Ministry of Defence)*, Application No 30/CI/CS/2020; *Yakubu Oumar v State of Cameroon (Ministry of Defence)*, Application No 39/CI/CS/2020; *Elongo Joseph v State of Cameroon*, Application No 08/CI/CS/2021.

99 *Albert Womah Mukong v Cameroon* (decision on merits), 458/1991, CCPR (1994).

100 Decree No 2012/539 of 19 November 2012 on the Special Status of the National Police, Sections 89 to 129.

101 Decree No 2001/181 of 25 July 2001 on the Organisation of the National Gendarmerie.

102 Law No 2024/008 of 24 July 2024 Governing Forests and Wildlife, Sections 154 to 162.

103 Law No 2023/014 of 19 December 2023 on the Mining Code, Sections 159 to 164.

104 Law No 98-005 of 14 April 1998 on the Water Regime, Sections 19 to 21.

105 Law No 96/12 of 5 August 1996 on the Framework Law for Environmental Management, Sections 88 to 90.

106 Decree No 94/199 of 07 October 1994 on the General Status of the State Civil Service, with all its amendments, Sections 92 to 110, 121 and 122.

the legal conditions and procedures for remand in custody are liable to disciplinary,[107] financial[108] and criminal sanctions.[109]

With regard to the discipline of magistrates, they are subject to the following sanctions: warning, reprimand, removal from the promotion list, delay in advancement to a higher step for a maximum period of two years, removal from office, demotion in group or grade, temporary exclusion from service for a maximum period of six months, dismissal without suspension or forfeiture of pension rights, and dismissal with suspension or forfeiture of pension rights.[110] State counsels at times, after warning police unit heads on several occasions about their errant ways, decide not to entrust them with investigations.

In criminal law, civil servants who violate the conditions and forms of police custody and remand in custody are liable to imprisonment and fines for aggravation for public servants, false arrest, active corruption and passive corruption, abuse of function, favouritism, refusal of service, murder, grievous harm, torture, assault occasioning death, assault occasioning grievous harm, simple harm, slight harm, constructive force, unintentional killing and harm, forced labour, extortion of disposition or signature, and professional confidence.[111]

Conclusion

The practice of police custody and remand in custody in Cameroon is far removed from the legal requirements of respect for human dignity. It is often observed that these measures to prevent pre-trial detention are used in humiliating and dehumanising ways, compromising the rule of law and social equilibrium. However, there are national and

[107] Law No 2017/012 of 12 July 2017 to lay down the Code of Military Justice, Section 12.

[108] Criminal Procedure Code, Section 236(3).

[109] Criminal Procedure Code, Section 137.

[110] Decree No 95/048 of 8 March 1995 on the Status of the Judiciary, with different amendments, Sections 46 to 62.

[111] Penal Code, Sections 132(1), 291(1), 134, 134(1), 140, 143, 148, 277, 277(3), 278, 279, 280, 281, 285, 289, 292, 308, and 310 respectively.

international mechanisms for sanctioning the state and civil servants in their actions that inhibit the rights of persons in police custody and detainees. It is therefore imperative for them to take ownership of the repressive and reverential legal framework of human rights, in order to ensure that they are respected.[112] Cameroonians have in their hands the tools to humanise themselves.

[112] *Legal department v DJIAGAM Hermann,* (unreported), High Court of Wouri, Order for extension of the Remand warrant of 13 August 2025. In this case, what is regrettable is that, the detainee, despite the examining magistrate's laconic motivation, did not introduce an appeal request before the Inquiry Control Chamber of the Court of Appeal of Littoral (Douala) in the forms and time-limits provided for in Sections 271 (the time-limit for appeal is 48 hours with effect from the following date of service of the said ruling, which was carried out on 14 August 2025) and 274 of the Criminal Procedure Code, in order to have the possibility to sanction this decision and see his right to freedom restored.

A conversation with Tekin Saeko: From Kianjokoma to Kajiado, police brutality and the cross-border crisis of accountability

James Mulei*

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'Language is very powerful. Language does not just describe reality. Language creates the reality it describes'.[1] Desmond Tutu

Abstract

This essay responds to Tekin Saeko's tribute to the Kianjokoma brothers, situating his findings within broader philosophical questions of violence, legitimacy, and justice. Saeko argues that the unresolved trial of the alleged suspects, formerly police officers, in the murder of the Ndwiga brothers, more than three years after their deaths, illustrates how justice in Kenya is routinely deferred, rendering accountability a mirage. Further, he highlights the structural weaknesses of oversight institutions such as the Internal Affairs Unit (IAU) and the Independent Policing Oversight Authority

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1 Bill Moyers, 'Interview with Archbishop Desmond Tutu', *American Archive of Public Broadcasting*, 27 April 1999.

(IPOA), noting that limited mandates, bureaucratic inertia, and political capture frustrate reform and make convictions rare. Building on these insights, this paper seeks to extend the conversation by placing the Kianjokoma murders alongside the killing of journalist Arshad Sharif in Kajiado. By drawing connections between these separate crimes, this paper explores how patterns of delayed justice, institutional weakness, and political expediency exceed national boundaries, revealing cross-border dimensions of accountability. The analysis also introduces the notion of a 'dysfunctioning functioning system' to capture how institutions may operate procedurally yet fail substantively, sustaining wrongful exculpation under the guise of legality. Rather than offering a final answer, this paper opens a philosophical inquiry into how legality and impunity entangle in Kenya's policing, raising questions about whether accountability in such contexts is ever more than a fragile and deferred promise.

Keywords: accountability, impunity, dysfunctioning functioning system, philosophy, police brutality

Introduction

Tekin Saeko's reflection on the Kianjokoma brothers, published in the previous volume of this journal, reminds us of how deeply entrenched police brutality is in Kenya.[2] What we witness is a stark contradiction of Wole Soyinka's reminder that justice is the first condition of humanity, which in Kenya continues to remain unfulfilled.[3] To start with, I find Tekin's approach compelling in its insistence on the embeddedness of violence within policing institutions.[4] His thesis mirrors the Kenyan experience, where the colonial architecture of control was not dismantled but merely rebranded after independence.[5] Like Tekin, I understand police brutality not as an aberration but as a rational outcome of an institution historically designed to protect power rather than people.[6]

Yet, I part ways with Tekin's universalist inclination to locate state violence primarily in institutional pathology through a closer reading of his recommendations.[7] While I agree that institutional design is essential, the Kianjakoma case reveals the equally corrosive influence of political capture and executive manipulation that continues to plague the 'natives'.[8] My argument is that reforming the policing institution without confronting the culture of political and administrative expediency amounts to little more than cosmetic change.

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2 Tekin Saeko, 'An update of the Kianjokoma brothers' case and the struggle for police accountability in Kenya', 3 *Kabarak Law Review* (2024) 255.

3 Wole Soyinka, *The man died: Prison notes*, Rex Collings Publishers, London, 1972, 101.

4 Saeko, 'An update of the Kianjokoma brothers' case and the struggle for police accountability in Kenya', 246.

5 Saeko, 'An update of the Kianjokoma brothers' case and the struggle for police accountability in Kenya', 251.

6 Saeko, 'An update of the Kianjokoma brothers' case and the struggle for police accountability in Kenya', 251.

7 Saeko, 'An update of the Kianjokoma brothers' case and the struggle for police accountability in Kenya', 257.

8 Saeko, 'An update of the Kianjokoma brothers' case and the struggle for police accountability in Kenya', 246-248.

Accordingly, in the sections that follow, I extend Tekin's analysis by situating the Kenyan police within a philosophical continuum of brutality. In doing so, I both affirm and complicate Tekin's thesis while noting that violence is systemic, but arguing that its endurance is actively sustained by those in power and those in charge of granting those affected justice.

Reading about Emmanuel and Benson Ndwiga's ordeal – killed for being outside during the COVID-19 curfews, their murder trial delayed for over three years[9] – I could not help but recall another tragedy that unfolded on Kenyan soil. The killing of Pakistani journalist Arshad Sharif on 23 October 2022 at Kajiado.[10] As I considered these tragedies, I was reminded of Hannah Arendt's observation that violence arises when power is absent, since true authority does not need force to secure obedience. In Kenya, as the Kianjokoma and Kajiado cases show, police 'authority' collapses into violence, revealing a deficit of legitimacy where coercion substitutes for genuine power.[11]

Yet, the murder of the Kianjokoma brothers is not an isolated crime. The killing of Pakistani journalist Arshad Sharif in Kajiado in October 2022 demonstrates how Kenyan policing extends beyond domestic repression into cross-border crises of accountability. Unlike the Ndwiga brothers' case, which exposes delay and inertia in local courts, Sharif's case reveals how opacity and diplomatic deflection compound impunity when international sensitivities are at stake.[12] When placed together, these cases expose what I call a dysfunctioning functioning system; institutions that perform procedurally while failing substantively to deliver justice.

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9 Saeko, 'An update on the Kianjokoma brothers' case and the struggle for police accountability in Kenya', 246-247.

10 Aljazeera, 'Killing of Pakistani journalist Sharif in Kenya "planned": Report', *Aljazeera*, 7 December 2022.

11 Hannah Arendt, 'On violence' in *Crises of the Republic*, New York, Harcourt, Brace & World, 1972, 47-48.

12 Reporters Without Borders, 'Impunity looms one year after Arshad Sharif's murder in Kenya', 23 October 2023.

Achille Mbembe's reflections on postcolonial sovereignty further illuminate how legality and violence entwine, creating a political order where impunity is normalised rather than aberrant.[13] I build on these insights to argue that police violence in Kenya should not be seen as the failure of rogue officers or weak institutions alone, but as the expression of a deeper grammar of governance where political expediency sustains compulsion.[14] By political expediency, I mean making a decision or taking an action because it is convenient, advantageous, or beneficial in the short term for political gain, rather than because it is right, just, or principled.

Three interlinked questions frame this inquiry. First, how do delayed trials impose not only legal but also psychological and social violence on victims' families, eroding the promise of justice? Second, why do police oversight bodies like Independent Policing and Oversight Authority (IPOA) and the Internal Affairs Unit (IAU) enact investigative rituals while withholding findings or avoiding prosecution, thereby masking inaction under the cover of compliance? Third, why is police violence tolerated, indeed, at times incentivised when officers anticipate political protection during elections and protests? Addressing these questions, I situate Kenya's crisis of accountability within both domestic and cross-border contexts, advancing a philosophical reading of policing as a system that functions procedurally but fails substantively, producing an enduring justice mirage.

Crossfire or cross-border injustice: Remembering Arshad Sharif

Many dream of speaking truth to power and leaving behind a legacy of courage. For most, it remains a distant ideal. For a few, it becomes their life's defining struggle. Arshad Sharif was one such figure. As a

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13 Teo Ballvé, 'On the postcolony', Territorial masquerades, 3 August 2011. See more generally, Achille Mbembe, *On the postcolony*, University of California Press, 2001, 25.

14 Reporters Without Borders, 'Impunity looms one year after Arshad Sharif's murder in Kenya', *Legal Framework and Justice System Violence against Journalists News*, 16 November 2025.

fearless investigative journalist, he carried his pursuit of truth beyond Pakistan, notably through his investigations into military corruption and state overreach. This often placed him at odds with political and security elites.[15] On 23 October 2022, while he was living in self-imposed exile in Kenya, he was fatally shot in Kajiado county. At the time of his death, Sharif was a passenger in a Toyota Land Cruiser travelling along Magadi Road when Kenyan police officers opened fire.[16]

Authorities later explained that the officers had been pursuing a stolen Mercedes Benz Sprinter van reported in Pangani, Nairobi, and claimed to have mistaken Sharif's vehicle for the suspect van.[17] The Inspector General of Police publicly described the shooting as an a case of 'mistaken identity' and expressed regret, assuring the public that investigations would be conducted.[18] IPOA also announced that it would initiate prompt inquiries into the matter.[19]

Despite these assurances, little progress was made. Sharif's widow, along with journalists' associations in Pakistan and Kenya, repeatedly petitioned for accountability, arguing that no serious investigations had been carried out and no prosecutions had been initiated against the officers responsible. Multiple letters sent by the family through their counsel to Kenyan authorities seeking updates went unanswered.[20] Petitioners alleged violations of Sharif's constitutional rights, particularly his rights to life, dignity, and fair treatment under the Constitution of Kenya.[21] They accused state authorities of failing in their duty to conduct timely, independent, and effective investigations, thereby perpetuating a culture of impunity.

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15 Wesley Dockery, 'Exiled Pakistani reporter shot dead in Kenya', *Press Freedom Pakistan*, 24 October 2024.

16 *Javeria Siddique w/o Arshad Sharif and 2 others v Attorney General and 4 others*, Constitutional Petition E009 of 2023, Judgment of the High Court in Kajiado, (2024) [eKLR] para 3.

17 *Siddique w/o Arshad Sharif and 2 others v Attorney General and 4 others*, para 4.

18 *Siddique w/o Arshad Sharif and 2 others v Attorney General and 4 others*, para 4.

19 *Siddique w/o Arshad Sharif and 2 others v Attorney General and 4 others*, para 4.

20 *Siddique w/o Arshad Sharif and 2 others v Attorney General and 4 others*, para 85.

21 *Siddique w/o Arshad Sharif and 2 others v Attorney General and 4 others*, para 8.

Nearly two years after Arshad Sharif's tragic death in Kajiado, Kenya, justice remains elusive. The circumstances surrounding his killing and the subsequent lack of meaningful investigative outcomes and judicial action have deepened the grief of his family and drawn criticism from national groups such as the Kenya Association of Journalists.[22] The Sharif case makes clear that the dysfunction that I describe is not confined to Kenyan citizens but extends to non-citizens, raising questions of international trust in Kenya's institutions.

On 8 July 2024, the High Court in Kajiado ruled that the use of lethal force against Sharif was unlawful and unconstitutional, ordering the Kenyan government to pay 10 million Kenyan shillings in compensation to his widow, Javeria Siddique.[23] This decision was later partly upheld by the Court of Appeal in 31 July 2025, which affirmed the compensation amount and interest until full payment is made.[24] The High Court had also issued a mandatory order requiring the respondents to update the petitioners on the status of investigations, including IPOA and the Director of Public Prosecutions (DPP)'s recommendations, and the identities of the police officers suspected of the murder.[25] However, the respondents failed to comply during the Court of Appeal proceedings, which showcased that they had fallen into the entrenched practice of bureaucratic stalling.

At the High Court, the petitioners had sought to enjoin the IPOA as a respondent in the Ksh 10 million compensation claim arising from the killing of journalist Arshad Sharif and they succeeded.[26] They argued that IPOA bore partial responsibility for the violation of rights due to its alleged failure to take prompt or effective action in investigating

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22 *Independent Policing Oversight Authority v Siddique w/o Arshad Sharif and 6 others*, Civil Appeal E802 of 2024, Judgment of the Court of Appeal at Nairobi, (2025) [eKLR] para 4.

23 *Siddique w/o Arshad Sharif and 2 others v Attorney General and 4 others*, para 107(g).

24 *Independent Policing Oversight Authority v Siddique w/o Arshad Sharif and 6 others*, para 110-11. This decision while upholding the sum given by the trial court, excluded the Independent Policing Oversight Authority from paying it by holding it was not jointly and severally liable.

25 *Siddique w/o Arshad Sharif and 2 others v Attorney General and 4 others*, para 107(f).

26 *Siddique w/o Arshad Sharif and 2 others v Attorney General and 4 others*, paras 106-07(g).

the matter and ensuring accountability of the implicated police officers. In response, IPOA moved to the Court of Appeal to challenge its joinder, contending that it had fulfilled its statutory mandate.[27] The delay in prosecutorial action was attributable to the DPP's deliberations rather than any inaction on IPOA's part.

However, the Court of Appeal noted that IPOA had failed to disclose the identities of the police officers involved in Sharif's killing to the applicants and the action the state organs responsible for prosecution intended to take. This was a disclosure that the Authority ought to have provided to ensure transparency and accountability in the investigative process.[28]

These gaps in communication and transparency left the family and the public with unanswered questions and deepened the sense of frustration over the slow wheels of justice. In many ways, this mirrors what happened in the Kianjokoma case; in both instances, victims' families were caught in a limbo, forced to navigate institutional inertia while the state's promise of accountability remained largely unfulfilled. The patterns of delay and procedural compliance without substantive justice reveal a continuity in the Kenyan system. A continuity where the machinery of law moves, but too often fails those it is meant to protect.[29] By examining these cases together, we begin to see that the failure to act decisively is not merely bureaucratic but deeply political, affecting both domestic and international perceptions of justice.

When time becomes punishment

Ali Mazrui once discerned that African societies which developed cultures of monuments, brick, and mortar were often more technolog-

[27] *Independent Policing Oversight Authority v Siddique w/o Arshad Sharif and 6 others*, para 111.

[28] *Independent Policing Oversight Authority v Siddique w/o Arshad Sharif and 6 others*, para 100.

[29] Jürg Helbling, Walter Kälin and Prosper Nobirabo, 'Access to justice, impunity and legal pluralism in Kenya', 2(47) *The Journal of Legal Pluralism and Unofficial Law* (2015) 349.

ically sophisticated than pastoral societies, yet this did not necessarily make them more humane.[30] I observe that this paradox of advancement speaks to our own justice system. The more elaborate and procedural it becomes, the more it risks entrenching cruelty in more subtle forms. Justice in this case is not denied outright but endlessly deferred. The long wait becomes the first punishment and the belated verdict a second. This often makes me question its worth. More so, when it comes only after time itself has already condemned us.

The Sharif case, like Kianjokoma, illustrates how punishment operates through time. To understand this, we must return to Foucault's insight that modern power operates not only through spectacular punishments but also through subtle techniques that manage time, procedure, and expectation.[31] Foucault's theory of punishment reveals that the decline of spectacular, barbaric punishments in medieval Europe was not driven by a new moral concern with time or rational justice, but by transformations in how power circulated between rulers, nobility, and subjects.[32] Punishment moved from the visible cruelty of the scaffold to the seemingly neutral operation of prisons, where discipline was embedded in procedures, surveillance, and everyday regulation.[33]

What changed was less the severity of punishment than the social logic behind it. The nobility no longer displayed raw violence but instead embedded control within institutions that managed relations between people under the guise of good governance and order.[34] The execution of Marie Antoinette in 1793 further exemplifies this logic. Her trial and death by guillotine were less about her individual guilt than about displaying the sovereignty of the revolutionary state.[35] From this, I note that just as Antoinette's execution was a theatre of sovereignty, these policing oversight bodies equally become theatres of sovereign-

30 Ali Mazrui, *The Africans: A triple heritage*, Little Brown & Company, Boston, 1986, 73.

31 Michel Foucault, *Discipline and punish: The birth of the prison*, Random House, New York, 1977.

32 Foucault, *Discipline and punish*, 149.

33 Foucault, *Discipline and punish*, 120-122.

34 Foucault, *Discipline and punish*, 149.

35 Hilarie Beloc, *Marie Antonette*, GP Putnam's Sons, New York & London, 1925, 535.

ty but through procedural delay, masking the absence of substantive justice: a spectacle designed to demonstrate control rather than pursue truth.

This dynamic is not confined to Europe. In Kenya, the colonial state imported the court and prison systems not as mechanisms of rational justice but as instruments of control.[36] These institutions were designed less to serve justice for the colonised than to legitimise authority through elaborate procedures that masked violence with legality.[37] IPOA and prolonged murder trials today illustrate this colonial inheritance. Justice is often delayed or denied not through outright spectacle, but through procedural rituals, adjournments, missing files, endless inquiries that give the appearance of law while entrenching impunity.[38] In both the Kianjokoma and Sharif cases, power is exercised not by resolving conflicts swiftly but by staging justice as a slow performance that sustains authority.

Through this, we see that in Kenya, the meaning of law is unstable. This is because different authorities cannot fully control or legitimise it. Instead, law becomes a struggle over who decides what is public or private, individual or collective, African or foreign, shaped less by clear rules than by overlapping histories.[39] For Kenyan institutions like IPOA, it means their authority is not self-evident or stable. They are constantly negotiating their legitimacy in a contested legal and political environment, where the state can easily gut them out, and the people may never trust their effectiveness.

Having read time in the postcolony, Mbembe reminds us that it is neither linear nor progressive, but suspended, repetitive, and en-

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36 Alex Thomson, *An introduction to African politics*, Routledge (2nd edition), New York, 26.

37 Thomson, *An introduction to African politics*, 26.

38 Isaac Amuke, 'Who is policing the police? Kenya's lame duck oversight mechanism', 5 December 2019. Tekin Saeko notes this in relation to the Ndwiga brothers, see, Saeko, 'An update on the Kianjokoma brothers' case and the struggle for police accountability in Kenya', 247-48.

39 Isaac Amuke, 'Who is policing the police? Kenya's lame duck oversight mechanism'.

tangled.[40] This frame illuminates how Kenyan justice through policing oversight bodies, operates and folds time into loops of waiting. Justice here is not denied outright, but endlessly postponed, always 'coming soon'. Never fully arriving. Citizens are not only subjected to physical violence or bureaucratic procedure, but to temporal violence. They are trapped in an endless present of suspension.[41]

In this sense, I perceive that the policing oversight procedures resemble what Mbembe calls the entanglement of postcolonial time. A space where power consolidates itself by managing anticipation, delay, and the very rhythm of justice. I deduce that it is not simply that discipline embeds itself in procedure, but that time itself is weaponised, staging justice as a slow, unending performance that sustains authority rather than resolves conflict.[42]

If I follow Derrida's insistence that justice is always 'a venir', endlessly deferred yet sustaining the horizon of law's legitimacy, then the policing system performs a cruel inversion that simultaneously imitates and betrays this promise.[43] Postponement here is not the openness of futurity but the foreclosure of possibility, a temporal regime where the future is emptied out in advance, and the act of waiting becomes indistinguishable from punishment itself.[44] Yet, the paradox cuts deeper. The very différance that for Derrida secures justice's ethical infinity is here consumed by power. Thus, deferral no longer gestures to responsibility but to domination.[45]

What is deferred is not justice but the subject who waits, suspended between recognition and abandonment. Mamdani's account of bifurca-

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40 Ballvé, 'On the post colony'.

41 Paddy O'Halloran, 'Transcending myth: A reading of Achille Mbembe's "On the postcolony"', *The Franz Fanon Blog*, 14 October 2014.

42 Foucault, *Discipline and punish*, 210.

43 Jacques Derrida, 'Force of law: The mystical foundation of authority'; Rucilla Cornel, Michel Rosenfeld, and David Gray Carlson (eds) *Deconstruction and the possibility of justice,* Routledge, London, 1992, 27.

44 Ballvé, 'On the post colony'.

45 Derrida, *Deconstruction and the possibility of justice*, 6.

tion sharpens this irony.[46] But even his distinction falters once translated into time. Those who wait as 'citizens' and those who wait as 'subjects' are not two opposed categories but two modalities of the same temporal violence, differentiated not by rights but by endurance. In this sense, 'justice' deconstructs itself, its promise of arrival depends on its non-arrival, and its credibility depends on the very waiting that erodes trust.

I can only conclude that trust, then, is not simply lost but rendered structurally impossible, since to trust the law is already to misrecognise delay as imminence and suspension as resolution. It is precisely here that I hesitate, I cannot bring myself to trust a system that feeds on my anticipation, that turns patience into subjugation and hope into a mechanism of control. To trust such a system is not faith but complicity, and I would rather live with doubt than lend my belief to a justice that never arrives.

The dysfunctioning functioning system and oversight as a performance of justice

A central disjuncture of modern governance is that institutions often endure not because they succeed, but because their very dysfunction becomes a mode of functioning.[47] When I turn to John Mbiti, I find his account of African time deeply provocative. Mbiti insists that time is not an abstract mathematical continuum, but an event-based reality. He teaches that the present (*sasa*) flows into the past (*zamani*), and the future is not an endless horizon but a short, foreseeable stretch, perhaps six months or two years ahead.[48] As he puts it, 'time does not move, only events come and go'.[49]

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46 Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, Princeton University Press, New Jersey, 2018, 17.

47 Tom Goodfellow, '"The bastard child of nobody"? Anti-planning and the institutional crisis in contemporary Kampala', Crisis States Working Papers Series No 2, 8-9.

48 John S Mbiti, *African religion and philosophy*, Praeger Publishers, New York, 1970, 28.

49 Mbiti, *African religion and philosophy*, 28.

I see in this not a deficiency, as critics like Newell Booth and Benjamin Ray have suggested with their charge of 'reversed teleology,' but a reorientation. An insistence that meaning lies in lived events rather than in abstract chronology.[50] This event-based way of thinking about time resonates with Mogobe Ramose's philosophy of *Ubuntu*, where being itself is an ongoing event of living with others.[51] From this vantage point, I begin to question institutions that 'function' on paper yet remain vacuous in practice. These institutions tick forward in bureaucratic time, but they do not move with the pulse of communal life.

This makes me wonder, what does it mean for a system to endure without truly serving its purpose? If, as Mbiti argues, time becomes real only through events, then an institution that fails to produce justice is timeless in the raw sense of the word, as in bereft of time. The violence of forceful sedenterisation visited upon the Somali and Borana communities during the Shifta Wars led them to precisely call this period *gaf Daba,* literally, 'when time stopped'.[52]

Such a system of deferred 'justice' is suspended, circling itself without substance. In that suspension, families and communities are left in a state of limbo, enduring the psychological, financial, and social toll of a justice that never materialises.[53] Its survival is not proof of vitality but of inertia. Ramose deepens this point when he reminds us that being is always being-with and justice that is not shared among all dissolves into contradiction.[54] A system that functions in form but fails in essence becomes a void presence. It exists, yet it negates the very communal life it was meant to affirm. In this sense, dysfunction does not merely accom-

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50 Newell S Booth, Jr quoting Mbiti, 'Time and African beliefs revisited', in Jacob K Olupona and Sulayman S Nyang (eds) *Religious plurality in Africa: Essays in honour of John S Mbiti,* Mouton De Gruyter, Berlin and New York, 1993, 84.

51 Ada Agada, 'Nietzsche and Ramose on being and becoming: An exercise in cross-cultural philosophising', 6(1) *Journal of World Philosophies* (2021) 5.

52 See Sean Bloch 'Stasis and slums: The changing temporal, spatial, and gendered meaning of "home" in Northeastern Kenya', 58(3) *Journal of African History* (2017) 403-23.

53 Mbiti, *African religion and philosophy*, 28.

54 Ada Agada, 'Nietzsche and Ramose on being and becoming: An exercise in cross-cultural philosophising', 5.

pany function. It becomes the very mode through which the institution lives on, sustained by the denial of its own promise.

Kenya's policing oversight bodies reveal such an enigma. These institutions established to curb abuse often end up legitimising it, functioning less as mechanisms of accountability than as theatres where justice is rehearsed but barely performed.[55] In the *Arshad Sharif* case, the Court of appeal noted the IPOA is the 'Wanjiku's watch man', a recognition that seemed to affirm its democratic mandate.[56] Yet this very designation situates the irony at the heart of oversight. While formally entrusted with guarding the public interest, such bodies often deliver only procedural compliance, withholding the substantive disclosures and decisive actions that accountability requires.[57]

What I perceive then is that substantive disclosure would, for instance, entail releasing full investigative findings including forensic evidence, timelines of police conduct, and internal communications. This aids families and the public to confront not merely that 'an inquiry was done' but what it revealed.[58] The absence of such disclosure in cases like the Kianjokoma murders, where trial delays obscure evidence, or in the killing of Arshad Sharif, where contradictory reports from Kenyan and Pakistani authorities deepened confusion, suggests that the failure is not accidental. It emerges from political interference and bureaucratic inertia, each of which ensures that accountability remains a performance rather than a practice.

As Africans, from an *Ubuntu* worldview, this dysfunction is especially stark. *Ubuntu* insists that 'I am because we are', showcasing that dignity, justice, and accountability are never private goods but communal conditions of existence.[59] Yet in practice, Kenya's accountability

[55] Amuke, 'Who is policing the police? Kenya's lame duck oversight mechanism'.

[56] *Independent Policing Oversight Authority v Siddique w/o Arshad Sharif and 6 others*, para 30.

[57] *Independent Policing Oversight Authority v Siddique w/o Arshad Sharif and 6 others*, para 100.

[58] *Independent Policing Oversight Authority v Siddique w/o Arshad Sharif and 6 others*, para 100.

[59] Sakiemi Idoniboye-Obu and Ayo Whetho, 'Ubuntu: "You are because I am" or "I am because you are"?', 20(1) *Alternation* (2013) 243.

structures fracture this ethic, making the experience of 'justice' episodic, felt only by those immediately affected, while the wider community remains untouched. This works in contradiction to the principle that all should have a voice in determining whether a justice system is advantageous to them or not.[60]

Put differently, from both the Arshad Sharif and Kianjokoma cases, even as these contradictions weigh heavily, we continue to trust the very institutions that betray us. Why? Because trust, in this sense, is not naïve belief but a wager of hope. To abandon trust altogether would be to abandon the communal horizon that *Ubuntu* calls us into: the conviction that 'I am because we are'.[61]

If we ceased to trust, we would tacitly concede that justice is impossible in common; that life together is condemned to fragmentation. It is this scenario that defines our condition, institutions endure not because they deserve trust, but because our hope in them is the only way to preserve the possibility of a shared life.[62] And yet, as the Sharif and Kianjokoma cases show, the system inverts *Ubuntu's* maxim into a cruel parody which truncates to 'you are because you suffer'.

Oversight, which should affirm collective security, becomes privatised, making injustice visible only to those who directly endure it. Justice thus appears not as a guarantee for all but as an accident of misfortune. The question, then, is not simply whether we can trust, but whether those who preside over such systems would act differently if they, too, were subjected to the very accountability they so easily defer. What then I recognise is that the measure of *Ubuntu* today is whether we can transform institutions so that suffering is not the only bond that reveals our shared humanity.

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60 Philip Ogo Ujomu and Felix Olatunji, 'Philosophical reflections on social justice and social order in postcolonial Africa', 5(2) *Lex Humane* (2013) 132.

61 Idoniboye-Obu and Whetho, 'Ubuntu: "You are because I am" or "I am because you are"?', 243.

62 Idoniboye-Obu and Whetho, 'Ubuntu: "You are because I am" or "I am because you are"?', 243.

We suffer because the system has made violence ordinary

Frantz Fanon warned us that colonial violence was never simply about domination of the body. It reshaped the mind, the imagination, and the very structures through which society organises life.[63] Colonial policing did not merely enforce order but inscribed fear as the grammar of authority.[64] What is unsettling is that this grammar has outlived formal colonialism.

Police brutality in Kenya still bears the imprint of that inheritance, where violence masquerades as legality and the baton or the bullet continues the colonial task of disciplining populations rather than protecting them. What is worse, however, is that this violence is no longer foreign, it is now natives brutalising their own. Kenyan police against Kenyan citizens, a haunting proof that colonial brutality has survived by wearing our face.[65]

Fanon never treated violence as one-dimensional. It was, for him, both the coloniser's pathology of domination and the colonised's horizon of liberation.[66] Violence stripped of its emancipatory potential was mere subjugation where violence reappropriated by the oppressed could become the crucible of freedom. When I look at police brutality in Kenya, I see this tension replayed in a distorted form. Violence no longer gestures toward liberation, it has been captured by the postcolonial state and turned inward against its own citizens.[67] Here lies the deepest inversion, what Fanon diagnosed as the coloniser's logic of control has been internalised as our own logic of governance.

The persistence of police violence in Kenya raises deeper questions about the very foundations of the state's authority. If law is to embody the will of the people, then Kenya's legal order, rooted in the reception

63 Frantz Fanon, *The wretched of the earth*, Grove Press, New York, 92-94.

64 Fanon, *The wretched of the earth*, 38.

65 Fanon, *The wretched of the earth*, 38.

66 B K JHA, 'Fanon's theory of violence: A critique', 49(3) *Indian Journal of Political Science* (1988) 360-363.

67 Amuke, 'Who is policing the police? Kenya's lame duck oversight mechanism'.

date of 12 August 1897, complicates this claim. On that day, the British Crown decreed that all statutes of general application in England passed before 12 August 1897 would be applicable in Kenya, unless repealed by local legislation.[68]

This arrangement effectively subjected Kenya to a vast body of English law, making the task of repeal nearly impossible and ensuring that, despite independence, Kenya's legal foundations remain tethered to colonial authority.[69] From my view, symbols such as the national flag and national anthem gesture toward independence, yet the underlying juridical order suggests that compulsion, rather than consent, continues to ground the authority of the Kenyan state.

But philosophically, this is where the tragedy deepens. The coloniality of policing is no longer imposed from without. It is not 'ours' in origin, yet we have adapted its taste to fit our own governance, normalising forms of violence once meant to secure democracy as now the routine language of state order.[70] What the colonial state invented as control, the postcolonial state sustains as necessity. Brutality becomes not merely a borrowed violence but a domesticated one, claimed as part of our own authority.[71]

Internationally, the picture is equally bleak. Fanon anticipated that colonial violence would not remain confined to its original borders but would seep into the global order – in this case Kenya.[72] Today, we witness its normalisation. From Kianjokoma to Kajiado, Kenya to Pakistan, state brutality is narrated as the defence of sovereignty, security, or democracy. When Kenyan police kill peaceful protestors and unarmed

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68 T Cashmore, 'Studies in district administration in the East Africa Protectorate (1895-1918)', Unpublished PhD Dissertation, Cambridge, Jesus College, 1965, 17.

69 Cashmore, 'Studies in district administration in the East Africa Protectorate (1895-1918)', 17-22.

70 Ali Mazrui, 'Who killed democracy in Africa? Clues of the past, concerns of the future', IX (1) *Development Policy Management Network Bulletin* (2002) 18.

71 Patrick Gathara, 'Kenya's police violence is colonial and institutional, as well as political', *The New Humanitarian*, 26 June 2025.

72 Eunice N Sahle, 'Fanon and geographies of political violence in the context of democracy in Kenya', 42(3-4) *The Black Scholar* (2012) 48.

civilians, their actions cannot be understood as isolated local excesses. Rather, they are performances in a global theatre of state violence, following a script drafted in colonial times and continually rehearsed in contemporary systems of policing and control worldwide.

A troubling fact however, is that this violence has lost the dialectical edge Fanon once saw in it. When police beat protestors, they do not simply negate the humanity of those they strike, they also negate their own humanity by becoming instruments of inherited domination.[73] In this way, coloniality of being is revealed: the officer denies the humanity of others because he has already been alienated from his own, reduced to a function of power rather than a subject of dignity.[74]

Colonial policing was never neutral. Its function was always political, designed to secure the interests of empire rather than the dignity of the colonised.[75] The colonial policeman was not merely an enforcer of law but an instrument of rule, embodying the violence through which authority was made visible and subjects were kept in line. What disquiets me is how little this has changed. In Kenya today, when police beat protestors or terrorise communities during elections and protests, they do not act as aberrations of democracy but as its shadow, performing violence with the quiet assurance that they will be shielded by political authority.

Philosophically, I see in this an unsettling economy of violence. The officer does not strike only to disperse a crowd; he strikes to announce loyalty. Brutality becomes a performance of allegiance to the state, an enactment of excess that communicates fidelity more clearly than words ever could. In this sense, violence is not accidental but transactional, the officer offers violence, and the ruling class reciprocates with protection. The baton or the bullet becomes a kind of political currency, a token of

[73] Fanon, *The wretched of the earth*, 266-268.

[74] Fanon, *The wretched of the earth*, 266-268.

[75] Aghamelu Fidelis and Ejike Emeka, 'Understanding Fanon's theory of violence and its relevance to contemporary violence in Africa', 3(4) *An African Journal of Arts and Humanities* (2017) 25-26.

exchange between the governed and the governors, where what circulates is not justice but impunity.

But herein lies the philosophical tragedy, violence corrodes not only the victim but also the perpetrator. By acting with the expectation of political protection, the police officer does not simply negate the protestor's humanity, he also relinquishes his own. He becomes less a subject and more an instrument, less a citizen than a weapon deployed by the political class. Fanon warned that colonial violence reduced the colonised to 'things'.[76] What I perceive today is an inversion of this warning, in offering themselves to the state as agents of repression, police officers risk becoming 'things' too, husks of violence, alienated from their own humanity.[77]

This is why oversight bodies often appear so impotent. They are not simply bureaucratically weak but structurally bound to the same logic. As my paper relays, institutions charged with accountability frequently defer to political authority rather than restrain it. Their compliance is not a failure of will but a reflection of the same transactional economy, to regulate violence is to risk disrupting the flow of loyalty that sustains the state. Thus, impunity is not an accident of dysfunction but a structural feature of institutional governance itself.

Conclusion

What I draw from Kianjokoma and Kajiado is that police brutality is not a failure of law but its antithesis. Not an aberration of democracy but its performance. Colonial violence has been domesticated, and its currency of loyalty still circulates between officers and political elites. Yet, if brutality corrodes the humanity of both the victim and the perpetrator, then it also corrodes the very possibility of politics as a shared life. Philosophically, I think our task is not merely to demand reform but to reclaim the measure of justice itself. To me, this requires a refusal

[76] Fanon, *The wretched of the earth*, 266-267.

[77] Fanon, *The wretched of the earth*, 267.

of the colonial tastes we have normalised, the preference for order over justice, for survival over freedom. Until we decolonise this inheritance, accountability will remain a mirage. The true challenge is whether we can reimagine governance so that the bond of our common life is not suffering, but dignity.

I do not offer recommendations here, because to prescribe within the same structures that breed and sustain brutality is to risk reproducing their logic. To recommend reform in a system whose very survival depends on dysfunction is to accept the grammar of delay and proceduralism that this paper has critiqued. Instead, I leave the reader with a philosophical horizon, that justice must be reimagined altogether. Not as a pretentious performance of sovereignty, but as the affirmation of our shared humanity.

Climate justice unpacked: A review of the 2025 Inter-American Court of Human Rights and International Court of Justice advisory opinions on environment, human rights and state obligations

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Abstract

The Advisory Opinion OC-32/25 *by the Inter-American Court of Human Rights (IACtHR) in response to a request by the Republic of Colombia and the Republic of Chile delimited the individual and collective obligations of American states in climate emergency matters within the framework of the American Convention of Human Rights. Although this advisory opinion reaffirms the obligation of states under international law to address climate change and redefines the limits of environmental law and social justice, this opinion touches on only a small part of the problem. Additionally, the applicable legal framework – particularly the principles of state responsibility*

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for breaches of obligations to protect the climate system, as reflected in the International Court of Justice (ICJ) advisory opinion on climate change – merits close attention. Further, these proceedings reveal the interaction between law, science, nature, and society.

Keywords: state responsibility, environmental law, advisory opinion, Inter-American legal system, climate emergency

Introduction

On 29 May 2025, the Inter-American Court of Human Rights (IACtHR) issued a landmark *Advisory Opinion (OC-32/25)*[1] clarifying the obligations of states under three regional human rights treaties: the American Convention on Human Rights (the American Convention), the American Declaration of the Rights and Duties of Man, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador).

The Republics of Chile and Colombia, which will be subsequently referred to as the requesting States, sought to strengthen climate governance and influence global climate justice by moving the IACtHR to delimit and interpret Articles 1(1), 2, 4(1), 5(1), 8, 11(2), 13, 17(1), 19, 21, 22, 23, 25, and 26 of the American Convention; Articles 1, 2, 3, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the Protocol of San Salvador; and Articles I, II, IV, V, VI, VII, VIII, XI, XII, XIII, XIV, XVI, XVIII, XX, XXIII, and XXVII of the American Declaration of the Rights and Duties of Man.

Since American states lack strong domestic and cross-border legislation to hold national governments and enterprises accountable, the IACTHR is pioneering the establishment of a legal framework for climate justice in the hemisphere. Through their request for an advisory opinion, the requesting states aimed to invite the Inter-American Court to expound on its *Advisory Opinion (OC-23/17)*[2] on the *Right to a Healthy*

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1 The climate emergency and human rights (Interpretation and scope of Articles 1(1), 2, 4(1), 5(1), 8, 11(2), 13, 17(1), 19, 21, 22, 23, 25 and 26 of the American Convention on Human Rights, 22 November 1969, OAS No 36; 1, 2, 3, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 17 November 1988, OAS No 69 (Protocol of San Salvador); and I, II, IV, V, VI, VII, VIII, XI, XII, XIII, XIV, XVI, XVIII, XX, XXIII, and XXVII, of the American Declaration of the Rights and Duties of Man, 2 May 1948, OAS Res XXX), *Advisory Opinion AO-32/25*, Series A No 32, IACtHR (29 May 2025).

2 The environment and human rights (state obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17, Series A No 23, IACtHR (15 November 2017).

Environment which outlines the individual and collective obligations and responsibilities of state parties to the above-mentioned treaties to address the climate crisis.

This request for an advisory opinion pushed for extraterritorial obligations, mandating states to regulate companies and prevent the causation of harm beyond the borders of the requesting States. To this effect, *Advisory Opinion (OC-32/25)* confirms that states are legally bound to tackle climate change by defining how they can be held responsible for 'climate inaction'.[3]

The role of the Inter-American Commission on Human Rights in the Inter-American System

The Charter of the Organisation of American States (OAS), adopted in 1948, outlines the primary function of the Inter-American Commission of Human Rights as to 'promote the observance and protection of human rights'.[4] This mandate of 'protection' encompasses the authority to receive and adjudicate cases pertaining to human rights. Consequently, all American States parties to the OAS Charter acknowledged the jurisdiction of the Commission and the IACtHR to assess individual complaints regarding alleged human rights violations in their jurisdiction.

Additionally, in instances where some American states that have not ratified the American Convention, both the IACtHR and the Inter-American Commission have the mandate to determine whether there has been a breach of the American Declaration.[5] Further, it is noteworthy that although the American Declaration was not legally binding at the

[3] *Advisory Opinion AO-32/25*, IACtHR, Section VI, paras 217-629.

[4] Charter of the Organisation of American States, Article 106.

[5] See *Garza v United States*, Case 12.243, Inter-American Commission of Human Rights, *Report No.1255, OEA/ser.L/V/II.111, doc. 20 rev. P.60* (2001); Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, *Advisory Opinion OC-10/90*, IACtHR.

time of its adoption, it has since evolved into an instrument providing legal obligations for OAS member states.[6]

By 1967, the American Declaration was the sole human rights instrument in existence whose existence coincided with the amendment of the OAS Charter. Thus, under the authority of Article 29(d) of the American Convention,[7] the Inter-American System empowers the Inter-American Commission to receive and examine petitions alleging violations of the human rights enshrined in the American Declaration against states that are not parties to the American Convention.[8]

Notably, the competence of the Inter-American Commission to address human rights violations persists even where a state has not ratified or where a state has denounced the American Convention[9] (such as the Republic of Trinidad and Tobago). Additionally, the Inter-American Commission's mandate to oversee the observance of human rights persists even when a state is suspended or withdraws from the OAS. The Inter-American System ensures that all treaties ratified by a member state remain valid even if the state decides to withdraw from the OAS, as illustrated by the cases of the Bolivarian Republic of Venezuela and the Republic of Nicaragua.

The International Court of Justice (ICJ) in its advisory opinion of 23 July 2025,[10] determined state obligations under international law[11] and customary international law.[12] The ICJ determined that the Kyoto Protocol and Paris Agreement expanded the general mitigation obligations

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6 See Diego Rodríguez-Pinzón, 'Precautionary measures of the Inter-American Commission on Human Rights: Legal status and importance', 20(2) *Human Rights Brief* (2013) 13.

7 Restrictions Regarding Interpretation: 'No provision of this Convention shall be interpreted as: (…) d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have'. American Convention on Human Rights of 1969, Article 29.

8 *Rules of Procedure of the Inter-American Commission of Human Rights*, Article 51 (1).

9 American Convention on Human Rights, Article 78.

10 *Obligations of states in respect of climate change (Advisory Opinion)*, ICJ, General List No 187 (23 July 2025).

11 *Obligations of states in respect of climate change*, ICJ, paras 174-270.

12 *Obligations of states in respect of climate change*, ICJ, paras 272-315.

of states contained in the United Nations Framework Convention on Climate Change (UNFCCC), especially those outlined in Article 4. The duty of states to prevent significant harm to the environment,[13] and the duty to cooperate[14] reflect the degree of care expected of each state (for example by providing financial assistance and facilitating technology transfer and capacity building). These principles align with the treaty-based cooperation obligations of good faith and due diligence.

This commentary explores the significant legal transformation of climate justice prompted by these recent advisory opinions. This commentary argues that the IACtHR has redefined state responsibilities by framing climate inaction as a human rights violation and a failure of due diligence. In addition, the ICJ's interpretation that greenhouse gas (GHG) emissions are a form of marine pollution defines GHGs as transboundary harm and establishes a basis for state accountability.

Finally, this analysis delves into the specific climate change implications facing vulnerable states, particularly small island developing states in the Caribbean. This commentary also assesses the legal instruments that provide a framework for pursuing climate justice and analyses the current challenges related to climate justice enforcement and capacity.

Some key findings of the IACtHR Advisory Opinion

The IACtHR in *Advisory Opinion AO-32/25* builds on the jurisprudence in *Advisory Opinion (OC-23/17)* and classifies state obligations into two groups of rights, 'those whose enjoyment is particularly vulnerable to environmental degradation harmful to the individual, also identified as substantive rights, and the procedural rights whose exercise contrib-

[13] *Obligations of states in respect of climate change*, ICJ, paras 352-353; United Nations Convention on the Law of the Sea, Article 206.

[14] *Obligations of states in respect of climate change*, ICJ, paras 350-351; United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, Article 197.

utes to sound environmental governance'. [15] Substantive rights cover the right to life, personal integrity, and health, while the second group refers to freedom of expression, access to information, and participation in decision making. These rights may have a greater effect on vulnerable populations,[16] such as indigenous peoples and those living in extreme poverty. Additionally, the IACtHR stated that climate change disrupts the right of human beings to enjoy a dignified existence.[17]

The IACtHR *Advisory Opinion (OC-32/25)* is especially relevant since the IACtHR has enforcement power over the OAS,[18] unlike the ICJ. These proceedings provide a framework that states can use to fulfill their environmental law and climate justice obligations, thereby acting as a backdrop for the implementation of both short-term and regional level policy changes at the regional level.

Under IACtHR jurisprudence, the lack of effective environmental governance and protection efforts can be considered a violation of human rights. This allows individuals and communities to sue states in their domestic jurisdictions for failure to put in place adequate environmental protection measures. The IACtHR stated that environmental degradation and climate change directly threaten substantial and procedural rights under international human rights law, such as the right to life and indigenous peoples' rights.[19]

Additionally, the IACtHR reinforced the right to a healthy environment as a standalone right by stating that '[e]ach Party shall guarantee the right of every person to live in a healthy environment and any other

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15 *Advisory Opinion AO-32/25*, IACtHR, para 26; *Advisory Opinion OC-23/17*, IACtHR, para 64.

16 *Advisory Opinion OC-23/17*, IACtHR, para 67.

17 *Advisory Opinion AO-32/25*, IACtHR, para 90.

18 Adoption of precautionary measures under Article 25 of the *Rules of Procedure of the Inter-American Commission of Human Rights*. See also, Rodríguez-Pinzón, 'Precautionary measures of the Inter-American Commission on Human Rights: Legal status and importance', 13.

19 San Salvador Protocol, Articles 4 and 5; American Convention on Human Rights, Article 21.

universally recognised human right …'.[20] The IACtHR also stated that to the right to a clean and healthy environment is rooted in intergenerational human rights and justice.[21]

The IACtHR further determined that we are in a 'triple planetary crisis'[22] of climate change, pollution, and biodiversity loss which threaten the lives and well-being of millions of people. Thus, states should be held accountable for transboundary and cross-border harm caused by their lack of climate policies, this will ensure that states fulfill their extraterritorial and intergenerational responsibilities.

Advisory Opinion (OC-32/25) states that due diligence is a general obligation of state parties,[23] in accordance with Article 1(1) of the American Convention, regional human rights law,[24] and the right to a healthy environment. The IACtHR observes that the principle of due diligence is customary law in the Americas. State obligations under due diligence, even in the absence of scientific certainty, require states to adopt effective measures to prevent serious harm to the environment.[25] Failure to comply with their duty to prevent environmental harm creates new risks of serious human rights violations.

Enforcement gaps are expected due to the reliance on the principle of common but differentiated responsibilities. ITLOS reflected that measures must be taken 'individually or jointly as appropriate' within due diligence[26] in accordance with Article 194 of United Nations

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20 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and Caribbean, 4 March 2018, C.N.195.2018, Article 4.1.

21 Maria Antonia Tigre, 'The right to a healthy environment in Latin America and the Caribbean: Compliance through the Inter-American System and the Escazú Agreement', in Christina Voigt and Caroline Foster (eds) *International courts versus non-compliance mechanisms: Comparative advantages in strengthening treaty implementation*, Cambridge University Press, 2024, 262-284.

22 *Advisory Opinion AO-32/25*, IACtHR, para 42.

23 *Advisory Opinion AO-32/25*, IACtHR, para 224.

24 *Advisory Opinion AO-32/25*, IACtHR, paras 269-457.

25 *Advisory Opinion AO-32/25*, IACtHR, para 229.

26 See *Responsibilities and obligations of States with respect to activities in the Area,* (AO) ITLOS Reports 2011, 43, para 117*; Climate Change,* (AO) ITLOS Reports 2024, 91, paras 239 and 399; *Obligations of states in respect of climate change*, ICJ, paras 194, 343 and 349.

Convention on the Law of the Sea (UNCLOS).[27] Thus, the discretion of states to regulate within the limits of their capabilities does not exempt states from legal accountability. The IACtHR and the ICJ denote that states are expected to act within their governance capacity, although the limits should not be used as a pretext for delay or inaction. Preventive action under scientific uncertainty requires states to refrain from acting rather than acting in ways that might contribute to environmental harm within their jurisdiction.

The IACtHR detailed that states have the duty to notify and consult with each other in good faith if there is a risk of transboundary harm, therefore, reaffirming the special obligations of states towards the protection of vulnerable states.[28] Similarly, these proceedings reaffirmed the duty to cooperate under international customary law, especially when addressing activities that could cause environmental harm and affect vulnerable populations and coastal or inland territories.

Private individuals, companies, and the climate emergency

The IACtHR affirmed that 'companies are called upon to play a fundamental role in addressing the climate emergency'.[29] Failure to meet these duties exposes states to legal claims based on both domestic climate laws and international rulings.

Environmental impact assessments and cooperation are continuous obligations, and states must take preventive measures to reduce environmental risk, even in the absence of scientific certainty. Whether a particular activity poses a risk of significant harm depends on the probability and foreseeability of the occurrence of the said harm. The magnitude of the risk should be determined by assessing the risk.[30]

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27 *Obligations of states in respect of climate change*, ICJ, paras 345 to 349. Citing *Request for an advisory opinion submitted by the Commission of Small Island States on climate change and international law* (AO) ITLOS, para 199, paras 206-207, and para 241.

28 United Nations Convention on the Law of the Sea, Article 194(2).

29 *Advisory Opinion AO-32/25*, IACtHR, para 345.

30 *Obligations of states in respect of climate change*, ICJ, para 298: 'the cumulative and diffuse nature of GHG emissions may involve some difficulty in risk assessment, (…) all

For instance, the bioaccumulation effect of heavy metals due to different acts undertaken by states and private individuals in their jurisdiction, such as releasing unprocessed wastewater and agricultural by-products, which have negative consequences on the environment such as the destruction of fisheries, is significantly harmful.

The IACtHR compels states to ensure that private individuals comply with climate responsibilities within their obligations under international law. States are obliged to regulate, supervise, and monitor private individuals that 'entail risks for the human rights recognised in the American Convention'.[31] The IACtHR states that the American states must act with 'enhanced due diligence' to comply with their obligations and responsibilities in the context of climate change.[32] Thus, it is necessary to assess and monitor all risks, adopt preventive measures, and integrate science with the human rights perspective for effective policies. Further, states can be held responsible for failing to regulate private individuals.

Some key findings of the ICJ's Advisory Opinion

The 2025 ICJ advisory opinion identified the principles under the UNCLOS which is one of the most relevant instruments in the climate justice system. Similarly, the International Tribunal for the Law of the Sea (ITLOS) relied on the UNCLOS principles in its advisory opinion[33] that addressed climate governance.[34] Articles 192 and 194 of UNCLOS outline the duty of states to take all necessary measures to protect and

States provide for and conduct EIAs with respect to particularly significant proposed individual activities contributing to GHG emissions to be undertaken within their jurisdiction or control'. Citing *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Reports 2010, para 205.

31 *Advisory Opinion AO-32/25*, IACtHR, para 230.

32 *Advisory Opinion AO-32/25*, IACtHR, para 236.

33 *Request for an advisory opinion submitted by the Commission of Small Island States on climate change and international law* (Advisory Opinion) ITLOS No 31 (21 May 2024).

34 *Obligations of states in respect of climate change*, ICJ, paras 336-440.

preserve the marine environment, including preventing, reducing, and controlling marine pollution.

One of the key findings of the ICJ in its advisory opinion was that that climate justice provisions are not *lex specialis* and do not 'override' general international law.[35] This interpretation holds significant weight in resolving ambiguities in international law principles. For instance, principle of state responsibility relied on in the advisory opinions overrides the state sovereignty principle since the state responsibility principle requires the use of collaborative actions to mitigate emissions and reduce transboundary harm.

The ICJ described the climate crisis as an 'urgent and existential threat',[36] where inaction (or lack thereof) of relevant measures is in breach of state obligations, constituting an internationally wrongful act.[37] In line with this, the ICJ in its 2025 advisory opinion provides an authoritative interpretation of the extent to which states can be held accountable for transboundary climate harm by classifying GHG emissions as a form of marine pollution.[38] Further, the ICJ affirmed obligations on GHG-emitting states to take specific measures to comply with the provisions of UNCLOS, the Paris Agreement, and international customary law. This is a step forward for climate justice especially for the most vulnerable states, particularly the small island developing states.

The ICJ through its 2025 advisory opinion seeks to influence climate litigation by linking climate justice inaction to transboundary harm. The ICJ found that the effects of climate change 'significantly impair' the fulfillment of human rights.[39] Further, the ICJ stated that the duty to prevent significant harm to the environment[40] and cooperate for environmental protection[41] aligns with international human rights

35 *Obligations of states in respect of climate change*, ICJ, paras 162-171.

36 *Obligations of states in respect of climate change*, ICJ, para 73.

37 *Obligations of states in respect of climate change*, ICJ, para 207.

38 *Obligations of states in respect of climate change*, ICJ, paras 339-368.

39 *Obligations of states in respect of climate change*, ICJ, paras 376-382.

40 *Obligations of states in respect of climate change*, ICJ, paras 132-139.

41 *Obligations of states in respect of climate change*, ICJ, paras 140-142.

law, including the right to life, food, health, and a clean environment. The ICJ took into consideration the principle of *common but differentiated responsibilities (CBDR)*[42] of states as well as international customary law obligations which are applicable to all states, regardless of the extent to which states have ratified climate treaties.[43]

Under the *Pulp Mills on the Uruguay River (2011)*[44] and *Costa Rica v Nicaragua (2015)*[45] cases, the ICJ clarified that sovereign rights do not allow states to avoid their due diligence obligations to ensure that all activities within their jurisdiction do not cause significant harm to shared natural resources and other states.[46] Due diligence is a standard conduct, and climate inaction is a breach of due diligence. The duty to prevent significant harm to the environment is not passive, therefore, due diligence requires the putting in place of active measures to avoid transboundary impacts. In defining GHG emissions as marine pollution, the ICJ lays the legal basis for the argument that states are required to adopt all necessary measures to mitigate their climate change effects.

Vulnerability of small island states and the climate emergency

With respect to small island states, the ICJ affirmed that 'once a state is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood.'[47] Although the ICJ did not elaborate further, loss of territory due to rising sea-levels would not discontinue the legal status of small island and developing states. In the American system, Caribbean small island and developing states face an unparalleled risk of climate change, with nearly 22 million peo-

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42 United Nations, United Nations Framework Convention on Climate Change (UNFCCC), 9 May 1992, 1771 UNTS 107, Article 2(1).

43 *Obligations of states in respect of climate change*, ICJ, para 315.

44 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (merits) ICJ Reports 2010, para 205. Similarly, in paragraph 197, the ICJ defined environmental obligations as due diligence obligations.

45 *Certain activities carried out by Nicaragua in the border area (Costa Rica v Nicaragua)* (merits) and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (merits) ICJ Reports 2015, para 104.

46 *Obligations of states in respect of climate change*, ICJ, paras 297 to 299.

47 *Advisory Opinion AO-32/25*, IACtHR, para 363.

ple living below six meters above sea level.[48] The intensity of extreme weather events has already displaced thousands of people and caused billions of dollars in losses in the region.

Caribbean small island and developing states are highly vulnerable to transboundary harm, and despite enforcement gaps persisting due to limited capacity, the IACtHR places greater responsibility on developed American States, but encourages developing states and Caribbean small island and developing states to take all feasible measures[49] through regional cooperation and enforcing climate policies.[50]

Enhanced due diligence requires American States to assess and mitigate environment related risks. While the common but differentiated responsibilities principle acknowledges disparities in states' contributions to climate change, it does not absolve Caribbean small island and developing states of their duty to act[51] within their governance capabilities to safeguard vulnerable populations. By upholding their responsibility, Caribbean small island and developing states[52] have assumed global leadership by addressing the issue of loss and damage and requesting climate justice through dedicated funding mechanisms to compensate for their irreversible losses.[53] The IACtHR Advisory Opinion provides legal leverage for vulnerable states to demand climate justice and protect their people.

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48 Adrian Cashman and Mohammad Nagdee, 'Impacts of climate change on settlements and infrastructure in the coastal and marine environments of Caribbean small island developing states (SIDS)', *Caribbean Marine Climate Change Report Card: Science Review* (2017) 155-173.

49 *Advisory Opinion AO-32/25*, IACtHR, paras 258 to 265.

50 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 1983; OAS, 'Inter-American Climate Change Action Plan 2023-2030,' OAS/Ser.K/XLIII.4, 4 October 2023; CARICOM, Declaration for Climate Action, CARICOM, 2015. Amended on 26/07/2024.

51 *Advisory Opinion AO-32/25*, IACtHR, paras 258-265.

52 Ali Serim, 'The vital role of small island developing states (SIDS) at COP29', Ministry of Foreign Affairs of the Commonwealth of the Bahamas, 10 November 2024.

53 Barbados' Bridgetown Initiative.

Conclusion

The *IACtHR Advisory Opinion (OC-32/25)* and the ICJ's advisory opinion of July 2025 mark a transformative shift in climate justice by determining state obligations and explicitly linking climate inaction as a human rights violation under the American legal system. The IACtHR rulings reinforce the extraterritorial responsibilities of states to regulate private individuals and prevent transboundary harm under both treaties and international customary law.

The enforcement mechanism of the IACtHR provides a greater compliance framework than the ICJ's guidance, enabling domestic law and regional litigation for climate justice. These proceedings build upon and reinforce legal principles with a triad of authoritative interpretations on climate responsibility, therefore, strengthening the legal basis for regional accountability.

For Caribbean small island and developing states, these rulings are pivotal as they validate claims of reparations for loss, reinforce special protections for vulnerable populations, extend statehood and open a potential legal basis for 'climate refugees'. However, enforcement gaps remain due to asymmetrical capacities, thereby necessitating regional cooperation and financial and technical support from developed states. Ultimately, the IACtHR empowers individuals and vulnerable groups to demand climate justice through legal channels, compelling states and private business to align with human rights-based climate governance, and, providing the region with unprecedented legal tools to safeguard its people and ecosystems in an era of climate emergency.

Proportionality on the 'lite': The Kenyan Supreme Court's fatalism in the *Fatma Athman Abud (FAAF)* case

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Abstract

This case commentary discusses the recent Supreme Court of Kenya decision in Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others *which, sitting at the intersection of religious pluralism and the right to equality, has elicited quite the public discourse. This commentary forwards three main arguments: first is that the Supreme Court of Kenya, the Court of Appeal, and, to a large extent, the High Court in this case failed to apply Islamic law to resolve the contending claims in the case. This failure is mainly influenced by the relegation of Islamic law to the status of retrogressive culture that the colonial doctrine of repugnancy aimed to check. The second claim is that the Supreme Court did not correctly distinguish between 'limitations' and 'derogations' in the Kenyan 2010 Constitution's Bill of Rights. This terminology and doctrinal inaccuracy affected the general trajectory of analysis, especially on the chosen standard of the review of proportionality. Lastly, the Supreme Court in*

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this case, for the first time, introduced the famous four-part proportionality test through a 'side-door' as the appropriate standard of review. This commentary concludes by arguing that although the general outcome of the case has been celebrated as progressive, the outcome is still questionable since the path of reasoning by the Supreme Court is faulty.

Keywords: proportionality, Islamic law, limitations, derogations, religious pluralism, Supreme Court of Kenya, right to equality, repugnancy doctrine

Introduction

The Kenyan Supreme Court rendered its decision in *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others* on 30 June 2025.[1] The decision has been lauded and condemned in equally forthright language in different circles. On the one hand, commentators of 'the total' constitution have lauded the decision as a big win for the right to equality under the Constitution of Kenya, 2010.[2] On the other hand, others, especially commentators who practice the Islamic faith, have condemned it as a death knell to the limited exception on the application of equality in the Bill of Rights granted to Islamic law and principles under Kenya's post-2010 constitutional arrangement.[3]

The central issue of the case was the extent to which the right to equality in Article 27 of the Constitution of Kenya, 2010 can be limited by the 'limiting' clause in Article 24(4) of the Constitution. The Supreme Court is thus correct when it notes at the beginning of its decision that the case 'sits at the intersection of religious pluralism and the right to equality'.[4]

I make three core claims in this short commentary: the first is that the Supreme Court of Kenya, the Court of Appeal, and, to a large extent, the High Court in this case failed to apply Islamic law to resolve the contending claims in the case. This failure is mainly influenced by the colonial logic that relegated Islamic law to the status of retrogressive culture that should be checked by the colonial doctrine of repugnancy.

The second claim is that the Supreme Court did not correctly distinguish between 'limitations' and 'derogations' in the Kenyan 2010 Constitution's Bill of Rights. This terminology and doctrinal inaccuracy affected the general trajectory of the analysis, especially on the chosen standard of the review of proportionality. This false start did not, how-

1 Petition No E035 of 2023, Judgment of the Supreme Court at Nairobi, eKLR.

2 Joshua Malidzo Nyawa, 'From the cold to the fold: Kenya's Supreme Court enclasps rights of "illegitimate" children in Islamic succession', *WordPress.com*, 30 June 2025.

3 Constitution of Kenya (2010), Article 24 (4).

4 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 1.

ever, affect the choice of the proportionality test that the Court eventually settled on, since the Court correctly selected the four-part proportionality test that is typically applied to the analysis of the limitations of rights found in human rights instruments.

The third core claim is that in this case, the Supreme Court for the first time introduced the famous four-part proportionality test as the appropriate standard of review. However, the Supreme Court introduced this proportionality test through a 'side-door'. Even so, the Court misapplied the test. Based on these three arguments, the decision cannot be celebrated as a breakthrough since the process of arriving at the decision was one fraught with serious reasoning deficiencies.

This essay proceeds as follows: the first sub-section offers a very brief fact pattern of the case by focusing on ten core specific facts. The first sub-section also briefly discusses how the previous courts before the Supreme Court, that is the Court of Appeal and High Court, engaged with the vital question of the applicable law. I show that only the High Court, to a limited extent, engaged with aspects of Islamic law, with the Court of Appeal and Supreme Court completely failing to engage with Islamic law. This failure is tacitly linked to the High Court's introduction of the repugnancy doctrine.

The second sub-section discusses the Supreme Court of Kenya's failure to distinguish between the doctrines of limitations and derogations leading to a false analytical start; with the Supreme Court engaging with irrelevant provisions of international and easily distinguishable case law. The third sub-section analyses how the Supreme Court introduces through a 'side-door', fails to apply, and misapplies the principle of proportionality. This essay concludes by holding the view that in this case the end cannot justify the means. Although the general outcome of the case has been celebrated as progressive, the outcome is still questionable since the path of reasoning by the Supreme Court is faulty.

Brief factual analysis

There are about ten critical pieces of fact established in the entire litigation. The first is that the deceased, Salim Hakeem Juma Kitendo, was a Muslim man who died intestate and might have been polygamous at some points of his married life. The second is that he celebrated his first uncontroverted Islamic marriage with Fatuma Athman Abud Faraj on 4 August 2006. The third is that all four children they bore were born within wedlock and would, according to Islamic law, be entitled to an inheritance.[5]

The fourth is that Ruth Faith Mwawasi, the presumptive second wife, has the following four children: SJ, born on 14 July, 1998, LK, born on 8 October, 2003, HK, born on 26 November, 2006 and TK, born on 12 September, 2007.[6] One of Ruth Faith's children, SJ, is not the deceased's biological child.[7] The deceased and Ruth Faith Mwawasi started cohabitation in the year 2000 and formalised[8] their Islamic marriage in 2011. The fifth is that all three of Ruth Faith Mwawasi's children were also born before her Islamic wedding but within her cohabitation, that is before 2011.[9] The sixth is that there is no evidence that those three children are not the deceased's biological children.

The seventh is that the only child of the third respondent, Marlin CP's, in this case was also born out of wedlock but arguably within her cohabitation period with the deceased, since the child was born only six months after Marlin and the deceased's alleged Islamic wedding. The eighth is that there is also no evidence that Marlin's child is not the deceased's biological child.[10]

Thus, cumulatively, we can reach a ninth factual conclusion that outside of the contested issues of the legitimacy of marriages and their

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5 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 2.

6 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 3.

7 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 3.

8 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 3 and 13.

9 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 3 and 13.

10 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 6.

dissolution, eight of the nine children involved in this case are more probably than not the deceased's biological children. Finally, we can also conclude that if the concerns about the legitimacy of marriage are raised, it is possible that only four of the eight biological children of the deceased would be born within wedlock.

Islamic law as 'repugnant' culture?

The Supreme Court's finding in paragraph 41 of its judgment that: 'the superior courts below were cognisant of the provisions of Section 2(3) of the Law of Succession Act and thereby applied Islamic law to determine the beneficiaries of the deceased's estate who indisputably professed Muslim faith' is inaccurate and is not supported by a faithful reading of the High Court and Court of Appeal's decisions. The High Court had found that Islamic law would apply in the case 'to the extent that it was not repugnant to justice and morality'.[11]

The introduction of the 'repugnancy clause' to limit the application and effect of Islamic law is not supported by any law or legal reasoning. It, for lack of a better description, appears out of thin air. It is not only unsupported by any persuasive reasoning, but also has the effect of relegating Islamic law to a cultural practice that must be disciplined by this colonial clause, whose presence in Article 159(3)(b) of the Constitution of Kenya, 2010 is itself unfortunate and arguably retrogressive.

Regardless of this position, neither the High Court nor the Court of Appeal fully applied Islamic law in this case as contended by the Supreme Court. The High Court found that a deceased Muslim's biological child (whether born out of wedlock or not) should be a dependant as required by Section 29 of the Law of Succession Act. This is not an application of Islamic law but an act of forcefully applying statutory law onto Islamic law. The High Court justifies its position as follows:

[11] *In re Estate of Salim Juma Hakeem Kitendo (Deceased*), Succession Cause No 200 of 2015, Judgment of the High Court at Mombasa, (2022) eKLR, para 61.

> This is because the child is innocent and should not be left to suffer out of his or her parents' mistakes. Indeed, choices have consequences and the prudent and inevitable thing a court of equity must do to uphold justice for all is, to recognise such a child as a dependant hence a beneficiary of the estate to the extent allowable under Sharia law. See Quran Sura 4:8 which recognises that, 'if other near of kin orphans and needy are present at the time of division of inheritance give them something of it and speak to them kindly'. It is therefore clear from the Quran that such cases of dependants are also entitled to part of the inheritance.[12]

This finding is a cursory and an after-the-thought use of Islamic law to justify a position the Court already finds plausible that is; a court of equity's view on justice for all. Furthermore, the Court of Appeal's reasoning does not mention any part of Islamic law but directly places the Islamic law position, under the scrutiny of the anti-discrimination provision in Article 27 of the Constitution.[13]

Although Islamic law is the *lex specialis*, the justification or reasons for the apparent discrimination of children born out of wedlock are not interrogated within Islamic law, instead, this rule is immediately placed under the yardstick of the right to equality and freedom from discrimination in Article 27 of the Constitution.

Article 24(4), which specifically limits this right in favour of Islamic law rules on inheritance, only appears when the Court of Appeal approvingly cites *CKC & another (Suing through their mother and next friend JWN) v ANC*.[14] This case is, however, distinguishable from *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others.* The distinction between these two cases is on the basis of the threshold requirement; that not all the parties in *CKC & another v ANC*, unlike in *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, were professing the Islamic faith. Basically, the Court of Appeal ignored Article 24(4).[15]

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12 *In re Estate of Salim Juma Hakeem Kitendo (Deceased*), para 98.

13 *FAAF v RFM and 2 others*, Civil Appeal E043 of 2022, Judgment of the Court of Appeal at Mombasa, (2023) eKLR, paras 57 onwards.

14 Civil Appeal 121 of 2018, Judgement of the Court of Appeal at Mombasa, (2019) eKLR 2.

15 Nyawa, 'From the cold to the fold: Kenya's Supreme Court enclasps rights of "illegitimate" children in Islamic succession'.

The Court of Appeal's rhetorical position that, '[I]t is our view that culture that is harmful to a child in the sense that it denies such a child his or her otherwise right to parental care and protection on the ground of marital status of the father and the mother cannot be countenanced'.[16] This again, confirms the petitioner's suspicion that the Court treated Islamic law as culture and subjected it to the colonial yardstick of repugnancy while using the non-absolute equality provisions of the Constitution of as a straw man.

The non-distinction of limitations and derogations in the Bill of Rights

The Supreme Court's finding in paragraph 40 of its judgement, that Article 24(4) creates a limited constitutional derogation from the equality provisions of the Bill of Rights to permit the application of Islamic personal law in specified areas – namely, personal status, marriage, divorce, and inheritance, is inaccurate and mixes up the doctrinal distinction between derogations and limitations.

A derogation in the bill of rights of most constitutions means a 'temporary suspension (or limitation) of certain rights under exceptional, crisis-like circumstances such as during a state of emergency, disturbances, disasters, and conflicts'.[17] A limitation means a 'justifiable restriction, infringement, or exclusion on the exercise of a right guaranteed in a human rights instrument or constitutional bill of rights'.[18]

Their corollary opposites are non-derogable rights which are rights that cannot be suspended temporarily even under crisis conditions (these rights, such as the right to life, can have in-built limitations), and rights that are absolute which are rights that cannot be infringed, limit-

16 *FAAF v RFM and 2 others*, para 62.

17 Gemmo Bautista Fernandez, 'Within the margin of error: Derogations, limitations, and the advancement of human rights', 92 *Philippine Law Journal* (2019) 4, 8.

18 Gemmo Bautista Fernandez, 'Within the margin of error: Derogations, limitations, and the advancement of human rights', 4, 8.

ed, or excluded for any reason, including general public interests. They include the freedom from torture, cruel, inhuman or degrading treatment or punishment. However, not all absolute rights are non-derogable.[19]

There is a small category of rights that occupy a special status in international law and form part of *jus cogens* norms that neither permit limitations nor derogations. These include the right or freedom from torture, cruel, and inhuman treatment or degrading treatment or punishment; and the prohibition of slavery and servitude.[20]

Thus, the distinction between derogation and limitation lies on the 'temporary' nature and the requirement of 'crisis-like' conditions for derogations, both of which are not required for limitations. This distinction might seem otiose since the result of both concepts is the restriction of the protected right. However, in application, the implications of these two concepts are in many cases widely different.

Article 24 of the Constitution can be termed as a limitation and not a derogation of the right to equality. The Supreme Court refers to Article 24(4) as a derogation numerously in its judgement.[21] However, Article 24 (4) is not a blanket limitation; it has internal safeguards to ensure that no actor violates the right to equality in a cynical and calculated way while invoking Article 24(4). The provision states as follows:

> The provisions of this Chapter [Bill of Rights] on equality [Article 27] shall be qualified to the extent strictly necessary for the application of Islamic law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

The Supreme Court reasons that the expression 'qualified to the extent strictly necessary' is a formulation common in international human

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19 Viktor Mavi, 'Limitations of and derogations from human rights in international human rights instruments', 38 *Acta Jur Hng* (1997) 107, 110.

20 Alex Conte, 'Limitations to and derogations from Covenant rights', in Alex Conte and Richard Burchill, *Defining civil and political rights: The jurisprudence of the United Nations Human Rights Committee* (2nd Ed) Ashgate, 2009, 39-64.

21 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, paras 40, 43, 44, 51.

rights conventions.[22] The Court makes two references, the first to Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) and the second to Article 15(1) of the European Convention on Human Rights (ECHR).[23] Unsurprisingly, both references are to the main derogation regimes of these two international human rights instruments.

The first reference the Court offers is Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) that states:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation …

The Supreme Court goes ahead to further its reasoning through General Comment No 29 on Article 4 of the ICCPR that links the notion of the 'extent strictly required by the exigencies of the situation' to the principle of proportionality that is commonly applied to derogations and limitations of powers.[24] This is an example of a false equivalence directly stemming from the Supreme Court's failure to appreciate the differences between limitations and derogations.

From the analysis above, Article 4(1) of the ICCPR and Article 15(1) of the ECHR are the main provisions on the derogation of rights that are specifically applicable during 'crisis-times'. These provisions only apply in times of 'public emergencies that threaten the life of the nation, the existence of which is officially proclaimed'.[25] Even though the formulation of 'the extent strictly necessary' (Article 24(4) Constitution of Kenya) and 'the extent strictly required' (Article 4(1) ICCPR) are close but not identical, the two provisions apply in two separate planes or

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22 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 47.

23 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 4(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, Article 15(1); *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 47-51.

24 UN Human Rights Committee, General Comment No 29: States of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 2; *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 48.

25 International Covenant on Civil and Political Rights, Article 4(1).

contexts. One applies in 'crisis-times' while the other applies at all times or in times of normalcy. This is a distinction that stems directly from the distinction between the derogation and limitation concepts analysed above.

This distinction is not only just semantic; it has a huge effect on how the proportionality analysis is undertaken to justify whether an action is a derogation or a limitation that is permitted within the context of that instrument, be it a constitution or human rights treaty. In determining whether the provision to be addressed is a limitation or derogation, the appropriate 'standard of review' is the proportionality test.

The Supreme Court reaches this conclusion quite early in its analysis. The Court reasons that 'the phrase "qualified to the extent strictly necessary" signals that any derogation from the general right to equality under the Bill of Rights is narrowly tailored and circumscribed … In other words, Article 24(4) is not a carte blanche for overriding the right to equality and freedom from discrimination; rather, it remains subject to the same proportionality test embodied in Article 24(1)'.[26]

But from the analysis above, one might ask whether the proportionality test on the analysis of derogation is distinct from that of limitations. I discuss the proportionality test more in the next sub-section. However, it is important to note here that that these two proportionality tests are distinct and have different implications. For example, as a threshold question, the proportionality test analysis for derogations only begins after there is evidence of a public emergency (or crisis-like situation) and an official proclamation is issued under the ICCPR.

General Comment No 29 on Article 4 of the ICCPR states that '[d]erogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant',[27] even though the obligation to limit any derogations to those strictly under the exigencies of the situation also reflects the principle of proportionality.

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[26] *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 44.

[27] General Comment 29, CCPR, para 4.

Proportionality as the appropriate standard of review

The standard of review in constitutional law refers to the 'nature, intensity, or level of scrutiny by a court or tribunal of decisions (or other actions that involve some form of prior determination) taken by a governmental authority'.[28] The concept of the standard of review is used in two different contexts in judicial analysis. The first context is the use by courts to examine the actions of other branches of government such as the executive and the legislative (where courts check on the constitutionality of legislative acts). Courts can also examine the actions of administrative agencies to check their compliance with delegated powers (constitutional review). The second context is its use by superior courts to scrutinise a lower court's decisions (appellate review).[29]

The scope of the standard of review ranges from *de novo* review, the most intrusive form, where the reviewer substitutes its own finding in place of the decision maker's finding, to the 'clearly erroneous or manifest lack of reasons' review, which is the least intrusive form.[30] In between these two scopes, there are others that include reasonableness, good faith, proportionality, and abuse of discretion.[31]

The limitations framework of the Constitution of Kenya, 2010 has a general limitations clause in Article 24 that applies to all rights in the Bill of Rights except those in Article 25. The language of that clause was

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[28] Jan Bohanes and Nicolas Lockhart, 'Standard of review in WTO Law', in Daniel Bethlehem, Donald McRae, Rodney Neufeld, and Isabelle Van Damme (eds) *The Oxford handbook of international trade law*, Oxford University Press, 2009, 379; Alexia Herwig and Asja Serdarevic, 'Standard of review for necessity and proportionality analysis in EU and WTO Law: Why differences in standards of review are legitimate', in Lukasz Gruszczynski and Wouter Werner, *Deference in international courts and tribunals*: *Standards of review and margin of appreciation*, Oxford University Press, 2014, 209.

[29] Lukasz Gruszczynski and Wouter Werner, 'Introduction', in Gruszczynski and Werner, *Deference in international courts and tribunals*: *Standards of review and margin of appreciation*, 1.

[30] Vladyslav Lanovoy, 'Standards of review in the practice of international courts and tribunals', in Gábor Kajtár, Basak Çali, and Marko Milanovic (eds) *Secondary rules of primary importance in international law: Attribution, causality, evidence, and standards of review in the practice of international courts and tribunals*, Oxford University Press, 2022, 42.

[31] Lanovoy, 'Standards of review in the practice of international courts and tribunals', 42.

borrowed from the South African Constitution, which had in turn been borrowed from the Canadian Constitution.[32]

The proportionality test in the analysis of the limitations of human rights is now widely linked to German origins and more robustly to the European Court of Human Rights and the Canadian Supreme Court.[33] The 1950 European Convention of Human Rights does not have a general limitations clause but has specific limitations for certain rights. For example, the right to religious freedom contains a limitation that allows for the restriction of religious manifestations when 'prescribed by law and [when] necessary, in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.[34]

The 1982 Canadian Charter of Rights and Freedoms contains a general limitations clause that is applicable to all individual rights to the effect that: '[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[35]

Section 36 of the South African Constitution also provides a general limitations clause that reads as follows:

> the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.[36]

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32 Christina Murray, 'Kenya's 2010 Constitution', 61 *Neue Folge Band Jahrbuch des offentlichen Rechts* (2013) 747-788.

33 Niels Petersen, *Proportionality and judicial activism: Fundamental rights adjudication in Canada, Germany, and South Africa*, Cambridge University Press, 2017, 1-9.

34 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9(2).

35 Canadian Charter of Rights and Freedoms, Section 1, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

36 Constitution of the Republic of South Africa (1996), Section 36.

This provision is strikingly similar to Article 24(1) the general limitations clause in the Constitution of Kenya, 2010 which provides that:

> (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

None of these legal instruments, including the Kenyan Constitution, mention the principle of proportionality in their texts. Yet, the ECHR, the Supreme Court of Canada,[37] the German Constitutional Court, and the Constitutional Court of South Africa have applied this judge-made principle. Thus, it was only a matter of time before the Kenyan Supreme Court invoked the principle. Its proponents argue that it implies the need to strike a proper balance between various competing interests.[38] The principle of proportionality is used as a tool of balancing and weighing the various interests against each other or finding a 'fair balance of interests'.[39]

The principle of proportionality consists of the following four rules: the legitimate ends or objective rule which interrogates whether the act pursues a legitimate aim; the suitability rule which looks into whether the act is capable of achieving its aim; the necessity rule which analyses whether the act impairs the right as little as possible; and the proportionality rule which can apply in the narrow sense or strict sense (*strictu sensu*) and which examines whether the act represents a net gain, when the reduction on the enjoyment of rights is weighed against the level of

[37] The proportionality principle, also known as the Oakes test was developed by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103.

[38] Aharon Barak, *Proportionality: Constitutional rights and their limitations,* Cambridge University Press, 2012, 457.

[39] Francisco J Urbina, *A critique of proportionality and balancing*, Cambridge University Press, 2017, 9-12.

realisation of the aim.[40] However, the critics of the principle of proportionality see it as a tool that enhances judicial activism.[41]

The mis- and non-application of the proportionality test

The Supreme Court in *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, relied on *Kandie v Alassane Ba and another* (Kandie),[42] where it had affirmed that the proportionality analysis in the context of adjudicating rights under the Bill of Rights involves a balancing exercise guided by the 'reasonable and justifiable' test. The Supreme Court in *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others* goes further to state that:

> [t]he Court [meaning the Supreme Court in *Kandie*] explained that for the effect of impugned law on a right to be proportionate, it must pursue a legitimate objective [legitimate objective test] and satisfy three subtests: First, the measure adopted must be suitable – meaning it must be capable of achieving the intended goal (suitability). Second, it must be necessary – there must be no less restrictive means available to achieve the same purpose (necessity). Third, the benefits of achieving the objective must outweigh the harm caused to the individual whose right is affected (proportionality in the strict sense).[43]

A faithful reading of paragraphs 73-77 of the *Kandie* case which the Supreme Court approvingly cites, reveals that the Supreme Court inaccurately referenced its own jurisprudence. In *Kandie*, the Supreme Court analysed some jurisprudence from the Kenyan High Court and Court of Appeal and concluded that the applicable test is a 'strict and elaborate scrutiny based on the "reasonability and justifiability" test'.[44]

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40 Matthia Klatt and Moritz Meister, *The constitutional structure of proportionality*, Oxford University Press, 2012, 2-3.

41 Grainne de Burca, 'The principle of proportionality and its application in EC Law', 13 *Yearbook of European Law* (1993) 105-50.

42 Petition 2 of 2015, Judgement of the Supreme Court of Kenya at Nairobi, (2017) eKLR paras 73-77.

43 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 52.

44 *Kandie v Alassane Ba and another*, paras 73-76.

Furthermore, in *Kandie*, the Supreme Court also approvingly cites the leading cases from Canada in *R v Oakes* and South Africa in *S v Makwanyane and another*[45] and *S v Manamela and another (Director-General of Justice Intervening)*[46] (*Manamela*). These cases provide the requirements of reasonable and demonstrable justifications; the criteria for balancing relevant considerations; and emphasise that 'the Court should not follow a mechanical checklist when determining whether a right is justifiably limited, but instead engage in a balancing exercise while considering proportionality'.[47] Specifically, in *Manamela*, the South African Court found that:

> It should be noted that the five factors expressly itemised in Section 36 are not presented as an exhaustive list. They are included in the Section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. … As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. … Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of this legislative and social setting.[48]

The Supreme Court (in *Kandie*) then concludes its analysis by stating that:

> The test to be applied in order to determine whether a right can be limited under Article 24 is the 'reasonable and justifiable' test that must not be conducted mechanically. Instead, the Court must, on a case-by-case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic society. The insertion of the word 'including' in article 24 also indicates that the factors to consider while conducting the balancing act are not exhaustive but a guide as to the main factors to be taken into account in that consideration.[49]

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45 [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

46 [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 (14 April 2000).

47 *Kandie v Alassane Ba and another*, para 76.

48 Quoted in *Kandie v Alassane Ba and another*, para 76.

49 *Kandie v Alassane Ba and another*, para 77.

The vital point to note here is that in *Kandie*, the Kenyan Supreme Court did not establish the four-prong proportionality test (legitimate objective, suitability, necessity, and proportionality *strictu sensu*) as it purports to have in *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*.[50] In fact, the Court in *Kandie v Alassane Ba and another* does not mention the notions of legitimate objective, suitability, necessity, or proportionality *strictu sensu* even once in the entire judgement. In my reading, therefore, the Supreme Court is squeezing or establishing the four-part proportionality test for the first time without appropriate justification and on very weak grounds.

By using its previous case (the *Kandie* case) that barely mentions the notion of proportionality to introduce the four-part test in its analysis, the Supreme Court shows that it is not keen to textually ground the four-part proportionality test in the text of the Constitution.

Moving on to the application of the test, the Supreme Court finds that:

> no reasonable justification has been advanced, nor can we discern any, that would warrant drawing a distinction between children in relation to their entitlement to their father's estate in departure from the guarantee to equal protection and benefit of the law in Article 27(1) of the Constitution. In our view, denying children born out of wedlock by the same parents the same benefits accorded to children born within on the basis of the alleged 'sins' of their parents, is unreasonable and unjustifiable. This therefore means that any attempt to exclude children born out of wedlock from benefitting from their father's estate fails the proportionality test envisaged by the phrase 'qualified to the extent strictly necessary' which is a condition under Article 24(4) of the Constitution.[51]

The Supreme Court's assertion here could easily obfuscate the four-part proportionality test due to two reasons. The first is that the limitation to the right to equality under Article 27 is provided by law and is within the Constitution of Kenya, 2010 itself in Article 24(4). It is therefore expected, and the Court stated it would do precisely this in paragraph 52 of the judgment, that Article 24(4) would then be subjected to the proportionality test analysis. There is also the inherent danger

[50] *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 52.

[51] *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 53.

that this limitation is found within the Constitution itself, and if found impermissible, it would make a provision of the Constitution itself unconstitutional.

Second, the application here would require considering the following questions: does Article 24(4) present a legitimate objective (legitimate objective)? Does Article 24(4) provide means that are capable of achieving the intended goal or objective (suitability)? Does Article 24(4) provide the least restrictive means available to achieve the purpose (necessity)? and does Article 24(4) provide benefits which outweigh the harm caused to the individual whose right is affected (proportionality *strictu sensu*).

However, the Supreme Court asks and answers a different question, which is: is there a reasonable justification for drawing a distinction between children in relation to their entitlement to their father's estate in departure from the guarantee to equal protection and benefit of the law in Article 27(1) of the Constitution? I contend that this question and its answer, given in the negative, is a misapplication and non-application of the proportionality test.

It is a misapplication because the stated issue the Supreme Court had decided to address was the following: whether the Court of Appeal improperly limited the application of Article 24(4) of the Constitution, and in doing so, misconstrued the relationship between Article 24(4) and Article 27 of the Constitution.[52]

The Supreme Court should not therefore have asked and answered the narrower and different question of whether the drawing of a distinction between children in relation to their entitlement to their father's estate is a departure from the guarantee to equal protection and benefit of the law in Article 27(1) of the Constitution. This is because this distinction stems directly out of the Islamic law of inheritance, which is exempted as a whole to the 'extent strictly necessary' for its application. So, while the case here concerned only one facet of Islamic law and its discriminatory effects, Article 24(4) covers a full array of Islamic law on personal status, marriage, divorce, and inheritance.

[52] *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 29.

It is possible to offer a pragmatic reading of the finding and argue that the Supreme Court was limiting its answer to just the specific issue that was at the core of the case to avoid the danger of declaring Article 24(4) of the Constitution unconstitutional. But this justification does not lead to whether the Court answered the question it had set before itself, which was broader and covered the relationship between Articles 24(4) and 27. In this instance, we can conclude that the Court did not therefore offer a persuasive resolution to the debate on the interpretation of Article 24(4), contrary to Joshua Malidzo Nyawa's conclusions.[53]

Assuming for the sake of argument that the question the Supreme Court created in its application of the proportionality test was the central question the Court needed to answer, I would still argue that the Court did not apply the test to this question, at least not as rigorously as would have been expected. So, the question is whether there is a reasonable justification in Islamic law for drawing a distinction between children in relation to their entitlement to their father's estate in departure from the guarantee to equal protection and benefit of the law in Article 27(1) of the Constitution?

The Supreme Court would only have found an answer to the legitimate objective question, which is the first part of the test, after an analysis of Islamic law. The Court does not attempt to engage in this analysis and reaches its conclusion without any engagement with Islamic law. Because my claim here is that there was a non-application of the test, we don't know what conclusion would have been reached if this analysis was undertaken.[54] It is possible a legitimate objective would have been found in which case the other parts of the test would have played a role in finding a much more robust solution to even this emergent question the Court decided to answer.

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53 Nyawa, 'From the cold to the fold: Kenya's Supreme Court enclasps rights of "illegitimate" children in Islamic succession'.

54 Mohamed Hoosain Sungay, 'A constitutional analysis of the disqualification of the child born out of wedlock form the inheritance principle found in Islamic law of compulsory succession', 58 *De Jure Law Journal* (2025) 75-91.

Take for example, the justification Prof Christina Murray offered in the same paper cited by the Court explaining the presence of Article 24(4) in the Constitution. Prof Murray stated that Article 24(4) was included in the Constitution of Kenya Review Committee Draft and retained in all later drafts. According to Prof Murray, Article 24(4) was retained at the request of Muslim women for whom Kadhis' courts 'had become an important site for resisting the oppression experienced in marriage and in domestic circumstances in a traditionally patriarchal and male-dominated society' and for whom recognising and protecting the religious and cultural aspects of Islam was important.[55]

It is therefore likely that if Article 24(4) was interpreted as a whole and not confined to one section of Islamic law, it would have or should have passed the legitimate objective test. Whether the provision as a whole or the narrower question of discrimination against children born out of wedlock would pass the more stringent parts of the test of suitability, necessity, and proportionality, *strictu sensu*, is an outcome we cannot know, as the inquiry did not go this far.

Conclusion

The Supreme Court of Kenya's doctrinal analysis and path of reasoning in this case is, unfortunately, unpersuasive regardless of the pro-formal equality outcome of the decision. Regardless of whether one agrees or disagrees with the findings of the Supreme Court, its findings can only be accepted as authoritative when a sound internal and intellectual logic compels the judging process.

In this short essay, I have shown that the decision of the Kenyan Supreme Court faces two arguably fatal inconsistencies that inevitably lead to a faulty outcome. The first is the doctrinal mixing up of the concepts of derogations and limitations and the consequential effect of referencing irrelevant international law instruments and decisions. This

[55] Murray, 'Kenya's 2010 Constitution', 747- 788 citing the Constitution of Kenya Review Commission, *The final report of the Constitution of Kenya Review Commission*, 2005, paras 13.5.5.

was and remains a case of the limitation of the right to equality through a legal provision in the Constitution itself. Whether one is convinced of the wisdom of having such a limitation is not irrelevant to answering the question whether the limitation itself is permissible under our Constitutional setup.

The second argument flows from the first in relation to the use, non-application, and misapplication of the principle of proportionality. The introduction of the principle of proportionality within Kenya's constitutional rights limitation framework is inevitable. The way the Supreme Court introduces and justifies it is unpersuasive and, unfortunately, for such a vital tool of constitutional interpretation, creates more constitutional uncertainty. We should just pause, reflect, and think about the future of some of the conflicts that will come in future in relation to the limitation in Article 24(4) of the Constitution.

The resuscitation of criminal defamation in Kenya and the ensuing consequences: An incisive examination of *Jacqueline Okuta v AG* vis-à-vis *BAKE v AG*

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Abstract

This case commentary examines the resuscitation of criminal defamation in Kenya under Sections 22 and 23 of the Computer Misuse and Cybercrimes Act, (Chapter 79C). It contextualises this development within the broader digital transformation, where social media and online platforms have revolutionised freedom of expression, participatory discourse, and democratic accountability. The commentary assesses the constitutionality and proportionality of criminal sanctions for false publication and defamation in light

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of the Constitution of Kenya (2010) and international human rights standards. By analysing the High Court decisions of Jacqueline Okuta v AG (2017) *and* BAKE v AG (2020), *the study illustrates the tension between state interests in regulating harmful digital content and the imperative to safeguard freedom of expression. The commentary highlights the risks of overbroad and vague legal provisions being used to suppress dissent, silence critics, and facilitate strategic lawsuits against public participation (SLAPPs), especially in politically sensitive contexts.*

Keywords: criminal defamation, cybercrime law, digital rights, freedom of expression, strategic lawsuits against public participation (SLAPPs)

Introduction

The advent of digital platforms – encompassing planetary infrastructures, systems, and technologies with distinctive socio-technical features, affordances and operational cultures – has fundamentally transformed the communication landscape.[1] These platforms have introduced novel modes of interaction, catalysed cultural shifts, transformed patterns of social exchange, and expanded the scope of human rights.[2] The shift to digital communication, characterised by decentralisation and real-time interactivity, has inaugurated diverse channels for content creation and dissemination. Platforms such as social media platforms, blogs, podcasts, streaming services, and online news outlets foster interaction patterns that emphasise speed, conciseness, and immediacy.[3]

The influence of digital media in individual and communal interaction has increased transparency in political processes, access to information and active citizen participation in democratic societies.[4] Social media, through user-generated content, has increasingly displaced mainstream media and ushered a democratised media environment.[5] Tellingly, users now contribute to and reshape public discourse via features such as 'likes', 'shares', and 'comments' which provide active

1 Admire Mare, 'Digital spaces, rights and responsibilities: Towards a duty of care model in Southern Africa', 7 *Digital Rights Access to Information Series* (2023) 4.

2 Admire Mare, 'Securing digital rights in Southern Africa: A call to action for stakeholders', 4 *Digital Rights South Africa* (2024) 5; Bernard Ngalim, 'Regulating speech in the African digital marketplace of ideas', *Tech Policy Press*, 25 October 2024; Mare, 'Digital spaces, rights and responsibilities', 3. See generally, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 23 April 2020, A/HRC/44/49.

3 Ling Han, 'The rise of digital media: Transforming communication, culture, and commerce', 22(72) *Global Media Journal* (2024) 2.

4 Han, 'The rise of digital media: Transforming communication, culture, and commerce', 2; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, para 31.

5 Victor Kapiyo, 'Social media and content regulation', in *State of internet freedom in Africa 2023: A decade of internet freedom in Africa – Recounting the past, shaping the future*, Collaboration on International ICT Policy for East and Southern Africa (CIPESA), 2023, 20.

feedback loops that sustain digital citizenship and reinforce awareness of digital rights and responsibilities.[6]

In this evolving ecosystem, individuals are no longer passive recipients of media, but active agents in shaping the prominence and circulation of information. The interactive nature of digital platforms has enabled individuals to share their views and find objective information immediately and inexpensively. As a result, digital spaces have emerged as veritable sites for achieving social justice and unlocking socio-political and economic freedoms,[7] and promoting accountability and good governance.[8]

Moreover, digital media transcends geographical boundaries, allowing access to information and knowledge that was previously unattainable, and contributing to the discovery of the truth and progress of society.[9] Within this framework, users are able to access information in real time, irrespective of their physical location.[10] This universality of access has not only broadened the spectrum of communicative reach but has also contributed to the emergence of an interconnected global public sphere. As such, digital media is an integral avenue for exercise of freedom of opinion and expression, including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice.[11]

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6 Mare, 'Digital spaces, rights and responsibilities', 6.

7 Mare, 'Securing digital rights in Southern Africa', 6.

8 Felicia Anthonio, 'Internet shutdowns: A threat to human rights and democratic values in Africa', in State of internet freedom in Africa, 2023, 13; Nanjala Nyabola, 'Online activism and civic space in Africa in the age of the privatised internet', in *State of internet freedom in Africa 2023*, 29.

9 United Nations Human Rights Council, Resolution on the promotion, protection and enjoyment of human rights on the internet, 16 July 2012, A/HRC/RES/20/8, Article 2.

10 Wairagala Wakabi, 'Digital democracy vs digital authoritarianism: The battle of our times', State of internet freedom in Africa, 2023, 7.

11 Universal Declaration of Human Rights, 10 December 1948, A/RES/217(III), Article 19; International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 19.

However, real-time dissemination and mass mobilisation challenge traditional controls, as billions share information reflecting their lived realities.[12] Concerns over the reliability and credibility of online content have led to increased state-imposed restrictions, including criminalisation of legitimate expression, thereby contributing to democratic regression and digital authoritarianism.[13]

While the proliferation of misinformation and disinformation presents urgent social challenges, this commentary advocates for the least restrictive measures to balance the rights and reputations of others with the preservation of freedom of expression. The study examines the re-criminalisation of defamation under the Computer Misuse and Cybercrimes Act (Chapter 79C), and assesses whether criminal sanctions for speech offences are legal, effective, necessary, and proportionate in a democratic society.

This case commentary proceeds as follows. This introduction lays the ground work on (criminal) defamation particularly in digital platforms. Section two sets out the digital rights within the right to freedom of expression and the precise ambit of its limitation. Section three analyses the case of *Jacqueline Okuta v AG and another* to arguing that criminal defamation based on personal interests goes against the principles of necessity and proportionality in limiting Article 33 of the Constitution of Kenya (2010).

Thereafter, Section four turns to *BAKE v AG and others* arguing that it incorrectly affirmed criminal defamation under Sections 22 and 23 of the Computer Misuse and Cyber Crimes Act. The fifth section closes by

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12 See generally, Claire Wardle and Hossein Derakhshan, *Information disorder: Toward an interdisciplinary framework for research and policy making*, Council of Europe Report DGI (2017) 09, 2017.

13 Mare, 'Securing digital rights in Southern Africa: A call to action for stakeholders', 6, defines digital authoritarianism as 'the use of digital media technologies by authoritarian regimes to surveil, repress, and manipulate domestic and foreign populations'; Nyabola, 'Online activism and civic space in Africa in the age of the privatised internet', 29-30; Ngamita, 'Internet freedom and new forms of censorship', State of internet freedom in Africa, 2023, 36; Aaron Olaniyi Salau, 'Social media and the prohibition of "false news": Can the free speech jurisprudence of the African Commission on Human and Peoples' Rights provide a litmus test?', 4 *African Human Rights Yearbook* (2020) 234.

depicting the weaponisation of Sections 22 and 23 of the Computer Misuse and Cyber Crimes Act against legitimate journalists, whistleblowers, and government critics and the use of strategic lawsuits against public participation (SLAPPs), which target people or groups for speaking out on matters of public concern.

The comparative reference to South Africa's recent repeal of criminal defamation underscores a global normative shift toward decriminalising speech offences and adopting proportionate civil remedies. Ultimately, this commentary concludes by advocating for legislative reform in Kenya to align statutory law with constitutional principles and international standards, emphasising the need for narrowly tailored civil liability frameworks that protect both reputational rights and democratic freedoms in the digital age.

Limitation of the right to freedom of expression through the law on false publication

Digital rights encompass access, participation, data security, and privacy within the digital space.[14] They are underpinned by human-centred values, including dignity, respect, equality, justice, responsibility, informed consent, and environmental sustainability.[15] These rights give people control and agency, and ensure that digital environments uphold fundamental freedoms and ethical principles intrinsic to democratic and inclusive societies.

Despite the recent emergence of digital rights, the rights draw from the broader human rights framework, and the fact that rights enjoyed offline must also be respected online.[16] A core digital right is freedom of expression, which includes the freedom to seek, receive, and share

[14] Mare, 'Securing digital rights in Southern Africa: A call to action for stakeholders', 7.

[15] Mare, 'Securing digital rights in Southern Africa: A call to action for stakeholders', 7.

[16] Bart Custers, 'New digital rights: Imagining additional fundamental rights for the digital era', 44 *Computer Law and Security Review* (2022) 2-3; Human Rights Council, Resolution on the promotion, protection and enjoyment of human rights on the internet, Article 2.

information and include ideas across all media.[17] This freedom supports personal development, political awareness and participation in public affairs.[18] It is essential to democratic governance as it allows people to discuss public affairs and critique matters relating to governance.[19]

Freedom of expression enables individuals to exercise other rights by allowing them to share information, voice dissents, and hold power to account on digital platforms. In *Robert Alai v AG and DPP*, the High Court observed that citizens have a democratic right to discuss government affairs and that they cannot exercise freedom of expression if they are barred from criticising their representatives.[20] Public criticism informs leaders when actions may not be in the national interest and requires public officers to tolerate scrutiny.[21] In *Jacqueline Okuta and another v AG and DPP*, the High Court found that criminalising defamation chills speech, stifles the flow of information and is disproportionate in a democratic society.[22]

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17 Constitution of Kenya (2010), Article 33(1); African Charter on Human and Peoples' Rights, 1 June 1981, 1520 UNTS 217, Article 9; Universal Declaration of Human Rights, Article 19; International Covenant on Civil and Political Rights, Article 19; *Media Council of Tanzania and others v Attorney General of the United Republic of Tanzania,* (Decision on merits) 2 EACJ, First Instance (2019) para 58 it was observed that freedom of opinion and freedom of media are at the core of the fundamental and operational principles set out in Article 6 and 7 of the Treaty for the Establishment of the East African Community.

18 *Media Rights Agenda and Constitutional Rights Project v Nigeria (decision on merits),* Communication Nos 105/93, 128/94, 130/94 and 152/96, ACmHPR (1998) para 54; African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019, Principle 1.

19 *Nevanji Madanhire and another v Attorney General* [2014] ZWCC 1, CCZ/2/14, 7; CCPR General Comment No 34: Article 19 on Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 2; *Khural and Zeynalov v Azerbaijan,* (Judgement on merits) 55069/11 ECtHR (2021) para 38; *R v Zundel* [1992] 2 SCR 731 at para 2 (Supreme Court of Canada), where it was noted that 'It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions'.

20 Petition No 174 of 2016, Judgment of the High Court at Nairobi, 26 April 2017 [eKLR] para 38.

21 *Khural and Zeynalov v Azerbaijan,* para 41.

22 Petition No 397 of 2016, Judgment of the High Court at Nairobi, 6 February 2017 [eKLR] 10; *Mineral Sands Resources (Pty) Ltd and others v Reddell and others* [2022] ZACC 37, para 1

Exercising freedom of expression involves the duties not to engage in propaganda for war, incitement to violence, hate speech and advocacy for hatred, and to respect the rights and reputation of others.[23] Additionally, Article 24 of the Constitution of Kenya (2010) requires a balance between individual rights and freedoms, and public order and safety.[24] Any limitation must be prescribed by clear and accessible law, serve a legitimate aim, be necessary, and be the least restrictive means required to achieve that aim in a democratic society.[25]

False publication, or 'fake news' is the deliberate production and sharing of misleading and false information for political, economic or ideological benefit.[26] In Kenya, false publication is restricted in the Defamation Act (Chapter 36), the Penal Code (Chapter 63), and the Computer Misuse and Cybercrimes Act. The Defamation Act covers slander affecting official, professional, or business reputations;[27] slander imputing unchastity to women;[28] and slander of title or malicious falsehoods.[29] The Penal Code creates the offence of libel[30] and unlawful publication.[31]

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where the South African Constitutional Court noted that, 'One of the more positive features of our nascent democratic order is vibrant, vigilant and vociferous civil society participation in public affairs. In a truly broad based participatory democracy characterised by that kind of active participation, our Constitution's aspirations and values find meaning in the lives of the populace for whose benefit the Constitution was ultimately enacted'.

23 Constitution of Kenya (2010), Article 33(3); International Covenant on Civil and Political Rights, Article 19(3); African Charter on Human and Peoples' Rights, Article 27(2); *Khural and Zeynalov v Azerbaijan,* para 45; Custers, 'New digital rights', 4 and 12.

24 *Robert Alai v Attorney General and Director of Public Prosecutions*, para 45; *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 9.

25 Constitution of Kenya (2010), Article 24; International Covenant on Civil and Political Rights, Article 19(3); Declaration of Principles on Freedom of Expression and Access to Information in Africa, Principle 9(1) and (2).

26 Admire Mare, Hayes Mawindi Mabweazara and Dumisani Moyo, '"Fake news" and cyber-propaganda in sub-Saharan Africa: Recentering the research agenda', 40(4) *African Journalism Studies* (2019) 4.

27 Defamation Act (Chapter 36), Section 3.

28 Defamation Act (Chapter 36), Section 4.

29 Defamation Act (Chapter 36), Section 5.

30 Penal Code (Chapter 63), Section 194.

31 Penal Code (Chapter 63), Section 197.

The Computer Misuse and Cybercrimes Act, on the other hand, introduces elements of criminal defamation in the digital space. Specifically, Section 22 of the Act criminalises the intentional publication of 'false, misleading, or fictitious data or misinformation with intent that the data shall be considered or acted upon as authentic, with or without financial gain … that negatively affects the reputations of others'. Section 23 criminalises knowingly publishing 'information that is false in print, broadcast, data or over a computer system, that is calculated or results in panic, chaos, or violence among citizens of the Republic, or which is likely to discredit the reputation of any person'.

However, restricting freedom of expression requires more than precise legislation.[32] The doctrine of necessity demands that the restriction must seek to achieve a legitimate purpose like protecting the rights and reputation of others or the protection of national security, public order, public health, or morality.[33] Defamation law legitimately seeks to shield people from unwarranted attacks, especially in the digital space with rapid information flow and limited checks and balances. In Kenya, affordable smartphones and mobile data plans have increased internet access and use, with citizens spending an average of three hours forty-three minutes per day on social media, far above global average.[34] Kenyans use digital media for interpersonal communication, entertainment, news, professional network, leisure, and civic engagement. These varied uses, coupled with long periods online, technological advances,

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32 *Lohé Issa Konaté v Burkina Faso,* (Judgement on merits) No 004/2013, ACtHPR (2014) paras 126-131, where the African Court of Human and Peoples' Rights found that the Penal and Information Codes were both 'within the law' and clear and concise; *Attorney General of Antigua and Barbuda and others v Leonard Hector* [1986] 2 AC 312 Court of Appeal, 15. Here, the Court noted that in determining substantive reasonableness in the restriction of freedom of expression, it should take into consideration many and varied factors. These include factors such as the nature of the right alleged to have been infringed, the purpose underlying the restriction, and the scope of the evil it seeks to remedy.

33 Declaration of Principles on Freedom of Expression and Access to Information in Africa, Principle 9(3); International Covenant on Civil and Political Rights, Article 19(3).

34 Margaret Njugunah, 'Digital access: 17pc of Kenyans now use social media', *Business Daily*, 3 August 2020.

and the ability to manipulate information, makes the digital environment vulnerable to misuse.[35]

Bots, algorithms, and fake accounts can manipulate public opinion, causing real harm, including damage to reputation.[36] The sheer volume of online information, a history of misinformation, and limited civic space in Kenya make it difficult to judge the reliability of online information. With limited reliable information and media literacy, people rely on rumours and speculation to understand public affairs. Digital media enables mass production and rapid spread of false information, empowering individuals to create and distribute content.

This participatory media environment blurs the line between producers and consumers and reshapes the public sphere. In societies with restricted civic space, social media hosts both genuine and fake news. These vulnerabilities necessitate legislative measures to protect the rights and reputations of others.[37] Accordingly, Kenya's laws on false information address legitimate concerns about problematic online behaviour and appropriately limit the freedom of expression.

Necessity and proportionality of criminal defamation: A case for *Jacqueline Okuta v AG*

Evidently, the restriction of freedom of expression in the digital space may, in some cases, serve a legitimate public interest. However, it is essential to evaluate whether these restrictions are appropriate for their intended purpose. They must also be the least intrusive means

35 Blaise Pascal Andzongo Menyeng, 'Disinformation in Africa: A threat to internet freedom and democracy', State of Internet Freedom in Africa 2023, 60.

36 Ngamita, 'Internet freedom and new forms of censorship', 36; Bruce Mutsvairo and Saba Bebawi, 'Journalism educators, regulatory realities, and pedagogical predicaments of the "fake news" era: A comparative perspective on the Middle East and Africa', 74(2) *Journalism & Mass Communication Educator* (2019) 147 defines [a bot] as a 'software that systematically posts automated attention grabbing [publications] to promote a person, product, or ideology, which has courted controversy for purportedly acting as grounds for potential manipulation among [digital media] users'.

37 Kapiyo, 'Social media and content regulation', 20.

available and proportionate to the interest they seek to protect.[38] For a limitation to meet the threshold of necessity and proportionality, it must arise from a pressing and substantial need that is relevant, sufficient, and demonstrable.[39]

Moreover, there must exist a connection between the restricted expression and the protected interest, such that the benefit derived from safeguarding that interest outweighs the harm occasioned to freedom expression, especially in view of the severity of the sanctions imposed. A limitation is deemed unreasonable where it is excessively harsh, arbitrary in its application, or overreaches the legitimate purpose it purports to serve.[40]

In *Jacqueline Okuta and another v AG and another*, the petitioners challenged Section 194 of the Penal Code arguing that it infringed upon the right to freedom of expression protected by Article 33 of the Constitution of Kenya (2010), and that imposing criminal penalties for defamation, a civil wrong, was unnecessary, excessive, and undermined democratic values.

The case arose from two instances where statements posted on Facebook led to criminal charges for alleged defamation. The petitioners contended that criminalising such speech was disproportionate and that civil remedies, such as damages, were sufficient and less restrictive. They also argued that criminal defamation laws are vague, overly broad, and subject to arbitrary enforcement, failing constitutional standards of clarity, necessity, and proportionality.[41] The state defended Section 194, claiming it served a legitimate aim by protecting individuals from reputational harm and discouraging malicious speech.[42]

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38 *Karen Kandie v Alassane BA and another,* Petition 2 of 2015, Judgement of the Supreme Court, eKLR para 79. See generally *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Republic of Zimbabwe* (2009) AHRLR 235 (ACHPR 2009).

39 Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019, Principle 9(4).

40 *Attorney General of Antigua and Barbuda and others v Leonard Hector*, 15.

41 *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 2 and 3.

42 *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 3 and 4.

However, Justice John Mativo found that constitutional restrictions on freedom of expression should only apply to expressions threatening public interest, not solely individual reputation, and that civil remedies are available and effective for such cases.[43] He applied the proportionality test and determined that criminal sanctions for defamation failed both the necessity and proportionality requirements.[44] He concluded that civil remedies adequately address reputational harm without the punitive consequences associated with criminal law.[45]

The High Court highlighted the 'chilling effect' of criminal defamation, which discourages robust public discourse, investigative journalism, and legitimate criticism which is an essential element of democracy.[46] Ultimately, the Court held that criminal defamation is an outdated, excessive, and constitutionally indefensible method of protecting reputation. It declared Section 194 of the Penal Code invalid for being inconsistent with the constitutional guarantee of freedom of expression under Article 33, affirming that civil remedies are the appropriate means for addressing defamation.[47]

Although criminal laws regulating online expression are often justified on the basis of protection of individual reputation, preservation of national security, or prevention of terrorism, in practice, criminal defamation has frequently been misapplied to suppress content deemed undesirable by governments and powerful actors.[48] This misuse has contributed to a culture of self-censorship, undermining the democratic function of open critique. Accordingly, it is imperative to assert that the imposition of criminal sanctions on individuals for seeking, receiving, or imparting information or ideas can seldom be justified as a proportionate means of protecting the rights or reputation of others.

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43 *Jacqueline Okuta and another v Attorney General and Director of Public Prosecution*s, 5.

44 *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 10-12.

45 *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 12.

46 *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 11.

47 *Jacqueline Okuta and another v Attorney General and Director of Public Prosecution*s, 13.

48 Antonio Zappulla, 'Foreword', in Joel Simon, Carlos Lauría and Ona Flores, 'Weaponising the law: Attacks on media freedom', Thomson Reuters Foundation, 2023, 2.

As noted in *Jacqueline Okuta,* the legitimate aim of limiting freedom of expression is to preserve state and societal interests, not to safeguard the private reputations of individuals.[49] Criminal defamation, by its very nature, is primarily concerned with personal reputation and therefore fails to satisfy the public interest threshold required for the curtailment of constitutional rights. Consequently, to employ criminal sanctions to protect individual reputations is not only antithetical to democratic values but also undermines the transformative intent of the Constitution.[50]

In assessing the proportionality of restrictions on freedom of expression in the digital sphere, it is imperative to weigh the adverse impact such restrictions may have on the internet's capacity to foster robust discourse and civic participation, against their purported utility in protecting other legal interests.[51] Given the distinctive architecture of digital media, it must be recognised that regulatory approaches deemed legitimate and proportionate for traditional media may not necessarily be so in the online context. For instance, in matters involving defamation, the instantaneous and interactive nature of digital platforms empowers affected individuals to exercise the right of reply promptly mitigating harm without the need for coercive legal sanctions.

Accordingly, it is important to review all criminal content-based restrictions in line with international human rights standards.[52] In particular, statutes criminalising sedition, insult, and the publication of false news should be repealed and replaced with civil remedies that are themselves necessary, proportionate, and narrowly tailored.[53] The

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49 *Jacqueline Okuta and Another v Attorney General and Director of Public Prosecutions,* 5.

50 Menyeng, 'Disinformation in Africa', 62.

51 Joint Declaration on Freedom of Expression and the Internet by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Co-operation in Europe Representative on Freedom of the Media, the Organisation of American States Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 1 June 2011, Principle 1(b).

52 Declaration of Principles on Freedom of Expression and Access to Information in Africa, Principle 22(1).

53 Declaration of Principles on Freedom of Expression and Access to Information in Africa, Principle 22(2)-(3).

jurisprudential consensus holds that defamation between private individuals has long been recognised as a civil wrong or tort, with the appropriate recourse lying in an action for damages under common law.[54] Elevating such matters to the level of criminal offences is not only disproportionate but constitutes a misapplication of the constitutional framework, which is designed to protect rights in the public interest rather than resolve personal grievances through penal mechanisms.[55]

The criminalisation of defamation lacks constitutional foundation, as Article 33(2) of the Constitution of Kenya (2010) is anchored in the collective interest of the state and the general public, and not in the sensitivities of private individuals.[56] Applying the doctrine of *noscitur a sociis* (meaning that 'the meaning of a word is known by accompanying words'),[57] it becomes evident that defamation does not bear the requisite public harm dimension akin to incitement to violence, hate speech, or propaganda for war – offences that fundamentally threaten public order.[58] As such, criminal defamation – when unrelated to state security or public peace – cannot be properly categorised as a constitutionally legitimate limitation on the right to freedom of expression.

Resuscitation of criminal defamation in Kenya: The peculiarity of *BAKE v AG and others*

In *BAKE v AG and others*,[59] a judgement issued in 2020, 3 years after *Jacqueline Okuta*, the High Court was once again confronted with the complex legal and constitutional questions surrounding criminal defamation. The petition challenged the constitutionality of Sections 22 and 23 of the Computer Misuse and Cybercrimes Act, arguing that the provisions reintroduced the offence of criminal defamation, which had

54 F Reginald Scott, 'Publishing false news', 30(1) *Canadian Law Review* (1952) 39.

55 *Lohé Issa Konaté v Burkina Faso,* para 150.

56 *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 6.

57 *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 6.

58 *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 4 and 6.

59 *Bloggers Association of Kenya (BAKE) v Attorney General and 3 others*, Petition No 206 of 2019, Judgment of the High Court at Nairobi, (2020) eKLR.

been declared unconstitutional under Section 194 of the Penal Code in *Jacqueline Okuta*, and that the structure of Section 23 of the Act bore semblance to Section 29 of the Kenya Information and Communications Act (Chapter 411A) which was declared unconstitutional in *Geoffrey Andare v Attorney General and 2 others*.[60]

The petitioner contended that the impugned provisions infringe Articles 32 and 33 of the Constitution of Kenya (2010), which guarantee the rights to freedom of conscience, religion, thought, belief, opinion, and expression. It was further submitted that these rights echo Article 19 of both International Covenant on Civil and Political Rights (ICCPR) and Universal Declaration of Human Rights (UDHR), protecting the right to hold opinions without interference, and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The petitioner submitted that the Constitution of Kenya (2010) does not privilege any type of opinion or expression, nor does it condition the enjoyment of freedom of expression on the truth of the statements made.[61] The petitioner argued that Sections 22 and 23 of the Computer Misuse and Cybercrimes Act impose a preliminary filter or threshold before one is entitled to express oneself, thus amounting to an unconstitutional limitation.

In determination, the High Court under Justice JA Makau acknowledged that Article 32 of the Constitution of Kenya (2010) imposes on the state a primary obligation of neutrality towards the content of ideas expressed by individuals. It emphasised that the state must, in principle, ensure that no person, opinion, or mode of expression is excluded *a priori* from the public sphere. Nonetheless, the Court reiterated that the right to freedom of expression is not absolute, and that Article 24 of the Constitution allows for its limitation, provided that such restriction is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.[62]

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60 *BAKE v Attorney General and 3 others*, para 27.

61 *BAKE v Attorney General and 3 others*, paras 28, 29, 30, 59.

62 *BAKE v Attorney General and 3 others*, para 36, 37.

The High Court referenced *Özgür Gündem v Turkey*, where the European Court of Human Rights acknowledged that the effective exercise of freedom of expression may require not just non-interference by the state but positive measures to protect individuals from violations by third parties. These include obligations to strike a fair balance between the general interest of the community and the rights of individuals.[63] In this context, the Court observed that the state has a legitimate role in ensuring the safety and integrity of information flows, particularly in the digital age, where misinformation has a unique and expansive impact.[64]

Concerning Section 22 of the Computer Misuse and Cybercrimes Act, which criminalises intentional publication of false, misleading or fictitious data intended to be acted upon as authentic, the High Court considered whether the limitations it imposes are proportionate. It found that assessing proportionality entails not only examining the impact of such restrictions on private citizens, but also understanding their broader systemic effects, especially within the digital environment where the rapid dissemination of information can cause irreparable harm.

The High Court observed that the petitioner had failed to demonstrate that the limitation imposed by Section 22 was excessive in relation to the purpose it sought to achieve. The High Court found that the compelling state interest in protecting national security, public order, and the rights of others, justified preventive restrictions to inhibit the dissemination of information that is harmful to the public at large. The High Court stressed that the existence of less restrictive means must be established to invalidate a legislative measure; yet in the instant case, no viable alternative to achieving the legislative objective was proposed.[65]

The High Court went on to scrutinise Section 23 of the Computer Misuse and Cybercrimes Act, distinguishing it from Section 29 of Kenya Information and Communications Act, which had been invalidated for being overly broad and vague, particularly in its use of subjective lan-

[63] *BAKE v Attorney General and 3 others*, para 38 citing *Özgür Gündem v Turkey* (Judgement on merits) 23144/93, ECtHR, (2000).

[64] *BAKE v Attorney General and 3 others*, para 39.

[65] *BAKE v Attorney General and 3 others*, paras 40, 41 and 42.

guage such as 'grossly offensive', 'indecent', or 'menacing'. The High Court noted that unlike Section 29 of Kenya Information and Communications Act, Section 23 of the Computer Misuse and Cybercrimes Act was precise, narrow in scope, and directly targeted the misuse of computer systems for disseminating harmful falsehoods. The Court noted that Section 23 of the Computer Misuse and Cybercrimes Act applied universally, unlike Section 29 of the Kenya Information and Communications Act which was restricted to individuals licensed to operate telecommunications systems.[66]

Further drawing upon *County Government of Kiambu and another v Senate and others*, the High Court underscored the role of judicial interpretation in adapting the law to new societal contexts, especially in the face of evolving technologies and communications systems. It cautioned against static interpretations of constitutional rights, observing that legislation must be flexible enough to address contemporary challenges such as cybercrime, misinformation, and mass disinformation campaigns.[67]

In addressing the petitioner's broader concerns, the High Court noted that while Articles 32 and 33 of the Constitution protect all expressions, Article 33(2) clearly outlines exceptions for propaganda for war, incitement to violence, hate speech, and advocacy of hatred. Furthermore, Article 33(3) provides that every person must respect the rights and reputations of others in exercising the right to freedom of expression. The Court also referred to Article 19(3) of the ICCPR, which permits lawful restrictions on freedom of expression in the interests of public order, the protection of reputation, or the general welfare in a democratic society.

The High Court upheld the provisions noting that freedom of expression, just like other rights, has a negative dimension (restricting arbitrary state interference) and a positive dimension (requiring the state to protect individuals from harm, including malicious online abuse). It

66 *BAKE v Attorney General and 3 others*, para 47.

67 *BAKE v Attorney General and 3 others*, para 51.

stated that the state has a legitimate interest in ensuring the authenticity, safety, and integrity of digital communications in light of increasing cyber threats. Expression may be restricted when it infringes the reputation, dignity, or security of others, especially online, because digital content spreads quickly and can cause amplified harm. Any such restriction must be assessed through a proportionality test that weights individual rights against the public interest.[68]

The High Court went on to note that preventive measures against harmful online content are justified when the state demonstrates a compelling interest and when no equally effective, less restrictive alternative exist. The Court concluded that the petitioners failed to propose a less restrictive yet equally effective alternative to the legal measures established in Section 22 of the Computer Misuse and Cybercrimes Act.

With respect to Section 23 of the Computer Misuse and Cybercrimes Act, the High Court distinguished cyber libel from traditional forms of defamation: internet posts can be shared globally with a single click, meaning reputational damage can be far greater than with conventional media. The Court noted that the technological distinction justifies criminalisation of defamation in the digital space. The Court also noted that while defamation involves speech, constitutional protection to freedom of speech is not absolute.[69] The state has an obligation to shield individuals from deliberate character assassination or falsehoods, and the anonymity and reach of cyberspace warrant heightened protection.

The reasoning of the Court drew heavily on *Hoho v The State* where the Supreme Court of Appeal of South Africa upheld the constitutionality of criminal defamation.[70] However, South Africa repealed the offence through Section 34(1) of the Judicial Matters Amendment Act, 2023, marking a significant shift in the legal position. The explanatory memorandum to the South Africa Judicial Matters Amendment Bill, 2023 clarified that the repeal of criminal defamation would not affect

[68] *BAKE v Attorney General and 3 others*, paras 57, 64, 39, 45, 56 and 40.

[69] *BAKE v Attorney General and 3 others*, paras 42, 56 and 36.

[70] *BAKE v Attorney General and 3 others*, paras 54 and 55 citing *Hoho v The State* (493/05) [2008] ZASCA 98.

civil liability for defamation, which remains governed by delictual principles.[71]

The Department of Justice and Constitutional Development of South Africa justified this legislative reform by citing concerns raised by international human rights bodies and comparative foreign jurisdictions regarding the chilling effect of criminal defamation laws – particularly on investigative journalism and public dissent. It was noted that alternative remedies, such as civil damages and the offence of *crimen injuria* (meaning the crime of unlawfully and intentionally impairing another person's dignity or privacy),[72] are available to protect individual dignity without imposing the severe sanctions associated with criminal prosecution.[73]

In this light, the continued reliance on *Hoho* warrants critical reassessment. Although Justice Piet Streicher, in *Hoho* acknowledged the gravity of criminal sanctions compared to civil penalties, he erred in reasoning that the heightened evidentiary threshold in criminal law (*i.e.*, proof beyond reasonable doubt) sufficiently offsets the impact on freedom of expression.[74] This position fails to account for the qualitative distinctions between civil and criminal liability – particularly the stigma, punitive consequences, and permanent records associated with criminal conviction.

Moreover, the assertion that criminal sanctions are reasonable so long as the accused knew their conduct was unlawful overlooks evolving international human rights standards. While Justice Streicher might not had the benefit of General Comment No 34 of the United Nations Human Rights Committee on Freedom of Opinion and Expression (2011), and the Declaration of Principles on Freedom of Expression and Access

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71 Publication of Explanatory Summary of the Judicial Amendment Bill 2023, Notice 1678 of 2023, Government Gazette No 48217, 21, 2.35.2.

72 South African Law Commission, Chapter 2: South African Legal Response to the Phenomenon of Stalking or Predatory Behaviour, Issue Paper 22, SAFLII, archived 22 November 2008, para 2.22.

73 Publication of Explanatory Summary of the Judicial Matters Amendment Bill 2023, 21, 2.35.2.

74 *Hoho v The State*, para 33.

to Information in Africa (2019) issued by the African Commission on Human and Peoples' Rights since the *Hoho* judgement was delivered in 2008, and Justice Makau in *BAKE* ignored these instruments that discouraged the criminalisation of defamation, urging states to adopt civil remedies that are both necessary and proportionate.[75]

Conclusively, the 2010 Resolution on Repealing Criminal Defamation Laws in Africa calls on African States to repeal criminal defamation laws or insult laws, as they constitute a serious interference with freedom of expression and impede the role of the media as a watchdog, preventing journalists and media practitioners from practicing their profession without fear and in good faith.[76]

The impact of Sections 22 and 23 of the Computer Misuse and Cybercrimes Act

The provisions of the Computer Misuse and Cybercrimes Act have been invoked to stifle internet freedom during critical events including detention of bloggers, journalists, whistleblowers, and government critics, with the motive of locking up information. The Directorate of Criminal Investigations (DCI) has applied these provisions against people who create or share online content touching on Kenyan politics or alleged corruption.[77] Such enforcement has resulted in arbitrary arrests, selective prosecutions, intimidation and harassment targeting journalists

[75] General Comment No 34, CCPR, para 9; Declaration of Principles on Freedom of Expression and Access to Information in Africa, Principle 22(3).

[76] African Commission on Human and Peoples' Rights, Resolution on Repealing Criminal Defamation Laws in Africa, 24 November 2010, ACHPR/Res.169(XLVIII)10, Preamble 12; World Association of News Publishers (WAN-IFRA), 'Declaration of Table Mountain calling on African governments as a matter of urgency to review and abolish "insult" and criminal defamation laws', 16 February 2011.

[77] Joseph Ndunda, 'Court releases 22-year-old man arrested for impersonating President Ruto on social media', *The Eastleigh Voice*, 25 April 2025; ARTICLE 19 Eastern Africa, 'Freedom of expression and the digital environment in Eastern Africa: Monitoring report January-December 2020', 2021, 12.

and bloggers,[78] and the removal or disabling of online posts and websites.[79]

These actions suggest that anti-cybercrime laws are being weaponised to silence legitimate expression and restrict access to critical and pluralistic information, rather than to uphold legitimate regulatory objectives.[80] The resulting 'chilling effect' undermines public confidence in the justice system and disturbs the balance between protecting reputations and ensuring open, democratic discourse.

The same legal framework has also been used for SLAPPs, which target people or groups for speaking on matters of public concern.[81] Human rights defenders, journalists, and civic-minded individuals are frequently prosecuted for defamation in Kenya. Notably, in 2023, blogger Cyprian Nyakundi faced a court injunction and legal restraint after alleging the Kenya Union of Savings and Credit Cooperatives was under investigation for fraud.[82] Similarly, in 2020, Dr Godwin Agutu, after raising concerns about the misuse of COVID-19 donations, was later arrested on unrelated charges, highlighting the risks faced by those who publicly question authority or expose wrongdoing.[83]

These suits are often designed not to win on the merits but to waste respondents' time and resources and discourage them from comment-

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78 Kapiyo, 'Social media and content regulation', 20; Ngamita, 'Internet freedom and new forms of censorship', 33.

79 ARTICLE 19 Eastern Africa, 'Freedom of expression and the digital environment in Eastern Africa', 12.

80 Edetaen Ojo, 'Emerging issues in digital rights in Africa: A discussion paper for the African Declaration on Internet Rights and Freedoms (AfDec) coalition', Association for Progressive Communications, 2024, 13; Mare, 'Securing digital rights in Southern Africa', 6.

81 *1704604 Ontario Ltd v Pointes Protection Association* [2020] 2 SCR 587, 4. This term originated from the United States of America, see, Penelope Canan and George W Pring, 'Studying strategic lawsuits against public participation: Mixing quantitative and qualitative approaches', 22(2) *Law & Society Review* (1988) 386.

82 Mzalendo Trust, 'The effect of strategic lawsuits against public participation (SLAPP) on freedom of expression and citizen participation in public dialogues in Kenya', 2023, 27.

83 Mzalendo Trust, 'The effect of strategic lawsuits against public participation (SLAPP) on freedom of expression and citizen participation in public dialogues in Kenya', 27.

ing on public issues.[84] They often take the form of defamation, abuse of process or malicious prosecution cases. Unlike vexatious litigation, which involves a pattern of baseless suits, a single SLAPP can be enough if its goal is to suppress public participation.[85]

Canadian courts have recognised the potential abuse of SLAPPs and have developed safeguards against the potential abuse. A court may dismiss a case if it stems from an expression on a matter of public interest.[86] Nonetheless, proceedings may continue if the underlying claim has a real prospect of success, is supported by credible evidence and lacks any valid defence.[87] The claimant must also show substantial harm from the expression, and the public interest in allowing the case must outweigh the chilling effect on free speech and civic engagement.[88]

Some jurisdictions provide statutory SLAPP defences. South Africa's Constitutional Court addressed similar concerns in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*.[89] Although South African law lacks an explicit SLAPP defence, the Court held that courts have inherent authority to prevent abuses of its processes. Litigation is abusive when it is used for ulterior purposes, such as silencing public participation or imposing punitive costs.

Courts assess abuse by examining the legal merits of the claim, the claimant's motive and the foreseeable consequences. Even if a claim appears legally sound, judges must consider whether the true aim is to chill constitutionally protected rights. In recognising the alignment between SLAPP-type litigation and the abuse of process doctrine, the South African Constitutional Court created jurisprudential space for the invocation of a SLAPP defence in appropriate circumstances.[90]

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84 *Mineral Sands Resources (Pty) Ltd and others v Reddell and others* (CCT 66/21) [2022] ZACC 37, para 42.

85 *Mineral Sands Resources (Pty) Ltd and others v Reddell and others*, para 80.

86 *1704604 Ontario Ltd v Pointes Protection Association,* 25.

87 *1704604 Ontario Ltd v Pointes Protection Association,* 8.

88 *1704604 Ontario Ltd v Pointes Protection Association,* 11.

89 *Mineral Sands Resources (Pty) Ltd and others v Reddell and others*, paras 84-88.

90 *Mineral Sands Resources (Pty) Ltd and others v Reddell and others*, paras 83 and 89-102.

Conclusion

The re-criminalisation of defamation in Kenya through the Computer Misuse and Cybercrimes Act presents a significant challenge to constitutionalism, democratic discourse, and the realisation of digital rights. While the state has a legitimate interest in protecting individuals from reputational harm and interdicting the spread of harmful digital content, such restrictions must meet the threshold established in Article 24 of the Constitution. The jurisprudence in *Jacqueline Okuta v AG and DPP* compared to *BAKE v AG and others*, reveals an unsettling trend of using criminal defamation as a tool for silencing dissent, curbing criticism of public officials, and shrinking civic space.

The latter decision, when juxtaposed against international and comparative human rights standards, exposes a misalignment between domestic judicial reasoning and the evolving consensus on the decriminalisation of speech-related offences. The global shift, including South Africa's recent repeal of criminal defamation, underscores the growing recognition that civil remedies offer a more appropriate and constitutionally sound response to reputational harm, especially in a digital age marked by rapid dissemination, heightened interactivity, and the potential for robust counter-speech.

Moreover, the selective enforcement of these provisions, particularly against journalists, bloggers, whistleblowers, and government critics, illustrates how vague and overbroad laws can be weaponised to stifle legitimate expression, distort the purpose of criminal justice, and chill public participation. The increasing use of these provisions in SLAPPs further entrenches a culture of fear, legal intimidation, and institutional mistrust. Therefore, Kenya must reassess the continued criminalisation of defamation in light of its constitutional framework, its obligations under international human rights law, and the practical realities of digital communication. Legislative reform should aim to repeal criminal defamation and related speech offences, replacing them with narrowly tailored civil remedies that safeguard both reputational rights and the foundational freedom of expression.