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Interview with

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First Class Honours (LLB, Strathmore University, Kenya) and
Best Oralist Philip C. Jessup International Law Moot Court Competition

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EDITOR-IN-CHIEF'S NOTE

EZEKIEL ARCHIBONG

This first edition of The StarLight for 2026 features an unprecedented number of articles and the highest for any edition since the magazine's inception. What this means is that our students are no longer contented with just being bystanders or onlookers and waiting perpetually until they are called to the bar before they can contribute meaningfully to conversations that are shaping the African legal landscape. Their contributions are not just about re-echoing established thoughts or reasoning but are challenging the status quo and charting uncommon paths of legal studies. It is deeply fulfilling for us to see The StarLight living its dreams.

We open this edition with "Climate Refugees in Africa: Bridging Human Rights and State Sovereignty" by Ochieng Odero and Ali Hassan. The duo shed lights on the tension between sovereignty and humanitarian obligation, advocating for a rights-based reconceptualisation of climate displacement and regional legal reform to protect vulnerable populations. In "The Thin Line Between Justice and Emotion," Ezinne Nwaru-Patrick examines how emotional impulses can blur the boundary between justice and vengeance in criminal law, emphasising that fairness, not retaliation, must guide legal outcomes.

Cherono Kibiwott's article exposes the fragility of constitutional guarantees when security priorities eclipse civil liberties. He offers critical insights into gaps in enforcement, weak oversight, and institutional impunity, ultimately calling for robust reform to restore the balance between freedom and security. On the other hand, Phindiwe Chona, in "VAT Exemption on Sanitary Pads in Lesotho: Translating Fiscal Policy into Menstrual Equity," explores Lesotho's 2019 VAT removal as a progressive step toward menstrual equity, while highlighting persistent cultural, economic, and infrastructural barriers.

Linda Nyamweya's "Underfunded and Overlooked: The Silent Quagmire in Primary and Secondary Schools" critiques Kenya's education system, calling for transparent budgeting, strengthened oversight, targeted reforms, and meaningful investment in education for development. Emmanuel Obado, in "Emerging Challenges and Opportunities in Data Privacy and Governance in Kenya," examines five years of Kenya's Data Protection Act, highlighting institutional progress alongside persistent challenges in awareness, enforcement, and regulation.

Antony Makau Irungu and Anthonia Oseiwe Odion jointly dissect the tension between contractual certainty and fairness in labour law. Drawing on judicial precedents and comparative perspectives, they advocate for legislative clarity to ensure equity and predictability in employment relations. Steve Odhiambo examines Kenya's 2025 High Court ruling abolishing criminal sanctions for attempted suicide. He argues for a paradigm shift toward a therapeutic, rights-based approach that prioritises care, prevention, and holistic mental health governance

In this edition, we interviewed Emmanuel Macharia" a highflying law student, whose remarkable journey has been shaped by discipline, intellectual curiosity, and global advocacy excellence. Emmanuel traces his rise from Strathmore University, Kenya to record-setting achievements in international mooting, including the Nuremberg Moot Court Competition, Germany and Philip C. Jessup International Law Moot Court Competition, Washington D.C. Emphasising clarity, composure, and humility as the pillars of advocacy, he offers profound insights on balancing academic rigour with leadership.

I want to thank our editorial team, writers, and everyone who contributed to the success of this edition. To our readers, thank you for continually reminding us why The StarLight stands as a voice of thoughtful reflection. Within these pages, you will find narratives that challenge orthodoxy, and analyses that provoke introspection. I invite you not just to read, but to engage, and allow each piece to enlighten and inspire you for a change in the new year, and beyond.

Welcome to 2026!

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CLIMATE REFUGEES IN AFRICA: BRIDGING HUMAN RIGHTS AND STATE SOVEREIGNTY

OCHIENG ODERO & ALI YUSRA HASSAN

INTRODUCTION

Across the world, climate change is no longer a distant warning but a lived reality. Rising temperatures, severe droughts, floods, and storms are disrupting livelihoods and forcing entire communities to move. In Africa, the crisis is especially urgent. Millions have already been displaced by droughts in the Horn of Africa, floods in Southern Africa, and cyclones along the Indian Ocean coast. What was once seen as an environmental issue has become a human one, testing the limits of law, morality, and governance.

International refugee law, however, has not kept pace with these realities. The United Nations Convention Relating to the Status of Refugees (the1951 Refugee Convention) and its 1967 Protocol remain the cornerstone of global refugee protection, but they define refugees narrowly, covering only those fleeing persecution for reasons such as race, religion, or politics. People forced to leave their homes because of drought or rising seas do not fit this definition, leaving them without legal coverage. In Africa, the Convention Governing the Specific Aspects of Refugee Problems in Africa adopted by the Organization of African Unity in 1969 expanded protection to include individuals fleeing "events seriously disturbing public order." However, its scope remains does not properly capture environmental displacement.

This legal and policy gap has created uncertainty for states and for those seeking refuge. Governments are torn between the duty to protect their citizens and the need to uphold humanitarian principles that extend beyond borders. Nowhere is this tension clearer than in Africa, where weak infrastructure, limited resources, and growing environmental instability intersect.

This article explores the evolving concept of climate refugees within Africa's legal and political landscape. It examines how sovereignty and humanitarian responsibility can coexist under international and regional law. By analysing African and global case studies, it highlights both the challenges and opportunities for reform. Ultimately, it argues that protecting those displaced by climate change is not only a moral necessity but also a constitutional and human rights obligation that defines modern statehood.

Defining the Climate Refugee Problem.

The term **climate refugee** has become common in public debate, yet it lacks a formal legal definition. People displaced by environmental change do not fall neatly within the categories established by international refugee law. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol define a refugee as someone who has fled their country due to a "well-founded fear of persecution" on grounds such as race, religion, nationality, membership of a particular social group, or political opinion. This definition, created in the aftermath of World War II, was shaped by political and civil conflicts, not by environmental crises.

As climate change accelerates, this limitation has become more visible. Individuals fleeing drought, famine, floods, or rising sea levels often cross borders out of necessity, yet they are excluded from international protection because they do not meet the legal threshold of persecution. Instead, they are treated as irregular migrants, subject to immigration control rather than humanitarian assistance. This leaves them vulnerable to detention, deportation, or

statelessness, despite facing life-threatening conditions.

Africa's 1969 OAU Refugee Convention attempted to expand this definition by including those compelled to leave their countries due to "events seriously disturbing public order." Some scholars and courts have interpreted this to potentially include environmental disasters, but the language remains ambiguous. In practice, few states have applied it to climate-related displacement. The absence of a clear encompassing definition means that legal protection depends largely on political will rather than obligation.

The debate extends beyond technical wording. It questions how the law defines persecution, protection, and humanity itself. Can the slow violence of climate change, droughts that destroy livelihoods, floods that erase homes, be considered a form of persecution? If not, do existing frameworks adequately protect those affected?

The United Nations High Commissioner for Refugees (UNHCR) recognises climate change as a major driver of displacement but continues to rely on non-binding guidelines and temporary protection measures. Without reform, millions of people, especially in vulnerable regions like Africa, the Pacific, and South Asia, will continue to fall through the gaps of international law.

Defining the climate refugee is therefore not just a matter of semantics but of justice. It requires the law to expand beyond only protecting those persecuted by governments to also protecting those displaced by forces beyond any government's control.

Environmental Law and Human Rights Dimensions

Environmental law and human rights law increasingly overlap when addressing the impacts of climate change. While international environmental law focuses on states' responsibilities to manage natural resources and reduce emissions, they rarely address the rights of people forced to move because of environmental harm. Human rights law, on the other hand, places individuals at the centre, making it essential in protecting those displaced by climate change.

Global frameworks such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement acknowledge climate-induced migration as an emerging issue. Yet, these instruments are largely preventive and do not create enforceable rights for displaced persons. They bind states to reduce emissions and build resilience, but they remain silent on what happens when prevention fails and people lose their homes. The Sendai Framework for Disaster Risk Reduction (2015–2030) recognises the link between disasters and displacement, urging governments to reduce vulnerabilities, but it also lacks a clear protection mechanism.

In contrast, human rights instruments like the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the African Charter on Human and Peoples' Rights recognise the right to life, dignity, and security. These rights imply that governments must take reasonable steps to protect people from foreseeable environmental harm. When climate change destroys homes, livelihoods, or access to water, it becomes a human rights issue rather than just an environmental one.

Kenya's domestic framework reflects this intersection between environmental and human rights protection. The Constitution of Kenya (2010) guarantees the right to a clean and healthy environment under Article 42 and obliges the state to ensure sustainable development under Article 69. These provisions create a direct link between environmental protection and human welfare.

Furthermore, the Refugees Act, 2021 adopts both the 1951 Refugee Convention and the broader 1969 OAU Refugee Convention. Under Section 4, Kenya recognises refugees not only as those fleeing persecution but also as persons escaping "events seriously disturbing public order." While the law does not explicitly mention climate displacement, this phrase provides room for a broader interpretation. Environmental disasters that disrupt public order, such as floods, droughts, or famine, could fall within this definition if applied progressively.

This connection between human rights and environmental law demonstrates that displacement caused by climate change cannot be viewed as a purely ecological problem. It challenges how the law defines responsibility, protection, and the limits of sovereignty. In Africa, where the effects of climate change are intensifying, integrating human rights principles into environmental governance may be the most effective way to ensure that displaced communities are not left without protection or recognition.

As the climate crisis deepens, governments are confronted with a growing moral and legal dilemma how to balance national sovereignty with humanitarian obligations. Sovereignty gives a state the right to control its borders, protect its citizens, and regulate migration. Yet, the humanitarian principles embedded in international law require states to safeguard life and dignity, even when those in need come from beyond their borders.

This tension becomes evident when environmental disasters displace people across national lines. While no country can be forced to open its borders, international law recognises limits to sovereignty where human rights are at stake. The principle of non-refoulement, enshrined in the 1951 Refugee Convention and reflected in customary international law, prohibits states from returning individuals to territories where their lives or freedoms would be at risk. This principle, though developed for political refugees, has growing relevance in the context of climate change, where returning people to drought- or flood-stricken regions could amount to exposing them to death or serious harm.

Climate change has also challenged the traditional understanding of state responsibility. The effects of environmental degradation often cross borders and cannot be confined to one state's jurisdiction. This blurring of responsibility calls for cooperation rather than isolation. The United Nations Human Rights Committee's decision

in Ioane Teitiota v. New Zealand (2020) (CCPR/C/127/D/2728/2016) marks a critical step in this direction. The Committee held that states may violate the right to life under Article 6 of the ICCPR if they deport individuals to environments made uninhabitable by climate change. While this decision is only persuasive, it signals that state sovereignty must be exercised in a way that respects humanitarian obligations arising from global environmental realities.

In Africa, the same question arises with greater urgency. Many states, already struggling with resource limitations, face internal displacement from floods, droughts, and desertification. The instinct to prioritise national interests is understandable, yet humanitarian law demands that protection of life and dignity take precedence. The African Charter on Human and Peoples' Rights recognises (Article 20) the right to existence (Article(s) 1, 16 and 18) and the duty of states to promote human welfare, principles that extend naturally to people displaced by environmental crises.

Sovereignty and humanitarian duty are therefore not opposing values but interconnected responsibilities. A modern understanding of sovereignty views it not as absolute control but as the ability to govern justly, protect citizens, and uphold shared human values. In the era of climate displacement, the strength of a state is measured not only by how tightly it guards its borders, but by how humanely it responds to those seeking refuge from catastrophe.

Kenya, Somalia and the Dadaab Dilemma

The tension between sovereignty and humanitarian responsibility is vividly illustrated along the Kenya–Somalia border. For over three decades, Kenya has hosted Somali refugees fleeing not only conflict but also the devastating effects of drought, famine, and environmental collapse. The Dadaab Refugee Complex, established in 1991, remains one of the largest refugee settlements in the world, home to nearly 300,000 people. For many families, Dadaab is the only home they have ever known.

Kenya's role as a host state has drawn both praise and pressure. On one hand, it has upheld international solidarity by sheltering displaced persons in accordance with the 1951 Refugee Convention, the 1969 OAU Refugee Convention, and the Refugees Act, 2021. On the other, the government has repeatedly threatened to close Dadaab, citing national security risks, terrorism concerns, and the strain on limited resources. These fears are not unfounded; the region faces real threats from extremist groups and economic hardship. Yet, closing the camp would place thousands of lives in danger and violate core humanitarian principles.

The principle of non-refoulement, which prohibits states from returning refugees to territories where their lives or freedoms are threatened, is binding under both international and Kenyan law. This was reaffirmed in Kituo Cha Sheria & Others v. Attorney General & Others (2017) KECA 773 (KLR) where the High Court of Kenya declared the government's directive to close Dadaab unconstitutional. The Court held that such action violated Kenya's obligations under international refugee law and the rights of refugees to dignity and protection.

The Dadaab dilemma reflects a broader challenge for many African states: balancing domestic priorities with humanitarian duty. Kenya's experience shows that adherence to humanitarian law does not weaken sovereignty but strengthens it by aligning state action with constitutional and moral responsibility. As climate change continues to drive displacement, the Dadaab case stands as a reminder that compassion and legality must guide state responses, even under immense pressure.

Southern Africa – Mozambique, Malawi, and Cyclone Displacement

The effects of climate change are not confined to one region of Africa. In Southern Africa, the devastation caused by cyclones has exposed the continent's growing vulnerability and the absence of legal protection for

those displaced by natural disasters. When Cyclone Idai struck Mozambique, Malawi, and Zimbabwe in 2019, more than 2.6 million people were displaced. A few years later, Cyclone Freddy hit the same region, forcing thousands more to flee. Most of these individuals were not seeking permanent relocation; they were merely escaping destruction and loss.

Governments in the region were ill-prepared to manage this scale of displacement. Since existing refugee and migration laws did not recognise climate-related displacement, those who crossed borders were often treated as irregular migrants rather than persons in need of protection. Temporary shelters and emergency aid were provided, but long-term legal and social solutions were largely absent. Many displaced people were left in limbo—neither recognised as refugees nor integrated into host communities.

The Southern African Development Community (SADC) coordinated humanitarian assistance through short-term emergency mechanisms, but these efforts were reactive rather than preventive, by providing support to national authorities in emergency response, early recovery operations, continuous monitoring of the situation and consolidation of a regional humanitarian appeal, based on the evolving impact assessments. here remains no regional legal framework in Southern Africa that clearly outlines how states should respond to people displaced by environmental disasters. The absence of such a framework has led to inconsistent and fragmented responses across the region.

This experience underscores the growing need for African states to develop legal pathways for those affected by climate disasters. The displacement caused by Cyclones Idai and Freddy shows that climate change is no longer a theoretical issue, it is a reality reshaping communities and borders. As such, the region's approach must move from temporary humanitarian aid to structured protection policies that safeguard the dignity and rights of displaced persons while respecting the sovereignty of states.

Case Study -The Pacific Islands and New Zealand

The experiences of small island nations in the Pacific offer a compelling example of how climate change can redefine the meaning of refugee. States such as Kiribati, Tuvalu, and the Marshall Islands face an existential threat from rising sea levels. For these nations, climate change is not a distant risk—it is a slow-moving catastrophe that threatens to submerge entire territories and displace entire populations.

For decades, communities in these islands have relied on migration as an adaptation strategy, moving temporarily or permanently to neighbouring countries like New Zealand and Australia. Yet, when climate impacts escalate to the point where life becomes unsustainable, the question arises: can these people be legally recognised as refugees? The 1951 Refugee Convention says no. Its definition limits refugee protection to those fleeing persecution by human actors, not environmental forces.

This limitation was tested in the landmark case of Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment (CCPR/C/127/D/2728/2016) (New Zealand, 2020). Teitiota, a citizen of Kiribati, applied for refugee status in New Zealand, arguing that the rising sea levels and environmental degradation in his homeland threatened his family's survival. New Zealand's courts rejected his claim, holding that climate change did not meet the definition of persecution under the Refugee Convention. However, when the case reached the United Nations Human Rights Committee, a significant shift occurred.

The Committee found that while Teitiota's removal did not violate his rights in that particular case, states may breach Article 6 of the International Covenant on Civil and Political Rights (ICCPR) if they deport individuals to countries where climate change poses a real risk to life. This was the first time an international human rights body recognised that environmental degradation can make deportation unlawful.

Following this ruling, New Zealand began exploring new legal and policy approaches, including humanitarian visas for Pacific Islanders affected by climate change. The Teitiota case has since become a reference point for discussions on expanding refugee protection to include environmental displacement.

For Africa, this case carries valuable lessons. It shows that the law can evolve to meet emerging realities and that humanitarian principles can reshape traditional legal definitions. The Pacific experience also highlights the importance of proactive planning and regional solidarity. Waiting until disaster becomes irreversible not only threatens human rights but also undermines the moral authority of states. A similar legal and policy shift in Africa could prevent future crises and affirm the continent's leadership in humane governance.

Bridging the Divide – Regional and Continental Cooperation.

Despite the complexity of balancing sovereignty and humanitarian duty, these principles can complement rather than contradict each other. Regional and continental cooperation offers Africa the opportunity to transform climate displacement from a humanitarian crisis into a shared responsibility.

The African Union (AU), through instruments such as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention 2009), has already recognised the need to protect people displaced from their own countries due to natural or human-made disasters. However, the Convention focuses mainly on internal displacement. Cross-border movement caused by climate change remains largely unaddressed, leaving a gap that regional blocs can fill.

Bodies like the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC) are well positioned to lead this reform. They can harmonise national policies, share data, and coordinate relocation programmes. IGAD's work on the Free Movement Protocol and regional migration policy frameworks offers a foundation for future cooperation. Similarly, SADC

could expand its humanitarian mechanisms to include formal protection for those displaced by climate-related disasters.

Creating an African Framework on Climate Displacement would be a practical step forward. Such a framework could define who qualifies as a climate-displaced person, outline the obligations of host states, and establish shared funding mechanisms for emergency response. It would allow African countries to manage migration collectively, rather than react individually in moments of crisis.

Moreover, this cooperation would reinforce Africa's existing human rights commitments. The African Charter on Human and Peoples' Rights and the Agenda 2063 vision both affirm the duty of states to protect life, promote unity, and uphold shared prosperity. Recognising climate-displaced persons as deserving of regional protection would be consistent with these values.

An African-led approach would also strengthen sovereignty, not weaken it. By setting their own regional standards, African states can avoid external imposition while addressing humanitarian realities. This partnership between sovereignty and solidarity represents the future of governance on the continent—one where compassion and cooperation define the exercise of state power in an era of global environmental change.

CONCLUSION

Climate displacement is prompting us to rethink traditional ideas about borders, rights, and responsibilities. African states have valid concerns about sovereignty, but they also have legal and moral responsibilities that cannot be overlooked. Balancing the two requires more than emergency responses; it needs a new vision, one where sovereignty is about leadership rather than exclusion. With the right legal frameworks and regional cooperation, Africa can turn this challenge into an opportunity: to protect its people, uphold its values, and shape the future of humanitarian protection in a warming world.

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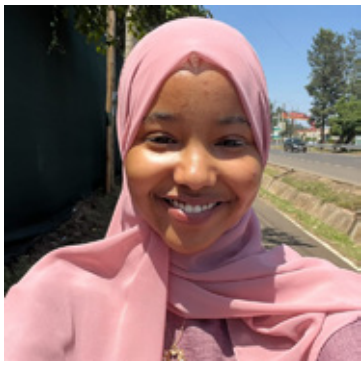
Ochieng Odero is a final-year paralegal student at the Kenya School of Law. He serves as the Head of Policy and Research at the Empowerment Pathway Alliance, a community-based NGO focused on mental health and supporting vulnerable populations. He has a strong interest in tort law, access to justice, legal reform, and public interest advocacy in Africa. Ochieng is also an active public speaker, having participated in various legal and youth-focused forums. He advocates for justice systems that are fair, inclusive, and responsive to the needs of marginalized and underserved communities across the continent.



Ali Yusra Hassan is a legally trained professional and Certified Negotiator with a strong foundation in paralegal practice, legal research, and Alternative Dispute Resolution (ADR). She is passionate about advancing access to justice and promoting community-centered approaches to conflict resolution. Through her work with the Solution to the Society Youth Organization, Yusra has been actively involved in civic education, gender equality advocacy, and restorative justice initiatives. Her current focus lies in exploring the intersection of law, environmental sustainability, and human rights to build equitable responses to climate-induced displacement and social vulnerability.

THE THIN LINE BETWEEN JUSTICE AND EMOTION: EMOTION AS A KEY FACTOR IN THE CRIMINAL JUSTICE SYSTEM.

EZINNE TREASURE NWARU-PATRICK

ABSTRACT

While Justice is a significant tool for a democratic society, understanding the true meaning of Justice and the aim of punishment is needed for a prosperous society. Unfortunately, emotions have been identified as a key factor in administering justice. The main objective of this research paper is to examine how the punitive measures of punishing offenders still echo in our modern society and provides reformative and rehabilitative alternatives to the brutal approach. This research reveals how emotions have clouded our sense of Judgement and why there is a need for reforms. This analysis reveals how laws like The Administration of Criminal Justice Act, 2015 and Execution of Sentences Act have introduced reformative alternatives to justice. These findings emphasises that retaliation and desire for revenge should not surpass the desire for justice and a progressive society.

KEYWORDS: Emotions, Justice, Punishment, Revenge, Society, Desire.

INTRODUCTION

We call it justice when the goal is to make someone pay, but is it really justice or just vengeance dressed in legal robes? Justice is widely regarded as the cornerstone of a democratic society—a system built on fairness and the rule of law, but beneath all of this is a desire for vengeance. Justice at its core means fairness, equality and impartiality. Retribution, in contrast, refers to punishment for wrongdoing. Justice and retribution both aim to address wrongdoing; however, they differ in approach and ultimate goal. While justice focuses on fairness, equality, rehabilitation, and aims at addressing the root causes of crime and preventing future harm, retribution, on the other hand, is more punitive in nature, seeking to inflict punishment on the wrongdoer as a form of revenge or retribution for their actions.

Criminal punishment is meant to reflect key theories of deterrence, restoration, fairness and upholding justice rather than inflicting pain; however, when a crime is committed, society's response is often emotional, and they are focused on the offender paying for their crimes rather than actually upholding justice. Throughout history, the thin line between justice and retribution has blurred significantly. From the ancient eye-for-an-eye principle of punishment to the modern modes of punishment, criminal law has oscillated between moral correction and societal revenge.

This article examines how criminal punishment often strays from its initial purpose of upholding justice into exacting revenge. It traces the historical roots of punishment, the purpose of punishment and why rethinking punishment is important to uphold the rule of law and promote a true democratic society.

THE HISTORICAL ROOTS OF PUNISHMENT

Punishment can be defined as "any penalty, or confinement, inflicted upon a person by the authority of the law and the judgement and the sentence of the court, for some crime or offence committed by him or for his omission of a duty enjoined by law." Throughout history, punishment has evolved, and several attempts have been made to reform the punitive and vindictive punishments that were used in the past.

In ancient times, criminal punishments were often brutal and public, serving both as retribution and a deterrent. The earliest legal codes, such as the Code of Hammurabi from ancient Mesopotamia, dating back to around 1754 BCE, is one of the oldest deciphered writings of significant length in the world and is renowned for its principle of “an eye for an eye.” . It laid out explicit and often harsh penalties for various offenses and also reflected a rigid and punitive approach to maintaining order.

THE ANCIENT GREECE MODE OF PUNISHMENT

In ancient Greece, punishments ranged from fines and public shaming to corporal punishment and, in severe cases, execution. The Athenians had no doubts about why they punished: it was simply because someone was angry at a wrong and wanted that anger dealt with. In other words, the punishment was to appease the anger that the victim or society was feeling. For this reason, several brutal measures were taken to placate the society. It was evident in various courtrooms, the prosecutor was either the offended or he had something to do with the offence. This explains that punishment was not given to uphold justice or to restore order; it was mainly to retaliate, to avenge the victim.

When it came time to punish, the Athenians acted out of anger and to cure anger. Anger was thus assumed to be not only the source of particular punishments but also at the root of law itself. The reason for this system was to allow citizens to convert their anger into a public decision in the view of restoring peace and uplifting the community. Can such acts really be called justice?

Similarly, Roman law, codified in the Twelve Tables around 450 BCE, detailed various punishments, including corporal punishment, slavery, and execution. The Romans were particularly known for their use of crucifixion, a brutal method intended to serve as a stark warning to others.

AFRICAN MODES OF PUNISHMENT

Many scholars acknowledge that contemporary criminal justice systems in numerous African states are significantly influenced by colonial legacies. Nevertheless, before colonization, indigenous African societies had well-established traditional mechanisms for administering justice, rooted in communal values, restorative practices, and customary law. Africans had a way of ruling themselves before colonization invaded Africa. African indigenous punishment included: capital punishment, murder, corporal punishment, banishment, etc.

THE ROLE OF RELIGION IN PUNISHMENT

The role of religion in punishment was very significant in ancient times. Many societies believed that crimes were not only offenses against individuals but also affronts to the gods. Punishments were therefore too harsh due to this belief. Punishments were often carried out in a ritualistic manner to appease divine forces. For example, in ancient Egypt, legal decisions and punishments were overseen by the pharaoh, who was considered a god on earth, blending judicial and religious authority. Similarly, in Islamic law crimes were considered offences against divine order. Offences like intoxication brought about serious punishment (80 lashes) and renouncing one's religion was considered an offence to Allah and was punished by execution.

Historical evolution of punishment reveals how early civilizations utilized punitive measures as a tool of vengeance/control, to reinforce authority and deter wrongdoing, establishing a foundation for contemporary legal practices. While these systems laid the groundwork for modern justice, they also left behind a legacy of retribution that still shapes criminal law today.

FUNCTIONS OF PUNISHMENT (THEORIES OF PUNISHMENT)

Punishment is a penalty inflicted on an offender through judicial procedure. Punishment can be defined as the consequences imposed on an offender for a crime committed. Punishment can be said to be imposed to promote peace and order in the society. It is important to note that the primary purpose of criminal law is punishment. Through the enforcement of criminal law, society aims to hold the offender accountable for the offence he committed and to prevent similar offences from being committed.

The theory of punishment refers to the philosophical and conceptual foundations that underpin our understanding of punishment and the purpose it serves in society. Historically, theories of punishment have proposed five purposes for criminal sanctions: deterrence, incapacitation, rehabilitation, restitution, and retribution.

Deterrence

This aims to prevent future crime by frightening the defendant or the public. There are two types of deterrence: Specific deterrence and General deterrence. Specific deterrence relates to the offender. This is to prevent him from committing the crime again. This type of deterrence is enforced to instill fear in the perpetuator of the crime. General deterrence, on the other hand, aims at instilling fear in the public. When the public learns, for instance, that an individual defendant received a life sentence for the crime of murder, this knowledge hopefully inspires a deep fear of criminal prosecution and deters others from committing murder.

Incapacitation

This is sometimes referred to as isolation. Incapacitation is society's recognition that some offenders cannot be deterred or rehabilitated. This is to protect the society from potential harm that the offender is capable of. This can be done in several ways, the most common of all is Execution, also known as a death sentence. Other ways include imprisonment for life, house arrest and incarceration. This approach is not concerned with reforming the offender or deterring others, but rather with the immediate protection of society by limiting the offender's opportunity to reoffend.

Rehabilitation

This can also be called the reformative theory. The reformative theory of punishment states that the goal of punishment should be to help offenders learn from their mistakes and become productive members of society. This theory seeks to prevent future crimes by reforming the defendant's behaviour. Examples of rehabilitation can include educational and vocational programs, treatment centre placement, and counselling. Alaska Therapeutic Court is an example of a criminal sanction that primarily focuses on rehabilitation.

Restitution

The purpose of restitution is to repair the harm inflicted upon the victim. Restitution may involve court-ordered payments from the offender to compensate for the damage caused. In this respect, it often mirrors a civil damages award. Compensation can cover physical injuries, loss of property or money, and in rare cases, emotional distress, typically reflected in future counselling expenses. Restitution may also include reimbursement for certain costs associated with the criminal prosecution and punishment.

Retribution

The retributive theory of punishment is a widely debated and controversial theory that holds that punishment is justified as a way of exacting revenge for a wrong that has been committed. According to this theory, punishment serves to pass across the message that, the criminal behaviour will not be tolerated. Supporters of this theory argue that holding offenders accountable is essential not only to affirm societal norms but also to demonstrate that criminal conduct will not go unchallenged. When victims or society discover that the offender has been adequately punished for a crime, they may achieve a certain satisfaction that our criminal justice system is working effectively.

WHEN JUSTICE TURN INTO VENGEANCE.

**"When justice is driven by emotion,
it ceases to be justice and becomes revenge."**

In recent years, emotions have occupied an important place in criminological discussions on crime, punishment, and control. The media and the public are more preoccupied with an offender getting punished and paying for his crime. We have witnessed numerous instances where the punishment meted out to offenders appears vengeful. The underlying reason is simple: emotions.

When a crime is committed, society clamours for justice. But in truth, in the heat of outrage, the true essence of justice is often forgotten. Justice is not about satisfying emotional impulses; it is about fairness, equity, and impartiality. Punishment cannot and should not be eradicated. Justice demands that offenders face the repercussions of their deeds. However, when punishment becomes excessive, it crosses the line into revenge. When it is designed to appease public sentiment rather than uphold reformation it ceases to be justice. It becomes retribution. Instances where punishment strayed from justice to revenge:

Central Park Five (USA).

This is a case of a 28-year-old woman who was raped and beaten in Central Park, New York. Five Black Hispanic boys, aged between 14 and 16, were found guilty and jailed for the crime. They became known as the Central Park Five. However, they never committed the crime. Rather, these boys were interrogated, beaten and made to make false confessions. Although, the DNA evidence from semen found at the

scene didn't match any of the five boys, prosecutors relied solely on the initial interrogations. After the real offender came out and admitted to his crimes, he was not prosecuted because of the Statute of limitation. One of the boys called Salam said "We were convicted because of the colour of our skin. People thought the worst of us."

Mob Justice

Mob justice, also known as vigilantism, refers to the act of a group taking the law into their own hands to punish individuals they perceive as guilty, often without due process. This phenomenon has persisted across cultures and historical eras, often surfacing in societies where formal justice systems are either fragile or ineffective. There are several examples of mob Justice;

Jungle Justice in Lagos and Other Cities

In Nigeria, mob violence, popularly known as 'jungle justice', has become an unsettlingly common response to crime. People accused of theft, witchcraft, or minor offences are often beaten, lynched, or even burnt alive without any form of trial. Silver Nwokoro reports that this devastating development is a symbol of a seemingly failed legal system. Many citizens no longer trust the police or the courts to deliver justice fast, so they take matters into their own hands. In November 2024, an unidentified man, suspected of burglary, was lynched by an angry mob in Port Harcourt, Rivers State. His corpse was later found along Olu Obasanjo Road.

Prisons as an instrument of revenge.

The conditions in some prisons today are deeply troubling. It is important to remember that the original purpose of imprisonment and introduction of prisons was rehabilitation and integrating the society. Yet, this cause is forgotten. The reality of prison life now often reflects a vengeful purpose rather than a reformative one.

Prisoners are frequently treated in ways that strip them of their humanity. Every individual is entitled to the fundamental right to dignity, as enshrined in Section 34 of the 1999 Nigerian Constitution. This right establishes that all humans deserve to be treated like humans with respect and dignity. Unfortunately, this principle is not adhered to in prison. Inmates are brutally beaten, under-fed, denied access to medical care and subjected to degrading treatment. This is a clear sign of revenge not justice. These examples and many others depict how emotions and desire for revenge dictate the punishment given to offenders. Justice is misunderstood by a lot of people. What they call justice is, in fact, retribution.

THE CASE OF RETHINKING PUNISHMENT

Across cultures and generations, punishment has served as a tool for upholding justice. Yet in many societies today, punishment has drifted from its origi

nal purpose. Rather than reforming behaviour, it is now used for revenge. We should not forget the true purpose of punishment and the true meaning of Justice. Emotions often cloud our judgement threatening societal progress. Over emphasis on retribution clouds the sense of justice. It focuses on attacking the offender rather than paying attention to the root cause of the offence to prevent a future occurrence. We should focus more on rehabilitating the society, than exacting revenge on an offender.

Rehabilitative and restorative alternatives that prioritise accountability and healing. Restorative justice practices offer an alternative approach to addressing crime by focusing on repairing harm, fostering accountability, and rebuilding relationships between offenders, victims, and the community. Unlike traditional punitive justice systems, restorative justice emphasizes dialogue, empathy, and understanding, creating opportunities for mutual
healing and resolution.

Some of the ways restorative and rehabilitative justice can be implemented include:

i. Victim-Offender Mediation

This is a restorative justice mode of ensuring conversations between offenders and victims. This will enable some of these victims get the closure which they truly deserve to move on before punishment is administered to the offender. Research shows that victim-offender

mediation often leads to greater victim satisfaction than traditional court proceedings. Participants frequently express a sense of validation and emotional relief, underscoring the model's powerful role in restoring dignity and fostering healing.

ii. Therapeutic Support

Victims should be taken care of to promote a true society and to uphold true justice. This can be done through therapy sessions for the victim, where they are able to voice out their pains and truly let go. Restorative justice models have demonstrated varying degrees of effectiveness across different contexts. Empirical research indicates that these models can significantly enhance outcomes for both victims and offenders when compared to traditional punitive measures.

It is important to note that laws have been put into place to promote restorative justice. The Administration of Criminal Justice Act (ACJA) reforms Nigeria's criminal procedure and introduces restorative elements, i.e, Section 467 of ACJA makes provision for offenders to serve their sentence in rehabilitation or correctional centres established by the federal government in lieu of imprisonment. Execution of Sentences Act (2001) is another law that has been enacted to execute sentences in a way that prevents new crimes, reassures society, and ensures satisfactory conditions for prisoners. (Section 2).

Many countries have enacted laws that promote restorative and rehabilitative justice, emphasizing healing and accountability over punishment. This includes Australia, New Zealand, Canada, United Kingdom, the United States, etc. For example, In Canada, the Youth Criminal Justice Act (2003) emphasizes rehabilitation and reintegration over punishment. Also in the UK, restorative justice is embedded in the Crime and Courts Act 2013.

CONCLUSION.

Throughout the existence of humanity, we have found it difficult to create a balance between vengeance and emotions. Humans are naturally emotional which makes it more difficult to create a balance. Ancient societies used punitive measures to uphold justice and to ensure compliance to rules and regulations. In modern times, there are still signs of the methods used in ancient society. Even as society evolves, the line between justice and revenge remains blurred. True justice reflects reformation, equality, rehabilitation and growth. Justice surpasses the desire for revenge.

Our anger and emotions should not make us forget the true meaning of justice and the whole purpose of punishment. There is a need to rethink the understanding of justice and punishment for a true democratic society because our method of handling crimes reflects the true nature of our society.

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BALANCING SECURITY AND CIVIL LIBERTIES: THE ROLE OF REFORMS IN PROTEST MANAGEMENT.

CHERONO DANIEL KIBIWOTT

ABSTRACT

The discourse surrounding protest management in Kenya underwent a profound shift in 2024, as the nation witnessed an overwhelming uprising led by thousands of young activists predominantly from Generation Z. They took a stand against the proposed Finance Bill 2024, which they deemed financially burdensome. What initially started as peaceful protests against tax increases rapidly devolved into chaos, marked by heavy-handed responses from law enforcement agents. The police resorted to tear gas, water cannons, rubber bullets, and even live ammunition actions that tragically culminated in the loss of at least sixty lives and left hundreds injured. This tragic escalation illustrates the deep-seat knee tensions that persist between the necessity of state security and the protection of civil liberties in Kenya. The right to peaceful assembly, guaranteed under Article 37 of the 2010 Constitution, is repeatedly undermined by the excessive use of force employed by the authorities. Article 37 explicitly affirms that every individual has the right to assemble peacefully, to demonstrate, to picket, and to present petitions to public authorities, unarmed and peacefully. However, the existing gap in enforcement enables security

INTRODUCTION

Protest is an intrinsic right, enshrined in the Constitution of Kenya, to which every citizen is entitled. At its core, the effective management of protests in Kenya hinges on the challenging task of balancing legitimate security concerns such as the need to prevent vandalism or outbreaks of violence with the protection of fundamental freedoms guaranteed to all citizens. Article 238 of the 2010 Constitution provides a crucial framework for achieving this delicate equilibrium by outlining the principles and responsibilities pertaining to national security. Titled "Principles and state of national security," Article 238(1) explicitly states that national security is a primary obligation of the Government, underscoring its responsibility to protect the nation and its citizens. Subsection (2) elucidates the aim of national security: to promote and ensure the safety, economic stability, and social wellbeing of the people, the State, and society at large. This is to be accomplished through various measures, including (a) intelligence activities designed to inform policy decisions; (b) proactive measures to prevent and combat threats such as terrorism, violent crime, and natural disasters; and (c) the protection of individuals, property, and the State from both internal and external threats. Most significantly, Article 238(3) stipulates that the pursuit of national security must be conducted in accordance with the law and with due regard for the rights and freedoms of individuals and collective groups. This provision firmly links security strategies to constitutional protections, ensuring that actions taken in the name of security, especially in the context of managing protests, cannot be used as a justification for the infringement of civil liberties. Additionally, Article 238(4) mandates the State to cultivate mechanisms for civilian oversight and control over security forces, thereby mitigating the potential for abuse of power. Subsection (5) reinforces this framework by establishing that the national security apparatus must operate under the auspices of civilian authority, which is a cornerstone of democratic governance.

In the wake of the constitutional reforms instituted after 2010, notable initiatives have been launched to bolster these principles. One such reform is the establishment of the National Police Service (NPS) under Article 244, which outlines the expectations placed on law enforcement to strive for

professionalism, root out corruption, and adhere to established human rights standards. This initiative aims to transform a police force that historically bore the legacy of colonial oppression into one that is accountable and committed to respecting the rights of citizens. The Public Order Act (Cap 56) plays a vital role in regulating public assemblies and processions by stipulating the requirement for permits for public gatherings and criminalizing what it defines as "unlawful assemblies" under Section 5. While this Act is intended to maintain a balance between order and the rights to assembly and protest, it has faced criticism for facilitating arbitrary restrictions on spontaneous protests. The success of these regulations and reforms, however, hinges on addressing ongoing systemic issues, including extrajudicial killings, the establishment of robust judicial oversight, and the consistent enforcement of reform outcomes. This article posits that while these reforms offer a framework with significant potential, the persistent shortcomings in addressing these challenges contribute to a culture of impunity and a gradual erosion of civil liberties. To strengthen this argument, the analysis will draw upon various Kenyan laws, including the National Police Service Act (2011), the Penal Code (Cap 63), the Public Order Act (Cap 56), the Independent Policing Oversight Authority Act (2011), and others, to craft a comprehensive understanding of the legal landscape governing protest rights and security in Kenya.

Extra-Judicial Killings: The Ultimate Erosion of the Balance

Extrajudicial killings stand as one of the most profound violations of rights within the context of protest management in Kenya, transforming what should be peaceful expressions of dissent into alarming arenas of state-sponsored violence. The term "extrajudicial killings" refers to the illegal taking of life by agents of the state without following due legal processes. Such actions fundamentally violate Article 26 of the 2010 Constitution of Kenya, which enshrines the right to life and explicitly forbids arbitrary deprivation of life. Moreover, these actions contravene provisions found in Section 49 of the National Police Service Act (2011), which dictates that the use of lethal force is only permissible in situations that pose imminent threats to human life.

The regulatory framework around the use of force is further elaborated in the Sixth Schedule of the National Police Service Act, which restricts the use of firearms to instances of absolute necessity and promotes non-lethal alternatives, such as batons and tear gas, to manage crowds. However, despite these explicit guidelines, police officials frequently perceive protesters as significant threats, leading them to deploy considerably disproportionate levels of force. This not only creates a prevailing culture of impunity among law enforcement but also constitutes a direct infringement of Article 29, which safeguards individuals against torture as well as cruel, inhuman, or degrading treatment. Such egregious actions undermine the spirit of Article 238(3), which emphasizes that all security actions must prioritize the protection of individual rights. In this troubling context, protests intended as demonstrations of democratic expression in accordance with Article 37 are reframed as existential dangers that warrant lethal responses. They operate in blatant disregard of Sections 202 and 203 of the Penal Code concerning manslaughter and murder.

The consequences of these practices have been catastrophic, particularly illustrated during the widespread protests against the Finance Bill in 2024, where reports indicated that at least 60 individuals lost their lives. Amnesty International meticulously documented sixty-three (63) fatalities directly linked to these protests, in addition to eighty-three (83) confirmed cases of abductions and more than two thousand (2,000) unlawful arrests, many of which involved police firing live ammunition at unarmed citizens. The Kenya National Commission on Human Rights (KNCHR) confirmed these harrowing trends in its State of Human Rights Report for the period from July 2023 to November 2024, detailing cases of enforced disappearances that were followed by grim discoveries of execution-style killings. Many protesters were reportedly abducted from their homes or from public spaces, only to be found later with fatal gunshot wounds. These heinous acts violate the provisions against murder outlined in Section 203 and manslaughter in Section 202 of the Penal Code.

In 2024 alone, the Independent Medico-Legal Unit (IMLU) found evidence of over 100 extrajudicial killings, with a significant number being directly associated with the suppression of protests. Academic insights from scholar Mutuma Ruteere, who has extensively analyzed police accountability, indicate that these killings are part of a persistent mindset rooted in the colonial legacies that still shape the National Police Service (NPS). He highlights a troubling "shoot first" mentality that endures despite reforms aimed at improving police conduct. The discourse around extrajudicial killings in Kenya is robust, particularly among scholars who critique the country's track record on civil liberties before the constitutional reforms of 2010. Their analyses link these acts to fundamental systemic failures, while more recent scholarship explicitly points out that the promised reforms have consistently fallen short in stopping ongoing violence both in counterterrorism operations and in protest management.

The historical patterns of such violence loom large over the present context. The post-election violence in 2007, for instance, resulted in over five hundred (500) reported extrajudicial killings, as detailed in the poignant report titled "Cry of Blood." This tragic chapter in Kenya's history catalyzed reforms, including the recommendations of the Ransley Task Force, which aimed to impose stricter regulations on the use of force. Nevertheless, the unfortunate reality of 2024 demonstrates that the same brutal tactics have reemerged. Organizations like Human Rights Watch and Amnesty International have reported instances of abductions and killings aimed at obstructing the wheels of justice, suggesting that the state prioritizes counterterrorism or anti-riot approaches over adherence to fundamental human rights.

The Prevention of Terrorism Act (2012) has frequently been cited as an enabling framework for extrajudicial actions conducted under the pretext of ensuring national security. According to the court findings in the case Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] KEHC 7074 (KLR), a troubling acknowledgement was made regarding the current state of affairs in Kenya: "We are living in troubled times. Terrorism has caused untold suffering and greatly compromised national security and individual safety... It is how the State manages this balance that is at the core of the petition before us." This underscores the tension between security needs and the protection of rights, which has become a focal point of legal arguments in recent years.

In light of these ongoing atrocities, the KNCHR has urgently called for comprehensive investigations into these human rights violations, warning that without address, Kenya risks regressing into "the dark abyss of atrocities." The ramifications of these extrajudicial acts not only violate domestic laws but also breach international human rights standards, such as those established in the UN Basic Principles on the Use of Force commitments that Kenya has formally recognized. As such, it is vital that the focus shifts towards ensuring accountability and protecting the sanctity of human life within the framework of law enforcement, to restore faith in justice and safeguard fundamental liberties for all citizens.

Judicial Oversight: The Cornerstone of Proportionality in Kenya's Policing

Judicial oversight plays an essential role in protecting citizens from potential police overreach, particularly in the context of managing protests in Kenya. This oversight is vital for maintaining proportionality and accountability within law enforcement agencies. The 2010 Constitution of Kenya, specifically Article 244, lays a foundational principle that mandates the National Police Service (NPS) to operate in accordance with human rights standards. This constitutional provision underscores the importance of ethical policing, particularly during situations that involve public demonstrations.

To further ensure accountability, the Independent Policing Oversight Authority (IPOA) was established under the Independent Policing Oversight Authority Act of 2011. This body is tasked with investigating allegations of police misconduct, including instances of excessive force that may occur during protests. IPOA's mandate encompasses ex officio investigations, especially in cases of alleged police-related deaths, emphasizing the need for impartial and thorough investigations to eliminate impunity. The significance of this oversight mechanism is bolstered by Article 59(2)(d) of the Constitution, which authorizes the Kenya National Commission on Human Rights (KNCHR) to probe human rights violations actively.

This system of oversight aligns with the principles outlined in Article 238(4), which advocates for the establishment of civilian control mechanisms. This positioning highlights the judiciary and independent bodies as critical defenses against any potential abuse of power by security forces. Additionally, the Criminal Procedure Code (Cap 75) further underpins these mechanisms by mandating timely investigations into deaths, emphasizing the importance of inquests as per Section 195, especially when fatalities are deemed suspicious.

In practical terms, IPOA has rigorously investigated abuses that occurred during protests in 2024, revealing a disturbing pattern of unlawful killings and making recommendations for prosecutions stemming from these findings. According to IPOA's performance report, a total of 1,943 complaints were processed, demonstrating the scale of concerns regarding police conduct. Significant high court rulings have shown the judiciary's commitment to upholding constitutional rights. For instance, in the landmark case of Kenya Human Rights Commission & 8 others v Nchebere (2024), the court ruled that unprovoked police brutality aimed at violently dispersing peaceful demonstrations violated citizens' rights to freedom of expression as articulated in Articles 36 and 37 of the Constitution. The ruling emphasized that "The right to assembly, demonstration, and picketing is guaranteed by Article 37 of the Constitution" but also noted that any limitations imposed must be reasonable and justifiable within the framework of a free and democratic society that values human dignity and equality.

Similarly, in another pivotal case, Law Society of Kenya v Kithinji & 5 others; Katiba Institute & another (Interested Parties) (Petition E373 of 2024) [2025] KEHC 7957 (KLR), the judiciary stated in paragraph 78 that "It is the duty of the state to aid the exercise of rights and freedoms of speech rather than hinder them through executive or legislative actions that infringe upon citizens' freedoms." The court explicitly deemed the deployment of plain-clothes police officers to manage protests as unconstitutional and unlawful, as per paragraph 94.

Scholarly contributions to the discourse around policing and oversight, such as those by Mutuma Ruteere in his work, "Local Policing Accountability in Kenya", call attention to the pressing need to strengthen oversight mechanisms to address the grim realities of deaths resulting from police actions. Additionally, Kenyan academics advocate for a bolstered role for the judiciary in protecting civil liberties during protest events, drawing insights from critiques of opaque systems predating 2010 as well as evaluations of IPOA's effectiveness in the post-2010 landscape. Human rights organizations like Amnesty International have championed the idea of strategic litigation, exemplified by the Law Society of Kenya's lawsuit in June 2024 against the Inspector General, which challenged the unlawful arrest of over 400 protesters without charges, directly highlighting violations against Article 49 regarding the right to a fair trial.

However, real-world effectiveness of these judicial mechanisms is often impeded by various factors. A 2025 study conducted by the African Policing Civilian Oversight Forum revealed that limited resources, political interference, and disappointingly low conviction rates plague the system, with only a small percentage of cases resulting in accountability for police misconduct. Compounding these challenges, IPOA's investigations frequently face delays stemming from a lack of cooperation from the NPS, a situation that undermines the transparency necessary for fostering public trust, as outlined in the UN Minnesota Protocol.

Moreover, the KNCHR's 2024 report on human rights affirms that complaints regarding excessive use of force persist, reiterating the urgent need for judicial independence to uphold the principles of justice as enshrined in Article 159 of the Constitution. The requirements for permits under the Public Order Act have also been legally contested on the grounds that they violate the rights to spontaneous assembly, as evidenced by rulings affirming the right to protest without prior notification. For instance, in Independent Policing Oversight Authority v Siddique w/o Arshad Sharif & 6 others (Civil Appeal E802 of 2024) [2025] KECA 1456 (KLR),the court pointed out significant shortcomings in police oversight, indicating a pressing need for reassessment and reform to ensure citizens can exercise their rights without undue hindrance.

Enforcement of Reform Outcomes: From Promise to Precarity

Well-intentioned reforms in Kenya often fail due to enforcement gaps, exposing disparities between policy and practice in protest management. Post-2010 reforms, including merging police services, vetting officers, and use-of-force guidelines under the Ransley Task Force, aimed to enhance accountability as per Article 244(c), which requires compliance with constitutional standards. The National Police Service Regulations, 2012, supplements this by outlining disciplinary procedures for force violations. Yet, outcomes are mixed: while some training on de-escalation occurred, brutality persists, with 2024 protests revealing continued lethal force, contravening Article 238(5)'s subordination of security to civilian authority.

A 2025 study in the International Journal of Research and Innovation in Social Science highlights politicization and inadequate training as barriers, leading to over five hundred (500) extrajudicial killings since 2017 despite quotas. Kenyan scholar Wangui Kimari argues in The Conversation that enforcement fails due to colonial roots in the Penal Code and resistance from elites, with killings rising amid protests. Mutuma Ruteere's research on strengthening oversight underscores unmet goals of post-2010 reforms, while scholars like Fredrick Ogenga analyze how governance crises in protests reveal enforcement shortfalls, eroding civil liberties. Amnesty International's 2024 annual report critiques the low prosecutions for abuses, documenting sixty-three (63) deaths and calling for accountability mechanisms under the NPS Act. KNCHR's July 2023–November 2024 report echoes this, reporting eighteen (18) updated cases of extrajudicial killings and disappearances, and urging enforcement of IPOA recommendations. Challenges include resource scarcity, union pushbacks, and vague metrics, as noted in Amnesty's "A Drop in the Ocean" report on stalled

investigations. The proposed Public Order (Amendment) Bill, 2025, which seeks to impose stricter penalties on "unlawful" protests, risks further entrenching of impunity if enacted without safeguards. In Republic v. Fredrick Ole Leliman & 4 others [2016] KEHC 992 (KLR), paragraph 119 warned, "It would be a grave error on the part of this Court to allow the said Police Service and the Institutions named to revert back to that dark past," highlighting enforcement's role in preventing regression to pre-2010 abuses.

Enforcement demands institutional will and community monitoring; hybrid models blending IPOA mandates with civil society, as in KNCHR consultations, show promise. Without it, reforms exacerbate imbalances, fostering cynicism and escalation, as unchecked militarization prioritizes control over dialogue.

CONCLUSION

Reforms in Kenya's protest management offer a pathway to harmonize security with civil liberties, yet extrajudicial killings, weak judicial oversight, and enforcement deficits reveal their limitations. From 2024's deadly suppressions where scholars like Fredrick Ogenga note governance crises amid youth-led dissent these failures entrench impunity, transforming protests into peril. Journal analyses and works by scholars like Mutuma Ruteere call for decolonizing structures, emphasizing facilitation and ex officio probes to revive scuttled reforms.

As of 2025, with eroded trust and abuses unabated, multifaceted strategies empowering IPOA, tying budgets to compliance, and community involvement are vital. Only through enforced reforms can Kenya affirm security serves liberties, ensuring protests drive progress, not pretexts for violence. In this balance lies democratic resilience.

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VAT EXEMPTION ON SANITARY PADS IN LESOTHO: TRANSLATING FISCAL POLICY INTO MENSTRUAL EQUITY.

PHINDIWE CHONA (INTERNATIONAL HUMAN RIGHTS LAB)

INTRODUCTION

Period poverty in Lesotho extends far beyond the inability to purchase sanitary products. It is a multidimensional challenge rooted in cultural silence, economic inequality, and policy gaps that collectively undermine the dignity and potential of women and girls.

The taxation of essential hygiene products raises fundamental questions regarding fairness, gender equity, and the state's duty to protect human dignity. In Lesotho, sanitary pads are not a luxury but a necessity, central to women's health, education, and participation in social and economic life. Yet for many Basotho girls and women, managing menstruation remains a monthly struggle marked by limited access to affordable sanitary products, inadequate sanitation infrastructure, and cultural stigma.

In 2019, the Government of Lesotho took a decisive step by removing Value Added Tax (VAT) on sanitary pads through the Value Added Tax (Amendment) Regulations No. 34 of 2019. This policy shift recognised menstrual hygiene as a public concern rather than a private burden. While commendable, the exemption alone has not dismantled the deeper structural and social barriers that sustain period poverty across the country.

Empirical evidence suggests that fiscal measures, while important, are insufficient without complementary interventions such as distribution programmes, menstrual health education, and improved water, sanitation, and hygiene (WASH) facilities. This article examines the impact of Lesotho's VAT exemption on sanitary pads and explores how it can be expanded to advance menstrual equity. The discussion draws on national statistics, regional comparisons, and human- rights policy frameworks to provide practical recommendations for sustainable change.

1. CULTURAL STIGMA AND SILENCE

In many Basotho communities, menstruation remains a subject shrouded in silence and discomfort. Conversations about periods are often treated as taboo, resulting in misinformation and shame. This cultural stigma discourages open dialogue between parents, teachers, and learners, leaving many girls uninformed about menstruation until their first experience.

In Mphaki, a rural community in Quthing District, UNFPA organised community dialogues that empowered women and girls to discuss menstruation openly and access necessary hygiene products (UNFPA Lesotho, 2023). These initiatives demonstrate that culturally sensitive education and engagement can mitigate stigma and strengthen menstrual equity.

Despite its impact, deep-rooted cultural taboos continue to impede progress. Many girls still feel ashamed to discuss menstruation, while boys often lack the awareness to support their peers. Comprehensive menstrual health education for both genders is therefore essential to challenge stigma and foster dignity.

2. THE ECONOMICS OF MENSTRUATION: PERIOD POVERTY IN CONTEXT

While cultural beliefs shape how menstruation is perceived, economic realities determine whether girls and women can access the products they need. Examining this economic dimension reveals the structural inequalities that perpetuate period poverty in Lesotho—inequalities that extend beyond affordability to include income, education, and social attitudes.

2.1 Economic Barriers

According to the World Bank (2023), about 55% of rural households in Lesotho live below the national poverty line. Even with the VAT exemption, affordability remains a major obstacle for low-income families. A pack of pads that costs M12 in urban Maseru may rise to M18–M20 in mountain districts such as Mokhotlong or Thaba-Tseka due to transport inflation and limited supply chains. This regional disparity undermines the intent of the VAT exemption by keeping essential products out of reach for the most vulnerable girls and women.

2.2 Educational Impacts

Recent data from UNICEF (2023) indicates that up to 15% of adolescent girls in rural secondary schools miss at least two days of class per menstrual cycle due to a lack of sanitary products, inadequate facilities, or embarrassment. This absenteeism can accumulate into significant learning gaps, reducing educational attainment and reinforcing cycles of poverty (UNFPA Lesotho, 2023).

2.3 Coping Mechanisms & Health Risks

When sanitary pads are inaccessible, girls adopt unsafe alternatives such as newspapers, leaves, or rags (MESHA, 2022). These methods increase the risk of infections, compromise dignity, and perpetuate stigma. Beyond health implications, these coping strategies reinforce the social invisibility of menstrual needs.

3. MENSTRUAL HEALTH AS A HUMAN RIGHTS IMPERATIVE

The continuing economic inequalities and social taboos surrounding menstruation underscore a broader issue: menstrual equity is not merely a matter of access or awareness—it is a matter of rights. Recognising menstruation as a human right, reframes the discussion from charity to justice, positioning menstrual health within the broader framework of gender equality and social justice.

3.1 Legal Frameworks

Menstrual health intersects directly with constitutional and regional rights on dignity, education, and social welfare. Article 12 of the Constitution of Lesotho (1993) guarantees the right to dignity and non-discrimination, while the African Charter on Human and Peoples' Rights (1981) enshrines the right to health and education.

3.2 Implications of Menstrual Inequity

When girls miss school, face humiliation, or compromise their hygiene due to lack of access, these constitutional and international rights are infringed. In many rural areas, girls are forced to miss school during their periods due to lack of sanitary products and fear of embarrassment. For example, a case documented by World Vision (2023) describes a rural girl, Lerato, who had to use cloth during her menstrual cycle, causing her to miss classes and experience shame. Her story highlights how period poverty intersects with cultural stigma and educational inequity, underscoring the urgent need for holistic interventions.

3.3 Policy and Rights Alignment

The Gender and Development Policy (2018) reinforces Lesotho's commitment to gender equality, yet without targeted menstrual health interventions. These commitments remain rhetorical. Fiscal measures like VAT exemption must be complemented by structural and educational initiatives to ensure these commitments are realised. Menstrual equity should thus be framed as a rights-based policy priority rather than charitable intervention.

A rights-based approach reframes menstrual health as a question of justice, not charity. The State's obligation extends beyond fiscal exemption—it must ensure that every girl can manage her period safely, affordably, and with dignity. In essence, Menstrual equity is both a matter of public policy and constitutional fulfilment.

In recent years, this normative understanding has inspired national efforts to translate principle into practice. Initiatives such as Her Majesty Queen 'Masenate Mohato Seeiso's Hlokomela Banana project demonstrate how advocacy, policy, and leadership can collectively advance menstrual justice.

4. POSITIVE INTERVENTIONS AND POLICY RESPONSES

Recognising menstrual health as a human right provides the foundation for national interventions. Policy responses, education programmes, and community initiatives operationalise these rights, translating principle into tangible support for girls and women across Lesotho.

The Hlokomela Banana initiative, launched by Her Majesty Queen 'Masenate Mohato Seeiso, reflects a growing national effort to change this narrative. The project, which provides free sanitary pads to girls in high and secondary schools, aims to normalise menstruation and ensure that no girl misses school because of her period (Gender Links, 2023). The phrase "ho hlokomela banana"—to care for our girls—carries both cultural and moral significance, framing menstrual health as a shared social responsibility rather than an individual challenge.

These national efforts complement the human rights framework by operationalising menstrual equity at community level. Through leadership, education, and resource provision, they demonstrate how cultural change and policy can intersect to uphold dignity and equality for all menstruating individuals.

While Lesotho has made significant strides through fiscal and normative initiatives, challenges persist in ensuring equitable access for all girls. Examining regional experiences can provide valuable lessons to strengthen national strategies and avoid pitfalls encountered elsewhere.

5. REGIONAL INSIGHTS: LESSONS FROM OTHER AFRICAN COUNTRIES

Lesotho's VAT exemption on sanitary pads is a progressive step, but experiences from other African countries highlight that tax relief alone is insufficient to achieve menstrual equity. Fiscal measures must be complemented by robust distribution, education, and infrastructure to ensure meaningful access. Lessons from South Africa, Kenya, and Rwanda provide practical insights for strengthening Lesotho's approach.

a) Kenya: A cautionary example.

Kenya was one of the first African countries to remove VAT on menstrual products. However, inconsistent implementation, weak monitoring, and distribution challenges meant that many girls still lacked

access (Fuller Project, 2024). This demonstrates that fiscal policy alone cannot reach the most vulnerable.

b) South Africa: Pairing fiscal relief with school distribution.

Following the 2018 VAT removal on sanitary pads, provincial governments launched school distribution schemes. In pilot areas, school absenteeism linked to menstruation dropped by nearly 25% (Global Citizen, 2019). Pairing fiscal relief with targeted school-based distribution can significantly improve access and reduce absenteeism, particularly in rural and underserved areas.

c) Rwanda: Integrated national strategy.

Rwanda has implemented an integrated menstrual equity strategy combining tax-free sanitary products, school programmes, menstrual education campaigns, and promotion of locally produced reusable pads. This approach ensures sustainability while reducing reliance on imports (UNICEF Rwanda, 2022).

Lesson for Lesotho: Holistic, multi-pronged strategies—combining fiscal relief, education, local production, and distribution can create sustainable menstrual equity beyond mere tax exemptions.

5.1 Implications on Lesotho

Regional experiences show that:

- Tax exemptions are necessary but not sufficient.
- School-based and community distribution programmes are critical to reach girls effectively.
- Implementation and monitoring are vital to ensure equitable access.
- Investment in local production can improve affordability and reduce supply chain dependence.
- Comprehensive menstrual education, for both girls and boys, helps challenge cultural stigma and supports dignity.

By learning from these regional successes and challenges, Lesotho can translate fiscal policy into tangible menstrual equity, ensuring that all girls can manage their periods safely, affordably, and with dignity.

6. BEYOND TAX REFORM: BUILDING A COMPREHENSIVE MENSTRUAL HEALTH POLICY

Building on lessons from regional experiences, Lesotho can now expand fiscal policy into a holistic menstrual health strategy. Fiscal relief, such as Lesotho's VAT exemption on sanitary pads, is an important step but only a starting point. Lessons from South Africa, Kenya, and Rwanda demonstrate that combining fiscal policy with distribution programmes, menstrual education, local production, and legal frameworks is crucial to achieving meaningful menstrual equity. To ensure that the VAT exemption translates into tangible equality, Lesotho needs an integrated, empirical national strategy.

6.1 Short-Term Priorities (0–12 months)

- Enforce VAT exemption guidelines across all retail chains: Ensures that zero-rated products are truly affordable and accessible for all girls.
- Expand school-based sanitary pad distribution in underserved districts: Directly addresses barriers to education caused by period poverty.
- Conduct WASH (Water, Sanitation, and Hygiene) audits to identify infrastructure gaps: Provides a foundation for safe and dignified menstrual management.

6.2 Medium-Term Goals (1–3 years)

- Establish a National Menstrual Health and Hygiene Programme under the Ministries of Education and Health: Integrates policy, education, and distribution efforts for nationwide reach.
- Support local manufacturing enterprises to produce affordable, reusable pads: Reduces import dependence, lowers costs, and creates economic opportunities.
- Integrate menstrual health education into school Life Skills curricula: Challenges cultural stigma and equips both girls and boys with knowledge to support menstrual equity.

6.3 Long-Term Vision (3–5 years)

- Enact a Menstrual Health Act to secure budgetary allocations and legal protection for menstrual rights: Provides a legal backbone to sustain programs and ensure compliance.
- Institutionalise monitoring indicators

linking menstrual health to education and health outcomes (Gates Open Research, 2022): Enables evidence-based policy adjustments and accountability.

• Build public-private partnerships to ensure sustained product supply and innovation: Strengthens supply chains and encourages investment in menstrual health solutions.

Policy Shift: Lesotho must evolve from tax relief to systemic reform, embedding menstrual health within national development planning, cultural awareness initiatives, and normative obligations. Only by combining fiscal, educational, infrastructural, and legal measures can every girl manage her period safely, affordably, and with dignity.

PERSONAL REFLECTION AND COMMITMENT

These policy shifts are not just technical adjustments, they reflect lived realities. As a Mosotho woman who has experienced the wrath of period poverty firsthand, I know how it can deny girls education, compromise health and erode dignity. Growing up in Lesotho, I faced the barriers of limited access to menstrual products and cultural stigma, which shaped my understanding of the broader social and economic inequities at play. This work has strengthened my resolve to advance menstrual equity through policy, advocacy and cultural awareness. I am committed to ensuring that every girl can manage her period safely, affordably and with dignity, transforming fiscal policy and social norms into tangible rights and opportunities for all.

CONCLUSION

When a nation ensures that every girl can learn, work and live with dignity, fiscal policy becomes not just an economic tool, but a vessel of human rights. Lesotho's progressive VAT exemption, when paired with structural, cultural and educational interventions, exemplifies how policy can advance equity, justice and empowerment. By linking economic justice with cultural awareness and legal obligation, the country can move from zero-tax to zero-shame, zero-exclusion, and ultimately, zero-period poverty.

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INTERVIEW WITH EMMANUEL MACHARIA

First Class Honours (LLB, Strathmore University, Kenya) and
Best Oralist Philip C. Jessup International Law Moot Court Competition

Q Tell us about your background and key academic or professional achievements so far, and how they have shaped your journey in law.

Answer: I was born in Limuru and raised by the shores of Lake Naivasha in Kenya. Growing by the lakeside, I learned early that life, like a lake, is calm until the wind changes direction. But most importantly, when the wind rises, composure matters more than noise. This perspective shaped my approach to law: steady, observant, composed and deeply reflective but always prepared for the crosswinds. I also grew up with an identical twin brother, Albert Macharia, who pursued law and earned remarkably similar academic and advocacy distinctions. This dynamic taught me something profound, talent may be shared, but discipline is deeply personal. My legal formation began at Strathmore Law School, where I graduated with First Class Honours and earned Dean's List recognition across multiple years.

As a mooter and legal researcher, I discovered a deep and enduring passion for advocacy. My journey has been marked by several milestones, including winning Best Oralist distinctions and competing at the highest international levels. Notably, at the Nuremberg Moot Court Competition in 2023, I had the privilege of representing my institution in Germany. In the Philip C. Jessup International Law Moot Court Competition (2024 and 2025 Kenyan Rounds), I was awarded Best Oralist, and our team placed overall 5th globally out of 865 teams in Washington, D.C., earning both the Best African Team and Best New Team awards. To date, I hold the Kenyan record for the country's highest-ever placement at the Jessup International Rounds in Washington, D.C. These represent only a fraction of the competitions in which I have been privileged to succeed.

Yet, while winning was exhilarating, it was not what shaped me most. The defining moments were the long nights rewriting submissions, rigorously testing arguments, confronting doubt, and being sharpened by stronger counter-arguments. The discipline of law taught me that intelligence is not merely demonstrated — it is refined through resistance. Through research and mooting, my conviction deepened: law is not merely about winning cases; it is about protecting dignity, especially for the vulnerable. That belief continues to be the anchor of my journey.

Lastly, having graduated and now preparing for the bar, I have come to understand that qualification is not an endpoint, but an invitation — an invitation to serve with integrity, to think with courage, and to practice law not as a career alone, but as a lifelong commitment to justice.

Q What inspired you to pursue a career in law, and if it was not law, what would it have been and why?

Answer: I grew up asking uncomfortable questions. "Why?" was probably my first cross-examination. Law appealed to me because it sits at the intersection of justice, structure, and human stories. It gives you the tools to challenge power respectfully and sometimes dramatically, if the facts allow. If not law, I would probably have pursued diplomacy or public policy — something that allows engagement with global systems. Or perhaps music. I was a school band captain and played the trumpet. There is something about a well-timed crescendo that is not very different from a well-timed objection in court.

Q You have earned recognition as "Best Oralist." What core skills are essential for excelling in advocacy?

Answer: Four things:
Clarity. Structure. Composure. Humility
Clarity means understanding your argument so thoroughly that you can explain it to your grandmother without footnotes, and without losing her halfway through. If you cannot simplify it, you probably do not understand it well enough.

Structure is everything. Judges are persuaded when your reasoning feels inevitable, when each point leads naturally to the next, and the conclusion seems less like an opinion and more like the

only logical destination. Advocacy is not about sounding impressive; it is about being coherent and strategic in your delivery.

Composure is the secret weapon. The best advocates are not the loudest; they are the calmest under pressure. When a judge interrupts you mid-sentence, that is not a threat — it is an invitation to think on your feet.

And lastly, humility. The law is too vast for arrogance. Every argument you make has likely been tested —and possibly dismantled by someone smarter before you. The wise advocate respects that reality.

Q How did you balance academics, moots, internships, and leadership?

Answer: **Short answer:** Google Calendar and prayer.
Long answer: I learned early that busyness is not productivity. I prioritised ruthlessly. I scheduled everything including rest. I delegated when leading. I studied intentionally instead of endlessly.
Most importantly, I stopped trying to be everywhere. Excellence requires focus. You cannot argue five cases in your head at the same time and you cannot lead effectively if you are constantly exhausted. Balance is not about doing everything. It is about doing the right things well.

Q What impactful lessons did you gain from international legal forums?

Answer: Representing Strathmore University internationally reinforced a critical lesson: international law often presents itself as universal, but historically, its architecture has reflected unequal power. Engaging with peers across civil law, common law, and hybrid systems exposed how the doctrines we are neutrally taught, ironically carry historical baggage —colonial legacies, economic hierarchies, and geopolitical influence. The question is not merely what the rule says, but who shaped it, whose interests it protects, and who bears its consequences.

First lesson: universality must be interrogated.
Many principles in international law are framed as objective, yet their origins often lie in moments of exclusion. Understanding this does not weaken the law — it strengthens our ability to reform it.

Second: voice matters.
Global South perspectives are not supplementary; they are essential. When African, Asian, and Latin American scholars articulate alternative interpretations, they are not dissenting from the system, they are expanding it.

Third: humility must co-exists with awareness.
The more I interacted with international forums, the more humble I became. One quickly realises that brilliance is global. The moment you think you have mastered an area, someone from another jurisdiction reframes it entirely.

The most valuable lesson?
Listen carefully; Speak second.

Q Should students specialise early or wait?

Answer: Early curiosity is good. Early rigidity is not. I believe students should explore widely in their early years. Law is interconnected. Constitutional principles influence commercial transactions. Human rights inform criminal law. Specialisation should be informed, not accidental. When you have seen enough of the landscape, you can choose your mountain wisely.

Q Share a moment you underperformed and how it shaped you.

Answer: I have lost moots. I have delivered arguments I later wished I could edit mid-sentence. One particular loss hurt deeply because I knew I had prepared well — but I had not adapted quickly enough during questioning. That experience taught me that preparation is only half the battle. Agility wins championships. Failure, I learned, is feedback —- sometimes loudly delivered.

Q What habits have been most transformative?

Answer: · Reading beyond the syllabus.
· Writing consistently – even when not required.
· Reflecting after every competition or presentation.
· Physical exercise (a sharp mind needs oxygen).
· Silence. Thinking time is underrated.

Growth in law is cumulative. Small daily discipline compounds into courtroom confidence.

Q What mistake do many law students make?

Answer: They confuse performance with mastery. Memorising cases for exams is not the same as understanding legal reasoning. Chasing titles without building competence is dangerous. Another mistake? Comparing journeys. Law is not a sprint. It is a long marathon process.

Q Practical advice for building confidence in public speaking?

Answer: Speak often. Even when you are nervous. Especially when you are nervous. Join moots. Volunteer to present in class. Record yourself. Watch yourself—even if it is uncomfortable. Confidence is not the absence of fear; it is familiarity with it. And remember, judges are human. Audiences are human. They want you to succeed. If you have prepared well, walk into the room like you belong there - because you do.

UNDERFUNDED AND OVERLOOKED: THE SILENT QUAGMIRE IN PRIMARY AND SECONDARY SCHOOLS

LINDA NYAMWEYA

ABSTRACT

This article examines the persistent underfunding of basic education in Kenya, highlighting the widening gap between government budgetary allocations and actual disbursements to public schools. Despite constitutional commitments to free and compulsory basic education and significant nominal increases in education budgets over recent financial years, schools continue to experience severe cash-flow constraints due to delayed disbursements, budget cuts, and weak accountability mechanisms. The paper demonstrates how chronic underfunding has undermined infrastructure development, teacher availability, learning resources, and overall education quality, disproportionately affecting rural and marginalized communities. It further explores policy and accountability gaps within the education funding framework, including ineffective oversight and the lack of adequate planning following the 100% transition to secondary education. The consequences of these challenges include overcrowded classrooms, substandard learning environments, declining academic outcomes, and unlawful cost-shifting to parents. The article concludes by proposing practical reforms, including timely and transparent disbursement of funds, digitized tracking systems, strengthened community oversight, and targeted support for disadvantaged schools. Ultimately, it argues that sustainable investment in education is essential for social equity, national development, and the realization of Kenya's long-term development goals.

INTRODUCTION

Basic education in Kenya is free and compulsory, according to the Constitution of Kenya 2010 and the Basic Education Act . The introduction of free basic education is stemmed from the National Rainbow Coalition (NARC) Manifesto in 2002 whereby the country was faced by imminent collapse of the education sector due to poverty. The NARC manifesto intended to ensure that basic education, that is from primary school and the day secondary school, is free and compulsory to all children in Kenya. President Mwai Kibaki, upon ascending to the presidency fulfilled the manifesto by ensuring that the free primary education programme is rolled out and later on in his second term of presidency, he introduced free day secondary education to improve access to schooling. The government was expected to

fund free primary education and free day secondary education. The same was then engrained in our Constitution of Kenya, 2010 and the Basic Education Act. However, this brilliant idea is gradually becoming neglected due to inconsistencies in the government, among other tremendous challenges.

The current state of funding remains a silent quagmire, with schools receiving as low as sh.87 to cater for all their needs. Delayed disbursements and budget cuts are among the major challenges that are hitting hard and making them struggle with major operations, such as infrastructure maintenance and settling supplier bills. In fact, in the second term of 2025, many schools were forced to stop operations earlier than scheduled due to the inability to attend to the various needs, as funding per student was about 3000 shillings less.

Constant underfunding has resulted in poor quality of education across the country at large, compelling many families to rely on private institutions, which is unaffordable for a significant number of parents. Poor infrastructure remains a chronic issue even today. Many children still have to learn under trees, and some do not have access to amenities such as laboratories for scientific studies. Furthermore, the unavailability of teachers is still a persistent problem arising due to underfunding and delayed pay.

The government, through the legislative body, should come up with a way of addressing the policy and accountability gaps to reduce discrepancies in the education funding process and allocation. Stakeholders in the various precincts of education in Kenya should call to action the government to ensure it is on its toes at levelling up what His Excellency, President Kibaki, began.

Government commitments to the transformative role of education

As many would say, education is the key to success. Others would back it up with a common quote that the good thing about education is that no one could ever take it away from you. Some others would even add that education is the greatest equalizer. Such reflections only emphasize how invaluable education really is. No human being desires a life of poverty. One of the surest ways of securing a better future for children is by investing adequately in education. The government has, over the years, promised to make such a significant investment by committing to providing free basic education to its citizens, but the lingering question remains: are these promises genuine or merely empty words? Can we track the citizens who have been assisted by these commitments? This remains an unsolved puzzle to date.

The current state of funding

A once tremendously beautiful idea, introduced in the early days of 2003 has begun to shatter due to selfishness and greed among government officials. Over the last five financial years, basic education has been significantly overlooked, with budget cuts, corruption, and delayed disbursements affecting both primary, and the newly introduced junior secondary schools. Over the last three years, funding has increased enormously from about 544 billion in 2022's financial year to 722 billion in 2025's financial year. However, it appears that schools operate on paper budgets, because in reality, they face cash flow crises despite these budgetary increments.

Another issue related to funding is that the government often announces large allocations but fails to disburse funds on time. For example, in 2025, the government disbursed only about half of the allocation per student and left over eighteen billion Kenyan Shilings outstanding, despite allocating more funds this year to education. Even with accurate allocations, the actual disbursements are inadequate to meet the needs of schools, particularly given the rising number of students following the 100% transition to high school policy that began in 2018.

Accountability and policy gaps

With such a chronic predicament hitting one of the largest investments in the country, the gnawing question is, where actually lies the problem? Policies have been formulated to make things easier.

However, they have been counterproductive due to the many gaps left unaddressed by such policies. The responsible persons have often failed to be accountable on their part. According to a report done in 2023, accounting officers fail to adequately account for the management and use of public resources. Even after demanding explanations on why the governments fail to disburse funds on time, the status quo remains, with unfulfilled promises on funding disbursements. The relevant stakeholders in charge of monitoring how the funds are used have also failed in their responsibility. With the 100% transition to high school policy, the government is yet to provide a plan for settling such students into the learning environment, and students have had to put up with the situation by converting non-classroom areas to classes. As a result, citizens have had to put up with the immense challenges their children are experiencing.

Consequences of constant underfunding

Despite the government's promise under the Vision 2030 to increase infrastructure and maintain the existing ones, the current state is still alarming, with only half a decade to actualize the vision. Due to the underlying crises in various parts of the country, many students have had to study in crowded classrooms an environment that's not conducive to learning. In Baringo County, Ngambo Primary School students have had to adopt creative ways of studying under trees to avoid the often, scorching sun while in class, after the heavy rains destroyed the poorly constructed classrooms. In some instances, teaching aids have become a fantasy as some are caught by surprise during their national examinations due to a lack of learning resources. According to a recent report done by The Daily Nation, it was reported that there is an alarming rate of failure in the national exams, mainly due to a lack of learning resources among other challenges. The use of substandard facilities is the normality in such institutions. Funding increases, but the situation remains unchanged. In the recent case of Wasike v Principal Secretary Ministry of Basic Education & 4 others , parents in St Georges' Girls Secondary School were taxed unlawful levies by the school to fund major projects abandoned by the government, such as building a dormitory. This prompted the petitioner, a parent in the institution to initiate a lawsuit against the ministry of education and the school. The court guided by the constitution, held that no extra levies should be imposed on parents by the school, unless there is prior written approval by the Cabinet Secretary, Education. These are just among the enormous problems and consequences of the funding snag.

Recommendations

In light of the findings above, several measures can be taken to improve the funding status of the education sector. There needs to be an increase and reinforcement in funding by the relevant stakeholders. The actual budgeted fund should match what is being disbursed to the school. That way, the school's management systems will run smoothly without interruptions, such as teachers' strikes and school closures before the scheduled time. With the rising technological advancements, the government can develop a method for digitizing and tracking fund disbursements. This will help address transparency issues, curb corruption among officials, and close accountability gaps within the ministry. In addition, priority should be given to rural and marginalized schools to enhance learning in all parts of the country. This is because many rural schools lack basic social amenities due to inadequate funding, and often provide poor-quality education for children. Improving teacher recruitment and training could also aid in improving learning, particularly in the new basic education curriculum. Communities could also be involved in budget oversight to ensure accountability and transparency in the allocation and disbursement of these funds.

CONCLUSION

In conclusion, Kenya's education system stands at a crossroad. While the promise of free and compulsory basic education has opened doors for millions of Kenyan citizens, chronic underfunding continues to drain its quality and sustainability. The silent quagmire of inadequate resources has forced schools to struggle even with meeting basic needs and diminishing learning outcomes. If education is truly to remain the equalizer, then funding must match the scale of demand and urgency of reform. We must therefore recognize that investing in education is not a cost but a long-term commitment to national growth and social justice. It is only through deliberate and consistent funding that Kenya can ensure a better future for its children.

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Linda Nyamweya is a law student at the University of Nairobi, Kenya, with a deep interest in children, education, and the law. Passionate about promoting justice and equality, she focuses on how legal frameworks can protect and empower young people. Her studies and writing explore children's rights and access to education, reflecting her belief that every child deserves a fair start in life. Linda hopes to use her legal knowledge to help shape inclusive policies that give all children the opportunity to thrive.

EMERGING CHALLENGES AND OPPORTUNITIES IN DATA PRIVACY AND GOVERNANCE IN KENYA

EMMANUEL OBADO

The enactment of the Data Protection Act (DPA) of Kenya in 2019 marked a pivotal moment in the nation's legal and technological landscape, which subsequently is enshrined under Article 31 of the constitution of Kenya . Five years on, while significant strides have been made in establishing a framework for data protection and governance, a complex interplay of challenges and opportunities has emerged. This essay delves into these complexities, examining the key developments, persistent hurdles, and potential avenues for improvement in Kenya's data protection regime.

KEY DEVELOPMENTS AND MILESTONES BROUGHT BY THE ENACTMENT OF THE OFFICE OF THE DATA PROTECTION COMMISSIONER (ODPC).

The operationalization of the Office of the Data Protection Commissioner (ODPC) stands as a crucial milestone. The establishment of this independent body provided the necessary institutional framework for enforcing the DPA. The ODPC has played a vital role in:

1. Defining Key Concepts: The ODPC has been instrumental in clarifying the roles of data subjects, data controllers, and data processors within the Kenyan context. This clarity is crucial for the practical application of the Data Protection Act (DPA). By defining these roles, the ODPC has helped organizations understand their responsibilities and the rights of individuals regarding their personal data.

2. Enforcement and Rulings: The ODPC's active engagement in investigating and ruling on data privacy cases has established precedents and provided guidance to organizations on compliance requirements. The ODPC's active engagement in investigating and ruling on data privacy cases has set important precedents. These rulings provide guidance to organizations on compliance requirements, ensuring that they adhere to the principles of data protection. The enforcement actions taken by the ODPC demonstrate its commitment to upholding data privacy rights.

3. Registration of Data Controllers and Processors: The mandatory registration of entities handling personal data has created a database of responsible parties and facilitated oversight. The mandatory registration of entities handling personal data has created a comprehensive database of responsible parties. This registration process facilitates oversight and accountability, making it easier for the ODPC to monitor compliance and address any breaches of data protection regulations.

4. Public Awareness Campaigns: While challenges remain, the ODPC has undertaken efforts to raise public awareness about data privacy rights and responsibilities. The ODPC has undertaken efforts to raise public awareness about data privacy rights and responsibilities. These campaigns aim to educate individuals about their rights under the DPA and encourage organizations to adopt best practices in data protection. While challenges remain, these efforts are essential for fostering a culture of data privacy in Kenya.

These developments represent significant progress in establishing a data protection framework. However, the journey towards effective implementation has been fraught with challenges.

CHALLENGES TO EFFECTIVE DATA PRIVACY AND GOVERNANCE

The enactment of the Data Protection Act, 2019, was a pivotal moment. It established a legal framework for the protection of personal data, recognizing the fundamental right to privacy. The operationalization of the Office of the Data Protection Commissioner (ODPC) marked a crucial step, providing a dedicated body to oversee data protection compliance. The ODPC has since issued rulings on various data privacy cases, contributing to the evolving jurisprudence of data protection in Kenya. The DPA, or Data Protection Act, aims to protect personal data and ensure its responsible use. However, several key challenges have hampered its full realization:

Limited Public Awareness: Despite efforts by the ODPC, public awareness of data privacy rights and the mechanisms for redress remains low. Many Kenyans are unaware of their rights regarding the collection, use, and disclosure of their personal data. This lack of awareness hinders effective enforcement, as individuals are less likely to report violations. Despite the ODPC's efforts, many Kenyans remain unaware of their data privacy rights and the mechanisms for redress. Public education campaigns and outreach programs are essential to bridge this gap.

Enforcement Gaps: While the ODPC has made strides in enforcement, resource constraints and the sheer volume of potential violations pose significant challenges, and the capacity to investigate complex data breaches and enforce penalties effectively needs further strengthening. The ODPC faces resource constraints and a high volume of potential violations, which pose significant challenges to effective enforcement. Strengthening the ODPC's capacity to investigate complex data breaches and enforce penalties is crucial for ensuring compliance with the DPA.

Independence and Autonomy of the ODPC: Concerns persist regarding the ODPC's independence and autonomy. Its perceived close ties to the Ministry of ICT raises questions about its ability to act impartially, especially in cases involving government entities or politically connected organizations. This perceived lack of independence undermines public trust in the institution. The ODPC faces resource constraints and a high volume of potential violations, which pose significant challenges to effective enforcement. Strengthening the ODPC's capacity to investigate complex data breaches and enforce penalties is crucial for ensuring compliance with the DPA. Concerns about the ODPC's independence and autonomy persist, particularly due to its perceived close ties to the Ministry of ICT. Ensuring the ODPC's impartiality, especially in cases involving government entities or politically connected organizations, is vital for maintaining public trust in the institution.

Data Protection in the Digital Age: The rapid advancement of technology, particularly the rise of artificial intelligence (AI) and Large Language Models (LLMs) such as ChatGPT, big data analytics, and the Internet of Things, present new and complex data privacy challenges. Existing legal frameworks may struggle to keep pace with these developments, creating regulatory gaps. Furthermore, the rapid advancement of technology, including AI, large language models (LLMs), big data analytics, and the Internet of Things, presents new and complex data privacy challenges. Existing legal frameworks may struggle to keep pace with these developments, creating regulatory gaps that need to be addressed.

Cross-Border Data Transfers: The increasing flow of data across borders raises concerns about the adequacy of data protection safeguards in recipient countries. Ensuring compliance with the DPA when data is transferred outside Kenya requires robust mechanisms for international cooperation and enforcement. The increasing flow of data across borders raises concerns about the adequacy of data protection safeguards in recipient countries. Ensuring compliance with the DPA when data is transferred outside Kenya requires robust mechanisms for international cooperation and enforcement.

Data Protection in Specific Sectors: Certain sectors, such as healthcare, finance, and telecom

EMERGING OPPORTUNITIES FOR STRENGTHENING DATA PRIVACY AND GOVERNANCE

Despite the challenges, several promising avenues exist to support and strengthen data privacy and governance in Kenya.

1. Enhanced Public Awareness Campaigns

Effective public awareness campaigns are paramount to empower individuals with knowledge about their data privacy rights and how to exercise them. Utilizing diverse media platforms, such as social media, traditional media, and community outreach programs, is key to reaching a wide audience. These campaigns should employ clear, concise, and engaging messaging that resonates with different demographics. Furthermore, fostering community engagement through workshops, seminars, and interactive platforms can facilitate dialogue, address concerns, and build a stronger understanding of data privacy issues.

2. Capacity Building for the Office of the Data Protection Commissioner (ODPC)

The ODPC plays a crucial role in enforcing data protection laws. To effectively fulfill its mandate, it requires adequate resources, including a well-trained workforce, cutting-edge technology, and sufficient funding. Investing in staff training programs, upgrading technological infrastructure, and ensuring adequate budgetary allocations are essential to enhance the ODPC's investigative and enforcement capabilities. This will enable the ODPC to conduct thorough investigations, issue timely decisions, and impose meaningful sanctions on non-compliant entities.

3. Strengthening ODPC Independence

The independence of the ODPC is crucial for its effectiveness and public trust. Legislative amendments can be implemented to clarify the ODPC's powers, responsibilities, and decision-making processes, ensuring its autonomy from undue influence. Furthermore, adequate budgetary allocation and administrative independence are essential to safeguard the ODPC's ability to function impartially and effectively. These measures will bolster public confidence in the ODPC's ability to uphold data privacy rights and ensure compliance with data protection laws.

4. Developing Sector-Specific Regulations

While the Data Protection Act provides a general framework, developing sector-specific regulations for industries handling sensitive personal data, such as healthcare, finance, and telecommunications, can offer more tailored guidance and enhance compliance. These regulations can address the unique data privacy challenges faced by each sector, such as the use of health data for research, the processing of financial transactions, and the collection of telecommunications metadata. This sector-specific approach will provide greater clarity for businesses and individuals, facilitating better compliance and reducing the risk of data breaches.

5. Promoting Data Protection by Design

Integrating data privacy principles into the design and development of products and services from the outset, known as "data protection by design," is crucial for minimizing privacy risks.

This proactive approach encourages organizations to prioritize privacy considerations throughout the entire lifecycle of their products and services, from data collection and processing to storage and disposal. By embedding privacy into the core of their operations, organizations can significantly reduce the likelihood of data breaches, enhance user trust, and comply with data protection regulations more effectively.

6. Fostering International Cooperation

In an increasingly interconnected world, cross-border data flows are becoming more common. Strengthening international cooperation with other data protection authorities is crucial for addressing the complexities of these flows and ensuring consistent enforcement of data privacy principles. This can involve sharing best practices, coordinating investigations, and collaborating on joint initiatives to address global challenges such as the use of surveillance technologies and the protection of children's data online.

7. Embracing Technological Solutions

Leveraging technology can significantly enhance data privacy and governance. Privacy-enhancing technologies (PETs), such as differential privacy and homomorphic encryption, can enable organizations to process and analyze data while minimizing the risk of privacy violations. Furthermore, automated compliance tools can help organizations streamline compliance efforts, identify and mitigate risks, and demonstrate adherence to data protection regulations. By embracing these technological solutions, organizations can improve their data privacy posture and operate more efficiently in the digital age.

8. Leveraging Academic and Research Expertise

Engaging with academic institutions and research organizations can provide valuable insights and contribute to the development of evidence-based policies and best practices in data protection. Academic research can shed light on emerging privacy challenges, such as the ethical implications of artificial intelligence and the impact of data breaches on individuals and society. This collaboration can inform policy decisions, drive innovation in data protection technologies, and contribute to a deeper understanding of the evolving data privacy landscape.

9. Promoting Data Literacy and Skills Development

Investing in data literacy and skills development programs is essential for equipping individuals and organizations with the knowledge and skills needed to navigate the complexities of data privacy in the digital age. These programs can include educational initiatives for the general public, professional training for data privacy professionals, and curriculum development for educational institutions. By fostering a data-literate society, individuals can make informed decisions about their data, exercise their rights effectively, and contribute to a culture of data privacy.

10. Clarifying Jurisdictional Issues

Clear and consistent jurisdictional rules are crucial for effective enforcement of data privacy laws. Ambiguity regarding which authority has jurisdiction in specific cases can lead to delays, inconsistencies, and ultimately undermine the effectiveness of data protection enforcement. Legislative or judicial clarification of jurisdictional rules can provide legal certainty, streamline enforcement processes, and ensure that individuals have access to effective remedies for data privacy violations.

From the above analysis, we get to ask ourselves the following questions.
1. How can the Kenyan judiciary effectively adjudicate data privacy disputes in the digital age?

2. What are the key challenges to the ODPC's independence and how can they be addressed?

3. How can Kenya effectively regulate the use of personal data by AI systems and LLMs

4. What are the most effective mechanisms for compensating data subjects for data breaches?

5. How can public awareness campaigns be improved to empower individuals to exercise their data privacy rights?

HOW THE KENYAN JUDICIARY CAN EFFECTIVELY ADJUDICATE DATA PRIVACY DISPUTES IN THE DIGITAL AGE

Specialized Training: Judges and legal practitioners should receive specialized training in data privacy laws and emerging technologies to ensure they are well-equipped to handle complex data privacy disputes.

Establishing Precedents: The judiciary can play a crucial role in interpreting and clarifying data protection laws through landmark cases, setting precedents that guide future decisions.
Digital Evidence Management: Implementing robust systems for managing digital evidence, including secure storage and authentication, is essential for the integrity of data privacy cases.
Collaboration with Experts: Courts can collaborate with technical experts to better understand the nuances of data privacy issues and make informed decisions.

KEY CHALLENGES TO THE ODPC'S INDEPENDENCE AND HOW CAN THEY BE ADDRESSED

Limited Funding: The ODPC faces challenges due to limited funding, which affects its ability to effectively carry out its mandate. The solution to this is to Increase the ODPC's budgetary allocation to ensure it has the necessary resources to operate independently.
Political Interference: The perceived close ties to the Ministry of ICT raise concerns about the ODPC's impartiality. The solution is to amend the Data Protection Act to make the ODPC autonomous and separate it from the Ministry of ICT.

Competing Roles: The existence of competing data protection roles with other sector regulators can undermine the ODPC's effectiveness. This can be resolved by establishing clear jurisdictional boundaries and collaboration frameworks with other regulators.

EFFECTIVE REGULATION OF THE USE OF PERSONAL DATA BY AI SYSTEMS AND LLMS

Supplementary Regulations: Introducing regulations under the Data Protection Act specifically tailored to address AI-related data privacy concerns, such as automated decision-making and algorithm transparency.
AI Impact Assessments: Mandating organizations to conduct AI Impact Assessments to evaluate privacy risks, ethical concerns, and potential biases before deploying AI systems.
Algorithmic Transparency: Requiring AI developers to disclose how their algorithms process personal data and make decisions, ensuring accountability and fairness.

Ethical Guidelines: Developing ethical guidelines for the use of AI in sensitive areas such as healthcare and finance to protect individuals' rights.

EFFECTIVE MECHANISMS FOR COMPENSATING DATA SUBJECTS FOR DATA BREACHES

Legal Recourse: Allowing data subjects to take their cases to court to claim compensation for any damage caused by data breaches, including both material and non-material damage.

Class Action Lawsuits: Facilitating representative actions or class action lawsuits where multiple affected individuals can

collectively seek compensation. Alternative Dispute Resolution: Encouraging the use of alternative dispute resolution mechanisms, such as mediation and arbitration, to resolve data breach claims more efficiently. Regulatory Fines: Imposing fines on organizations that fail to protect personal data, with the proceeds used to compensate affected individuals.

PUBLIC AWARENESS CAMPAIGNS IMPROVED TO EMPOWER INDIVIDUALS TO EXERCISE THEIR DATA PRIVACY RIGHTS

To effectively raise awareness about data privacy, a fundamental shift in perspective is necessary. Instead of solely focusing on regulatory compliance and the fear of fines, campaigns should prioritise framing data privacy as an inherent human right. This approach fosters a deeper understanding of the importance of data protection and empowers individuals to actively engage in safeguarding their personal information.

Community engagement plays a pivotal role in this endeavour. By partnering with local communities, civil society organizations, and educational institutions, awareness initiatives can be tailored to resonate with diverse demographics. This localized approach ensures that messages are relevant and accessible to all members of the community.

Furthermore, interactive workshops and training sessions can provide individuals with the knowledge and skills to understand and exercise their data privacy rights. These hands-on experiences can empower individuals to make informed decisions about their data, such as controlling data sharing preferences, understanding privacy policies, and utilizing available privacy tools.

Finally, leveraging a multi-channel approach through multimedia campaigns across social media, radio, and television can effectively disseminate information and engage the public in a meaningful dialogue about data privacy. This multifaceted approach ensures that key messages reach a broad audience and encourages active participation in the ongoing conversation about data protection.

By prioritizing human rights, fostering community engagement, implementing interactive learning experiences, and utilizing diverse media channels, data privacy awareness campaigns can effectively empower individuals and cultivate a culture that values and respects the fundamental right to privacy.

DIFFERENT SCOPES OF DATA PRIVACY

USE OF PATIENT DATA FOR RESEARCH

Patient data holds immense potential for medical research, driving advancements in treatments, deepening our understanding of diseases, and ultimately improving public health outcomes. By analysing patient data, researchers can identify patterns, test hypotheses, and develop new therapies. However, utilizing this valuable resource presents significant challenges. Obtaining informed consent from patients is paramount, ensuring their understanding and voluntary participation in research. Maintaining the confidentiality and security of sensitive patient information is crucial to protect individual privacy and build trust in the research process. Strict adherence to ethical guidelines and data protection regulations is essential to prevent misuse of patient data and safeguard individual rights.

TELEMEDICINE

Telemedicine presents significant advantages, particularly for individuals in remote locations, by providing convenient access to healthcare services. Reduced travel time and the ability to consult with specialists from anywhere significantly improve patient access and potentially improve outcomes. However, the expansion of telemedicine necessitates a strong emphasis on patient data privacy. Ensuring secure communication channels and implementing robust cybersecurity measures are paramount to protect sensitive patient information from breaches and unauthorized access.

RISE OF AI IN HEALTHCARE

AI holds immense potential to revolutionize healthcare by enhancing diagnostic accuracy, personalizing treatment plans, and streamlining administrative processes. However, this transformative power hinges on

addressing critical data privacy concerns. AI systems require vast amounts of sensitive patient data, raising concerns about data breaches and misuse. Ensuring the transparency of AI algorithms and obtaining informed consent from patients are paramount to building trust and ethical AI adoption in healthcare.

Data Privacy and Human Rights.

DISCRIMINATION

Discrimination poses a significant risk within AI-powered healthcare. Data privacy violations can expose sensitive personal information, such as health status, ethnicity, or socioeconomic background, which could be used to unfairly discriminate against certain individuals or groups. Robust data protection laws and regulations are crucial to mitigate this risk. These safeguards should not only prevent the collection and use of sensitive personal data for discriminatory purposes but also ensure equal treatment and access to healthcare for all individuals, regardless of their background.

SURVEILLANCE

Surveillance, while potentially necessary for security purposes, raises significant concerns about individual privacy and freedom. Excessive surveillance can infringe upon fundamental rights such as freedom of speech and assembly, creating a chilling effect on open discourse and dissent. Striking a balance between security needs and individual liberties is crucial. This requires transparent surveillance policies, robust oversight mechanisms, and clear legal frameworks that safeguard privacy rights while allowing for legitimate security measures.

RIGHT TO BE FORGOTTEN

Individuals should possess the fundamental right to request the deletion of their personal data from online platforms and databases. This right is crucial for safeguarding individual privacy, minimizing the potential for misuse of personal information, and empowering individuals to control their digital footprint. To effectively implement this right, robust legal frameworks must be established that clearly outline the conditions under which data deletion can be requested and enforced. Furthermore, organizations must develop transparent and efficient procedures for handling such requests, ensuring that individuals' data is deleted promptly and securely when appropriate.

TOPICAL ISSUES ARISING FROM DATA PRIVACY AND GOVERNANCE

Jurisdiction of Courts: Clear jurisdictional rules are essential for handling data privacy cases, especially those involving cross-border data flows or online violations. Harmonizing jurisdictional rules with international standards and promoting mutual legal assistance can enhance enforcement.

Conceptualizing Data Subjects, Controllers, and Processors: Clear definitions and practical guidance on the roles and responsibilities of data subjects, controllers, and processors are crucial for effective implementation of the DPA. Addressing the complexities of joint controllership and processor liability is particularly important.

Compensation for Data Privacy Breaches: Establishing clear criteria for determining compensation for data privacy breaches is essential for providing redress to data subjects and incentivizing organizations to comply with the DPA. This should consider both material and non-material damages.

Independence and Autonomy of the ODPC: As discussed earlier, strengthening the ODPC's independence is crucial for building public trust and ensuring impartial enforcement. This requires legislative and institutional reforms.

Data Privacy in Employment: Addressing data privacy concerns in employment, recruitment, and hiring practices requires specific guidance on the lawful processing of employee data, including background checks, surveillance, and data retention.

Incompliance Issues: Addressing non-compliance requires a multi-faceted approach, including education, awareness campaigns, regulatory guidance, and effective enforcement. Providing support and resources to SMEs is particularly important.

Cross-Border Data Transfers: Implementing robust mechanisms for ensuring adequate data protection safeguards in recipient countries is crucial for facilitating cross-border data flows while protecting data privacy rights.

Ethics and Sensitivity in Data Processing: Promoting ethical data processing practices, including respect for data subject rights and consideration of potential harms, is essential for building public trust and ensuring responsible data use.

Data Privacy in the Age of LLMs and Generative AI: The rapid development of LLMs and generative AI presents novel data privacy challenges, including issues related to data collection, model training, and output generation. Adapting existing legal frameworks to address these challenges is crucial.

Data Protection in Banking/Financial Services: Given the sensitive nature of financial data, robust cybersecurity measures and sector-specific regulations are essential for protecting data privacy in the banking and financial services sector.

Liability of Data Breaches: Clarifying the liability of data controllers and processors, especially in cases involving third-party involvement, is crucial for ensuring accountability and incentivizing responsible data handling.

Data Protection in Elections: Safeguarding data privacy in elections is crucial for ensuring the integrity and fairness of the electoral process. This includes addressing concerns related to voter registration, data security, and the use of data analytics in political campaigning.

Conclusion

Kenya has made commendable progress in establishing a data protection framework. However, significant challenges remain in ensuring effective implementation and addressing emerging threats. By focusing on enhancing public awareness, strengthening the ODPC's capacity and independence, developing sector-specific regulations, promoting data protection by design, fostering international cooperation, and embracing technological solutions, Kenya can build a robust and effective data protection regime that safeguards individual rights while fostering innovation and economic growth. Addressing the specific topical issues highlighted in the call for papers will further contribute to a more nuanced and comprehensive understanding of the challenges and opportunities in data privacy and governance in Kenya. Continued dialogue, research, and collaboration among stakeholders are crucial for navigating the evolving landscape of data protection in the digital age.

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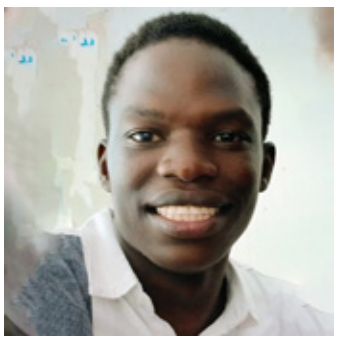

THE COLLISION OF EXPECTATIONS: LEGITIMATE EXPECTATION IN FIXED-TERM CONTRACTS

ANTONY MAKAU IRUNGU & ANTHONIA OSEIWE ODION

Abstract

The doctrine of Legitimate Expectation, originally rooted in administrative law, has been controversially applied within labor law, creating significant legal ambiguity regarding the security of tenure under fixed-term contracts. This article addresses the central judicial dissonance arising from one key decision: the restrictive interpretation by the Kenyan Court of Appeal in Transparency International - Kenya v Omondi, which unequivocally asserted that fixed-term contracts extinguish all rights and expectations upon expiry, cautioning that automatically renewable contracts undermine the very purpose of specified-term contracts. The paper examines the resulting tension between the employer's managerial prerogative to control renewal and the employee's right to fairness based on prior conduct or conditional renewal clauses. Vide a comparative perspective, this paper identifies the specific objective criteria, such as prior notice requirements and the conduct of the employer, that courts deem sufficient to transform a subjective hope of renewal into an enforceable legitimate expectation. The central conclusion is that this critical area of labour law is currently dictated entirely by unpredictable case-by-case precedent. Consequently, the paper strongly advocates for a necessary legislative intervention to amend the Kenyan Employment Act to clearly incorporate and define the parameters of legitimate expectation, thereby providing much-needed clarity, consistency, and predictability in the Kenyan labor market.

Keywords: The Doctrine of Legitimate Expectation, Fixed-Term contracts, Labour Law, Employment Law, Contractual Certainty.

Introduction

The Kenyan labor market, like many across the global economy, is increasingly characterized by the pervasive use of fixed-term contracts (FTCs). These agreements are celebrated by employers for offering necessary flexibility, aligning specific roles with finite project timelines, and maintaining organizational agility. By definition, a fixed-term contract is an agreement that automatically terminates by the effluxion of time upon a pre-determined date, establishing a clear horizon for both the employer and the employee. This certainty, derived from the foundational principle of pacta sunt servanda that parties must perform their treaty/contractual obligations in good faith, is considered paramount to the sanctity of contract law. However, this classical contractual certainty finds itself in continuous collision with the evolving principles of fairness and security of tenure enshrined within modern labour legislation, and the constitutional mandates governing fair administrative action. The central legal question animating this tension is whether the non-renewal of a fixed-term contract can, under specific circumstances, create a legitimate expectation that is capable of enforcement, typically through an award of damages, thereby challenging the employer's absolute prerogative to terminate the relationship.

1.1 A Legitimate Expectation in Labour Law

The doctrine of Legitimate Expectation is not indigenous to employment law; it is a powerful concept borrowed directly from administrative law. In its original context, it serves as a mechanism to check the unfettered discretionary power of public bodies, requiring them to honor promises, representations, or established practices unless there is an overriding public interest to deviate. Even though Lord Denning coined the term 'legitimate expectation' in a much later case law which will be discussed later, the foundations of this doctrine was laid by the Court of Appeal of England and Wales in, Associated Provincial Picture Houses Ltd v. Wednesbury Corp. The Plaintiff, therein, was granted a license to run a cinema on the condition that children aged fifteen years and below will not be permitted on Sundays. However, according to the then law, cinema could run only from Mondays to Saturdays and not on Sundays, though the commanding officer of the military could grant permission to run the cinema. The Plaintiff thus challenged the conditions put by the public authority on the ground of 'unreasonableness'. The courts held that in order to check the unreasonableness of the decision, the following must be fulfilled: Whether the defendant failed to take the factors that should have been considered into account or whether the decision was so irrational that it would never be considered by any reasonable authority. It is this deduction of 'reasonability' that became the pillar on which the doctrine of legitimate expectation stands.

As mentioned earlier, the term legitimate expectation was first used by Lord Denning in ***Schmidt v. Secretary for home affairs***. The dispute involved two US citizens who had travelled to the United Kingdom for academic study. When their permits expired, the Home Secretary refused to extend it without affording them a right to be heard. The House of Lords deemed it unnecessary to allow the applicant an opportunity to make a representation. A hearing would only have to take place where an individual had some right or interest, as Lord Denning equally noted; "any legitimate expectation that it would not be fair to deprive him of, without hearing what he has to say". He continued to add that such a legitimate expectation would arise if the applicant's permits has been revoked before the time has expired, in such a case the Applicant ought to have be given the opportunity to make representations.

Its integration in Employment Law, the doctrine holds that where an employee, based on the conduct of the employer or the terms of the contract, has a reasonable and objective basis to anticipate a certain benefit or continuation of a relationship, the employer cannot arbitrarily withdraw that benefit without following fair procedure or providing justification. Its application attempts to balance the common law insistence on the sanctity of the contract term with the statutory and constitutional requirement that employment terminations must be procedurally and substantively fair.

This approach has been highlighted by the strict contractual interpretation adopted by the Court of Appeal of Kenya in the seminal ***case of Transparency International - Kenya v Omondi [2023]***, Civil Appeal 81 of 2018. This case involved an employee who, after two years of satisfactory and exceptional performance, expected the renewal of her fixed-term contract on improved terms. The Court of Appeal, in overturning the trial court's finding of unfair termination, issued a clear and cautionary dictum:

> **"Automatic renewal would undermine the very purpose of the fixed term contract, and revert to indeterminate contracts of employment... Bearing the foregoing in mind, we note that fixed term contract carries no rights, obligations, or expectations beyond the date of expiry."**

It establishes the principle that the only reason an employer is obliged to give for non-renewal is that ***"the term has come to an end, and no more."*** The Omondi judgment effectively warns that transforming a fixed-term arrangement into a perpetual expectation undermines contractual integrity and the intention of the parties to the agreement.

To navigate this terrain, this paper proceeds as follows: First, it summarizes the factual background and issues determined in the Transparency International - Kenya v Omondi case to establish the current high-water mark of judicial conservatism on FTC non-renewal. Second, it critically explores the precise circumstances under which Courts, even post-Omondi, have found an employee's expectation of renewal to be truly "legitimate". This includes an analysis of two primary objective bases for such claims: (a) the unequivocal conduct or omission of the employer, such as failure to give a contractually required notice of non-renewal, as seen in Ruth Gathoni Ngotho- Kariuki v Presbyterian Church of East Africa, and (b) the fulfilment of conditional renewal clauses, such as satisfactory performance and ongoing need for services. Finally, the article concludes by arguing that reliance solely on case law, which often appears contradictory and reactive, is unsustainable for a mature labour jurisdiction. It therefore proposes a decisive legislative/policy framework that incorporates a clear, codified substructure for legitimate expectation, defining the circumstances, thresholds, and remedies, thereby reducing unnecessary litigation and ensuring predictable justice for both employers and employees.

2. Judicial Conservatism: Transparency International v Omondi

The dispute originated from the termination of the employment relationship between Transparency International, Kenya (Hereinafter **"TI-Kenya"**), the Appellant, and Teresa Carlo Omondi, the Respondent. Ms. Omondi was engaged by TI-Kenya on October 1, 2010, as a Deputy Executive Director/Head of Programmes under a fixed-term contract spanning two years. A crucial term of this contract stipulated that any ***"further extension of this contract shall be subject to satisfactory performance and the on-going requirement of your services."*** Despite her contention that her performance was diligent and exceptional, evidenced by successful resource mobilization, TI-Kenya chose not to renew her contract upon its expiry in September 2012. Consequently, Ms. Omondi asserted that, having met the conditional renewal terms, she possessed a legitimate expectation that the contract would be renewed, potentially on improved terms. The failure to renew, in her view, amounted to unfair termination, leading to the initiation of litigation.

At the Court of Appeal, in its reasoning, the COA emphatically declared that a fixed-term contract carries no rights, obligations, or expectations beyond the date of expiry, reasoning that such agreements are inherently designed to terminate automatically upon the effluxion of time. The Court cautioned that mandating automatic renewal or requiring an employer to provide reasons for non-renewal, in the absence of an explicit contractual requirement, would fundamentally "undermine the very purpose of the fixed-term contract" and effectively convert it into a contract of indeterminate tenure, ***contrary to the parties' original intent***. Crucially, in interpreting the doctrine of legitimate expectation, the Court drew a sharp distinction, clarifying that an employee's subjective hope or wish for renewal even when fueled by stellar performance, does not constitute a legitimate expectation. An enforceable expectation, the Court held, only materializes when the employer furnishes an objective indication, through an overt act or omission, that renewal was forthcoming and that the employee relied upon this indication. Since no such promise was demonstrated by TI-Kenya, the employer was held to have merely exercised its contractual discretion. Consequently, the Court determined that TI-Kenya was not obligated to provide any reason for the non-renewal beyond the simple fact that "the term has come to an end, and no more," comparing the demand for such a reason to requiring an employer to justify rejecting an initial job application.

By narrowly defining the doctrine, requiring ***clear, objective evidence of an actual promise or indication of renewal***, the ruling protects the managerial prerogative of employers to manage their fixed-term workforce without the regulatory burden of justifying non-renewal.

3. A Margin of Appreciation: Contra Omondi

As evidenced by Omondi, Courts generally raise a margin of appreciation that such an expectation

must be reasonable and legitimate, determined not by the employee's subjective hope but by an objective assessment of the employer's conduct, the object and purpose of the Fixed-term contract, as well as the intention of the Employer vis-à-vis the Employee.

In Tanzania, the exception is conditional, as evidenced by Rule 4(5) of The Employment and Labour Relations (Code of Good Practice) Rules, which necessitates that an employee claiming a reasonable expectation of renewal must demonstrate the basis for that expectation on an objective basis. This requires the employee to prove that the employer had, through "a clear practice, promise, or representation, fostered the belief that the contract would continue." A significant circumstance capable of generating such an expectation is where an employer deviates from the contract's fixed term by retaining the employee beyond the designated expiry date, as demonstrated in the case of Eunice Mwikali Munyao v. Elys Chemical Industries Limited. In this instance, the respondent kept the claimant beyond the contractual term, a factor that contradicted the argument of termination by effluxion of time and lent credence to the claimant's asserted expectation of renewal, notwithstanding the respondent's subsequent attempt to frame the extra duration as a mere two-month extension. Furthermore, a critical factor considered is the employer's history of repeated renewals of the fixed-term contract. The repeated renewal of short-term contracts for the same services is often viewed by the courts as creating a pattern that transforms the temporary nature of the engagement into a de facto indefinite arrangement, thereby generating a legitimate expectation of continued employment. When such a contract is finally not renewed, the termination can be construed as unfair dismissal under the relevant labour laws, triggering a requirement for substantive and procedural fairness. This was the rationale and decision by the Tanzanian Court of Appeal in ***Abdul-Karim Haji v. Raymond Nchimbi Alois and Joseph Sita Joseph (2006) and the Kenyan Court of Appeal in Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho- Kariuki [2017]***

The legal framework is also highly sensitive to the presence of conditional promises within the contract itself or within associated institutional policies. As seen in the South African context a clause promising renewal subject to certain conditions, such as "satisfactory performance" or "availability of funding," can strengthen the claim of legitimate expectation once those conditions are met. However, the employer retains a limited discretion, which must be exercised fairly and rationally. This was the rationale in Dierks v. University of South Africa. The Applicant had been employed by the Respondent, the University of South Africa, under a series of fixed-term contracts across multiple years. Specifically, the Applicant held contracts during 1995 and 1996 in the Old Testament Department. The dispute centered on the 1997 employment period, where the Applicant was engaged under a fixed-term contract for two discontinuous periods: March 1 to April 30, 1997, and subsequently July 1 to December 31, 1997. Drawing on the precedent cases such as ***MAWU & Another vs A. Mauchle (Pty) Limited t/a Precision Tools***, the court outlined several objective factors for this assessment. These factors included the evaluation of all surrounding circumstances of the employment, the significance or lack thereof of the contractual stipulations regarding renewal, any agreements or undertakings made by the employer that might imply continuity, and the practice or custom of the employer concerning contract renewal or re-employment. Furthermore, the court considered the purpose of or reason for concluding the fixed-term contract, the employer's failure to give reasonable notice of non-renewal, and the nature of the employer's business itself.

The upshot of these is that, if a legitimate expectation is established, the employer is often required to follow a fair procedure before making a non-renewal decision, frequently involving notifying the employee of the factors against renewal and allowing the employee an opportunity to be heard. This procedural protection ensures that the employer's ultimate decision is rational and not

motivated by unfair labour practices, even if the final decision remains the employer's prerogative.

Legal scholars, including the authors, strongly argue that due to the complexity and lack of clarity arising from the solely case law-based evolution of this doctrine, there is a necessity for legislative intervention. They suggest amending provisions of the Kenyan Act to clearly define the circumstances that establish a reasonable expectation for renewal, thereby guiding courts, employers, and employees, and ultimately protecting the employee as the weaker party in the employment relationship.

CONCLUSION: PROACTIVE GOVERNANCE

The transplant of the doctrine of legitimate expectation from administrative law to Employment law in fixed-term contracts highlights a clash between "reasonableness" and contractual certainty. The Court of Appeal's restrictive stance in Transparency International - Kenya v Omondi firmly established that fixed-term contracts carry no rights or expectations beyond their expiry date, warning that automatic renewal undermines the contract's very purpose. This dichotomy forces courts to engage in a case-by-case evaluation using subjective criteria, such as the Dierks factors, which consider surrounding circumstances, custom, and employer undertakings to distinguish genuine expectation from mere subjective hope. Consequently, legitimate expectation under Kenyan employment law remains highly inconsistent and entirely dependent on judicial interpretation, leading to a palpable lack of clarity and an increase in unnecessary litigation. It is thus imperative that the resulting ambiguity be addressed. Legislative reform, as previously highlighted, would codify and clearly define the objective circumstances that establish a reasonable expectation for contract renewal, offering much-needed certainty to employers, employees, and the third arm of government alike.

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PERSPECTIVE ON THE DECRIMINALIZATION OF ATTEMPTED SUICIDE IN KENYA AND ITS IMPLICATIONS FOR MENTAL HEALTH GOVERNANCE

STEVE ODHIAMBO

Abstract

In the context of evolving constitutional values, public health imperatives, and shifting global approaches to mental health governance, Kenya's legal framework on suicide has undergone significant judicial re-examination. For decades, Section 226 of the Penal Code criminalized attempted suicide, subjecting individuals experiencing acute psychological distress to prosecution, fines, and imprisonment. This punitive approach, rooted in moralistic and deterrence-based reasoning, has increasingly been questioned for its efficacy, humanity, and constitutional legitimacy.

This article undertakes a critical analysis of the recent High Court decision in ***Kenya National Commission on Human Rights & 2 others v Attorney General; Director of Public Prosecutions & 3 others (Interested Parties); Law Society of Kenya (Amicus Curiae) [2025] KEHC 6 (KLR)*** that effectively decriminalized attempted suicide, situating the ruling within Kenya's broader constitutional architecture and international human rights obligations. The paper examines the historical foundations of criminal liability for attempted suicide and interrogates the underlying assumptions that equate mental health crises with criminal culpability. In doing so, it highlights the dissonance between criminal justice responses and contemporary understandings of mental illness, vulnerability, and the right to health.

Further, the article explores the social and psychological drivers associated with suicidal ideation, with particular emphasis on depression as a pervasive yet under-addressed public health concern. It argues that criminal sanctions have contributed to stigma, social exclusion, and fear of seeking medical or psychosocial support, thereby exacerbating rather than mitigating harm. By contrast, the emerging legal shift signals a move toward a therapeutic and rights-based framework that prioritizes care, prevention, and rehabilitation over punishment.

Ultimately, this paper contends that the decriminalization of attempted suicide represents a pivotal step toward modernizing Kenya's mental health policy and aligning the law with constitutional values of human dignity, equality, and social justice. It contributes to the ongoing discourse on mental health reform by advocating for a holistic, non-punitive legal response that better serves individuals in crisis while strengthening mental health governance in Kenya.

INTRODUCTION

Section 226 of the Kenyan Penal Code criminalizes attempted suicide. The penal code classifies attempted suicide as misdemeanor punishable by imprisonment for a period not exceeding two years or a fine or both under section 36. This provision has subjected vulnerable individuals to prosecution, fines and even imprisonment. Moreover, society has set standards which view suicide as immoral, unethical and a religious vice. The people who survive suicide are castigated and publicly shamed in the belief that this will change their perspectives.

Section 226 of the penal code provides that malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not; knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused. This section clearly criminalizes attempted suicide and provides a punishment of two years imprisonment, a fine or both upon conviction pursuant to section 36 of the penal code.

This paper analyzes the 2025 High court decision in ***Kenya National Commission on Human Rights & 2 others v Attorney General; Director of Public Prosecutions & 3 others (Interested Parties); Law Society of Kenya (Amicus Curiae) [2025] KEHC 6 (KLR)*** that decriminalized suicide and delves into the possible ramifications. The paper delves into the reasons that drive people into suicide ideation. The paper takes a focused look at depression as a major challenge and provides measures to navigate, counter and ultimately overcome depression. This is in the wake of the realization that there are better ways to handle attempted suicide in a way that does not promote stigma deterring people who might have mental health disorders from getting the medical attention that they require. Suicide is in fact currently illegal in just 25 countries, and an additional 20 countries follow Islamic or Sharia Law where suicide attempters may be punished with jail sentences. Majority of countries have laws making it illegal to abet, aid or encourage suicide but the nature and punishment of the actions that are illegal varies.

Suicide borrows its wordings from Latin Suicidium which entails the actions by oneself to take away his or her own life. On the other hand it is self harm encompassing the desire to end one's own life that does not result into death.

Legislation on attempted suicide

Mental Health Act

This is an indispensable part of the legislative system in Kenya that addresses mental health. Section 3 of this Act delineates the tenets that underpin mental health treatment, with a particular focus on the significance of advancing individuals' mental health. A legal incongruity where criminalization and a legislative focus on mental health coexist is highlighted by the comparison of Sections 226 of the Penal Code and section 3 of the Mental Health Act.

Succession Act

The succession Act introduces a more complex level beyond the penal code and the mental health Act. In this Act, a person who is found to have committed suicide is permitted to have their will discounted in section 31 (f) (i), which invalidates a gift given in contemplation of death by suicide. The interaction between mental health laws and succession laws highlights the complex relationships between legal frameworks and how they may affect people and their families.

The penal code (Amendment) Bill, 2021

The Penal Code (Amendment) Bill, which was just submitted, is a major step in the right direction toward modernizing the law to address mental health issues. Chief Justice Martha Koome led the effort to modify the Penal Code to remove Section 226. The goal was very clear: in line with Section 3 of the Mental Health Act, legalize attempted suicide

to make it easier to provide care and support to suicide survivors.

The Courts Recent Stance
The High Court pronounced itself in the case of Kenya National Commission on Human Rights & 2 others v Attorney General; Director of Public Prosecutions & 3 others (Interested Parties); Law Society of Kenya (Amicus Curiae) [2025] KEHC 6 (KLR);

Brief Facts
The Petitioners contended that the main driving factors for attempted suicide in Kenya and globally are various undiagnosed and untreated mental health conditions as well as mental disabilities which result in suicidal thoughts that may lead to attempted suicide by persons affected. They thus contend that criminalisation of attempted suicide amounts to the punishment of persons with mental disabilities contrary to the provisions of Section 2 of the Persons with Disabilities Act and Articles 27 and 260 of the Constitution. Further that this criminalisation amounts to punishment of persons with mental health issues and is contrary to the constitutional requirements on the right of persons to the highest attainable standard of healthcare under Article 43 of the Constitution and Section 4 of the Health Act, 2017.

The petitioners also alleged that section 226 of the penal code is a violation of the right to the highest attainable standard of health, which includes mental health, under Article 43 of the constitution. They averred that it was also a contradiction of the right to equality before the law and non-discrimination on the basis of health, under Article 43 of the constitution; the right to human dignity protected in Article 28 of the constitution; the right of persons with disabilities as protected in Article 54 of the constitution. The petitioners also asserted that the protection of the child as well as the rights of the child, is recognized in Article 55 of the constitution.

Issue
Is section 226 of the penal code inconsistent with the Constitution?

Law Applicable
Section 226 of the penal code criminalizes attempted suicide, stating that anyone who attempts to kill themselves is guilty of a misdemeanor and can be punished with imprisonment for up to two years, a fine, or both. Section 34 of the penal code states that when in the code no punishment is specially provided for any misdemeanor, it shall be punishable for a term not exceeding two years or with a fine or with both. The petitioners argued that Section 226 violates several constitutional guarantees, including:

Article 27
Right to equality and freedom from discrimination. This Article provides that the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth

Article 43
This Article outlines the right to the highest attainable standard of health. The High Court ruled that criminalizing attempted suicide contravenes these constitutional rights. The court emphasized that individuals who attempt suicide are often suffering from mental illness and lack the intention (mens rea) to commit a crime. Penalizing them not only stigmatizes them but also deters them from seeking the help they need. The court declared that section 226 of the penal code is unconstitutional for violating Articles 27, 28, and 43 of the Constitution.

The Evolution of Suicide Law in Kenya: Towards Decriminalisation and a Public Health Paradigm
Suicide has been viewed in many ways. It has been regarded as an expression of emotional distress or a cry for help. It has also been regarded as an expression of aggression against self or against significant others or as a result of mental illness. Most researchers see suicide as a human problem and observe that there is no period in history it has not occurred.

Kenya's legal framework on suicide is historically rooted in colonial-era penal philosophy, which conceptualised suicide and attempted suicide as moral and criminal deviance rather than manifestations of psychological distress. Section 226 of the Penal Code criminalises attempted suicide, prescribing imprisonment for a term not exceeding two years, while Section 227 renders aiding or abetting suicide a felony. This fault-based, punitive approach places the individual in psychological crisis at the centre of criminal culpability rather than therapeutic intervention. The Kenyan courts demonstrated this in two significant cases J S K v Republic and Paul Isaac Okengo v Republic,in which both defendants were found to have been too unwell to stand trial. Diminished responsibility is accepted in Kenya, due to insanity. A person will not be criminally responsible for an act or omission if, at the time of the act or omission, they were either;

i. Incapable of understanding what they were doing; or
ii. Incapable of knowing right from wrong, as a result of any disease affecting their mind.

Intoxication, which includes drugs and narcotics, may only form a defence to a criminal charge if the person did not know that their act or omission was wrong, or did not know what they were doing, and the defendant was either;

i. Intoxicated without their consent by the malicious or negligent act of another person; or
ii. Rendered, temporarily or otherwise, insane at the time of their act of omission.

The continued criminalisation of attempted suicide raises profound constitutional questions, particularly in light of the 2010 Constitution. Article 28 guarantees the inherent dignity of every person, while Article 43(1)(a) recognises the right to the highest attainable standard of health, including mental health. Criminal sanctions imposed on persons in mental distress arguably undermine both provisions by substituting care with coercion. Article 29 protects individuals from cruel, inhuman, or degrading treatment. Subjecting a suicidal person to arrest, detention, and prosecution may amount to secondary victimisation, exacerbating psychological harm rather than alleviating it. From a proportionality perspective, the punitive response fails to meet the constitutional threshold of necessity and reasonableness in a democratic society. The Mental Health (Amendment) Act, 2022 further reinforces this paradigm shift by recognising mental health as a core component of public health and State responsibility. However, the coexistence of progressive mental health legislation with residual penal provisions creates normative incoherence and legal uncertainty, underscoring the need for full legislative reform.

Proponents of decriminalisation argue that suicide prevention is best achieved through a no-fault, public health framework that prioritises early intervention, access to mental healthcare, and social support systems. Criminalisation fosters secrecy, stigma, and fear of legal repercussions, discouraging individuals from seeking help at critical moments. Critics of decriminalization however, often contend that removing criminal sanctions may normalise suicide or weaken deterrence. Empirical evidence does not support this claim. Jurisdictions that have decriminalised suicide have not experienced increased suicide rates; rather, they report improved reporting, intervention, and prevention outcomes.

Impact of Criminalising Attempted Suicide

As I have already averred, the law as it has stood for a long time has been a hindrance to people living with suicidal thoughts. This has largely been because the knowledge that it is a criminal offense makes them go into hiding rather than seek help. For this very reason, very few people come out to say that they have attempted or are contemplating killing themselves. The fact that suicide attempts are considered to be punishable crimes, suicide attempts are often undeclared, and deaths by suicide are more often classified as accidental or of undetermined cause.

Although the mere fact that suicide claims so many lives may be enough to spark preventive measures, the need to intervene becomes clearer still when one learns that for many individuals who are suicidal, the wish to die is counterbalanced by a wish to live; the desire for death may be temporary; the suicide attempt may not be designed to end life but rather to communicate with someone in this life and it is often a cry for help. Article 43(1) of the constitution of Kenya 2010 provides that every person has the right to the highest attainable standard of health which includes the right to healthcare services. It is prevalent that this provision of Article 43(1)(a) also encompasses the right to proper mental health care. Furthermore, Article 21(2) of the constitution states that the state shall take legislative, policy, and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.

Throughout the world, mental health has been considered a global problem and statistics have shown that over 300 million of the world's population suffer from disorders related to mental health. These figures present a wide prevalence of mental ill health more generally the world over. Following the above-mentioned facts, an interpretation of constitutional provision on the right to health should include those individuals with mental health disorders without any discriminatory measures put in place that would serve to deny them their inherent human dignity. This is especially in relation to those individuals with suicidal ideation tendencies. Article 259 (4) (b) also states the word includes means includes, but is not limited to and since the provision incorporates include in its' wording, it then means the right to health is broad and is limited to neither physical nor reproductive health and can be inclusive of mental health. In relation to the right to health, we see the enactment of the Health Act no. 21 of 2017. Within this act, there is an express mention of mental health as a constitutive element of health. The Health Act defines 'health' to mean a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity. The provision serves to show that when engaging in discussions that pertain the right to health, it could as well be construed to include the right to mental health. Of significance to note is that, the Health Act defines health care services to mean, prevention, promotion, management, and alleviation of disease, illness, injury, and other physical and mental impairments in individuals, delivered by health care professionals through the health care system routine health services or its emergency health services.

It is an erroneous assumption that criminalizing attempted suicide will serve the purpose of deterring people from attempting suicide. Nothing is so distant from the truth than the above presupposition. As a matter of fact, if someone is in a severe state of emotion or agony and you try to convince them not to kill themselves because someone else did it and got caught, it won't work since they've already made up their minds to do it. It is against this backdrop that Justice Mugambi enunciated that the provision of section 226 of the penal code contravenes several constitutional guarantees, including the right to health and freedom from discrimination. He noted that penalizing individuals struggling with mental health challenges not only stigmatizes them but also deters them from seeking the help they need.

This vestige of colonial era laws, which subjected victims to up to two years in prison, a fine or both failed to consider the nuanced reality of mental health struggles. With incarceration resoundingly proven not to be the solution, it is time for the government to ensure systems are put in place and strengthened to ensure individuals with mental health conditions receive the care they deserve and not punishment. Psychological reports from as early middle of the previous century reveal that most people who have died by suicide have suffered from mental health disorder and as a result those advocating for decriminalization of attempted suicide argue that the laws are insensitive to the plight of troubled individuals and their despairs. They view Criminalization of attempted suicide as amounting to double penalization as they are forced to get over their personal mental health problems as opposed to being assisted.

Comparative Analysis

Different states have put in place different approaches. Some have continued with the colonial laws that criminalized the act while others have decriminalized the law. In Botswana attempted suicide is not categorized as a crime. However, aiding or abetting the suicide of another person constitutes a criminal offense under Botswana law. The Botswana Penal code provides any person who;

i. procures another to kill himself;

ii. counsels another to kill himself and thereby induces him to do so; or

iii. Aids another in killing himself, is guilty of an offence and is liable to imprisonment for life.

Under Gambian Law, attempted suicide is prohibited. The country's anti-suicide laws are covered under Chapter 21, Sections 205 and 206 of the Gambian Penal Code. Section 205 captioned "Aiding Suicide," stipulates that any person who;

i. procures another to kill himself; or

ii. counsels another to kill himself and thereby induces him to do so; or

iii. Aids another in killing himself, is guilty of a felony, and is liable to imprisonment for life.

Section 206 of the Gambian penal code tasks exclusively o attempted suicide. It stipulates that any person who attempts to kill himself is guilty of a misdemeanour. If a person survives attempted suicide in India, he or she is typically reported to law enforcement authorities, arrested and turned over to the court for prosecution. If the person is convicted, they are subjected to judicial sanctions such as fines or penal custody.

In Zambia, attempted suicide is no longer a criminal offence. This follows the repeal of laws that previously criminalised it. Chapter 89 of the Penal Code, known as The Suicide Act, explicitly removes suicide from the scope of criminal liability. Section 3, titled "Suicide not to be an Offence," abolishes the common law rule that treated suicide as a crime. As a result of this repeal, individuals who attempt suicide in Zambia do not face any legal or judicial penalties, and survivors are not subject to prosecution.

In India for, in the case **P. Rathinam v Union of India**, the Supreme Court decided to abolish section 309 of the penal laws criminalizing attempted suicide stating the section was cruel and irrational as it amounted to punishing the person who suffered agony with another state of despair by imprisoning him.

In Roe v Wade for instance the Supreme Court of the United States held that the state's interest in preserving a mother's life was compelling enough to limit the fundamental constitutional right to privacy and the mother's derivative right to an abortion after the first trimester. The Court further held that the state's interest in the potential life of the foetus was compelling enough to allow the state to prohibit abortion after the second trimester. In the euthanasia context, states assert the same interest in opposing termination of life support measures or life-prolonging treatment. Similarly, in the suicide context, courts emphasize the state's interest in life preservation. The courts hold that the preservation of life has a high social value in our culture and suicide is deemed a 'grave public wrong.

In addition to the protection of societal life, the state interest in life preservation also extends to the protection of each individual from harm, even self-inflicted harm. The paternalistic parens patriae power is employed by the state in the suicide context to protect individuals, namely suicidal individuals suffering from mental illness, from self-induced harm, on the theory that the individual is, at that time, incapable of protecting herself.

Suicide and personal autonomy; A right or a wrong?

Morally, suicide is considered wrong because human life is sacred. Taking the ' sanctity of life view' human life is deemed to be inherently important and precious demanding respect from others and reverence of oneself. In as much as life is precious, it is important to note that persons with suicidal tendencies and on the verge of actualizing the act have reached a point where the life we consider valuable is meaningless to them. They have gone through situations that make their life unbearable and not worthy of existing.

Telling them that suicide is wrong because their life is valuable and an attempt of taking it away, will be penalized is an insult to the underlying conditions they are going through. Perhaps a better approach other than punitive laws would be of importance. This we can achieve by addressing their situation medically and as result ensure their right to health is realized. Many societies consider one's life to be interlinked with the people existing around him. Attempting to kill oneself therefore is considered a breach of an obligation to live towards your loved ones. The same was also affirmed by Aquinas when he was defending prohibition of suicide when he stated suicide injures a community to which an individual is part of Aristotle also in his Nicomachean ethics concludes that suicide is somehow a wrong to the state or community though he does not express what exactly is the wrong that suicidal people exhibit but it serves to show that for a longtime suicide has been seen as violation of an obligation towards others to live thus making it a societal concern and as a result should be prohibited.

In Kenya, there is a growing alarm over shocking numbers of suicide cases in Kenya. Kenya National Commission on Human Rights issued a report stating that 1442 Kenyans attempted suicide between 2015 and 2018 and subsequently linked the rise in cases to mental ill health caused by a breakdown in socio-economic safeguards. The commission says suicide is the last path of escape for individuals with unaddressed mental health needs. Unfortunately, suicide prevention measures adopted by Kenya do not reflect the above findings and thus lead to continued discrimination of individuals who attempt to commit suicide when it comes to access to mental health care which is what they need.

An article published by Chiromo Hospital Group on the reality of suicide in Kenya indicates that an estimated 311 people commit suicide yearly and to them this is actually not the accurate estimation since attempted suicide is criminalized in Kenya leading higher risks of under reporting. It remains to them that suicide is one of the leading causes of death in Kenya. associated this high-rate prevalence to mental health disorders such depression and Schizophrenia. They state these conditions causes' severe mental disorders making an individual susceptible to suicide. Factors such as history of mental illness among immediate family members may also influence suicide.

The number of suicide cases in Kenya certainly is getting out of hand. Every three days or so, We wake up to a suicide case. It is even more unfortunate that it has cut across all ages, as it is no age bracket is spared. However, those between the ages 20 and 40 seem to be the hardest hit. One thing that stands out is that most of the victims are battling with handling the truth about situations. Others are battling with pressure from various quotas. Currently, the two greatest contributors to depression leading to suicide in Kenya are relationships and finances. There are certainly other contributors but these two

seem to stand out. People kill themselves because of failed or troubled relationships and money issues. Failed relationships is indeed a hot topic amongst our young people today between the ages of 18 and 25. This could largely be due to the fact that relationships are marred with a lot of deception and ingenuity. Young people get into relationships with several ulterior motives and every time these are not met the relationships end in a quagmire leaving either parties with no will to continue with life.

A vast majority of these victims actually try reaching out but we brush them off claiming that after all, it rains everywhere. Whereas it could be raining everywhere it is worth taking note that not everyone was taught how to dance in the rain. In the wake of all these, people who find themselves in these situations should instead collect themselves and dig deep to find themselves even just one reason to press on. To be fair sometimes our circumstances press us to the wall and we feel like we've lost it all. At times we have been pressed against the wall and reach what we think are our limits. Sometimes we get to that stage where we cannot distinguish between day and night because they both look dark as hell. Sometimes we reach out to people who instead turn away and cut themselves off. Other times people we trust can term us a bother, or even a nuisance. One thing that can certainly help us in the midst of all this is the constant focus on our purpose. Sometimes we are hit hard but our focus must never slip off our sight. Even the times we are constantly under pressure out of this world, we must harness that and remember that diamonds are made under pressure.

We have to decide that as long as there is nothing we can do about a situation, we must not worry ourselves to death. Inevitably we sometimes suffer the loss of loved ones through separation or death, we lose jobs and opportunities but it is prudent but it is prudent to only look at the good the things we've lost brought while they still lasted. Certainly, we must convince ourselves that better days are coming, and the fact that this has been said over and again and is considered a cliche doesn't make it any less true. Life does not always turn out exactly as we want it or as we expect it to. Once in a while it may give you a blow from which you think you cannot recover, but if you still have breath in you, always reel back and continue fighting for as your grandmother used to say, yesterday is not today and today is not tomorrow. Each day rises fresh from the hands of God bringing with it what it will.

The greatest reason to keep pressing on is to show the society that giving up is not an option and pressing on yield to fruits. There is always a reason to keep going. A great cheering squad awaits us at the finish line. We area all human, we make wrong choices and we fall. However, when all is said and done we must rise above everything and hit the road like we stopped in the first place. We have to step on the gas and go. life can only be understood backwards but it must be lived forward. We are not supposed to give up, we must learn to dance in the rain. It is no surprise that many look okay outside but inside them are heavy battles being fought. After all, the darkest hour is usually before dawn. The rationale of the ruling by justice Mugambi which allowed a victim of attempted suicide to not face a punishment therefore does not give the leeway for suicidal thoughts to always prevail. It was meant to shift our focus to take a medical approach in order to reduce suicide prevalence.

CONCLUSION

A vast majority of Kenyans are not aware that suicide could be caused by mental health conditions. Communities still believe in cultural and religious condemnation of suicide. They view suicide as a taboo and to the religiously affiliated individuals; a crime against God. This has propagated stigmatization and discrimination of people who attempt suicide. The ruling by Justice Mugambi in the case of Kenya National Commission on Human Rights & 2 others v Attorney General; Director of Public Prosecutions & 3 others (Interested Parties); Law Society of Kenya (Amicus Curiae) [2025] KEHC 6 (KLR); is a step towards the right direction that will ensure the medical concept of suicide is taught in schools and the right information surrounding suicide is available to the nation. The state should at this point cooperate with Intergovernmental organizations, and non-governmental organizations to ensure that

the people are thoroughly sensitized on the legal position of attempted suicide so that victims come out and get the assistance that they deserve rather than the usual castigation. This will go a long way to shift perceptions and stigma. The ruling certainly is a rallying call to individuals, organizations, and the government to continue to raise awareness and fight discrimination.

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