ALL KENYAN MOOT COURT COMPETITION

13TH EDITION

KENYATTA UNIVERSITY



THE ACADEMIC ALMANAC

Volume III

TIDES OF CHANGE







Safeguarding **Human Rights** And
Enhancing **Government Accountability**
In The **Digital Era**

OUR PARTNERS





















































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FOREWORDS

GRIFFINS TIMBE

It is with genuine pride and deep satisfaction that I offer this foreword in Vol III of the Academic Almanac. Having reviewed research papers for the All-Kenyan Moot Court competition over the years, I can confidently confirm that the 13th edition demonstrated a notable improvement across the board. From the structure of the papers to the research conducted, researchers have clearly elevated their research skills.I observed an extensive research and an excellent flow of ideas in the Research papers.

Something unique about AKMCC is that they address current academic and societal challenges with nuance and foresight, making the volume not only timely but impactful. The overall quality of this edition surpasses what we have seen in the recent past, establishing a new benchmark for the publication. The editorial board, and indeed the broader academic readership, can take pride in what contributors have achieved.The bar has been raised and I believe researchers in the next edition will raise it higher.

I congratulate all authors for their dedication and commitment, which has made this edition one of the finest to date.It doesn't end here,you have a whole research arena to conquer in the job market.I equally applaud the 13th Edition Organizing committee for striving for excellence and putting up an amazing Edition.Your efforts can't go unrecognized.

PRESIDENT'S NOTE:

Dearest Gentle Reader,

It is my absolute pleasure to present to you the All Kenyan Moot Court Competition (AKMCC) E-journal 2025, titled The Academic Almanac, Volume III. As shall be evidenced by the published papers, this has been a labour of love by all stakeholders involved in this process.

The launch of this journal could not have come at a more critical time. This year marks 15 years since the promulgation of the Constitution of Kenya, 2010, yet Kenyans are yet to fully realise the rights and fundamental freedoms that the Constitution envisioned they would enjoy. The 13th Edition's theme "TIDES OF CHANGE: Safeguarding Human Rights and Enhancing Government Accountability in the Digital Era" further buttresses this live topic. With continued technological advancements, the instruments used in the clamour for change are constantly improving. The past year saw the use of smartphones and social media being deployed to plan and facilitate these movements. Notably, gradual developments within the technological sphere have redefined the tools used to advocate for social change and also highlighted violation of rights associated with digital spaces, such as privacy and liberty of the person.

The increased advocacy efforts since June 2024 bear witness to the fact that the citizens of Kenya, especially the younger generation, are awake and alive to the need for good governance and that it is indeed possible to achieve. It is a demand made in full acknowledgment of the deeply embedded social inequities and corruption that continue to plague our beloved country. It is a renewed quest for justice, responsible management of public resources and respect for civil and political rights while taking deliberate steps to promote the socio-economic rights critical for a sustainable quality of life.

The papers published in this volume of the E-journal add to this clarion call. It is a call to respect the rule of law, going back to the basics of ensuring transparency and accountability by all those who hold positions of authority and responsibility. It also serves as a stark reminder for the need to sustainably utilise the country's natural resources, for our sake and that of the generations to come. Most importantly, it is a call to respect, promote and protect civic and political rights and freedoms, especially human life through holding rogue officers accountable in cases of arbitrary arrests and detainment, torture and extra-judicial executions.

I feel elated that the scholarly space continues to expand, providing such an opportunity for the young professionals. Even more, I am truly humbled by the guidance offered by the older professionals within the community that the AKMCC has gradually cultivated over the past 13 years. My hope is that we shall all experience the joys and fruits of the small, deliberate and consistent steps we take. To our partners, thank you for always believing in the AKMCC vision and trusting us. Finally, and perhaps most importantly, to our authors, thank you for lending us your voice.

I wish you happy reading and may you relish the brilliance of intellect exemplified in these writings.

Warmly and proudly,

Faith J Mahinda

President

AKMCC, 13th Edition.

CHIEF EDITOR'S NOTE-HAMISI OMBASA

It is with great delight and ecstasy that I present to you Vol III of the Academic Almanac. Over the past 3 years, the AKMCC research category has witnessed immense and evident growth of its participants, being students across all accredited law schools in Kenya. The 13th Edition went a notch higher. The Research papers submitted by contributors exuded a remarkable improvement in quality, depth and originality. Such an encouragement to me as the Lead Editor. This growth displays the crucial role of AKMCC in cultivating Research skills and encouraging Research among law students.

I acknowledge the efforts of all the authors for putting their best foot forward and cooperating with the peer review team. You portrayed utmost professionalism throughout the review process. The journey of a thousand miles starts with one step and your step starts here. Going forward I encourage you to go forth and conquer the world with the notable skills you have garnered. Be the best lawyers, legislators, judges, consultants, lecturers and any other profession you venture into.Impact the world with your skills and knowledge.

This milestone couldn't be possible without our very able experts who diligently evaluated each paper with fairness, consistency and commitment. Their unwavering commitment ensured that only work of the highest standard made its way into these pages. To them we extend our sincerest appreciation for their contribution. Equally, I acknowledge the efforts of the Peer review committee who consistently attended the numerous late night meetings to make this Volume a success. Also, to the entire 13th edition Steering committee, your efforts can't go unrecognised.

To all the organisations that have partnered in cash and in kind to bring this dream to a reality, thank you for impacting a generation. You are empowering future legislatures, judicial officers, ardent lawyers and researchers. This support is not in vain. Keep doing the good job. As Editor-in-Chief, I remain confident that the Academic Almanac will continue to grow as a beacon of research, dialogue, and discovery. The best is yet to come. I encourage our readers to engage with the diverse ideas contained in this edition, and to join us in advancing the shared pursuit of knowledge.

Without a doubt, the future is Research!As you turn these virtual pages, may your curiosity be stirred, your knowledge sharpened, and your coffee never run out.

With scholarly mischief,

Hamisi Thomas Ombasa.

Head of Research/Editor-In-chief

AKMCC 13th Edition

TOPIC 1: LEGISLATIVE ROLE OF THE KENYAN PARLIAMENT IN ENSURING GOOD GOVERNANCE THROUGH TRANSPARENCY,ACCOUNTABILITY AND PUBLIC PARTICIPATION

PARLIAMENT AND GOOD GOVERNANCE: A CRITICAL LOOK AT TRANSPARENCY, ACCOUNTABILITY AND PARTICIPATION

Precious Tabitha

TABLE OF ABBREVIATIONS

ABBREVIATION	MEANING
AI	Artificial Intelligence
MPs	Members of Parliament
CS	Cabinet Secretary
CLT	Counter Legislative Tracker
NA	National Assembly
NCOP	National Council of Provinces
AR	Augmented Reality
VR	Visual Reality

1.0 ABSTRACT

This research examines the impact of transparent legislative practices on good governance, with a particular focus on mechanisms that promote public accessibility and openness. It evaluates key elements such as access to information, clarity of legislative processes, public participation, and accountability structures. The study explores how transparency enhances accountability, builds public trust, improves decision-making, and strengthens democratic institutions. Using a comparative legal approach, the research analyzes the legislative transparency frameworks of Kenya and South Africa. It draws on both qualitative and quantitative data, examining statutes, judicial decisions, parliamentary reports, and public records. Through content analysis and case studies, the study identifies best practices and highlights areas for improvement in Kenya's legislative processes, emphasizing transparency's role in participatory democracy.

CHAPTER ONE

1.1 INTRODUCTION

Democracy revolves around the Kenyan Parliament. Citizens are represented with the aspiration of seeking solutions to their problems. Assembling all citizens is impractical, so the system allows them to choose representatives. Sovereign power belongs to Kenyans, exercised per the Constitution, directly or through elected representatives.[1] This can only be done through elections where citizens vote for their preferred candidates. The National values and principles of good governance entail participation of the people, transparency and accountability.[2] In the case of George Bala v Attorney General (2017) eKLR,[3] the court held that the principles set out in Article 10 are not exhaustive.

Participation reflects a process where individuals and groups are meaningfully involved in shaping decisions that affect them.[4] It is grounded in openness and accountability, creating space for diverse perspectives and fostering inclusive governance. In this context, Parliament has a responsibility to create avenues through which the public can engage with legislative and other parliamentary processes.[5] Transparency operates as a safeguard within governance structures, ensuring that state operations remain open to scrutiny. It enables citizens to understand how decisions are made and resources are allocated, which in turn strengthens public confidence. Alongside this, accountability ensures that those entrusted with public power answer for their conduct. It discourages impunity and promotes ethical leadership.[6]

Governance, as understood in this study, extends beyond the act of decision making to include how those decisions are implemented and monitored. It is the continuous interaction of institutions, processes, and norms that shape how authority is exercised in the public sphere.[7] Parliament in this case plays an important role in promoting good governance. However, the effectiveness of parliament in enhancing accountability, transparency and participation is often challenged by factors such as lack of political will, corruption and limited public engagement. The practical implementation of these principles during parliamentary procedures is often a challenge which affects the ability of parliament to accomplish its duties.

Parliament should be given oversight mechanisms to scrutinize the actions of the government because increasing parliaments' oversight enhances democracy and good governance.[8] While Parliament plays a crucial role in

1 The Constitution of Kenya, 2010, Article 1(1), (2).

2 Ibid, Article 10(2) (a), (c).

3 *"By employing the use of the term "include" the framers of the Constitution were alive to the fact that there are other values and principles which may advance the spirit of the Constitution and hence all State organs, State officers, public officers and all persons may be enjoined to apply them. What this means is that the national values and principles of governance in Article 10 of the Constitution are not exclusive but merely inclusive. The Constitution set out to plant the seed of the national values and principles of national governance but left it open to all State organs, State officers, public officers and all persons when applying or interpreting Constitution, enacting, applying or interpreting any law, or applying or implementing any public policy decision to water and nurture the seedling to ensure that the plant develops all its parts such as the stem, the leaves, the branches and the flowers etc. In other words the national values and principles of governance must grow as the society develops in order to reflect the true state of the society at any given point in time."*

4 Sessional Paper on Devolved Government, 2012.

5 Supra, note 2, Article 118(1) (b).

6 Md Lutfor Rahman, 'Governance and Good Governance: A Theoretical Framework' (2016) 6 Public Policy and Administration Research 40 <https://www.iiste.org/Journals/index.php/PPAR/article/view/33578?-form=MG0AV3> accessed 23 December 2024.

7 UNESCAP, 'United Nations Economic and Social Commission for Asia and the Pacific' (2009) <https://www.unescap.org/sites/default/files/good-governance.pdf> accessed 23 December 2024.

8 Riccardo Pelizzo and Rick Stapenhurst, 'The Role of Parliament in Promoting Good Governance in

promoting good governance, there are significant opportunities that need improvement which will enhance its effectiveness hence strengthening the democratic governance.

1.2 RESEARCH QUESTION

i) i) How effective is the legislative role of parliament in ensuring good governance through transparency, accountability and public participation? ; and

ii) ii) What are the challenges and opportunities Parliament faces in enhancing transparency, accountability and public participation?

iii) 1.3 RESEARCH OBJECTIVES

iv) Analyze parliamentary practices' effectiveness in promoting good governance; and

v) Identify the challenges and opportunities parliament faces in enhancing transparency, accountability and public participation.

1.4 PROBLEM STATEMENT

The development and stability of a good government entirely depends on its good governance. Parliament therefore, ensures this by helping realize transparency, accountability and public participation. However, it often faces challenges such as lack of transparency, limited public engagement, inadequate legislative oversight and cases of corruption when it comes to fulfilling these roles which negatively hinder the ability of parliament to promote good governance effectively.

Implementation of mechanisms designed to enhance these principles is still a real struggle. This therefore, causes a gap to exist between the theoretical principles of good governance and their practical implementation. This study aims to investigate the main obstacles behind this gap and identify possible approaches and policy changes that may enhance Parliament's effectiveness in fostering sound governance ultimately advancing democratic responsibility and boosting citizens' confidence in public institutions.

1.5 THEORETICAL FRAMEWORK

1.5.1 Theory of Representative Government

John Stuart in his book "Considerations on Representative Government" argues that it is the desire of a representative government, not for its representatives to make legislation but instead bodies such as parliaments and senates be best places for public debates held by people. Parliamentary bodies should be watchdogs of professionals who come up with policies and laws.[9] The community will disengage and form a passive relationship with the government if not allowed to speak out. Such criticism, though arguable to some, often leads to moral deficiency, losing community responsibility and social justice. People tend to believe their rights and purpose in society has ceased, making them less involved in the society.[10] This kills the energy in the society.

He warns against the "tyranny of the majority" where the interests of the majority are likely to overpower interests of the minority. Legislative bodies are to make sure that the voices of minorities are heard. Educational

Africa' [2007] SSRN Electronic Journal.

9 ipl.org, 'Summary of John Stuart Mills Consideration on Representative Government' (Ipl.org20 August 2020) <https://www.ipl.org/essay/John-Stuart-Mills-Argument-For-Representative-Government-PJYVSA-J35U?form=MG0AV3> accessed 28 December 2024.

10 Ibid.

policies that enlighten citizens on their rights should be advocated for.[11] John Stuart Mill's theory underscores the centrality of public participation, transparency and accountability in representative governance, precisely the focus of this research. By advocating for parliaments to serve as forums for open debate rather than mere legislative factories, Mill aligns with the idea that legislative bodies must facilitate public engagement and oversight.

This enhances transparency, ensures minority voices are not drowned out by majoritarian rule, and strengthens accountability mechanisms which are all key pillars in promoting good governance, which this study seeks to evaluate through a critical analysis of Parliament's legislative role.

1.5.2 Theory of Balanced Ecology of Governance

Robert Miller emphasizes that governance interacts with a complex network of interrelated organizations which are centered towards citizens. The Ecology of Governance helps identify the connections between principles and structures of governance such as accountability, transparency and participation. These principles entail the need for a serious balance of power between the state and civil society with none being in absolute control. Transparency can be achieved if information concerning governance is accessible and there exists a dialogue between institutions and citizens.[12] This is very key.

Accountability requires participation. If Parliaments fail to build relations with wider society or do not engage active citizenship they still are not efficient despite being organized internally. Parliament has responsibility to ensure a balanced government.[13] An unbalanced ecology of governance is state centered, the executive dominates the judiciary and legislature, governance is exclusive, information is guarded jealously and participation is not encouraged, parliamentarians lack staff offices and information that would enable them effectively carry out their functions. Government and opposition parties engage in rhetorical conflicts in parliament where Members of Parliament ("MPs") act more like elevated municipal councilors, dedicating their efforts to securing advantages for themselves.

An effective governance is where; Parliament is part of horizontal accountability, where its proper functioning depends on its ability to relate and work with other parts of the system. Vertical accountability is where it is required to work with civil society, organizations and citizens in holding government accountable.[14] This theory is relevant as it helps create a balanced system of governance within society.

1.6 CONCEPTUAL FRAMEWORK

A representative democracy entails citizens delegating their sovereign power to elected representatives, who delegate their authority to bureaucrats. Unfortunately, this does not always ensure that governmental power is used for its created intentions because those who govern are not always accountable to the governed. Therefore, to understand the limitations of representative democracy, one should grasp the concept of accountability. Accountability is a social relationship where an actor feels obligated to justify their conduct to another.[15] This

11 Ibid.

12 'Parliamentary Accountability and Good Governance' <https://parlcent.org/wp-content/uploads/2020/07/Parliamentary_Accountability_and_Good_Governance_Handbook_EN.pdf> accessed 24 December 2024.

13 Ibid.

14 Ibid.

15 Migai Akech, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Govern-

ensures some actors have the right to hold others to a set of standards, check whether they have met their responsibilities and impose sanctions if they have not.

Accountability mechanisms serve several purposes in a democratic context. First, they enable the people to hold public officials accountable. Representative democracy is therefore, a principal-agent relationship. People (principals) confer their sovereignty to representatives, who then delegate authority to ministers and public servants (agents). Secondly, by exposing exercises of governmental power that are unjust and unauthorized these mechanisms help prevent corruption and abuse of power. Thirdly, misconduct is prevented by keeping agents vigilant. Finally, by promoting acceptance of government authority and building confidence accountability mechanisms legitimize government in the eyes of the public.[16] Checks and balances should be used to prevent actions that go beyond legitimate boundaries. Therefore, institutions of governance should limit themselves and try to constrain the potential abuse of power.[17] This creates a balanced form of government.

ment Accountability?' (2011) 18 Indiana Journal of Global Legal Studies 341.

16 Ibid.

17 Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 The American Political Science Review 29 <https://www.jstor.org/stable/30038917> accessed 25 December 2024.

CHAPTER TWO

2.0 THE LEGISLATIVE ROLE OF PARLIAMENT

The functions of Parliament include: representing the will of the people, exercising their sovereignty, considering and passing amendments to the Constitution and altering county boundaries, protecting the constitution, making laws and promoting a democratic governance.[18]

2.1 THE ROLES OF PARLIAMENT

2.1.1 Representation Role

Representing people's interests is fundamental to parliamentary systems. Parliament's legitimacy is based on political representation involving norms of behavior. By examining how MPs engage with their electorate, represent their interests in policy making and advocate for their constituencies, this analysis highlights the crucial link between citizens and their elected representatives.[19] This function can be viewed from various perspectives: political, geographical, social, economic, and administrative. Making Parliament more responsive to people's needs, regardless of distinctions, is effective for representation.

While physical presence in parliament is important, structural changes may be necessary to allow parliamentarians to speak for their constituents even when direct communication is not possible. Examples include special parliamentary committees addressing specific issues like gender equality, disability rights and climate change, holding hearings nationwide to involve less mobile community section.[20] By doing this parliament becomes effective.

Representation function involves: ensuring MPs stay in contact with their constituencies by providing resources and time, inviting citizens to parliamentary sittings and their offices, conducting information workshops in counties about Parliament's work entails: involving civil society in parliamentary work through committees and discussion groups, providing MPs with special training on their representative roles, asking them to fulfill promises made during election campaigns, delivering results in health, education, and infrastructure.[21] These actions create good governance.

2.1.2 Oversight Role

Parliament is essential in John Locke's separation of powers model, where Legislative and Executive powers are distinct. The Legislature sets rules, while the Executive executes them under the oversight of the legislature. As the representative of the people, Parliament ensures public policy meets citizens' needs, monitoring law implementation,[22] development plans and budgets adopted by parliament. This makes Parliament a defender of people's interests.

2.2 THE OBJECTIVES OF PARLIAMENTARY OVERSIGHT

18 Supra, note 5, Article 94.

19 'The Role of Parliament in Promoting Good Governance Governance and Public Administration Division (GPAD) Economic Commission for Africa' <https://archive.uneca.org/sites/default/files/PublicationFiles/role-of-parliament-in-promoting-good-governance.pdf> accessed 30 December 2024.

20 Ibid.

21 Ibid.

22 Yamamoto H, 'Tools for Parliamentary Oversight a Comparative Study of 88 National Parliaments Written and Edited By' <http://archive.ipu.org/pdf/publications/oversight08-e.pdf> accessed 26 December 2024.

vi) Ensuring transparency by providing a public space where policies and actions of the government are debated, subjected to public opinion and scrutinized;

vii) Providing a platform for financial accountability by ensuring that governments spending towards publicly funded services is well scrutinized and approved;

viii) Exercising oversight by parliament also helps scrutinize if the implementation of government policies have resulted in the desired impact;

ix) Parliamentary oversight helps protect the rule of law where by monitoring policies and examining abuse of power the rights of citizens are protected.[23] These objectives enhance parliamentary oversight.

TOOLS FOR PARLIAMENTARY OVERSIGHT

2.3.1 Parliamentary hearings whether in plenary or committee meetings, are essential tools for gathering information on policies or issues. While nearly all Parliaments hold hearings, their ability to compel testimony varies. To make informed decisions, parliamentarians often use additional information beyond government reports. They follow procedures for holding hearings and receiving public submissions, which are recorded as part of parliamentary proceedings.[24] Persons heard include; government officials, interested parties, experts and the public.

2.3.2 Votes of no confidence can withdraw or confirm parliamentary confidence in the government or a minister, potentially leading to resignations or dissolution. Interpellation requires government members to justify policies, possibly leading to debates and votes of no confidence.

2.3.3 Parliamentary questions are a key oversight tool, clarifying government policies and potentially leading to interpellation. These questions, often asked orally or in writing, can produce valuable information.

2.3.4 Committees of inquiry are ad-hoc groups investigating specific issues, possessing extensive powers like summoning witnesses and requesting documents. They are used globally to address corruption and power abuse. They primarily serve to prepare matters for discussion in the full chamber. They create reports, and occasionally, committee members participate in debates on these reports. Committees play a crucial role in ensuring informed discussions within the chamber. The presence of numerous specialized committees enhances parliamentary work, as they can address the same issues from various perspectives simultaneously.

2.3.5 Special standing committees focus on sensitive issues like national security and defense.[25] Parliament has power to review and confirm Executive appointees, ensuring scrutiny of high public office appointments.

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23 'Parliamentary Function of Oversight | Agora' (www.agora-parl.org) <https://www.agora-parl.org/resources/aoe/parliamentary-function-oversight> accessed 25 December 2024.

24 'Strengthening Kenya's Democracy: Collaborative Approach' (Westminster Foundation for Democracy19 February 2024) <https://www.wfd.org/story/strengthening-kenyas-democracy-collaborative-approach> accessed 25 December 2024.

25 Supra, note 23.

CHAPTER THREE

3.0 PUBLIC PARTICIPATION

Public participation involves people in decision making. In Kenya, sovereign power belongs to the people, exercised in accordance with the constitution.[26] Parliament is mandated to conduct its business openly and enhance public involvement by facilitating involvement of the public in the legislative and other businesses of Parliament. It has to ensure that its sittings are not excluded to the public or the media except in exceptional circumstances where the speaker of the relevant house has given justifiable reasons for the exclusion.[27] The Constitution requires openness in public finance.[28] During budget preparations, the National Assembly seeks public input[29] supported by the Public Finance Management [30] Act.

Kenyans have the right to petition Parliament on any matter within its authority, including legislative changes.[31] Public service principles further ensure citizens are involved in policy-making[32] provided with accurate and timely information[33] and granted access to information held by the state.[34] Kenya's Constitution underscores the significance of access to information, aligning with an open and democratic society.[35] This framework ensures accountability in public services.[36] The Public Participation Bill, 2024 further supports public engagement by ensuring timely access to information and enhancing transparency and democracy.[37]

Involvement of the public was also emphasized in the case of British American Tobacco PL[38] where public participation is not abstract; it must be purposive and meaningful. Furthermore, the Supreme Court of Kenya's ruling in Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others addressed several constitutional and procedural issues surrounding the Finance Act 2023 and public participation to include:

a) Public Participation Must Be Meaningful- The Court reaffirmed that public participation must be qualitative and substantive, not merely symbolic. While Parliament is not required to adopt every public view, it must demonstrate that it considered them meaningfully.

b) Fresh Participation for Significant Amendments- If substantial amendments are introduced after initial public participation, renewed consultation may be necessary, especially if the changes materially affect the content or impact of the legislation.[39]

3.1 BENEFITS OF PUBLIC PARTICIPATION

Fosters better public-government relations, strengthens trust, empowers citizens, brings diverse ideas, and

26 Supra, note 18, Article 1(1).
27 Ibid, Article 118(1) (a)(b),(2).
28 Ibid, Article 201(a).
29 Ibid, Article 221(5).
30 2012, Section 207.
31 Supra, note 26, Article 119(1).
32 Ibid, Article 232(d).
33 Ibid, Article 232(1) (f).
34 Ibid, Article 35.
35 Ibid, Article 24(4).
36 Ibid, Article 232 (1) (e).
37 Public Participation Bill, 2024.
38 British American Tobacco Limited v Cabinet Secretary for the Ministry of Health & 5 Others(2017) eKLR.
39 Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others eKLR (Petition E031, E032 & E033 of 2024 (Consolidated)).

prioritizes public-relevant issues.

3.1.1 Effective tools for public participation

Petitions: Citizens can petition Parliament on legislative matters[40]; Public Forums: Face-to-face engagement for instant feedback; Submissions of Memoranda: Public input during the consideration of bills, budget estimates, and other legislative processes.

3.2 PROGRESS DONE BY PARLIAMENT IN ENSURING PUBLIC PARTICIPATION, ACCOUNTABILITY AND TRANSPARENCY

3.2.1 The Public Participation Bill 2024

Aims to promote citizen engagement in Kenya's governance by making clear instructions for public participation, improving oversight, accountability and transparency. It is open for comments from the public, as it spans all ministries and there is a suggestion to clarify which Cabinet Secretary ("CS") will be responsible for public participation. It suggests a compliance certificate from the Registrar for authorities that complete public participation exercises. However, it lacks details on solutions for authorities denied a certificate.[41] The Bill requires the Registrar to provide reasons for rejecting a report and allow authorities to appeal the decision.

Non-compliance with the Bill's requirements results in fines that are monetary, and disciplinary action against the responsible authority's accounting officer, but it does not address the impact of non-compliance on the legal status of policies or projects. Complaints must be submitted in respectful language, but these stipulations could be misused to limit participation. The Bill should therefore, align with Article 33 of the Constitution, which restricts freedom of expression only in cases of propaganda for war, incitement to violence, hate speech, or advocacy of hatred, ensuring that public participation respects others'[42]rights.

3.2.2 The recent political climate in Kenya

The recent political climate in Kenya has brought the importance of public participation in governance processes. Events such as the withdrawal of the Finance Bill 2024 following widespread protests and the impeachment proceedings against the Deputy President have highlighted the power of public[43]opinion.

40 Supra, note 36, Article 119.

41 'Key Highlights of Kenya's Public Participation Bill, 2024' (Cliffedekkerhofmeyr.com2024)<https://www.cliffedekkerhofmeyr.com/en/news/publications/2024/Practice/Corporate/corporate-commercial-alert-13-November-2024-key-highlights-of-kenyas-public-participation-bill-2024> accessed 28 December 2024.

42 Ibid.

43 kictanetadmin, 'Enhancing Public Participation : A Review of the Proposed Public Participation Bill 2024 | KICTANet Think Tank' (Kictanet.or.ke30 October 2024) <https://www.kictanet.or.ke/enhancing-public-participation-a-review-of-the-proposed-public-participation-bill-2024/?form=MG0AV3> accessed 28 December 2024.

3.2.3 Collaborations with civil organizations such as Mzalendo and Open Government Partnership

Civil organizations such as Mzalendo have been involved actively in giving recommendations and evaluating the Public Participation Bill, 2024. Such collaborations ensure that the bill is transparent enough.[44] By Mzalendo developing tools for participation and consultation, coordinating civil society engagement with Parliament under the umbrella of the Civil Society Parliamentary Engagement Network, and leading research and analysis on the performance of Parliament at national and county levels as well as on civic space issues, champions for public participation, citizen oversight over Parliaments, and more consultative and responsive political processes.

Furthermore by working to put in place mechanisms to increase engagement between representatives and their constituents, the organization champions for access to parliamentary information by using technology to make Parliament more accessible. This includes cascading legislative transparency and oversight to county level by rolling out the legislative trackers in[45] selected counties.

3.2.4 The County Legislative Tracker ("CLT")

Acts as a crucial link between citizens and local governments. It is an online database that gathers data from counties to monitor legislative activities, offering real-time updates on county legislations. It provides comprehensive insights into county government operations, empowering residents and the senate (as per Article 96 of the constitution) to oversee decisions impacting their communities. The CLT aims to ensure transparency by keeping the senate and the public informed about proposed laws, amendments, and crucial decisions affecting local communities. Developed by the Senate Liaison Office and Westminster Foundation for Democracy, the CLT provides a centralized platform to monitor legislative processes across all Kenyan counties.[46] The digital system tracks and displays the progress of bills and legislations within each county, enhancing legislative transparency and accountability.

44 Ibid

45 'Dokeza - Making Our Own Laws' (DOKEZA2024) <https://mzalendo.com/our-work/> accessed 28 December 2024.

46 'County Legislative Tracker Launched in Kenya to Help Promote Transparency' (Wfd.org8 August 2024) <https://www.wfd.org/story/county-legislative-tracker-launched-kenya-help-promote-transparency?-form=MG0AV3> accessed 28 December 2024.

CHAPTER FOUR

4.0 A COMPARATIVE CRITIQUE OF KENYA'S PARLIAMENT AND SOUTH AFRICA'S PARLIAMENT ON TRANSPARENCY, ACCOUNTABILITY AND PUBLIC PARTICIPATION

4.1 The legislative Role of Parliament in South Africa

South Africa's Parliament includes the National Assembly ("NA") and National Council of Provinces ("NCOP"), both participating in the legislative process.[47] Legislative authority has been granted to Parliament.[48] The NA, elected to represent the people, ensures government by the people as mandated by the Constitution. It fulfills this role by electing the President, serving as a platform for public debate on various issues, passing laws, and overseeing the actions of the Executive branch.[49] It considers, passes, amends, or reject any legislation, except Money Bills.[50] The NCOP ensures provincial interests are considered in national governance by participating in legislative processes and offering a forum for public discussion on provincial issues.[51] It can consider, pass, amend, propose amendments, or reject legislation, excluding Money Bills.[52] The Constitution categorizes Bills into: Constitutional amendments, Ordinary Bills not affecting provinces, Ordinary Bills affecting provinces and Money Bills.

The Constitution and parliamentary rules outline the procedures for passing each type of Bill. The Traditional Leadership and Governance Framework Amendment Act, 2003, requires the Secretary to Parliament to refer bills related to customary law to the National House of Traditional Leaders for comment. Parliament recognizes the importance of passing quality legislation that improves citizens' lives and involves the public. To achieve this, it plans to develop a legislative model to guide MPs and staff in processing legislation, aiming to enhance law-making processes and pass laws that[53] benefit all.

4.2 How does South Africa's Parliament enhance transparency, accountability and participation?

Parliament fulfills its oversight and accountability mandates per the Constitution and House rules. Committees interact with civil society organizations, businesses, experts, and professional bodies to enhance accountability. They can call on Ministers and department heads to account for any issue within their purview, as stipulated in sections 56 and 69 of the Constitution[54] and legislation.

4.2.1 Practices of Committees to effect Oversight and Accountability

i) Mandates of Committees: Each House's rules and the Joint Rules provide the mandates. Committees scrutinize legislation, oversee government activities, and engage with the public. They act as intermediaries between interest groups and the government and serve as entry points for citizens to Parliament's work.

47 The Constitution of the Republic of South Africa, 1996, Section 42.

48 Ibid, Section 43(a).

49 Ibid, Section 42(3).

50 'Law-Making | South African Government' (www.gov.za) <https://www.gov.za/about-government/government-system/law-making> accessed 1 January 2025.

51 Supra, note 49, Section 42(4).

52 Ibid.

53 Ibid.

54 'OVERSIGHT and ACCOUNTABILITY MODEL ASSERTING PARLIAMENT'S OVERSIGHT ROLE in ENHANCING DEMOCRACY CONTENTS' <https://www.parliament.gov.za/storage/app/media/oversight-reports/ovac-model.pdf> accessed 1 January 2025.

ii) Study Visits: Committees conduct physical inspections, converse with people, assess service delivery impacts, and develop reports with recommendations for the Houses to consider.

iii) Expert Consultations: Committees may invite external experts to provide background knowledge and analysis on relevant issues.

Reports and Mandates of Committees include; Committees as instruments of the Houses, facilitate oversight and monitoring of the Executive. They receive procedural, administrative and logistical support and use tools like departmental briefings, budget analyses, public submissions, strategic plan reviews, and[55] public hearings.

4.2.2 Committee Structures

1. **Portfolio Committees (NA) and Select Committees (NCOP):** These mirror government portfolios and clusters, respectively. They report to their respective houses on referred matters
2. Joint committees which address cross-cutting issues like gender and youth.
3. Ad hoc committees which are set up for specific investigations.
4. Joint Standing committees which exist for intelligence[56] and defense.

In Doctors of Life International v Speaker of the National Assembly & others (2006) SA[57] the Supreme Court of South Africa expounded on the importance of public participation. The Constitution ensures public participation in the NA, NCOP, and provincial legislatures through Sections 59, 72, and 118, respectively. These sections mandate that legislative and other processes must involve public input and that the respective Houses or committees conduct their business openly. Reasonable measures can be implemented to control public access, including media access, to the House and committees. This may involve security measures like searching individuals or denying entry/removing individuals when necessary. The NA, NCOP, and provincial legislatures can exclude the public, including the media, from committee sittings only when it is deemed reasonable and justifiable in an open and democratic society. These provisions aim to balance the openness of legislative processes with necessary security[58]and order.

4.2.3 Comparative table highlighting key aspects

Aspect	Kenya	South Africa

55 Ibid.

56 Ibid.

57 "All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws. An appropriate degree of principled yet flexible give- and take will therefore enrich the quality of our democracy, help sustain its robust deliberative character and, by promoting a sense of inclusion in the national polity, promote the achievement of the goals of transformation."

58 'Public Participation Framework for the South African Legislative Sector' (2013) <https://sals.gov.za/wp-content/uploads/simple-file-list/ppf.pdf> accessed 1 January 2024.

Legislative structure	Bicameral ; National Assembly and Senate	Bicameral; National Assembly and National Council of Provinces
Access to information	Efforts ongoing to improve access to legislative documents and live streaming of sessions	Extensive access to legislative documents, committee reports and live streaming of parliamentary sessions
Oversight and accountability mechanisms	Are in place but often influenced by political interference	Comprehensive oversight and accountability model involving regular interactions with civil society and experts
Committee practices	They conduct oversight but effectiveness varies	Have clear mandates, conduct study visits, consult experts and produce detailed reports
Public participation	Public hearings and consultations are conducted but engagement is limited.	Public input actively sought through consultations and community outreach.
Training and support of MPs	Training programs exist but need enhancement.	Emphasis of regular training
Committee resources	Need improved procedural, administrative and logistical support.	Receive adequate procedural, administrative and logistical support.
Transparency	Public participation provisions exist but are inconsistently implemented.	Robust public participation framework mandates involvement at various stages.
Engagement with external stakeholders	Limited engagement with civil society, businesses and experts.	Active engagement with civil society, business experts and professional bodies.
Technological integration	Ongoing efforts to integrate technology.	Established use of technology.

4.2.4 What can Kenya learn from South Africa then?

Lessons;

i) South Africa emphasizes the need for training MPs on their roles and ethical standards.

ii) South African committees are provided with procedural, administrative, and logistical support to facilitate their oversight functions.

iii) South African committees produce detailed reports on various activities, including oversight, international agreements, legislative proposals, and annual performance, which are

communicated to the relevant authorities.

iv) South Africa's parliamentary committees interact with civil society, businesses, experts, and professional bodies to enhance accountability.

4.2.5 Applications for Kenya

i) Implement regular training programs for MPs to ensure they understand their roles, ethical obligations, and the importance of public accountability.

ii) Ensure that its parliamentary committees have the necessary resources and support to effectively carry out their oversight and accountability roles.

iii) Adopt comprehensive reporting practices, ensuring that committee findings and recommendations are transparently communicated and monitored for implementation.

iv) Empower its parliamentary committees to actively engage with external stakeholders and experts to scrutinize government actions.

4.3 CHALLENGES PARLIAMENT FACES IN ENSURING TRANSPARENCY, ACCOUNTABILITY AND PUBLIC PARTICIPATION

4.3.1 Internal Capacities of Committees

Parliamentary committees face issues due to inadequate staffing levels, despite efforts by the Parliamentary Service Commission to enhance research and analysis capabilities. This shortage in the number and skills of staff leads to slow committee work, reducing overall effectiveness and diminishing the value of public participation. There is a need for improved staffing that matches the size, type, membership, and specific requirements of each committee. Additionally, better reporting mechanisms, quality report drafting, and effective implementation of parliamentary resolutions are necessary.

4.3.2 Infrastructure of Committees:

The limited physical infrastructure for committees restricts public participation. Only the Public Accounts and Public Investments Committees have dedicated meeting rooms; others share limited spaces. The expanded Legislature will further strain this infrastructure, though meeting the new Constitution's needs will also provide opportunities to address these infrastructure challenges.

4.3.3 Support and cooperation of government agencies

Lack of government support hinders committee performance. The new Constitution requires more government cooperation with increased oversight powers. For Parliament to play its rightful role in the budget process, it will rely heavily on government agency cooperation.

i) Integrity issues: Effective leadership and strong ethical grounding are key components for an effective committee. The recent committees have been termed as prone to kickbacks. The committees have been found to abuse public officers and solicit favors from them. MPs agree

to do favors for committee heads to further personal interests. Allegations of bribe-taking are raised. This leads to a negative impact on the integrity of the committees and parliament at large.

ii) Constitutional Dominance of the Executive: Extensive decree powers of the Executive can undermine the role of parliament in law making. This marginalization may also result from political manipulation by the Executive in a fragmented Parliament. In extreme cases, this can cause institutional deadlock, paralyzing effective governance. Therefore, a minimum level of cooperation within Parliament is essential.

iii) Lack of Resources and Capacity: Parliament, also known as the Legislature, primarily functions to make laws. This requires expertise not all parliamentarians possess. Most are not lawyers; thus, law-making is often done by Executive or Judiciary professionals, with the Executive deciding policies. Thus, Parliament's role is mainly to discuss and approve legislation, limiting its capacity.

iv) Lack of Public Acceptance: Parliamentarians often neglect their electorate, leading to laws not reflecting public interests, poor communication, and lack of accountability.

CHAPTER FIVE

RECOMMENDATIONS

5.1 Enhance civic education

Civic education should be granted to all citizens especially those in remote areas to help them have a basic understanding of their constitution and government. There should be consideration of geographical settings of the country. This can be done by using Visual Reality ("VR") and Augmented Reality ("AR"). VR is a technology that creates a fully digital environment, mimicking real or imagined worlds. By wearing a VR headset, you become completely immersed in this virtual space and can interact with it as though you were physically present. The government can employ VR to create immersive and interactive educational experiences, helping citizens understand their constitutional rights and governmental functions. For instance, a VR tour of the Kenyan Parliament can enable citizens to virtually explore the halls, watch parliamentary proceedings, and learn about legislative processes, making it particularly beneficial for remote areas with limited access to traditional educational resources.

AR enhances your view of the physical environment by adding digital elements to it. Unlike VR, which creates an entirely separate digital world, AR integrates virtual content into the real world. You can experience AR using devices like smartphones. It can overlay educational content onto the real world. When citizens point their smartphones at government buildings, AR can display information about the building's functions, the officials working there, and current legislative activities, thus making governance education more accessible and engaging.

While these technologies hold exciting potential, their implementation is not without hurdles. The steep upfront costs of VR equipment, coupled with limited internet connectivity and unreliable electricity in remote areas, pose significant barriers. Moreover, ensuring that educational content is translated and culturally tailored adds another layer of complexity. A practical way forward would be to leverage existing infrastructure such as community resource centers or Huduma Centres as initial testing grounds for these digital tools. Starting with mobile-based AR experiences, which are less demanding in terms of hardware and connectivity, can create early momentum. Once a solid foundation is established, VR-based learning can be gradually introduced into schools and institutions, paving the way for more inclusive and immersive civic education.

5.2 Partnering with agencies that are private

Especially those involved in information and technologies that deal with communication. Collaborate with tech companies to create AI-powered platforms that enhance real-time information sharing and public engagement. AI chatbots can promptly answer citizens' questions about legislative processes, public forums, and participation methods. Use blockchain-based voting systems to ensure secure and transparent public involvement in decision-making. These systems can be employed for consultations, referendums, and feedback, ensuring that citizens' opinions are accurately recorded and considered. Blockchain voting platforms offer high security due to their decentralized nature, transparency through real-time verification and auditing, accessibility for remote communities, and efficiency by streamlining the voting process and reducing costs.

Despite their promise, digital engagement tools face a number of significant hurdles. Public skepticism toward digital platforms remains high, compounded by the lack of a solid legal framework to regulate virtual consultations and e-voting, as well as persistent concerns over data protection and user privacy. To overcome these challenges, a pragmatic, step-by-step roll out is essential. The government could start by piloting accessible, mobile-friendly tools such as chatbots and interactive platforms designed to be intuitive and easy to use. This gradual introduction would not only test the practicality of such innovations but also allow for careful customization to reflect Kenya's social and cultural diversity. Ultimately, this staged strategy can help pave the way for more inclusive, secure, and trusted digital participation in democratic governance.

5.3 Create robust mechanisms for independent oversight of parliamentary operations

By Utilizing AI to monitor legislative activities can vastly enhance transparency and accountability. AI detects patterns, flags inconsistencies, and offers insights into parliamentary efficiency and integrity. This enables real-time analytics and predictive insights, improving decision-making and issue identification. By using blockchain which is a shared database spread across multiple computers in a network. While it is most famous for securely recording cryptocurrency transactions, its uses extend beyond that. Blockchains can make data in any industry unchangeable and tamper-proof. It can ensure legislative actions are documented transparently and securely by preventing tampering, ensuring accurate accessible records. This fosters public trust and accountability through a verifiable audit trail.

Despite their promise, rolling out such technologies comes with a fair share of obstacles. Resistance or doubt from within institutions may slow progress, while political meddling or insufficient funding could derail their implementation altogether. On top of that, aligning and standardizing data across parliamentary systems presents complex technical hurdles.

To effectively overcome these challenges, a gradual and well-planned roll out is essential. Starting with small-scale initiatives like AI dashboards that track core indicators such as parliamentary attendance or voting timelines can help build momentum and showcase tangible benefits early on. As confidence and capacity increase, more sophisticated functionalities can be phased in. Crucially, the success of this transition hinges on inclusive stakeholder engagement, bipartisan collaboration, and the development of supportive legal and regulatory structures. These elements are vital to reduce friction and establish a foundation for lasting, scalable innovation in parliamentary oversight.

5.4 CONCLUSION

The legislative role of Parliament in ensuring good governance is multifaceted. Through examining both Kenya and South Africa's parliamentary systems, it is evident that while both countries have established mechanisms to fulfill these roles, there is need for improvement, particularly for Kenya. While the legislative role of Parliament in Kenya plays an essential part in promoting good governance, there is a critical need for reforms to enhance its effectiveness meaning it is not effective enough. Kenya's Parliament, despite similar structures, often fails in implementing these principles. Adopting South Africa's best practices could lead to better governance.

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LIST OF ABBREVIATIONS

COK – Constitution of Kenya

CS – Cabinet Secretary

BETA – Bottom-Up Economic Transformation Agenda

NA – National Assembly
PFMA – Public Finance Management Act

BAC – Budget and Appropriations Committee

FY – Financial Year

BPS – Budget Policy Statement

SNS – Social Networking Sites

ABSTRACT

This paper starts in part one with an overview of the principles in the Constitution underpinning the power of the government to impose taxes and other fiscal policies and acknowledges the place of the Kenyan Parliament in the discharge of this state power. This discussion is complemented by examining the legislative and governance principles enshrined in the Constitution.

Consequently, the next part highlights some legislative roles of the parliament in constitutional processes that facilitate governance such as the budget-making process, the revenue allocation process, the legislative role in government borrowing and supplementary budgets. The paper further identifies the failure of the Parliament to recognize and fully appreciate these roles in ensuring good governance and respecting the basic rights of Kenyans.

In the third part, the paper explores the current state of governance while focusing on the link between the legislative role and its consequential impact on the socio-economic life of Kenyans. Further, the author finds and argues that poor institutional self-governance, diminished public trust and deviant laws are the legislature's failures in promoting good governance.

The author concludes that despite the Parliament being a critical stakeholder in governance through its legislative power, this institution has failed Kenyans. The final part demonstrates that a wholesome institutional change is necessary to improve the current state of governance. I therefore recommend the need for reorientation towards values of integrity, independent service and the need to win public confidence as reforms needed to achieve the change we want.

Keywords: Parliamentarians, Budget, Constitution, Revenue, Finance Bill, Appropriation and Socio-economic.

1.0 INTRODUCTION

Under the 2010 Constitution, the Kenyan Parliament exercises its legislative authority by passing Bills. This Legislative power under our social democratic Constitution is not only shared horizontally and vested in the national bicameral legislature but is also vertically shared with the county legislatures. In legitimizing the people's sovereignty, the apex law has expressly provided that at national level, the legislative power vested in the Kenyan Parliament is derived from the people.

Just like all state organs, the Parliament is a critical stakeholder in governance through its legislative role. This role is vital in public finance management, a governmental obligation in governance, through taxation and the making of tax policies that have the force of law. This fundamental obligation can only be achieved through good policies which lead to the enactment of good laws, and good laws do not end up in court on grounds challenging their constitutionality.

To this effect, our democratic Constitution has express provisions permitting the raising of revenue from citizens and state-residents, provisions on equitable spending of the revenue and finally express provisions on the control of the revenue. This paper makes a decry on the legislative role of the parliament in realizing and enforcing the democratic governance contemplated in Article 94(4)

of the Constitution by upholding constitutionalism in matters public finance. A closer consideration is given to the legislative role in the events and circumstances surrounding the Finance Bill of 2024 that was proposed as a solution to the socio-economic and fiscal challenges faced by the Republic of Kenya.

2.0 PROBLEM STATEMENT

The legislative organ of a state plays a crucial mandate in the implementation, enforcement and realization of the Constitution. This role is actualized through its legislative role in passing bills to laws on diverse issues and policies that directly affect Kenyans. However, in recent times the Kenyan Legislature has drastically failed to live up to its role in ensuring good governance through sound policies that come into force through the right procedure.

Adherence to Constitutional principles of public consultation, accountability and transparency in legislative processes acts as the test of constitutionality as the people need to be fully included in the process. However, political will is key in their compliance. The current state of governance is at its lowest as poor and uninformed policies have caused misery to millions of Kenyans, denying them the basic necessities of life and depriving them of any trace of human dignity.

The Legislature has failed as an institution in its self-governance and institutional independence by ending up being controlled by the executive. This poses a great challenge to governance in our presidential system of government where a strong check on the executive cannot be overlooked. This has led to an increased distrust and disillusionment as to the government's capacity to deliver. It is on this basis that this paper finds fault with the parliament and makes a few recommendations on the possible changes that can enhance governance.

2.1 THEORETICAL FRAMEWORK

The discussion in this paper is anchored on the guiding philosophy of realist jurisprudence as the legal discussion appreciates the realities that exist on the ground. This framework takes into account our legal system which has an established legal order with a pre-established hierarchy of norms. The existing realities of the Kenyan people are anchored on the legitimate expectation, that a competent and just government will secure their liberties. As such, the power vested in our governance institutions should not be used to oppress the people in any form.

2.2 CONCEPTUAL CLARIFICATIONS

2.2.1 Taxation

'The process whereby charges are imposed on individuals, institutions or property by the legislative branch of the government to raise funds for public purposes.'

2.2.2 Appropriation

'Authority granted by Parliament to pay out of the Consolidated Fund or out of any other public fund.' This authority is exercised as provided in an Appropriation Act enacted by Parliament.

2.2.3 Equalization Fund

'Can only be used to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those service in those areas to the level generally enjoyed by the rest of the nation, so far as possible.

3.0 CHAPTER ONE

3.1 THE POWER TO TAX AND CONSTITUTIONAL LAW

The framers of the Constitution were very intentional when they expressly noted that 'the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.' The drafters of the COK realized that the people who the law and institutions were established to govern were excluded from the system. They attempted to respond to this situation by proposing mechanisms that could support holistic governance. The discussion below focuses on the underlying institutional framework and fundamental Constitutional norms that underpin the power of the state to tax.

3.1.1 Constitutional Framework

The authority and power exercised by the government is reposed in the people by virtue of their sovereignty and from their consent and will, emanates from the Constitution. Parliament as a creature of the Constitution is mandated to only operate within the Constitution. As a subject of the Constitution, the Kenyan Parliament can neither be said to have unchecked power nor immunity from accountability.

Parliament, as a stakeholder in governance, has a constitutional duty to live up to the spirit and the letter of the Constitution. It establishes a bicameral form of parliament made up of the National Assembly and the Senate. A determination of allocation of the national revenue between the two levels of government and appropriation of funds for expenditure vests in the NA. The Senate on the other hand considers and deliberates on Bills concerning counties. The allocation of revenue among counties is also deliberated by the Senate which eventually oversights over revenue allocated to the county governments.

Under the purview of the legislature in generating public finance, the Constitution provides for a money Bill. Article 209(1) provides that 'only the national government may impose an income tax, value-added tax, customs duties and other duties on import and export goods and excise tax.' It is only by legislation that the national government may authorize the imposition of any other tax or duty. It is on this Constitutional basis that a Finance Bill is usually proposed to introduce new revenue raising and collection measures. Section 77 of the PFMA provides that the 'Cabinet Secretary may waive a national tax, a fee or charge imposed by the National Government and its entities provided that such a waiver or variation has been authorized by an Act of Parliament.' In a bid to ensure control, parliament is mandated to enact legislation to ensure both expenditure control and transparency in fiscal management.

It is clear that the people through the Constitution already made the decision and established Parliament as an institution of legislative processes that facilitates governance. What is left to the Legislature is to give legal effect to the process and implement the democratic will of the people. However, the legislature seems to have ignored this obligation delegated to it by the people of Kenya.

3.2 Legislative and Governance Principles

The COK is primarily about values, aspirations and the vision of Kenya as a democratic nation. All aspects of public finance shall be guided by the Constitutional principles of transparency, accountability and public participation. These three pillars are the cornerstone to good governance.

Parliament as a state organ is bound by Article 10 under the COK which underscores the need for inclusiveness and public participation in the arena of governance. All these values are of great importance and truly a test of constitutionality in governance.

The COK takes a step further to facilitate the realization of these values, by mandatorily requiring legislative processes among other businesses of the parliament and its committees be done in an open manner in addition to facilitating public participation.

The parliamentarians are reminded that the nature of authority they possess is a public trust to be exercised in a manner that is consistent with the purpose and objects of the constitution and vests responsibility to serve the people rather than the power to rule them. The constitution recognizes marginalized people as not able to 'fully participate in the integrated social and economic life because of its relatively small population or any other reason.' Article 2(5) commits state entities to standards of public participation.

Participation by the public is truly a form of participatory democracy in governance. It is all about empowering the people and a form of acknowledging that sovereign power belongs to them. It appreciates that governance is a people-centered affair rather than a power-centered thing. It contrasts and compares the views of the political class with those of the public. The inclusiveness aspired for under Article 10 pictures both internal and external inclusion such that the views of those likely to be affected and interested persons are taken into consideration in the ultimate outcome and in this case, a Bill on consideration.

Information stands as an important element and thus calls for a reasonable opportunity to be informed. The people own the process and all classes of persons are involved. Overt efforts are made and seen to be made to include everyone aside from the elite. The issues deliberated on are people-centered issues and not issues of power interests. This promotes transparency in the fiscal policies that are adopted in the end as people consider the likely consequences of such.

Accountability as a constitutional principle demands that the parliament should be amenable to external scrutiny and review. To further accountability, the right to petition Parliament in relation to its legislative role inheres to every person.

Transparency entails parliament doing its best to ensure that the people understand what happens inside. Transparency demands the right information be disseminated at the right time and in the right way to ensure external stakeholders, interested parties and the public play an accountability role. The internal process should be easily subjected to public scrutiny. The timelines in conducting public consultations gives meaning to transparency.

All these principles exist to build trust and government's legitimacy, influence willingness to pay taxes, facilitate a focus on broader issues, ensure shared values and ensure early agreements on very fundamental issues prone to manipulations through policies. The Kenyan Parliament has become a dominant player in

the erosion and disregard of these principles of the democratic philosophy of good governance. Those who exercise its mandate end up being those who wield power in the name of the Constitution only to undermine what they swore to protect and uphold.

4.0 CHAPTER TWO

Budgetary power is distributed between the executive and the legislature thus vulnerable to short-term political influence.

This section discusses the legislative role of the parliament in the budgetary power and other constitutional processes.

4.1 LEGISLATIVE ROLE IN THE BUDGET PROCESS

The budget-making process for every FY starts with the budget formulation process in the Ministry of Treasury and National Planning in line with the Budget Calendar. Several Bills such as the Finance Bill are proposed all in policy form which must be submitted within a statutory set time to the NA for consideration. The budget by the national government contains estimates of revenue and expenditure as well as deficit financing proposals like borrowing that will increase the public debt.

The Constitution is explicit in the provision that only legislation can be utilized to impose, waive or vary any tax or licensing fee. This lays the Constitutional basis for proposing the Finance Bill, a money Bill which mandates the NA to only proceed with the recommendation of the BAC.

NParliament's role is recognized in the PFMA under Section 35(1) (g) through enacting Bills such as the Appropriations Bill required to implement the budgetary proposal The NA is to consider the Finance Bill which sets out the measures of raising the national government's revenue so as to have it assented to before the 30th June of any year.

The role of the parliament in budgetary power empowers it to act as an effective deliberative body. The legislative role can be actualized in amending the proposed Finance Bill to take into account the prevailing economic circumstances.

The amendments should reflect social realities and the needs of the present. The responsiveness of the Finance Bill to national aspirations and issues has long been questionable.

In this digital era, the forms of public participation may incorporate any creative means to facilitate public consultations on the contents of this Bill. Digital platforms can also be used to facilitate the participation of marginalized groups who live in remote areas or belong to small language groups and the elders who due to their condition may have to stay at home. Amendments should not be partisan and short-sighted and should reflect social realities and needs overtime.

4.1.2 The Finance Bill, 2024

An anticipated additional Ksh. 346.7 billion for the FY 2024/25 budget was to be generated from the proposed tax measure in the Bill.

The focus was on enlarging the tax base thus establishing predictable revenues for the government while supporting production, consumption and investments.

A consideration of the key tax policies proposed in the Bill negates this assertion. Most of the policies in the Bill were short-sighted by achieving the purpose of the moment and the parliament was only concerned with partisan amendments. During public hearings many Kenyans protested against the onerous and inequitable tax measures in the Bill while citing high cost of living. The NA ignored the bulk of public comments to lower the cost of living.

4.1.3 Key Tax Policies Highlighted in the Finance Bill, 2024

At the core of the Bill were target amendments to key legislations like the Value Added Tax Act and Income Tax Act.

It proposed to make the Housing Levy a deductible expense given that Pay As You Earn and the Affordable Housing Levy are calculated from a similar base leading to double taxation;

a proposed increment on the excise duty rates on activities like betting, gaming, prize completion and lotteries given their addictive nature from 12.5% to 20% to further discourage participation among school going children and young adults;

Eco-Levy was proposed to be introduced due to the high production and importation of hazardous goods significantly increasing e-waste in the Country.

4.1.4 Appropriation Bill

A proposal of the allocation is done by the Ministry of Treasury with the intent of achieving a particular object. The Appropriation Act is very fundamental as withdrawal of money from the Consolidated Fund is legitimized by it after being enacted by parliament.

This Act also approves the utilization of the Equalization Fund by the National government.

This clearly shows the role played by the Parliament in ensuring distributive and social justice in governance by making use of legislation.

The BAC is mandated to pursue effective public engagement through representations from the public as it deliberates and reviews the estimated expenditure of the national government.

This Bill has to be considered and be passed by the Parliament before the 26th June of any year.

4.2 Legislative Role in the Allocation Process

Equitable sharing, between the two levels of government, of the national revenue is a duty vested in the Parliament by the COK.

The county governments are entitled to not less than 15% of this Revenue.

The Division of Revenue Bill (introduced two months before a FY ends)

to be considered by the NA acts as the instrument of realizing this equitable division of revenue.

The NA assembly deliberates on this Bill in less than 30 days after introduction and may make amendments.

Since it concerns counties, the Senate has to consider this Bill once passed by the NA.

The County Allocation of Revenue Bill which further divides the revenue allocated to the County governments to individual counties is subject to Senate's consideration.

4.3 Legislative Role in Government Borrowing

The public debt refers to 'all financial obligations attendant to loans raised or guaranteed and securities issued or guaranteed by the national government.'

The legislative role of the parliament is invoked in this process in setting the national and county governments' borrowing entitlement threshold.

The terms of borrowing, guaranteeing loans and reporting requirements by the national government are to be prescribed by legislation.

4.4 Legislative Role in Supplementary Budgets

A Supplementary Appropriation Bill is preceded by the National Assembly's approval of the Supplementary Estimates.

The procedure for Money Bills apply consequently the Bill is introduced by the Chair of the BAC for consideration. Following the rejection of the Finance Bill 2024, Supplementary Budget 1 for FY 2024 was prepared by the national government and approved by Parliament.

CHAPTER THREE

5.1 The Present State of Governance Examined

Upon Kenyans being invited to contribute on the proposal for the budget of the 2023/2024 FY on issues that should be addressed in the budget, the reality on the actual state of governance was brought to light as a serious social-economic issue. The major concerns raised revolved around five issues: the high cost of living and higher prices of basic commodities; high tax burden; wastage of public resources; increased public debt burden and high levels of youth unemployment.

A shift to the parliament as a stakeholder in governance reflects a sad reality. It has become a dominant player in not only undermining but also ultimately destroying governance systems. The public has lost much of its confidence in this critical institution that plays a fundamental role in giving life and meaning to the Constitution. This has aggravated the tension between ordinary citizens and those governing them.

There has been a decline in the standards of the laws enacted on fiscal policies leading to endless legal battles disputing the legality and the constitutionality of the deviant legislations. The grounds invoked by many petitioners challenge the basic procedures in upholding the explicit constitutional values of transparency and public participation. Actual policies enacted are rarely in tandem with campaign +promises.

The public on the one hand is left with a little understanding of what goes on inside the parliament. The failure to keep the public fully informed of the progress made is purely due to the fact that the parliamentarians are constantly getting involved in situations of conflict of interest.

The legislative power has become the essential tool of oppression under which so many Kenyans have suffered. The poor institutional self-governance of this critical institution has caused misery to millions of Kenyans, denying them basic necessities of life and depriving them of any trace of human dignity. This is overtly seen by its subservience to the executive through political misuse in achieving political objectives that override public interest and Constitutionalism. All of these with the goal of self-enrichment through political collaborations.

A keen focus on what drives the parliamentarians shocks the conscience. Most of them are driven by self-interests through corrupt conduct coupled with different ideologies and firmly tied to the machinery of the state. This political sycophancy has reached those irrational and unattractive lows. Parliament has become an integral part of the system of political corruption and those who occupy its offices have become invincible leaders.

5.2 The Clash between Politics and Legality: Constitutional Mandates versus Political Considerations in Governance

The duty to respect, uphold and defend our Constitution is an inherent duty to the Kenyan parliament as a State organ and as a critical stakeholder in governance. In disregard of this, parliament has exalted its political pursuits over constitutionalism in most of its legislative process. Recent bills presented to parliament on fiscal policies such as the Finance Bills of 2023 and 2024 for consideration have been devoid of impartiality but only aimed at serving the interests of the executive.

The departure from just political means by a considerable number of lawmakers has gravely violated the philosophy and the dictates of our Constitution. The subservience of the legislature to the whims of the executive has made it impossible to protect public interest where issues of governance are in conflict with the

wishes of the ruling party. To this end, the many interests that the parliamentarians have and the infinite that they serve end up carrying the day at whatever cost.

Parliament has through its conduct openly declared itself as a tool to be used by the incumbent government. The frequent meetings at the statehouse before deliberating on the Finance Bill, 2024 and the drastic change in their perception of the Bill after it was withdrawn by the President following public unrest and dissatisfaction clearly speaks to this control. This essentially violates our constitution in a more fundamental way; denying the Constitution they swore to respect, protect and uphold.

The Finance Bill which has to be enacted by the parliament in exercising its legislative authority focuses on widening the revenue base of government taxes. It is to this effect that the Finance Bill, 2024 was seamlessly passed parliament against the wishes of the people, with the intention of being assented to by the president. However, the same Legislature ends up failing to satisfactorily exercise its oversight functions over the spending of this revenue collected by overtaxing Kenyans. It is on this basis that I cannot fail to underscore the significant importance of the oversight role of the parliament in fiscal policies enacted by parliament.

A look at the institutional mechanism of accountability by the judiciary over the decisions and actions of the legislature presents an ongoing struggle to realize the vision of our transformative constitution. It appears that most laws are not passed in good faith but only designed for the benefit of a particular class. The reality hits when those who are not contemplated bring the case in court.

5.3 A Poor Institutional Self-Governance and Diminished Public Confidence

The Kenyan legislature has not demonstrated a convincing amount of effective self-governance. It has lacked the integrity and political will to defend constitutional supremacy and good governance by not only negating these principles but also being accomplices in their destruction. It has lacked the patriotism to speak for what is right but has rather kept a low profile in any matter relating to the inherent rights of the Kenyan people.

Public confidence has diminished as the citizens hardly see it as the people's sympathizer but what they see is a subjugated state-machinery. Delving into the structure of the operations and the driving force of this institution reveals the reality of the blind eye they have turned to the needs of the Kenyan people. Fewer efforts are seen in this institution in trying to make right their wrongs.

The COK under Article 27(8) demands 'the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.' The parliament as a political arm of government has a qualified form of membership predominately through elections and political nominations. Cognizant of this fact, an obligation to legislate an Act that promotes suitable representation in a time frame of five years post-promulgation of the COK was vested on it.

The means of realizing this affirmative action principle through the enactment of the two-thirds gender legislation is not expressed in the constitution thus obligating the parliament further. Legislation addressing this issue is yet to see the light of the day despite Court decisions and a few advisory opinions. All the parliaments since 2010 have failed to perform this constitutional duty. This indeed is a failed institutional self-governance in equalizing formal representation.

5.4 Jurisprudence on Public Participation

The Kenyan courts have been actively involved in expounding rich jurisprudence on public participation.

The Supreme Court in its recent decision on the Finance Act, 2023 in The Cabinet Secretary for Treasury and Planning and Others v Okiya Omtatah & Others
found and held that democratic legitimacy in legislation is achieved through meaningful public participation that roots decisions to public deliberations and reasoning.
The court also pronounced itself on post-public participation amendments to a bill introducing new provisions, the court highlighted the mischief that might underline this tactic as parliamentarians may withhold certain provisions from being subjected to public engagements only to be introduced at the tail end of the legislative process.
The court emphasized the need to distinguish material/substantive amendments from trivial/inconsequential amendments as it establishes the obligation to conduct further public participation.
The court made this important observation relating to the legislative processes and access to information:

> "It is important to note that to enhance transparency and accountability in the law-making process, the public should be able to track and monitor the legislative process at every stage."

Public participation entails empowering the citizenry, making information available to them and the need to motivate the people to participate. In the Gakuru case,
the court at noted:

> "…public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates…and where the legislation in question involves such important aspects as payment of taxes and levies, the duty is even more onerous."

Kenyan courts have emphasized on according to the public some reasonable level of participation.
The circumstances of each case will inform what a reasonable opportunity amounts to.
The finding in the Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others
at paragraph 165 illustrates this:

> "Reasonableness is also to be determined from the nature and importance of legislation or decision to be made, and the intensity of the impact of the legislation or decision on the public."

The failure to take into account the views of those who take part in the public participation process that is preceded by notices, dissemination of information and holding public fora amounts to futility in the whole exercise.
A meaningful public participation, as per the courts, entails the influence of the people in the final decisions made.

6.0 CONCLUSION AND RECOMMENDATION

A major tectonic shift should begin to take place as the system has lost much credibility and effectiveness as most people do not expect any justice from legislative processes. Parliamentarians should not be seen as persons silently watching the suffering of the people.

Democratic governance can only be achieved where there is separation of governmental powers.

There is need for a reorientation towards values of integrity, honour, independent service and competence for an independent-minded legislature. Some distance with the executive is necessary to ensure objective and impartial laws that embrace constitutionalism. This will also reduce the influence of competing agendas.

Given the current digital era we live in, SNS can be utilized in conducting productive engagements between the public and parliamentarians. This can be impactful in reaching out to marginalized Kenyans who remain excluded due to limited outreach and logistical challenges. The same can be used to disseminate information on the Bills.

There is a need to adopt a policy and legislative framework establishing and anchoring the process of public participation. A framework of piloting awareness to the marginalized and vulnerable populations for full inclusion is key. The need to win public confidence can only be realized by a fundamental change in the legislation system anchored on the principles encompassing the duty of care owed to society in the sphere of governance.

A fundamental shift in the drive and the political will of the lawmakers to one that is built on collaborations and partnerships between the Legislature, civil society organizations, faith-based institutions and development partners is needed. Parliament can also draw on external capacity by directly requesting research support in cases of weak technical capacity, particularly in economic policies. A broad stakeholder consultative process that taps into the expertise of more experienced personnel in matters of governance will truly bring the change we need.

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A CRITIC OF THE LEGISLATIVE ROLE OF THE KENYAN PARLIAMENT ENSURING GOOD GOVERNANCE

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ABSTRACT

This study examines how the Kenyan Parliament has applied the values outlined in the 2010 Kenyan Constitution, which prioritizes accountability, public involvement, and sound government. Despite strong law, the report finds significant shortcomings in the Parliament's operation. Among these include low levels of accountability systems, a lack of public engagement, and insufficient executive oversight. Such worries undermine public confidence and impede efficient government. Some of the ethical and transparent measures that should be implemented include strengthening implementation procedures, increasing the capacity building of MPs, and making law requirements on public engagement more rigorous.

CHAPTER ONE

INTRODUCTION

A critic of the legislative role of the Kenyan parliament in maintaining transparency, accountability, and public participation to guarantee good government. The Kenyan Parliament's legislative role in fostering accountability, openness, and public participation in order to achieve good governance has been questioned from a variety of angles. The Kenyan parliament is faced with several problems under the context of good governance that is on public participation, accountability and transparency. Public participation is not fully exercised since we see that people are not involved in significant issues for example in the recent 2024 finance bill and funding model was rejected since not that much public participation took place and on accountability can be seen in the context of the Kenyan Parliament would entail that MPs be held accountable for their choices, actions, and expenditure of public funds. Transparency this the accessibility to the correct information given by the legislature to the public the paper has critically analyzed the shortcomings and the solutions to each shortcoming.

PROBLEM STATEMENT

While Parliament should, in theory, serve as Kenya's chief legislative body to formulate laws, scrutinize government acts, and offer an avenue for the engagement of the people, in recent years, the institution has come under increased criticism regarding its role in the enhancement of good governance principles through openness, accountability, and public participation. Its performance should be critically analyzed to point out deficiencies and propose remedies.

THEORETICAL FRAMEWORK

The theoretical framework provides a theoretical foundation for understanding transparency, accountability, and public participation in the context of governance. It uses appropriate theoretical viewpoints and concepts to study the legislative role of Kenya. Public participation as defined by Public Participation in the Legislative Process is Citizens' engagement in government decision-making is essential to the operation of a democratic form of governance, as stated in Chapter One of Kenya's Constitution 2010 the public's engagement in Parliament's legislative actions is a basic constitutional principle.

Accountability according to Kenya Law Integrating Accountability Mechanisms in Local Government Service Delivery is the checking and balancing of potential misuse of power by public authorities with the goal of decreasing the possibility of corruption. Transparency is the attribute of being open, transparent, and easily understood. It includes both physical transparency, such as the capacity to see through an object, and metaphorical transparency, which refers to open communication and accountability in a variety of settings, including governance.

RESEARCH OBJECTIVES

1.Point out any inadequacies in the Kenyan Parliament's current legislative procedures with relation to accountability and public engagement and to examine how poor public participation affects governance and public confidence in governmental organizations.

2.Analyze case law and current legal frameworks to determine how they could improve parliamentary accountability and openness and make practical suggestions for enhancing oversight operations, promoting a transparent culture in legislative processes, and enhancing public engagement methods.

CHAPTER TWO

ANALYZING THE RESEARCH OBJECTIVE

PUBLIC PARTICIPATION

The International Association for Public Participation defines public participation as involving people affected in decision-making processes. Public engagement can range from informing citizens about Parliament's activities to delegating choices to them. Public engagement is one of the fundamental principles of democracy. Democracy is based on the principle that all citizens have an equal right to participate in decisions that impact their lives. Citizens' engagement in government decision-making is critical to the operation of a democratic form of governance, as stated in Chapter 1 of Kenya's Constitution 2010.

Furthermore, international agreements and treaties signed by Kenya emphasize the need of public engagement. The International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR) uphold people' freedom to participate in public affairs. These agreements jointly require that government include public participation to guarantee that policies and decisions represent the will of the people.

Public engagement has several advantages. Some goals include empowering citizens, generating innovative ideas, improving citizen-government relations, legitimizing government programs, prioritizing initiatives, and improving outcomes. The significance of public engagement is emphasized in Article 118 of the Constitution, which empowers Parliament to "promote public participation and involvement in the legislative other business of the Parliament and its committees. Citizen participation in policymaking and Implementation improves and deepens good governance. Who should participate? All members of the public can participate in legislative procedures, either individually or through organized groups. According to Kenya's Constitution, Parliament cannot discriminate against individuals based on age, ethnicity, color, gender, or political affiliation.

Framework for rights, duties and responsibilities of the public in public participation

1. Sovereign authority belongs to the people and can be exercised directly by citizens or indirectly through elected leaders.

2. public engagement is a core value of national governance emphasized in Article 10 of the Constitution.
3. Right to petition. Article 119 of the Constitution, the Petition to Parliament (Procedure) Act, No. 22 of 2012, and the National Assembly Standing Orders allow the public to request that Parliament consider any topic under its jurisdiction.
4. Article 27 of the Constitution ensures equitable participation in decision-making processes, including legislative activity by Parliament.

5. Article 33 of Kenya's Constitution guarantees freedom of expression, including the right to seek, receive, and share information and ideas, especially during public participation.
6. Article 35 of the Constitution and the Access to Information Act, No. 31 of 2016, ensure citizens' right to access information kept by the state.

Furthermore, public engagement mechanisms in legislative decision-making are ineffective. Despite constitutional guarantees, citizens have limited opportunity to participate in policy formulation and lawmaking. Public consultations are frequently tokenistic, with choices taken without substantial input from the public.

Despite strong legislative frameworks, Kenya confronts problems in attaining effective public involvement, including low knowledge, restricted access to information, and insufficient procedures for incorporating public comments into policy choices. Logistical challenges, such as geographical limits and digital differences, also limit widespread involvement, particularly among marginalized and rural areas.

INADEQUATE PUBLIC PARTICIPATION

Public participation became a crucial component of the Constitution Article 118 (b) of the Constitution, read in conjunction with the Public Finance and Management Act and the Public Procurement Act, mandates public engagement and involvement in all aspects of governance, including the legislative, budgetary, and procurement processes. This pledge aims to increase citizens' opportunities to evaluate draft legislation and provide feedback on public policy creation and execution. However, as written, the commitment could be more defined and broader in scope in order to achieve dramatic changes. As a result, the prospective impact of the commitment is rated as moderate overall. Kenya's legislative and financial processes have a history of secrecy and exclusion of citizen participation. An example of inadequate public participation the recent protests against the Finance Bill demonstrate how upset many Kenyans, particularly the youth, are with the absence of meaningful public participation and government action. The bill, which many saw as a heavy burden, sparked widespread resentment, prompting young people to demonstrate on the streets. These protests emphasize the necessity for the government to listen to its constituents. When people feel ignored, they frequently protest to have their opinions heard. The government must provide effective channels for conversation and be willing to change policy depending on popular feedback.

An example of inadequate public participation recent policy announcements on the logging ban, Mau Forest evictions, and the 2018 Finance Bill show a lack of public input. Protests by the business community against the logging ban, politicization of the Mau Forest evictions, subsequent displacement of people, and ethnic riots in Narok and Nakuru counties as a result of the evictions are only a few examples of the public's silence. Massive public resentment and outrage, private sector protests, negative public opinion, tenacious civil society activism, and strenuous implementation of parts of the Finance Bill (2018) all point to a fundamental problem: a lack of inclusion and public participation in its formulation. Worse is the lack of effective policy planning linked with these recent guidelines especially on stabilization of prices or inflation, resettlement of evictees and the effectiveness of public service restructuring in service delivery.

The logging ban in February 2018, for example, was a Cabinet decision made without public input. This embargo resulted in the loss of direct and indirect jobs, doubled timber prices, and increased building expenses, pushing the government to lift the ban on private commercial forests. The government lacked a sector stabilization

plan, which should have been implemented prior to the ban. This strategy required sufficient timescales to allow stakeholders to make necessary adjustments without affecting jobs or doubling timber prices.

The subsequent eviction of residents from the Mau and Lelan woods is yet another Cabinet decision, resulting in the displacement of around 2,300 households from Mau and 500 more from Lelan. Evictees lost their livelihoods and were left hungry and exposed to the elements. In their makeshift camps, some of them were ill with pneumonia, diarrhea, and other waterborne infections. The administration lacked a pre-eviction relocation plan and a post-resettlement livelihood stabilization plan.

In relation to the Finance Bill, more consultations with various stakeholders in the commercial sector and enough involvement with the public through public participation forums would have provided new viable options for collecting revenue without hurting the cost of living and he cost of production in the country. It could also have enabled the government to reschedule tax plans and adopt sustainable timelines across stakeholders.

Implementing the public involvement process is critical in a democratic society and meets public requirements. However, there are other issues that can limit public participation. Exploring the causes for the obstacles to the implementation of the public involvement process is a crucial step toward achieving effective participation and improved results. We examine the internal and external elements that restrict public engagement in the following manner.

BALANCING PARTICIPATION WITH ADMINISTRATIVE DEMANDS

Inadequate financial and personnel resources pose a significant internal impediment to public engagement. Involving the public in decision-making takes time and costs money and energy. Starting with the planning process, it takes a significant amount of time to build a meaningful process that can effectively engage individuals and their opinions. Administrators already have a busy schedule, making it difficult for them to devote extra time and attention to public participation. Furthermore, organizing forums, seminars, or public gatherings necessitates sufficient funding, a lengthy preparatory period, and competent staffing. The transaction cost may be larger than the advantages. As a result, it is difficult to carry out a low-cost participation initiative.

LACK OF SKILLED FACILITATOR

Some administrators who coordinate the public participation process lack engagement abilities. They may also be less experienced with public participation. Skilled practitioners are essential to the success of participation because they can streamline the process, maintain positive relationships with residents, and produce better results. Although some agencies provide external services, seminars, or workshops to train administrators about public engagement, they are frequently expensive and do not take context into account. In reality, a streamlined engagement method that the practitioner may readily use is more practical and advantageous.

LOW EFFICIENCY

When contending with work, household, and other everyday duties, people rarely prioritize attending public meetings. Following the completion of daily duties, there is less time available, making participation more challenging. Furthermore, traditional public engagement initiatives typically take

longer and produce less satisfactory results, resulting in an even lower rate of participation. Thus, there is an urgent need to improve the efficiency of involvement approaches without compromising outcomes.

APATHY TOWARD CIVIC PARTICIPATION

Another external element contributing to poor participation is the public's lack of interest in public concerns. Practitioners must answer concerns about how to motivate citizens, spark their interests, and elicit meaningful feedback. To enhance participation, we can give them with a variety of options and chances. Possible solutions include encouraging the people to participate in public issues that affect their daily lives and offering rewards for participation.

challenges in ensuring meaningful participation of marginalized groups include the above costly, lack of skilled facilitator, low efficiency and not interested in participation and if all of them are solved then challenges facing public participation will be solved and remedied and public participation enhanced.

LIMITED OPPORTUNITIES FOR PUBLIC INPUT ON PROPOSED LEGISLATION

Kenya is now battling with the concept of public engagement. Many court rulings have been declared unlawful in the recent decade, owing in part to a lack of public input. This is quite concerning. Several court decisions have criticized the lack of a public participation statute for its ambiguity and urged the legislature to adopt one.

In the first CAS case Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Parties) (Petition 33 & 42 of 2018 (Consolidated)) [2021] KEHC 464 (KLR) (Constitutional and Human Rights) (20 April 2021) (Judgment), the court faulted the PSC for failing to provide information about workload analysis, current authorized establishment, level of grading, designation, extra posts required, evidence of optimum utilization of existing posts, information that the office would not disadvantage similar offices in the public service or cause unfair competition, and information about the financial implications of creating the office.

Furthermore, in the BBI case, the High Court ruled that public information should have been provided in English, Kiswahili, Braille, and Kenyan sign language, as required by the Constitution. Furthermore, the Constitution mandates proper information and sensitization prior to and during an activity in order to empower individuals to participate actively and from an informed stance.

Furthermore, Kenya's draft public participation policy, 2018, requires the publication (proactive) and publicization of information; whether published or not, it must be accurate, timely, well disaggregated, in simplified language and format, accessible, using friendly systems, and authentic information of integrity. It also emphasizes that the media and format should be tailored to the literacy levels of the participating public, and that the audience should be assisted in accessing information.

According to the PSC 2015 principles on public involvement for policy creation, a state organ should identify and address public participation capacity needs, publish information about the purpose of public participation, and offer feedback on the inclusion of public opinions. Furthermore, the draft county model law on public involvement says that information for the public should include summary of the subject matter.

CASE LAW OF REPUBLIC OF KENYA IN THE HIGH COURT AT KISUMU PETITION E013 OF 2023

(APIYO V ATTORNEY GENERAL & 2 OTHERS (PETITION E013 OF 2023) [2024] KEHC 1967 (KLR)

Legal Challenge Over Public Participation in Affordable Housing Bill

Lawrence Omule Apiyo filed a petition against the Attorney General, the Cabinet Secretary for Lands, and the National Assembly concerning the Affordable Housing Bill (National Assembly Bill No. 75 of 2023). The petitioner argued that the legislative process was being rushed without adequate public participation, particularly affecting marginalized communities. He claimed that the notice published on December 9, 2023, inviting public submissions was insufficient and did not comply with constitutional requirements for public participation as outlined in Article 10(2)(a) and (b) of the Constitution of Kenya. The petitioner sought conservatory orders to halt the public participation process and declared that the bill's fast-tracking was unconstitutional due to lack of proper engagement with affected communities.

Issue of the case

The disputation was based on the ground of whether or not the National Assembly's procedure of public involvement on the Affordable Housing Bill was done within the constitutional mandate for inclusivity and effective consultation with the marginalized group.

Ruling

The High Court's judgment was in his favor, stating that public participation principles are cardinal legislative processes in a constitutional democracy. That the means applied by the National Assembly did not meet the constitutional threshold for effective public participation, more particularly to the poor and marginalized persons. The court issued conservatory orders suspending the public participation process for failure of the Constitution and lack of constitutionality in the process followed.

The ruling essentially reiterated the necessity for effective public Involvement in legislative processes, especially where legislation would affect the vulnerable populations. The decision by the court was an assurance that every legislative action should ensure genuine public involvement as part of democratic principles enshrined in the Constitution of Kenya.

ROBERT N. GAKURU & OTHERS V. GOVERNOR KIAMBU COUNTY & 3 OTHERS [2014]

The case Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] KECA 459 (KLR) concerned the Kiambu Finance Act 2013, which was deemed null_and unconstitutional by the High_Court due to insufficient public engagement in its enactment. The appellants, which included the Kiambu County Government and its executives, filed an appeal, claiming that public involvement had been adequately performed through a variety of channels, including newspaper advertisements and a hotel conference.

The major issue was whether the Kiambu Finance Act 2013 met the constitutional requirement for public engagement outlined in Articles 10, 174, and 196 of the Kenyan Constitution, as well as the County Government

Act 2012 and the Public Finance Management Act 2012. Some critics questioned the effectiveness of public consultations before the Act was passed and Interpretation of what makes meaningful public involvement whether the rejection of an earlier draft of the Act required additional public input before resubmission.

The Court of Appeal confirmed the High Court's decision, emphasizing that public engagement must be genuine, not just formal. The court decided that the public was not properly asked to participate in the legislative process. Simply placing announcements in newspapers or organizing a single meeting at a hotel does not meet the constitutional criteria for public participation. The idea of public participation applies even when a new measure is proposed after the prior one has been rejected. The court emphasized that public engagement is critical to ensuring that legislation is informed, responsive, and reduces arbitrariness in lawmaking.

The ruling establishes guidelines for public involvement, stressing that it must be open and accessible to all individuals, especially those from underrepresented groups.

The court stressed in the aforementioned case of Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others [2014] that public engagement must be meaningful and not only a show off. The court determined that appropriate time for interaction, sufficient information, and inclusivity are necessary for effective participation. Instead of encouraging true citizen involvement, the Bill runs the risk of solidifying flimsy practices in the absence of defined standards and accountability procedures.

Lack of public participation is something that has been an issue in the legislative process for a long time for example in the recent finance bill of 2024 and the new university funding model recently the new funding the model for university students was quashed by the high court judge for lack of public participation the government is now prohibited from proceeding with its implementation.

The judiciary's importance in upholding public participation requirements is highlighted by recent court decisions, such as the High Court's ruling in the Affordable Housing Bill case. These decisions highlight the need for legislative procedures to truly involve all parties involved, especially underrepresented groups, in order to preserve democratic values. The continuous difficulties in achieving successful public engagement highlight the necessity of better systems that support inclusive discussion and input.

ACCOUNTABILITY

Nowadays, accountability is a vital component of public government. The idea of accountability, which first arose as a component of public finance management (that is, calculating and accounting for the use of public funds), has expanded beyond the field of public finance to encompass a wide range of significant decisions and the decision-making authorities. In order to prevent the possibility of corruption in public offices and authorities, the concept of accountability revolves around the checking and balancing of possible abuses of power by public officials.

Accountability in the context of the Kenyan Parliament would entail that MPs be held accountable for their choices, actions, and expenditure of public funds. This entails being open and honest about the use of public money, interacting with the public to clarify their stances and policies, and taking responsibility when they fall short of expectations or violate moral principles. A crucial component of successful governance is

accountability, which upholds the rule of law, guarantees the efficient and moral use of public resources, and fosters public-government confidence. Holding people and organizations responsible for their deeds helps to stop corruption, power abuse, and resource misuse.

LACK OF OVERSIGHT MECHANISMS

Strong mechanisms of accountability that ensure MPs are held liable for their actions are lacking. While procedures such as the Public Accounts Committee and the EACC exist, they are often perceived to be either underfunded or inept. In the absence of effective mechanisms, Members of Parliament might commit acts with impunity since they are sure no action would be taken against them. A lack of effective oversight procedures has hampered the Kenyan Parliament in efficiently managing public resources and holding the executive to account for its activities. This condition is occasioned by a number of factors that are important. The inability of the Kenyan Parliament to handle public resources and hold the executive to account has been hampered by a lack of effective oversight procedures.

This condition is caused by a number of important issues:

a) Weak Capacity and Resources

The backlog of unfinished and delayed reports has left the Parliamentary Accounts Committee (PAC) with an excessive amount of work. Its capacity to adequately examine government actions is hampered by this, which has a limited effect on public finance corruption and transparency.

b) Legal and Institutional Gaps

Legal systems have flaws that limit Parliament's power. For example, the Treasury can act alone without sufficient parliamentary supervision because the Public Finance Management Act does not stipulate who should ratify public loans. Furthermore, attempts at accountability may be hampered by the intricacy of Parliamentary Standing Orders.

c) Political Dynamics

Accountability procedures are frequently weakened by political party alliances in Parliament. Members might put party allegiance ahead of their oversight duties, which would prevent parliamentary recommendations against executive violations from being implemented.

d) Implementation Issues

The effectiveness of legislative monitoring is further limited by the fact that, even when laws are passed, they are frequently not implemented at the county level. Because of this discrepancy, county assemblies find it difficult to carry out effective supervision since they have trouble making sure that local governments implement and uphold the law.

e) Limited Engagement with Citizens

To improve accountability, the public must be more involved in legislative procedures. Better oversight results may result from educating citizens about their rights and the function of Parliament.

RECOMMENDATIONS FOR IMPROVEMENT

MPs can improve their ability to interact with complicated financial documents and laws by receiving regular training on their oversight tasks and responsibilities and enacting legislation that makes it easier for the general public to participate in legislative and budgetary proceedings can empower people and increase the efficacy of supervision. Enhancing accountability systems and guaranteeing the enforceability of parliamentary decisions can be achieved by reviewing and coordinating legal frameworks across government branches.

The Kenyan Parliament may strengthen its oversight powers and improve governance and decrease corruption in the nation by tackling these problems.

INADEQUATE ENFORCEMENT OF REGULATIONS

One major issue that has been affecting the integrity of the legislative institution in Kenya is insufficient enforcement of laws relating to Members of Parliament. In cases when misconduct has been proved but if not addressed well enough, it leads to a culture of impunity and erodes public trust in the government.

Let's consider this problem in greater detail:

Weak Disciplinary Mechanisms

Inconsistent implementation of regulations may result from unclear procedures for looking into and penalizing MPs who act unethically and organizations like the Parliamentary Service Commission (PSC) and the Ethics and Anti-Corruption Commission (EACC) frequently have limited power to enforce compliance or levy fines.

Political Protection

Political alliances or party loyalty may protect Members of Parliament from consequences. As a result, there may be a reluctance to hold other party members responsible, creating the impression that immoral activity is accept and reporters of misbehavior or whistleblowers may be afraid of reprisals, which deters them from coming forward with information on unethical activity.

Public Perception and Trust

The public believes that MPs can act without consequence when misconduct allegations are not addressed. The legitimacy of the Parliament as an institution is threatened by this breakdown of trust. When people feel that their representatives are not held responsible, they may lose faith in the political system, which can result in a decline in civic engagement and democratic participation.

Recommendations for Strengthening Enforcement

Giving oversight organizations like the EACC and PSC more power and funding can improve their capacity to look into and successfully enforce laws against MPs. Accountability might be increased by establishing independent commissions with the express responsibility of monitoring parliamentary behavior.

Consistency in enforcement can be ensured by establishing precise standards for disciplinary sanctions taken against MPs who are found guilty of misconduct. Enforcing mandatory reporting

procedures for misconduct can guarantee that cases are properly documented and handled.

Transparency and accountability can be improved by making information regarding investigations and findings publicly accessible. Citizens can be empowered to hold their legislators responsible by participating in oversight through public forums, petitions, and feedback systems.

By addressing gaps that let MPs to avoid responsibility, current rules could be strengthened in terms of enforcement. MPs who violate ethical standards may be discouraged from acting unethically by imposing explicit consequences.

Kenya can promote a more accountable parliamentary system that rebuilds public confidence and strengthens democratic governance by tackling these problems and putting effective reforms into place.

PARTY LOYALTY OVER PUBLIC ACCOUNTABILITY

MPs' loyalty to their political parties comes above their public accountability. Even when it contradicts the interests of their voters or the fundamentals of good government, MPs are frequently under pressure to follow the party line. MPs' independence and public accountability may be compromised as a result. Key issues that arise include the following:

Political Expediency

The changing alliances among MPs, especially after elections, show that many prioritize potential rewards from the ruling government over their responsibilities to voters. This behavior contributes to the perception that MPs are more interested in personal gain than in serving their constituents. Politicians are often under pressure to align with their party's stance, even when it conflicts with the interests of their constituents.

Erosion of Oversight Role

Parliamentarians' propensity to readily endorse the executive branch's budgetary proposals undermines their ability to act as a check on the government's authority. This alignment frequently results in insufficient examination of government acts, which further damages the institution's reputation.

Consequences of Defiance

Members of Parliament may be sanctioned by party leadership for openly opposing party positions, which may deter them from acting in a way that satisfies their ethical duties or the demands of their people. Party allegiance is strengthened by this disciplinary system at the price of accountability.

Impact on Governance

Effective representation is hampered by the way party allegiance and governance are entangled. When elected officials put party agendas ahead of the interests and goals of the people, citizens may feel deceived and become disenchanted with the democratic process.

By addressing these issues, Kenya can work towards a more accountable parliamentary system where MPs

prioritize the interests of their constituents alongside their party affiliations.

In general, those who oppose the Kenyan Parliament's legislative role in upholding accountability for good governance may contend that the current systems are inadequate and inefficient in making MPs answerable for their deeds. More openness in financial matters, stricter enforcement of legislation, and a change in culture where MPs put public accountability ahead of party allegiance are all necessary.

TRANSPARENCY

A key component of good governance is transparency, which includes accountability, openness, and communication in the decision-making process. Regarding the legislative function of the Kenyan Parliament in upholding good governance. Many countries, including Kenya, have entrenched the freedom to knowledge in their constitutions. Article 35 of the Kenyan Constitution allows citizens the right to acquire information maintained by the state, which is necessary for exercising and safeguarding their rights. Furthermore, the Access to Information Act of 2016 attempts to assist this right by mandating public bodies to release information both proactively and upon request.

Existing Accessibility Issues

Information Availability

While parliamentary proceedings are meant to be open to the public, real access may be restricted. Information about proposed laws, discussions, and vote records may not be widely available or easily accessible. For example, transcripts of parliamentary sessions and key papers are occasionally presented in formats that are difficult for the general public to understand.

Public Participation

Public involvement in legislative processes is frequently more theoretical than practical. Although committees may solicit public input on proposals, many citizens are unaware of these possibilities due to ineffective outreach and communication strategies9. Furthermore, meetings and debates may take place behind closed doors, reducing transparency.

Passive Access Modes

The current ways of accessing parliamentary proceedings, such as viewing sessions on television or attending parliament, are primarily passive. Citizens cannot actively engage or participate in real-time conversations or decisions, reducing their role in governance.

RECOMMENDATIONS FOR IMPROVEMENT

Establishing a single online platform that consolidates all parliamentary information in user-friendly formats will make it easier for citizens to discover pertinent data. Parliament should promote public participation through various media channels to keep citizens informed about the legislative process.

Committees should open their sessions to the public and provide timely updates on their activities and decisions.

In conclusion, while legal structures exist to facilitate access to parliamentary information, major loopholes persist that impede effective public engagement and accountability. Addressing these issues would necessitate collaborative efforts from both politicians and civil society.

FINANCIAL TRANSPARENCY

The budgeting process is sometimes unclear, making it difficult for the public to comprehend how monies are distributed to various programs and initiatives. Detailed fiscal allocations to specific MPs or constituencies may not be easily accessible or understandable.

While some financial reports are released, they are often difficult to utilize. Technical jargon and elaborate formats might turn off non-expert citizens, preventing them from efficiently examining how monies are spent. There is typically insufficient oversight and monitoring of how MPs spend their allocated monies. Without frequent audits and reviews, it is difficult to effectively track expenditures and uncover potential misuse or misallocation of resources.

Many citizens are ignorant of their entitlement to obtain financial information or how to participate in the budgeting process. This lack of information can lead to apathy toward financial oversight and accountability.

The International Monetary Fund (IMF) promotes budgetary transparency as critical to government performance. The IMF Fiscal Transparency Code establishes international standards to encourage best practices in public finance management. Adhering to these criteria allows governments to avoid allocative distortions in public finances while also improving accountability.

Nontransparent fiscal practices can result in wasteful tax expenditures and misallocation of resources, ultimately damaging public trust and government.

Mechanisms for Enhancing Transparency

Public Access to Financial Information

Budget transparency is making data on revenues, expenditures, and other financial transactions easily accessible to the public. This accessibility enables people, researchers, and the media to effectively examine government financial practices. A transparent budget process not only allows for monitoring but also encourages public engagement in decision-making, which can result in improved resource allocation.

Regulatory Frameworks

To increase transparency, regulatory structures must be effective. Regulators make ensuring that companies provide timely and accurate financial information. This criterion makes it possible for interested parties to base their informed decisions about a government's financial health on reliable information. Since inadequate transparency permits unchecked financial misuse, it can result in increased corruption and a decline in public trust. Poor policy implementation and inefficient resource allocation due to poor monitoring negatively affect social stability and economic development. Finally, increasing accountability of the management of public funds to MPs. Finally, making public funds management more accountable to MPs requires greater financial

transparency. Strong transparency measures can help governments boost public trust, prevent corruption, and guarantee the efficient use of public resources.

DISCLOSURE OF CONFLICTS OF INTEREST

Transparency in disclosing conflicts of interest is critical for ensuring the integrity of Kenyan Members of Parliament (MPs) decision-making processes. Critics claim that there is insufficient information about these conflicts, which can lead to choices that prioritize personal or vested interests over the public benefit.

Legal Framework for Disclosure

Kenya has established various legal mechanisms to ensure transparency in conflict of interest disclosures, including the following:

The Public Officers Ethics Act, 2003 prohibits public officers from having any interest that may conflict with their official duties and declares such interest.

Leadership and Integrity Act, 2012 This Act requires MPs and other public officers to declare their interest in any matter under debate and in any transaction involving other state officers. It also provides that such declarations should be made available to the public.

The Conflict of Interest Bill, 2023, seeks to improve the current framework by requiring disclosure of all assets and interests that may affect decision-making. The key provisions include:

Mandatory Disclosure

Public officers must report any direct economic interests in debates or procedures, as well as any discussions with other members or state officials.

Recurring Requirements

Bill mandates that MPs recuse themselves from discussions where a conflict exists, thereby preventing personal interests from impacting legislative decisions.

Public Access to Declarations

The law highlights how crucial it is to make conflict of interest registers open to the public in order to promote accountability and public confidence.

Concerns have been raised about the enforcement of disclosure requirements since compliance might not be accounted for because of vague guidelines as to what comprises a conflict of Interest, MPs can justify non-disclosure based on subjective considerations, which could amount to instances where conflicts are not disclosed due to neglect or willful blindness individuals have question the sincerity of public officials revelations, since so many declarations of ethical investigations might not yield very honest responses.

In conclusion, while Kenya has established a framework for revealing conflicts of interest among MPs, opponents claim that insufficient enforcement and potential loopholes weaken its effectiveness. Improving

transparency in this area is critical for ensuring that legislative actions put the public benefit ahead of personal interests.

PUBLIC ACCESS TO PARLIAMENTARY PROCEEDINGS

Public access to parliamentary proceedings is a key element of democratic governance, which enables people to participate in and scrutinize the processes of legislation. This is catered for in Article 118 of the Kenyan Constitution, which mandates that Parliament operates transparently and promotes public participation. However, some critics questioned how such regulations would actually be implemented in practice and pointed out a number of barriers to public access.

Legal Framework Supporting Public Access

1.Constitutional Provisions

Article 118 of the Constitution of Kenya 2010 requires Parliament to perform its work in an open manner and to encourage public participation in legislative processes. This includes ensuring that sittings and committee sessions are open to the public, unless there are compelling reasons for exclusion.

2.Access to Information Act

This bill strengthens citizens' rights to access state-held material, promoting more transparency in parliamentary proceedings.

Challenges to Public Access

Limited Awareness and Communication: Information regarding legislative sessions and possibilities for public participation is frequently disseminated by traditional media, such as newspapers. This strategy only reaches a limited portion of the Kenyan population, with estimates indicating that only approximately 2% have regular access to such publications. Accessible methods, such as radio or mobile platforms, can boost outreach. However, online transcripts and documents are often offered in difficult-to-understand formats. This may hinder public engagement and participation.

Regulated Access to Parliament Buildings: Security concerns lead to stringent regulations regarding physical access to Parliament. This can create barriers for citizens wishing to attend sessions in person.

To improve public access and participation in parliamentary processes, numerous methods could be implemented and expanding communication tools to include radio broadcasts and cellphone alerts may help reach a larger audience and inspire residents to participate more actively. Creating more accessible online platforms for accessing parliamentary materials and tracking legislative procedures will help citizens participate more effectively. Enacting comprehensive public participation legislation could provide clear instructions for citizens to engage with Parliament, such as dates and methods for legislative input.

In conclusion, while Kenya's legal system promotes public access to parliamentary sessions,

Considerable hurdles to effective participation exist. Addressing these difficulties is critical for

Cultivating an inclusive democratic process.

MEDIA FREEDOM AND INFORMATION DISSEMINATION

Media freedom and information distribution are critical to guaranteeing transparency in the functioning of Parliament. Critics contend that government intervention in the media, restrictions on press freedom, and limited access to diverse and independent information sources all impede openness in Kenya's parliamentary processes.

Legal Framework Supporting Media Freedom

Article 34 of the Kenyan Constitution establishes a strong framework for media freedom by enshrining the rights to free expression and access to information. Key legal instruments include:

1. The Media Council Act created the Media Council of Kenya, which is responsible for regulating the media industry, establishing ethical standards, and protecting journalists' independence.
2. The Access to Information Act promotes public access to information held by state entities, increasing transparency and accountability within government processes.

Challenges Facing Media Freedom

Government Interference

There have been reports of government interference in media operations, such as the temporary suspension of television stations broadcasting opposition activities.

Press Freedom Violations

Reports show an increase in press freedom breaches in Kenya, including physical attacks on journalists and intimidation techniques to prevent independent reporting. The Media Council of Kenya has voiced worry about these episodes and their consequences for democracy.

Economic Pressures:

Media outlets rely significantly on advertising, making them susceptible to political and corporate influence. This dependence can compromise editorial independence, leading to self-censorship or biased reporting.

Recommendations to Enhance Media Freedom

To promote media freedom and improve openness in parliamentary functioning, numerous solutions are advocated.

Strengthening legal protections

Reforming antiquated rules that limit journalistic freedom will help Kenya's legal system meet international norms. This includes addressing laws intended to intimidate or silence journalists.

Supporting Independent Journalism

Financial incentives and assistance for independent media organizations can boost editorial independence and promote high-quality journalism.

Encouraging Public Engagement

Initiatives aimed at increasing public awareness about media rights and responsibilities can empower citizens to demand greater accountability from both the government and the media.

In summary, while Kenya has developed a legal framework to promote media freedom, persisting obstacles such as government meddling and commercial pressures jeopardize its efficacy. Strengthening media independence is critical for increasing transparency in Parliament and ensuring citizens' access to the information they need to participate actively in democracy.

ACCESS TO INFORMATION

Access to timely, accurate, and relevant information regarding parliamentary activities is critical for promoting transparency and accountability in governance. Critics claim that in Kenya, there is a substantial absence of such access, limiting the public's capacity to hold Members of Parliament (MPs) accountable for their actions and choices.

Legal Framework for Access to Information

Kenya's Access to Information Act (2016) was enacted to let citizens exercise their right to access information held by public entities. This law seeks to improve openness and accountability in governance by making information about government operations, including legislative actions, widely available to the public. However, the usefulness of this act has been questioned due to a number of implementation issues.

Challenges in Accessing Information

Cultural Secrecy

The Kenyan Parliament has a deeply ingrained culture of secrecy, which frequently results in restricted reaction to requests for information. According to reports, around 63% of requests sent to parliamentary staff were ignored, suggesting a serious obstacle to openness.

Implementation Gaps

Although the Access to Information Act establishes a legal basis for information access, its implementation has been impeded by a lack of explicit laws governing how information requests should be handled. The lack of clarity makes it difficult for citizens to efficiently navigate the system.

Inadequate Proactive Disclosure

Although public entities are required to proactively disclose some types of information, many fail to do so sufficiently. This includes facts regarding proposed laws, discussions, committee meetings, and vote records, which are required for public examination.

Digital Accessibility Issues

The lack of digitalization of records, as well as the absence of a centralized digital register, complicate access to parliamentary information. Many citizens find it difficult to access timely information because of outmoded record-keeping processes.

Importance of Timely Access

When citizens have access to legislative papers and procedures, they can engage in meaningful conversations regarding laws and policies that affect their lives. Transparency allows the public to monitor MPs' activities and choices, which promotes accountability and discourages corruption.

Informed persons are more likely to participate in democratic processes such as voting and advocacy, hence strengthening democracy.

Recommendations for Improvement

Clearer rules and guidelines on processing requests for information will go a long way toward improving compliance with the Access to Information Act. Public bodies should be encouraged or compelled from time to time to publish any vital document relating to their activities, for instance, proposed laws and voting history. Making a central digital repository of parliamentary records can help in such dissemination both more effectively and reliably.

Put briefly, despite the legal framework designed to facilitate access to information in Kenya, high barriers persist which deter people's involvement in parliamentary processes. It is quite crucial that such obstacles be eliminated so as to make the political regime accountable and transparent, where the people can have an active role in democracy. The Kenyan Parliament's lawmaking role with respect to positive promotion of transparency is criticized and l acks serious depth in the major areas of financial transparency, public access to documents and proceedings, access to information, media freedoms, and freedom from conflict of interest. Some of these shortcomings will be likely barriers to public scrutiny, oversight, and participation within the legislative procedure.

CONCLUSION

The examination of the legislative role of Kenyan Parliament in promoting good governance through transparency, accountability, and public participation reveals many shortfalls that retard democratic progress. Whereas the Constitution provides for public involvement, actual practice is characterized by a lack of meaningful participation of citizens in the process of legislating. This is well manifested in various ways, especially from instances where public consultations have been superficial, thus causing widespread dissatisfaction among the populace. As one grapples with these issues, there is a realization that active citizenship is an ingredient in effective governance. Whereas the Constitution of Kenya provisions have made a provision for the involvement of the public in decision-making processes, systemic obstacles do exist. The obstacles that stand in the way include lack of resources to conduct such engagements, facilitators to conduct discussions, and overall lack of interest by citizens on account of experiences of mere tokenistic involvement in the past.

Added to that, marginal groups face added difficulties that make their participation in governance even more

difficult. The Kenyan Parliament is supposed to take radical steps that prioritize accountability and openness to the end of enhancing inclusiveness and participation in the parliamentary process. This includes amending the current frameworks so as to ensure public participation is an integral part of the legislative process rather than a mere formality. The establishment of clear guidelines with respect to the opportunity for citizens' participation and the mechanisms of accountability and feedback would strengthen confidence in the administration. Lastly, in these times of increasing digitization, resorting to technology might be crucial for bridging the gap between the public and Parliament.

The consultation and provision of Information through digital platforms will make the work of Parliament better known to a wider audience, and discussions even more inclusive. In addition to giving citizens a louder voice, the process of legislation benefits from diverse insights. Conclusion In all, the improvement in the human rights situation in Kenya and enhancing government accountability involves a concerted effort to enhance the legislative role of Parliament with genuine public participation. Addressing the identified deficiencies and installing appropriate mechanisms for engagement could make Kenya inch closer to a more open and accountable governance framework that truly represents the will of the people. It requires a commitment by all concerned that citizen participation becomes one of the cornerstones of democracy to ensure that governance is responsive to the needs and aspirations of all Kenyans.

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A CRITIQUE OF THE LEGISLATIVE ROLE OF THE KENYAN PARLIAMENT: TRANSPARENCY, ACCOUNTABILITY, AND PUBLIC PARTICIPATION.

"In a democracy, the power of governance emanates from the people and returns to them, ensuring accountability and transparency." – Mary Robinson.

Hafsah Chaudhry

1. ABSTRACT

This study critically evaluates the legislative role of the Kenyan Parliament in ensuring good governance through transparency, accountability, and public participation. Since Kenya's independence, these elements have remained a struggle for Parliament, including corruption and insufficient public participation when passing bills—leading to citizen dissatisfaction and an unstable political climate. However, there has been notable progress, with more citizens pushing for good governance by exercising their constitutional rights. Parliamentarians are now more tightly bound by law to act in accordance with principles of good governance. Still, a major challenge remains to fully break away from the legacy of poor governance and ensure genuine transparency, accountability, and participation. Consequently, this critique provides valuable insight to policymakers, political figures, and citizens by shedding light on the broader realities of Kenya's political landscape. It aims to deepen understanding and raise awareness of the urgent need for reform. Furthermore, it offers recommendations on how to break free from the grip of tyranny and suppression in hopes of building a better political framework for future generations. Part of this includes comparing Kenya's legislature to more progressive systems. The methodology focuses on unpacking the topic through legal sources, including the Constitution, judicial precedent, and scholarly works.

2. INTRODUCTION

Article 10 of the Constitution emphasizes democracy, public participation, accountability, and transparency as essential elements guiding governance. These elements are pivotal in any country's stability, growth and security. Without these elements, a country and its citizens' peace are threatened.

First, defining the key terms in this topic is crucial in understanding the issue at hand. Good governance has been defined as ensuring that 'political, social, and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision making over the allocation of development resources.' Transparency entails 'official business conducted in such a way that substantive and procedural information is available to, and broadly understandable by, people and groups in society, subject to reasonable limits protecting security and privacy.' Accountability entails 'procedures requiring officials and those who seek to influence them to follow established rules defining acceptable processes and outcomes, and to demonstrate that they have followed those procedures.' While Public participation is 'the process of engaging the public in decision making.'

Having this in mind, the paper adopts the following roadmap: A historical background on the matter, problem statement and a discussion a major theory that ties to the issue. The analysis of the main portion of the research split into two parts: Transparency and Accountability, and Public Participation. In this part, various legal sources and examples from outside Kenya will be used to sharpen the lens of critiquing the legislative role of parliament. This paper will also use court cases to enhance the critique through a practical display of the issue at hand, accompanied by works of literature whose authors have recognised the flaws in Kenya's parliament. Lastly, a conclusion to summarise the paper and its findings.

3. HISTORICAL BACKGROUND

Kenya's history is plastered with incidents and era's that are contrary to all the principles of Good Governance we stand by today; a testament to the poor governance witnessed over the years. One notable stain in Kenya's history is the Goldenberg Scandal that occurred in the 1990's. The beginnings of the Goldenberg Scandal were in 1991 and 1992 when Kenya faced a severe economic downturn. The government proposed an exportation scheme whose target was boosting the economy. The company 'Goldenberg International', claimed it exported gold and diamond and went forth to request the Government to grant them an additional 15 percent Export Compensation. The Parliament, after some persuasion, amended the Local Manufacturers (Export compensation) Act that disallowed this and did not even question the Finance Minister's decision to re-open the scheme despite suspicion of corruption having occurred. Fraudulent payments by the bank to the company members and parliament officials were authorized. This led to millions of shillings being corruptly acquired, a clear lack of transparency within the parliament, consequently turning a blind eye to evident corruption and by extension participating in the Scandal. In the eyes of the public, those who the public look up to for good governance were, at this time, not a trustworthy group of officials.

Another notable occurrence is in 2017, when the Building Bridges Initiative (BBI), despite being originally executive driven, faced criticism on the matter of public participation. There were proposed changes to the Constitution's basic structure without a mandatory referendum from the parliament. This faced a lot of criticism regarding good governance, seeing as the proposal sought to amend the whole structure of government from a presidential to a parliamentary system. This was one example where public participation was flawed.

Very closely tied to the BBI case is the Njoya case where the Constitution of Kenya Review Act created to amend the Constitution was declared unconstitutional due to a conditional referendum hence serving as a prime example of poor governance. The voting system in parliament to determine whether the Act would pass was made up of many representatives such as parliamentarians, that were allegedly not voted for directly by the citizens and there was unequal district representation in parliament, thus not accountable to the citizens. This example ties to a lack of good governance by those in Parliament, involved in legislative roles, failing to execute the law-making process properly.

These are only but a few examples in Kenya's history that show that in the absence of effective regulation, the law serves as an instrument for the abuse of power from personal interest. With these elements prevalent in any government, the practice of good governance is absent as representatives at the parliamentary level are not accountable to the public. There is no transparency in their actions and there is a lack of public participation, as the abuse of power only takes into account the interest of those who are governing the country and not listening to the voices of who the country governs.

4. PROBLEM STATEMENT

The problem this topic addresses comes down to the current situation in comparison to the ideal situation. The current situation is one where the parliament does not undertake its legislative role in the constitutional manner established regarding the elements of good governance. In Okoth Ogendo's paper, he looks through the years of parliament in Kenya, along with the suppressed judiciary, extrajudicial killings and dictatorship ruling, concluding that perhaps this governance is a lasting effect of colonialism and left a stain on African leadership on how to use power and tend to the citizens. This, although not as dangerous as it used to be, is still a threat in our parliament today where the population ponders on disappearing funds and people, as well as lack of accountability and transparency from the parliamentarians and attempt to silence the population in the face of the interests of these very parliamentarians. For example, multiple protests have arisen in the past year due to unfair tax burdens and suspicion from the citizens on corruption amongst parliamentarians. It is crucial to note that we must examine the culture of leadership and the behaviour of decision-making across all of Parliament, from the people themselves to the decisions they make, the scandals they are involved in and the laws they pass. The flaw in the law-making process with regards to Good Governance is only part of a larger attitude that ought to be examined to understand how to bring out true Good Governance and cease the growing mistrust citizens have in Parliament.

The ideal situation is one where people have trust in the parliament, the laws they pass and the facilities they provide. Current cases and real-life situations in Kenya have seemed to drift far from the definition of Good Governance. These recurring issues can only be solved through mutual understanding and collective reform; Parliament needs to seek interest in the people and their welfare.

The direction of this paper aims to critisise the current situation, then use those criticisms to display recommendations that will lead to the reflection of the ideal situation.

5. CONCEPTUAL FRAMEWORK

There are multiple theories that underscore the need for good governance and the lack thereof in Kenya's Legislature. However, the most crucial theory is the social contract theory established by John Locke.

This is defined as 'an agreement between the ruled and their rulers, defining the rights and duties of each'. In light of this research, it proves that if parliament desires to display democracy, then social contract is an inevitable contributor for the Parliament to rule two-way. Transparency, accountability and adequate public participation comes from the attitude of our rulers. They must be willing to act in the best interests of the citizens. In return, the citizens must abide by the laws and trust those in power to act accordingly. Part of their sovereign power is delegated to Parliament to enforce and protect. The citizens are bound by the law. The laws themselves and the law-making process affect the citizens' mindset toward those who govern them

and the way in which law affects their lives. It all boils down to a precise outlook of practice that will ensure political and social stability in any setup.

6. CRITICISING THE ELEMENTS OF GOOD GOVERNANCE

In the following section, the three building blocks of Good Governance will be thoroughly discussed, starting with familiarising the readers as to the requirement for Good Governance, thereafter, criticising the operation of its elements in the Kenyan Parliament. This will be done in two subsections: Transparency and Accountability, then Public Participation. Court cases, works of literature and news reports will collectively be used throughout this section.

6.1 The Legislative Role of Parliament; Good Governance as a Pillar of Operation

This first part is key for readers to understand the ideal role and framework of the Parliament in ensuring good governance. It is crucial to understand what should be done, to assess whether

what is being done is the ideal.

The Constitution states in Article 94 (4) that 'Parliament shall protect this Constitution and promote the democratic governance of the Republic.' Article 118 (b) further states the parliament should 'facilitate public participation and involvement in the legislative and other business of Parliament and its committees.' Most important to these provisions is Article 10 (1) that states that 'The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them', one of these being '(c) good governance, integrity, transparency and accountability.'

From reading these articles, it is evident that the role of Parliament is to act in accordance with the Constitution and by extension, the will of the people. It does so while recognising the elements of Good Governance as stated in Article 10 of the Constitution. This is evidenced in the Katiba Institute case where the main issue centered around Section 15(2) of the Judicial Service Act and whether the President's authority to appoint members of the Judicial Service Commission was constitutional. In its adjudication, the Supreme Court decided that such Presidential appointment was unconstitutional and usurped the independence of the Judiciary. This Act, being drafted by the Parliament, had such a flaw that resulted in lack of proper accountability to the Constitution and adhering to it. This in turn infringed on Good Governance as it meant that members of the Judicial Service Commission may be influenced by the executive, infringing on their independence and by extension the sovereignty of the people. This case demonstrates the importance of legislative actions by the Parliament. The laws that they create are designed to affect members of society and if these laws are drafted poorly or unconstitutionally; it is a sign of lack of Good Governance from the Parliament.

This ties to the social contract theory as the Judicial Service Act influences the sovereignty of the people and if that is infringed, then the Parliament is held accountable for poor drafting of laws, which has a bounce back effect on the citizens' attitude and trust toward Parliament.

As stated in Michael Jhonston's paper on good governance, 'citizens and officials must see good governance not only as an ideal, but also as improving their own lives.' In the case mentioned above, the role of law making needs to be seen in light of long-term benefit to the citizens through good governance, rather than a simple means of creating law for it to exist. The Parliament and the interest of the citizens work hand-in-hand to constitute a democratic society.

6.2 Transparency and Accountability as facets of Good Governance

Transparency and Accountability are important traits of any parliament. The members of Parliament create laws that govern the country. Including those who govern counties, they are obliged to act with honour, dignity and uphold ethical practices.

To criticize this aspect of good governance, one must look at cases and instances of the Kenyan Parliament over the years that demonstrate a lack of these qualities and give constructive criticism on how to combat this issue. The section will discuss transparency and accountability in light of the members of Parliament, their duties and making of laws.

In the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others, the Trusted Society of Human Rights Alliance challenged the appointment of Mumo Matemu as chairperson of the Ethics and Anticorruption Commission. The Parliament approved of his appointment despite rumours of his anti-ethical behaviour in the past. Important to this paper was the issue concerning the powers of the court on deciding the validity of his appointment. The members of Parliament merely ticked the procedural guidelines without looking into ethical considerations of the appointment and not considering the merit substance in that review. They are accountable to the citizens to show this transparency and ensure that the Parliament is acting toward the freedom and will of the people. The act of accountability and transparency therefore not only lies in the members of Parliament themselves, but also the duty they must appoint members of institutions and ensuring that is carried out in good faith with accountability and transparency. This leads to their role in ensuring that the laws created, and the bills drafted too are a display of transparency and accountability of the Parliament.

Furthermore, in the case of National Assembly & Another v Okiya Omtatah Okoiti & 55 Others, the Finance Act 2023 was initially held as unconstitutional due to a lack of public participation. Although the Supreme Court later overturned that decision, the court held that the amendments to the Kenya Roads Act and the Unclaimed Financial Assets Act under the Finance Act were unconstitutional because they were neither incidental nor directly related to a money bill as required under Article 113(3) and Article 114(3) of the Constitution. The Parliament had the onus of being accountable to the public in ensuring transparency and accountability to perform adequate public participation and ensuring transparency in the purpose of the Acts that are created.

The case of Gachagua v Speaker of the National Assembly & 3 others was one that spurred a lot of attention to the transparency and accountability of members of Parliament. Despite the impeachment, he was acquitted of corruption charges, with 53 senators voting against his conviction, reflecting challenges in holding high-ranking officials accountable. The members of Parliament often act through political pressure which blurs the correct method of governance. The Deputy President was not held accountable due to the actions of the members of Parliament's vote in favour of his acquittal. In addition to tribalism, factors such as personal interest of wealth added to the image of political figures in Kenya. This is a strong display of lack of transparency and accountability.

Having looked at cases that shows instances where Transparency and Accountability were undermined, this section will turn its attention to scholarly work that is similar to this paper, which critique Kenya's adherence to principle of Good Governance over the years.

In a paper written by C. Odhiambo-Mbai,

he outlines factors that undermine the promotion of public accountability in Kenya and further gives multiple criticisms on the operation of Parliament that cause problems such as corruption, political influence and lack of transparency in laws as mentioned in the cases ab ove. One of which includes the ineffectiveness of 'watchdogs.' One particular casthat elucidates this is the National Assembly & Another v Okiya Omtatah Okoiti & 55 Others, where the Court takes an active stance by declaring some of the Acts unconstitutional as they are not of benefit to the citizens. This serves to show that the judiciary is active in ensuring that the Parliament is operating within the boundaries of Good Governance. Although this may seem an effective way to ensure that good governance is taking place, it raises a hidden concern as to whether there are effective watchdogs within Parliament that can check the integrity and ethical practices of those who are making laws.

Another criticism he gives is that there is a lack of incentives for the members of Parliament to emanate values of Good Governance. By looking at the Gachagua case, discussed above, the Members of Parliament were under influence to withdraw his conviction, knowing that the laws that were created and the Constitution were not in favour of his actions. Hence, looking at the Finance Act cases, knowing the actions of Parliament, they receive public criticism of the laws that are made and their purpose to the people. Furthermore, looking at the integrity of the members of Parliament opens opinions to the public about the laws created and the acts of Good Governance involved in creating them. This links to the next subsection when looking at public participation in the intention of or lack of good governance in law making.

Although the situation has since improved, there being increased judicial activism and more elaborate laws governing the operation of the Parliament, there is still great need for reform. As seen through the cases discussed above, members of Parliament still do not operate in full transparency, there is still corruption and unaccountability for lost funds and laws are still being made without proper elaboration, procedure and public participation. This stems from the growth of public distrust and an ineffective way for the Parliament to govern its people. The tides of change ought to be brought about by reforms. It begins with the discipline and mindset of those in power, knowing their purpose in good governance and a strong stance by the court to uphold the values of the Constitution for the people.

Michael Johnston also highlights that those in legislation should pay close attention to problems and controversies. It is no secret that there are controversies regarding the integrity of those in Parliament and the laws they make such as the Finance Act that often spur talk into their personal interest rather than the welfare of the country. These public concerns need to be watched out for by the legislature to ensure that they do not act in the circle of the ongoing criticisms.

In conclusion, all these cases demonstrate the way in which the Parliament understands transparency and accountability, which is put into perspective by the literature written by scholars on what should be done or what is being done incorrectly. This is only a mere representation of the Parliament's actions, but it is enough to give readers a picture of what this paper aims to criticise.

6.3 Public Participation in Good Governance

Article 21 of the Universal Declaration of Human Rights emphasizes 'the right of everyone to participate in government, directly or through representatives, underscoring democratic governance. This aligns with public participation in legislative processes.' Public participation is an extremely important aspect of good governance, ensuring that those whom the laws are created for have a say in the method and material of their creation.

In the case of Robert N. Gakuru & Others v County Government of Kiambu & Attorney General, the petitioners claimed there was a lack of public participation in the legislation of the Finance Act 2023 in Kiambu County including unlawful levies and unfair taxes which went against the will of the people. The court emphasised that public participation needs to go beyond mere adherence to the Constitution but more of looking into the inherent will of the people. This is the main problem. Our legislative branch is adhering to the process of making Acts known to the Parliament and not looking into the purpose of public participation to embody the view of the people. It ought to be reinforced that public engagement must be meaningful and not merely a formality. This is a key idea in Okoth Ogendo's paper where he claims that members of government and other political officials are adhering to what the Constitution says but not embodying its values The unfair levies and high taxes proposed within this bill are akin to the Finance Bill 2024 that caused an uproar and heavy tax burdens on the people. This is a sheer example of how MPs are more interested in gaining power like their colonialists, as suggested by Okoth Ogendo , rather than the welfare of the people. To curb this, Members of the government need to stop viewing public participation as a barrier to their will and power, but as a step forward towards the welfare of the country and the sovereignty of the people.

Many other papers have been written on this matter of public participation under good governance. For example, a paper written by David Ethuro proposed recommendations as to how public participation can be improved, including increased trust in the legislature through campaigns, more connection to

public and technology advancement to make the expression of public views regarding upcoming laws easier. It is necessary to enact such changes as a step towards good governance. As mentioned above in the BBI and the Njoya case, public participation is a pivotal role in ensuring good governance and through the events mentioned in history that shows that Kenya's political elites have struggled to balance personal needs for societal views.

As stated earlier, the Finance Bill 2024 is a relevant example of how public participation is enacted in Kenya. There were multiple amendments to the Bill due to continuous dissatisfaction among the citizens, including 'the removal of the proposed 16 per cent VAT on bread, transportation of sugar, financial services, foreign exchange transactions as well as the 2.5 per cent Motor Vehicle Tax.' Although one may argue that this is public participation, there is a deeper understanding that is needed in implementing public participation: there were only multiple changes after debates, protests and court interference. The Parliament in the beginning was not of the same opinion with the citizens. Moreover, in the Finance Bill case, the court recommended that parliament 'put in place reasonable measures to ensure it considers and treats the proposals, views, suggestions, and comments received during such an exercise.' This is a clear indicator that public participation is done only when the last string snaps and not inherent in the process.

It may be useful to look at strategies that other Parliaments around the world have adopted. In the Briefing Paper from the House of Commons Library, strategies that the UK Parliament used in public participation can inspire our Parliament to do the same.

For example, the UK Parliament works with independent organisations to openly debate laws on digital platforms and express their views on platforms such as Twitter and Facebook. This is done before the parliamentary debates and ensures that all views are represented in the final discussion. This differs from Kenya whereby digital platforms are merely used to breakdown information to citizens, accessible to ongoing parliamentary activities and post comments on social media that are often ignored by those

in power. Kenya should adopt such a strategy. According to a digital report, Kenya ranks number one in the world for time spent on social media. It is the onus of the country's representatives to use such information to our benefit: use this social media as a strong agent for public participation. Whether it is passing of laws, approving budgets or impeachment processes, social media needs to transform into an active debate forum rather than a forum that is used to criticise and organise protests

In the case of Wanjeru v County Secretary/Head of County Public Service County Government of Nyeri, disputes arose over the Nyeri Alcoholic Drinks Control Act and related 2024 regulations. The petitioner argued that they violated constitutional provisions and procedural laws. This included a lack of proper public participation and breaches of the Nyeri County Public Participation Guidelines. Kellen Kiambati's paper discussed public participation in Kenya, mentioning that it is insufficient, requiring bidirectional communication and better public engagement. He also criticised on this point stating that there is inadequate civic education and capacity-building. These are recommendations which ought to be taken into account in the hope of a better and more friendly political climate in the future. When citizens complain concerning lack of adequate public participation, it is a sign that the legislature is too far from the people and they are acting as a mere authority to be complied with by,

rather than a group of people who create laws for the citizens. The situation should be, as seen from the above criticism, one where Parliament ensures that the people have time and opportunity to engage in upcoming laws, whether all those opinions are taken into account or not.

Overall, Kenya has adopted the use of public participation as stipulated in the Constitution. Courts have intervened where the Parliament has created laws that are distantly involved with the people and Kenya is working on new digital ways of making the parliamentary debates, and proceedings available to the citizens. However, the fact that courts still need to intervene is a sign that public participation is not being given the attention that it deserves. Mere box-ticking does not consider the purpose of public participation to embody the views of the people. The citizens should not merely react, or protest as has been seen in the country, but they should actively engage. This can be done through looking at other countries' strategies for effective public participation; but it really starts with the mindset of those in charge of enforcing it.

7.0 CONCLUSION

To summarise this research, it is important to note the need for change. By digging through Kenya's past, we learn the flaws that have been incorporated into the system and come to see what the ideal situation should be. Kenya's political figures seem to strongly regard the Constitution, a guiding document that instructs them on how to practise good governance, but the practise of constitutionalism is masked behind tyranny, corruption and a lack of ethical practise to the welfare of the citizens; key elements required for transparency, accountability and public participation. Progressive implementation is needed in the hope that it opens the eyes of those in power considering a turn in Kenya's political history. This paper has only illustrated a few examples with powerful recommendations; only a portion of examples are needed to realise the scope of the problem we face. There is still hope to continue to improve what we already have through a shifting mindset and a clear set of goals.

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WABUNGE VERSUS WANJIKU: WHO IS REALLY HOLDING THE MIC?

An article by Moseti Glorias Bonareri.

ABSTRACT

This paper will focus on the Kenyan legislature uncovering its rich history, its advancements from the colonial period to the present. The paper will also examine what good governance is and the role that the parliament plays in promoting it. Transparency; accountability and public participation play a critical role in giving good governance its meaning. This paper examines the role of the legislature in promoting good governance by enhancing transparency, accountability and public participation. It takes a deep dive into the values of transparency, accountability and public participation critically analysing using recent case law and events how the aspects highlighted have been achieved. The paper will also highlight the hits and misses of the legislature in achieving the above principles of good governance. This will include data obtained from multiple sources. The challenges faced by the legislature in promoting good governance will also be analysed and recommendations will be provided in order to counter the challenges faced.

1.2 Introduction

Parliament is the arm of government mandated with the task of making laws. Its mandate flows from the Constitution which also lays out its other roles including promoting transparency, accountability, oversight and public participation. Parliament is a key proponent of good governance and that can be achieved when the legislature adequately performs its functions

1.2.1 Evolution of the Kenyan legislature

The Kenyan legislature dates back to 1907 where the British Colonial Administration established a Legislative Council (LEGCO) in 1907. The main duty of the LEGCO was to advise the then Chief Minister on the running of the colony. Its membership consisted of members nominated from the administration and the settler farming community. The speaker of the LEGCO was the Chief Minister. The LEGCO also formulated laws which focused mainly on protecting the interests of the white settlers. For many years, the Kenyan Nationals were unrepresented in the LEGCO up until 1944 when Eliud Mathu became the first African member to be nominated by the Governor to represent the African community. Previously, the interests of Africans were represented by the spiritual guides who were the European clergymen. In his position as a representative of the African nationals, Eliud Mathu championed the rights and freedoms of Africans. He sought reforms in the land sector and advocated for inter-racial co-operation. By 1955, membership to the LEGCO accommodated more Africans including the Late Retired President Moi.

After independence, the bicameral system which constituted two houses; the House of Representatives and the Senate was abolished and a new unicameral system was introduced. This was argued as a move to

reduce the decentralisation of power as the ruling party then KANU promoted the idea of central power. As time went by, Parliament sought to free itself from the executive and find its own independence. The fight for parliamentary independence began in 1970 when Hon Jean Seroney introduced a motion in parliament seeking to free the legislature. The legislature was at the time under a ministry in the executive and this severely impaired its functioning. The bill to form the Parliamentary Service Commission (PSC) also sought to make the legislature more independent. Introduction of departmental committees promoted legislative oversight.as was evident with the eighth parliament (1997-2002).

The 2010 Constitution brought along with it the clear separation of powers and most importantly proper definition of the roles of parliament. Chapter eight of the constitution titled the legislature is divided into several parts with each part addressing certain aspects of the legislature. The bicameral system was reintroduced giving rise to the Senate and the National Assembly. The senate specifically focuses on counties while the National Assembly is concerned with national issues. Both houses play a critical role in promoting accountability, transparency and ensuring that there is adequate public participation. Whether the roles have been substantially executed will be discussed in this paper.

Problem Statement

Good governance is a system of public administration that fosters efficiency, equity, public participation, transparency, and accountability, among other crucial principles designed to enhance the overall welfare of citizens. Unfortunately, achieving good governance remains elusive for many modern societies, and Kenya is no exception. The legislature plays a crucial role in promoting good governance, as its primary responsibility is to represent the interests of the people. A functioning legislature that aligns with the constitution and all relevant laws is the foundation for fostering good governance and encouraging public involvement in governance and development.

This paper highlights the challenges in promoting good governance through the legislature, specifically how Parliament can enhance transparency, accountability, and public participation.

1.4 Theoretical Framework

This paper makes reference to the Stakeholder Theory which suggests that managers are supposed to act in the best interests of not just the shareholders but all the parties affected by their actions. The theory was first laid out by R. Edward Freeman in his book “Strategic Management: A Stakeholder Approach”. This theory emphasizes that managers, when trusted and empowered, ought to act in the best interests of all the members of the organisation, not just the shareholders. Good governance focuses on treating citizens as citizens, not just customers or consumers, and ensuring that efficiency does not lead to bad service. Citizens have the right to protest and hold politicians accountable when there is bad service, ensuring a more efficient public sector. The legislators in this case are the managers and are therefore expected to act in the best interests of the citizens they represent.

The stakeholder theory encompasses aspects such as accountability where managers in this case legislators are expected to be responsible for their actions. They are supposed to make decisions that are in the best interests of the citizens ensuring that they can properly account for consequences of the decisions. Another aspect of the theory is inclusiveness which ensures that a broader perspective is employed when seeking opinions. This expands the scope of governance by inviting a larger majority into the decision-making process. Public participation involves the involvement of parties affected by a decision in the decision-making process and

therefore inclusivity is a crucial requirement for there to be meaningful participation.

The stakeholder theory can be applied in good governance to ensure that the interests of the citizens are considered in the daily operations of the legislature.

CHAPTER 2

2.1 GOOD GOVERNANCE

Good governance has been defined as a public administration system that encompasses values and principles which aid in promoting the welfare of society. According to former United Nations Secretary-General Kofi Annan, "Good governance is ensuring respect for human rights and the rule of law; strengthening democracy; promoting transparency and capacity in public administration. "Good governance is perhaps the single most important factor in eradicating poverty and promoting development." The Constitution of Kenya highlights good governance as a national value and a principle of governance.

Good governance entails certain principles which are discussed below:

1. Equity and inclusiveness. Equity has been defined as the situation in which everyone is treated fairly and equally. Inclusiveness is the act of incorporating different types of people and treating them fairly and equally. Good governance emphasizes the dignity of human beings, equal rights, and freedom from discrimination for all members of society. It promotes a sense of belonging and stakeholder involvement, ensuring that vulnerable groups are protected and given opportunities to enhance their well-being. This principle ensures equal access to better opportunities and societal well-being.

2. Efficiency and Effectiveness: Efficiency is the use of time, energy, resources in a good way without wastage. Effectiveness means achieving anticipated results. Good governance aims for optimal use of resources to achieve desired outcomes. This includes delivering services promptly and meeting the needs of citizens sufficiently.

3. Rule of law -The principles of justice, equity, and fairness in society are central to good governance philosophy. Complete enshrinement of individual and collective rights, impartial enforcement of the law, an independent court, and an unbiased police force are all necessary. The rule of law emphasises that the law, not people, is in charge. It places a strong emphasis on impartial enforcement of the law and everyone's rights.

4. Responsiveness- This is a crucial principle of good governance, requiring institutions to serve all citizens within an appropriate timeframe. It requires the government to adapt to rapid societal changes, considering civil society's views and constantly re-assessing its activities. As change is inevitable, responsiveness is essential for the government to accommodate and adapt to societal changes. It is therefore imperative that the state ensures that in promoting good governance, swift action is taken to address issues that arise in the society.

Good governance also entails more principles which will be discussed with reference to the parliament and the roles it plays in enhancing good governance.

CHAPTER 3

3.1 TRANSPARENCY

Transparency has been defined as the quality of being done in an open way without secrets. The Constitution mandates Parliament to conduct its business in an open manner, and its sittings and those of its committees shall be open to the public.

The affairs in the legislature should therefore be accessible to members of the public. Transparency in the legislature is emphasised in achieving good governance, since it promotes adherence to laws and regulations. It necessitates unrestricted information flow and dissemination, so that impacted individuals can readily access institutional procedures and information.

3.1.1 Legal framework on transparency

The Access to Information Act, Section 3(b),5(1)(c) mandates public entities such as the Parliament to disclose information that they hold proactively and publish all relevant facts while formulating important policies to the general public or the persons likely to be affected thereby. International instruments such as the African Charter on Human and Peoples' Rights Section 9 and Section 19 of the International Covenant on Civil and Political Rights (ICCPR) all require the states to make public all information that concerns the citizens. The importance of transparency in the legislature was highlighted in the case of Aura V Cabinet Secretary Ministry of Health and others where it was held that transparency promotes public participation which improves good governance, service delivery and responsiveness to government and its agencies.

3.1.2 Transparency in practice in the Kenyan Legislature

Access to parliamentary buildings is restricted in Kenya but the sittings are mostly open to the public through other means. This essentially means that citizens cannot get a live view of the sitting of parliament. There are numerous requirements and a protocol to be observed before one gets to parliament but there are other ways of viewing the sittings. The Hansard is a record of speeches, questions and answers and procedural events in the National Assembly and the Senate. It is accessible to the public either online or physically. Additionally, the parliamentary plenary and committee sittings are normally

Figure 1. A trend in the poverty ranking of counties in 2021 and 2022

aired on a dedicated TV station. The Kenyan legislature also has a public website where it publishes all its affairs. The website contains publications including; advance copies of the agendas of the plenary and committee meetings, results of votes on draft legislation, annual reports of parliamentary activities.

Government policies should be freely communicated to all citizens, encouraging trust in

their objectives, in order to guarantee successful governance. Other governmental and non-governmental organisations should be able to examine decision-making procedures and actions. The legislature as an arm of government is mandated with the task of communicating all laws and policies to the public. The legislature has embraced a County Legislation Tracking (CLT) system which offers a centralised platform for tracking bills across the 47 counties. This move is aimed at promoting transparency of the legislature at the county levels (county assemblies) by allowing citizens an opportunity to closely monitor the bills in the county assemblies. The system however only allows for one to track the progress of a bill and not the contents of the said bill. This impedes the whole idea of transparency. The only time citizens get access to the bills is when the submission of memoranda is required during public participation. This is when the views of the public are considered with reference to the contents of a certain bill. The official law reporting website in Kenya also contains bills where citizens can access and read through the contents of the bills.

Noteworthy to mention is that transparency in the Kenyan legislature has not been fully realised. The internet connectivity in Kenya was at around 31% in 2023 according to a study carried out by Statista. This means that the bills published online are not accessed by a majority of the population. The population that has access to the internet also is not fully active in following the legislative processes in Kenya.

The transparency of the Kenyan legislature was put to the test with the enactment of some legislation. The legislations include the Primary Health Act, Social Health Insurance Act and the Digital Health Act. The issues that arose was the fact that the acts were shrouded in mystery and secrecy. The notices requiring submissions of public memoranda were significantly shortened, the publications were almost illegible and the language used during the "purported" public participation was English which limited the number of people who could participate by airing out their views on the said legislation. This actions by the National Assembly and the Senate were a clear contravention of the Constitution since it disregarded important aspects including transparency. Consequently, it is prudent to note therefore that transparency in the Kenyan legislature has not been fully realised.

3.2 ACCOUNTABILITY

Accountability refers to the fact of being responsible for what you do and give a satisfactory answer for it. It is a core principle of good governance requiring leaders to be responsible for their actions. In Kenya, all sovereign power belongs to the people who exercise the power through elected individuals. This means that the elected officials for instance Members of Parliament and Senators are answerable to the citizens whom they represent. Accountability also is important in the distribution and use of public resources entrusted to public officials. Proper account should be given for the utilisation of public resources to ensure that there is no misappropriation or embezzlement of the said resources.

3.2.1 Legal framework on accountability as a principle of good governance in Kenya

The Constitution of Kenya under article 10(2)(c) lists accountability as a national value and a principle of governance. The roles of parliament also provide that the Senate and the National Assembly should exercise oversight over national revenue and its expenditure and state officers for example the President and the Deputy President. The Public Finance Management Act was enacted to ensure public finances are managed at both the national and the county levels of government in accordance with the principles set out in the Constitution; and that public officers who are given responsibility for managing the finances are accountable to the public for the management of those finances through Parliament and County Assemblies. The National Assembly is tasked with considering the budget estimates of the National Government,

Parliament and Judiciary presented by the Treasury and approves the same with amendments.

3.2.2 An analysis of the effect of CDF on accountability in the legislature

The Constituencies Development Fund is a portion of the national budget set aside for constituencies for purposes of infrastructural development, wealth creation and in the fight against poverty at the constituency level. The MPs are tasked with managing this fund and ensuring that the funds are put into good use which benefits the constituencies. CDF has been seen in practice in the building of classrooms, issuance of bursaries to needy students, building markets and motorbike shades. The fund has helped in the development of a number of constituencies.

A case was lodged in court challenging the constitutionality of the CDF act on the grounds that it interfered with the doctrine of separation of powers; its formulation was also questionable since it violated articles of the Constitution and the problems it created in impeding oversight. The Supreme Court held: "There was a real threat of the CDF creating confusion as to which project was being implemented by which level of Government. In addition, it created the prospect of duplication of funding for the same project leading to wastage of scarce public resources. It created a state of lack of clarity as to which level of Government was responsible for which particular project therefore compromising on accountability." The court noted that CDF would impede accountability since there was confusion in the level of government responsible for various projects.

The court in the case further held "Given the constitutional edict in article 259(1) (a) and (d) that the Constitution should be interpreted in a manner that promoted its purposes, values, and principles, and contributed to good governance. Adopting an interpretation that allowed conflict of interest undermined the oversight role of the Legislature. Allowing legislators any role, even a merely ceremonial role in discharging a mandate that belonged to the Executive branch at either the national or the county level, would promote conflict of interest and compromise their oversight role. Therefore, the CDF Act, 2013 violated the values and principles of accountability and good governance." The Supreme Court noted that CDF posed a threat to the doctrine of separation of power. The CDF gave the legislators a role that created a conflict of interest since the MPs had the discretion to determine the implementation of the projects. This personal interest created reduces their level of accountability. From the foregoing the act was declared unconstitutional.

3.2.3 The role of parliament in budgetary oversight

The Parliament also ensures accountability in the other arms of government. The Public Accounts Committee scrutinizes government expenditure and ensures public funds are used appropriately. The Committee has the discretion to summon government officials to provide explanations for certain policies and other actions. The Parliamentary Committees summon Cabinet Secretaries to provide reasons for particular policy and interrogate them on the running of the particular ministries. This has however been criticised since it is viewed as an abuse of the doctrine of separation of powers. The action however has a positive impact since government officials are held accountable for their actions and citizens can gauge the performance of the government through such avenues.

The legislature is a key player in accountability since it plays the role of oversight. However, due to instances of political interference this role has not been sufficiently performed. There seems to be harmony between the legislature and the executive prompting even members of the opposition to slow their role in calling

out discrepancies present in the implementation of policies affecting the government. Accountability is also hindered by lack of political will where MPs are conflicted on where to look into since they also heavily benefit from the perceived benefits of "evils of the government".

3.3 PUBLIC PARTICIPATION

The International Association for Public Participation defines it as the involvement of those affected by a decision in the decision-making process. Before the legislature makes laws, it is prudent to get the views and concerns of the citizens they represent. The laws made by parliament directly affect the citizens and their views should be considered and integrated in the making of the laws..

3.3.1 The legal framework governing public participation in Kenya

The Constitution of Kenya under Article 118(1) (b) mandates parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. The National Assembly Standing Orders provide that bills should first be sent to the relevant departmental committees for example the public finance committee for public participation to be conducted. The case of Aura V Cabinet Secretary Ministry of Health and others laid out the bare minimum requirements of public participation to include

i.) Proper sensitization on the nature of legislation to be enacted or policy to be effected;

ii.) Adequate notice depending on the circumstances which must however be reasonable;

iii.) Facilitation of the public to ensure that members of the public are able to access the information required in a convenient and practical manner, understand the same, have a meaningful opportunity to attend, contribute and provide their views;

iv.) The views of the public should be considered and where they are to be rejected or declined, reason for such rejection and dismissal should be stated; This will obviate the public participation being a cosmetic or a public relations act;

v.) Public participation should be inclusive and should reflect a fair representation and diversity of the populace to be affected;

vi.) There must be integrity and transparency of the process.

The above guidelines critically bring out the qualitative and quantitative aspect of public participation. In the case quoted above, the Senate and the National Assembly haphazardly carried out public participation shortening the required timelines, constructively handpicking the stakeholders to be interviewed during the public participation and shrouding the advertisement in mystery by publishing it ineligibly. The above actions by the legislature amounted to disregard of public participation which resulted in the three acts; the Primary Health Act, Digital Health Act, and the Social Health Insurance Act to be declared unconstitutional by the High Court.

3.3.3 Public participation in the Finance Bill 2024

The Finance Bill 2024 also sought responses from the public. An overwhelming number of the population was against the bill and outwardly expressed their disapproval through the channels provided by the Parliament. The Parliament however disregarded these opinions and views and went ahead and passed the bill which imposed excessive tax obligations on the citizens of Kenya. Due to public pressure however, the bill was not assented to by the President who referred it back to Parliament in order to make relevant changes.

The issue that arises here is to what extent does the opinion of the public affect the decision-making process. According to Article 1 of the Constitution, all sovereign power belongs to the public who exercise it through their democratically elected representatives. Article 94(1) provides that the legislative authority of the Republic is derived from the people. This means that the will of the people must prevail. In failing to consider the views of the citizens and passing the Finance Bill 2024, Parliament breached the duty of public participation and blatantly disregarded the will of the people. Arguments may be drawn that amendments were introduced by parliament to reflect the views and concerns raised by the people. It is important to note however that a bill that contained over 100 amendment clauses was defective and could not be cured in any way apart from being discarded entirely. The citizens of Kenya wholly disregarded the bill and the campaign of #RejectFinanceBill2024 rents the air both online and offline.

3.3.4 Public participation in the impeachment of former Deputy President Rigathi Gachagua

The recent impeachment of the former Deputy President also raised concerns on public participation. The members who were pushing for the impeachment were the same members who were seeking views from the public. This presented a situation where one had to be the judge in their own case. It would be impractical for such a member to present the views of the public that are contrary to theirs. The citizens were not even aware of the roles of a deputy president and neither were they afforded an opportunity to weigh the accomplishments of Mr. Rigathi against the said roles. The public views template issued to the citizens by the National Assembly resembled a charge sheet not adequately defining the grounds for impeachment. This amounted to a limitation of the right to access information of the citizens.

It is arguable that public participation has improved over the years in Kenya. The principle is however applied in specific circumstances and ignored in others that are essentially critical. Urgency is usually cited as a defence by the government when it fails to conduct sufficient public participation. The instances when public participation is carried out, the views of the public are not considered in the decision-making process. Public participation then becomes just a mere formality. Members of Parliament have been seen glued to their screens during views collection. This shows that they are less concerned with hearing the views of those they represent.

CHAPTER 4

4.1 CONCLUSION

The Kenyan legislature can trace its roots back to the 1900s and has made present steps to the present time. Good governance is a multifaceted concept that encompasses values such as transparency, accountability, public participation among others. A keen look into Parliament and how it has helped in promoting good governance involves a deep dive into its functions and its performance of the functions. It is important to note that the values have been substantially implemented with a challenge being political interference and lack of political will. Adherence to the Constitution is the first step in promoting good governance. Parliament therefore has to always follow the provisions of the Constitution to ensure that good governance is a norm in Kenya

4.2 RECOMMENDATIONS

1. Improved access to information.

The legislature should focus more on providing citizens with more information about the bills. The CLT system is a progressive idea however it only affords one the opportunity to track the progress of the bills rather than the contents of the bill. The Parliament can incorporate technology and Artificial Intelligence to make the system much more effective. While at it, the opportunity gives the young people in society an avenue for employment and latitude to help move the country forward. The awareness created on a certain policy should target the marginalised individuals and incorporate means such as local languages in order to reach a larger population. The above can be incorporated to improve transparency.

2. Objective public participation

The main objective of public participation is to involve the ones affected by a decision in the decision-making process. This essentially means that you will consider the views of the public and incorporate them in the final decision or provide sufficient reasons for failing to incorporate the views. Parliament should be objective when seeking the views of the public and ensure that all views are accepted and relevant views accommodated in the selected policies.

3. Scrapping of the Constituencies Development Fund

The CDF's objective is good since it intends to ensure that constituencies are fully developed and the special fund aids the vulnerable people in the society. The fund however creates confusion since there are no clearly defined areas in which the fund operates. This results in double funding of projects resulting in wastage of funds. The fund also creates an avenue for corruption since the MPs are in charge of regulating the fund. Reports from the Auditor General indicate missing funds that cannot be adequately accounted for. The CDF impedes accountability and this undermines good governance.

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A CRITIQUE OF THE LEGISLATIVE ROLE OF KENYAN PARLIAMENT IN ENSURING GOOD GOVERNANCE

Isack Omondi

CHAPTER ONE

1.0 ABSTRACT

The concept of Good Governance has grown to be a prevalent matter in policy discussions across nations. Good Governance harmonises principles that are related to the effectiveness, transparency, accountability and participation of the people. The author specifically focuses on how good governance has been impacted by the parliament through accountability, transparency and public participation. This has been assiduously carried out by first identifying a problem statement of which is the origin of the author's work. As the author continues, he goes through the theoretical and conceptual framework of the study. Onto the substantive part, the author in an orderly manner focuses first on accountability in relation to good governance. This is then followed by transparency and public participation. The conclusion then points out the gaps left amid the parliament's efforts in enhancing good governance in its legislative role. This is a critical writing format.

1.1 INTRODUCTION/ BACKGROUND OF STUDY

In a republic that cherishes democracy, the voice of the people plays a crucial role in how they are governed. Following this, the Constitution of Kenya was meticulously drafted especially Article 1(1) which expressly provides that "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this constitution ." Further, Article 1(2) gives the options of exercising the power directly or indirectly . This was aimed at maintaining order in governance as a result of the proximity to impossibility of every citizen participating in governance directly. The provisions in the second sub-article of article 1 gave birth to Article 1(3)(a) from where the parliament gets its power . The parliament plays a very key legislative role pursuant to articles 94 and 95 . This delegation of power does not give the parliament unlimited power.

Participation of the citizens is enshrined in Article 118 of our constitution. It is a crucial constitutional principle in the role of the parliament in legislation. Public participation is the act of consulting those who are to be affected by decision-making process .Parliament has to uphold the national values and principles of governance given in Article 10(2)(c) which include good governance, integrity, transparency and accountability . The questions of transparency, accountability and public participation have risen over the past years with the eye opener being the finance bills for the two consecutive years that is 2023 and 2024. Specifically, the finance bill 2024 leading to an eruption of chaos which posed a threat to the stability of the nation. This paper delves into the issue in an attempt to answer this legal question.

1.2 PROBLEM STATEMENT

Despite the constitutional and legislative frameworks designed to promote good governance through public participation, transparency, and accountability, the Kenyan Parliament has consistently faced public criticism for inadequately responding to the concerns of its citizens. Recent events, such as the passage of the Finance Bills of 2023 and 2024, have intensified this scrutiny, with the public decrying rushed legislative processes,

limited genuine public engagement, and a perceived prioritization of political party interests over the will of the people. These concerns raise critical questions about whether Parliament has been effectively discharging its legislative role in alignment with the principles of good governance. The persistent disconnect between the legislative process and public expectations points to a systemic challenge in balancing efficient law-making with meaningful citizen involvement. This research, therefore, seeks to critically examine the extent to which the Kenyan Parliament fulfills its legislative mandate in a manner that is accountable, transparent, and participatory, and to explore how the current gaps undermine public trust and the realization of good governance.

1.3 THEORETICAL FRAMEWORK

1.3.1 Social Contract Theory

The social contract theory explains the origin of governance. Thomas Hobbes, John Locke and Jacques Rousseau were the proponents behind it. These theorists attempted to explain how an organized society came to be. Their argument was that civil society come about from a social contract amongst the people.

Rousseau argues that the combined will of the people is what gives social contract its legitimacy. According to his reasoning, social contract prospers on one condition which is, that the will of the people is taken to be a crucial factor in administration. This leads to the notion that anyone who rules over the people without taking to consideration that power originates from the people breaks the laws of the land as it is impossible for the people to give up their sovereignty.[59] The validity of governance is drawn when the will of the people is held to be paramount. Jean Bodin opined in his theory of constituted theory of sovereignty that sovereignty is vested on a particular entity being either the monarch, a parliament or a constitution. This theory emphasizes the legal aspects of sovereignty, where the authority to govern is derived from a legal framework or governing body. However, the constituted theory of sovereignty fails to give the remedies to violation of the will of people, as has been stated in the theory of Social Contract; anyone who does prioritize the will of the people is a violator of the law.

1.4 CONCEPTUAL FRAMEWORK

According to Thosmson in Beyond Instrumentalised Politics, democracy is participatory where those governed take part in agenda setting, identifying priorities, and formulating public policies. Anything not involving public participation is in breach of democracy. This is because non-participatory democracy, makes the will of the people sham either by ignoring them or by not consulting them in making laws, and therefore treating them as lesser beings or agents. (Thomson : Beyond Instrumentalised Politics, 2024) This reasoning is quite encouraging but the proponent fails to describe what participatory entails. This is in terms of the thresholds of the participation, the scope and the responsibility of those who have been vested with authority to represent the people in terms of giving feedback to the people as to the reasons for considering and not considering them in some aspects thus the necessity for this research paper.

Democratic governments at times fail to fulfil the will of the people making the citizens demand for transparency, a principle which has often been referred to as the solution "for disregard of the people

59 African Network of Constitutional Lawyers (ANCL) and others, "TOWARDS PROMOTING ACCESS TO INFORMATION IN KENYA" (2011) <https://ancl-radc.org.za/images/ati_resources/ANCL-ATI_national_study_in_Kenya.pdf>

and operations of government where government claims to be democratic but where it falls short of its rhetoric" . Advocacy for "open" governments globally by way of transparency, participation, and accountability are marked as milestones in the road towards ensuring routine and daily government procedures, produce, actions, services, and products accessible to the members of the public and viewed by citizens as representing the substance as well as the appearance of democracy.

CHAPTER TWO

2.0 SUBSTANCE OF RESEARCH

2.0.1Accountability of Parliament

Accountability means that "those who hold and exercise public authority are held to account. " Holding one accountable translates to taking possession of the endgame of an act. Its significance was evident in the case of Institute of Social Accountability & another v National Assembly of Kenya & 3 others (Petition 1 of 2018) [2021] KESC 30 (KLR) (6 August 2021) (Ruling) where the High Court found against CDF that it violated the principles of accountability and transparency, asserting that legislative actions must comply with constitutional mandate. Every government and organization is required to take possession of all its duties, rights, authorities, and obligations in order to achieve the objectives that have been set. Aims of accountability in the exercise of public authority, with regards to parliament, are:

(1) to check on use of authority avoiding ultra vires acts

(2) ensuring efficiency and effectivity in the use of resources

(3)Continuous promotion and improvement of work performance.

Through these objectives, the parliament ensures promotion of democracy which is one of their most crucial functions pursuant to article 94(4) which provides as follows, "Parliament shall protect this Constitution and promote the democratic governance of the republic. " However, the Kenyan people hold different opinions as parliament also strives to do its best in promoting good governance in its legislative role. It is in this sense that the paper critics its accountability based on various dimensions of accountability.

2.0.1.1 Accountability and Executive Influence

In most instances, the President in each period has often enjoyed the advantage of having majority of the members of parliament aligned to him. This is as a result of being the party leader of the party with majority. The public often criticizes this opining that it reduces the parliament's effectivity of maintaining good governance through the aspect of checks and balances. The political party that forms the government usually has their objectives as a party including party loyalty which is buttressed by the Constitution itself.

Political party legislation is in Article 92 of the first in the hierarchy of laws in Kenya. Following this, the parliament enacted The Political Parties Act No. 11 of 2011. In its Preamble, it states that its an Act of Parliament with provisions 'for the registration, regulation and funding of political parties' and other related functions. Section 14(5)(e) provides that "A person who, while being a member of a political party promotes the ideology, interests or policies of another political party shall, notwithstanding the provisions of subsection (1) or the provisions of any other written law, be deemed to have resigned from the previous political party. This section dictates party loyalty upon members of parliament.

The President being the leader of the political party with majority in parliament has a say in the ideologies of the party. Take an example of the Finance Bill 2024 where the President had to call for a parliamentary group meeting at the state house of Kenya Nairobi, a meeting whose target was to ensure that the finance bill passes despite opposition from Kenyans. Here the members of parliament were at a dilemma whether

to put the interests of the party ahead or those of the people but majority chose the party taking to account section 14(5)(e) of Political Parties Act. How then do we expect the parliament to conduct its legislative role properly in ensuring good governance if by going against the executive a member finds him(her)self at limbo of exiting the party which translates to losing the parliamentary seat pursuant to Article 103(e)(i) which states that "The office of a member of parliament becomes vacant if having been elected to parliament as a member of a political party, the member resigns from that political party or is deemed to have resigned from the party as determined in accordance with the legislation contemplated in clause(2)"

The above brings challenges with following the bills that originate from the executive where the members of parliament find themselves in dilemma of whether to place party interest ahead or the interests of the citizens. This to a greater extent infringes on the parliament's independence which is a great threat to good governance in the republic of Kenya. This could give rise to a minute dictatorship where the executive will at all times push for laws that it has special interest in due to the indirect control of the houses of parliament.

Parliaments have been categorized based on the extent to which they take to consideration what the electorates want. They include;

(i) "rubber stamp legislatures." These are sham legislatures that merely exists to fulfill the wishes of the executive.

(ii) "arena legislatures."This is a true definition of the will of the people. The parliament works towards the interests of the people.

The law classifies our parliament as arena legislatures while the critics would classify it as rubber stamp legislatures taking to consideration the practice of enacting legislations in which the executive has special interest in. This has to a great extent reduced the people's confidence in the parliament as they presume that they work under orders of the executive. Confidence is inherent where there is good governance. Lack of confidence by the people in their parliament shows there is little or no good governance in the republic.

2.0.1.2 Professional Accountability in Legislation

This means that the members of parliament must carry out their legislative function with a lot of competence to avoid having erroneous legislations which may end up subjecting the people to dire consequences. To this extent, some argue that for one to qualify to be a member of parliament, such a person has to be an active member in the legal field, that is being a lawyer or one with some scintilla of understanding of law. The basis of their reasoning that the most crucial function of the parliament being law making, makes it unsuitable for one with limited knowledge of law to engage in law making. It is impractical for an individual to make what he has little understanding about. In some incidences the members of parliament end up voting for bills in which they have little knowledge about. They merely attend to vote 'yes' or 'no' when pushed by the interests of their political parties.

However, the scope of responsibilities of the Kenyan parliament is so wide that it cannot be left for lawyers only. The constitution in Article 124 establishes various committees of parliament. These committees have a special oversight role and play a very crucial role in planning

of good governance. An example is Budget and Appropriations of the National Assembly. This is a very critical committee that requires high level of professionalism in economics in order to properly work.

To enhance professionalism, there is an established institution called The center for Parliamentary Studies and Training which is an institution that equips parliamentary staff with skills both the members of parliament and the support staff.

2.0.2 Parliamentary Transparency

"Transparency has many elements: open government, with access to official forums, and institutions that respond to the citizen; freedom of information laws; protection of public interest disclosure (whistleblowing); a free press practising investigative journalism; and a lively civil society sector campaigning for openness of all these kinds. " Regarding parliament, transparency is an open government with access to official forums and institutions that respond to the citizens. Mutual reports and feedback between the parliament and the people enhances openness. Article 10(2)(c) of the Constitution of Kenya 2010 lists transparency as a principle of governance which binds all state organs, state officers, public officers and all persons. Parliament being a state organ has to conduct its activities in a transparent manner.

2.0.2.1 Public ownership of Parliamentary Information

Parliament is an institution financed by the tax payers money hence a public institution. Thus it is right for parliamentary information to be shared to the public for transparency. For legislative purposes, parliamentary information includes texts of written legislations and amendments, legislative process and committees.

Access to information is a constitutional right pursuant to Article 35(1)(a) which states that, " Every citizen has the right to access information held by the state. " Access to Information Act was enacted to give effect to Article 35 of the Constitution of Kenya. Section 5(1)(a)(iii) states that "Subject to Section 6, a public entity shall facilitate access to information held by such entity and which information may include the procedure followed in the decision making process, including channels of supervision and accountability. " Section 5(1)(a)(iv) also provides for the disclosure of salaries. This has a ripple effect of combating corruption as whatever that is done is on the face of the people, no secrecy in the legislative process. Reducing corruption is one of the biggest steps towards enhancing good governance as public officers act responsibly towards upholding integrity in governance.

The Kenyan parliament to a great extent has achieved sharing information on parliamentary activities with the citizens. Parliamentary bills whether amendment bills or totally new legislations are usually shared to the public in online sites where the parliament awaits for feedback. The channel named Bunge TV also comes in handy in making information more accessible to the public. A challenge arises to individuals who have limited access to internet or any online platform. To this extent, the parliament has failed in its mandate of promoting access to their information.

2.0.3 Public Participation

In governance, public participation is the consultation, either explicitly or, vicariously

of those who have interest as to the end results of whatever that is to be done. The people are crucial shareholders in that they are able to take part frrst, explicitly, second, vicariously through elected representatives when making, adopting and implementating the laws and policies that affect them. Participation of the people is therefore an important component of the relationship between the government and the people. (Roberts 2004; Jacobs et al. 2009; Bryson et al. 2013).

The Constitution in article 118(1)(b) states that "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees. FurtherSection35(2)(b)ofPublicFinanceManagementActmandatespublicconsultationduringbudgetpreparation.

Again, Section 207 provides for citizen participation in financial management. Pursuant to the case of Robert N. Gakuru & others V Governor Kiambu County &3 Others[2014]eKLR, it was stated by the court inter alia that the illusory version of public participation ought to be avoided but it should rather be real being not to be treated as a formality.

The question of public participation has become very rampant within the past years mostly associated with finance bill 2023. The parliament has often been accused of not putting to consideration the will of the people collected during public participation in the sense that the proposals collected do not see the light without the parliament giving substantial reasons for the rejection of such proposals.

Another question that arose was the introduction of some amendments in post public participation stage. Here, the Court came up with a finding that the sections which brought conflict had been brought in after public participation which was not opposed. The court held that another public participation was not necessitated also putting to consideration the time restraint of Finance Bill 2023.. This was the finding in the case of Cabinet Sectretary for National Treasury and Planning & 4 others V Okioti & 52 others. In as much as the parliament is not obliged to bring it back for public participation, the process deserves to be transparent as amendments made ought to be made available to the public.

Parliament has to provide feedback so that the members of the public have confidence in the decisions that parliament makes in legislations. In the feedback, the parliament ought to give reasons for making the amendments and for not considering some of the opinions collected during public participation. If this practice is embraced then a greater percentage of citizens will feel satisfied with the transparency of the process hence good governance. Parliament greatly failed in this stage as most of the proposals were rejected without giving out reasons as indicated in the public participation report for the 2023 Finance Bill.

However, an exception was established in the case of Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others [2018] eKLR where fresh amendments brought into a bill which did not find their origin from the process of public participation have to be taken back to the public for a fresh public participation. Not subjecting such provisions to public participation is an insult to the sanctity of the legislative process and an insult to the principles of transparency, accountability and good governance.

In the 88th paragraph of the ruling, the court gave guidelines of public participation as follows;

(i) Public participation applies in all aspects

(ii) The responsibility of ensuring public participation is on whoever who is undertaking a process

that requires public participation.

(iii) Absence of legislation is not a limiting factor to legislation.

(iv) Public participation must be real and not illusory.

(v) Public participation has to be meaningful.

(vi) Notice of reasonable quality has to be given.

(vii). Both written and oral submissions are applicable in public participation.

(viii) There is no automatic repudiation of public participation based on allegations of absence of consultation but circumstances of each case has to be considered.

There is practical deficiency in matters public participation when it comes to civic education. There is unreasonableness when the parliament claims to have conducted public participation when a great population especially those in marginalized areas have no understanding as to what public participation entails, leave alone legislations. We do not expect them to ensure transparency of the process that they have little understanding about. This saw the parliament receiving ten thousand memoranda when there was a call for public participation. Calling this adequate public participation is quite frivolous as the number of memoranda in relation to that of electorates brings negligible percentage. The few politically literate are the ones who are involved in public participation which is against democracy which advocates for involvement of all thus a limiting factor to good governance.

CHAPTER THREE

3.0 CONCLUSION

From the findings in the research paper, it is evident that to a larger extent the parliament suffers influence from the executive branch of government which is a big threat to good governance of the republic of Kenya. This therefore calls for political goodwill of the Kenyan political class which will embrace good governance.

Also, questions of public participation still bring in ambiguity as the courts have to contradict each other in decision making. This therefore calls for the parliament to enact a legislation which will lay down a proper framework for public participation across all sectors. This will give full effect of Article 118 of the constitution which promotes transparency of the legislative process hence good governance.

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TOPIC 2:

IMPACT OF THE WITHDRAWN FINANCE BILL 2024: ON FISCAL SUSTAINABILITY VIS A VIS CIVIL POLITICAL RIGHTS

STRIKING A BALANCE: FINANCING THE FUTURE WHILE IMPEDING THE PRESENT TAXPAYERS

Nigel Chipinde Akilimali

ABSTRACT

In the age of progressive tax regimes guided by the principle of protecting the inherent right of life and to live a good life, we reason Kenya's fiscal policies would follow suit. However, we see the State commit the cardinal

sin of impeding the crystallization of civil political rights. These rights are intrinsic to human dignity and are linked to achieving fiscal sustainability. The paper illustrates how the withdrawn Finance Bill 2024 proposed a myriad of problematic changes all stemming from the focus on regressive taxes. Justifying the voice of the citizens of Kenya, the author aims to dive into three regressive taxes that were instrumental in the Finance Bill s deviation from the capabilities approach specifically the eco levy, VAT and excise duty, in that they would deny taxpayers their substantive freedoms in realizing functions like nutrition or healthcare. Proposing a keener introspection into what the taxpayers want, it highlights the challenges they faced with a focus on the right to equality and how these regressive taxes propagate income inequality.

INTRODUCTION

Austin O'Malley affirms in both levying taxes and in shearing sheep, it is well to stop when you get down to the skin. Similarly, we find this principle in the implementation of a fiscal policy. The year 2024 saw many contentious matters rise and fall, but none with the effect such as the withdrawn Finance Bill 2024 (herein after referred to as the Finance Bill). With the mass protests by Kenyan citizens within her borders and in foreign lands, it is only fair to seek the truth as to the underlying reasons as to why many Kenyans felt their personhood was under attack.

The Finance Bill was an alleged solution to the deterioration of the state's economy which was only weakened by the debt unsustainability. The bill ultimately aimed to collect enough revenue to sustain the debt repayment and prevent debt default which has been a common issue in African states. However, it unknowingly created a fundamental flaw.

The canons of a good tax structure are founded on fairness and equity; therefore, it is quite peculiar that the finance bill focuses on increasing indirect taxes which inherently and to a greater extent affect middle to low taxpayer brackets. However, Mbadi, the Cabinet Secretary for the National Treasury and Economic Planning, praised the government for providing appropriate mechanisms to tailor-fix the economic issues burdening sectors like agriculture. Despite this erroneous statement, the author argues that a tax structure that limits specifically the right to equality of its taxpayers, increasing the tax burden to middle to low income earners, is bad for fiscal sustainability.

Stricto sensu, fiscal sustainability, according to Shayne Kavanagh, refers to the ability of a government to maintain its financial health over a long period of time in a manner that does not resort to practices that can have a negative impact on the overall quality of life. With this contextual definition the premise, the overall goal of fiscal sustainability being the satisfaction of citizens, finds its foundation. The appropriate definition of satisfaction is the crystallization of civil political rights which inherently lie in human dignity. Consequently, the key right to be protected is the right to equality as an imbalanced tax burden that disfavors the middle to low-income earners affects their ability to have a good quality of life.

The paper begins by introducing the research problem and providing a contextual background as well as the core thesis. Subsequently, part II will tackle the problem statement and part III will address the theoretical framework and specifically introduce the theory 'capability approach.' This theory will support their claims as its core principle is like that of fiscal sustainability. Part IV will be the literature review and capture the essential discourse around this topic. Part V will focus on three main levies to support the core thesis. Part VI will be the conclusion and give a solution to the problem.

PROBLEM STATEMENT

The economic state of Kenya is riddled with unemployment and challenging market conditions. Despite this, the State has continued to view human resources as one of absolute exploitation. Albeit the possible legitimate aims to justify their actions of taxation, such as to fund the recurrent and developmental expenditure, there needs to be certain limitations as to how far this agenda can be pushed before it diminishes fiscal sustainability and inhibits the right to equality (a principle of a good tax).

The author seeks to validate the uproar through a critical analysis of three key tax proposals contained within the Finance Bill through the lens of fiscal sustainability in a manner that ties to the realization of the right to equality. The three key tax proposals that will aid this discourse include: the eco levy, the excise duty and the implementation of VAT on industries like financial technology service providers commonly referred to as 'fintech'. The rationale behind reviewing these three tax proposals is because they are all regressive taxes as opposed to progressive taxes. A claim that shall further be discussed.

THEORETICAL FRAMEWORK

4.1 Capability Approach

This theory developed by Amarya Sen, is rooted in the principle of the most important thing being what people can be and do. Directly tied to measuring the quality-of-life individuals can achieve, its core concepts of analyzing this are 'functionings' and 'capability'. Sen defines 'functionings' as the states of 'being and doing' such as being educated or being well-nourished. 'Capabilities' on the other hand refer to the real and substantive freedoms that lack obstacles allowing an individual to choose between different functionings.

Real Freedoms as used by Sen often have misunderstood definitions. These forms could be trivial, valuable or detrimental. He argues that it is important to not limit the definition of freedom as this approach relies on widening the range of possible ways of life, a person can choose (achieve different functioning's) which was similarly supported by Nussbaum. Moreover, he argues that the core of this approach is capabilities. Seeing as we live in a liberal world, freedom is an inherent right.

Basing this paper on this approach is appropriate because its central objective aligns with the objective of fiscal sustainability, which is promoting a good quality of life. This paper aims to weigh the finance bill's subject matter against the objective of protecting and promoting a good quality of life.

Despite several economic theories existing as to how fiscal sustainability can best be measured, the author intends to focus on a theory away from the mathematical evaluation of such. The core reason for focusing on the crystallization of human rights is due to the critiques these economic theories face. Not to disclaim what economists such as Robert Arai have proposed that fiscal sustainability at its core be measured through ratios of public spending to Gross Domestic Product (GDP). A purely empirical analysis to determine a form of state sustainability fails to consider the humanity that instills the sovereignty of the state. Additionally, the fact that GDP is not a conclusive indication of a good quality of life for the majority and that its calculation itself is based of flawed presumptions that will be discussed in the part below.

LITERATURE REVIEW

5.1 The flaws of a pure economic analysis on fiscal sustainability

When it comes to measuring tax burden there are three key levels: under taxation, optimal taxation and over taxation. Normatively, there is no specific numerical threshold or figure, instead it is a relative measure showing the extent taxes affect individual welfare and economic activities in comparison to previous tax regimes. Jedrzejowicz argues that the prescribed method applied in calculating tax burdens by many countries is an empirical assessment of the tax to GDP ratio. This method faces a myriad of limitations that distort the accuracy of the tax burden a claim he further posits. These limitations include several methodological issues such as:

1. Taxes paid on government expenditure should be separated as they do not impact on the private sector economic activities, however this is not always the case.

2. Discrepancies as to how tax revenues are defined and what is included in the GDP are making it difficult to conduct comparative analysis across different nations.

3. Inconsistencies with regards to how tax revenues are classified where we have some mandatory social benefits paid by employers being classified differently influencing the overall tax burden assessment.

Additionally, the consistent use of GDP under the assumption of an ideal state where such methodological issues either do not exist or do not hinder the GDP, raises concerns on the accuracy of the conclusions made. According to the Ministry of Agriculture, such factors come to light when the failure to account for non-market production come to play where in Kenya approximately four million Kenyans practice subsistence farming, with less than a quarter of that practicing commercial production. They add that this inequality of scales leads to the misrepresentation of the total economic output of a country since GDP does not account for non-market production like subsistence farming.

Limitations like this hinder the effectiveness of an empirical analysis, and this paper therefore takes a rights-based approach to measure the fiscal sustainability of the Finance Bill as it does not face methodological issues.

5.2 Progressive taxes structures and their legal foundations

Article 201 (b)(i) clearly states that the burden of taxation shall be shared fairly, this sub-article has clear and direct influence from article 10(2) (b) on the promotion of equity which binds all state organs. These articles, read conjunctively, bind Parliament to ensure all fiscal policies with regards to tax structures are equitable and fair.

An important canon of tax is equity as developed by Adam Smith, which requires the rich people pay more taxes and the poor to pay less, different from equality which demands everyone pay an equal amount of tax. The rationale for this concept can be brought back to the capability approach by Sen. It is necessary to be cognizant of the dangers of a tax structure that does not follow this rule because of the resultant effect it will have on the realization of

substantive freedoms to those classified as low income. The resultant effect being pushing people into poverty.

The progressive tax structure the preferred tax structure, excels in implementing this principle because it is founded on the concept of higher tax rates for those with higher income focusing on progressive taxes. Progressive tax, is what financial journalists like Julia Kagan describe as taxes that increase or progress as taxable income increases. Implemented through the creation of tax brackets grouping taxpayers by income range, the rationale is based on the disproportionate burden that would arise with flat tax or regressive tax. This advantageous method allows low-income earners to be able to sustain a basic lifestyle and achieve a standard quality of life and additionally spend more on indirect taxes which would similarly stimulate the economy.

Matt Grundoff points out that although critics argue that this tax is a disincentive to achieving higher income levels, it is important to understand that these logical fallacies are based of no evidence. Studies by the IMF have shown that low taxes for high income earners do not incentivize them to work harder. It is important to address these concerns as the opposite of progressive tax structures, regressive tax structures, are significantly more problematic.

Regressive tax structures focus on taxing consumption taxes/ indirect taxes like: value-added tax (VAT), excise taxes, international trade taxes and many other forms of taxes. A focus on these regressive taxes leads to the economic burden on households, as industries pass the tax off to consumers increasing the buying prince. The Finance Bill 2024 is regressive increasing indirect taxes that would disproportionately affect low income earners and a clear differentiation of the two tax structures shows that it ought to have been progressive in order to be equitable.

5.3 The finance bill's regressive taxes and their impact on right to equality

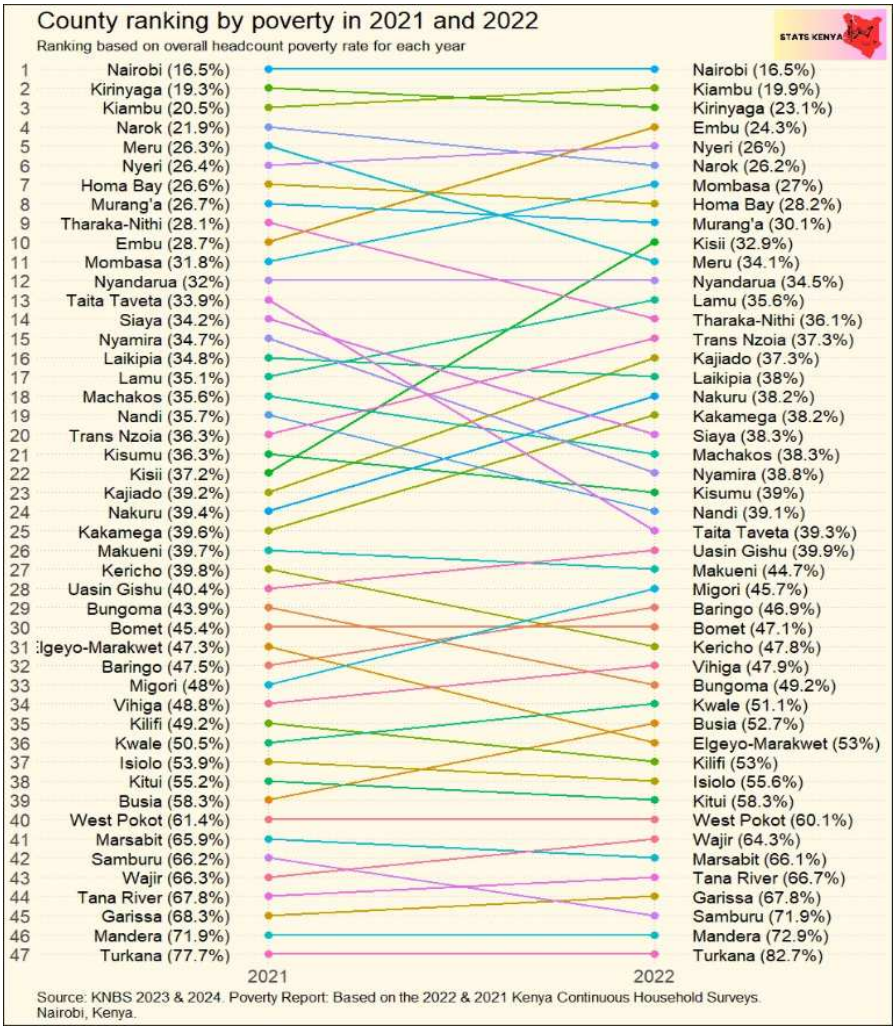
Looking keenly at the finance bill's provisions one can conclude that it is heavily centered on increasing regressive taxes. These taxes include value-added tax (herein after referred to as VAT), the excise duty, eco levy as well as the amendments proposed in the Miscellaneous Fees and Levies Act Cap. 496C. A brief analysis of each levy shows a danger posed to the consumer as these taxes are passed down to the consumer as will further be explained. Carmona suggests these taxes play a major role in increasing inequality levels and supports the argument that this tax proposal is in fact not pro-poor. The disproportionate effects it has on the middle to low-income taxpayers of the country consist of an outright violation of their civil political rights. These rights will be introduced with the discussion of each disadvantageous levy.

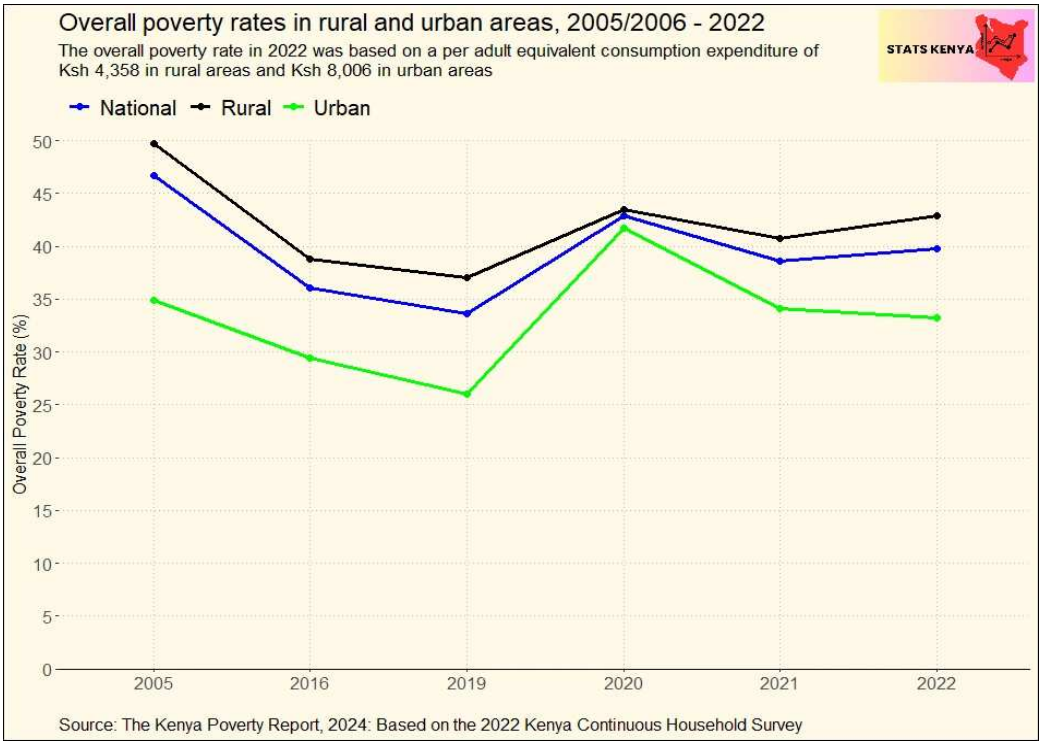
5.4 Poverty rate in the country as of 2022

The most recent report on the poverty rate in Kenya was conducted in 2022, and its analysis shed light on very important facts. Presented by StatsKenya, the poverty rate in rural areas increased from 37% in

2019 to 42.95 in 2022 where we see the COVID-19 pandemic was indeed a key reason for this drastic increase. Similarly, in urban areas, the poverty rate increased from fifteen-point seven percent (15.7%) to thirty-three point two (33.2%) in 2022.

With major counties leading the poverty rate scale, it is unfortunate that they similarly have high populations which only adds statistical data to the current poverty crisis. According to the data, rural areas are leading in terms of population of people living within or below the poverty line. This only spotlights the issue's existence without the impact of the finance bill's unfair tax propositions.





The author's rationale illustrating the above statistics only shows those who will be affected by the finance bill at the extreme end of the wealth distribution analysis. A key consideration is the impact it will have on the middle-class taxpayers because they similarly constitute most consumers who pay indirect taxes. This

Figure 2. Shows the linear comparative graph of poverty rates in rural and urban areas between 2005 to 2022

is supported by a case study in Latin America highlighted by Magdalena, concluding that those who are relatively poorer and do not constitute the wealthy class, pay up to two point four (2.4) times higher regressive tax than the wealthy class pay.[60] The justification for using this case study is that Latin America constitutes global south countries just like Kenya with similar characteristics economy-wise.

60 Magdalena (32).

THE NEGATIVE IMPACT OF THE FINANCE BILL'S INDIRECT TAXES ON RIGHT TO EQUALITY

6.1 The fiscal unsustainability arising from the general provisions of the Finance Bill

The Finance Bill was disruptive to the achievement of fiscal sustainability. The government had the goal of raising an additional three hundred and two billion Kenyan shillings in revenue, a forty three percent increase in tax rate.[61]

This is problematic for the taxpayers because it would greatly shift their capability to meet the basic needs of a good life. Drawing references from the above statistics on poverty and the great population of those affected this will lead to a downgrade and decrease the exploitability of the freedom's discussed by San. The Bill proposed several obstacles to achieving a good quality of life which is the appropriate metric of fiscal sustainability.

This problem is examined within the view of a complete ignorance of the taxpayers' rights to public participation, transparency and accountability. This position is supported by the uproar that ensued within the country. With protests spanning across almost all counties and lasting about a month with the main message being "#rejectfinancebill2024" it is unequivocal that the public view was not taken into account before its creation.[62] The author's view, is guided by the impacts of the protests that reached international status in affirming there was unaccountability on the end of the state and that there lacked transparency in the formulation of this fiscal policy. Additionally, these protests were a clear indication of the ineffectiveness of the public participation that the state is mandated to do according to Article 201 of the Constitution of Kenya.[63]

In sum, before diving into the nitty-gritty of the finance bill, this finance bill was a complete deviation from the mandate of accountability, transparency and public participation that must be conducted when creating fiscal policies. These deviations of constitutional rights are what the author highlights as the clear hinderance from fiscal sustainability (having a good quality of life).

6.2 The eco levy on women's rights to attain standard reproductive health

The eco levy is a fairly new environmental tax targeting manufacturers who import select plastic products[64] as a response to the promotion of the sustainable development goal twelve (SDG 12) on responsible consumption and production.[65]It works by charging a specific amount on imported plastic, depending on the weight which is to be paid by the manufacturer or importer but is ultimately brought forward to be paid by the buyer. [66] The eco levy is not a particularly novel tax to be implemented within Kenyan jurisdiction, rather is a double tax following the extended producer responsibility levy.

61 Fredrick Kimotho, 'Finance Bill 2024 enters the crucial stage following active public participation' (Deloitte 18 June 2024) < https://www.deloitte.com/ke/en/services/tax/analysis/finance-bill-2024-enters-the-crucial-stage.html> accessed on 10 December 2024.

62 Al Jazeera, 'Kenya on boil as anti-tax protesters killed in police fire: All to know' (Al Jazeera 26 June 2024) < https://www.aljazeera.com/news/2024/6/25/kenya-on-edge-will-anti-tax-protests-erupt-again-amid-national-strike> accessed on 10 December 2024.

63 CoK 2010, a 201.

64 Kenya Association Manufacturers, 'Eco levy- a deep dive for Kenyan manufacturers and mwananchi' (Kenya Association of Manufacturers) < https://kam.co.ke/sustainability-growth-under-kenyas-2024-finance-bill/#:~:text=This%20is%20a%20new%20environmental,collection%20centres%20across%2047%20counties.> accessed on 10 December 2024.

65 United Nations, 'The 17 goals' (United Nations) < https://sdgs.un.org/goals> accessed on 10 December 2024.

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With the same objective in mind, the extended producer responsibility (herein referred to as EPR) regulation was introduced under section 13 of the Sustainable Waste Management Act.[67]It was implemented and worked effectively to an extent and the implementation of the eco levy is not a substitution but rather an addition. The EPR levy operated under the National Environmental Management Authority (NEMA) where the plastic producers are required to pay a levy to a waste management scheme to handle their waste.[68]

The Finance Bill proposed to charge various rates for varying forms of manufactured goods such as electronic machines, sanitary pads and batteries and many other things.[69]This paper claims this to be problematic as it will affect the basic cost of women in Kenya to access sanitary pads. With the idea of this to promote local production, women already face constraints with locally manufactured ones and must consume imported ones. Constraints on level of quality between imported sanitary pads and locally manufactures sanitary pads exist evidenced by studies in various African countries.[70] Quite the irony as Kenya through senator Orwoba led a campaign to end period poverty.[71] The key question the author asks is how can women comfortably have a good quality of life, yet they are clearly being disadvantaged?

This is a direct breach of financial inclusion based of their protected characteristic of sex, perpetuating a systematic inequality. Women-led households are statistically the poorest leading by forty-eight-point three percent (48.3%) therefore how can the finance bill propose a tax that will further increase the lack of real freedom of choice to achieving their functioning of reproductive health care. [72] The conclusive result is that this double tax is both unnecessary and unequitable, affecting women.

6.3 The impact of value-added tax (VAT) on the fintech consumer

For this discussion, a specific focus is given on the fintech sector as opposed to the general overview on the impact on the industrial sector. VAT is a consumption tax on goods and services which is taxed from the initial production of the goods and services. [73] This therefore translates to an amount that is dependent on the cost of the product less the cost of materials taxed in the production stage. The tax is passed onto the buyer, or the end-user, and it raises government revenue. [74]

The finance bill 2024 proposed a myriad of changes concerning VAT. These included taxing the standard rate of VAT to financial services (fintech) that were previously exempted. Services such as issuance of credit cards, telegraphic money transfer services and foreign exchange transactions would be taxed at the standard rate of sixteen percent.[75]

67 , Sustainable Waste Management 2022, s 13.

68 National Environment Management Authority, 'Public Notice to all producers' (NEMA 30 August 2023) <https://www.nema.go.ke/images/Docs/EPR%20ACT/EPR%20Public%20Notice.pdf> accessed on 11 December 2024.

69 KPMG, (n 31).

70 Nyoni et al, 'Performance characteristics of local and imported sanitary pads', (Zimbabwe Journal of Science & Technology 2014).

71 Lenny Ruvaga, 'Battling period poverty in Kenya' (Harvard Public Health 4 December 2024) < https://harvardpublichealth.org/reproductive-health/battling-period-poverty-in-kenya/> accessed on 11 December 2024.

72 Stats Kenya, 'Overall poverty rates in Kenya by county', (Stateskenya 4 August) <https://statskenya.co.ke/at-stats-kenya/about/overall-poverty-rates-in-kenya-by-county/62/#> accessed on 9 December 2024.

73 Uradu L, Jackson A, 'What is value-added tax' (Investopedia 12 June 2024) < https://www.investopedia.com/terms/v/valueaddedtax.asp> accessed on 10 December 2024.

74 Ibid.

75 Alex Mathini and others, 'Kenya: The Finance Bill 2024' (Bowmans 13 May 2024) < https://bowmanslaw.com/insights/kenya-the-finance-bill-2024/> accessed 10 December 2024.

To illustrate the magnitude of this tax effect, a Microserve report in 2017, shows two million seven hundred thousand Kenyans had records in the Credit Revenue Bureau. This means they used financial services like Fuliza and Tala. Additionally, further reports show that in 2019, Mpesa reported sixty percent nationwide penetration.[76] Majority of these fintech startups are centered around the target audience of the middle to low-income earners since they act as a medium of promoting digital financial inclusion. The integration of fintech into a state's economy is a positive shift towards promoting income equality.[77]

Startups like Oyee empower motorcycle drivers with insurance schemes through embedded finance.[78] The effect of this increase in tax is that motorcycle drivers will severely be impacted because this levy will increase the amount the insured drivers pay and essentially hinder their ability to have medical assurance and affordable healthcare access. Similarly, Afyapoa, a fintech insurance company targeting low-income earners, will also be affected by this proposal, slowing down their human centered design[79] which has benefited society at large.

The harm suffered by the middle to low-income earners is the propagation of income inequality hindering their ability to access functionings (as termed by Sen) such as healthcare due to the high costs paid. The unreasonableness of increasing the regressive taxes poses a great challenge for achieving fiscal sustainability. Taxing the large population of taxpayers classified as middle to low-income hinders the crystallization of their right to equality. This disproportionately excludes them from achieving a good quality of life.

6.4 The impact of excise duty on fintech service consumers

Excise duty has always been perceived as a sin tax imposed with the aim of limiting the use of products that have negative social or environmental impacts.[80] They work by taxing products such as gambling, alcohol or cigarettes to discourage their consumption as they have negative moral implications.

The finance bill places this burden, increasing the percentage from the normal fifteen percent (15%) to twenty percent (20%). The fintech services facing this doble taxation (VAT and excise duty) will pass these indirect taxes to the consumers who constitute low to middle income taxpayers. This is because this cumbersome taxation would increase the cost of production to thirty nine percent, a rise that will negatively impact interest and fees.[81]

Before this increase to twenty percent, Money254 reported the rate of loan defaulting as a direct result of this tax being as high as thirty-five percent (35%).[82] This report illustrates the fiscal unsustainability of the excise duty towards the fintech space, a problem that almost exclusively affected middle to low-income earners. The inequality of this burden

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76 Kevin Mutiso, 'The evolution of fintech in Kenya', (Strathmore University Business School 17 April 2023) < https://www.youtube.com/watch?v=XocfSB8UcXs> accessed on 10 December 2024.

77 Ayse Demir, 'Fintech, financial inclusion and income inequality: a quantile regression approach', (The European Journal of Finance 1 June 2020) <https://doi.org/10.1080/1351847X.2020.1772335> accessed on 20 December 2024

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This paper highlights the prima facie existing fiscal unsustainability with the introduction of the excise duty at fifteen percent; therefore it is logical that an increase in the excise duty by a further five percent would contribute to the already looming danger of achieving a good quality of life.

CONCLUSION

To conclude, the author heavily speaks out against any fiscal policy within the withdrawn finance bill 2024 that focused on increasing tax rates on regressive taxes. This would lead to the limitation of key civil political rights which are justified and created on the concept of inherent human dignity calls for the government to introspect and gauge its priorities.

They recommend that the Value Added Tax (VAT) remain an exempted tax for plastic packaging products, the eco levy not be implemented as there already exists a tax with the same underlying rationale that functions and lastly that the excise duty remains 15% as opposed to the proposed 20%. These recommendations are tailored to balance the government's need of collecting revenue and the preservation of the right to equality.

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TOPIC 3:ROLE OF ECO-LEVY AS A PROGRESSIVE ECONOMIC TOOL TO EFFECTIVELY ADDRESS ENVIRONMENTAL PROTECTION WHILE ENSURING THE PROTECTION OF HUMAN RIGHTS.

ECO-LEVY; A PROGRESSIVE APPROACH TO ENVIRONMENTAL AND HUMAN RIGHTS PROTECTION

THE ECO-LEVY AS A PROGRESSIVE ECONOMIC TOOL IN ENVIRONMENTAL PROTECTION WHILE ENSURING THE PROTECTION OF HUMAN RIGTHS

Shaddy Blare Otieno

ABSRTACT

As the eco-levy plays a role in addressing environmental protection, it should safeguard human rights. Environmental degradation has been a persistent problem the Kenyan government has tried to solve with no perfect solution, despite the ban of plastic bags in 2017. Introduced as part of the Finance Bill, 2024, the eco-levy targets products which degrade the environment, such as plastics, diapers and electronic wastes. The levy aims at generating funds to aid in environmental conservation. This paper explains the effectiveness of the eco-levy in addressing Kenya's waste management challenges. An example was seen in the plastic ban in the year 2017, which never achieved the targeted objective. The paper also makes a comparison with countries like Rwanda where the ban of plastic bags worked effectively. Besides that, the paper also gives a report on the economic burden the eco-levy imposes on consumers, especially marginalized groups. The levy since it targets plastic products, will lead to increase of the plastic products. For example, a levy imposed on bread packaging will lead to its increase in price from Kshs 65 to Ksh 74, 1 litre of oil will shoot from Kshs 300 to Kshs 316, 1 kilogram of detergent will go up from Kshs 200 to Kshs 230. Finally, the paper gives recommendations on the approach the government should have taken in introducing the levy without increasing the cost of living and interfering with the rights of the citizens such as public participation.

CHAPTER ONE

1.1 BACKGROUND

Kenya has faced persistent environmental challenges over the years, particularly in waste management and pollution. Major urban centers continue to grapple with poor disposal of plastic bags, e-waste (such as batteries, computer components, and mobile phones), and other non-biodegradable materials. Despite the government's 2017 ban on plastic bags, environmental degradation remains a significant problem due to increased consumption and limited recycling infrastructure.

In response, the government introduced an Eco-Levy through the Finance Bill, 2024. This progressive tax targets goods harmful to the environment and aims to promote sustainable production and consumption practices. The Eco-Levy reflects Kenya's commitment to environmental protection, ecosystem conservation, and the transition to a green economy. It is also intended to raise revenue for environmental conservation initiatives.

However, the levy has been met with public criticism. Many citizens—especially those from low-income and

marginalized communities—perceive it as an economic burden rather than a protective measure. This has raised questions about whether the Eco-Levy can effectively balance environmental protection with the need to safeguard socio-economic rights.

CHAPTER TWO

2.1 PROBLEM STATEMENT

The Eco-levy plays an important role in ensuring environmental protection from degradation. It does so by imposing taxes on harmful products such as plastic packaging bags, electronic wastes, diapers and other harmful plastic products. This step of imposing levy on harmful products is to be realized progressively after its implementation as was the case of the Rwandan plastic bag ban in 2008,[83]in that, after being passed as a law, it will be implemented even in the subsequent years. The main reason for the Eco-levy is to reduce or completely stop the harm caused to the environment by these harmful products that are carelessly disposed on the environment. This does not leave behind water sources such as rivers and lakes that also face massive pollution. However, while fighting for a cleaner environment, the government in introducing the levy should ensure that Human rights are adhered to. For example, the levy ought to be introduced after the public has participated in its drafting and given their consent. This will cater for inclusivity and transparency to the citizens. This paper examines whether the Eco-levy can function as a progressive environmental tool while safeguarding human rights.

83 Moses Onyango Ogutu, Jackson Akor, Mike Ssempa Mulindwa, and Olexa Heshima, 'Implementing Circular Economy and Sustainability Policies in Rwanda: Experiences of Rwandan Manufacturers with the Plastic Ban Policy' [2023] Frontiers in Sustainability <https://www.frontiersin.org/journals/sustainability/articles/10.3389/frsus.2023.1092107/full>

CHAPTER THREE

3.0 THEORETICAL FRAMEWORK

3.1 Human Rights Framework

The Stockholm Declaration of 1972 recognizes the right to a healthy environment.[84] Principle 1 of the Stockholm Declaration emphasizes the interdependence that exists between human rights and environmental protection.[85] It states, "all people have the fundamental right to; freedom, equality, adequate conditions of life, and an environment that allows for a life of dignity and well-being." By creating a connection between the quality of life to the quality of the environment, it recognizes that environmental degradation could undermine basic human rights, such as the rights to health, life, and well-being.

The Rio Declaration of 1992 emphasises on sustainable development and environmental protection as integral to human well-being.[86] It was adopted at a summit in Rio de Janeiro. Its principles emphasize on the integration of sustainable development and environmental protection so as to ensure the well-being of the people living in the environment. Principles 1 and 4 provide for sustainability. Principle 1 states, "Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.[87]" Principle 4 states, "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[88]

Another body, The United Nations General Assembly Resolution of 2022, recognizes access to a clean, healthy, and sustainable environment as a universal human right.[89] Article 42 of the Kenyan Constitution states that every individual has the right to a clean and healthy environment.[90] This role is mandated to the state government as stated in Article 69.[91] The Eco-levy, which was an initiative of the government, plays a role in safeguarding this right by generating income to be used in maintaining a clean environment and also reducing pollution. While the eco-levy ensures a clean environment, it must also ensure it does not disproportionately affect the marginalized groups by increasing the cost of essential goods.

3.2 Economic justice

It refers to a principle aimed at ensuring fairness and equity in the distribution of economic resources, opportunities and also privileges in the country.[92] It is aimed at fair wages and working conditions, access to equal economic opportunities. This principle considers both the wealthy and the low-income households in

84 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) [1972] <https://www.globalhealthrights.org/wp-.

85 https://www.globalhealthrights.org/wp-content/uploads/2014/06/Stockholm-Declaration1.pdf **Declaration** of the United Nations **conference** on the **human environment (Stockholm Declaration)**, 1972 and the **Rio Declaration** on **Environment**

86 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/geolr29&section=25.

87 **Report of the United Nations Conference on Environment and Development**, Rio de Janeiro, 3-14 June 1992, UN Doc A/CONF.151/26 (Vol I), Principle 1.

88 **Report of the United Nations Conference on Environment and Development**, Rio de Janeiro, 3-14 June 1992, UN Doc A/CONF.151/26/Rev.1 (Vol I, 1992).

89 **Zhang Y and Tang X**, 'Ecological modernization and environmental governance in China' (2025) 31(2) Review of European, Comparative & International Environmental Law

90 The Constitution of Kenya, Article 42(a); Inter and Intra-generational use of the Environment.

91 IBID Article 69

92 Kenya Human Rights Commission, 'Economic Justice' (KHRC) <http://www.khrc.or.ke/our-work/economic-justice.html

the country (the capabilities of the citizens). Citizens with a lower capability should not be subjected to high wages which the wealthy can easily afford. For example, the Eco-levy leads to increased prices of goods which will affect the low-income households. According to Amartya Sen's approach to capability, development policies should at most enhance individuals' capabilities but not to impose hardships on them.[93] Amartya Sen's approach was supported by other scholars such as Phillip Van Paris. He has expanded the capability approach by advocating for unconditional basic income as a way of providing people the capabilities to lead lives they value. He argues that a guaranteed income would ensure a certain baseline of capabilities, supporting human freedom and dignity.[94] In our case, the eco-levy, while being implemented to promote environmental sustainability, should also preserve the citizens' economic freedoms and access to affordable goods. It should ensure it does not surpass the citizens' capabilities.

3.3 Legislative policies

When implementing the eco-levy, it must align with Kenyan's environmental and economic laws. For example, the Environmental Management and Coordination Act (EMCA).[95]

3.4 Theoretical and Legal Frameworks on the Eco-levy in Kenya

The eco-levy aligns with the Polluter Pays Principle ("PPP"). The PPP states that one who pollutes the environment pays for their actions so as to revert the harm caused to the environment.[96] This way reduces environmental degradation. The money collected from the polluters charged is channeled towards reverting the pollution caused by the polluters. When such levies are imposed to polluters, people will take caution towards environmental pollution, thus promotion of a clean environment.

93 Sen A, 'Capability Approach' (2025) Internet Encyclopedia of Philosophy

94 **Van Parijs P**, 'Competing Justifications of Basic Income' in Philippe Van Parijs (eds) Arguing for Basic Income: Ethical Foundations for a Radical Reform (Verso 1992) 3–43 https://scholar.google.com/scholar?cites=13045472745257158147&as_sdt=2005&sciodt=0,5&hl=en

95 The Environmental Management and Coordination Act, 1991: http://kmco.co.ke/wp-content/uploads/2023/01/Enhancing-Environmental-Governance-through-Law-and-Other-Tools_-Efficacy-of-EMCA-Kariuki-Muigua-January-2023.pdf

96 **Boffetta P, Kogevinas M, and Vineis P**, *"A Review of Cancer Risk Associated with Occupational Exposure to Ethylene Oxide.* "In Aaron J. Coe (ed) *Handbook of Toxicology* (Edward Elgar Publishing 2008)

CHAPTER FOUR

4.1 THE ECO-LEVY

4.2 The role of Eco-levy as a progressive tool

The Eco-levy is a progressive tool in that its objective is to progressively curb environmental degradation by imposing taxes on harmful non-biodegradable materials, that poses harm to the environment. With time, the manufacturers of these plastic materials will shift to the production of eco-friendly materials. The Eco-levy is based on the Polluter Pays Principle since it ensures that those responsible for environmental damage bear the cost to revert such harm. By imposing costs on such harmful products, it promotes for the adoption of sustainable practices that pose zero or minimal harm to the environment.

The levy generates funds for inclusive development. The funds can be used for social programs such creation of renewable energy sources, affordable public transport for instance introduction of zero emission buses in Nairobi CBD and the electric motorbikes,[97] job creation through reforestation projects. etc.

It also encourages innovation and long-term sustainability. Industries are encouraged through the levy to invest in eco-friendly technologies hence reduce environmental harm. Through this environmental sustainability is achieved.

97 https://www.researchgate.net/profile/Jacqueline-Klopp/publication/354172918_THE_POTENTIAL_FOR_MINIBUS_ELECTRIFICATION_IN_THREE_AFRICAN_CITIES_CAIRO_NAIROBI_AND_CAPE_TOWN/links/61530758522ef665fb66d03f/THE-POTENTIAL-FOR-MINIBUS-ELECTRIFICATION-IN-THREE-AFRICAN-CITIES-CAIRO-NAIROBI-AND-CAPE-TOWN.
Assessing the Contribution of Traffic Congestion to Greenhouse Gas (Ghg) **Emissions** in the **Central Business District (CBD)** of **Nairobi City, Kenya**
CN Sitati - 2021 - erepository.UON.ac.ke

CHAPTER FIVE

5.1 WHETHER THE ECO-LEVY ALIGNS WITH THE "POLLUTER PAYS PRINCIPLE" UNDER INTERNATIONAL LAW.

The PPP is a part of a set of principles which guides on sustainable development worldwide. It tackles on issues regulation of pollution that affect land, water and air. This principle asserts that those responsible for pollution should bear the cost associated with managing it so as to prevent further harm to the environment. It is enshrined in principle 16 of the 1992 Rio Declaration on Environment and Development, which states, "National authorities should promote the internalization of environmental costs and use of economic instruments, ensuring polluter pays for pollution."[98]

The Eco-levy as a progressive economic tool in addressing environmental protection, aligns with the PPP as well as the Organization for Economic Co-operation and Development "OECD". This body has for long advocated for the implementation of the PPP through the introduction of economic bodies such as eco-levies. For example, in the 1972 guiding principle touching on international aspects of Environmental policies, the OECD has emphasized that polluters should always incur the expenses of carrying out pollution prevention and the necessary/ effective measures decided by the public authorities so as to promote a cleaner and safe environment.[99]

The eco-levy on the other hand is an environmental tax which is imposed on activities or products that harm the environment. It thus directly aligns with the PPP, in that: it imposes financial responsibility on those whose products or activities harm the environment. It encourages sustainable environmental practices through this, since the fund collected herein are used in the removal of such harmful products in the environment.

The European Union "EU" has integrated the PPP into environmental policies, thus utilizing the eco-levy as the sole tool to enforce the PPP.[100] The PPP ensures that polluters bear the cost of preventing, controlling and remedifying the environmental damage they cause. Some of these frameworks are;

5.2 Legal Framework and Treaties

Treaties such as the Treaty on the Functioning of the European Union "TFEU" incorporates the PPP in Article 191(2).[101] This article states "Union policy on the environment shall aim at a high level of protection, taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive actions should be taken, that environmental damage should as a priority be rectified at source and the polluter should pay."

As explained by this article, we see how the PPP is upheld, thus creating liability on any such person who pollutes the environment, hence payment being a consequence of their actions. The PPP is thus set in the EU directives policies and decisions as a guiding principle for environmental protection. The eco-levy as well act

98 Principle 16 of the 1992 Rio Declaration

99 **McGaw B**, "The role of the OECD in international comparative studies of achievement" (2008) 15 Assessment in Education: Principles, Policy & Practice 223.

100 **McKenna P, Ozor N, and Nyambane MA**, 'The Policy and Institutional Landscape for Eco-Innovation in Africa' (2021) African Technology Policy Studies Network, Technical Report <https://atpsnet.org/wp-content/uploads/2021/07/The-Policy-and-Institutional-Landscape-for-Eco-Innovation-in-Selected-African-Countries

101 The TFEU Article 191(2)

in line with the PPP principle as it is stated by the International legal regimes.

5.3 The Environmental Liability Directive (ELD)

This is a European directive that aims at preventing and providing remedies to environmental degradation.[102] It was formally known as the Directive 2004/35/EC. It creates for operators' liability on environmental damage, since one must pay so as to prevent further environmental degradation or prevent causation of environmental harm.

This principle works similar to the PPP. The person responsible for environmental pollution must pay.

5.4 The Emission Trading System (ETS)

This is a marketplace/space where companies can buy and sell credits that allow them to emit a certain amount of carbon dioxide.[103] It works based on the PPP, since the companies are financially charged by a given authority to pollute less. This reduces effects to the environment such as the greenhouse gas emissions effect. Emitting companies must obtain from the government permit for each unit of their emissions. A country that has applied this method is China. In June 2014, seven cities in China had established carbon emission trading markets. These cities are Chongqing, Hubei, Tianjin, Guangzhou, Beijing, Shanghai, and Shenzhen.[104]

Explained above are some of the ways in which the EU works on the promotion of a cleaner environment based on the PPP. The eco-levy also aligns with the PPP since some levy is imposed on users and producers of harmful products.

102 L Bergkamp and B Goldsmith, *The EU Environmental Liability Directive: A Commentary* (OUP 2013).

103 **Emissions trading system** (**ETS**) implementation and its collaborative governance effects on air pollution- Yan, X Zhang, J Zhang, K Li - Energy Policy, 2020

104 The impact of **Emission Trading Scheme (ETS)** and the choice of coverage industry in **ETS**: A case study in China
B Lin, Z Jia - Applied Energy, 2017 – Elsevier

CHAPTER SIX

6.1 Eco-levy vis-à-vis Human Rights

The implementation of the Eco-levy in the proposed Finance Bill, of 2024 presents an interplay between environmental protection and human rights. As the eco-levy serves as a progressive tool in the realization of a sustainable environment, it must also ensure it does not infringe the fundamental human rights such as economic freedom, right to employments and access to affordable goods.

6.2 Eco-levy and the Right to a clean and healthy environment

Article 42 of the Kenyan Constitution guarantees every citizen the right to a clean and healthy environment.[105] The Eco-levy passes this test since it is a tool that aims at promoting a clean and healthy environment. Revenues collected from the levy can fund the environmental conservation projects such as waste management systems, reforestation and pollution control which results to a sustainable and healthy environment.

6.3 Eco-levy and Socio-Economic Rights

The Eco-levy taxation to some goods will definitely lead to increased prices of goods as their manufactures pass the cost to the consumers so as to realize profits. This affects the marginalized groups specifically the low-income earners thus undermining their socio-economic rights i.e. access to affordable goods, under Article 43 of the Kenyan Constitution.[106] Furthermore, the levy leads to double taxation. The Coca cola company for example criticized the levy for it would lead to double taxation. The levy required the company to pay Kshs 150 for every kilo of plastics they produced. The senior managers led by Dr John Mwendwa argued that the levy constitutes double taxation since the company already pays fees to a Producer Responsibility Organization as it was required by the Sustainable Waste Management Act of 2022.[107]

To ensure that the human rights are not compromised by the levy, then the levy needs to be structured progressively targeting luxurious or non-essential items more heavily than basic necessities. The levy should not also target products that are already taxed by other bodies in-charge. By doing this, there will be no problem of double taxation as was expressed by the coca cola company.

6.4 Eco-levy and Accountability to the citizens

Accountability is enshrined in Article 10(2)(c) of the Kenyan Constitution as one of the national values and principle of good governance. These principles bind all State organs, State officers, public officers and all citizens. Article 73 also talks about accountability as a part of the responsibilities of leadership.

The revenues collected from the eco-levy must be transparently allocated to environmental and social programs. The government must be accountable to the citizens on how these funds are used. Mismanagement of these funds undermines public trust and violates the right to accountability as stated in article 73 of the Kenyan Constitution.

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105 Constitution of Kenya 2010, article 42
http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-20th-November-2017.pdf

106 Constitution of Kenya 2010, Article 43.

107 **Simidi M Betterman**, 'Coca-Cola challenges proposed plastic tax in Kenya as industry panics over Eco Levy' (7 June 2024) *Clean Up Kenya* <https://cleanupkenya.org/coca-cola-challenges-proposed-plastic-tax-in-kenya-as-industry-panics-over-eco-levy

6.5 Impacts of the Eco-levy on Human Rights

6.5.1 Positive Impacts

The Eco-levy promotes the right to a clean and healthy environment.[108] The Constitution states that every person has a right to a clean and healthy environment. It also includes the right to have a clean and healthy environment protected for the benefit of the present and future generations (Inter-generational and Intra-generational use). The eco-levy by imposing taxes on harmful products encourages sustainable practices which promote environmental sustainability. Less pollution reduces the risks imposed on the health of those in the surrounding environment. It therefore promotes the right to a clean and healthy environment.

It leads to sustainable development in that it has the capability of funding programs for renewable energy, clean water and initiatives that lead to improved quality of life. It also supports socio-economic rights by promotion of employments in these sectors.

6.5.2 Negative Impacts

Leads to an economic burden on the low-income earners and business persons. Businesses that rely targeted products by the levy face higher costs of production. Small and Medium Enterprises (SMEs) are the most vulnerable as they lack the resources for transitioning to eco-friendly practices. The low-income earners especially the marginalized groups suffer as the increased prices of these products will hinder them from their purchase.

If the levy is poorly implemented, it could lead to social inequalities, considering the marginalized groups. The able/rich citizens will adopt easily to the new costs while the vulnerable will find it hard to adopt to these new prices. This violates the principle of equality as stated in the constitution.[109]

108 **Constitution of Kenya** (2010), Article 42(a).

109 Constitution of Kenya 2010, article 27(1)
IBID Article 27(4)
IBID Article 27(6)

CHAPTER SEVEN

7.1 BALANCING ENVIRONMENTAL PROTECTION WITH THE ECONOMIC IMPACT ON CONSUMERS ESPECIALLY THE MARGINALIZED GROUP (THE LOW-INCOME HOUSEHOLDS).

The Constitution of Kenya 2010 provides for the recognition of the marginalized groups. These are a group of people who are disadvantaged economically.[110] It speaks on their inclusion, equality, non-discrimination,[111] freedom from discrimination,[112] participation in governance,[113] etc.

This issue will discuss on the gap between environmental protection and economic equity, with a focus on the marginalized groups in Kenya.

The eco-levy was introduced to deal with matters on environmental degradation and to promote sustainability. Their economic implications however disproportionately affect the marginalized groups who face socio-economic challenges in the country.

7.2 Environmental protection by the eco-levy

As discussed earlier, eco-levy imposes tax on harmful products such as plastics and e-wastes. When taxes are imposed on such harmful products it leads to; reduction of environmental harm since there will be fewer supply or circulation of these harmful products, revenue generation for conservation and finally consumers and many businesses will adopt to eco-friendly alternatives.

These objectives align with Kenya's Vision 2030 and the Paris Agreement.[114] However, its impacts on vulnerable groups cannot be overlooked. The marginalized are at most affected by the financial burden this policy imposes. Some of these ways are; causing financial strain by increasing prices of goods, leading to inequality as the wealthy class will be at a position to afford the raised prices of goods, etc. To solve this issue, the government can introduce subsidies for the low- income earners, educate the vulnerable groups to help in transition to sustainable practices and use the eco-levy revenues to invest in eco-friendly alternatives.

7.3 Economic Implications for the low-income households

7.3.1 Increased cost of living

The eco-levy often leads to higher prices of goods which are subjected to the tax, for example electronics, plastic products, etc. This group of people who spend most or almost all of their income on basic needs are greatly affected by this impact. An increase in electric commodities for example, will force them to spend more on purchasing these products.

7.3.2 Job loss in affected industries

An increase in taxation of industrial materials such as plastics may lead to reduction in operations or total shutdown of such industries. Workers, of whom most are from marginalized groups are on the verge of losing

110 Constitution of Kenya 2010, Article 260
111 Constitution of Kenya 2010, Article 10
112 Constitution of Kenya 2010, 2010 Article 27
113 Constitution of Kenya 2010, 2010 Article 56
114 Attaining **Environmental** Sustainability in **Kenya**: Challenges and Prospects
P Kilusi, K Muigua - The principles of environmental protection aligned with Kenya's development blueprint, Vision 2030 14, seeks to transform the of the Paris Agreement 46, highlights Kenya's proactive

their jobs and sources of livelihood.

7.4 How to effectively introduce the eco-levy to protect the environment and to ensure economic equity

7.4.1 Public participation

The Kenyan Constitution provides for the need of public participation by the citizens,[115] when coming up with policies in the country that directly affects them. The article also states the national values and principles of good governance that should be adhered to by the governing body. The eco-levy ought to have undergone this stage of public participation so that the citizens understand its objectives.

7.4.2 Progressive tax structures

This is the process whereby essential goods such as plastic food packaging face lower taxation compared to luxurious goods which face higher taxation. This process enables the marginalized groups purchase essential goods for the satisfaction of their basic needs.

7.4.3 Gradual implementation

The eco-levy ought to be enrolled out in a gradually so as to create time for the consumers and the suppliers adopt adequately.

7.5 Comparative analysis

7.5.1 A case of Rwanda

The plastics ban in Rwanda is a comprehensive policy that is aimed at eliminating the use of plastics such as plastic bags, straws, cups and some plastic packaging materials.[116] It was introduced in 2008 and effectively reinforced in the subsequent years (a progressive tool). This ban was aimed at protecting the environment from pollution and to promote a sustainable environment. Some of the key features are: Prohibition of Single-use plastic products, businesses or individuals caught violating this rule to face heavy fines, encouragement of use of biodegradable products and plastic recycle. The Ministry of Environment Management Authority "REMA" was tasked to do so.[117] REMA achieved this by enrolling educational programs to the citizens, involvement of local leaders and Media campaigns. Besides REMA's role, the government of Rwanda offered alternative measure to the citizens such as: provision of biodegradable bags, businesses were encouraged to transition to sustainable practices thus led to increased employments (promotion of the right to employment by the government). Etc. This step by the Rwandan government impacted Rwanda in several ways, for example: led to a clean environment, led to a better health cycle in the country since a clean environment promotes good health, Rwanda has been recognized as one of the cleanest countries globally and it also led to the growth of eco-friendly activities in the country.[118]

As compared to the Rwanda's plastic ban, Kenyan government can offer subsidies for eco-friendly packaging. This will also be a source of employment to the citizens.

7.5.2 The European Union's case

115 Constitution of Kenya 2010, Article 10

116 Uche OL, 'Plastic Waste Regime in Rwanda, Kenya and South Africa: A Comparative Case Study' (2023) American Journal of Law

117 Rwanda Environmental Management Authority, 'S Assessment' (2014)

118 N Joel, 'Ecological Sustainability in Urban Landscapes and Smart Cities: Case Study Kigali City, Rwanda' (2023)

The European Union's Plastic Tax is also a vital case study. The EU introduced plastic tax with exemptions for certain industries and they did fund for innovation in green technologies.[119] Kenya can also adopt this mechanism; it can minimize economic disruptions significantly.

In conclusion, while balancing environmental protection and economic equity, the key factor to be considered are the marginalized groups. The eco-levy is an important tool in environmental protection. However, its implementation must provide fairness and inclusivity of the public.

119 Council Regulation (EU) 2019/904 of 5 June 2019 on the reduction of the impact of certain plastic products on the environment (OJ L 155/1, 12 June 2019)

CHAPTER EIGHT

Conclusion and recommendations

8.1 Recommendations

1. While introducing the Eco-levy, the Kenyan government can consider public participation.[120] It is important for the people to participate for they are sovereign.[121] Public participation promotes inclusivity and representation of the citizens, enhances decision making, builds trust and legitimacy, enhances accountability. Etc.
2. In the implementation of the eco-levy, the government should bench mark Rwanda's policy on the ban of plastic bags and how it was adopted effectively.[122] This can shade some light on how to transit from harmful practices to eco-friendly practices without interfering with the socio-economic rights of the citizens.
3. The government can offer civic education to the citizens on the importance of adopting to eco-friendly practices. The citizens should be made aware of the danger plastic waste products and other non-biodegradable products pose to the environment. Educating the citizens on the importance of a clean environment to their health makes them adopt to the sustainable practices
4. Offering alternatives to the plastic producers is also a step the government can consider. By offering alternative mechanisms to the producer companies, jobs are retained by the affected industries.
5. The levy ought to be designed in a fair manner in that it targets manufacturers and the polluter industries but not consumers.
6. The government can also promote local industries that produce biodegradable products or recyclable alternatives.

8.2 Conclusion

The eco-levy plays a vital role in addressing environmental degradation in Kenya. However, its implementation should be structured in a way that it does not infringe the citizens' socio-economic rights. Through the adoption of a participatory and transparency approach, Kenya can achieve environmental sustainability as well as protection of rights.

120 Constitution of Kenya 2010, Article 118

121 IBID Article 1

122 Uche, O.L. (2023). 'Plastic Waste Regime in Rwanda, Kenya and South Africa: A Comparative Case Study', American Journal of Law, 2023.

OL Uche, 'Plastic Waste Regime in Rwanda, Kenya and South Africa: A Comparative Case Study' (2023) American Journal of Law **Plastic** Waste Regime in **Rwanda**, Kenya and South Africa: A Comparative Case Study

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TOPIC 4:ROLE OF TECHNOLOGY IN EXERCISING THE FREEDOM OF EXPRESSION AND ITS IMPLICATIONS ON PRIVACY AND DATA PROTECTION.

NAVIGATING THE INTERSECTION BETWEEN FREEDOM OF EXPRESSION AND MISINFORMATION IN THE CONTEXT OF DEEPFAKES: A CASE STUDY OF KENYA

By Mitchel Kakai[123] and Rafaa Mazrui[124]

INTRODUCTION

Deepfakes are hyper-realistic but fabricated video or audio content generated using artificial intelligence algorithms, typically to make a real person appear to say or do something they never did.[125] Since their emergence in the late 2010s (initially used to superimpose celebrity faces in videos), deepfakes have rapidly evolved in sophistication and accessibility. Today, anyone with a computer or smartphone can produce convincing synthetic media, blurring the line between truth and deception in digital content. In Kenya's political and media landscape, deepfakes have begun to play a notable role, from doctored "news" videos to manipulated images, amplifying the existing challenges of misinformation in the digital age. This rise of deepfakes in Kenya has brought into sharp focus a fundamental tension. On one hand, the technology can be harnessed for creative expression, satire, or social commentary which are activities arguably protected as part of the freedom of expression. On the other hand, deepfakes pose unprecedented risks of misinformation, reputational harm, and even incitement of political unrest if maliciously deployed.

The Kenyan Constitution 2010 guarantees the freedom of expression subject to certain limitations and the right to access information under Article 33 and 35 respectively. These rights affirm the democratic value of open discourse including political dissent and satire which are characteristic of Kenya's vibrant social media environment. Indeed, Kenyans often use humour and digital creativity to comment on public affairs, sometimes testing the boundaries of acceptability. However, the same digital platforms have been misused to spread false information and propaganda, especially around elections.[126] Deepfakes supercharge this problem by making lies far more believable. The potential for a realistic fake video of a candidate or official saying inflammatory words, or an audio clip "confessing" to corruption, presents a high likelihood of compromising election integrity and public trust in the media. In Kenya's 2022 elections, observers noted an uptick in doctored images and

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Disclaimer: The views and opinions expressed in this paper are those of the authors and do not necessarily reflect those of the Konrad Adenauer Stiftung (KAS) Rule of Law Program for Sub-Saharan Africa

125 Centre for Intellectual Property and Information Technology Law, 'Examining the 2024 Computer Misuse and Cybercrimes Amendment Bill Proposals' (CIPIT, 2024) https://cipit.strathmore.edu/examining-the-2024-computer-misuse-and-cybercrimes-amendment-bill-proposals/ accessed 30 June 2025.

126 Mount Kenya Times, 'The Intersection of Technology, Disinformation, and National Security' (2024) https://mountkenyatimes.co.ke/deep-fakes-in-kenya-the-intersection-of-technology-disinformation-and-national-security/ accessed 30 June 2025 & Centre on Behavioural Science Insights, 'Addressing Fake News While Ensuring Compliance to Human Rights in Kenya' (COBS, 6 February 2025) https://cobsinsights.org/2025/02/06/addressing-fake-news-in-kenya/ accessed 30 June 2025.

videos fuelling disinformation.[127] As deepfake tools proliferate, the danger is that disinformation will become indistinguishable from legitimate news, undermining citizens' ability to access truthful information, itself a human right, and poisoning public discourse.

This article explores how Kenyan law and policy navigate the delicate intersection between protecting freedom of expression and curbing misinformation in the age of deepfakes. It begins by outlining the legal framework governing deepfakes in Kenya, including domestic statutes and Kenya's regional and international obligations. The discussion then delves into two recent Kenyan case studies that exemplify the challenges: one involving a deepfake image of President William Ruto in a coffin, and another involving an AI-generated video shared by a senior government official. A comparative review follows, examining how jurisdictions like the United States, European Union, United Kingdom, South Korea, Australia, and Italy are responding to deepfakes through law and policy. Finally, the article offers conclusions and recommendations for legal and policy reforms in Kenya, aiming to strike a prudent balance that safeguards human rights in the digital age while addressing the menace of deepfake-driven misinformation.

Legal Framework

Kenya's Domestic Legal Instruments Addressing Deepfakes

The Constitution of Kenya (2010) provides the foundation for any discussion on expression and misinformation. Article 33 provides for the freedom of expression, including the freedom to seek, receive and impart information or ideas. However, this freedom is not absolute. Article 33(2) explicitly excludes speech that amounts to propaganda for war, incitement to violence, hate speech, or advocacy of hatred that constitutes ethnic incitement or vilification of others. Article 33(3) further emphasizes that in exercising the right to freedom of expression, every person "shall respect the rights and reputation of others." This constitutional balance is directly relevant to deepfakes in that, while creating or sharing a deepfake may be an exercise of expression, it could infringe on the rights or reputation of others. For instance, if it defames someone or spreads dangerous falsehoods. Kenyan courts have affirmed that overly broad restrictions on speech can violate the Constitution's free expression guarantees, yet they have also upheld narrowly-tailored laws aimed at false publications that cause harm.[128] Therefore, any legal regulation of deepfakes must align with constitutional standards which are: protecting legitimate expression while permitting proportionate limits to curb demonstrable harms such as defamation, panic, or fraud.

Kenya's principal statute addressing cyber-related offenses is the Computer Misuse and Cybercrimes Act, No. 5 of 2018 (CMCA 2018). This Act, enacted to modernize cybercrime laws, does not specifically mention "deepfakes" especially given that the term was barely known in 2018 but it contains several broadly-worded provisions that can encompass harmful use of deepfake technology. Notably, Section 23 of the CMCA 2018 criminalizes the publication of false information. It provides that anyone who "knowingly publishes information that is false, in print, broadcast, data or over a computer system" and which either is calculated to result in panic, chaos or violence or "negatively affects the rights or reputations of others," commits an offense.[129] Violation of Section 23 carries a severe penalty of a fine up to five million Kenyan shillings or imprisonment up to ten years, or both. This provision squarely applies to deepfake misinformation: a person who creates or shares a deepfake knowing it's false for example, a fake video of a public figure to incite unrest or damage their reputation could be prosecuted for false publication. Indeed, as discussed in Case Study 1 below, authorities have invoked Section 23 to charge individuals who posted deepfake images of the president's "demise".

Other relevant offenses in the CMCA 2018 include computer forgery under Section 25 and impersonation

127 Ibid

128 Katiba Institute, 'Kenya High Court Strikes Down Subversion Law Upholding Freedom of Expression' (2024) https://katibainstitute.org/kenya-high-court-strikes-down-subversion-law-upholding-freedom-of-expression/ accessed 30 June 2025.

129 Computer Misuse and Cybercrimes Act 2018, No 5 of 2018, Sec 23

offenses. Section 25 criminalizes creating or altering computer data with intent to make it appear authentic, such that it is "acted upon as if it were authentic". A deepfake video could arguably fall under computer forgery if used to mislead others into acting on it as genuine evidence. Similarly, if a deepfake is used to impersonate someone, for instance, synthetically imitating a person's voice or likeness to deceive a victim, it may implicate Section 29 (cyber impersonation) or related identity-theft provisions. Kenya's courts have recognized the CMCA's role in combating new cyber offenses for example, upholding convictions under the Act for online impersonation and identity theft.[130] Nonetheless, various scholars note that Kenya's law still lacks explicit reference to AI-generated content. A recent legal analysis observed that while the CMCA 2018 is among Africa's more comprehensive cybercrime laws, it "still lacks specificity on AI-generated imagery," leaving a gap in addressing novel abuses like deepfakes.[131] In response, there are ongoing efforts to update the law. The Computer Misuse and Cybercrimes (Amendment) Bill 2024 proposes to introduce definitions and provisions tackling emerging threats such as deepfakes. Experts have urged that any amendments should explicitly define "deepfake" technology and address its misuse in cybercrimes, to provide clarity and enable effective prosecution.[132] As at the time of this writing, the 2024 amendment Bill is under review, reflecting Kenya's recognition that its legal framework must keep pace with AI-driven threats.

Deepfakes also raise questions under Kenya's Evidence Act, especially regarding the admissibility and reliability of digital evidence. Kenya's Evidence Act remains a statute dating to the colonial era but amended to accommodate electronic records. It contains provisions such as Section 106B, which set conditions for admitting electronic records like videos in court. To be admissible, a video or audio recording must be shown to be authentic and unaltered, typically through a certificate of electronic evidence as well as expert testimony on its integrity. A deepfake, by definition, is an altered or fabricated piece of media; hence, if a party attempted to use a deepfake video as evidence for instance, to falsely incriminate someone, the Evidence Act's safeguards should, in theory, expose it. Conversely, if an authentic video is challenged as a "deepfake," courts may require forensic expert analysis to verify authenticity. The Act also empowers judges to consider the "conditions under which the computer was operated" and whether the information might have been altered in the process of creation or transmission (Section 106B(4)). In the context of deepfakes, this means that a party seeking to adduce a video must convince the court it is original and unmanipulated. Kenyan courts have not yet reported a seminal case dealing with a deepfake as evidence, but analogous cases exist elsewhere, underscoring the Act's importance. For example, U.S. courts have seen instances of fake audio clips being presented. As such, the need for robust authentication procedures is paramount. Kenyan law may increasingly rely on digital forensics experts to detect tell-tale signs of deepfake fabrication such as irregular metadata or visual artifacts as part of the evidentiary process. In sum, while the Evidence Act does not name "deepfakes," its existing framework for electronic evidence will be a critical tool to filter truth from fabrication in legal proceedings.

Kenya's Penal Code contains traditional offenses that can apply to malicious use of deepfakes, although some colonial-era provisions have been recently invalidated for overbreadth. An example is Section 66 of the Penal Code (now unconstitutional), which criminalized publishing "alarming publications" likely to cause public fear or disturb the peace. A deepfake that causes public panic could have fallen under this, but the High Court struck down Section 66 in 2017 for violating freedom of expression.[133] Similarly, the offense of criminal defamation under Section 194 of the Penal Code was nullified in Jacqueline Okuta & Another v. Attorney General (2017) as an unjustified restriction on speech. These developments underscore Kenya's shift away from broad criminalization of speech toward more narrowly tailored provisions like those in the CMCA 2018.

130 Centre for Intellectual Property and Information Technology Law, 'Examining the 2024 Computer Misuse and Cybercrimes Amendment Bill Proposals' (CIPIT, 2024) https://cipit.strathmore.edu/examining-the-2024-computer-misuse-and-cybercrimes-amendment-bill-proposals/ accessed 30 June 2025.

131 Legal Africa, 'When AI Turns Criminal: The Tragedy of Elijah Heacock and the Legal Urgency to Protect Africa's Children' (2025) https://legalafrica.org/when-ai-turns-criminal-the-tragedy-of-elijah-heacock-and-the-legal-urgency-to-protect-africas-children/ accessed 30 June 2025.

132 Ibid

133 ARTICLE 19, 'Kenya: Passage of Flawed Computer and Cybercrimes Act Threatens Free Expression' (2018) https://www.article19.org/resources/kenya-passage-of-flawed-computer-and-cybercrimes-act-threatens-free-expression/ accessed 30 June 2025.

That said, the Penal Code still has relevant provisions. For instance, forgery and uttering false documents under section 345 might be invoked if a deepfake is recorded onto a device or medium intending it to be accepted as genuine "documentary" evidence. Impersonation offenses under section 382 could apply if someone uses a deepfake to impersonate another in a manner that causes legal harm such as obtaining a benefit or causing a liability in that person's name. Moreover, any deepfake content that crosses into obscenity, incitement, or fraud may trigger Penal Code provisions. It is worth noting that in 2024, the High Court also struck down the colonial-era offence of subversion under Section 77 of the Penal Code, in a case where a Kenyan had been charged for a tweet predicting a military coup.[134] The individual in that case was also charged under the CMCA for false publication (Section 23) regarding the same tweet. The court's decision to invalidate the subversion charge but leave the CMCA charge intact illustrates how Kenyan law is converging on the newer cyber law as the primary means to tackle harmful speech including deepfake misinformation, as opposed to antiquated penal provisions. In summary, while the Penal Code's direct role in regulating deepfakes is diminishing, it remains part of the legal toolkit, especially for forms of deepfake misuse that constitute fraud, identity theft, or other classical crimes.

The Defamation Act and Common Law of defamation in Kenya provide civil remedies for individuals whose reputation is harmed by false statements, including those made via deepfakes. A deepfake video or image that falsely portrays someone in a negative light for example, depicting a person committing a crime or making derogatory statements they never made could be deemed libel, a defamatory statement in permanent form. The person defamed by such a deepfake could sue the creator/distributor for damages. Notably, deepfakes can be even more pernicious than ordinary false statements because visual content tends to be highly persuasive. Under Kenyan defamation law, a plaintiff must generally prove that the published content was false, referred to them, and lowered their reputation in the estimation of right-thinking members of society. A deepfake meeting those criteria would qualify. The Defamation Act provides defences such as truth, fair comment, or privilege but none would apply to a knowingly fabricated video presented as real. If a deepfake is published as "satire" or parody, however, the context might be examined. Nonetheless, satire is not a formal defence but could negate the implication of a factual assertion about the person. It is conceivable that as deepfakes become more common, Kenyan courts will confront novel issues: for instance, how to handle a defendant who claims they did not realize a video was a deepfake and thus lacked malice. Additionally, while criminal defamation is no longer enforceable in Kenya as per the 2017 constitutional ruling, the civil defamation route remains important. The spectre of civil liability can itself act as a deterrent against spreading harmful deepfakes about private individuals or public figures. However, public figure plaintiffs like politicians bear the extra burden of showing malice that the publisher knew the content was false or recklessly disregarded the truth. In the deepfake context, establishing that the creator acted with malice knowing the media was fake may not be difficult if the very act of creating the deepfake demonstrates knowledge of falsity. In sum, Kenya's defamation law offers an avenue for victims of deepfake falsehoods to seek redress, aligning with Article 33(3) of the Constitution which protects reputation. Yet, practical challenges such as anonymity of online perpetrators and jurisdiction over global internet platforms can impede effective relief, indicating a need for complementary regulatory measures.

Although less immediately apparent, intellectual property law intersects with deepfakes in several ways. Kenya's Copyright Act, 2001 (as amended) protects original works of authorship including audiovisual works, photographs, and sound recordings. A deepfake often involves the manipulation of existing content e.g. using scenes from a film or someone's photograph to create a new video. If a deepfake incorporates significant portions of a copyrighted video or audio without authorization, it could infringe the rights of the original copyright owner. For example, taking a copyrighted news broadcast clip and altering it into a deepfake would infringe upon the broadcaster's rights. Moreover, the Act gives performers certain rights over the fixation of their performances; a deepfake that uses an actor's likeness or voice from a movie could potentially violate the performer's rights, though Kenyan law on image/likeness rights is not well-developed. Another angle is whether the deepfake itself is a protected "work" under copyright. Generally, to qualify, a work must

134 Katiba Institute, 'Kenya High Court Strikes Down Subversion Law Upholding Freedom of Expression' (2024) https://katibainstitute.org/kenya-high-court-strikes-down-subversion-law-upholding-freedom-of-expression/ accessed 30 June 2025.

be original and created by a human author. Pure AI-generated media with minimal human creative input challenges this notion of authorship. While Kenyan law has no explicit provision on AI-generated works, by default such works might not qualify for copyright since they lack a human author which is akin to how the UK and other Commonwealth jurisdictions traditionally require human creativity. That means deepfake creators might not hold any copyright in the fake videos, potentially leaving the content unprotected and easier to remove or reuse by others. Additionally, Kenya's copyright law under Section 15 contains exceptions for satire and parody following the fair dealing doctrine, even though Kenya's statute is more limited than some jurisdictions. If someone claimed their deepfake was merely a parody, it's uncertain if Kenyan law would accept that as a defence to copyright infringement as parody is not explicitly listed as a permitted use in the Act. However, these IP issues are yet to be tested in Kenyan courts with respect to deepfakes. Importantly, from a policy perspective, the absence of a "right of publicity" or specific personality rights statute in Kenya means individuals have limited control over the commercial use of their likeness. A person who finds their face used in an AI-generated advertisement or satire cannot easily claim an IP right in their face or voice[135]. Thus, while copyright law might help content owners combat some deepfakes particularly those re-using media content, it offers little solace to private individuals whose image is synthesized from scratch by AI. This gap suggests that Kenya may need to consider data protection and privacy laws as complementary mechanisms to regulate deepfakes involving personal likeness, to which we turn next.

Kenya's Data Protection Act 2019 can be viewed as also part of the domestic framework, given its relevance to personal images and biometric data. The Act defines personal data broadly to include data about an identifiable individual, which arguably covers one's facial images and voice prints. For instance, a deepfake that uses an individual's facial image scraped from social media to create synthetic content involves processing of that person's biometric data without their consent. This could be deemed unlawful processing under the Data Protection Act if done by a data controller or processor subject to Kenyan jurisdiction. The Act requires consent or other legal bases for processing personal data and includes provisions on preventing manipulation or impersonation. In theory, a person whose likeness is used in a deepfake could lodge a complaint with the Office of the Data Protection Commissioner, arguing violation of their privacy rights. Additionally, the right to privacy is a fundamental right under Article 31 of the Constitution. A deepfake exposing someone's private life or depicting them in compromising false scenarios might infringe upon their privacy and dignity. However, enforcement in this context is challenging as many deepfake creators may be anonymous or located abroad, and the Act, being relatively new, has primarily been applied to data breaches and misuse by corporations, not individual cybercrimes. Nonetheless, Kenya's obligations to protect privacy and personal data provide a normative basis for regulating deepfakes that cause personal harm. At minimum, the presence of data protection laws signals that consent is critical in use of someone's identity, aligning with global trends to treat unauthorized AI replication of a person (especially in intimate contexts) as a privacy violation.

In summary, Kenya's domestic legal instruments address deepfakes through a patchwork of provisions: cybercrime laws like the CMCA 2018 target harmful false content and related computer offenses; evidence law guards the integrity of proof; penal and defamation laws protect reputation and public order (though with constitutional limits to prevent abuse); copyright and data protection laws offer additional avenues to challenge unauthorized uses of one's likeness or creative works. The current framework, while reasonably comprehensive, is not perfectly tailored to deepfakes which is a gap Kenyan lawmakers are beginning to acknowledge. As deepfake incidents rise, Kenyan law is evolving, seeking to uphold free expression including political satire and artistic innovation while curbing the spread of injurious misinformation and protecting individuals' rights in the digital sphere.[136]

Kenya's Regional and International Obligations

135 Herbert Smith Freehills, 'Facing the Facade: Legal Challenges in the Age of Deepfakes' (2024) https://www.herbertsmithfreehills.com/insights/2024-06/facing-the-facade-legal-challenges-in-the-age-of-deepfakes accessed 30 June 2025

136 Legal Africa, 'When AI Turns Criminal: The Tragedy of Elijah Heacock and the Legal Urgency to Protect Africa's Children' (2025) https://legalafrica.org/when-ai-turns-criminal-the-tragedy-of-elijah-heacock-and-the-legal-urgency-to-protect-africas-children/ accessed 30 June 2025.

Kenya's approach to deepfakes is also guided by its commitments under regional and international law, particularly in the areas of cybercrime cooperation and human rights. These instruments provide both opportunities, in terms of frameworks to combat misuse of technology and constraints, in terms of safeguarding fundamental freedoms in any regulatory response.

The AU's Malabo Convention on Cybersecurity and Personal Data Protection is a continent-wide treaty aiming to harmonize cybercrime laws and data protection. Kenya has signed but not yet ratified the Convention.[137] Regardless, the Convention's principles influence Kenyan policy. It obliges State Parties to criminalize various computer-related offenses, several of which relate to deepfakes. For instance, Article 29 of the Convention calls for the criminalization of "offenses specific to information and communication technologies" including the production of "false digital content" that causes harm. While not explicitly using the term "deepfake," the Convention clearly targets the use of computers to fabricate data with intent to mislead. Another relevant provision is Article 28 on computer-related forgery, which mirrors the idea in the Budapest Convention as discussed below. It requires making it an offense to input or alter data with inauthentic data, resulting in inauthentic data being considered or acted upon as if genuine. A deepfake could be seen as a species of computer forgery, creating fake visual/auditory data intended to be believed. Additionally, the Malabo Convention emphasizes respect for human rights and freedoms in cybersecurity enforcement. It warns against arbitrary or excessive restrictions. Therefore, Kenya's eventual ratification and implementation of this Convention would necessitate laws that punish harmful deepfake usage e.g., for fraud, identity theft, hate propaganda while ensuring any limitations on online content are necessary and proportionate in a democratic society. As of mid-2023, the Convention has entered into force, putting pressure on signatory states like Kenya to align their national laws with these standards. In the deepfake context, Kenya can draw on the Convention's framework to refine its laws – for example, defining a new offense for malicious deepfakes could be justified under the Convention's mandate to combat computer-enabled falsehoods and protect digital security.

Kenya is a State Party to the African Charter on Human and People's Rights (ACHPR), which guarantees the right to receive information and freedom of expression under Article 9. The African Commission on Human and Peoples' Rights, which interprets the Charter, has emphasized that freedom of expression extends to the internet and that restrictions like those aimed at "fake news" must be provided by law, serve a legitimate aim such as the rights of others or public order, and be necessary and proportionate. In 2019, the African Commission updated its Declaration of Principles on Freedom of Expression and Access to Information in Africa, which specifically addresses digital age concerns. Principle 37 of the Declaration deals with "Information Disorder" (covering misinformation and disinformation) and urges states to refrain from broadly suppressing online content under the guise of "fake news" bans; instead, any measures to combat disinformation should be carefully tailored and not infringe on legitimate expression. This is highly pertinent to how Kenya handles deepfakes. A blanket ban on "false information", like under Section 23 of CMCA 2018 has drawn criticism,[138] and must be enforced with caution to avoid stifling satirists, journalists, or political dissenters. The African Charter also enshrines the right to dignity (Article 5) and the right to privacy (Article 4), which can be invoked to justify action against certain deepfakes – for instance, non-consensual sexual deepfakes violate the dignity of (especially female) victims, a point increasingly raised at the African regional level as part of women's rights and privacy discourses[139]. Moreover, Kenya as a member of the African Union is politically bound by AU resolutions on cyber security and digital rights. In 2022, the African Union Parliament and other bodies began discussing the impact of AI on human rights in Africa, acknowledging threats like deepfakes to electoral

137 Vellum Kenya, 'Examining the Legal Instruments of the Malabo 2014 Conference: Implications and Significance of Ratification for Kenya' (2024) https://vellum.co.ke/examining-the-legal-instruments-of-the-malabo-2014-conference-implications-and-significance-of-ratification-for-kenya/ accessed 30 June 2025.

138 Centre for Intellectual Property and Information Technology Law, 'Examining the 2024 Computer Misuse and Cybercrimes Amendment Bill Proposals' (CIPIT, 2024) https://cipit.strathmore.edu/examining-the-2024-computer-misuse-and-cybercrimes-amendment-bill-proposals/ accessed 30 June 2025.

139 Rangita de Silva de Alwis, 'The UN Cybercrime Convention Is a Promethean Moment' (Regulatory Review, 10 February 2025) https://www.theregreview.org/2025/02/10/de-silva-de-alwis-the-u-n-cybercrime-convention-is-a-promethean-moment/ accessed 30 June 2025.

integrity and social stability.[140] While these discussions are non-binding, they set normative expectations. In sum, Kenya's regional human rights commitments counsel a balanced approach: any anti-deepfake legislation or enforcement must protect people from real harm such as violence, reputational damage, or exploitation without unduly infringing freedom of expression or access to information. Kenya's judiciary has shown receptiveness to these principles for example, in striking down archaic speech offenses that were not precise or necessary in achieving the ends of justice.[141] Thus, Kenya's regional obligations push toward laws that specifically target malicious deepfake uses e.g., defamatory, fraudulent, or violence-inciting deepfakes rather than criminalizing all false content irrespective of context.

Globally, the Council of Europe's Budapest Convention on Cybercrime (to which Kenya is not yet a Party) has become a template for cybercrime laws. Kenya has cooperated with international partners and indicated interest in aligning with such norms. The Budapest Convention's provisions, while older, anticipate and cover issues relevant to deepfakes. Notably, Article 7 requires Parties to criminalize computer-related forgery, defined as the fraudulent input, alteration, deletion, or suppression of computer data, resulting in inauthentic data with legal effect as if it were authentic. A deepfake video could fit this description if used to deceive others in a way that has "legal effect" for instance, a fake video of a government official's order could be used to fraudulently induce action. Similarly, Article 8 on computer-related fraud would cover deepfakes deployed in social engineering scams e.g., a deepfake voice of a CEO used to trick an employee into transferring funds. While Kenya has not ratified the Budapest Convention, its own CMCA 2018 was influenced by international best practices including provisions of the Convention.[142] Therefore, Kenyan law already has offenses analogous to those in the Convention, such as false data publication, computer forgery, fraud, identity theft, etc. which can address deepfake-related crimes. One benefit of Budapest Convention membership would be enhanced international cooperation. Deepfake perpetrators often operate across borders. A video might be created abroad and uploaded to Kenyan social media. The Convention establishes channels for mutual legal assistance and expedited data sharing among member states. Without formal accession, Kenya can still cooperate case-by-case, but joining could streamline investigations of, for example, a foreign website hosting deepfake propaganda targeting Kenya. As deepfakes become a transnational disinformation tool potentially even used by foreign actors to meddle in African politics, [143] international cooperation is vital. Furthermore, the Convention's human rights clause under Article 15 reminds states that investigative powers must respect proportionality and privacy, again echoing the need to avoid overreaching surveillance or censorship in tackling deepfake crimes. In summary, alignment with the Budapest Convention, either through eventual ratification or by mirroring its standards domestically, supports Kenya in establishing a robust yet rights-respecting legal framework for deepfakes as part of cybercrime.

At the United Nations, negotiations have been underway (since 2022) for a comprehensive international convention on the use of ICTs for criminal purposes. This treaty, once finalized and if Kenya joins, could shape Kenya's obligations on matters like deepfakes. Draft texts and discussions have highlighted AI-enabled crime for example, deepfake-facilitated financial fraud, non-consensual pornography, and political disinformation campaigns have been noted as emerging threats requiring global response.[144] Civil society input to the UN process has stressed that deepfakes disproportionately affect women through sexual image abuse and can

140 GLOBSEC, 'Regulating Deepfakes: Global Approaches to Combatting AI-Driven Manipulation' (2024) https://www.globsec.org/sites/default/files/2024-12/Regulating%20Deepfakes%20-%20Global%20Approaches%20to%20Combatting%20AI-Driven%20Manipulation%20policy%20paper%20ver4%20web.pdf accessed 30 June 2025.

141 Katiba Institute, 'Kenya High Court Strikes Down Subversion Law Upholding Freedom of Expression' (2024) https://katibainstitute.org/kenya-high-court-strikes-down-subversion-law-upholding-freedom-of-expression/ accessed 30 June 2025.

142 Ibid

143 Mount Kenya Times, 'The Intersection of Technology, Disinformation, and National Security' (2024) https://mountkenyatimes.co.ke/deep-fakes-in-kenya-the-intersection-of-technology-disinformation-and-national-security/ accessed 30 June 2025 & Centre on Behavioural Science Insights, 'Addressing Fake News While Ensuring Compliance to Human Rights in Kenya' (COBS, 6 February 2025)

144 Rangita de Silva de Alwis, 'The UN Cybercrime Convention Is a Promethean Moment' (Regulatory Review, 10 February 2025) https://www.theregreview.org/2025/02/10/de-silva-de-alwis-the-u-n-cybercrime-convention-is-a-promethean-moment/ accessed 30 June 2025.

undermine trust in media and elections[145]. We can expect that any UN convention will encourage states to criminalize the most egregious deepfake abuses such as sexual exploitation material or election manipulation using AI, while also calling for safeguards to ensure enforcement doesn't stifle legitimate expression. Although the UN treaty is still in draft form as of 2025, Kenya is likely following its development. Provisions in the draft addressing "fabrication of data or evidence" or "psychological manipulation via ICT" could become benchmarks for Kenyan law reform down the line. Additionally, joining a UN convention would assist Kenya in capacity-building, sharing best practices on detecting deepfakes and obtaining assistance from countries with advanced forensic technology.

Finally, Kenya is a party to the International Covenant on Civil and Political Rights. Article 19 of the ICCPR protects freedom of expression but permits restrictions for respect of the rights or reputations of others, national security, public order, or public health/morals, provided the restrictions are provided by law and necessary. The UN Human Rights Committee has cautioned against vague "false news" laws, noting in General Comment 34 that even false statements are generally protected speech, and prohibitions should be limited to serious harms like defamation of individuals, incitement of violence, etc. on a case-by-case basis. This international standard implies that Kenya should avoid any blanket ban on creating or sharing deepfakes per se, and instead narrowly tailor laws to target malicious intent and real harm. For example, penalizing a deepfake intended as parody or political critique would conflict with ICCPR obligations, whereas penalizing a deepfake fabricated to incite ethnic hatred or to defraud people could be justified. Balancing these is key. Additionally, the ICCPR under Article 17 enshrines the right to privacy, which underpins action against forms of deepfakes that intrude on one's private life or image without consent. Notably, calls at the UN level to recognize the problem of non-consensual deepfake pornography as a violation of women's privacy and dignity have been growing.

In conclusion, Kenya's regional and international obligations press it to craft deepfake policies that protect human rights in the digital age. The African and global cybercrime frameworks encourage criminalization of harmful uses of deepfakes such as those causing security breaches, fraud, or personal harm and enhanced cross-border cooperation to combat these ills. Concurrently, African Charter and ICCPR norms demand that Kenya upholds freedom of expression and the flow of information, warning against using "misinformation" concerns as a pretext to silence dissent or satire. The challenge for Kenya is to navigate these sometimes-competing imperatives, a challenge that becomes tangible in real-world cases, as the next section demonstrates.

Case Studies

To illustrate the complex interplay between freedom of expression and misinformation in the context of deepfakes, this section examines two recent case studies from Kenya. Each involves synthetic media but with contrasting circumstances. One is a bottom-up expression (albeit false and provocative) by a private citizen that provoked a forceful state response; the other is a top-down dissemination of a deepfake by a government official. Together, they reveal the legal and ethical issues Kenya faces.

Case 1: Deepfake Image of President William Ruto in a Coffin

In late 2024, amid a charged political atmosphere, an image began circulating on Kenyan social media purporting to show President William Ruto lying in a coffin as if deceased. This macabre image was AI-generated, essentially a deepfake still image, presumably created as a form of political satire or as a hoax. Those sharing it often appended captions suggesting that the President had died and a funeral was underway. One widely shared post included a photograph of a funeral procession with the caption: "President William Ruto's Body leaves Lee Funeral Home", implying that the sitting head of state had passed away.[146] The image and caption were entirely fabricated, crafted as a satirical commentary reflecting widespread public calls for the President's departure from office, whether through resignation or, symbolically, death, echoing the

145 Ibid

146 Channels Television, 'Kenya Student on Trial for Fake Caption of Ruto "Funeral"' (Channels TV, 29 May 2025) https://www.channelstv.com/2025/05/29/kenya-student-on-trial-for-fake-caption-of-ruto-funeral/ accessed 30 June 2025.

constitutional provisions for vacancy of office and drawing parallels to the demise of other African leaders while still in power. However, the virality of the post on platforms like Twitter (X) and Facebook created a brief frenzy, with some members of the public initially taken in by the fake news and others angrily condemning the morbid joke.

Kenyan authorities treated this incident very seriously. David Oaga Mokaya, a 24-year-old university student who allegedly first posted the "Ruto coffin" deepfake on Twitter, was arrested and charged under the Computer Misuse and Cybercrimes Act for publishing false information.[147] Prosecutors argued that Mokaya knowingly spread false news that could cause public alarm. The charge aligns with Section 23 of the CMCA 2018 (discussed earlier), which criminalizes knowingly publishing false information that could result in panic or that harms others' reputation. In court proceedings at Milimani Law Courts in Nairobi, Mokaya's defence lawyer contended that the image was political satire and fell within his constitutional free expression rights. "Our client was taking the right as a citizen to express his political opinions, express political satire… and also criticise the head of state. Political satire is not a crime," the lawyer argued, calling the case "flimsy" and an attack on freedom of expression. The case garnered significant attention as a bellwether for how Kenya would handle the tension between humorous (if in poor taste) expression and the government's aversion to misinformation about the presidency. The trial was still ongoing as of mid-2025, the latest hearing in May 2025 was adjourned, with a new date set for July 31, 2025.[148] If convicted, the student faces up to 10 years imprisonment.

It was not an isolated incident. At least five other individuals had been detained in December 2024 for similar online satire targeting President Ruto.[149] Notably, reports emerged that some of these individuals were not merely arrested through legal channels but were subjected to extrajudicial abductions. According to human rights groups, security forces allegedly kidnapped and held incommunicado several bloggers and content creators who had shared either the Ruto coffin image or other mocking content.[150] Two people were said to have been abducted specifically for sharing the AI-generated coffin photo.[151] Another case was that of Gideon Kibet (known by his pen name "Kibet Bull"), a cartoonist who regularly posted caricatures of the President. Kibet was abducted for a period of time; upon release, he publicly stated he would cease drawing cartoons of the President.[152] These reports, if accurate, indicate a heavy-handed state response extending beyond lawful prosecution, a blatant violation of due process and free expression rights. The Kenyan government and police officially denied any role in the abductions.[153] Interestingly, President Ruto himself later commented on the matter, suggesting acknowledgment: he stated at a press conference that "all the people who disappeared or were abducted… have been brought back to their families" and he gave firm instructions that such actions should not happen again.[154] This implies high-level awareness that security operatives might have overreached in quelling online satire, and an attempt by the President to distance himself from those actions once they came to light.

The episode triggered a mix of public reactions. On one side, many Kenyans, even those in opposition, found the coffin image distasteful and misleading. Spreading false news about a president's death can indeed sow confusion and has the potential to disturb public order. For example, financial markets or diplomatic circles might react adversely to such rumours. Thus, some members of the public felt an example needed to be made

147 Ibid

148 Ibid

149 Odanga Madung, 'Tortured over a tweet: how the war between Kenya's Gen Z and their president has moved online' *The Guardian* (1 May 2025) https://www.theguardian.com/global-development/2025/may/01/kenyans-tortured-for-a-tweet-president-ruto-satire-x-youth-gen-z accessed 9 July 2025.

150 Ibid

151 Ibid

152 Ibid

153 Ibid

154 Samuel Njihia, 'Outcry over Ruto's remarks on abductions of Gen Z protesters' *Nairobi Law Monthly* (13 May 2025) https://nairobilawmonthly.com/outcry-over-rutos-remarks-on-abductions/ accessed 9 July 2025.

to deter fake news. On the other side, civil society groups and free speech advocates were alarmed by the government's apparent intolerance of even satirical expression. The fact that the image was clearly not real (no credible outlet reported Ruto's death) led some to argue that it should be treated as parody, perhaps in poor taste, but not a criminal matter. Amnesty International Kenya and the Bloggers Association of Kenya (BAKE) raised concerns that using heavy laws like CMCA (and certainly any alleged kidnappings) against satirists would stifle legitimate speech. Every democracy has some tradition of irreverence towards leaders; punishing that too harshly edges towards authoritarianism. The debate also highlighted the ambiguity of deepfakes as a form of expression. If a deepfake is made obviously absurd (like a clearly caricatured image of a living person in a coffin), is it misinformation or satire? The law in Kenya does not explicitly exempt satire or parody from "false information" offenses. That ambiguity arguably gave authorities cover to pursue critics under the guise of fighting fake news.

From a human rights perspective, this case underscores the risk that anti-misinformation laws can be weaponized to suppress dissent. Yes, there is a valid state interest in preventing public panic and protecting the President's reputation from egregious falsehoods. However, when the state's response includes detaining university students and allegedly abducting cartoonists, the proportionality of that response is in serious question. The case also spotlights political expression as a specially protected category under international law, the Human Rights Committee has observed that the threshold for restricting political speech or satire is high, given its importance in democratic debate. In Mokaya's trial, this argument was front and centre: his lawyer insisted that however offensive or fake the post was, it was a form of political critique and thus should not be criminalized.[155] The outcome of the trial may set an important precedent. An acquittal could reaffirm Kenyan citizens' right to poke fun at leaders, even with the aid of AI imagery, whereas a conviction might reinforce a culture of self-censorship, where citizens refrain from sharing even obvious jokes about politicians for fear of jail.

This case vividly illustrates the intersection in question. A deepfake used as political satire crossed into what authorities deemed dangerous misinformation. The government's overriding concern was arguably not that Kenyans would truly believe Ruto was dead for long, but rather the symbolic insult and the potential of such posts to undermine the presidency's dignity or encourage a mood of lawlessness. The "misinformation" (fake death announcement) was intertwined with expression (critique or mockery of Ruto's regime). The challenge is drawing a legal line between legitimate satire (protected speech) and harmful fake news (punishable speech). Kenya's current law did not prevent the arrest of the satirist, suggesting the line may have been drawn too broadly in favour of enforcement. Moving forward, Kenyan policymakers might consider clearer guidelines or safe harbours for example, explicitly protecting satire/parody even if it involves falsehood, as long as no reasonable person would mistake it for factual news. Alternatively, the context (posting a presidential "death" during tense political times) may be seen as inherently harmful. If such content had triggered unrest or panic (thankfully it did not on a large scale), the state's position would be stronger.

In conclusion, Case 1 shows Kenya erring on the side of combating misinformation at the cost of clamping down on a form of expression. It highlights the need for nuanced approaches, possibly non-carceral responses like counter speech (officially debunking the fake promptly) or mild administrative penalties for spreading obvious hoaxes, rather than draconian punishments.

Case 2: AI-Generated Video Shared by Foreign Affairs PS Dr. Korir Sing'Oei

In February 2025, Kenya's Foreign Affairs Principal Secretary (PS), Dr. Korir Sing'Oei, posted a video on his official X (Twitter) account that quickly became infamous. The video was designed to look like a segment from CNN's foreign affairs program, it deepfake-portrayed renowned CNN journalist Fareed Zakaria, apparently

155 Channels Television, 'Kenya Student on Trial for Fake Caption of Ruto "Funeral"' (Channels TV, 29 May 2025) https://www.channelstv.com/2025/05/29/kenya-student-on-trial-for-fake-caption-of-ruto-funeral/ accessed 30 June 2025.

speaking in glowing terms about Kenya's role in peace negotiations in Sudan.[156] In the fake clip, Zakaria praises Kenya's peace diplomacy efforts, thereby bolstering the Kenyan government's narrative that it was playing a critical, positive role in resolving the Sudanese conflict. Along with the video, PS Sing'Oei tweeted a dismissive message aimed at critics of the government. He wrote: "For the fake analysts who doubt the good faith of Kenya's peace diplomacy, here is a cogent assessment by CNN's Foreign Policy expert, Fareed Zakaria.".[157] In essence, the PS was using the authority of a respected international journalist to validate Kenya's foreign policy, and in the same breath labelling dissenting Kenyan analysts as "fake."

Unbeknownst to Sing'ei (by his later account), the video was not an authentic CNN clip at all, it was a deepfake. While it used Fareed Zakaria's likeness and voice, the video had tell-tale signs of inauthenticity. The mouth movements were slightly out of sync with the audio; the graphic "lower third" banner looked amateurish; and significantly, neither CNN's platforms nor Zakaria's official accounts had any trace of this so-called segment.[158] Essentially, someone (identity unknown) had generated this faux CNN video using AI, PS Sing'Oei had then shared it, seemingly in earnest, as if it were a genuine external endorsement of Kenya's diplomatic stance.

The public reaction was swift and largely one of shock, disbelief, and embarrassment. Kenyans on social media quickly flagged the video as fake and criticized the PS for disseminating misinformation.[159] Many commentators were astounded that a high-ranking official would share such material without verification.

Beyond domestic ridicule, observers worried about the international ramifications. A fake CNN clip, if taken seriously outside Kenya, could damage the country's diplomatic credibility. Some feared that once international media caught wind, Kenya would be seen as a purveyor of disinformation. Diplomatic circles rely heavily on integrity; an official caught promoting falsehoods (even if unintentionally) may erode that integrity.

After a day or two of mounting criticism, Dr. Sing'Oei deleted the tweet and issued a public apology. "I sincerely apologise for inadvertently posting an AI-generated video disguised as a genuine commentary from Fareed Zakaria of CNN on the search for peace," he wrote.[160] He claimed he had been unaware it was AI-generated and that it was shared in error. The PS said his intention was to highlight Kenya's diplomatic efforts, not to mislead, and he expressed regret for the incident.[161]

The Sing'Oei deepfake incident raises critical questions. First, it highlights the ease with which even educated, high-level individuals can be fooled by or fall victim to deepfakes. If a Principal Secretary can inadvertently tweet a fake video thinking it real, what about the average citizen? This underscores the need for digital media literacy and verification protocols within government. Arguably, Sing'Oei and his staff should have vetted the clip, a quick check of CNN's official channels would have debunked it immediately. The incident has likely prompted internal government discussions about verifying information before amplifying it.

Second, this case demonstrates the harm deepfakes can do to public knowledge and discourse. For the hours

156 Citizen Digital, 'Shock, Disbelief After Foreign Affairs PS Shares CNN Deepfake Video Praising Kenya's Peace Effort in Sudan' (2025) https://www.citizen.digital/news/shock-disbelief-after-foreign-affairs-ps-shares-cnn-deep-fake-video-praising-kenyas-peace-effort-in-sudan-n357975 accessed 30 June 2025.

157 Ibid

158 Dickson Otieno, 'Kenya's Foreign Affairs PS Shares Deepfake CNN Video, Raising Questions on Misinformation and Accountability' *Tech-ish* (20 February 2025) https://tech-ish.com/2025/02/20/kenya-foreign-affairs-ps-deepfake-cnn/ accessed 9 July 2025

159 Ibid

160 Hilary Kimuyu, 'PS Sing'oei apologises for deepfake goof on Sudan conflict' *Nation Africa* (21 February 2025) https://nation.africa/kenya/news/sing-oei-apologises-for-deepfake-goof-on-sudan-conflict-4935696 accessed 9 July 2025

161 Ibid

it was up, some Kenyans might have believed Fareed Zakaria genuinely praised their country, a feel-good but false piece of news. When the truth came out, it likely bred cynicism and confusion. If people see that even mainstream-looking clips can be fake, they may start distrusting everything (the Liar's Dividend effect). Ironically, by using a deepfake, the PS may have undermined trust in legitimate media too. Next time Zakaria really says something on CNN, sceptics might doubt it's veracity. Thus, one official's act of sharing a deepfake can contribute to the broader erosion of truth, an outcome detrimental to the entire society's right to accurate information.

In summary, this case is a cautionary tale of how deepfakes can infiltrate the highest levels of discourse and how the responses to them can be uneven. It reinforces the argument that Kenya needs a coherent strategy for deepfakes, one that includes training officials, establishing verification protocols, enforcing laws fairly regardless of rank, and educating the public. The case also suggests that Kenya's legal tools might need refinement, perhaps a specific prohibition on officials disseminating false information, or at least formal guidelines, to prevent recurrence.

Comparative Legal Review

The challenge of deepfakes is global, and various jurisdictions have begun experimenting with legal and policy solutions. This section examines how a selection of countries and regions specifically, the European Union, South Korea and Australia are regulating deepfakes. Each offers insights that could inform Kenya's approach, be it through legislation specifically targeting deepfakes or by leveraging existing laws e.g., on impersonation, fraud, or image rights. The comparative review also highlights notable cases and controversies, shedding light on what "best practices" in deepfake governance might look like.

European Union

The European Union is addressing deepfakes as part of its broader strategy to regulate artificial intelligence and online harms. The EU's approach is characterized by imposing transparency obligations on AI-generated content and holding platforms accountable, rather than criminalizing end-users. Two major EU initiatives are noteworthy: the forthcoming AI Act 2024 and the existing framework of the Digital Services Act (DSA) 2022 and the Code of Practice on Disinformation.

In late 2023, EU institutions reached agreement on the world's first comprehensive Artificial Intelligence Act, which the European Parliament formally approved in 2024.[162] While the AI Act is a broad regulatory instrument covering many aspects of AI (from high-risk applications to governance), it explicitly tackles the problem of deepfakes. The Act will require that any AI-generated or AI-manipulated content that resembles real people or events be clearly labelled as such.[163] In other words, if someone creates a deepfake video or image, they have a legal duty to disclose that it is artificially generated. This applies to providers of AI systems that generate such content, and to those who deploy them. For example, a company offering a deepfake video creation tool in the EU must ensure the output contains some kind of watermark or notice of inauthenticity. Exceptions are likely made for law enforcement or national security uses and possibly for authorized parody, but generally the thrust is transparency. The law defines "deep fake" as AI-generated or manipulated content that "resembles existing persons, objects, places, or events", which captures the essence of malicious deepfakes.[164] The rationale is that labelling deepfakes will help viewers not be misled, thereby mitigating misinformation. These transparency rules will become enforceable from 2026 as the AI Act provides a phase-in period.[165] Providers who fail to

162 European Parliament, 'Artificial Intelligence Act: MEPs Adopt Landmark Law' (8 March 2024) https://www.europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law accessed 30 June 2025

163 Ibid

164 Artificial Intelligence Act, 'Article 3: Definitions' (EU AI Act, 2024) https://artificialintelligenceact.eu/article/3/ accessed 30 June 2025.

165 European Parliament, 'Artificial Intelligence Act: MEPs Adopt Landmark Law' (8 March 2024) https://www.europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law accessed 30 June 2025

label deepfake content could face hefty fines under the EU's penalty regime, potentially up to €30 million or 6% of global turnover for companies. While this measure does not fall under criminal sanction, this regulatory approach puts legal responsibility on AI content producers and distributors.

Additionally, the AI Act considers the creation of certain deepfakes as a potentially high-risk AI practice, especially if used in ways that impact democracy or security. It does not ban deepfakes outrightly as the EU stopped short of banning AI manipulations except in very specific cases like real-time biometric ID or social scoring.[166] Instead, it aims to ensure that deepfakes can be identified. This approach reflects the European preference for safeguarding fundamental rights (freedom of expression, right to information) by avoiding censorship, while still countering the harms of disinformation through transparency. For Kenya, which trades significantly with the EU and often aligns with global tech norms, the AI Act's provisions could serve as a model: requiring labels on state-produced media, for instance, if any AI elements are used, or encouraging local platforms to mark synthetic content. It's a less punitive, more preventive measure.

The EU's Digital Services Act, effective 2022, imposes due diligence obligations on online intermediaries to manage systemic risks like disinformation. For the largest platforms, designated Very Marge Online Platforms (VLOPs) like Facebook, YouTube, etc., this includes assessing and mitigating the spread of fake or manipulative content. Coupled with the EU's Code of Practice on Disinformation (a co-regulatory scheme where platforms voluntarily commit to actions), deepfakes are specifically flagged as a growing concern. Signatories to the Code which include all major social media companies pledged to develop "indicators for users to recognize synthetic media" and to invest in technology to detect and label deepfakes. For instance, Facebook's deepfake ban was partly in response to EU pressure. In June 2023, the updated Code of Practice even mentioned establishing a Deepfake Observatory to share data on deepfake videos between platforms and researchers.[167] The DSA, now enforceable, gives regulators power to audit how platforms handle deepfakes and other online harms, and to fine them if they fall short. A recent example: the European Commission reportedly asked TikTok and Twitter to report on the presence of deepfake election content and what steps they take to label or remove it. The Commission also floated the idea that certain high-risk deepfakes like those inciting hate or fraud could be treated akin to illegal content which platforms must remove promptly under the DSA.

The EU's emphasis is thus on platform responsibility and user empowerment. Rather than prosecuting individual deepfake creators, which is difficult across jurisdictions, the EU aims to make the environment less hospitable for deepfake dissemination. Tools like provenance technology (watermarking original media) and deepfake detectors are being promoted. Another interesting EU development is in the realm of copyright and data protection, the GDPR (privacy law) could arguably allow Europeans to demand deletion of deepfake images of themselves as a violation of their data rights, and the EU Copyright Directive (2019) might allow news organizations to claim copyright infringement if their broadcast is deepfaked.

For Kenya, adopting a similar stance means engaging platforms (Facebook, Twitter, etc.) through its regulator or by law to ensure that Kenyan users are warned or shielded from malicious deepfakes. Kenya could push for AI transparency in any future tech legislation, mirroring the EU's drive to label synthetic content. The EU's approach also underscores that fighting deepfakes is not solely a criminal law issue but part of a larger digital governance and human rights framework.

Denmark

In June 2025, Denmark introduced a pioneering legal reform aimed at addressing the growing threat of

166 Ibid

167 Columbia Journal of European Law, 'Deepfake, Deep Trouble: The European AI Act and the Fight Against AI-Generated Misinformation' (2024) https://cjel.law.columbia.edu/preliminary-reference/2024/deepfake-deep-trouble-the-european-ai-act-and-the-fight-against-ai-generated-misinformation/ accessed 30 June 2025.

deepfakes by reasserting individual control over digital identity. The Danish Ministry of Culture announced a proposal to amend the Danish Copyright Act to grant individuals exclusive rights over their own facial features, voice, and physical likeness, including in cases involving realistic, AI-generated imitations.

The proposed legislation prohibits the distribution of realistic AI-generated content impersonating a real person without their consent and introduces civil remedies, including takedown rights and compensation claims, available even if the individual has suffered no demonstrable harm. These rights would persist for up to 50 years after the individual's death. [168] Importantly, the Bill preserves protections for satire and parody, consistent with freedom of expression under the European Convention on Human Rights.

The law is currently undergoing public consultation, with formal parliamentary consideration expected in autumn 2025 and possible enactment by early 2026. As the first proposal of its kind in Europe, Denmark's initiative offers a compelling legal model for jurisdictions such as Kenya, where statutory rights to personality and likeness remain underdeveloped. By framing identity protection through a copyright-based lens, Denmark advances a novel legal doctrine that safeguards individual autonomy in the digital age while respecting artistic and political expression, an approach Kenya and other countries may wish to study in formulating their own deepfake governance framework.

South Korea

South Korea, being a vibrant democracy but one with a history of bitterly fought elections, recognized the threat of deepfakes to electoral integrity. In late 2023, the National Assembly revised the Public Official Election Act to prohibit publishing or broadcasting "fabricated visual or audio materials" related to candidates or parties during the election period (typically 90 days before the election day).[169] Any AI-manipulated portrayal of a candidate that could mislead voters is banned. Violation can attract not just criminal charges but also election law sanctions (which in Korea can include loss of candidacy or voting rights). This came after some minor incidents in the 2022 presidential election where cheap fake (not full deepfake) videos misrepresenting a candidate's statements went viral. The law now tries to pre-empt AI-driven disinformation in campaigns.

On the other hand, deepfake technology in benign uses (like entertainment) is not outlawed, and there's active research in developing better detection. South Korea also launched public education campaigns warning young people (especially students) about the illegality and immorality of creating or sharing deepfakes.

South Korea demonstrates the value of prompt, offense-specific legislation when a particular deepfake-related harm becomes acute. Kenya, similarly, might look at its societal context and come up with a pinpoint law for the issues that proliferate deepfakes. Korea's heavy sentences also send a deterrent signal, something to consider if Kenyan law currently only, say, fines such behaviour or has ambiguous coverage. Korea's ban on election deepfakes ties into protecting democratic processes, a priority Kenya shares. While Kenya hasn't reported major deepfake incidents in elections yet, the legal framework to nip it in the bud could be pre-emptively considered, learning from Korea's proactive stance.

Australia

A standout aspect of Australia's approach is the e-Safety Commissioner – a government agency with powers to regulate online content and enforce removal of harmful material. Under the Online Safety Act 2021, e-Safety can issue takedown notices for image-based abuse, which includes deepfake images. If someone in Australia finds a deepfake image of themselves online, they can report to e-Safety, which can then compel websites

168 *Kulturministeriet*, 'Proposal to Amend the Danish Copyright Act to Address Deepfakes' (June 2025) https://www.kulturministeriet.dk accessed 5 July 2025.

169 Terrence Matsuo, *"Deepfakes and Korean Society: Navigating Risks and Dilemmas"* (*The Peninsula*, KEIA, 3 October 2024) https://keia.org/the-peninsula/deepfakes-and-korean-society-navigating-risks-and-dilemmas/ accessed 9 July 2025.

or social media to remove it (with steep fines for non-compliance). This administrative mechanism provides quicker relief than waiting for police investigations. The e-Safety Commissioner, Julie Inman Grant, has publicly warned about deepfakes, highlighting cases of deepfake child abuse images, and has used her anti-bullying pulpit to get platforms to invest in detection tech.[170] In 2023, e-Safety joined forces with international counterparts in the "Global Partnership on AI" to study deepfake trends and responses.

Australia has an implied freedom of political communication in its Constitution. To the extent deepfake regulation touches on political speech, laws must be reasonable and proportionate. The deepfake laws passed so far are targeted at intimate images, which don't raise political speech issues. Should Australia consider laws on political deepfakes, they'd have to align with this implied freedom. So far, they've relied on non-legislative measures like fact-checking during elections and voluntary codes given that Australia is part of the same Disinformation Code as the EU, which includes commitments on deepfakes by tech companies. The Australian media too has taken steps like News programs running educational segments on spotting deepfakes.[171]

Australia's dual approach, criminal sanctions plus rapid content removal tools, could be instructive. For Kenya, empowering an agency like the Communications Authority or Data Protection Commissioner to issue takedown orders for proven deepfake abuse could greatly help victims. On the criminal side, Australia reaffirming that deepfake misuse is akin to other image abuse suggests that Kenyan prosecutors and legislators should view it not as a novelty but simply a new method of committing familiar harms like defamation and fraud. Thus, laws can be updated to explicitly mention "computer-altered images" in the definitions of crimes. Another aspect is public awareness as Australia's e-Safety is very active in outreach. Kenya could similarly invest in educating the public on deepfakes, perhaps via the Media Council or Ministry of ICT, to build societal resilience against misinformation.

Across these jurisdictions, some common threads emerge: nearly all are criminalizing non-consensual sexual deepfakes, many are trending toward requiring labelling of deepfakes to curb misinformation; enforcement is challenging but focus is on major harms (elections, sexual exploitation, fraud). Each legal system balances differently on free expression. Europe slightly defers to free expression while exercising caution while Asia-Pacific nations like South Korea and Australia more readily legislate restrictions. Kenya, crafting its path, can selectively borrow from the legislative and policy reforms of these countries. Given Kenya's commitment to human rights in the digital age, a sensible approach would be to protect individuals from the worst deepfake harms such as sexual violence, severe defamation and fraud with clear laws, ensuring any political speech restrictions are narrow and in line with democratic values by focusing on transparency rather than blanket bans, and incorporate international cooperation and technology investment for detection.

Conclusion and Recommendations

Conclusion

Deepfakes sit at a precarious intersection of Kenya's aspirations to uphold freedom of expression and the urgent need to combat misinformation and protect citizens' rights in the digital age. As the above analysis shows, deepfakes can be used for creative or political expression, sometimes satirical, sometimes subversive but they also pose real threats to individual dignity through impersonation or non-consensual sexualization, to democratic discourse through fake news and manipulated political narratives, among others. The Kenyan legal framework is gradually coming to grips with these challenges, yet gaps and ambiguities remain. Meanwhile, comparative insights from other jurisdictions illustrate that effective solutions are within reach, so long as Kenya tailors them to its constitutional values and socio-political context.

170 VOA News, *"Australia criminalizes distribution and creation of deepfake pornographic material"* (Voice of America, published c. February 2024) https://www.voanews.com/a/australia-criminalizes-distribution-and-creation-of-deepfake-pornographic-material/7643430.html accessed 9 July 2025.

171 Attorney-General's Department (South Australia), *"Deepfakes in South Australia"* (Attorney-General's Department of South Australia) https://agd.sa.gov.au/law-and-justice/consultation/deepfakes accessed 9 July 2025.

Kenya's current laws do provide a basis to prosecute harmful deepfake-related acts such as publishing false information or committing fraud via impersonation. However, these laws were not drafted with deepfakes in mind and thus may not cover all nuances. The case studies highlighted that enforcement has been inconsistent. There has been a heavy hand against critical or satirical deepfakes, but a light touch when state actors themselves err, indicating a need for more even-handed application of the rule of law. They also underscore the danger of overreach through using anti-misinformation laws to punish satire risks chilling free expression, a foundational right in Kenya's Constitution and international commitments. On the other hand, doing nothing in the face of malicious deepfakes could embolden bad actors and erode truth in public discourse.

Therefore, Kenya must strive for a balanced approach. One that safeguards free expression, especially political and artistic expression, and encourages innovation in AI, while robustly deterring and punishing the abusive and rights-violating uses of deepfake technology. The theme of "human rights in a digital age" implies that any solution should put human dignity, privacy, and democratic values at the center.

Recommendations

In light of this analysis, the following policy and legal reform proposals are advanced for Kenya to navigate the deepfake dilemma. Parliament should consider amending existing laws or enacting a standalone statute to specifically address deepfakes. A targeted provision can define "synthetic media impersonation" and criminalize the creation and/or distribution of deepfake content with intent to mislead or cause harm and without the consent of the person depicted. This could be modelled on South Korea's approach on sexual images. Crucially, the law should distinguish malicious intent from innocent or protected uses. Exemptions or defences should exist for parody, satire, and journalistic or academic uses of deepfakes, with appropriate disclosure. The penalty should be proportional to the harm. For instance, higher if used to falsely depict someone in a sexual act, commit fraud, or incite violence; lower or non-criminal if it's a generic misleading video without severe consequences. Such a law would fill gaps and serve as a clear deterrent, while signalling that Kenya is serious about combating emerging cybercrimes.

Beyond criminalization, Kenyan law should bolster civil remedies for those harmed by deepfakes. This could involve amending the Data Protection Act 2019 to clarify that creating or sharing someone's AI-generated likeness without a lawful basis violates personal data rights, enabling the Data Commissioner to order takedowns and impose penalties. The right to be forgotten could be invoked for deepfake content online, allowing victims to demand its erasure. Additionally, there is the option of empowering an authority (perhaps the Communications Authority or the NCIC if relevant to hate speech) to issue rapid takedown notices for egregious deepfakes. This would be akin to Australia's e-Safety model. For instance, if a non-consensual sexual deepfake is circulating, a victim should have a one-stop avenue to get it removed from Kenyan-hosted sites and to request platform intervention globally.

Further, the government should develop clear guidelines or regulations on how laws like the CMCA 2018 are to be applied in misinformation cases. Law enforcement must be trained to differentiate between harmful disinformation and protected expression. For example, the DPP could issue prosecution guidelines stating that satire or political commentary, even if in poor taste or containing falsehood, will generally not be prosecuted under Section 23 unless it also involves factors like incitement to violence or specific, provable harm. This would prevent trivial or politicized use of the law. Additionally, any enforcement actions (especially by security agencies) must strictly follow due process, no more abductions or intimidation of online critics. Oversight bodies like the Independent Policing Oversight Authority (IPOA) and Kenya National Commission on Human Rights (KNCHR) should be vigilant in monitoring to ensure that anti-fake news efforts do not become a cover for repression. Embedding these commitments, perhaps via an internal police circular or even an amendment

in the CMCA stipulating that prosecution requires approval at a high level to avoid abuse, could be useful.

Legal measures alone are not foolproof. Kenya should invest in public education about deepfakes. The Ministry of Education and Ministry of ICT could collaborate to include media and AI literacy in school curricula and run nationwide campaigns. Citizens should learn how to verify content, for instance, checking official sources if they see sensational claims and how to recognize common deepfake artifacts (as Citizen Digital demonstrated in analysing the Sing'Oei clip). Supporting independent fact-checkers and granting them access to promptly debunk suspected deepfakes will also mitigate harm. On the technological side, the government can partner with academia and industry to develop or adopt deepfake detection software. For example, tools that authenticate videos using blockchain or digital watermarks can be used by newsrooms and government agencies to assure the public a given video is real. Encouraging local media houses to join global initiatives like the Content Authenticity Initiative could flag fake media and help restore trust in genuine media. In election periods, the IEBC and media should have rapid response plans for any deepfake incidents, ready to clarify and inform the public so as to pre-empt confusion or violence stemming from fake videos.

Kenya should also align with international best practices on cybercrime and human rights. This could involve accelerating ratification of instruments like the AU Malabo Convention and shaping its implementation to cover deepfake abuses. Regionally, Kenya can work with the East African Community or African Union to develop guidelines on AI and disinformation, ensuring a harmonized approach (as deepfakes will cross borders on social media). On the global stage, Kenya can actively participate in the finalization of the UN Cybercrime Convention, advocating for inclusion of provisions against AI-generated harmful content, and in UNESCO or other UN bodies' discussions on the ethics of AI. Additionally, learning from the comparative review, Kenya could emulate aspects of the EU AI Act by mandating transparency. This could be perhaps by introducing a regulation that any political advertisement or government-produced video that uses AI-manipulated content must disclose that fact clearly. This could be enforced by the IEBC for campaigns or by a general consumer protection rule. The government could also engage tech platforms (Facebook, Google, TikTok etc.) through either legislation or MOUs to ensure their services in Kenya are not used to virally spread deepfakes. This might include requiring quick suspension of accounts that propagate dangerous deepfakes (akin to how terrorism or hate content is handled).

Finally, Kenya should not view deepfakes solely as a problem to be outlawed, but also as a symptom of broader AI development. Policies to encourage ethical AI innovation could help in the long run. This includes supporting Kenyan tech developers to innovate in watermarking AI content, or building authentication into digital cameras (so videos carry metadata proof of origin). By being part of the solution technology, Kenya also creates economic and research opportunities in the AI field. Simultaneously, an ethical framework via the recently established Kenya National AI Taskforce can set norms. For instance, urging content creators and influencers to pledge not to use deepfakes deceptively. Just as Kenya took a principled stand in the past on open internet and access to information, it can take leadership in Africa on the principle that truth in media is worth defending with both hard and soft measures.

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THE DOUBLE-EDGED SWORD:TECHNOLOGY, FREEDOM OF EXPRESSION AND THE EVOLVING LANDSCAPE OF PRIVACY AND DATA PROTECTION

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ABSTRACT

Internet usage has grown exponentially, with Kenya recording 10.55 million social media users and 17.86 million internet users as of 2023. These statistics overtly pinpoints the internet's critical role as a platform for accessing information and amplifying voices, fostering democratic engagement. However, this digital revolution presents significant challenges, particularly in the realms of privacy and data protection. As individuals increasingly share personal information online, the risk of privacy breaches and the misuse of data looms large.

This paper aims to add to the existing research, by exploring the interplay between technological advancements and constitutional rights to freedom of expression and privacy in Kenya, critically assessing whether the existing legal framework sufficiently addresses these prerogatives. By examining how digital platforms enable communication while exposing users to surveillance, data misuse, and privacy violations, the study evaluates the challenges of balancing free expression with robust privacy safeguards. Through qualitative analysis of Kenya's legal frameworks, global case studies, and best practices, the paper offers strategies to regulate content effectively, promote data protection, and enhance free expression. It emphasizes the need for comprehensive regulatory mechanisms to uphold constitutional rights in the digital age while ensuring technological innovations are enablers of privacy and free expression rather than threat

INTRODUCTION

The right to freedom of expression is one of the essential foundations of a democratic society and the basic conditions for its progress and for each individual's self-fulfilment.[173] This right is enjoyed both online and offline. The UN recognizes it as fundamental in constructing inclusiveness, peaceful democracies, and knowledgeable societies.[174] Article 9 of the ACHPR, Article 19 of the UDHR, and the ICCPR exponentially guarantee this right.[175] Further, the Bill of Rights under the Constitution of Kenya reaffirms this right to enjoy other human rights.[176] In the past two decades, the internet's power to advance the tenets of freedom of expression has gained prevalence due to its seamless ability to send and receive information worldwide.[177]

Social media avenues powered by the internet, such as X, breached traditional channels of freedom of expression, offering unprecedented opportunities to exercise it fully.[178] As a result, they have quickly emerged as essential tools for exercising the right to freedom of expression.[179]

However, the benefits of technological advancements are accompanied by significant concerns regarding

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173 Poulsen W, Freedom of Expression, and the Internet (Cambridge University Press 2014); Von Hannover v Germany (No 2) [2012] ECHR 15 (ECtHR)

174 UNHRC, 'Freedom of opinion an expression': resolution A/HRC/RES/44/12- EN. Geneva: UN, 24, July 2020. Available at <https://digitallibrary.un.org/record/3877197 > accessed 22 November 2024

175 Art 9, African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) ; Art 19, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) ; Art 19, International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 197) 999 UNTS 171

176 Constitution of Kenya Art 33(1)

177 Grace Nolasco, 'Freedom of Expression on the Internet and the Law in Tanzania' [2016] MLR 46

178 House of Lords Communications and Digital Committee, 'Free for all? Freedom of expression in the digital age'

179 Ibid, Frank La Rue, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression A/HRC/17/27 16 May 2011

privacy and data protection. The digital footprints left by individuals online can be exploited, leading to potential breaches of privacy. Previous research has extensively explored these issues, documenting the use and misuse of problematic laws and policies, as well as internet disruptions by governments to address misinformation, disinformation, hate speech, and unrest. While these studies have provided valuable insights, many have focused on specific aspects without offering a comprehensive view, and there is limited access to up-to-date data on technology's impact.

By delving into these issues, this paper contributes to the ongoing discourse on the ethical and legal implications of technology in the digital age. It highlights the need for a nuanced approach that safeguards both the freedom of expression and protection of personal privacy, ensuring that technological advancements serve the interests of all Kenyans.

2.1 Statement of the Problem

Quintessentially, technology should act as a formidable enabler of freedom of expression, empowering individuals to communicate freely and participate actively in public discourse, without the threat of breaches of privacy. In line with the principles of administrative law, citizens ought to be able to share their thoughts and opinions online, assured that their personal data is safeguarded by robust legal frameworks and stringent regulatory measures.[180] Paramount to this ideal is the protection of privacy and data, ensuring that rights and freedoms of individuals are upheld in the digital sphere.

However, the current situation in Kenya deviates from this ideal. While technological advancements have indeed broadened the avenues of freedom of expression, they have concurrently introduced profound challenges in privacy and data protection.[181] The use of mobile phones and social media platforms has rendered users susceptible to heightened risks of privacy breaches and data misuse. Existing legal and regulatory frameworks often fall short in addressing these emerging threats, leaving conspicuous gaps in the protection of individual's privacy.

Only by accepting and opening our eyes to these issues can we adequately address these challenges, lest they perpetuate to different and unfamiliar degrees.

2.2 Theoretical Framework

2.2.1 Utilitarianism

Utilitarianism, coined by philosopher John Stuart Mill, posits that the best action is the one that maximizes overall happiness or utility.[182] Utilitarianism emphasizes the consequences of actions and seeks the greatest good for the greatest number.[183] The utilitarianism theory can be used to explain the rationale for the protection of online freedom of expression for everyone's good. [184]

Technology has revolutionized how we exercise freedom of expression, enabling instantaneous communication, global reach, and access to vast communication. From a Utilitarian perspective, this expansion of expressive

180 Migai Akech, Administrative Law (Strathmore University Press, 2016)

181 Gregory P, Free Speech in the Digital Age (OUP 2019);Keraka Caleb, 'The Intersection of Digital Technology, Fundamental Human Rights and Constitutional Values & Principles in Kenya's Digital Space (March 30, 2023) https://ssrn.com/abstract=4660373 Accessed 10 December2024

182 Bentham J, An Introduction to the Principles of Morals and Legislation (2nd edn, OUP 1970); Mill J, Utilitarianism (OUP 1998)

183 Ibid, Markkula Centre for Applied Ethics, Calculating the Consequences: The Utilitarian Approach to Ethics (Santa Clara University 2014)

184 John Stuart Milll, On Liberty (Dover Publications 2002), 18-22

capabilities maximizes societal happiness by promoting democratic participation, innovation, and cultural exchange.[185]

Nonetheless, Utilitarianism may justify privacy invasions if they result in a greater overall good, such as improved national security. This theory prioritizes collective benefits over personal privacy, eroding rights to privacy and data protection.[186] According to Utilitarian principles, these negative consequences must be weighed against the benefits of technological advancements.[187]

It's in line with this approach that this paper aims to provide a framework for evaluating the trade-offs between technological benefits and privacy risks, highlighting the need for a balanced approach by emphasizing the importance of considering the collective impact of technology on society while recognizing the potential harm to individuals. This perspective can inform policy decisions and regulatory frameworks that aim to maximize the benefits of technology while safeguarding privacy and data protection, just as was stated by the Supreme Court of South Africa in Hoho v The State,[188] that freedom is not without limitations and should be viewed in the context of human dignity, a fundamental value of a democratic state.[189]

2.2.2 Libertarianism

Coined by John Locke,[190] this theory believes that governments serve to protect citizens' rights but cannot grant them nor impose social standards.[191] For Locke, free speech is an inalienable right that citizens have because of their status as independent, unique individuals living in a free society.[192] Libertarianism thus advocates for the unregulated flow of information and strong protection of personal liberties.[193]

Technology amplifies the capacity of freedom of expression by providing platforms for individuals to share their ideas and opinions without governmental interference. From a libertarian perspective, this aligns perfectly with maximizing individual liberty and minimizing state control.[194]

However, Libertarianism's strong emphasis on minimal regulation can lead to the absence of necessary oversight mechanisms to protect individuals from corporate or other entities' abuses of power.[195] Its focus on individual rights may overlook the collective good and the need for community-based solutions to address broader societal issues, such as privacy violations.[196]

This paper, in light of the libertarian perspective on technology, freedom of expression, and privacy, seeks to provide valuable insights into the tension between individual liberties. It highlights the importance of protecting personal freedoms while recognizing the potential pitfalls of an unregulated digital environment.

2.3 Conceptual Framework

185 Ibid 23 -24; Norman Barry P, On Classical Liberalism and Libertarianism (Macmillan, 1986)
186 Jonathan G, Utilitarianism, and Its Critics (Reprint edn, Macmillan, 1990)
187 Ibid
188 Hoho v The State (493/05) [2008] ZASCA 98 (17 September 2008)
189 Ibid 36
190 John Locke, Two Treatises of Government (Cambridge University Press 1998)
191 Ibid 45
192 Ibid 106
193 Norman P. Barry, On Classical liberalism and libertarianism (Macmillan 1986)
194 David Boaz, The Libertarian Mind (Simon & Schuster 2014)
195 Sandel J, Liberalism, and the Limits of Justice (Cambridge University Press, 1982)
196 Ibid Chapter 2; Cohen G.A, Self-Ownership, Freedom, and Equality (Cambridge University Press, 1995)

According to Simon Kemp, at least 42.0% of Kenyans are estimated to use the Internet.[197] With such a significant number of internet users, the democratic fabric of society is tested if the issue of content restriction is not adequately addressed. The importance of safeguarding the freedom of expression in cyberspace is underscored by Richard Moon's argument that the value of freedom of expression lies in social interactions.[198] According to Moon, communication enables individuals to form relationships and associations that are essential for a functioning society.[199]

Waldron further emphaszes this by framing communal tolerance as a "public good."[200] He argues that a well-ordered society requires everyone to recognize that it is not just for them individually but for all collectively.[201] He asserts that people should be able to go about their lives with the assurance that they will not face hostility or violence.[202] Building on Waldron's perspective, Grace Nolasco highlights the need to balance freedom of expression with other rights, such as privacy.[203] Such balance ensures that the exercise of one right on the internet does not infringe upon another.[204] In light of these perspectives, this paper addresses the social tensions arising from the control of information created by the Internet and digital technologies. Unchecked, these tensions risk may render fundamental rights meaningless, reducing them to hollow promises devoid of substantive value

FREEDOM OF EXPRESSION IN A DEMOCRACY

Freedom of expression is considered the foundation stone[205] and a pillar for every free and democratic society.[206] It serves 4 broad purposes; it helps an individual to obtain self-fulfilment, assists in discovery of truth, strengthens the capacity of an individual to participate in decision-making and provides for a mechanism for establishing a reasonable balance between stability and social change.[207]

Cardozo J in Palco[208] recognized that freedom of thought and expression is the matrix, the indispensable condition, of every other form of freedom.[209]

The information shared encompasses not only the one that is favourably received but also the one that the ECtHR described as shocking, offending, and disturbing, such as the demands for accountability.[210] Hence, freedom of expression is considered the sine qua non and a hallmark of every democracy.[211]

197 Simon Kemp, 'Digital 2023: Kenya's Datareportal (February 13, 2023)

198 Richard Moon, 'The Scope of Freedom of Expression' Osgoode Hall Law Journal 23 (1985), 331-357

199 Ibid 344

200 Jeremy Waldron, The harm in hate speech (Havard University Press, 2012)

201 Ibid 93-95

202 Ibid 94

203 Grace Nolasco, 'Freedom of Expression on the Internet and the Law in Tanzania,' Moshi Co-operative University Law Journal 5.2 (2020) 123-145

204 Ibid 125

205 UNHRC, 'General Comment No 34' (12 September 2011) UN Doc CCPR/C/GC/34; See also Bowman v UK 24839/94 (ECtHR,19 February 1998) para-42.

206 Onder Bakircioglu, 'Freedom of Expression and Hate Speech' (2008) 16 Tulsa J Comp & Intl L 1,2

207 Munhumeso & others 1995 (1) SA 551; Makali David, Media Law Practice: The Kenyan Jurisprudence (1st edn, Phoenix2003); Ngugi CM, 'Free Expression and Authority in Contest: The Evolution of Freedom of Expression in Kenya' (2020) 15 Journal of African Media Studies 102; see also Wanuri Kahiu & another v CEO – Kenya Film Classification Board & 2 others; Article 19 East Africa (Interested Party) & another [2020] eKLR

208 Palco v Connecticut 302US 326-7

209 Ibid, Nyawa Joshua Malidzo, Freedom of Expression on the Internet: How Justice Makau reduced freedom of expression to a cipher' (March 15, 2023)

210 Handyside v United Kingdom 5493/72 (ECtHR, 7 December 1976) para 49

211 Nyawa Joshua Malidzo, Freedom of Expression on the Internet: How Justice Makau reduced freedom of expression to a cipher' (march 15, 2023); See also Botha v Smuts & another [2024] ZACC 22; Thomas Scanlon, A theory of Freedom of Expression (Havard University Press, 1972); David Ademi, 'Digital Rights: A Critical Analysis of the Status of Online Freedom of Expression in Kenya' (2024) https://www.academia.edu/121170236/DIGITAL_RIGHTS_A_CRITICAL_ANALYSIS_OF_THE_STATUS_OF_ONLINE_FREEDOM_OF_EXPRESSION_IN_KENYA Accessed 26 November 2024

Nyawa states that without freedom of expression, a state cannot be described as a democracy.[212] This is because without freedom of expression, there will be no competition for political ideas and those in power will not be held accountable by their electorates.[213] The Canadian Supreme Court endorses the argument in Edmonton Journal v Alberta, stating that it is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression.[214] In the same spirit, Poulsen and Nyawa opine that when considering allegations of infringement of freedom of expression, it is upon judges to start from the point that freedom of expression is requisite in a democracy.[215] Secondly, due to its importance in a democracy, freedom of expression is a potential adversary to those who wield power and they will consider all possibilities to ensure that freedom of expression is extinguished. [216]

THE KENYAN LEGAL FRAMEWORK UNDERPINNING FREEDOM OF EXPRESSION ONLINE

The right to freedom of expression is governed by the Constitution, International Law, statutes, and case law.

The Constitution provides for the right to freedom of expression in article 33(1) while article 22 grants the locus for aggrieved persons to enforce alleged human rights infringement cases in courts of law.[217] It emphasizes that everyone is equal before the law and has an equal claim to its protection and benefits.[218] This constitutional mandate is complemented by various statutes, including the KICA[219], Penal Code[220], Media Council Act[221] as well as Defamation Act[222] among others. The international laws ratified, by virtue of articles 2(5) and (6), include, the UDHR, ICCPR, ACHPR, CRC, EAC Treaty among others.

In interpreting article 9 of the ACHPR, the AHRC has asserted the fundamental importance of freedom of expression and information as an individual human right, a cornerstone of democracy and a means of ensuring respect for all human rights and freedoms.[223] It stressed that 'within the law' refers to international law[224], which gives wide latitude for Africans to draw from International law to support their claims for freedom of expression.[225] The HCK in the Robert Alai Case, by declaring section 132 of the Penal Code unconstitutional, set a precedent that criminal defamation laws should not unduly restrict freedom of expression, especially when it comes to political discourse and criticism of public figures.[226] Similarly, the same court in Jacquelline Okuta Case, struck down Section 194 of the penal code, which criminalized defamation.[227]

However, the right to freedom of expression is self-limiting.[228] It is subject to restrictions only if they are

212 Ibid 4

213 Ibid

214 Edmonton Journal v Alberta [1989] 45 CRR 12

215 Poulsen W, Freedom of Expression, and the Internet (Cambridge University Press 2014); Nyawa Joshua Malidzo, Freedom of Expression on the Internet: How Justice Makau reduced freedom of expression to a cipher' (March 15, 2023)

216 Ibid

217 Constitution of Kenya 2010

218 Ibid art 27

219 Kenya Information and Communications Act Cap 411A

220 Penal Code Cap 63, s 77

221 Media Council Act 2007 Cap 411B, s 36

222 Defamation Act 2019 Cap 36, s 2, s 3

223 Law Offices of Ghazi Suleiman Sudan 11 [2003] AHRLR (ACHPR 2003) See also Lohe' Issa Konate Burkina Faso 004/2013 [ACHPR]

224 Article 19 v Eritrea Comm No 275|03, para 91-92

225 African Affairs Committee Freedom of Expression Sub-Committee, The Right to Freedom of Expression on the Internet as it applies to social media (1 March 2016. New York City Bar)

226 Robert Alai v Attorney General [2017] eKLR

227 Jacquelline Okuta & Jackson Njeru v Attorney General [2017] eKLR

228 The Constitution of Kenya 2010 art 24(1); International Convention on Civil and Political Rights art 19(3)

strictly construed and established convincingly.[229] Article 33(2) states that freedom of expression does not extend to: propaganda for war, incitement to violence, hate speech or advocacy hatred while article 24 states that a right or a fundamental freedom shall not be limited except by law, and that the limitation is reasonable and justifiable in an open and democratic society.[230]

Therefore, Article 24 is mandatory, and a judge must take it seriously, not mechanically,[231] as seen in Samuel Manamela v The Director-General of Justice, where the Constitutional Court of SA,[232] in considering the limitation clause, which is in parimateria to Article 24, cautioned against using the factors set out therein as a laundry list or in Kenya's Supreme Court words in Karen Njeri Kandie Case, that the test must not be conducted mechanically'.[233] The Constitution, in article 20(3) requires judges to adopt an interpretation that most Favors the enforcement of a right or fundamental freedom, just as the COA has posited that the theme under article 20(3) is 'maximization and not minimization; expansion, not constriction; when it comes to enjoyment and concomitantly facilitation and interpretation'.[234]

Makau Mutua opines that one of the one of the leitmotifs of the 2010 Constitution, which has been described as a post-war constitution[235] is the promise of a human rights state.[236] The heart of every post-war constitution is the protection of human rights through a limitation clause in the Bill of Rights.[237] Therefore, the inclusion of Article 24 of the Constitution is monumental and should not be seen as ornamental or decorative.[238]

Notably, these provisions are consistent with Mill's Utilitarian theory, which grants people the freedom to do as they like, so long as they do not harm others.[239] No one has the right to infringe upon the rights of others to exercise that person's own.[240]

TECHNOLOGY AND FREEDOM OF EXPRESSION IN KENYA

Evolution of Technology in Communication

In a pre-digital era, the dissemination of information was controlled by a few gatekeepers, such as traditional media. However, the internet has disrupted this paradigm, allowing anyone with access to the internet to publish content and reach a wide audience.

Rukondo opines that previously freedom of expression was considered in relation to complex structures of communication such as newspapers and radio rather than individuals. However, the notion of freedom of expression as an individual liberty has been revived as the internet has empowered the individual with mass media outreach that was previously the preserve of media houses.[241] In June 2012, the HRC unanimously

229 Zana v Turkey App no 18954/91 (ECtHR, 25 November 1997)

230 Okiyah Omtatah Okoiti v Communications Authority of Kenya & 3 others; Article-19 East Africa & 4 others (Interested Parties) Petition No 53 [2017] eKLR; See also Sunday Times v United Kingdom Application No 65 38/74 para-49.

231 Nyawa Joshua Malidzo, Freedom of Expression on the Internet: How Justice Makau reduced freedom of expression to a cipher' (March 15, 2023); Benjamin Gregg, The Human Rights State: Justice Within and Beyond Sovereign Nations (Philadelphia: University of Pennysylvania Press, 2016)

232 Samuel Manamela v The Director-General of Justice (2000) 3 SA 1 (CC)

233 Karen Njeri Kandie v Alassane Ba 7 & another KESC 13 (2017) eKLR

234 Attorney General v Kituo cha Sheria & 7 others [2017] eKLR

235 Speaker of the Senate & Another v Attorney General & 3 others Advisory Opinion Reference No 2 [2013] eKLR; See also Luka Kitumbi & 8 others v Commissioner of Mines and Geology & another, Mombasa HCCC No 190 [2010] eKLR

236 Makau Mutua, 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' (1997) 10 Havard Human Rights Journal 63; See also Benjamin Gregg, The Human Rights State: Justice Within and Beyond Sovereign Nations (Philadelphia: University of Pennysylvania Press, 2016)

237 Attorney General & another v Randu Nzai Ruwa & 2 others Civil Appeal No 275 of 2012; [2016] eKLR

238 Nyawa Joshua Malidzo, Freedom of Expression on the Internet: How Justice Makau reduced freedom of expression to a cipher' (March 15, 2023); Benjamin Gregg, The Human Rights State: Justice Within and Beyond Sovereign Nations (Philadelphia: University of Pennysylvania Press, 2016)

239 John Stuart Mill, On Liberty, (Dover Publications, 2002) (n 32)

240 Ibid

241 Solomon Rukondo, 'My President is a Pair of Buttocks: the limits of Online Freedom of Expression in Uganda' (2018) 26 International Journal of Law and Information Technology 252

affirmed that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of the frontiers and through any media of one's choice.[242]

According to the CAK, as of 2023, the country's internet penetration rate stood at an impressive 89.2%, with most users accessing the internet via mobile devices.[243] The rise of ISPs and the affordability of internet bundles have contributed to this growth. Platforms like Twitter have enabled users to share their views and engage in discussions on matters of public interest.[244]

5.2 Role of the Social Media Platforms

Internet tools are terraforming the traditional political landscape by shifting who controls information, who consumes information, and how that information is distributed.[245] These digital platforms have emerged as indispensable conduits for communication and expression,[246] furnishing a forum where individuals can articulate and share their thoughts, and recount their experiences to a global audience.[247]

Social media has been instrumental in political discourse in Kenya. During election periods, notably the 2017 and 2022 elections, Twitter and Facebook were pivotal in educating and mobilizing voters, and fostering robust political debate.[248] Moreover, it has amplified the voices of activists and advocacy groups. Movements such as #RejectFinanceBill2024 and #EndAbductionsKenya have gained momentum and found resonance in Kenya, highlighting issues such as police brutality and bad governance.[249]

The US Supreme Court's ruling in New York Times v Sullivan protected the press from excessive defamation litigation, emphasizing the importance of robust debate on public issues.[250] The "actual malice" standard set by this case ensures that individuals and the media engage in critical discourse without undue fear of legal repercussions.[251] Similarly, the EACJ in the Burundian Journalists' Union Case held that the requirement for journalists to reveal their sources concerning state security and public order was unreasonable and infringed upon the fundamental rights of journalists.[252]

5.3 Technology-Driven Freedom of Expression in Kenya: #RejectFinanceBillProtests

Digital Activism played a central role in opposing the Finance Bill 2024 with social media platforms like Twitter being used in organising and coordinating the protests.[253] Through online campaigns and petitions, significant pressure was placed on law makers, urging them to reconsider the bill.[254] Digital activism enhanced

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242 UN Human Rights Council Resolution A/HRC/20/L. 13, adopted 29 June 2012 ;African Commission on Human and Peoples' Rights, 'Declaration of Principles on Freedom of Expression and Access to Information in Africa' (2019) Principle 37

243 Communications Authority of Kenya, State of Internet Penetration in Kenya (CAK, 2023) https://www.ca.go.ke/reports-and-studies Accessed 22 November 2024

244 Ibid

245 Solomon Rukondo, 'My President is a Pair of Buttocks: the limits of Online Freedom of Expression in Uganda' (2018) 26 International Journal of Law and Information Technology 252; See also Thomas Scanlon, A theory of Freedom of Expression (Havard University Press, 1972)

246 Badili Africa, 'Digital Democracy in Kenya: Revolutionizing Participation and Governance' (2024) Badili Africa Journal

247 Ibid

248 Anne Gitonga and Eliud Moyi, 'The Role of Information Technologies in Innovation in Kenya's Micro, Small and Medium Establishments' (2018) Africa Journal of Science, Technology, Innovation and Development 23-35

249 Ibid 10

250 New York Times Co v Sullivan [1964] USSC 4; 376 US 254 (1964)

251 Ibid para 265

252 Burundian Journalists' Union v Attorney General of the Republic of Burundi (Reference No 7 of 2013) [2015] EACJ 91 (15 May 2015)

253 Abiero, D. (2024). "Technology-Facilitated Rights and Digital Authoritarianism: Examining the Recent Internet Shutdown in Kenya." Centre for Intellectual Property and Information Technology Law (CIPIT) https://cipit.strathmore.edu/technology-facilitated-rights-and-digital-authoritarianism-examining-the-recent-internet-shutdown-in-kenya/Accessed 22 November 2024

254 Ibid

transparency around legislative process, exposing failures in public consultation.[255]

It also helped overcome geographical barriers, enabling protesters across Kenya to unite and coordinate their efforts, thus creating a nationwide movement.[256] Additionally, Kenyan youth utilized their tech skills to raise awareness and mobilize support against the Finance Bill, by creating Al tools such as Finance Bill GPT to answer questions about the bill and even produced Al-generated music.[257]

However, the internet shutdown during the protests in Kenya lead to the suppression of digital activism.[258] By cutting off the internet access, the government effectively restricted these activities, making it difficult for protesters to coordinate and express their views.[259]

IMPLICATIONS ON PRIVACY AND DATA PROTECTION

The Constitutional Court of SA in Botha v Smuts & another,[260] recognized the right to privacy as a shield against unwarranted intrusions, which allows individuals to control their personal information and make life decisions.[261] Privacy has, thus, become of increased significance both as a fundamental right and as a key issue arising from technological advancement, given the twilight of the modern surveillance age.[262]

Risks posed to the right to privacy by digital technologies

The collection, storage, and use of personal data is a major threats to privacy posed by digital technology.[263] In the Nubian Case, biometric data and the GPS coordinates required by the disputed amendments were found to be personal, sensitive and intrusive data that required protection.[264] While the HCK in Okoiti v CAK, in overturning CAK's plan to implement a surveillance system accessing mobile services subscriber's data was unconstitutional, emphasized the importance of privacy rights and the need for less intrusive measures.

Individuals are increasingly exposing their personal information online as social media, e-commerce, and other online platforms rise in popularity.[265] This information might include their name, email address, phone number, and even sensitive information like financial and medical records.[266] Although some businesses use this data for good reasons like marketing and improving user experience, others may use it for nefarious reasons like identity theft, fraud or prejudice.[267] In KHRC v CAK, the CAK introduced a generic DMS for spying on mobile and communication devices of Kenyans without

255 Ibid

256 Ibid

257 Laibuta M., "Gen Z, right to privacy, and a revolution." (20240 https://www.laibuta.com/data-protection/gen-z-right-to-privacy-and-a-revolution/ Accessed 22 November 2024

258 Ibid

259 Ibid

260 Botha v Smuts & another [2024] ZACC 22

261 Ibid para 180

262 Shoshana Z, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power (Public Affairs, 2019)

263 Keraka Caleb, 'The Intersection of Digital Technology, Fundamental Human Rights and Constitutional Values & Principles in Kenya's Digital Space (March 30, 2023) https://ssrn.com/abstract=4660373 Accessed 10 December2024

264 Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR.

265 Chisomo Nyemba, 'Right to Data Privacy in the Digital Era Critical Assessment of Malawi's Data Privacy Protection Regime' (LLM Thesis, University of Pretoria); Kevins, Jerameel and Brian, Kibet, 'Defining Data Protection in Kenya: Challenges, Perspectives and Opportunities (November 7, 2022)

266 Ibid

267 Ibid

public consultations or public participation. The courts considered this as a threat and violation of the right to privacy of the subscribers.[268]

Over the years, there have been on-going reports of the expansive monitoring and surveillance practices.[269] In March 2017, a report by Privacy International documented how the information acquired from unlawful communications surveillance is justified by the state as a response to counterterrorism – from surveillance, profiling, locating, tracking and arresting targets to abuse, torture, abduction and extrajudicial killing, a process in which Kenyan citizens' fundamental human rights are seriously abused.[270]

Cybersecurity threats such as hacking and data breaches compromise sensitive information and undermine the right to privacy and data protection.[271] Kenya has had several high-profile data breaches, including a data breach at the KRA in 2017.[272] Such data breaches can lead to the theft of personal information and financial loss, making people reluctant to share information online.[273]

6.2 THE CASE OF KENYA'S #REJECTFINANCEBILL2024 PROTESTS

The protests were a significant political event marked by widespread public opposition to new tax measures proposed in the Finance Bill.[274] Privacy concerns emerged due to actions like "tuwasalimie," where activists casually shared the personal information of MPs and other public figures. [275] While this was a necessary step for accountability, it raised significant privacy issues.[276] The ODPC thus issued a cautionary statement advising against sharing personal data, which infringes on individuals' right to privacy, especially personal data belonging to persons who are not public figures and have not acted to make their contact details public.[277]

268 Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR

269 The Right to Privacy in Kenya: Joint Stakeholder Report Universal Periodic Review 35th Session – Kenya, Submitted by the National Coalition of Human Rights Defender-Kenya (NCHRD-K), the Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN), Paradigm Initiative, and Privacy International, July 2019 https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=7566&file=EnglishTranslation Accessed 10 December 2024

270 Privacy International, "Trace. Capture, Kill: Inside Communication Surveillance and Counterterrorism in Kenya." March2017 https://privacyinternational.org/report/43/trackcapture-kill-inside-communication-surveillance-and-counterterrorism-kenya Accessed 10 December 2024

271 Keraka Caleb, 'The Intersection of Digital Technology, Fundamental Human Rights and Constitutional Values & Principles in Kenya's Digital Space (March 30, 2023) https://ssrn.com/abstract=4660373 Accessed 10 December2024

272 BBC NEWS, Kenya Revenue Authority 'lost$39m to hacker, https://www.bbc.com/news/world-africa-39351172 Accessed 10 December 2024

273 Daniel Solove J and Paul Schwartz M, Privacy and Data Protection in a Digital Age (OUP 2018); Sara Quach and Park Thaichon, 'Digital Technologies: tensions in privacy and datas' Journal of the Academy of Marketing Science, 2022

274 Abiero, D. (2024). "Technology-Facilitated Rights and Digital Authoritarianism: Examining the Recent Internet Shutdown in Kenya." Centre for Intellectual Property and Information Technology Law (CIPIT) < https://cipit.strathmore.edu/technology-facilitated-rights-and-digital-authoritarianism-examining-the-recent-internet-shutdown-in-kenya/> Accessed 22 November 2024

275 Business Daily, 'Digital Activism: Delicate balance in public officials' right to privacy,' https://www.businessdailyafrica.com/bd/corporate/tea/activism-delicate-balance-in-public-officials-privacy=4667266 Accessed 22 November 2024

276 Ibid

277 Laibuta M., "Gen Z, right to privacy, and a revolution." (2024) https://www.laibuta.com/data-protection/gen-z-right-to-

The protests also witnessed a wave of abductions, which raised the question of how the abductors could easily trace the abductees.[278] The outrage greeted the exclusive Nation Media investigation, dubbed " Big Brother watching," that revealed how police have been colluding with telcos', especially Safaricom, to irregularly access call data and location records that are then used to conduct surveillance, track, and capture, and even kill suspects without using the appropriate legal channels.[279] Consequently, the USA Ambassador to Kenya denounced the abuse of mobile phone users' right to privacy, stressing that privacy and the rule of law are fundamental democracies. [280]The KHRC said that the expose revealed the telcos' complicity in aiding and covering up abductions and killings by rogue police.[281]

THE VIEW OF AFRICAN TRADITION ON FREEDOM OF EXPRESSION

Is it entirely true that Africans do not embrace the right to freedom of expression mainly because most African cultures do not permit it? Seleoane argues that even though freedom is a universal right, Africans have failed to demonstrate any interest in embracing it and developing a unique African approach to it.[282] Well, this paper agrees that some traditions practiced by Africans may have suppressed the idea of freedom of expression. The true reflection is how our leaders and elders seem not to like the idea of criticism even today. According to Monye,[283] traditional African communities exhibit unique views expressed through hierarchical structures, allowing individual opinions to be expressed within specific structures, such as elders.[284]

However, the position of this paper is that African tradition is not strange to the idea of freedom of expression. A significant number of African cultures acknowledge that people have the freedom of expression. Africans have always embraced the idea of decision-making through community engagement under trees, where every individual is accorded the right to say what they think.[285] . According to Chasi, the issues discussed in these forums are driven by the principles of democracy, which included public participation and freedom of expression.[286] They also included the removal of traditional leaders, such as elders, from those positions and the decision to punish offenders.[287]

Additionally, African tradition encouraged individuals to question their misfortunes. The Shona people have a saying that goes mwana asingacheme anofira mumbereko, meaning that a baby that does not cry dies on the back of the caregiver.[288] Like many African mothers, the Shona carry babies on their backs. In the event the baby develops breathing difficulties and does not cry for help, she may end up dying, for the mother will not

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278 Jurists News, 'Gen Z Leads Digital Uprising Against Economic Injustice in Kenya,' https://www.jurist.org/commentary/2024/07/gen-z-leads-digital-uprising-against-economic-injustice-in-kenya Accessed 22 November 2024

279 Nation Television, 'Telcos on the spot for aiding the police to snoop on mobile phones,' https://youtu.be/scwxd-102j7Y?si=ALs6T7BhPuFplpXk Accessed 22 November 2024

280 Kenyans.co.ke, 'US Ambassador Responds After Kenya Police Exposed for Violating Privacy' https://www.kenyans.co.ke/news/105831-ambassador-whitman-calls-respect-for-privacy-laws-after-kenya-police-expossed-accessing Accessed 22 November 2024

281 Steve O., "European envoys raise concerns over wave of abductions in Kenya" 31 October 2024 https://www.theeastafrican.co.ke/tea/news/east-africa/european-envoys-raise-concerns-over-wave-of-abductions-in-kenya-4807234 Accessed 22 November 2024

282 Mandla Seleoane, 'Towards an African theory of freedom of expression?' (2001)20 Politeia: Journal for Political Science and Public Administration 5-21

283 Stephen Monye, 'Freedom of Expression and Traditional Communities: Who Can Speak and When?' (2017) 29 Southern African Public Law 323

284 Ibid

285 Kwaku Asante & Ross Herbert, 'African Tradition Upholds Free Speech, Democracy' (29 Apr 2008) https://saiia.org.za/research/african-tradition-upholds-free-speech-democracy Accessed 22 November 2024

286 Collin Chasi, 'Ubuntu and Freedom of Expression' (2014) Ethics & Behaviour 497

287 Ibid 503

288 Ibid 505

realize. The interpretation of this paper, and that it is relevant to freedom of expression is that, for one's needs to be assured, one must be allowed to speak out about one's concerns. Conversely, a society where people cannot speak their minds and express their opinions democratically is a dead society.

The Ubuntu philosophy explains how Africans should interact with freedom in their complex yet flexible cultures. Nicolaides believes that Ubuntu's values point towards the realization of fundamental human rights and freedoms, including equality and human dignity.[289] According to Chasi, Ubuntu presents a unified set of cultures that aims to enable Bantu-speaking Africans to express themselves and interact harmoniously freely.[290]

COMPARATIVE ANALYSIS: SOUTH AFRICA'S STANCE

South Africa, a nation that has undergone a profound transformation from apartheid to a vibrant democracy, stands at the forefront of this dynamic interplay between technology, freedom of expression, and privacy. [291] Their strategy is said to have begun with the transition to democracy in 1994. [292] This transition led to the adoption of a new constitution in 1996, which included explicit guarantees for fundamental rights, including privacy and freedom of expression. [293]

1.1 Effective Laws

5. These are the POPIA, ECTA, and PAIA.[294] POPIA protects personal information processed by public and private bodies by establishing minimum requirements for the lawful processing of personal information. [295] ECTA aims to promote legal certainty and enforceability in electronic communications and transactions.[296] PAIA, conversely, ensures that individuals have the right to access information held by public and private bodies. Hence, it supports freedom of expression by enabling the free flow of information. South Africa also hosts an independent judiciary.[297] The Constitution guarantees this independence, and the courts, in collaboration with relevant bodies such as the prosecution, impose harsh penalties and heavy fines to deter infringement of these fundamental rights.[298]

1.2 Responsive Public Service

The Batho Pele governs this service with " People First" principles.[299] This consists of Consulting Users of Services, Setting Service Standards, Increasing Access, ensuring courtesy, Providing More and Better

289 Nicolaides A, 'Duty, Human Rights and Wrongs and the Notion of Ubuntu as Humanist Philosophy and Metaphysical Connection' (2022) Athens Journal of Law 123-136

290 Collin Chasi, 'Ubuntu and Freedom of Expression' (2014) Ethics & Behaviour 497

291 Jane Duncan., 'Monitoring and defending freedom of expression and privacy on the internet in South Africa.' School of Journalism and Media Studies, Rhodes University https://www.apc.org/en/pubs/giswatch-2011-special-edition-1 Accessed 22 December 2024

292 Ibid

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294 Swales L. 'The Protection of Personal Information Act and data de-identification.' S Afr J Sci. 2021; 117 (7/8), Art. #10808. https://doi.org/10.17159/sajs.2021/10808 Accessed 22 December 2024

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296 C.M. van der Bank., 'The right to privacy- South African and Comparative Perspectives' European Journal of Business and Social Sciences, Vol. 1, No. 6, pp 77-85, October 2012 https://www.academia.edu/6272127/THE_RIGHT_TO_PRIVACY_SOUTH_AFRICAN_AND_COMPARATIVE_PERSPECTIVES_A Accessed 22 December 2024

297 Jane Duncan., 'Monitoring and defending freedom of expression and privacy on the internet in South Africa' School of Journalism and Media Studies, Rhodes University https://www.apc.org/en/pubs/giswatch-2011-special-edition-1

298 Ibid

299 Department of Public Service and Administration (South Africa). (1997). "Batho Pele – People First: White Paper on Transforming Public Service Delivery." https://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/frameworks/white-papers/transform.pdf Accessed 23 November 2024

Information, Increasing Openness and Transparency, Monitoring and Evaluating Improving Public Service.[300] The Government is equally committed to taking administrative and policy measures to promote these fundamental rights.[301]

1.3 Effective Enforcement

The Information Regulator is the primary body promoting privacy, data protection, and freedom of expression.[302] It vigorously monitors and enforces compliance with the POPIA and ensures that individuals' privacy rights are protected.[303] Additionally, it works with other agencies, such as the Right2Know Campaign and Privacy International, to conduct compliance checks and advocate for privacy and freedom in South Africa.[304]

On the other hand, South African courts recognize the public interest defense in cases involving the publication of information, balancing the right to freedom of expression, privacy, and data protection.[305]

1.4 How South Africa Has Handled the Constriction of Digital Civic Space

With rampant technological advancements, South Africa has been ranked as one of the best-developing countries in terms of protecting fundamental rights and participating in democratic governance.[306] In response to the increasing violations of freedom of expression and privacy rights, South Africa has hastened international cooperation by participating in international forums and cooperating with other countries to address global digital rights challenges and share best practices.[307] In collaboration with civil society groups and digital rights advocates, she has launched public awareness campaigns to educate citizens about their digital rights and how to protect privacy online while enhancing their freedom of expression.[308]

The efforts to promote these rights in South Africa differ from those in Kenya. Indeed, despite being a developing country, the government is doing all it takes to progressively realize the rights of its citizens to privacy, data protection, and freedom of expression. We can learn a lot from them and change the situation in Kenya.

RECOMMENDATIONS AND CONCLUSION

Findings

This paper has broadly illuminated the complex but significant concept of the right to privacy, data protection, and freedom of expression, as well as the problems that arise from online freedom of expression. It sought to

300 Ibid

301 Constitution of the Republic of South Africa, 1996, s 14 & s 16 https://www.gov.za/documents/constitution/chapter-2-bill-rights Accessed 23 November 2024

302 The Media Policy and Democracy Project for the Right2know Campaign., 'The Surveillance State: Communications surveillance and privacy in South Africa' March 2016

303 Ibid

304 Ibid

305 Botha v Smuts & another [2024] ZACC 22,

306 Tony Roberts., 'Digital Rights in closing civic space: lessons from ten African countries https://www.ids.ac.uk/opinions/digital-rights-in-closing-civic space-lessons-from-ten-african-countries

307 Ibid

308 Firoz C. and Jonathan K., 'Towards a Public Law Perspective on the Constitutional Law of Privacy in South Africa in the Age of Digitalization.' Journal of African Law https://www.cambridge.org/core/journals/journal-of-african-law/article/towards-a-public-law-perspective-on-the-constitutional-law-of-privacy-in-south-africa-in-the-age-of-digitalization/7C-59251723CFA61FED14D33F4BD3E6F5

examine how freedom of expression is protected in cyberspace by HR law, both through state practices and approaches adopted by courts, and its implications for data privacy. The paper argues that the Internet's days of being just another means of communication are long gone. It is now the "public space of the 21st century—the world's town square, classroom, marketplace, coffeehouse, and nightclub." [309] For this reason, it should be protected.[310] Nonetheless, the paper notes with concern that the Internet's growth has equally led to its increased usage for illicit purposes, which amounts to privacy invasion and prompts governments to undertake social media and censorship.

This paper concludes that while online freedom of expression may be violated by censorship, there are valid concerns that limitation may also be necessary due to the misuse of cyberspace.

Recommendations

1. In calling for regulation, a clear definition of what constitutes illegal or harmful content ought to be provided.[311] IHR instruments like the ICCPR,[312] ACHPR[313] as well as the CoK[314] outline restrictions on freedom of expression for reasons like national security or protecting rights and reputations. However, the specifics of what constitutes harmful content vary widely across jurisdictions, creating challenges in balancing privacy and freedom of expression. Kenya would need to define such content.

2. Requiring companies to meet performance targets for content violations. Regulations can hold internet companies accountable by setting specific targets for their content moderation systems, focusing on outcomes achieved rather than processes. For instance, requiring platforms to publish annual data on the prevalence of content that violates their policies and assessing whether they have maintained such content below a certain threshold can lead to greater oversight or penalties for repeated failures.[315] However, defining the threshold is crucial to avoid unintended consequences, such as companies narrowing the definitions of harmful content to meet targets.[316]

3. Holding internet service providers responsible for having specific systems and procedures to carb harmful content. This approach is the best way to guarantee that freedom of expression and privacy rights are balanced. By requiring procedures like routine public reporting of enforcement statistics, user-friendly methods of reporting content, or external review of policies, this regulation might provide states with the information they need to evaluate social media firms' efforts objectively.[317]

4. Kenyan courts should continue working towards developing jurisprudence that will guide the current and future generations on how best to exercise their online freedom of expression while respecting each other's privacy.

5. Kenya should benchmark the models that have been adopted by countries such as South Africa and strive to develop proper policies and measures that will guide in promoting online freedom of expression while

309 Hillary Clinton, 'Internet Rights and Wrongs: Choices and Challenges in a Networked World' (Lecture, The George Washington University, Washington D.C., 15 Feb 2011)

310 Ibid

311 UN Human Rights Office, Regulating Online Content: The Way Forward (2020)

312 ICCPR art 19

313 ACHPR art 27(2)

314 Constitution of Kenya 2010 art 33(2)

315 Monica Bickert., 'Online Content Regulation' (Meta February 2020)

316 Ibid

317 Monica Bickert, 'Online Content Regulation' (Meta, February 2020); Alice Munyua, Grace Githaiga and Victor Kapiyo, 'Intermediary Liability in Kenya' https://www.apc.org/sites/default/files/IntermediaryLiabilityinKenya Accessed 22 November 2024

maintaining privacy and data protection.

9.3 Conclusion

Technology serves both as a powerful enabler of freedom of expression and a formidable challenge to privacy and data protection. By examining and adopting the robust practices of countries like South Africa, Kenya can navigate this intricate landscape, ensuring a harmonious balance that upholds digital rights while safeguarding individual privacy.

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FREEDOM OF EXPRESSION VIS A VIS PRIVACY AND DATA PROTECTION

Shanise Kadenyeka

ABSTRACT

The right to privacy and freedom of speech are both fundamental rights that are not only enshrined in the Constitution but also form an integral core of international law. However, the onset of technological evolution, such as social media, has led to the jurisprudential development of adherents involving the balance of these rights apropos to data protection. Being an intricate affair as both rights are subject to limitations, a quaestio juris emanates on how freedom of expression can encroach on privacy rights and how privacy laws restrict free speech while considering the balance between personal, national, and international interests.

Freedom of speech guarantees a pivot for popular excellence and governance, whereas the right to sequestration conserves individual independence. Still, due to rising technology trends, balancing these rights concerning data protection is a complex subject. This paper seeks to pinpoint the commerce between the fundamental rudiments of mortal rights and the pressure arising from their concurrence due to the arrival of technology, similar to state surveillance, which has compromised the assertion of these rights.

This study examines both international and national legislation, such as the Constitution of Kenya and the ICCPR, to establish how various legal institutions have interpreted and applied the contesting interests of these rights as well as aid them to form an opinion on a balance of approach on their opposing interests and how the government must foster their synchronization in the expeditiously evolving digital world.

Key Words: Freedom of Expression; Right to Privacy; Data Protection; Technology

INTRODUCTION

2.1. Background to the study

The onset of the digital age has revolutionized communication and information dispersion. It has empowered individuals to express themselves freely and access information on a global scale. However, the balance between freedom of expression and the right to privacy has become increasingly tenuous in the digital age. The proliferation of digital platforms has normalized speech, allowing individuals to state their opinions and advocate for change. However, this freedom is often counterbalanced by the growing concerns around data protection and surveillance. Governments and corporations frequently exploit digital tools for data collection,

potentially undermining individual privacy and chilling free speech.

This paper examines the interplay between these fundamental rights, with a focus on the legal frameworks and practical challenges involved in safeguarding both. In Kenya, the right to Freedom of Expression is enshrined in The Constitution of Kenya 2010 under article 33, the right to privacy is provided for under article 31 and subsequently, the enactment of the Data Protection Act 2019, which paved way to the establishment of the office of Data Commissioner in November, 2020 to regulate the procession of personal data.

The paper explores the evolution of digital rights and highlights the implications of unchecked government surveillance and corporate overreach. It underscores the necessity of adopting robust data protection mechanisms to ensure accountability and protect privacy without stifling expression. Furthermore, the study advocates for a rights- based approach that aligns privacy and freedom of expression, fostering an ecosystem of trust and transparency. By emphasizing the pivotal role of jurisprudence, policy reforms, and technological innovation, this paper aims to contribute to the ongoing dialogue in safeguarding human rights in an interconnected world.

2.1.1 Why data protection?

Data Protection has become increasingly important in recent years due to the growing use of digital technologies and the increasing amount of personal information being collected and stored online.[318] In the Kenyan Constitution, data protection is primarily enshrined under Article 31(c) and (d), which guarantees the right to privacy, including the right not to have information relating to one's private affairs unnecessarily revealed[319]; essentially establishing the foundation for data protection laws within the country.

This was given effect by the establishment of the office of the Data protection Commissioner (ODPC) which is the designated government agency that is key to ensuring appropriate handling of personal data in Kenya as enshrined in the Data Protection Act, 2019, this was highlighted in the case of Okoiti v Communications Authority of Kenya, where it was held that Communication Authority's plan to access mobile subscriber data without proper safeguards violated users' privacy rights under the constitution, highlighting the importance of robust procedures when collecting and processing personal information.[320]

2.2. Problem statement

In Kenya, the constitution spells that the government has the responsibility to observe, respect, protect, promote and fulfill the core fundamental human rights which include the right to privacy and freedom of expression. Furthermore, it bears the duty and mandate to protect its citizens' data. However, with the recent technological advancements and especially in the area of social media which has led to the formation of a stressed field play on the enjoyment of these rights where the enforcement of one right implies to infringe upon the other right. For instance, where does one draw the line between exercising one's freedom of expression and enforcing one's right to privacy?

The Data Protection Act contains the principles of data protection which are to be observed by all data controllers and processors, the government being one of them. However, in the recent technological era, there have been concerns of government surveillance by state agents which tend to infringe on some fundamental rights. And whilst the government counter claims the need for such with the defense of national interests even though it may bear chilling effects and set a dangerous precedent. The question then emerges on which interests between national and personal prevail especially when it comes to upholding basic human freedoms

318 Personal Data Protection Handbook (ODPC, 2024).

319 The Constitution of Kenya 2010, Article 31(c) and (d).

320 Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others [2018] KEHC 7513 (KLR).

while fostering accountability in the ever-rapid digital world.

A clear example of such would be the recent abductions and torture of certain social media users in which the government has been accused of playing a part by surveilling their social media presence.

This highlights the pressing need to foster the legal frameworks and strengthen enforcement mechanisms so as to mediate the relationship between these fundamental rights and prevent a conflict of rights while also enhancing accountability on the government's part

2.3. Theoretical framework

2.3.1. Democratic participant media theory

Democratic Participant Media Theory, is the latest in the field of media theories, and Professor Dennis McQuail is its proponent.[321] It emphasizes the importance of active citizen engagement in shaping public policy and decision- making processes. A cornerstone of this engagement is freedom of expression, which allows individuals to freely share their views, opinions and information without fear of censorship or reprisal. This freedom is essential for fostering open dialogue, holding governments and institutions accountable, and ensuring that a diversity of perspectives is considered in the democratic process.

However, the increasing reliance on digital technologies and the vast amounts of data they generate also raise concerns about individual privacy and data protection. Striking a balance between these competing interests is crucial for ensuring that democratic participation remains both informed and protected.

2.3.2. Sociological school of thought

This study will employ the use of the Sociological School of thought advanced by Emile Durkheim, Eugen Ehrlich, Roscoe Pound, and Karl Renner, who argued that "…the study of the law is concerned with how law affects society and vice versa".[322] They considered the law to be a product of societal values, customs, and institutions. This broad school of thought draws on various intellectual traditions to critique modern society and culture.

This theory will aid in examining and critiquing the Government's role vis a vis existing and emerging societal needs. The key mechanisms identified for incorporating these realities are freedom of expression and right to privacy and data protection. Consequently, privacy policies formulated through this lens should reflect the sociological realities and address the concerns of diverse social groups.

2.3.3. Social Contract theory

The Social Contract theory advanced by Thomas Hobbes and later by John Locke envisages that the State has political power and the "right" to make laws and to enforce them squarely for "…the public good".[323] The theory will aid in advancing the supposition that the formation of a government is a demonstration of a "social contract between the people and the State." The Government's role manifests in this social contract.[324] Privacy policies must be formulated with the input and consent of the governed. Freedom of Expression and privacy

321 Diekola Hannah, 'Democratic Participant Theory' (Scribd) < https://www.scribd.com/document/645126725/Democratic-Participant-Theory> Accessed 2 January 2025.

322 Statethieu Deflem, 'Sociological Theories of Law,' Pp. 1410-1413 in Encyclopedia of Law and Society: American and Global Perspectives, edited by David S. Clark. Thousand Oaks, CA: Sage Publications (2007).

323 Thomas Hobbes, 'The Leviathan,' [1651].

324 Ibid.

and data protection are ways of fulfilling this contract.

2.4. Conceptual framework

The recent and infamous June 2024 Gen Z protests coupled with the introduction of proposed legislations which are to give the state more control over its citizens' data have led to the increase of government opposition and resentment from the general public over potential curtailing of fundamental rights and freedoms under the guise of national security.

The case of Handyside v United Kingdom (1976) accentuates the balance which court should apply, it stated that freedom of expression is not only applicable to information that is favorably perceived or regarded to be inoffensive, but also to those that offend, shock or disturb the state or any sector of the population.[325] For such are the demands of pluralism and tolerance, without which there is no democratic society. Should there be a need for any limitation, the state may apply the proportionality test established in the Canadian Oats case to determine whether it is justifiable.[326]

2.4.1. Freedom of expression

Freedom of expression is a cornerstone of democratic societies, enabling individuals to participate in public discourse, hold governments accountable, and challenge the status quo. In the digital age, the right has taken new dimensions, facilitated by the internet and social media platforms. Every person has the right to Freedom of Expression. It is a fundamental human right which has been codified in the Constitution of Kenya 2010 as well as numerous international treaties.

Article 19 of the ICCPR provides that the right to freedom of expression not only entails the freedom to hold opinion but also includes the right to "receive and impart information and ideas." Freedom of Expression is defined similarly under the ECHR. It posits a grinder, a pivotal mechanism that refines and scrutinizes governmental actions, ensuring that authorities fulfil their obligations in a democratic society. Rooted in the social contract theory, this principle underscores that the powers vested in government are delegated by the people, who have sovereign power and implicitly through democratic participation in elections. This delegation emphasizes that the government actions must reflect the will of the people, held accountable by open dialogue and robust expression. However, this right is under threat of disestablishment in the face of contemporary challenges.

The rise of social media and the digital landscape has profoundly altered the dynamics of expression. Though these platforms democratize information dissemination, they also unleash the potential for misinformation while weakening the foundations of independent media. As a result, we witness a troubling backlash from the government seeking to regulate cybercrime and manage the deluge of misinformation. Such governmental actions, while framed as necessary for public safety, risk undermining the core tenets of free speech. Kenya, for instance, plummeted from 69th to 116th in the 2023 World Press Freedom Index which is alarming since the decline shows that the protection for journalists, human rights defenders, whistleblowers and protesters right to freedom of expression has deteriorated.[327]

While freedom of expression is important, it can be restricted in certain circumstances to protect the sensibilities

325 Handyside v United Kingdom [1976] ECHR 5, (1976) 1 EHCR 737 at 751.

326 R v Oakes [1986] 1 SCR 103.

327 Article 19, 'Kenya: Safeguard Freedom of Expression for Sustainable Development' (Article 19, 19 July 2024) < https://www.article19.org/resources/kenya-safeguard-freedom-of_-expression-for-sustainable-development/ > Accessed 29 December 2024.

of others and prevent spread of harmful and offensive content as presented in the case of Nation Media Group Limited v. Attorney General (2007).[328] To mitigate chaos and uphold public order, certain legal doctrines have emerged to limit freedom of expression effectively. The "bad tendency test" and the "clear and present danger test," articulated notably by Justice Oliver Wendell Holmes Jr., highlighted conditions under which speech could be restricted.[329] With the introduction of the "imminent lawless action" test the threshold for limiting speech became more stringent requiring a clear link between speech and unlawful behavior.[330]

Freedom of speech is also limited under article 33(2) of the Constitution of Kenya 2010 as it provides that the right to freedom of expression does not extend to; propaganda for war, incitement to violence, hate speech and advocacy for hatred. This evolution of legal standards illustrates the delicate balance between safeguarding information and maintaining social order, with the latter often overriding the former in critical circumstances. In the digital period, the unbounded proliferation of speech can lead to defamation, social fracture, and chaos. When misinformation spreads unbounded, it can assuage the enterprises of hostile functions while aggravating societal divisions. In the pursuit of freedom of speech, one must undertake considerable due diligence about its effects, particularly within the unpredictable geography of social media, where voices that echo falsehood can overshadow reasoned converse. While freedom of expression serves as a grinder for responsibility and popular function, guarding this right in a fleetly evolving society demands careful consideration of the pitfalls and liabilities that accompany it.

2.4.2. Privacy and data protection

The Black's Law Dictionary defines privacy as the right that protects individuals from officious surveillance and ensures the protection of their personal information. In the case of KELIN and others v CS Ministry of Health, Justice Lenaola emphasized that the right to privacy provides a robust shield for an individual's intimate personal sphere.[331] Justice Chelameswar affirmed this principle in the case of KS Puttaswamy v. Union of India,[332] which the Jamaican Supreme Court cited in Julian J Robinson v. The Attorney General of Jamaica, asserting that the right to privacy is an essential freedom protected by the Bill of Rights.[333] Furthermore, it is one of the inherent human rights recognized under article 17 of the International Covenant on Civil and Political Rights.

Article 31 of the Constitution of Kenya explicitly acknowledges and affirms the right to privacy, underscoring its vital role in safeguarding individual liberties within our society. The Data Protection Act which also lays the principles of data protection, defines data protection as the law designed to protect personal data. The High Court in the Huduma Namba case Emphasized that data protection entails safeguarding personal information from misuse, and ensuring transparency, accountability, and individual consent in its collection and processing.[334] Furthermore, the UN Resolution on The Right to Privacy recommends that in the collection, processing, and storage of sensitive human information, the state must respect its human rights obligation,

328 Nation Media Group Limited v Attorney General [2007] KEHC 3684 (KLR).

329 Schenck v. United States, 249 U.S 47 (1919).

330 Brandenburg v. Ohio, 395 U.S. 444 (1969).

331 Kenya Legal and Ethical Network on HIV& AIDS (KELIN) & others v Cabinet Secretary Ministry of Health & 4 others [2016] KEHC 8450 (KLR).

332 Justice K.S Puttaswamy (Retd) & v Union of India (2017) 10 SCC 1.

333 Robinson, Julian v Attorney General of Jamaica (2019).

334 Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020], eKLR.

especially the right to privacy.[335]

The onset of social media, being one of the numerous technological advancements, has posed a critical challenge to the enjoyment of this right regarding data protection, due to technologies such as artificial intelligence which complicates regulation. In some cases, there has been a challenge in the dissemination of information as to whether it is factual or AI-generated, particularly with the invention of deep fakes which can impersonate the actual words and actions of a person.[336] Furthermore, there have been growing concerns about the potential misuse of state powers to carry out surveillance activities in the defense of national security.

While the Constitution provides for the limitation of fundamental rights, the same must be done while balancing the interests of both the state and its citizens. The same was recapitulated in the Google Spain SL v AEPD case where it was held that the protection of personal data must be considered about its function in society and be balanced against other fundamental rights in line with the principle of proportionality.[337] This is due to the concern that data protection has become the law of everything, applying to everyone thus putting legal compliance at risk when it should adapt to socio-technical changes.

2.4.3. Debunking the nexus between freedom of expression and privacy

The right to privacy establishes a critical foundation for the enjoyment of freedom of expression, particularly in the digital age, where nearly every online action reflects a form of expression. It is crucial to understand that these two rights are inextricably linked; an infringement on one can significantly impact the other. However, the rapid advancement of technology has provided the state with an unchecked means to conduct surveillance and intrude into individuals' private lives, which contravenes the provisions of Article 31 of the Constitution. Such actions create a substantial chilling effect, hindering not only the exercise of these rights but also discouraging citizens from expressing themselves due to fear of governmental interference.

The right to privacy is vital for the exercise of a broad spectrum of human rights, including personal autonomy. Consequently, any novel interference with this right can yield serious repercussions. In the landmark case of Toonen v. Australia, it was established that any interference with privacy must be proportional to the intended outcome and necessary in the given context.[338] Moreover, The UN Resolution in regards to Privacy right in The Digital sphere clearly states that states must ensure any infringement on the right to privacy strictly aligns with the principles of legality, necessity, and proportionality. This approach safeguards not only individual rights but also the democratic fabric of society.[339]

2.5. Methodology

This research utilizes a qualitative approach to gather and critically assess information. Primary and secondary sources, including books, journal articles, legislation and the Constitution, will serve as a foundation for acquiring comprehensive and in- depth data.

335 UN General Assembly, Resolution 75/176, 'The Right to Privacy in the Digital Age' UN Doc A/RES/75/176(28 December 2020).

336 Article 19, Privacy and Freedom of Expression in the Age of Artificial Intelligence (April 2018) < https://www.article19.org/wp-content/uploads/2018/04/Privacy-and-Freedom-of-Expression-In-the-Age-of-Artificial-Intelligence-1.pdf > Accessed 2 January 2025.

337 EUR-Lex-62012CJ0131 –EN – EUR – Lex para 8.3.

338 Toonen v Australia, Communication No. 488/1992, U.N. CCPR/C/50/D/488/1992 (1994).

339 Human Rights Council, A/HRC/27/37 (EN), < https://dataskydd.net/files/utrednigar-fn/A.HRC.27.37_EN.PDF >, Accessed 1 January 2025.

3. GOVERNMENT ACCOUNTABILITY AND SURVEILLANCE IN THE DIGITAL ERA

3.1. Government Surveillance Programs

The Kenyan government is using surveillance programs to enhance national security and public safety. However, these programs raise significant concerns about privacy and data protection.[340] Following the infamous June 2024 Gen-Z Protests, there were several state- led abductions and arbitrary arrests.[341] With people's personal data being collected at an unprecedented scale, the balance between ensuring security and safeguarding individual privacy has come under scrutiny. In this era, privacy faces threats from state surveillance in the name of national security.

Numerous government agencies infringe the right to privacy of innocent citizens, they intrude upon private communications, amass vast databases of who we call and when. Telecommunication companies have also been accused of violating Kenya's privacy through surveillance that is not regulated.[342]

3.2. Legal Framework

Government surveillance is legitimate if done under the correct legal framework that provides for judicial oversight. The Kenyan Constitution 2010 guarantees privacy rights as paramount in Article 31. Kenya has also enacted other laws and established institutions to protect the right to privacy, including: The Data Protection Act 2019, this law defines how personal data can be processed and legally applies to data controllers and processors including government agencies, internet service providers, and supermarkets. The establishment of the Office of Data Protection Commissioner (ODPC), which is an independent state office, enforces compliance with data protection and privacy laws. It also provides individuals with rights and remedies to protect their personal data. The National Intelligence Service Act outlines the powers and responsibilities of intelligence agencies, including surveillance.

The High Court of Kenya declared an intended government surveillance policy to implement a Device Management System (DMS) on mobile networks to be in conflict with the right to privacy, and therefore constitutionally invalid.[343] The Court found the policy violated the right to privacy by enabling mass surveillance without adequate public participation. The judgment highlighted the importance of data protection and need for less restrictive measures to achieve the stated goal for combating counterfeit devices. The Court ordered the Communication Authority to cease implementation of the DMS system and engage in meaningful public consultation before adopting any future surveillance policies.

3.3. Government Accountability

The government bears the duty to uphold the right to privacy which is a fundamental right provided for as provided for by article 31 of the Constitution of Kenya 2010.[344] It is the duty of the government to respect and protect this right in all surveillance activities. The government should also ensure lawfulness and proportionality. Surveillance measures must be authorized by law and proportionate to the legitimate aim being pursued.

Government institutions must obey the Data Protection Act, ensuring the lawful, fair, and transparent processing

340 State surveillance: Kenyans have a right to privacy – does the government respect it? (The Conversation, 29 November 2024) Accessed 3 January 2025.

341 Ibid

342 https://www.africanliberty.org/2024/12/03/state-surveillance-in-kenya-breaches-citizens-right-to-privacy/ Accessed 29 December 2024.

343 Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others [2018] KEHC 7513 (KLR).

344 The Constitution (n2), Article 21(1).

of personal data collected through surveillance. This includes implementing appropriate safeguards to protect data from unauthorized access and misuse. Surveillance measures should be designed to be as targeted and minimally intrusive as possible. The government should also engage in meaningful public consultation on surveillance policies to ensure that the public concerns and rights are taken into account.

In essence, the government must strike a balance between national security interests and the fundamental right to privacy of its citizens, should there be an issue where the national security interests prevail, it should be in accordance with article 24 of the Constitution of Kenya 2010 which provides for limitation of fundamental rights and freedoms.

4. COOPERATE RESPONSIBILITY AND DATA PROTECTION

Privacy is a fundamental right that is deeply rooted in various international human rights agreements. It is crucial for upholding human dignity and is essential for the functioning of a democratic society. When it comes to corporate responsibility in data protection, organizations have a significant role to play in safeguarding personal information while complying with legal requirements. In Kenya, the Data Protection Act of 2019 is a key legislation that mandates businesses to protect individuals' privacy rights. This law sets out guidelines for how companies should collect, process, and store personal data, promoting transparency and accountability.

Commercial intelligence in data protection involves the strategic administration of information that various associations handle. Companies ought to establish robust data governance structures to ensure compliance with statutory regulations. Furthermore, the principle of responsibility emphasizes the significance of corporations in demonstrating compliance through corroborated programs, procedures, and threat assessments. In the case of Ceres Tech Limited v Commissioner, the High Court of Kenya emphasized the significance of protecting personal data in the public arena.[345]

Such legal findings accentuate the corporate responsibility to guarantee that data protection measures are not just legal burdens but integral cores of organizational culture. Eventually, effective commercial responsibility in data protection goes beyond mere compliance; it involves building trust with stakeholders by showing a genuine commitment to responsible data management and protection. By aligning commercial intelligence strategies with these principles, associations can navigate the various hurdles of data protection while contributing constructively to society.

5. BALANCING FREEDOM OF EXPRESSING ONESELF AND PRIVACY

The right to privacy is the fundamental barricade that stands in the way of complete State control and dominance. Without it, the social contract is shattered, and individuals can not recognize their popular rights to participate, form, cultivate, and enjoy their personal views.

People unfit to form or communicate private affairs devoid of the State will not only be deprived of their right to express themselves freely but also of the protection of their communications. Therefore, the balance between privacy and freedom of expression lies in icing reasonable restrictions with a clear legal base while securing pluralism and democratic converse. The capability to freely suppose and conduct ideas is essential to who we are as mortal beings.

345 Ceres Tech Limited v Commissioner, Office of the Data Protection Commissioner [2024] eKLR

6. CHALLENGES AND BARRIERS

The intersection of expression freedom, privacy and data protection in Kenya presents a complex landscape with several challenges and barriers. While the Constitution guarantees freedom of expression and privacy, the increasing use of technology and the growing importance for data collection have created challenges and barriers to these fundamental rights.

6.1. Lack of Adequate Data Protection Laws

While Kenya has made strides with the Data Protection Act 2019, full implementation and enforcement remain a challenge. This absence of protection can lead to the abuse of personal data, which can be exploited to identify individuals and track their movements, potentially undermining their freedom of expression. In addition, the Office of Data Protection Commissioner depends on the Ministry of ICT, and state organs, which can lead to a conflict of interests. The credibility of the commissioner of data protection may be affected by lack of independence.[346]

6.2. Potential for government surveillance and censorship

The Kenyan government has been known to monitor online activity, especially with regard to communications, which can not only daunt individuals but also be used to stifle dissent. Also, the government's capability to collect and analyze large amounts of personal data can be used to identify individuals for intimidation or persecution.

6.3. Data monopoly

The aggregation of power in the hands of a few tech companies particularly where the state has shares can also threaten the freedom of expression. These companies have vast quantities of consumer data, which they can exploit to manipulate public opinion while controlling the flow of information. This tends to limit the capability of individuals to express themselves freely, especially when bearing contrasting opinions.

6.4. Lack of public awareness

Many Kenyans are not privy to their data protection rights, making them vulnerable and susceptible to exploitation and thus limiting their competence to exercise control over their personal data.

7. RECOMMENDATIONS

These recommendations aim to create a balanced environment where freedom of expression and privacy can coexist, promoting a more democratic and secure digital space in Kenya:

7.1. Strengthen Legal Frameworks

There should be comprehensive laws to protect data and ensure the effective implementation of the Data Protection Act, 2019, with clear guidelines on how personal data can be collected, stored, and shared. Aligning local laws with international standards, such as the General Data Protection Regulation (GDPR) is also key to enhance trust and protect citizen's rights.

7.2. Enhance Regulatory Oversight

There is a need to strengthen the office of the Data Protection Commissioner by providing adequate resources

346 Kenya Institute for Public Policy Researcg and Analysis (KIPPRA), 'Strengthening Data Protection in Kenya: Opportunities and the Way Forward' < https://kippra.or.ke/strengthening-data-protection-in-kenya-opportunities-and-the-way-forward/ > Accessed 31 December 2024.

and autonomy to enforce data protection laws.[347] Reinforcement of the independence of the media council to address issues of content regulation without infringing the right to freedom of expression should also be put in place.

7.3. Promote Digital Literacy and Awareness

Launching nationwide campaigns to educate citizens about their rights to privacy and the importance of data protection can go a great way in promoting awareness. There is also a need for capacity building by providing training for journalists, activists and law enforcement agencies on the balance between freedom of expression and privacy.

7.4. Safeguard Online Expression

Limiting Surveillance and Censorship by ensuring that all government surveillance measures are lawful, necessary, and proportionate with adequate oversight mechanisms is necessary to prevent infringement of individuals' right to privacy and freedom of expression. Social media platforms can as well adopt transparent content moderation policies that uphold the freedom of expression while protecting the users' privacy.

7.5. Adopt Privacy- Enhancing Technologies

Promoting the use of encryption and methods that integrate privacy can safeguard personal data without stifling free speech. Also, there is a need to encourage the integration of privacy by formulating principles in the development of digital platforms and services to uphold and promote the effectiveness of the right to privacy and expression freedom

8. CONCLUSION

The intricate balance between the freedom of expression and privacy in the digital world is necessary for preserving primary fundamental rights and enhancing government accountability. In order to achieve this, a multifaceted approach consisting of strengthening legal frameworks through diverse data protection policies ought to be established so as to ensure the robust protection of the citizens' data. Empowering nonsupervisory bodies similar to the Office of the Data Protection Commissioner and the Media Council Kenya can enhance oversight and ensure adherence to the right to privacy and freedom of expression norms.

Also, by conducting digital literacy campaigns which create public awareness, the citizens will be educated on their rights and responsibilities in the digital world. This will not only enhance the protection of their fundamental rights but also ensure that the digital space remains a platform for free and open discourse, which is essential for the development of a vibrant and transparent society.

347 Ibid.

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THE ROLE OF TECHNOLOGY IN EXERCISING THE FREEDOM OF EXPRESSION AND ITS IMPLICATIONS ON PRIVACY AND DATA PROTECTION

***Winnie Wambui Mburu**

1. ABSTRACT

The freedom of expression and right to privacy ought to be mutually reinforcing; each advancing and or safeguarding the other especially now with the advent of the digital space. With the internet as a global resource, advancing the freedom of expression through various forms and platforms has been made easier. With the click of a button, information has been shared to a multitude or received by strangers. This efficiency has enabled people to express their ideas, seek, receive and impart information in digital spaces. It has well propelled digital activism, calling for government accountability. With this expanded opportunity however, comes privacy concerns. The right to privacy in its very essence refers to the right not to interfere with. It seeks among others to protect the autonomy and personal details of the person. With the digital space being public, as this paper will suggest, the respect of this right can be particularly challenging. The interrelatedness of these two concepts in the digital space especially, can be particularly crippling, with at times one curtailing the other. This paper notes and addresses the delicate need for the balance between the freedom of expression and its connotation in regards to the right to privacy and data protection. It highlights instances and solutions where these two, whilst appearing in contrast to each other can be delicately synchronized to ensure a rights respecting digital space.

Key words: data privacy, freedom of expression, digital space, data protection

2. INTRODUCTION

The advent of the digital space has radically changed the perspective of freedom of expression. The internet has provided a crucial space for exchange of information therefore an avenue for the exercise of the freedom of expression.[348]Digital platforms, different from traditional contexts have allowed multitudes to access, create and share information for a wide range of persons. Social media has allowed people to express themselves freely defying geographical boundaries. [349] It has been utilized allowing for rapid communication and public discourse as some of the revolutionary opportunities that the digital space has presented. Whereas the public nature of the internet forms its much celebrated, it is this very trait that poses a risk to its users.

Every expression of one's thoughts or ideas on the internet leaves what is referred to as a digital foot print.

348 Joseph Maina, 'Freedom of Expression in a Digital Era: Eastern Africa Perspectives' (2023) < https://fesmedia-africa.fes.de/news/freedom-of-expression-in-a-digital-era-eastern-africa-perspectives.html> accessed 26th June 2025

349 Sarah Lee, 'Free Expression in the Digital Age; Navigating the Complexities of Freedom of Speech in the Modern Media Landscape' (2025) https://www.numberanalytics.com/blog/free-expression-digital-age accessed 26th June 2025

This means, one's information online can be traced back to them. This poses a risk to persons, discouraging them to utilize the digital space in advancing their freedom of expression. Thus, encouraging the freedom of expression online requires a guarantee that the right to privacy will at the same time be respected.[350]

This paper therefore examines and proposes the need for a delicate balance between the freedom of expression online and the respect of the right to privacy. While noting that both the right to privacy and freedom of expression are not absolute rights, it examines the permissible and non-permissible limitations to these two. It attempts to bring forth the argument that, with the advent of the digital space, the freedom of expression and right to privacy ought to be mutually reinforcing through privacy laws that balance these two.

3. PROBLEM STATEMENT

In 2012, the UN Human Rights Council adopted a resolution asserting that the same rights enjoyed by people offline must as well be protected online. Article 19 (Organization) elaborates by arguing that the freedom of expression was designed to traverse mediums in its expression.[351] That it matters not whether it is exercised online or offline. This is backed by the recognition of this right in international instruments, Article 19 of the UDHR states:

"Everyone has the right to freedom of opinion and expression ; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The digital space has indisputably created a space where rights and freedoms can be exercised freely and has been rightly hauled for doing so. Abreast of the potential that the digital space holds, domestic and international legislations have been enacted to regulate the utilization of the digital space so as to create a rights respecting cyberspace. Whilst this progress is applauded, it is not devoid of challenges and risks, key among them being privacy concerns and inadvertent limitation of the freedom of expression online.

Emphasis has been laid on the single ground of limitation of this freedom as national security threat and or the need to maintain public order.[352] Despite this narrow and explicit limitation, there has been an intentional expansion of the scope of this limitation to facilitate unnecessary collection, processing and storage of data by governments under the guise of national security concerns. This has made apparent surveillance concerns which are a derivative of data collection and tracking. It is sadly not a new revelation that governments and corporations censor data for surveillance practices. This is evidenced by their ability to cause blockage and cause internet outages and promotional texts for marketing purposes for corporations.[353] This is unfortunately done without consent, express or implied of the data subjects.

Further, with the interconnectivity advantage that the digital space holds, it provides a perfect arena where information can be imparted and shared through diverse channels. This forms part of the need to limit the nature of the freedom of expression as it raises a potential threat of being weaponized. It is in creating restrictions that the Constitution of Kenya states:

350 MindSEO, 'Freedom of Expression and Privacy in the Digital Age' < https://www.mindseo.com/resource/freedom-of-expression-digital-age/> accessed 27th June 2025

351 Article 19, 'Freedom of Expression and ICTs: Overview of International Standards', (2013) page 16

352 Article 19 ICCPR

353 Directorate- General for External Policies, Policy Department of the European Parliament, 'Surveillance and Censorship: The Impact of Technologies on Human Rights' (2015) https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549034/EXPO_STU(2015)549034_EN.pdf accessed 26th December, 2024

(2)The right to freedom of expression does not extend to-

(a) propaganda for war

(b) incitement to violence

(c) hate speech; or

(d) advocacy of hatred that

(i) constitutes ethnic incitement, vilification of others or incitement to cause harm;or

(ii) is based on any ground of discrimination specified or contemplated in Article 27(4)

Similarly, Article 31 on the right to privacy identifies it scope as extending to the right to not have

"information relating to their family or private affairs unnecessarily required or revealed."

Enactment of the Data Protection Act and the subsequent Office of the Data Protection Commissioner (ODPC) sought to attain a myriad of objectives key among them ensure the protection and preservation of rights respecting digital space. Yet, despite all the aforementioned efforts, the digital space is and continues to be marred by unnecessary and unconsented data collection and processing with growing technological advancement.

The hallmark of the implications of the freedom of expression lies in deliberate curtailing of the exercise of this right. Despite being a constitutionally and internationally recognized right, governments and institutions continue to criminalize and curtail it beyond the established limitation. This goes to the extent of legislative overreach through enactment of legislations such as the Computer Misuse and Cyber Crimes Act whose provisions sought to criminalize the exercise of the freedom of expression in the digital space.

This paper shall discuss the aforementioned limitations of the freedom of expression online and how each of them goes to the heart of exposing persons to privacy violations. Whilst still appreciating that the right to freedom of expression is not absolute, it notes how this can be used as an excuse to breach privacy of individuals. It highlights the apparent disconnect between these two rights. A disconnect which, if addressed will enable entities, state and non-state to treat these two rights mutually reinforcing creating a rights respecting cyber space.

4. THEORETICAL FRAMEWORK

4.1 Capability Approach

The pioneer of the Capability Approach, Amartya Sen defines it as a theoretical framework that focuses on the wellbeing of the person.[354] It is a normative framework that evaluates individual well-being as well as social arrangements.[355] It underlies the significance of the freedom to achieve well-being as a matter of what people can do and be. Its core characteristic lies in its realistic approach to what people are and can be able to do, that is, their capabilities. It is a theory that emphasizes the ability and opportunities for people to do or take part in various activities that form part of the life of a person. This approach posits two broad categories of evaluation which include: assessment of an individual's well-being (her advantage) and an assessment of the goodness of a social arrangement.[356] Sen, the pioneer, argues,

354 The Capability Approach,< https://plato.stanford.edu/archIves/sum2020/entries/capability-approach/> (2011) accessed 26th December 2024

355 Dr. I. Robeyns, 'The Capability Approach: An Interdisciplinary Introduction' https://commonweb.unifr.ch/artsdean/pub/gestens/f/as/files/4760/24995_105422.pdf (2003)accessed 26th December, 2024

356 UNDP Human Development, 'The Capability Approach and Human Development: Some Reflections.' https://hdr.undp.

> "The capability approach to a person's advantage is concerned with evaluating it in terms of his or her actual ability to achieve various valuable functions as part of living. The corresponding approach to social advantage- for aggregative appraisal as well as for the choice of institutions and policy- takes the set of individual capabilities as constituting an indispensable and central part of the relevant information base of such evaluation."

Martha Nussbaum, while in agreement with Amartya Sen, offers a perspective of justice as advanced by the capabilities approach. She posits that one of the core principles of the capabilities approach lies in the concern with entrenched social injustices.[357] In her book she lists central capabilities core to the capabilities approach one of which includes, senses imagination and thought.[358] She idealizes this as the ability to produce self-expressive works without fear of political ramifications.[359] She further lays emphasis on the role of various institutions such as the government in advancing the capability's approach.[360] That is, the respective institution's role in providing an environment where individuals can be able to do or to be in their respective social arrangements.

Technology has adopted this approach by enhancing the ability of people to access information and express themselves in the digital space. Further, the digital space has provided an arena for increased communication and civic engagement in the quest for good governance. Technology has made it possible for enhanced checks and balances to be achieved as progress of institutions is documented and uploaded on digital platforms where the citizenry can scrutinize and offer feedback.

Technological advancement has as well had a significant impact on enhancing the capability of persons with disability to have access to information and actively take part in public participation. This is by use of assistive technologies only made possible by technological adoption. As the Capabilities approach lays emphasis on enhancing the ability of individuals to do or take part in, technology has indisputably effectively provided an all inclusive platform where the right to access information and freedom of expression can be exercised.

With regards to the intricate balance between the freedom of expression and data privacy, this theory acts as a stark reminder of the significance of the autonomy of the person. Whilst appreciating the inclusivity of the internet in advancing the freedom of expression, it notes that the same ought to be followed by non-interference of the person's privacy. It condemns surveillance which is a threat to the freedom of expression online, by laying emphasis on the autonomy and independence of the person to do, be, speak among others. It notes, while a larger arena has been provided for persons to exercise the freedom of expression, the same should not act as a bait for surveillance or harvesting of data on peoples' personal lives.

4.2 Public Sphere Theory

The proponent of this theory, Jurgen Habermas, illustrates that the public sphere is a domain in social life where public opinion can be formed and it is constituted in every conversation in which individuals come together to form a public.[361] He defines it as the space where private individuals converge to discuss matters

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357 The Capability Approach,< https://plato.stanford.edu/archIves/sum2020/entries/capability-approach/ > accessed 26th December,2024.

358 C. Kleist, 'Global Ethics : Capabilities Approach'< https://iep.utm.edu/ge-capab/> accessed 27th December, 2024

359 Ibid

360 Ibid

361 https://uw.pressbooks.pub/mediacriticalapproaches/chapter/6-1-habermas-the-public-sphere/ accessed 27th December 2024

they deem of general concern. A space where people came together to exercise their freedom of expression voicing their opinions openly and freely. He posits the public sphere as a space that stood on among others two major principles; inclusivity and transparency.[362] Discussions would be held by people from all walks of life and openly without fear. He critically notes the role played by media in the public sphere and posits its role as that of mediation and dissemination of information.[363]

In supplementing Habermas' ideology, appreciating its complexity in the modern day, Rutherford describes the public sphere as;

"an assembly of persons engaged in a dialogue which generates opinions and perspectives which affirm or challenge decisions of the state, government, guiding and influencing liberal democracy by developing public consensus."[364]

Traditionally, the theory was evidenced in the media space in the form of newspapers. This is contrary to Habermas emphasis on physical interaction/ presence.[365] With the development of new technologies the internet has become the modern day public sphere.[366] The internet has become the hub where people express their opinions on democracies and matters of public importance to them. Social media platforms like Facebook, You-tube, Instagram, X App among others have become the place where people virtually congregate to exchange ideas; communicating and publishing content in exercise of their freedom of expression.

Social media platforms have become the forum through which advocacy is greatly exercised. They have become fields where protests and revolutions are sparked up. Where state and police violence is monitored and worldwide views critiqued.

Section 25 of the Data protection Act, while highlighting principles of data protection, provides that data shall be processed in a lawful and transparent manner in relation to the data subject.[367] Transparency as a key principle of this theory connotes that information shared online shall not be processed in any other manner unless with the consent of the data subject. Physical dialogue has shifted online and with that comes the sharing of personal data as well. Notably, certain applications even require the sharing of live locations. This has proven hazardous in the recent past, where telecommunication companies have been accused of sharing personal data, in this case live locations of their customers to authorities for purposes of arrest. Persons who have exercised their freedom of speech online in providing dissenting opinions against leaders have suffered the brunt of it with some even being tortured, arrested or killed on this account. This violates the very tenet of this theory which calls for transparency and the smooth transition in recognizing the internet as the new public sphere.

4.3 SURVEILLANCE THEORY

Surveillance refers to the 'process of observing a person, group, place or an ongoing activity with the aim of gathering information'.[368]It is further regarded as the 'scrutiny of individuals, groups and contexts through the

362 'Jurgen Habermas and the Concept of Public Sphere' (2010) https://journalism.university/media-and-communication-theories/jurgen-habermas-public-sphere-concept/ accessed 27th December 2024

363 Ibid

364 Almuqren, A.(2023) 'The Contemporary Public Sphere- Habermas ' Perspective' Advances in Social Sciences Journal, 10(6) https://drive.google.com/file/d/16bgEvY-09Yxx899G_isMcbyTtRug9dDT/view?pli=1

365 Ibid

366 E.Cela, 'Social Media as a New Form of Public Sphere' (2015) European Journal of Social Sciences Education and Research, Vol. 2 Iss 3 https://revistia.com/files/articles/ejser_v2_i3_15/Erlis.pdf accessed 27th December 2024

367 Data Protection Act, Section 25(b)

368 M.Medi, 'Online Surveillance and Freedom of Expression in Kenya' (2021) https://erepository.uonbi.ac.ke/bit-

use of technical means to extract or create information.'[369] Scholar, Shoshana Zuboff while looking at it from a capitalism perspective, defines surveillance capitalism as the unilateral claiming of private human experience as free raw material for translation into behavioral data.[370]

In his works, Zuboff postulates the undermining of autonomy occasioned by surveillance. He lays emphasis on how democracy deteriorates from the very fear of surveillance. He consequently avers that individuals are restricted from openly and freely airing their views (exercising their freedom of expression) from the fear that their data is being collected. He further notes the unlawful processing of this data for objectionable purposes.

Exercise of the freedom of expression online sadly, places one under the risk of surveillance. It predisposes one to having their right to privacy blatantly violated with some wrongly arguing that once material is in the public domain, it is open to manipulation. This paper argues in line with this theory, that mere posting of data online does not waive the need for consent from the data subject. Rather the principles of Data Protection as enshrined in the Data Protection Act and Internationally recognized, General Data Protection Regulation must still be met for processing or manipulation of personal data in any way or form.

5. CONCEPTUAL FRAMEWORK

The freedom of expression has been utilized by state and non-state actors in calling for input in the running of entities and organizations. This is particularly true in democratic states. As utilized in the running of public institutions, it entails the freedom to put forward opinions about the running of public institutions.[371] We utilized the freedom of expression that can enable governments to gain legitimacy and trust from the people who elected them, strengthening the social contract theory. This has been made easier by the presence of the digital space which, properly employed can serve as a useful tool in achieving the aforementioned. This however, is not devoid of risks such as surveillance and how this curtails the agenda of a free space for the practice of the freedom of expression.

5.1 Transparency and Accountability of Government activities

Article 10 of the COK provides for the national values and principles of governance that guide all persons and entities in Kenya. These values include:

> "(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.
>
> (c) good governance, integrity, transparency and accountability."

This implies a duty on governments to ensure that information relating to their activities, projects and performance is available to all persons. This ensures that it is possible for governments to be placed under strict scrutiny and that the citizenry is aware and on board with the conduct of its government. Transparency serves to achieve accountability.[372] The rationale behind the two principles lies in ensuring checks and balances for

stream/handle/11295/160482/Medika%20Medi%20%20shedrack%20-Project.pdf?sequence=1#:~:text=Surveillance%2C%20by%20definition%2C%20intrudes%20on,order%20to%20track%20their%20actions.&text=Source%3A%20The%20Global%20Expansion%20of%20AI%20Surveillance%20by%20Carnegie.> accessed 27th December 2024

369 A. B Whitford and J. Yates, 'Surveillance and privacy as coevolving disruptions : reflections on 'notice and choice' Policy Design and Practice,2023 Vol 6https://www.tandfonline.com/doi/epdf/10.1080/25741292.2022.2086667?needAccess=true accessed 28th December 2024

370 J. Laidler, 'High Tech is Watching You' The Havard Gazzete (2019)https://news.harvard.edu/gazette/story/2019/03/harvard-professor-says-surveillance-capitalism-is-undermining-democracy/ accessed 28th December, 2024

371 I. Lenaola & A. Oginga, 'Constitutional Law, Doctrines and the Litigation of Fundamental Freedoms' (2023, LawAfrica)

372 A. Carstens, 'The Role of Transparency and Accountability for Economic Development in Resource-rich countries (2005)< https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp012705> accessed 28th December 2024

governments so as to prevent and curtail abuse of power. Absence of which would create distrust, instability and upheavals in the political and social space.

Traditionally, juridical principles can be used to underpin the government's role in ensuring transparency and accountability in their dealings. Principles such as 'Justice must not only be done but must be seen to be done' underpin the arms of governments role to provide information and indulge the public in perpetuating accountability. Courts have and continue to stand at the front line in preserving these two values through decision making. The Court in Transparency International v Attorney General , did exactly so by declaring several provisions of the Public Audit Act unconstitutional for violating constitutional principles key among them being transparency and accountability.[373]

With the advent of technology, the government's ability to achieve these core tenets have been made easier. Government reforms have and continue to be aligned with the fast changing digital space to keep up with the citizenry, which conducts most of its activities online. It has become imperative for processes previously done in physical offices with long queues to be digitized. Departmental institutions such as the NTSA, BRS,KWS among others have been made easily accessible owing to technological advancement. Significantly, in the judiciary, the CTS has made it possible to track cases and note their progress over time.

Of key-note importance are websites such as the Auditor General's website where financial and compliance reports are made. Others include, the Office of the Controller of Budget, Parliamentary Legislative tracker, Open Government Partnership among others. Various civil and non-profit organizations have as well, in a bid to promote transparency and accountability, set up online platforms to inform the public on government activities. These include, the Institute for Social Accountability (TISA) and Transparency International Kenya among others.

5.2 Scrutiny and Public Participation

Just as transparency and accountability, public participation forms a core tenet in the national values and principles of governance as envisaged in the COK. Article 13 of the African Charter on Human and People's Rights provides for the essential nature of public participation of the citizenry by holding:

> "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."

The same is mirrored by Article 25 of the ICCPR. The Court in Apiyo v Attorney General & 2others adopts the definition of public participation as envisioned in the Kenya Draft Policy of Public Participation as:

> "The Kenya Draft Policy of Public Participation defines public participation as the process by which citizens, as individuals, groups or communities (also known as stakeholders)take part in the conduct of public affairs, interact with the state and other non-state actors to influence decisions, policies, programs, legislation and provide oversight in service delivery, development and other matters concerning their governance and public interest, either directly or through freely chosen representative." [374]

The question of who takes part in public participation has been a long and contentious one. With Courts' emphasis on inclusivity and extensiveness by policy makers and legislators in the conduct of public participation. This is so as to prevent declarations of invalidity of grounds of insufficiency of public participation. Litigation on public participation has been unending with the most recent precedent on this area being the Supreme Court's

373 Transparency International (TI Kenya) v Attorney General & 2 others (2018)eKLR

374 Apiyo v Attorney General & others (Petition E013 OF 2023) (2024)eKLR

decision on the Finance Bill 2024 which made substantive reference to the famous BAT case.[375]

The digital space creates a space for addressing the challenge of inclusivity in public participation. This ought to, however, be used as a supplementary avenue. The digital space provides an avenue for 'inclusive and accessible forums for public discourse'.[376] It is what may be termed 'E-democracy'. In leveraging technology, spaces for political discourse may be created and enhanced. For public institutions and departments, online consultation and participation forums may be established to enable the public to scrutinize government agencies' reports and offer constructive criticism at that. [377] Ideas may also be presented online and the citizenry offered a chance to contribute towards the proposals. From the reports issued in the various government websites, audits may be done by ordinary citizens and progress tracked, allowing a participatory democracy.

With increased internet penetration rates and access to internet services, the digital space can supplementarily, be used to achieve inclusive public participation not only in regards to specific legislation but for progressive checks as to government activities as well.

In Kenya for example, utilization of the digital space in exercise of the freedom of expression enabled the achievement of participatory democracy and the realization of the sovereignty of the people. The digital space enabled political discourse on emerging and contemporaneous issues such as the controversial Finance Bill. Leveraging on AI, the digital space enabled the simplification of traditionally complex legislative text and a further translation of the text into native languages that ordinary citizens could comprehend. Technology through social media enabled discussions, civic education and wide spread awareness as to the government's affairs right from the contentious Finance Bill to the infamous Adani Deal. All of which, mass citizen engagement was experienced online.

5.3 SURVEILLANCE CONCERNS

Article 17 of the ICCPR provides:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family home or correspondence, nor to unlawful attacks on his honor and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

Despite its brevity, this article establishes the right to autonomy of one's data. The right to not unnecessarily collect, process and store personal data. It entails the right to confine/ safeguard personal data from being accessed by third, fourth or even fifth parties. It lies in the idea that data is to be held in confidence by those to whom it is given and utilized for a specific purpose. That should any subsequent need arise for further processing, consent from the data subject will be sought before the subsequent processing. This ought to be in alignment with the data protection principles key among them, consent and lawful processing as postulated in Section 5 of the DPA.

Surveillance defies the very essence of the right to privacy. Principle 4 of the Global Principles on Protection of Freedom of Expression and Privacy defines surveillance and its effects as:

> "The indiscriminate and untargeted collection, storage and analysis of digital and traditional

375 The Cabinet Secretary for the National Treasury and Planning & 4 others v Okiya Omtatah & others (Petition E031 as consolidated with E032, E033 of 2024)

376 < https://www.oecd.org/en/blogs/2024/09/breaking-new-ground-enhancing-citizen-participation-in-democracys-digital-age.html#:~:text=One%20of%20the%20most%20promising,their%20opinions%20and%20influence%20policy.> accessed on 7th January, 2025.

377 I. David 'Public Participation Through Digital Platforms' (2023) https://www.kictanet.or.ke/public-participation-through-digital-platforms/ accessed 28th December 2024

communications or communications data without specific, individual reasonable suspicion ("mass surveillance") by state and non-state actors impinges on the very essence of the right to privacy. It also has a chilling effect on the exercise of the right to freedom of expression and the right to hold and form an opinion by searching and accessing and disseminating information online. As such, mass surveillance is always a disproportionate interference with the rights to privacy and freedom of expression."[378]

The Court in KNHRC V CAK held as follows in regards to the right to privacy and surveillance:

"Privacy is a fundamental human right, enshrined in numerous international human rights instruments. It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as the freedom of expression, information and association. The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction and liberty, a private sphere with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals. Activities that restrict the right to privacy such as surveillance and censorship can only be justified when they are prescribed by law, necessary to achieve a legitimate aim and proportionate to the aim pursued."[379]

It is common knowledge that there has been an imminent 'digital migration'. Most if not all services are currently undertaken online with little to no need to physically go to offices to access certain services. Despite the great advantage this poses, citizens (in this case data subjects) live in constant fear of surveillance owing to increased internet usage as necessitated by their daily lives. The court in appreciating this noted:

"Threats to individual privacy are greater now than ever envisaged. Global technologies and convergence facilitate the dissemination of information but, at the same time, pose enormous threats to individual (and corporate) confidentiality. A comprehensive personal dossier can now take minutes to compile electronically and a digital camera or mobile phone can record images in an infinite variety of ways and circumstances."[380]

Despite the myriad of opportunities offered by the digital space, internet security is still a major concern. It has become increasingly easy for governments and corporations in liaison with telecommunication companies to obtain crucial personal data issued in good faith, in expectation of holding it in confidence, to obtain personal data.

To aptly understand the challenges held by surveillance, scholars contemplate three potential concern areas. These include:

"1. The concern that governments diminish citizen's privacy by collecting their data.

2. the concern that they diminish their privacy by accessing their data, and

3. the concern that the collected data may be used for objectionable purposes."[381]

Surveillance or even mere apprehension of it greatly curtails the freedom of expression. It prevents people from openly airing out their opinions or criticisms for fear that they are being monitored or that they may be targeted for their views. This is a direct violation of their right to privacy and counter-productive in democracies whose values are based on transparency and accountability.

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378 Article 19, 'The Global Principles on Protection of Freedom of Expression and Privacy' https://www.article19.org/data/files/medialibrary/38657/Expression-and-Privacy-Principles-1.pdf accessed 28th December 2024

379 Kenya National Human Rights Commission v Communications Authority of Kenya & 4 others (2018)eKLR

380 Ibid

381 P. Konigs,'Government Surveillance, Privacy and Legitimacy', < https://link.springer.com/article/10.1007/s13347-022-00503-9> accessed 29th December, 2024

6. CONCLUSION

It is an indisputable realization that the advent of the digital age has and continues to create an expansive arena for the exercise of the freedom of expression. Among others, it continues to create a space where the citizenry can engage in political discourse, activism and advocacy of their rights. Despite the great opportunities and potential it portrays. It is not devoid of risks. The threat of the same space being utilized to undermine the right to privacy is imminent. The same space has been used as surveillance and to target persons based on the ideas that they have shared online. It has been utilized, wrongly, as a tool to advance extrajudicial killings, state censored abductions and crippling political dissent. This paper calls for increased autonomy of one's data and transparency in the processing of such data. It condemns surveillance, hopeful that the freedom of expression and right to privacy in the digital space will not be looked at as singular and separate rights but as mutually reinforcing rights.

7. RECOMMENDATIONS

Stringent regulation as to the sharing of data between Telecommunication companies and the government. June 2024 in Kenya is highly remembered for among other things, the allegation of a popular telecommunication company sharing personal data to enable authorities to effect arrests. Thus it would be important that regulations be enacted reiterating the place of the data subject's consent and the specific lawful instances when data may be shared by telecommunication companies to third parties.

Enactment of trans-border/ trans-national laws and policies on digital privacy. A key challenge facing data protection and privacy laws in their jurisdictional nature. Noting that the internet is not geographically limited, it is prudent that regional and internationally recognized data protection and privacy laws be enacted to reflect the nature of the internet.

Establishment of an independent commission to address challenges faced by the ODPC. As it stands, the ODPC is under the Ministry of Information, Communications and the Digital Economy (MICDE), being under a government ministry would curtail the independence of its decision noting that government agencies have been sued in the past for violating Data Protection Principles. Thus, establishing it as a separate entity would effectively preserve its independence.

Descriptive interpretation on what constitutes 'national threat to security' in the context of sharing of personal data. Authorities have relied on national threats to security in the past to breach data privacy principles. Definitively establishing what constitutes national threat to security will prevent the misuse of this term in breaching privacy laws.

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Data Protection Act

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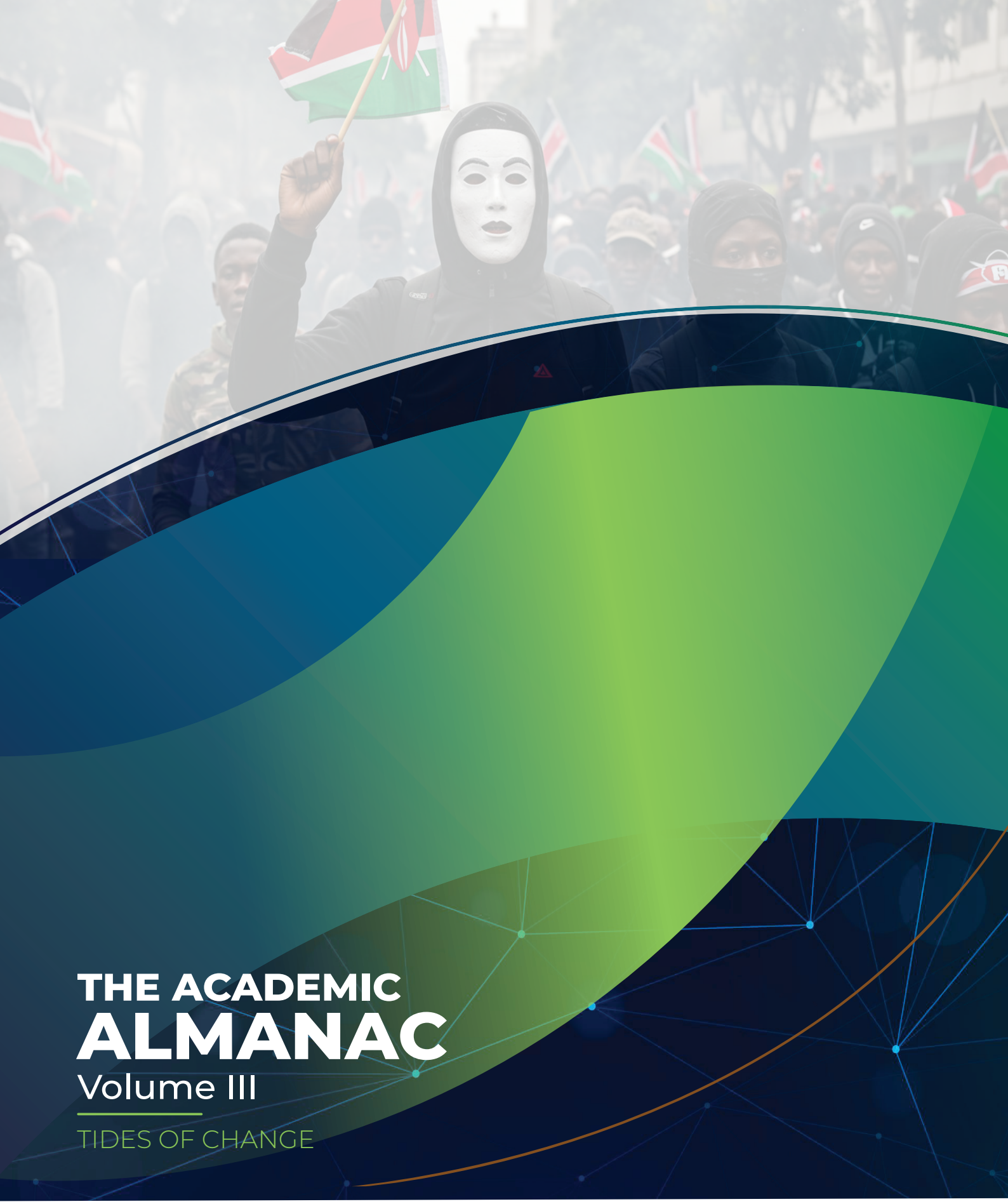
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