The Advocate

The Advocate Magazine

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Protecting Constitutionalism and the Rule of Law- Ensuring Accountability

+ Responsible Management of Public Finance: Revenue, Borrowing and Spending

+ Mainstreaming ESG Frameworks and Digital Trust: The Legal Imperative in Kenya

+ Protecting Constitutionalism and The Rule of Law – Ensuring Accountability (The Lsk at a Historic Crossroads)

By Ms. Faith Odhiambo, President, Law Society of Kenya

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VOX POP

I wish to affirm that the Judiciary is ready to handle the 2027 Electoral Dispute Resolution (EDR) cycle with fairness, efficiency, independence, and integrity.

As the leadership of the Judiciary, we will fully support the JCE as it steers us towards an effective EDR process during the 2027 cycle. I urge all stakeholders and fellow Kenyans to join hands with the Judiciary in safeguarding our constitutional democracy. It is only through collective commitment that we can build a just, peaceful, and democratic nation.

Electoral justice is not the work of one institution alone — it is a shared responsibility. Sustained collaboration is vital if we are to achieve a peaceful electoral process that reflects the constitutional vision of free, fair, and transparent elections and contributes to the consolidation of our democracy. I also call upon all our partners — the Law Society of Kenya, the IEBC, other electoral stakeholders, and our development partners — to continue walking this journey with us. I commend the JCE for its resolve to confront systemic challenges. This includes the need for timely electoral law reform, continuous capacity building for judges and judicial officers, and fostering stronger synergies with other stakeholders involved in the electoral process." - ***Justice. Martha Koome, EGH Chief Justice of the Republic of Kenya I her speech during the launch of the Judiciary Committee on Elections (JCE) Operational Plan 2025–2028 in Nairobi.***

The Law Society of Kenya is apprehensive that if the current volatile situation between the Public and the National Security Organs persists or is further exacerbated, Kenya's sovereignty, democracy and constitutionality will be on the brink of imploding. Accordingly, it is the duty of every right-thinking citizen, especially those entrusted with positions of power and service, to take urgent, deliberate and objective action to end the menace of extrajudicial killings, bring its perpetrators to book, and find justice for all victims of these heinous criminal elements within our security organs.- ***LSK President Faith Odhiambo in a Statement of The Law Society of Kenya Calling For Accountability on The Brutal Killing of Kenyans And Investigations on Historical Extrajudicial Killings by officers of The National Security Organs.***

The Law Society of Kenya is no longer perceived as a distant institution. Under this Council, we have made it visible, credible, and responsive. We've shown up. We've spoken out. We've taken action , and we've done it with clarity, compassion, and courage.

We've also made room for the public in our conversations. Through outreach, bar-bench engagements, and townhalls, we are building trust in the legal profession, and that is vital in a time when people feel abandoned by institutions. - ***LSK Vice President Mwaura Kabata in his opening remarks for the LSK Annual Conference 2025.***

On behalf of the Secretariat and the Council of the Law Society of Kenya, I warmly welcome you to this significant event - the official launch of the LSK Taskforce on Efficiency and Ethics in Courts and Land Registries. This is a defining moment for our institution. It is also a public statement that the Law Society of Kenya is committed to accountability, justice, and continuous institutional renewal. The decision to establish this Taskforce was driven by a wave of credible reports from members and the general public pointing to systemic inefficiencies and persistent corruption within our courts and land registries. As a Society, we listened - and we acted. As CEO, I want to reaffirm that this initiative is not merely administrative. It is strategic. It aligns with our constitutional mandate to uphold the rule of law and protect the public interest. It demonstrates that the Law Society is not a passive observer of dysfunction but an active architect of reform- ***LSK Secretary/CEO Florence W. Muturi in a statement Launch of the LSK Taskforce on Efficiency and Ethics.***

"This meeting marks a key milestone in our commitment to reform the Advocates Remuneration Order to ensure it reflects current legal practice trends, economic realities, and the needs of emerging practice areas.

As a committee, we remain dedicated to safeguarding the dignity and sustainability of legal practice in Kenya. This process is central to enhancing the bread and butter of our members and reinforcing fair compensation for Advocates across the country."- ***Chacha Odera, Senior Partner at Oraro and Company Advocates and Chair of the Ad Hoc Committee on the Review of the Advocates Remuneration Order at a meeting held on 4th July 2025 at the LSK Secretariat offices.***

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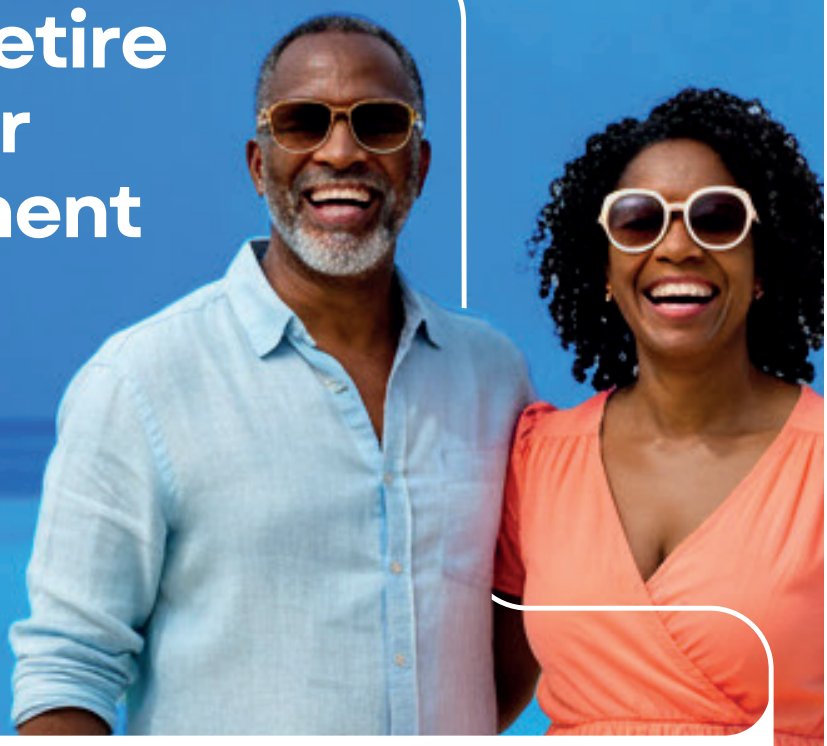

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Message from the CEO

Upholding Constitutionalism, Promoting Accountability, and Leading Legal Transformation

Dear Members,

As we reflect on the state of our democracy and the evolving role of the legal profession, it is imperative that we renew our commitment to the foundational values enshrined in the Constitution of Kenya 2010—constitutionalism, the rule of law, and accountability.

Recent developments have tested the strength of our institutions and the resilience of our constitutional order. We have witnessed worrying trends, including extrajudicial actions, suppression of fundamental freedoms like shutting down of live broadcasting and threats to judicial independence. These actions not only erode public trust but also undermine the democratic fabric of our nation. In this context, the Law Society of Kenya must remain unwavering in its mandate: to defend the rule of law, champion human rights, and uphold justice without fear or favour.

The theme of this edition, **"Protecting Constitutionalism and the Rule of Law – Ensuring Accountability"**, is both timely and necessary. It reminds us that the fight against abuse of power, state overreach, and impunity requires robust legal frameworks, independent oversight, and relentless civic vigilance. As a Society, we must lead this charge through strategic litigation, advocacy, and meaningful engagement with state organs and the public.

Equally important is the stewardship of public resources. Under the sub-theme, **"Responsible Management of Public Finance: Revenue, Borrowing and Spending"**, we examine how legal tools and institutional checks must be deployed to address the persistent challenges of excessive taxation, corruption, and fiscal mismanagement. Through legal advocacy and public interest litigation, we must demand transparency and prudence in the management of Kenya's finances.

In this era of rapid change, we must also embrace the future. The sub-theme, **"Mainstreaming ESG Frameworks and Digital Trust: The Legal Imperative in Kenya"**, challenges us to reimagine our role in a world where Environmental, Social, and Governance (ESG) principles and digital transformation are becoming central to legal and business practice. As legal professionals, we must position ourselves as architects of sustainable, ethical, and digitally trusted systems. Our work must go beyond compliance; it must drive change, ensure equity, and foster long-term resilience.

I wish to conclude by quoting the political theories of John Locke and the founders of the American republic, that, ***Government can and should be legally limited in its powers, and that its authority or legitimacy depends on it observing these limitations***.

Let this edition of the *Advocate* serve as both a reflection and a call to action—for each of us to recommit to our professional responsibility in defending constitutional values and shaping a legal ecosystem that is just, inclusive, and future-proof.

Sincerely,
Florence W. Muturi
Chief Executive Officer
Law Society of Kenya

> *"Read it. Rethink it. Reform it. The law is only as powerful as those who stand to uphold it!*

Protecting Constitutionalism and The Rule of Law – Ensuring Accountability (The LSK at a Historic Crossroads)

By Ms. Faith Odhiambo, President, Law Society of Kenya

Introduction

We converge at the Diamond Leisure Beach & Golf Resort for the **2025 Annual Conference of the Law Society of Kenya**, not merely to mark another item in our calendar. We gather as a profession called to service, as citizens duty-bound to protect the Constitution, and as guardians of the rule of law at a time when our nation's democratic fabric is being tested.

The theme of this year's conference, ***"Protecting Constitutionalism and the Rule of Law – Ensuring Accountability",*** is not aspirational. It is urgent. It is a daily call to action for every lawyer who believes in justice, for every member of the bar who knows that silence in the face of oppression is complicity, and for every leader entrusted with the stewardship of our great institution, the Law Society of Kenya (LSK).

This theme could not be more apt, nor more urgent. It speaks not only to the core mandate of the Law Society of Kenya but to the foundational ideals upon which our Republic is built. It is a call to vigilance in an era marked by democratic regression, state overreach, and increasing attempts to erode the hard-won liberties enshrined in our Constitution.

As lawyers, we are bound by a professional and moral duty to uphold the Constitution of Kenya, 2010—a transformative charter born out of decades of public struggle, sacrifice, and aspiration. Constitutionalism is not merely about textual fidelity; it is about safeguarding constitutional culture—a living commitment to legality, restraint of power, separation of powers, due process, public participation, transparency, and equality before the law.

The rule of law, likewise, is not a slogan—it is the very infrastructure of justice. It demands that all persons and institutions, public and private, are subject to the law, equally and without exception. When power is exercised arbitrarily or when the law is manipulated for political expedience, it is not just the letter of the Constitution that is violated—it is the social contract itself that is broken.

In recent months, we have witnessed disturbing developments:

- Unconstitutional deployment of the military in civilian spaces without constitutional or legislative authorization.
- Clampdowns on media freedom, including attempts to suppress live protest coverage through unlawful directives.
- Disregard of court orders, including by high-ranking public officers.
- Weaponization of the criminal justice system to silence dissent and intimidate protestors.

These are not isolated incidents; they are manifestations of a deeper governance crisis. The Law Society of Kenya, under this Council, has refused to stay silent and has risen to the challenge. We have used the tools of the law not only to seek redress, but to uphold our role as defenders of constitutional order. This theme is not aspirational—it reflects the work we do, the leadership we embody, and the values we must defend. We have confronted these threats—in courtrooms, in boardrooms, and on the streets—armed with the Constitution, guided by the rule of law, and committed to justice without compromise.

But accountability is not the responsibility of state organs alone. It must begin within. As the bar, we must also subject ourselves to the same standards we demand of others. That is why our internal reforms—on ethics, systems, welfare, and remuneration—are not administrative niceties; they are a reflection of our fidelity to the principles we defend.

This theme, then, is not abstract. It is a professional imperative and a national necessity. It demands that we:

- Speak truth to power, even when it is inconvenient.
- Defend judicial independence, especially when it is under assault.
- Insist on fidelity to due process, especially in times of crisis.
- Reject impunity, whether perpetrated by the executive, the legislature, or within our own ranks.
- Build institutional resilience, so that our legal profession remains the last line of defense when all else falters.

This year's conference is therefore not merely a platform for learning—it is a reaffirmation of our role as custodians of constitutional order, defenders of institutional integrity, and champions of public interest lawyering.

Let the conversations here deepen our resolve. Let the lessons inspire our practice. And let the solidarity forged here strengthen our collective ability to protect the soul of our democracy.

As I reflect on the past year and the collective strides we have taken as a Society, I am filled with pride, not merely because of what we have done, but because of *how* we have done it—with **courage, principle, and unity**. Our work has been rooted in constitutional fidelity, ethical consistency, and institutional transformation.

Wakili Tower: Building Our Legacy, Brick by Brick

Our journey toward a permanent headquarters for the Society—a home befitting the stature and aspirations of the Kenyan legal profession—has not been easy. But we are unwavering.

The **Wakili Tower project**, once an ambitious dream, is now a near-reality. After engaging members at the General Annual Meeting held in Kisumu and revisiting the scope with financial prudence, the Council approved a revised and realistic model. The re-advertisement of the tender is in motion.

In furtherance of this goal, and to pave the way for the demolition of the existing structure at Gitanga Road, the Council has commenced the process of relocating the Secretariat staff to our Society's property in South C. This interim measure prioritises the safety and wellbeing of our staff and ensures operational continuity during the redevelopment phase.

This project is not merely about bricks and mortar—it signifies institutional permanence, the long-term financial sustainability of the Society, and a visible commitment to the future of the legal profession in Kenya. We are not merely constructing a building. We are laying the foundation for a legacy—a fortress of the rule of law and a beacon for generations of advocates yet to come.

Remuneration and Dignity of Work

This year, the Law Society reconstituted the Committee on Advocates Remuneration with a clear mandate to undertake a comprehensive review of the Advocates Remuneration framework. The objective is simple yet imperative: to ensure that legal practitioners are remunerated commensurately with the professional value, skill, and responsibility their work entails. The continued undervaluation of legal services through under-pricing and exploitative arrangements is untenable and must be decisively addressed.

We are currently at the public participation stage of this process, having already taken into account extensive feedback received from members, including substantive proposals raised during the last concluded Annual General Meeting. In addition, a nationwide survey is underway, and we urge all members to participate actively. This process belongs to all of us.

Concurrently, we are undertaking a broader review of the legal and regulatory framework governing the legal profession, with a view to harmonising and updating existing statutes to better reflect the evolving demands of legal practice and the justice sector at large.

Let us seize this opportunity to collectively reaffirm the dignity of our labour and the integrity of our profession.

System Modernization: A Bar Reimagined for the Digital Age

No institution can thrive in the 21st century with 20th-century tools. That is why we embarked on a full-scale revamp of our **Enterprise Resource Planning (ERP) system**—to match the evolving needs of our members and the demands of a digitized profession.

Testing of the system's modules is ongoing, and we are on the cusp of launching a platform that will improve everything—from practicing certificate renewals to CPD tracking, to internal governance and external communication. Efficiency is no longer optional; it is the standard our members deserve.

Efficiency and Ethics Taskforce: Reforming the Justice Ecosystem

Injustice festers in the cracks of inefficiency. That is why we launched the **Taskforce on Efficiency and Ethics**, chaired by the venerable Senior Counsel John Ohaga and co-chaired by Wilfred Nderitu and supported by a diverse team of advocates drawn from various branches of the Society.

Its work has been aggressive, data-driven, and member-informed—field visits to registries, vetting of magistrates, formation of subcommittees, and consultations with branch leadership across the country.

We are diagnosing a system that too often has failed the public—and we will not shy away from proposing bold reforms to restore trust in our courts and registries.

Combating Masqueraders: Securing the Integrity of Legal Practice

The protection of the legal profession from unlawful encroachment remains one of the most urgent mandates of the Law Society of Kenya. The infiltration of unqualified persons masquerading as advocates not only undermines the dignity and exclusivity of legal practice but also exposes the public to grave injustices, including fraudulent transactions, professional negligence, and abuse of due process.

The Society continues to adopt a multi-pronged approach in addressing this menace. First, through policy reform and legal engagement, we have sustained our call for the urgent review of statutes and administrative procedures that permit ambiguity in the identification and verification of legal practitioners. Notably, we are working closely with the Office of the Chief Land Registrar to address the persistent challenge of documents—particularly in conveyancing and land transfers—being signed without clearly identifying the advocate responsible. Such omissions have created fertile ground for masqueraders to unlawfully participate in legal processes.

Secondly, the Society has continued to take enforcement actions, including reporting, naming, and initiating prosecution of known masqueraders, while urging the Judiciary, investigative agencies, and regulatory bodies to prioritise cases involving impersonation of advocates.

The fight against masqueraders is not only about preserving turf—it is about upholding the rule of law, protecting the public, and securing the professional future of every genuine advocate.

We call upon all members to remain vigilant and to report any incidents of masquerading to the Society. Together, we must jealously guard the integrity of our practice, as we work toward a legal system that reflects professionalism, ethics, and public confidence.

Upholding Rights, Responding to Crisis: LSK and the Gen Z Protests

When the country witnessed a generational uprising—young people taking to the streets, demanding transparency, justice, and accountability—the **Law Society of Kenya was not absent.** We were on the frontlines.

We set up **rapid response teams** in all eight LSK branches to provide pro bono legal aid to arrested or abducted protestors. We documented human rights violations through our **National Legal Observation and Documentation Mission**. We moved to court swiftly to challenge illegal gag orders by the Communications Authority and unconstitutional military deployment on civilian soil.

We stood for justice. We stood for the people. We stood for the Constitution.

DEFENDERS COALITION

SUPPORTING HUMAN RIGHTS DEFENDERS IN KENYA

WHO WE ARE

Defenders Coalition is the National Coalition of Human Rights Defenders in Kenya, established in 2007 to promote the safety, security, and well-being of Human Rights Defenders (HRDs). We are a trusted and professional organization dedicated solely to the protection of HRDs through capacity building, advocacy, and legal support. Our membership includes both organizations and individual defenders, and we are part of key regional and global human rights networks, including Defend Defenders and CIVICUS.

STRATEGIC PILLARS

- Enabling & safe civic space for HRDs
- Socio-economic Wellbeing of HRDs
- HRD Protection and Safety
- Instutitional Excellence

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Over 8,000 HRDs have benefited from our services on personal protection skills and rapid response.

WHO WE WORK WITH

Kenyan human rights organizations and Individual Human Rights Defenders
Defenders Coalition works with a diverse range of people and groups including:

- Indigenous people
- Women HRDs
- Journalists and bloggers
- PWDs
- Student Rights Defenders
- Social Justice Champions
- Environment and Land rights defenders
- Democracy and Good governance advocates
- LGBTQ+ rights defenders
- Veteran HRDs

Get in touch with us:

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Justice for All: From Kitengela to Kampala

Our intervention in the **Kitengela Three case**—where three young men were unlawfully detained—was a powerful reaffirmation of the Law Society of Kenya's resolve: no one, no matter how powerful, is above the law. We moved with urgency, filed contempt proceedings against the Acting Inspector General of Police, and secured a landmark High Court judgment holding him in violation of court orders. The precedent was clear: court orders must be obeyed, and the rule of law respected.

But let it be known—this was not an isolated case. During and after the anti-Finance Bill 2024 protests, the Society intervened in numerous cases of unlawful arrests, abductions, incommunicado detentions, and blatant abuse of police power. Through our rapid response legal teams and coordinated documentation missions, we offered legal representation, secured releases, and amplified the voices of victims whose rights had been trampled.

We were not just passive observers—we were active defenders of justice, moving swiftly where others hesitated.

Regionally, while our proposed partnership with the **Uganda Law Society (ULS)** on prison decongestion and legal aid collaboration is still in the pipeline, it represents an important step toward cross-border solidarity. Our shared challenges—overcrowded prisons, delayed justice, and under-resourced legal aid—require regional solutions. The discussions with ULS are promising, and we are committed to building a framework that advances access to justice across East Africa.

Justice is not bound by borders. And neither is our commitment to uphold it.

Wellness for Advocates: The Wakili Medical Cover

For too long, the legal profession has valorized overwork and overlooked wellness. This year, we changed that.

We launched the **Wakili Medical Cover**, designed in partnership with Octagon Africa. It offers comprehensive care for our members—inpatient, outpatient, dental, maternity, and more. The uptake is growing. The message is clear: **the well-being of lawyers is not a luxury—it is essential.**

Additionally, we secured partnerships with Zamara and other providers for accessible **pension and insurance** products, including for young and transitioning lawyers.

Championing Knowledge, Building Camaraderie

Professional growth is central to our agenda. The ongoing **revamp of our CPD framework** will soon deliver more relevant, more practical, and more accessible content—including digital learning and cross-border training.

But it's not all formal. Through the **Justice Games**, we rediscovered something fundamental: **community**. In Mombasa, lawyers from all corners played, danced, and laughed together. We are not just colleagues—we are a family.

Defending the Public, Serving the Profession

We have actively contributed to **Parliamentary processes**—submitting memoranda and offering oral representations on public finance laws, electoral reform, and justice sector bills. Our interventions are shaping legislation and defending constitutional integrity.

More importantly, we've **restored public trust** in the Law Society. Through bar-bench forums, town halls, and media engagement, we've made the Society visible, credible, and relevant.

A Word on Leadership

I cannot conclude without acknowledging the unity and strength of our Council. My gratitude goes to all my colleagues in leadership, and especially to our members, whose trust sustains us.

To those who seek to lead this Society in the future—let service, not ego, be your compass. Let the Constitution, not convenience, be your guide.

The Road Ahead

As we look to the future, the Law Society of Kenya must remain the **guardian of justice**, the **conscience of the Republic**, and the **protector of our professional integrity**.

The road ahead requires a renewed focus on securing and expanding our practice spaces. As a Society, we have continued to push further and aim higher—advancing the legal profession through policy engagement, regulatory reform, and targeted advocacy. In this regard, we made detailed submissions to Parliament seeking review of critical legal frameworks, including but not limited to the law on trusts. Our proposals were substantively adopted at the final legislative stage, following constructive deliberations with the Justice and Legal Affairs Committee (JLAC), demonstrating the Society's growing influence in shaping the legislative landscape.

However, the task of defending the legal profession is ongoing. We remain uncompromising in our fight against encroachment and the menace of masqueraders. We have underscored the urgent need for comprehensive legal

and regulatory review, particularly in relation to conveyancing practice. To this end, we are actively engaging the Office of the Chief Land Registrar to address persistent concerns, including the signing of legal documents and land transfer instruments without proper identification and authentication of the advocate involved—practices that continue to create loopholes for masqueraders to unlawfully encroach upon our domain.

Simultaneously, we have prioritized the development of our Continuing Professional Development (CPD) programme, which continues to grow in leaps and bounds. Our current focus is on specialized CPDs that not only accredit but also certify our members in niche and evolving areas of legal practice. This strategy aims to empower our members to progress through various phases of professional growth and to expand the horizons of legal work available to advocates across the country and region.

The Society must remain vigilant and visionary. The future demands that we be intentional in our efforts—not only to defend the gains of the past but to lay the groundwork for a dynamic and responsive Bar. A Bar that is not only national in stature but regional in reach. A Bar that stands tall as the premier professional association in East Africa and beyond.

We will not relent— Not in court. Not in Parliament. Not in the streets. Not in our offices.

The journey continues—toward a more accountable state, a more empowered society, and a Stable, Progressive Bar.

Let this conference renew our shared commitment:
To stand for the rule of law.
To fight for justice.
To protect the people.
To defend the Constitution.

End!

THE ADVOCATES BENEVOLENT ASSOCIATION

The Advocates' Benevolent Association is the welfare arm of the Law Society of Kenya whose main objective is to assist distressed members.

Benefits of membership to the Advocates Benevolent Association:

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aba@lsk.or.ke 0717-595-006 @LSK_ABA The Advocates' Benevolent Association

GUARDIANS OF TRUST: The Role of Advocates in Kenya's ESG and Digital Trust Future

By Hamisi Rigga

Charles Dickens in his fourth novel, The Old Curiosity Shop, said that if there were no bad people, there would be no good lawyers. However way you may interpret this, the phrase also implies that good lawyers have a duty to counter/check the activities of bad people. And bad people are rampant everywhere in the society, in our homes, in the corporate world, in public bodies. Are you then a good lawyer capable of countering the excesses where they occur?

In Dickens' novel, he tells the story of a crumbling world disguised by a façade of order. In this world the innocent suffer under the weight of moral decay, poor governance, and unchecked power. That world, sadly, is not confined to fiction. It eerily echoes our courtrooms, corporate boardrooms, and digital systems; where ESG and digital trust are often treated as ornamental rather than essential. Although we realize that these issues are important, we still tend to overlook them.

Nonetheless, Kenya currently stands at a pivotal juncture in its history where the intersection of sustainability, profitability, ethical governance, and responsible digital transformation can no longer be treated as peripheral considerations. These concerns are increasingly becoming key considerations for any enterprise. The twin imperatives of Environmental, Social and Governance (ESG) integration and the cultivation of Digital Trust are now central to the legitimacy, resilience, and global competitiveness of both public institutions and private enterprises in the world over, let alone in our country.

Owing to its unique position, the legal profession naturally has a critical role to play in this broader commitment to ESG and Digital Trust principles. As the architects of policy, stewards of justice, and champions of accountability, legal professionals are exceptionally placed to influence Kenya's trajectory toward ethical and sustainable governance. Yet despite our numbers, the mainstreaming of these concepts remains uneven and characterized by issues such as legislative gaps, low awareness, and emerging risks, among others.

This article explores the urgency of operationalizing ESG and digital trust principles in Kenya's legal and regulatory landscape. It outlines the current framework, highlights both obstacles and opportunities, and positions the advocate as a pivotal agent in driving sustainable, rights-based, and future-ready governance. As the country positions itself in the global economy, the question is no longer whether these issues matter, but rather, how they are being handled.

In Kenya, the rapid expansion of e-governance and the digital economy has amplified the need to entrench both ESG principles and digital trust across all sectors. It is important for Kenya to incorporate these frameworks into its laws, policies, and institutional practices so as to align itself with global trends and to further increase its global competitiveness.

What is the current legal and regulatory landscape?

The current legal and regulatory landscape on ESG and digital trust in Kenya is characterized by a myriad of laws, regulations, and policy instruments including the Companies Act, the Data Protection Act, and the Computer Misuse and Cybercrimes Act, among others.

The Environmental dimension in ESG is regulated independently by its own set of laws including the Climate Change Act and the Environmental Management and Coordination Act. The Social dimension is also regulated independently. The Governance dimension in ESG suffers a similar fate and is regulated by laws such as the Companies Act, the Capital Markets Act, and the Leadership and Integrity Act.

Despite notable progress, Kenya's ESG regulatory landscape remains fragmented and unevenly enforced. While environmental and social protections are embedded across various statutes, there is no one unified legal framework that consolidates ESG principles into a cohesive standard for businesses or public institutions. This leaves room for injustices to slip in between the cracks.

Enforcement mechanisms, particularly in the social and governance dimensions, often lack consistency and bite. For example, in 2015 the Capital Markets Authority issued ESG reporting guidelines but the same have remained largely voluntary. Also in 2021, the NSE issued an ESG Disclosure Guideline for issuers of securities but equally as well, the same are voluntary. This has had the effect of limiting the guidelines' widespread adoption, and further forestalling any enforcement on the same.

In this evolving landscape, advocates are called upon to not only interpret and apply these frameworks, but to also shape and influence them. We should be at the forefront in driving reform, ensuring compliance, and championing for accountability at every level of governance and enterprise. We should be good lawyers.

What role can Advocates play?

The role of advocates in mainstreaming ESG and digital trust principles in Kenya is multifaceted, and is becoming increasingly critical as these imperatives continue to become central to governance and to business generally. Just as the good lawyers did in Dickens' world, advocates must serve as the ethical counterweight to unchecked corporate power, state overreach, or performative governance. We should not stand aside and watch as injustice and malpractices occur. This is possible under the Advocate's role as:

1. Compliance warriors

   Advocates are often seen as the voice of reason by their clients. They (clients) regularly seek their advocate's advice when it comes to complying with set down laws. These clients may be corporate clients, public bodies or even non-profit entities.

   We as advocates therefore have a huge role in ensuring members of the public comply with the set down ESG and digital trust imperatives. Consequently, by the nature of our calling, we are tasked with enhancing compliance to the said ESG and digital trust imperatives so that the rights of even the downtrodden are well protected.

   It is noteworthy that this role also ties in with the advocate's role as a capacity builder since it is expected that before compliance, they will increase awareness on the set down principles by advising their clients on the prevalent legal landscape. In this regard, Advocates can even hold training seminars meant to educate their clients, or even the public in general, on these emerging trends.

   This role of capacity building also entails participating in legal and regulatory reform so as to lend legal assistance to those tasked with creating ESG and digital trust policies.

2. Policy influencers

   As the legal advisors, advocates are more often than not faced with the task of drafting policies for their corporate clients. Consequently, when doing so, they should ensure that such policies are succinct, enforceable, and well aligned with global trends. They should not only look after their clients' interests, but the interests of the other stakeholders as well.

   Undertaking this role also entails participating in the country's legal and regulatory reform. Advocates should not shy away from this participation as it provides you the opportunity to shape Kenya's ESG and digital trust future. This participation may be varied and you, the advocate, may choose whichever form of participation works best for you. You may apply to be part of the committees tasked with oversight and enforcement, you may submit memoranda to influence policy as and when required, or even volunteering for the drafting of the actual national policies. The goal is to ensure that not only good governance, but that justice is also upheld.

3. Litigators and Public defenders

   This role entails taking part in public litigation to hold corporates/public bodies accountable for ESG and digital breaches. You can institute public interest litigation to not only check the excesses of the executive, but also to ensure that corporates and/or public bodies are held accountable for ESG and digital breaches.

   Dickens paints a world where the powerless are crushed beneath the weight of neglect, avarice, and polite indifference. In this world justice is absent not because it is outlawed, but because too few are willing to fight for it. To live in a better world, advocates therefore have an obligation to fight for it. Good governance cannot be achieved unless there are people willing to strongly advocate for the same.

Conclusion

In the face of accelerating digitization and revamped sustainability expectations, Kenya's future hinges on our ability to integrate ESG and Digital Trust into the very fabric of our law and systems of governance. As the stewards of justice, architects of policy, and champions of accountability, Kenyan advocates must rise to this challenge. Let us turn aspiration into enforceable actions and in doing so, we shall ensure that our country is not only prosperous and globally competitive, but also principled and digitally trustworthy.

Dickens warned of a society trapped in nostalgia. The people polished old relics while ignoring the current suffering around them. Let us shun this world. As advocates, we must resist the comfort of convention and embrace our evolving responsibility to justice in an increasingly digital world.

The Author is Advocate of the High Court of Kenya.

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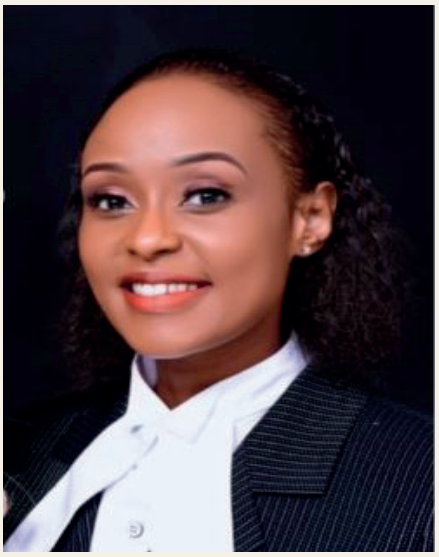
Safeguarding Constitutionalism and The Rule of Law In Kenya: A Human Rights Imperative



By Jennifer Wambugha Riziki Nyariki

In Kenya's evolving constitutional democracy, the twin pillars of constitutionalism and the rule of law form the bedrock of accountable governance. Yet, these ideals are constantly strained under the weight of institutional impunity, executive overreach and widening inequality. As we navigate this constitutional moment, the urgency to re-centre human rights within governance frameworks cannot be overstated.

Constitutionalism Beyond Text

Constitutionalism is not merely the existence of a constitution, but the spirit in which it is upheld. **Kenya's 2010 Constitution** is hailed as one of the most progressive globally, embedding justiciable rights and robust checks and balances. However, the lived reality is far from ideal. Despite a rich Bill of Rights, marginalised communities still face disproportionate state violence, informal settlements remain underserved and access to justice is marred by economic and geographic disparities. A constitution without constitutionalism becomes a façade - its power neutralised by selective adherence and political convenience.

The Rule of Law: A Promise Betrayed?

The rule of law is predicated on the idea that no one is above the law - not even the state. Yet, Kenya's political history is replete with instances where accountability is sacrificed at the altar of political expediency. From extra-judicial killings to land injustices, impunity remains entrenched. Recent civil protests met with excessive force by law enforcement have highlighted an alarming pattern: legal norms are applied differently depending on one's social status, ethnicity or political affiliation.

This selective application of the law erodes public trust in institutions and fuels a culture of impunity. For constitutionalism and the rule of law to thrive, the law must be consistent, fair and transparently enforced.

Human Rights: The Moral Compass of the Republic

Human rights provide the normative foundation for constitutionalism. They serve as the lens through which governance must be assessed. Kenya's Constitution recognises civil, political, economic, social, and cultural rights, affirming the state's duty to respect, protect, and fulfil them. Yet the gap between rights on paper and rights in practice remains glaring.

For instance, the right to housing under Article 43 remains elusive for thousands living in informal settlements threatened by evictions without notice or compensation. Similarly, access to healthcare - magnified during the COVID-19 pandemic - revealed systemic inequalities in public service delivery. These are not just governance failures; they are constitutional betrayals.

The Role of the Judiciary and Legal Practitioners

An independent judiciary is the guarantor of constitutionalism. Despite commendable jurisprudence in areas such as electoral justice, environmental protection and minority rights, the judiciary faces budgetary constraints, political attacks and public skepticism. Legal practitioners have a critical role to play - not just as litigators, but as public watchdogs and human rights defenders.

Advocates must actively engage in public interest litigation, provide pro bono services to the underserved and challenge unconstitutional policies and actions. The legal profession must be a bulwark against autocracy and a voice for the voiceless.

From Declarations to Action: The Accountability Nexus

Accountability mechanisms - such as the Office of the Auditor General, the Ethics and Anti-Corruption Commission and parliamentary oversight - are crucial. However, they often suffer from political interference and weak enforcement. True accountability is not just about prosecutions, but about ensuring transparency in public finance, integrity in appointments, and responsiveness to citizen grievances.

Digital technologies, social media, and civic tech have opened new frontiers for citizen-led accountability. The rise of whistleblower platforms and investigative journalism must be matched with strong legal protections for those who dare to speak truth to power.

Towards a Culture of Constitutionalism

Ultimately, protecting constitutionalism and the rule of law requires more than institutions - it requires a culture. A culture where citizens know their rights and demand them. Where leaders recognise that power is held in trust for the public good. Where the Constitution is not seen as an obstacle, but as a guidepost.

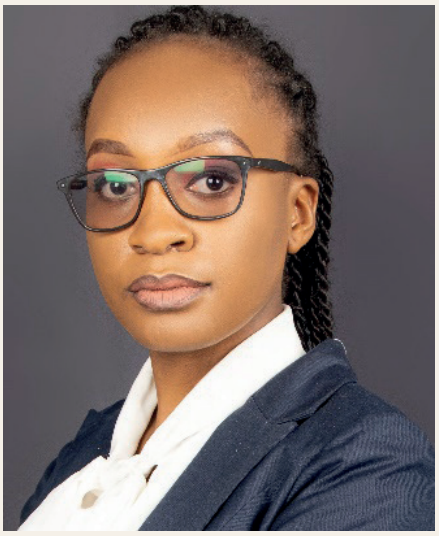
This culture begins with education - integrating constitutional literacy into our schools, our community dialogues, and our media. It involves civic action - protests, petitions and public forums ; and it requires moral courage - from judges, from lawyers, from citizens.

Conclusion

Kenya stands at a crossroads. Will we be a nation where the Constitution lives only in textbooks and courtrooms, or one where it animates every facet of public life? The answer lies in our collective commitment to constitutionalism and the rule of law, through a human rights lens. This is not merely a legal challenge - it is a moral one. For in protecting the Constitution, we protect the dignity of every Kenyan.

The Author is Advocate of the High Court of Kenya.

Extra-Judicial Killings A Threat to Democracy and Constitutionalism



By Linda Kiendi

In recent times, we have witnessed the brutal execution of citizens exercising their democratic rights to peaceful assembly, demonstration, picketing, and petition. Since June 25, 2024, when we saw the Gen Z demonstrations, followed by the murder of Albert Ojwang, and most recently the daylight execution of an innocent hawker simply trying to make a living, we have watched in horror as extrajudicial killings of Kenyans by the police have escalated. We have cried out and pleaded with the government, leaders, and relevant stakeholders—especially the police—to at least adhere to the Constitution and uphold the rule of law, but to no avail. It appears the lives of Kenyans no longer matter, as if the average Kenyan is considered a child of a lesser God, with the police at the centre of this tragedy. Those entrusted with the responsibility of protecting citizens have turned against them, committing cold-blooded murder without arrest or trial.

It is disheartening to see a government turn against those it is meant to protect. The facts are not just dry statistics; they represent innocent lives lost, dreams shattered, children left orphaned, and families left in mourning. Each life lost has significance; they matter to someone.

It is both saddening and unfortunate that over sixty years after Kenya gained its independence, we are still struggling with adherence to the rule of law. The police have transformed the rule of law into a version akin to the rule of the jungle, gradually leading the country toward anarchy. We seem to have forgotten the sacrifices our forefathers made to liberate this precious country from colonial rule and oppression. Now, we are witnessing the return of repression and disturbing methods of addressing our political differences and opinions.

When the citizens of Kenya promulgated the Constitution of Kenya in 2010, they ushered in a new era for themselves and future generations. This marked the beginning of a new Kenya and a new approach to governance, focused on upholding democratic principles where sovereign power resides with the people of Kenya. Article 1(2) of the Constitution empowers Kenyans to exercise their sovereign power either directly or through their democratically elected representatives. Therefore, citizens participating in demonstrations are exercising their sovereign power directly and safeguarding democratic principles. They utilise democracy as a shield against oppression by state organs, such as the police, and hold these institutions accountable to the spirit of constitutionalism.

Kenya is a democratic country governed by the rule of law, with the Constitution serving as the fundamental Gundnorm that drives social, political, and economic governance. Article 37 of the Constitution of Kenya, 2010, guarantees the fundamental right to assemble, demonstrate, picket, and petition. This article states that every person has the right to peacefully and unarmed gather, demonstrate, picket, and present petitions to public authorities. It is contrary to the spirit of the Constitution, as well as international law, to shoot at, injure, or kill peaceful demonstrators, as this violates the right to life and the right to demonstrate.

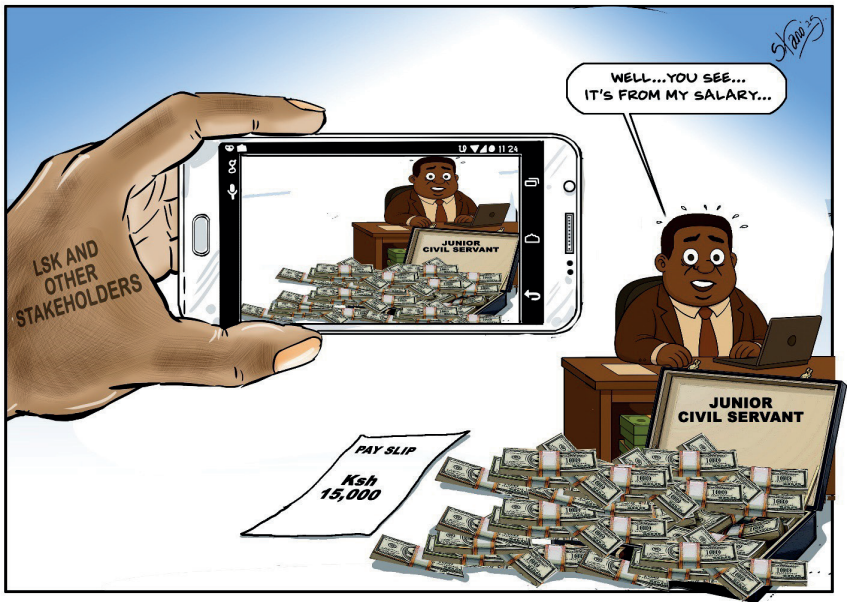
According to Article 2(5) of the Constitution of Kenya, international law is an integral part of Kenyan law. Any treaty ratified by Kenya automatically becomes part of the country's legal framework. Additionally, Article 1 of the Universal Declaration of Human Rights (UDHR) states that all human beings are born free and equal in dignity and rights. They possess reason and conscience and should act towards one another in a spirit of brotherhood. The reckless shootings of peaceful demonstrators by police officers not only undermine the rule of law and constitutionalism but also reveal a failure to uphold our shared human conscience.

In summary, the police have lost their humanity and sense of conscience when it comes to protecting citizens. By suppressing the fundamental right to protest through brutality and cold-blooded executions, the police are violating the spirit of the Constitution of Kenya 2010 as well as international laws concerning the right to life and liberty. Such actions jeopardise democracy and constitutionalism, threatening to plunge the country into chaos. Therefore, the police must be held accountable for the brutality occurring in this nation.

Police officers who commit reckless shootings during peaceful demonstrations must be held accountable by facing prosecution and appropriate punishment. This is essential to restore order within the police service and to remind them of the spirit of our Constitution.

Considering the recent incidents of police brutality, it is essential for the government and all stakeholders to speak out and take action to protect our constitution, uphold the rule of law, and strengthen democracy in our country. If we fail to act, we risk plunging our beloved nation into chaos. This is a heartfelt call to all citizens to rise above our differences, confront societal injustices, and work together to build a nation that embodies the values of justice, freedom, and fairness.

The Author is Advocate of the High Court of Kenya.



Government Bailouts: National Pride or Fiscal Sensibility

By Beth Michoma

Kenya Airways, the Kenya Broadcasting Corporation, Mumias Sugar, Kenya Power, and the Kenya Meat Commission are prominent institutions that have received government bailouts. While some have successfully navigated their recovery, others have incurred billions of Kenyan Shillings in losses and continue to struggle with achieving financial stability. This situation raises critical questions about the efficacy and sustainability of government interventions.

Government bailouts represent financial support provided by the state to prevent the collapse of institutions deemed vital for economic stability. These interventions aim to protect jobs, sustain essential services, and mitigate the risk of widespread economic repercussions.

Support can take various forms, including loans, cash infusions, or the purchase of stocks and bonds. Bailouts are often regarded as a last resort when the potential consequences of institutional failure are considered too severe for the broader economy or society.

While government bailouts are essential, the decision to implement them must be grounded in fiscal prudence rather than national pride or sentimentality. Unfortunately, many bailouts are driven more by national pride than by sound fiscal reasoning. When a country's major industries or companies face difficulties, it can tarnish the nation's image. Government intervention signals a commitment to supporting these industries, thereby boosting morale and instilling confidence among citizens and external financial institutions.

The notion of national pride can distract governments from investigating the root causes of financial instability, which may stem from mismanagement, outdated business models, or corruption. Consequently, these bailouts can serve as temporary fixes that fail to address underlying issues. Financial support may inadvertently support inefficient practices or allow ineffective leadership to persist, ultimately delaying necessary reforms.

Moreover, using national pride as a justification for bailouts can create a cycle of dependency. Companies may come to expect government intervention in times of crisis, diminishing their incentive to operate sustainably or innovate. This reliance can stifle competition and discourage new entrants, which are essential for a dynamic and healthy economy.

Instead of relying on national pride as a rationale for government bailouts, fiscal sensibility should guide these interventions, focusing on addressing the fundamental issues that lead to institutional decline. A comprehensive evaluation of each entity's operational model, governance structure, and market conditions is crucial. By identifying the root causes of financial distress, targeted interventions can be developed to promote long-term viability rather than temporary relief.

One effective approach could involve fostering transparency and accountability in the use of bailout funds. Establishing clear eligibility criteria, coupled with robust oversight mechanisms, ensures that financial support is utilized effectively and for its intended purpose. This may include mandating regular performance audits and setting measurable milestones that recipient institutions must achieve to continue receiving aid.

Furthermore, bailouts should be accompanied by stringent conditions that encourage necessary reforms. These might involve restructuring leadership teams, streamlining operations, or investing in innovation to enhance competitiveness. By linking financial assistance to reform mandates, governments can help break the cycle of dependency and promote sustainable growth.

Encouraging collaboration between the public and private sectors can also play a pivotal role in revitalizing struggling institutions. Partnerships can introduce new expertise, technology, and investment, injecting fresh ideas and practices into industries that may have become complacent or inefficient.

Ultimately, the goal of government bailouts should be to build resilience within the economy, ensuring that institutions are better equipped to withstand future challenges. By prioritizing fiscal sensibility over national pride, governments can craft policies that not only address immediate financial issues but also lay the groundwork for enduring economic health and prosperity.

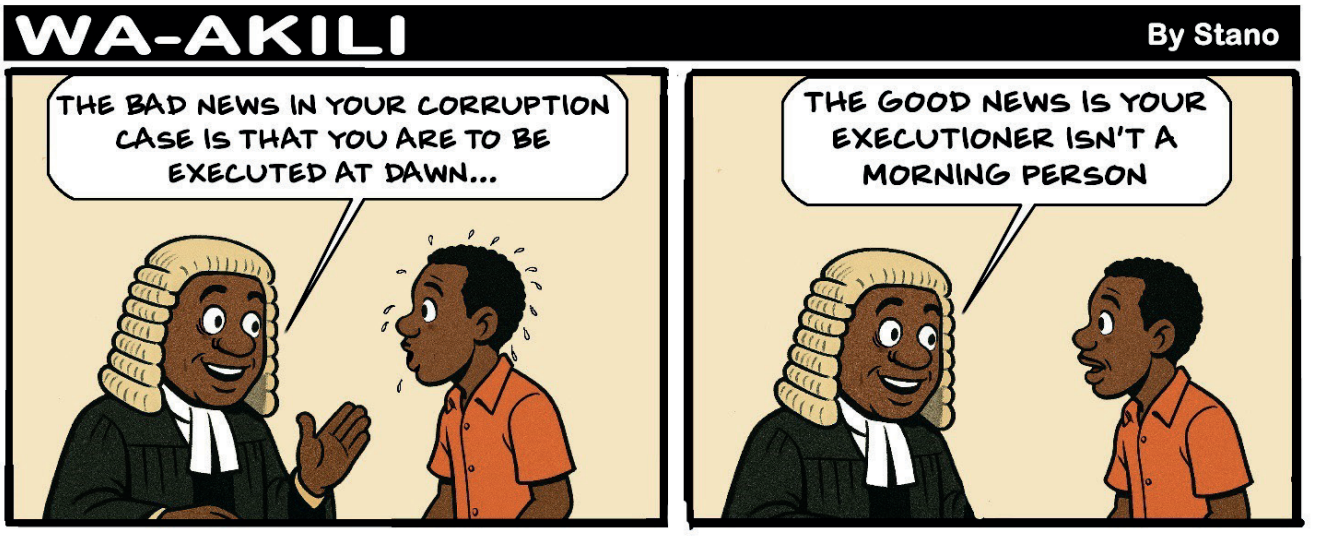
This balanced approach to government bailouts highlights the significance of strategic planning and a long-term vision. By prioritizing transparency, accountability, and reform, governments can foster an environment that encourages industries to innovate and adapt to shifting market dynamics. Such

initiatives can help mitigate the risks of future economic downturns and ensure that taxpayer funds are utilized judiciously to promote sustainable development.

Moreover, cultivating a culture of innovation and resilience within these institutions is essential. This can be achieved by promoting research and development, supporting emerging technologies, and investing in workforce training to equip employees with the necessary skills in a rapidly evolving economy. In doing so, companies receiving bailouts can evolve into competitive players on the global stage, thereby contributing to national economic growth and stability.

Ultimately, the success of government bailouts depends on a willingness to confront the challenging realities behind financial distress and a commitment to enacting meaningful changes. By adhering to these principles, governments can ensure that their interventions are effective not only in the short term but also pave the way for a more robust and dynamic economic future.

The Author is Advocate of the High Court of Kenya.



The Sedentary Barrister

By Byron Menezes

Become digital they shouted and so Covid – 19 dragged us shouting and screaming into the virtual legal profession. The virtual norm it is now. The days of travelling to cities, houses and villages across the country are a hazy dusty memory, the rush to get to court on time via footshoebishi, ndege and various travel connections long gone. The trek from the Nairobi CBD through the park and up those stairs,consigned to history making P.105s from 2019 feel ancient now in recounting such tales.

The convenience and efficiency of virtual court has heralded a new Sedentary life that looms ominously over our profession The tea at Hillside,Kabras kibanda in Kakamega,the famous T Tot samosa in Machakos, the legion of stairs at Milimani Nairobi and other courts around the country that made up the flesh of practice has metamorphosed into one of little box rooms where we huddle 'staring at the matrix' through our little screens, typing on our phones to colleagues and mumbling incoherently . The inactivity binds us to our armchair.

Physical research, preparing and binding documents meant prolonged workouts now reduced to clicking a few keyboard taps and hey presto its all ready the deep seek deep state of the AI world sits comfortably on our desks. Our social engagements have changed to a whatsapp message to 'smash', the word 'date' and spouse now a rarity within the profession, the once physical movement now taken up by mental fatigue staring at 7 inch and 14 inch screens for what else could we surely be up for !

But wait they say, our pockets are booming with **multiple courts being attended and the tinkling of dollars pouring into our POCHI yet whence shall we focus on our mental and physical well-being.** The long term consequences are looming catastrophically in a society bingeing on junk food. The increase in cardio-vascular disease and muscle fatigue are on the increase from our hunched posture, tip tapping away squashed into an incommodious seat masquerading as an ergonomic haven.

The resultant inactivity leads to desk munching, weight gain and the rise of diabetes, high blood pressure, heart disease, cancer and other consequential lifestyle diseases. The little jail cells we glorify as offices are other catalysts to the mental exhaustion and yet devoid of dying socialisation skills, the solitary trudge home has become a routine without the outlet to vent, unburden and rejoice with colleagues and friends.

As a legal profession, we must recognize the stark consequence of this new dispensation and adopt measures for a new work life balance. The value of exercise cannot be stressed enough, healthy nutritional eating, regular breaks from the desk and social engagements are amongst the elements that are mandatory for the legal profession now. Organisations must embrace this reality and start the change, for on the horizon loom the bad back claims, the cost of treating depression and its effects on the workforce and of course the profitable bottom line.

The need for mental health agility and invigoration must take priority to ensure the healthy advocate transitions into a wealthy advocate. It is essential the profession including the 70 percent being young advocates , to embrace nutrition education and practice a healthy lifestyle, exercise within the jail cell and urban concrete jungle, revelers programs, the favorable work life balance and schedule.

Practically we should take some of the following steps;

1. Increase physical activity by taking regular steps and keeping active even by using apps to monitor activity to improve circulation. Incorporation of exercise in the work space is fundamental in utilizing the desk, chair and building space. Ensuring regular exercise after work must be incorporated as well to improve physical and mental health.

2. Adapt the workspace to ergonomic office equipment from the infrastructure to the equipment we use. The laptop stands have become very popular as are mouse supports. The lighting and air flow must be optimized to minimize strain on our mental faculties and eyes.

3. Mental health and boundaries for firm work and clients now more than ever need to be incorporated to enable 'off' time. The use of meditation, disconnecting from social media and technology must be internalized. As we disconnect we must find alternatives to keep the mind fresh , from reading positive materials, to picking up hobbies that remove the toxicity of the profession for a few hours. Increasingly the issue of burn out is more and more on the horizon and seeking professional help is mandatory especially for the men. There are various counselors now that specialize in therapy. Coupled with this

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must be adequate sleep and a real strong focus on nutrition as they are intertwined. The avoidance of alcohol and late night is inevitable much as we love sherehe whether we can dance or not .

4. Adapting to the Virtual Court and the stress that comes with it means ensuring microphones that work, phones that are charged ,a possible backup data bundle and phone for those long cause-lists, learn the various platforms and seek the help of younger colleagues….Keep up appearances and discipline notwithstanding the upper part being visible, we have had bathroom scenes amongst other salacious online offerings. Learn the language of the virtual world and the danger of misinterpretation of words We must improve those soft skills that the profession once boasted off but is now dying swiftly the ability to talk and cajole each other into consents and status quo situations all geared to enhance our fee notes! It also helps with finding spouses

   Being proactive goes against the grain as a Kenyan, we tend to lament over a death more than we would when the person needed real help to stay alive. Implementation of these and other strategies will mitigate the health risks associated with our sedentary work and life style in the virtual world.

   Failure to embrace the same will lead to a pandemic of lifestyle diseases for the future to the detriment of Advocates and their families. And the massive associated healthcare costs!

   We stand guided for the future!

The Author is Advocate of the High Court of Kenya and Chairperson for the Advocates Benevolent Association (ABA)

Exclusionary Justice: Applying the Doctrine of Fruits of a Poisonous Tree to Arbitrary Arrests and Enforced Disappearances in Kenya

By Mugambi Nandi

Introduction

The concept of the "Doctrine of Fruits of a Poisonous Tree" is rooted in constitutional principles that seek to prevent evidence obtained through unlawful means from tainting judicial processes. Article 50(4) of the Constitution embodies this doctrine, mandating that any evidence obtained in violation of the Bill of Rights should be excluded if its admission would compromise a fair trial or the administration of justice. While Kenyan courts have increasingly relied on this principle to dismiss cases, especially corruption cases where evidence was obtained illegally, this exclusionary approach has not yet been broadly applied to cases involving arbitrary arrests, abductions, or enforced disappearances.

Article 29 of the Constitution prohibits arbitrary detention and enforced disappearances. The legal framework under the Penal Code addresses kidnapping and abduction but lacks specific provisions against enforced disappearances, especially where there is government involvement or denial of the detainee's status and location.

It is imperative for a broader interpretation of the Doctrine of Fruits of a Poisonous Tree, proposing that Kenyan courts should discharge individuals accused in cases where their arrest or detention violated constitutional requirements. This approach would ensure that the judicial system does not validate unlawful state actions, reinforcing the right to due process and the rule of law.

The Doctrine of Fruits of a Poisonous Tree

The purpose of the doctrine, as laid down in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) and Wong Sun v. United States, 371 U.S. 471 (1963) is twofold: to protect individual rights by preventing state overreach and to uphold public confidence in the justice system by ensuring that courts do not sanction unconstitutional practices. This approach aligns with a broader understanding of fair trial rights, as evidenced by similar rulings in other jurisdictions, such as the South African case of ***Gumede v S*** (800/2015) (2016) ZASCA, where the court highlighted the importance of excluding evidence that, if admitted, would undermine public policy or fair trial standards. By adopting the doctrine, courts seek to prevent the state from benefiting from its own misconduct, ensuring that procedural safeguards are observed throughout the justice process. Similarly, in Kenya, the High Court case ***Okiya Omtatah Okoiti***

& 2 others v Attorney General & 3 others (2014) eKLR demonstrated the application of Article 50 (4), ordering the removal of documents presented in violation of legal norms, thus preserving the sanctity of due process.

The Supreme Court, in the case of **Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others**, Presidential Election Petition 4 of 2017) [2017] KESC 45 (KLR) determined that the use of illegally obtained information before the Court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information. The High Court in **Philomena Mbete Mwilu vs. DPP & 3 Others**; 2019 eKLR, referred to the South African case of **Gumede vs. S** where it was held that: *Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice; evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair.*

The application of the Doctrine of Fruits of a Poisonous Tree in Kenya has prominently emerged in corruption cases. Courts have thrown out cases when the evidence was obtained through illegal searches, seizures, or breaches of confidence, viewing such evidence as tainted and unsuitable for use in prosecuting the accused. By doing so, the judiciary reinforces the principle that procedural violations by law enforcement cannot be justified by the pursuit of a conviction. This approach is crucial in safeguarding judicial integrity and ensuring that the state respects procedural requirements when gathering evidence. For example, courts have excluded evidence in high-profile corruption cases where the evidence was acquired without following due process, especially where it involved intrusions into privacy or unauthorized document seizures.

This doctrine, therefore, serves as a critical tool in promoting accountability and protecting the rights of accused persons. However, its application has largely been confined to cases involving illegally obtained evidence, and there remains significant potential for its extension to cases involving arbitrary arrests and detentions, which also infringe on constitutional rights and due process.

Enforced Disappearance, Abductions, Arbitrary Arrests and Their Increasing Prevalence

Enforced disappearance, abductions and arbitrary arrests disregard constitutional protections meant to ensure due process and undermine public confidence in law enforcement.

The International Convention for the Protection of All Persons from Enforced Disappearance defines "enforced disappearance" as the arrest, detention, abduction, or any other form of deprivation of liberty carried out by state agents, or by individuals or groups acting with the state's authorization or support. This is followed by a refusal to acknowledge the deprivation or concealment of the disappeared person's fate or whereabouts, effectively placing the individual outside the protection of the law. The Preamble of the Inter-American Convention on Forced Disappearance of Persons highlights enforced disappearance as one of the most serious forms of human rights violations which has been described as an "affront to human dignity" and a "grave and abominable offense against the inherent dignity of the human being."

Enforced disappearance is a continuous and ongoing violation that begins with the deprivation of the victim's liberty and persists until their whereabouts are known, regardless of how many years or even decades it may take. This crime is complex and infringes on a wide array of fundamental human rights. While the full extent of rights violated may vary, enforced disappearance typically threatens or violates key rights, including the right to life, liberty, protection from torture and ill-treatment, recognition of legal status, and economic, social, and cultural rights.

Despite Kenya having robust constitutional, legislative, and institutional frameworks, along with being a State Party to relevant international laws, enforced disappearances remain a prevalent issue. Kenya became a signatory to the International Convention for the Protection of All Persons from Enforced Disappearance in 2007, but the treaty has yet to be ratified. As a result, Kenya's current legal frameworks addressing enforced disappearances remain misaligned with international human rights standards.

Extending the Doctrine to Arbitrary Arrests: A Case for Discharge

Given the established judicial stance on excluding illegally obtained evidence, it is logical to extend this doctrine to cases of arbitrary arrest or abduction. Arrests without adherence to constitutional and legal safeguards are fundamentally unjust and undermine the legitimacy of the resulting charges. As such, any accused individual arbitrarily arrested and illegally detained through such unlawful means should be absolutely discharged from prosecution.

The law places a significant responsibility on the police to protect citizens, safeguard their property, and enforce the law in the interest of society. According to the Constitution of Kenya, the rights of an arrested person are clearly outlined, requiring that an individual be brought before a court as soon as reasonably possible, and no later than 24 hours after the arrest, except when the 24-hour period falls on a non-working court day. Additionally, the police are obligated to promptly inform the arrested individual of the reasons for their arrest and allow them to communicate with an advocate or any other necessary persons.

Despite the constitutional safeguards and training provided, the rise in unlawful actions by the police,

including enforced disappearances, demonstrates a clear disconnect between the expectations of the law and the actions being carried out by some officers. These practices undermine the legal framework designed to protect the rights of arrested persons and require urgent measures to bring policing practices into full compliance with the law.

Kenyan courts have the power and responsibility to interpret Article 50 (4) broadly to protect individuals from abuses of power that violate constitutional rights. For instance, where arrests are carried out without sufficient investigation or reasonable suspicion, as mandated by the Criminal Procedure Code, courts should not allow prosecutions to proceed. Instead, they should discharge the accused in the interest of justice and uphold public confidence in the rule of law.

Discharging individuals detained through arbitrary arrest would align with the doctrine's goal to prevent judicial endorsement of unlawful actions. As noted in ***Gumede v S***, this exclusionary rule extends beyond individual fairness, addressing broader public policy concerns that influence societal perception of justice. By refusing to legitimize charges originating from unconstitutional arrests, Kenyan courts would underscore the importance of adherence to procedural justice.

Conclusion

We submit that in order to uphold justice, Kenyan courts should discharge individuals detained through unlawful arrests, reinforcing the constitutional mandate to protect individual rights against arbitrary state action. The judiciary's commitment to procedural fairness and human rights would be reinforced through this stance, sending a clear message that the rule of law prevails over expediency. Kenyan courts should, therefore, apply the Doctrine of Fruits of a Poisonous Tree in cases involving arbitrary arrest, ensuring that due process remains a cornerstone of Kenya's criminal justice system.

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Genuine Practice or Cosmetic Venture: The Place of Public Participation In Ensuring State Accountability

By Elizabeth Mosa Agina

The Constitution of Kenya, 2010 ascribes all sovereign power to the people of Kenya and dictates that the said power shall be exercised only in accordance with the Constitution. Consequently, this implies that the voice of the people shall be considered in making any decisions affecting their welfare including; the formulation and implementation of public policy decisions, drafting and implementation of laws and the application of the Constitution.

Public participation goes to the root of the exercise of the people's sovereign power; it allows the people to assert their sovereignty in issues that affect them. This key principle is properly incorporated in the Constitution which outlines it as one of the national values and principles of governance under article 10 to which all State Organs, State Officers and even individuals are bound. Consequently, even where sovereign power has been delegated, the said duty bearers and representatives bear the responsibility of ensuring there is public participation in the making or implementing of public policy decisions.

While the Constitution sets the acceptable standard to promote State Accountability in decision making through use of public participation, to date, there is no primary legislation enacted by the National Assembly on public participation. To this end, the judiciary has been the doorstep of an avalanche of cases filed questioning the lack of consideration for the views of the people in formulation of public policy decisions and legislation. The cases relate to various areas of the law affecting the social and economic livelihoods of Kenyans including; public finance, on failure to conduct public participation after amending the Finance Act,2023; public administration, establishment of Igambang'ombe Subcounty in Meru County by the Ministry of Interior and Coordination of National Government with ineffective public participation and health, on enactment of the Primary Healthcare Act no 13 of 2023, the Digital Health Act no. 15 of 2023 and the Social Health Insurance Act no. 16 of 2023 with insufficient public participation. Most of these inefficiencies and gaps are attributable to the absence of a guiding legal framework outlining the parameters for conducting effective and inclusive public participation with a view to standardizing the process.

To address this gap, superior courts have severally pronounced themselves on parameters for public participation. Case in point was Petition No. 5 of 2017 before the Supreme Court where the petitioners challenged the adequacy of public participation in the formulation of regulations on tobacco control. In the case, the Supreme Court reiterated the centrality of the public participation principle as a fundamental pillar in actualizing the sovereignty of the people. The Learned Judges further highlighted the notable benefits of public

participation including; its use as an accountability tool due to its open and public nature, its capacity to cement legitimacy of legislation as well as its support for a representative democracy where despite disparities, even those who are disempowered can lend their voice and it can be taken into account.

In addition, the Supreme Court also addressed itself on what constitutes public participation and laid its basis on various court decisions before themselves, the Court of Appeal and the High Court. The public participation guiding principles were therefore listed as follows:

a. It application was to all aspects of governance

b. The public officer /agency mandated with undertaking a particular duty was bound to ensure and facilitate public participation

c. Despite absence of a prescribed public participation legal framework the public entity was bound to give effect to public participation using reasonable means

d. Public participation must be real and not illusionary. It shouldn't be a mere formality that is cosmetic or a public relations act aimed at fulfilling a constitutional dictate. It should have both quantitative and qualitative components

e. Public participation is not abstract, it should therefore be purposive and meaningful

f. Public participation must be accompanied by reasonable notice and reasonable opportunity based on a case-to-case basis

g. The process does not necessarily consist only of oral hearings, written submissions can also be made, therefore the mere fact that someone was not heard is not sufficient ground to annul the process

h. The public participation process is not automatically vitiated by mere allegations, the allegations are to be considered on case-to-case basis within peculiar circumstances i.e. the mode, degree and extent

i. Meaningful public participation entails; clarity on subject matter for the public's comprehension, use of a clear and simple engagement medium, an opportunity for balanced influence on the aspect under consideration by the public, commitment to the process, inclusive and effective representation, integrity and transparency in the process, enhancement of the capacity of the public to engage after their sensitization on the subject matter.

Whereas the principles provide parameters for consideration in undertaking public participation therefore laying a basis for its conduct, they remain persuasive at best owing to their latitude for contextualization on the process and structure of public participation. It is now incumbent on the legislature to hasten its steps and enact legislation to standardize the process and promote accountability.

The Author is Advocate of the High Court of Kenya.

A Futuristic Perspective on Responsible Public Finance Management in Kenya

By Victoria Kariithi

A Futuristic Perspective on Responsible Public Finance Management in Kenya

Technology is evolving at breakneck speed. One day a technology gets an upgrade, and by the next morning ... boom ... something fundamental has shifted ... again. Often, we find ourselves scrambling to keep up, feeling, well… a little lost, wondering how to navigate this rapidly changing world where the physical and digital are increasingly intertwined.

Rather than playing catch-up, we must begin to anticipate the future, especially the ways in which technology is reshaping our social, political, and economic landscapes. Government, like every other sector, must now view its functions through a techno-futuristic lens. Public administration can no longer operate in isolation from innovation; it must begin to ask how technology can be meaningfully integrated into service delivery. Estonia stands out as a compelling example of a government that embraced this challenge early, transforming its systems to lead globally in digital governance.

Kenya, too, must ask hard questions about the future. How can government services become more efficient, transparent, and responsive through technology? Specifically, how can emerging technologies, such as Artificial Intelligence (AI), Blockchain, Smart Contracts, and the Internet of Things (IoT), be harnessed to improve public finance management?

This article takes up that inquiry. It explores the potential for government to not only adapt to technological change but to lead it, designing systems that are smarter, more accountable, and better aligned with the realities of a digital-first world.

Public finance refers to the management of a government's revenues, expenditures, and debts. It encompasses how governments raise revenue (e.g. through taxes) and allocate spending on public goods and services. The objectives of public finance are wide-ranging, encompassing the promotion of economic stability, equitable resource distribution, the provision of public goods and services, the correction of market inefficiencies, and the overall enhancement of societal welfare. In Kenya, the rationale for active government finance is embodied in the Constitution. Article 201 of the Constitution sets out these core principles: openness and accountability (with public participation) in financial matters; equity in taxation and revenue sharing; inter-generational fairness; the responsible use of public funds; and clear, responsible fiscal reporting. These constitutional principles provide the normative foundation for Kenya's fiscal policy and budget system.

Under the Constitution and subsequent legislation, Kenya has built a detailed legal framework for public finance management. Chapter Twelve of the Constitution allocates all public funds to a Consolidated Fund (and analogous county funds) and requires that money may only be withdrawn under appropriation by the legislature or as authorized in law. This constitutional framework is further detailed in the Public Finance Management (PFM) Act (Cap. 412A), which outlines the structures for sound financial management at both national and county levels. The Act also defines the oversight roles of Parliament and county assemblies, assigns specific responsibilities to various public entities, and provides for related governance mechanisms.

Additionally, Kenya's public budget cycle and debt management system involves several key institutions with defined roles under Chapter Twelve of the Constitution and the PFM Act. Central to this architecture are key oversight bodies: Parliament, which sets borrowing ceilings and reviews public expenditure; the National Treasury, responsible for budget formulation and debt management; the Controller of Budget, who authorizes all withdrawals from public funds; and the Auditor-General, who audits the use of public resources to ensure legality, efficiency, and value for money. Collectively, these institutions are designed to safeguard public funds, promote equitable development, and uphold the principle of intergenerational fairness in fiscal policy.

Yet, despite this comprehensive legal and institutional infrastructure, Kenya continues to grapple with persistent public finance management challenges. These include a growing debt burden, stalled or inefficient projects, ballooning pending bills, and recurring fiscal stress. These issues highlight the urgent need not only for stronger enforcement of existing laws but also for deeper systemic reforms, potentially driven by the above referenced emerging technologies.

Now, let us imagine a public finance management system seamlessly woven together with Blockchain, AI, smart contracts, and the IoT. What might such a system look like? I don't claim to have a crystal ball to foresee the future but perhaps, just perhaps, it resembles what we are about to explore below.

Blockchain provides a tamper-proof, decentralized ledger where every transaction is permanently recorded and verifiable. In Kenya's context, this could mean recording procurement contracts, budget allocations, and payments on a shared ledger visible to relevant institutions and, *where appropriate*, the public. This eliminates opportunities for unilateral data manipulation or collusion and enables real-time audit trails, enhancing fiscal oversight. Smart contracts, which are self-enforcing agreements based on pre-determined conditions, can further automate budget disbursements. For example, payments to contractors could be triggered only after IoT sensors verify that a project milestone, such as a completed road segment, has been met.

AI enhances oversight through predictive analytics and anomaly detection. Machine learning algorithms can scan vast datasets to flag suspicious spending patterns, duplicate payments, or irregular procurement activity. This shifts oversight from retrospective audits to proactive, real-time fraud detection. AI can also improve revenue forecasting and resource allocation, supporting evidence-based fiscal planning and debt sustainability.

IoT acts as the real-world data provider in this ecosystem. Sensors embedded in public infrastructure can report on project progress, asset conditions, or service delivery, feeding data into smart contracts and Blockchain records. This not only ensures value for money but also enables dynamic, data-driven adjustments to spending and maintenance. Citizen-facing national or county government dashboards powered by IoT data could even promote public participation, accountability and transparency.

Together, these technologies have the potential to build a more responsive, data-driven, and accountable fiscal ecosystem, one that not only tackles long-standing inefficiencies but also begins to rebuild the fragile bridge of public trust in financial governance.

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Entrenching the Rule of Law in Management of Public Debt in Kenya - A Tale of Three Governments

By Christopher Oyier

"Kenya's total debt service as a share of revenue in the FY 2023/2024 was ***68.3 percent****, an increase from 58.8 percent in FY 2022/2023." This means that for every Kshs. 100 raised in revenue, Kshs. 68.30 went towards repayment of public debt. (****Kenya's Annual Public Debt Management Report 2023/2024 -National Treasury, September 2024****).*

Public debt is a vital tool for facilitating economic transformation especially in developing countries like Kenya. If managed at sustainable levels, public debt can accelerate the rapid growth of a nation's economy, thereby promoting a stable macroeconomic and investment environment. Conversely, unsustainable public debt can lead to enhanced macroeconomic vulnerability and increased tax burden for local citizens. Therefore, effective public debt management and fiscal planning continue to be crucial for the effective management of public finances and promotion of sustainable development. As witnessed from Kenya's June 2024 anti-Finance Bill protests (Gen Z protests), inadequate transparency and accountability in public finance management (including public debt) can be a principal factor in triggering economic crisis and unrest.

A brief explanation of public debt and its significance in Kenya's fiscal context would be useful as a starting point. Article 214 of the Constitution defines 'public debt' as 'all financial obligations attendant to loans raised or guaranteed and securities issued or guaranteed by the national government.' Simply put, it is how much a country owes all its lenders in aggregate (whether individual or business, whether other governments or development partners, and whether domestic or foreign). Public debt is necessitated by the need to fill the revenue gap in a country's budget (deficit).

LAW SOCIETY OF KENYA

ADVOCATES DISCIPLINARY TRIBUNAL

KNOW YOUR TRIBUNAL

ESTABLISHMENT

The Advocates Disciplinary Tribunal (ADT) plays a crucial role in upholding the standards of the legal profession in Kenya. The ADT is established under Section 57 of the Advocates Act, Cap 16.

MANDATE

The ADT is mandated to hear and determine complaints lodged against Advocates. The LSK Secretariat through the Compliance & Ethics Directorate, serves as the administrative arm of the Tribunal. It receives the affidavits of complaint from the Advocates Complaints Commission (ACC) and forwards them to the Tribunal members for prima facie determination. Once a case to answer is established, the Secretariat allocates the matters case numbers, sets them down for plea taking and undertakes service upon advocates. The Secretariat through the Compliance & Ethics Directorate also ensures advocates comply with orders of the Tribunal.

CONSTITUTION

The ADT is comprised of the Attorney-General, Solicitor-General or a person deputed by the AttorneyGeneral, six advocates, the Chairman, Vice-chairman and the Secretary of the Law Society. The Secretary of the Society is the Secretary to the Tribunal.

KEY STAKEHOLDER

TThe Advocates Complaints Commission (ACC) operates in close coordination with the LSK and the Tribunal. The ACC is established under Section 53(1) of the Advocates Act. It is mandated to receive complaints of professional misconduct against advocates. The ACC works to promote reconciliation, provide amicable settlement through Alternative Dispute Resolution (ADR) and conduct investigations with regard to complaints lodged against advocates. Additionally, the ACC may refer and prosecute complaints of professional misconduct before the Tribunal, at no cost to the complainants.

WHO CAN INSTITUTE A COMPLAINT AGAINST AN ADVOCATE?

- Any member of the public aggrieved can lodge a complaint against an Advocate.
- An advocate can lodge a complaint against a fellow advocate.

WHERE DO I LODGE MY COMPLAINT AGAINST AN ADVOCATE?

- An aggrieved party can either lodge a complaint directly with the Advocates Disciplinary Tribunal or with the Law Society of Kenya or with the Advocates Complaints Commission.

HOW DO I LODGE A COMPLAINT AGAINST AN ADVOCATE?

1. Write a letter to the Law Society of Kenya lodging a formal complaint against the advocate. Ensure to include the full names of the advocate and have the complaint signed.

2. Alternatively, you may lodge a complaint through the Advocates Complaints Commission. You will be required to fill in the provided help form. Subsequently, the Advocates Complaints Commission will carry out investigations into the matter and lodge a complaint on your behalf, with the Advocates Disciplinary Tribunal.

3. You may also prepare six sets of Affidavit of Complaint under section 60 of the Advocates Act to be forwarded to the Tribunal for determination.

ADVOCATES DISCIPLINARY TRIBUNAL

KNOW YOUR TRIBUNAL

HOW DO I LODGE A COMPLAINT BEFORE THE ADVOCATES DISCIPLINARY TRIBUNAL?

Prepare six (6) sets of Affidavits of Complaint (Under Section 60 of the Advocates Act)

↓

File the Affidavits at LSK

↓

Service by the LSK to the accused Advocate (private prosecution)

↓

Prima Facie Stage

↓

Plea taking Stage

↓

Hearing Stage (by affidavit evidence)

↓

Judgement stage

↓

Mitigation and Sentencing Stage

↓

Enforcement of Tribunal Orders

ADVOCATES DISCIPLINARY TRIBUNAL SANCTIONS

Where a case of professional misconduct has been made against an advocate the Tribunal may order the following: the advocate be admonished; the advocate be suspended from practice for a specified period not exceeding five years; the name of the advocate be struck off the Roll of advocates; the advocate to pay a fine not exceeding one million shillings; or the advocate to pay to the aggrieved person compensation or reimbursement not exceeding five million shillings.

FOR ANY FURTHER INQUIRES, CONTACT US AT

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ADVOCATES COMPLAINTS COMMISSION
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At the beginning of the late President Kibaki's first term in 2003, IMF's Debt Sustainability Analysis for Kenya estimated the country's debt at US$ 5.1 billion (**49%** of Kenya's GDP). Data from the Central Bank of Kenya estimated public debt at Kshs. 647 billion in June 2003, out of which Kshs 289.3 billion was domestic and Kshs. 357.7 billion (36.3% of the GDP) was foreign. In the first year of President Uhuru's term in December 2013, public debt stood at Kshs. 2,111.55 billion or **50.7%** of GDP. Slightly over a decade later in President Ruto's first term, Kenya's public debt has grown to Kshs. 10,581.98 billion as of the end of June 2024 comprising about Kshs. 5.1 trillion in external debt and Kshs. 5.4 trillion in domestic debt. Kenya's 2025 Medium-Term Debt Management Strategy (MTDS) notes that public debt was **63%** of GDP, **significantly higher** than the benchmark debt threshold of 55% of debt to GDP prescribed under section 50 (2A) of the Public Finance Management Act, Cap 412A (PFMA).

While the transcendent leap in Kenya's public debt between 2003 and 2025 can be attributed to diverse factors, and importantly, varied global economic environments (reflective in the 2008 global financial crisis, Covid 19 pandemic, among others), it should also be pointed out that the three regimes operated under completely different legal frameworks for public finance. Notably, through the introduction of constitutional imperatives on public finance management under the 2010 Constitution and the subsequent enactment of the PFMA in 2012, successive Kenyan governments have had to operate within fiscal frameworks that demand greater accountability and transparency. Indeed, since 2010, Kenya's legal framework has laid down expanded guidelines for raising government revenue and expenditure management through a variety of legal instruments such as laws on taxation and those on **public borrowing**, shaping how the government manages public finances to realize its short-term and long-term economic objectives.

Article 201 of the Constitution captures the principles of public finance in Kenya incorporating requirements that 'the burden and benefits of the use of resources and **public borrowing** shall be shared **equitably** between present and future generations' and that 'public money shall be used in a **prudent** and **responsible** way'. These and other relevant constitutional principles are reinforced by way of legislation vide the PFMA, that guide the utilization of public finances at both levels of government. With the country's debt service to revenue ratio expected to breach the 18% threshold from 2024 to 2028 (as per Kenya's 2025 MTDS), it is difficult to conclusively state that the current Kenyan government has achieved 'sustainable' public borrowing prescribed under the applicable legal framework.

Sections 12(1)(b) and 62(b) of the PFMA mandate the National Treasury to manage the levels and composition of public debt, including guarantees and other financial obligations. Within this mandate, the National Treasury is expected to play a primary role in ensuring that Kenya's public debt portfolio is properly structured in terms of maturity, currency, interest rate, composition, and funding of contingent liabilities. In addition, the Public Debt Management Office within the National Treasury is duly established to perform among others, the crucial role of preparing and updating the annual medium-term debt management strategy including debt sustainability analysis (s. 63 of the PFMA). The PFMA further imposes several reporting obligations on the Cabinet Secretary (CS) responsible for finance, with anticipated oversight roles by Parliament. For instance, the CS is required to report to Parliament if government borrowing exceeds the threshold set under PFMA by more than five percent.

Evidence from successive governments demonstrates that keeping within the legally prescribed debt levels has been a significant challenge. This points to a likely failure of strict implementation of the prevailing fiscal framework, or even more worrying, a failure in legislative oversight. At the current **63%** of **GDP**, it is clear that Kenya's public debt presents an elevated risk of debt distress (2025 MTDS). The unsustainable public debt situation continues to put Kenya on the precipice, and the government must urgently act to stringently implement strategies for managing public debt envisioned under the PFMA and related instruments.

Adherence to the legal and fiscal framework will ensure that the country's size and pace of public debt expansion is kept sustainable in the short and the long term, allowing the government to meet repayment obligations under different scenarios without upsetting the country's macroeconomic environment. This not only requires strong respect for the rule of law and political goodwill, but clear institutional coordination in implementation of the country's debt management strategies. While the judiciary must be at the core of guaranteeing of the rule of law in the management of public debt, other critical institutions like the Public Debt Management Office must also be empowered to expertly manage Kenya's public debt, including where necessary, through initiating amendments to the PFMA to grant it sufficient autonomy for this role.

The Author is Advocate of the High Court of Kenya.

Beyond the Colonial Cab Rank: Rethinking Lawyers' Duty in Kenya

By Eliud N. Moindi

Kenya's 2010 Constitution heralded a new era of constitutionalism and rule of law. Yet, one colonial relic remains entrenched in our legal profession: the cab rank rule. Inherited from British bar tradition, the rule obliges advocates to accept any case within their expertise when available, without discrimination. While originally intended to promote access to justice, its relevance in modern-day Kenya is questionable. With a growing population of legal practitioners and increasing threats to advocates' lives, many argue that the rule now infringes on constitutional values—especially Article 26, which guarantees the right to life.

The Colonial Origins of the Cab Rank Rule

The rule, rooted in 17th-century England, likened barristers to taxi drivers who must take the first passenger in line. It was designed to prevent discrimination in representation, particularly for unpopular clients. British legal codes still emphasize its necessity for ensuring fair trials and shielding lawyers from backlash for representing controversial clients.

However, this logic is a product of the British adversarial system. Kenya's legal tradition differs significantly—our Advocates Act and LSK codes do not codify the cab rank rule, nor do we operate under the rigid solicitor-barrister divide. Kenyan advocates are generalists, handling varied matters, and the cab rank doctrine is more aspirational than binding.

Relevance in Kenya's Legal Context

Kenya's legal profession has grown exponentially. Thousands of advocates are available, making the rationale for mandatory representation increasingly redundant. Under Article 50(h) of the Constitution, the state must provide legal representation to accused persons if they cannot access private counsel. Public defenders and legal aid mechanisms already exist to fill this gap.

So, why should individual advocates be compelled to take cases—especially at personal risk? Critics argue that compelling lawyers to represent anyone undermines constitutional rights, including dignity, security, and above all, life. The cab rank rule assumes the justice system's needs override the individual rights of the advocate. This is an unacceptable trade-off in a constitutional democracy.

Advocates Under Threat: Real-World Examples

Unfortunately, Kenya has seen a troubling rise in violence against lawyers. The Law Society of Kenya has repeatedly called attention to this crisis, noting that advocates—especially those defending unpopular or high-risk clients—face life-threatening danger:

- Jeremiah Kinyua Meeme (2019): Fatally shot over 50 times by police in a brutal incident condemned by LSK.
- Willy Kimani (2016): Human rights lawyer abducted and murdered while pursuing a police abuse case.
- Anthony Kabathi (2024): Gunned down after a client meeting along the Isiolo-Modogashe highway.
- Boaz Nyakeri (2021): Fatally stabbed near Rongai after leaving court.

These cases are not isolated. They reflect a dangerous trend that shows how the cab rank rule, when applied rigidly, can endanger lawyers' lives. Under such conditions, enforcing it becomes not only impractical but potentially unconstitutional.

Challenging the Colonial Hangover

Kenya's Constitution declares its supremacy and sets out a clear Bill of Rights. Nowhere does it mandate blind adherence to colonial legal practices. The cab rank rule may have had utility in a different era, but it is not sacrosanct. Kenya must evaluate whether it aligns with our own national values and legal realities.

Continuing to cling to this colonial obligation risks undermining justice. When lawyers are forced to represent dangerous individuals, it compromises their autonomy, safety, and professional integrity. The idea that advocates should be "blind to the character of their client" becomes philosophically and morally suspect, particularly in a society with real threats to the lives of legal practitioners.

A Case for Reform

Rather than abolish the rule outright, Kenya can pursue a balanced and contextual approach through reform.

Below are concrete proposals to ensure both access to justice and advocate safety:

1. Amend the Advocates Act or LSK Code Introduce clear exceptions that allow lawyers to decline briefs on legitimate grounds such as safety concerns, conflict of interest, or emotional capacity.

2. Strengthen Legal Aid and Duty Counsel Build a robust state-funded or pro bono legal aid system.
3. Enhance Advocate Security The state must provide protection for lawyers who undertake high-risk cases.
4. Review Professional Rules for Constitutional Compliance Ensure all professional obligations align with the Bill of Rights.

Conclusion:

Justice Must Protect Both the Accused and the Advocate The cab rank rule was designed to protect justice—but in its current form, it may actually undermine it. Justice should not require self-sacrifice from the very people tasked with defending it. Lawyers must not be expendable in a system that claims to uphold constitutionalism and accountability.

Kenya has the legal, moral, and historical mandate to evolve beyond colonial legacies. We can design a legal framework that both ensures universal access to representation and protects advocates from coercion and harm. Doing so will not weaken justice; it will strengthen it, aligning our legal practice with our national values and democratic aspirations.

Let us, therefore, liberate ourselves from outdated assumptions and embrace a legal profession that champions both justice and the safety and dignity of those who defend it.

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The Illusion if Justice: An Analysis of The Rule of Law in Kenya

By Shamallah Marion

Introduction

"*All animals are equal but some animals are more equal than others*" is a phrase that was used in the late George Orwell's book , Animal farm , as a satirical commentary to describe the hypocrisy of social and political systems where there are claims of equality while a select group of people enjoy preferential treatment and power. Is Kenya akin to an animal's farm where the pigs who control the farm have "more equal rights" compared to other animals or are all animals equal?

Origin of The Rule of Law

The rule of law was popularized by A.V Dicey who stated thus:

> *the rule of law means the absolute supremacy or predominance of the regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness or even of wide discretionary authority on the part of the government.*

The rule of law is a set of yardstick by which laws and actions by those with legal authority can be measured to see if they comply with the said principles. A.V Dicey in his text Introduction to the Study of the Law of the Constitution (1885), established three principles on which the rule of law is premised:

1. Supremacy of the Law

   This principle focuses on the predominance of the law while excluding the existence of arbitrariness or wider discretionary authority on the part of the government.

2. Equality before the Law

   According to this principle, no person is above the law including those in government and as such every person has an obligation to adhere to the rule of law.

3. Independence of the Judiciary

   This principle requires that the Judiciary is free from interference either by any other arm of the government (the legislature and the executive) or from any external force. Independence of the judiciary is firmly embedded in the doctrine of separation of powers which doctrine advocates for division of separate arms of government to ensure checks and balances while also making sure no arm of government interfered with the powers of the other arm.

The Rule of Law in Kenya

The constitution of Kenya is an embodiment of the doctrine of the rule of Law. Article 2 of the Constitution of Kenya , stipulates that the constitution is the Supreme Law of the land and binds all persons thus highlighting the principle of supremacy of the law and equality before the law.

Article 10(2) incorporates and/or recognizes the rule of law as part of the national values. The Constitution further establishes the judicial arm of the government under Article 159. Article 160 advocates for an independent judiciary free from control and directions from any person and authority . The Judiciary is only subject to the Constitution and the law.

Whereas the Constitution expressly provides for and upholds the rule of law, the pertinent question remains whether these noble provisions are effectively implemented in practice, or whether they exist merely as aspirational ideals on paper?

Is supremacy of the law and independence of the judiciary a mirage?

Dicey's principle of supremacy of the law places focus on no one being above the law and the law governing everyone regardless of their position in power. This principle is espoused under Article 2 of the Constitution of Kenya stating that *"this Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."*

Whereas this principle is well articulated in the Constitution, it would appear that the enforcement of the same is often selective in instances where the parties involved are high ranking officials or even those close to those in positions of power. High-profile corruption cases like the Anglo-leasing Scandal, Arror and Kimwarer Dam and the National Youth Service (NYS) Scandal stall in courts or collapse due to lack of evidence, political interference, or sudden changes in prosecutorial zeal.

Furthermore, the executive branch of the government has shown repeated disregard for court orders, undermining the judiciary's role as a check on power. The disobedience of court orders by the executive has in a large way affected the independence of the judiciary hence negating the very essence of the doctrine of separation of powers.

In 2018, Dr. Miguna Miguna swore in the then National Super Alliance (NASA) leader and presidential candidate Honourable Raila Amollo Odinga which action led to him being arrested and detained by the State, before being forcefully deported

to Canada despite the fact that a Court of competent jurisdiction had ordered against the deportation. The state not only ignored this order but also ignored the order directing the state to produce him in court. This erosion of judicial authority contradicts the very notion of a legal system where the law is supreme over political interests.

A two-tiered justice system?

"**WE THE PEOPLE**…" are not equal, some are more equal and above accountability. In Kenya, equality before the law is like a mirage, nothing but an optical illusion. Power and wealth often determines whether a person is entitled to a *"fair trial"* or in some cases escape prosecution all together. Ordinary citizens occasionally face systematic discrimination, police brutality, extra-judicial killings and arbitrary arrests mostly in circumstances where they try to hold the government accountable.

These injustices starkly reveal that legal protections are not uniformly applied, reducing the principle of equality before the law to a constitutional formality rather than a living practice.

Conclusion

As per the definition of the rule of law by Professor A.V Dicey, it is clear that the rule of law in Kenya, is more aspirational than operational. Whereas Kenya has clear and good laws in place, the application of the law plagued with inconsistencies, political interference, and systemic bias. The rule of law in Kenya functions less as a safeguard for justice and more as a rhetorical tool used to legitimize authority.

The ongoing investigative journalism, and civic activism signals a public increasingly unwilling to accept impunity. The state has an obligation to champion for the realization of the rule of law and ensuring that justice is not a privilege, but a right for every citizen. However, can the government as the perpetrator of injustice be relied on to remedy their own wrongs, or does the realization of the rule of law ultimately rest in the hands of the vigilant and empowered citizens?

The Author is Advocate of the High Court of Kenya.

Protecting Constitutionalism and The Rule of Law - Ensuring Accountability: From Promise To Peril: Reclaiming Constitutionalism in Defence of The Republic

By Ian Bahati

Plato wisely observed that dictatorships naturally arise out of democracy, and the most aggravated form of tyranny and slavery out of the most extreme liberty.

That Kenya's constitutionalism was earnestly fought for warrants no redundant discourse. Truly it was. Any good student of history bears testament. The preamble to our constitution alone whispers promises of a nation reborn. Its words, a manifestation of our deepest yearnings, each line promising hope, ambition and the radiant truth of our collective aspirations. Why then, since its inception, are we witnessing authority weaving a tapestry of tyranny?

The tide of disregard for the rule of law has surged since the birth of the constitution 2010, each regime adding its own weight to the former. The *Uhuruto* regime was marred by flagrant disobedience of court orders, unlawful and *Saudi style* deportations, shutdown of broadcast media, bypassing parliament in budgeting and expenditure, police brutality and excessive force, judiciary budget cuts as retaliation, politicization of prosecutions and the list goes on.

The current regime however, in almost a brazen echo to King Rehoboam's pledge to the Israelites "*My little finger is thicker than my father's waist. My faither laid on you a heavy yoke; I will make it even heavier. My father scourged you with whips; I will scourge you with Scorpions"*, has rubberstamped some of the worst constitutional abuses in this constitutional dispensation. From enforced disappearances of protesters and activists to extrajudicial killings during protests, whose knowledge was confessed by the head of state and to claim he has issued firm instructions to halt them is not absolution but an indictment , one which article 145(1) of the constitution clamors accountability but if the passing of the finance bill 2024 by parliament is anything to go by, *WE*, the people have lost yet another tool of checking the excesses by the executive. John Stuart Mill remarked *when legislature becomes a mere instrument of the executive, it ceases to be the guardian of liberty and becomes a tool of despotism, however cloaked in democratic forms*. Believe it or not, We are witnessing the subversion of the constitutional order at an unprecedented pace.

The foregoing constitutional violations notwithstanding, we are witnessing brazen intimidation and harassment of civil society organizations with hundreds of organizations deregistered as part of targeted measures to curb dissent, suppression of medial freedom and physical attacks to members of the fourth estate, arbitrary arrests and detentions with hundreds of protesters being arrested for participating lawfully in the right to peaceful protests and their rights to assembly with some held beyond the legal limit of 24 hours, perceived dragging of feet in addressing femicide and gender based violence, weaponization of regulatory frameworks, suppression of peaceful protests, utter discrimination and tribalism in public appointments and one would imagine the atrocities end there, yet they sink even lower, and unbelievably, the litany of wrongs endures, with abuses unceasing. At the time of writing this article, there was public outrage on the widely perceived malicious and due to be suspended plans to have the public seal transferred from the office of the Attorney General to the head of public service.

Nor is that the end to it. The widely acclaimed BBC Africa Eye documentary *blood parliament*, if taken to be gospel truth, indicates that the Kenya Defence Forces (KDF) personnel were well deployed before the gazettement by then CS for defence, Aden Duale. That they were sanctioned in record time is not in doubt either. The Precincts of the Parliament of Kenya are not listed as a protected area nor a controlled area nor a place of natural heritage in any act of Parliament. Yet, on June 25th 2024 an armed KDF personnel aimed at , shot and killed a protester. One death, a life too many. We continue to mourn the deaths of more than 60 deaths stemming from subsequent attempts at suppression of fundamental rights and freedoms. Even if, for arguments sake we are to consider that parliament is a protected area to warrant protection from the military, *the protected areas act* state that a sentry or person authorized in that behalf may use arms provided that the use of arms shall be as far as possible, to disable

and not to kill. The two confirmed deaths outside parliament precincts were headshots. Your guess is as good as mine. No one was aiming to disable. This was a brazen execution. So what then can the Law society do that it has not done to put the government in check and to fully realize its mandate under Section 4 of the Law Society of Kenya Act? How can we stand as a formidable force in the face of such emboldened desecration of constitutional order?

I raise you *RELENTLESSNESS*. The current LSK Council deserves its flowers for resolutely demanding accountability, condemning the defilement of the rule of law, putting spirited fights in the legal channels available and enhancing visibility of the society on media platforms. Yet, much more is needed from the members of the bar in support of these efforts. Each man and woman playing their part in painting our defiance of this desecration in vibrant strokes.

That *WE*, together and in unabating resolve, refuse to die the man, as the man dies in all who keep silent in the face of tyranny and because tyranny has shown to be organized so must *WE* also be organized to beat it. From aggressive civic education and public empowerment on constitutionalism, to strategic litigation and interventions, to initiating public watchdogs on adherence to the rule of law, to public justice forums and other visibility campaigns the society will and shall rise to the occasion.

All tyranny, bigotry, aggression, and cruelty are wrong, and whenever we see it, we must never be silent.

~ Ingrid Newkirk~

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Mainstreaming ESG Reporting and Compliance for Digital Trust in Financial Services: The Legal Imperative in Kenya.

By Louis Nganga

Introduction

Environmental, Social and Governance (ESG) are standards, practices and metrics that entail a more and more sustainable and socially conscious enterprise. Globally, conventional financial reporting, which communicates how profitable a business is, is being supplemented by ESG Audits, Sustainability Scorecards and Reports. Particularly connected with social and governance outputs of an enterprise is the ability to generate and maintain digital trust. Digital trust means that digital systems, whether private (such as mobile payment systems) or state-led such as e-Citizen are credible, transparent and reliable. In the context of the third arm of ESG, governance, digital trust implicates accountability at not only the highest level possible but all levels as far as data, and administrative fairness is concerned and as a component of digital governance and extrapolation of the digital rights consistent with Articles 31, 47 and 40 of the Constitution of Kenya, 2010.

As it stands, investors and shareholders are more interested in the ESG domains of even the most profitable companies today than ever before. This reality underlines the increasing importance of ESG reporting and compliance for financial services providers. In Kenya, regulatory uncertainty means ESG compliance is predominantly voluntary, prescriptive but in some cases, mandatory, but invaluable for banks given the interconnected global financial system.

When companies have internal controls that indicate how financially, socially and strategically sustainable their operations are, counterparties that engage with their services and goods or who invest in the business have a higher level of trust in the business as a going concern. Given this reality, enterprises find themselves at a crossroads - with ESG compliance in Kenya being mostly voluntary, many enterprises have not met global levels of ESG reporting, risk management and course correction that would be expected.

This situation presents an opportunity for regulators (the "legal imperative") to implement frameworks for compliance without overburdening enterprises already operating in a convoluted regulatory environment.

This article consolidates perspectives towards *legal* mainstreaming ESG frameworks, policies and standards (FPS) with a specific focus on the financial services ecosystem in Kenya.

Environmental, Social and Governance (ESG) Frameworks, Standards, Networks and Policies (FSNP)

The article proposes a five-pillar approach to ease regulation through proactive compliance - frameworks, standards, networks and policies (FSNPs).

ESG Compliance Frameworks

ESG Compliance Frameworks are tools that support market participants to attain global sustainability standards. By proposing guidance frameworks, regulators can allow enterprises to proactively take the first step towards ESG compliance mainstreaming. Corporate governance is an indicator of transparency and accountability within an enterprise, indicating to third parties that its leadership is committed to democracy and shareholder welfare. The Capital Markets Authority (CMA) Corporate Governance Guidelines and 2025 Regulations are an example of a compliance tool.

Legislative Reform and ESG Reporting Standards (ESG RS)

Regulators such as the Central Bank of Kenya (CBK), Financial Reporting Center (FRC) may propose, through the Law Reform Commission, integrated reporting in the Companies Act, 2015 for green investments.

One example of ESG Reporting Standards (ESG RS) is International Sustainability Standards Board (ISSB) International Sustainability Standards IFRS S1 and S2. This is a global reporting standard for sustainability and green investments allowing for comparability across nations and sectors. At regional level, one international example is the European Union (EU) Regulation 2023/0177 (COD).

ESG Compliance Through Policy

ESG Compliance Policies are statements of values and ethical standards. Policies are voluntary statements made by entities as to their commitment to achieving for example Zero Net Carbon by 2030. Kenyan financiers and consumers need access to good quality and comparable sustainability policy statements, which act as binding corporate commitments alongside current and market relevant financial data to make decisions in investment.

Policy development means building consensus on the need for global equivalence in ESG reporting at domestic and regional level and then the creation of policy statements regarding ESG issues. At present, Kenya urgently requires a multi-sectoral ESG Standards Reporting Advisory Group which can advise on equivalence with global ESG compliance standards.

Additionally, regulators such as the FRC and CBK should periodically implement guidelines and disclosures frameworks to allow strategically important institutions to assess risks and opportunities and voluntarily implement self-compliance mechanisms. Accordingly, the Central Bank has rolled out the Green Financing Taxonomy, a necessary and welcome addition allowing stakeholders a roadmap into ESG terms and indicators for banks and financial service providers.

ESG Compliance Networking

ESG Compliance Networks are units that mutually support members and other networks to meet and exceed sustainability standards and metrics as well as to report on ESG milestones. By way of an example, domestic Tier 1 Banks can organize an ESG Working Group (a simple compliance network) to develop common standards and taxonomies for precise communication to stake and shareholders.

Prudential Regulation of ESG Reporting Requirements

For financial services in Kenya, regulators should pursue a prudential approach through the principles of Fairness; Reliability; Transparency; Equity; and Responsiveness, through a voluntary "self-report" system that gradually becomes obligatory. For banks, sustainable finance guidelines can be complementary to policy statements on internal control, risk management, and sustainability as can Social capital registries and matrices and Diversity and Inclusion (DEI) indices.

Lastly, using sustainability as a regulatory litmus paper, CBK should engage with stakeholders to develop inception stage documentation as the journey to integrating ESG commitments gathers pace in Kenya.

Conclusion

In conclusion, digital trust means credibility in transparent systems that deliver for consumers without unduly compromising their rights as enshrined in the Constitution of Kenya, 2010. Environmental, Social and Governance (ESG) indicators are a bridge to building digital trust for market participants with a business presence in Kenya. As such, ESG frameworks, standards, practices and regulations (FSPRs) as well as industry networks between market participants, regulators and consumers are key steps towards ingraining ESG reporting (and consolidating trust and transparency in digital spaces).

By proactively engaging within these compliance tools, market participants (being regulators and consumers as well as enterprises, (domestic; regional and multinational) can pre-empt over- regulation as well as mollify against a knee- jerk regulatory imposition of reporting and compliance rules.

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TERMS & CONDITIONS APPLY

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The Surveillance State in Kenya: Technology, Power, and Resistance

By Bonface Were

Surveillance Technologies in Kenya (2024–2025)

Kenya has long grappled with the balance between security and privacy. Independent research shows advanced spyware and telecom exploits in use: for example, Citizen Lab (2020) identified Kenya as a likely client of "Circles" – an exploit of SS7 telecom infrastructure that can silently track calls, texts and phone locations – and earlier (2018) found *Pegasus* spyware infections targeting Safaricom and Simbanet customers. These tools can covertly turn ordinary phones into surveillance devices. Modern spyware (like Pegasus) is often deployed via hacked apps or SMS links, giving attackers access to a phone's camera, microphone, messages, and location. In practice, Kenyan law enforcement has access to sophisticated cell-site simulators ("IMSI catchers") and forensic tools (e.g. Cellebrite) that can extract data from devices. Such technology means a single smartphone or computer can be turned into a live spy node for agencies.

For example, Pegasus is known to give governments "virtually unfettered access" to infected phones. By 2018, Kenya was confirmed as *one of 45 countries* where Pegasus had been detected. Citizen Lab noted that Pegasus targets in Kenya included journalists and opposition figures. Similarly, "Circles" systems, which exploit telecom network flaws (SS4/7G/5G protocols), are believed sold only to states; Kenya was explicitly named as a likely Circles user by CitizenLab. These findings indicate that Kenyan authorities can intercept calls and texts and pinpoint users' locations by abusing mobile networks.

Beyond software, Kenya has deployed extensive physical surveillance infrastructure. In 2014 the government partnered with Safaricom and Huawei to create an urban "Safe City" surveillance network. Thousands of CCTV cameras (many with facial-recognition or license-plate capabilities) now blanket Nairobi and other cities. (For example, one report notes Nairobi "boasts nearly 2,000 CCTV cameras citywide," all feeding data into police HQ according to research conducted by Coda in 2023) Mobile money and SIM registration laws also give authorities backdoors: the Device Management System (DMS) approved in 2023, ostensibly to curb phone fraud, allows the telecom regulator access to IMEI and subscriber data – raising fears it could be used to monitor call logs or locations.

Government, Telecoms and Contracts

Surveillance capabilities in Kenya involve both government agencies and private firms. The Communications Authority of Kenya (CAK) and security services (NIS, DCI) legally oversee intercept operations under broad laws. In practice, the **CAK** has contracted networks and hardware from telcos and foreign vendors. For example, Safaricom signed a KSh –12 14 billion contract (2014) to build a nationwide surveillance "command center" integrating radios, cameras and analytics. The CAK later sought to force telcos to install the DMS "spying gadget," which Safaricom and others initially opposed citing privacy concerns. In April 2023 the Supreme Court allowed the DMS rollout, despite lawsuits from rights groups fearing it could let the state "snoop on subscribers" (monitor calls, texts, location and mobile payments). The regulator insists DMS only reads phone IDs, but independent observers note that even metadata access can reveal users' movements and contacts.

Moreover, law enforcement routinely uses standard telecom procedures. By law, agencies can request call-detail records (CDRs) and cell-site data via court order. However, credible reports and whistleblowers suggest many requests go through informal channels. A 2017 Privacy International report found security officers often have direct access to telco facilities and network intercept equipment. Likewise, past research uncovered a "middlebox" on Safaricom's network capable of filtering internet traffic. While Safaricom denied those specific findings (and claimed the box was removed), such episodes illustrate the depth of telecom collusion. In short, Kenya's major providers (Safaricom, Airtel) and the regulator have built or enabled surveillance infrastructure often under the guise of security or fraud prevention which critics say lacks transparency and judicial oversight.

Allegations and Public Reports (2023–2025)

Recent news and advocacy reports have brought many of these issues to public attention. In late 2024, the *Nation Media Group* published a major exposé revealing that Safaricom was giving security agencies essentially "unfettered access" to subscriber metadata. According to that report, internal systems allowed law enforcement to query real-time location and call logs without

warrants. Civil society groups (e.g. Nation's sister outlets, KHRC) quickly denounced this as a "state scandal". The story prompted immediate backlash: Safaricom reportedly suspended advertising with Nation Media, and tech fact-checkers launched "smear campaigns" against the investigation. At the same time, Kenyan activists publicly shared their fears that Safaricom data was aiding the abductions of protest leaders in 2023. For instance, artists and bloggers have urged supporters to dump Safaricom SIMs, claiming "customers call records and location data" were handed to state agents to track targets.

Meanwhile, human-rights observers have documented a broader crackdown. A 2025 CIPESA brief notes that **#RejectFinanceBill** and **#OccupyParliament** youth protests were met with surveillance, internet shutdowns and threats of social-media controls. In May 2025, Kenyan civil groups (ICJ Kenya, BAKE, Katiba Institute,LSK and others) sued the government and telcos for the multiple *"deliberate interference"* with internet access during those protests, demanding judicial oversight. Reporters Without Borders (RSF) and local NGOs have also echoed concerns: RSF called on authorities to protect journalists who exposed Safaricom's role, noting that the exposé revealed how security forces could "track and capture suspects covertly".

Journalistic investigations further tie into the surveillance narrative. CCTV cameras, facial recognition and data-mining software often imported from Israel or China have been documented around Kenya's cities. A Coda Story report on Nairobi's "Safe City" project shows Safaricom and Huawei installed cameras on highways and in minibuses, integrated with police networks. (Critics likened this to "wiretapping the city," warning it operated with almost no privacy safeguards.) Tech blogs and think tanks have noted that Kenya's security laws (e.g. AntiTerrorism Act, Computer Misuse Act) provide sweeping interception powers, meaning these tools can be used with minimal checks.

Government and Telecom Responses

Kenyan officials and telecoms have largely denied abusing surveillance powers. Safaricom's CEO Peter Ndegwa repeatedly stressed in 2024–2025 that customer data is only handed over under court orders. For instance, after the Nation exposé, Safaricom issued statements insisting it *"respects our customers' privacy and strictly adhere[s] to Kenya's data protection laws"*, and "only shares customer data when required by a court order". The Communications Authority similarly issued denials. In June 2025, when the mysterious death of influencer Albert Ojwang (who was under arrest) prompted questions about phone tracking, the CAK flatly stated it has *"no access to live location data"* and that any data requests must follow legal process. These denials echo longstanding telco policy: Safaricom claims it does not allow warrantless surveillance, and CAK emphasizes they do not monitor individual phones directly.

Nonetheless, these official lines contrast with public skepticism. Civil society points out that even "legal" requests in Kenya are often rubber-stamped, and that laws like the Data Protection Act 2019 have broad nationalsecurity exemptions. High-profile figures (including the National Assembly and the US Ambassador) have expressed doubts about the transparency of surveillance projects. For example, the US State Department in 2023 warned Kenyan lawmakers about proposed social-media regulations, citing press freedom concerns. Meanwhile, press freedom groups keep documenting abuses. In early 2025, the Kenya Union of Journalists reported 74 media freedom violations, including intimidation linked to exposés on corruption and surveillance. On 25th June 2025 during the anniversary protests of the Gen Z Maandamano, there were allegations that the Communications Authority of Kenya was being used by the government to curtail press and media freedom. CAK issued a Directive Ref No. CA/CA/BC/TV90 to all Televisions and Radio stations directing them to stop live coverage of the demonstrations. The Law Society obtained conservatory orders the same day suspending the directive. However this shows how far such entities can be misused and exploited to violate or infringe on human rights.

Legal and Civil Liberties Implications

Kenya's Constitution guarantees privacy, but practice is different. Courts have sometimes begrudgingly upheld surveillance laws: the Supreme Court in 2023 dismissed petitions to halt the DMS on privacy grounds. The Data Protection Act technically covers personal data, yet it explicitly exempts *"national security or public interest"* uses. Meanwhile, other statutes (e.g. the Communications Act, CMA, Anti-Terrorism Act) authorize interception of communications under very broad conditions. Activists warn that without stricter oversight, these provisions enable constant surveillance of dissent.

The impact on civil liberties is serious. Arbitrary surveillance erodes free speech and chilling effect: people admit avoiding criticism online for fear of being tracked. The abductions of activists in 2023 (at least 80 cases documented) have been linked in part to phone monitoring; relatives say victims were traced via SIM data. Mass shutdowns (like the Telegram block in 2024) interrupt free expression and emergency services. Privacy advocates note that Kenya's data breach of the African Union files in 2018 showed how vulnerable infrastructure is. The combination of widespread CCTV, IMSI-catchers, spyware and lax legal safeguards means virtually **all** digital activity can be monitored: from bank transfers to private chats.

In response, Kenyan civil society is mobilizing. Courtsuits, policy campaigns, and social-media activism are pushing for accountability. Civil rights organizations (LSK Katiba Institute, BHRC, KHRC) are demanding

transparency on contracts and urging enforcement of privacy laws. Regional bodies (AU, UN) have also taken note; the ongoing global debate over Pegasus has shone a spotlight on Kenya. So far, the government's position is that surveillance is a security necessity, while critics argue it has become "surveillance for surveillance's sake" hence undermining democracy. The state's actions suggest it is intensifying its digital oversight (Internet watchdogs now flag Kenya as a model of authoritarian techno-control), even as official statements emphasize rule of law.

Conclusion

Kenya's growing use of surveillance technologies is eroding the rule of law by enabling state agencies to bypass judicial oversight and infringe on constitutional rights. Tools like Pegasus and the DMS are often used to monitor critics and protestors without transparency, turning law enforcement into a means of repression. This shift from accountable governance to unchecked surveillance undermines public trust and the core principles of democracy and justice.

The Author is an Advocate of the High Court of Kenya, Strategic Litigation Specialist, Advocacy Programs Expert and Award winning Exemplary Reform Leader.

Responsible Management of Public Finance, Revenue, Borrowing and Spending in Kenya

By Washika Wachira

Tax revenue is the primary source of funding for Kenya's budget. The Kenya Revenue Authority (KRA) is in charge of collecting various taxes, including income tax, value-added tax (VAT), customs duties, and excise duty. Effective management of public funds, tax collection, borrowing, and spending is not only a constitutional requirement in Kenya, but also a vital component in promoting transparency, accountability, and sustainable development. While Kenya's revenue collection has improved over the last decade, it still faces substantial obstacles such as tax evasion, a narrow tax base, and inefficiencies in compliance enforcement. Efforts to improve revenue mobilisation include the deployment of digital tax systems, the growth of the tax base by targeting the informal sector, and the rationalisation of tax incentives that frequently erode it. Furthermore, increased public trust in the tax system is critical. Citizens are more inclined to comply with tax duties when they believe that their taxes are being used responsibly and transparently .Responsible revenue management requires efficiency, fairness and compliance.

Public borrowing is an acceptable means of financing growth, particularly when revenue collection is insufficient to satisfy infrastructure and social service demands. Borrowing in Kenya is governed by the PFMA and the Constitution, both of which require public debt to be managed in a fiscally sustainable manner.

However, Kenya's national debt has skyrocketed in recent years, prompting questions about debt sustainability. According to the National Treasury, Kenya's public debt stood at Ksh.10 trillion in 2024(the public debt-to-GDP ratio had topped to 60%,) causing the National Treasury to execute a Medium-Term Debt Strategy (MTDS) targeted at lowering reliance on external commercial loans and extending debt maturities. It raised concerns about debt sustainability. While borrowing can spur development, excessive or poorly managed debt burdens future generations and constrain fiscal space.

To achieve responsible borrowing, Kenya should:

- Align borrowing with development priorities.
- Improve debt transparency.
- Run regular debt sustainability analyses.
- Use concessional loans whenever possible.

The way public monies are spent demonstrates the government's commitment to service delivery and equity. Kenya's national budget is built on programme-based budgeting, which links resource allocation to particular outcomes and performance metrics. This method seeks to improve accountability and results-driven management. Nonetheless, obstacles exist.

Budget absorption challenges occur when monies are not completely utilised owing to delays in procurement or poor planning.

- Overspending in recurrent budgets, particularly on wages and salaries, leaving little room for development expenditure.
- Corruption and misallocation of funds jeopardise service delivery and public trust.

For example, reports from the Auditor-General and Controller of

LAW SOCIETY OF KENYA

APPLICATION FOR LETTERS OF NO OBJECTION

1. INDIVIDUAL ADVOCATE APPLICATIONS TO ESTABLISH A SOLE PROPRIETORSHIP

Preferred Name for registration

Note that the word 'advocates' must appear in the name. The name should be as it appears on the Roll of Advocates. Sole proprietors cannot use initials only.

The statement of particulars or proof of reservation certificate (BN)

as obtained from the business registrar. (can be the screenshot of the name reservation page)

The name of the partner(s)

to the outfit you are about to register.

The current PC (s) /receipt of payment

2.REQUIREMENT FOR REGISTERING LIMITED LIABILITY PARTNERSHIPS (LLPs)

Preferred Name for registration.

Note that the word 'advocates' must appear in the name.

Duly filled statement of particulars

statement of particulars as per the LLP Act

Proof of the reservation certificate (BN)

as obtained from the business registrar

The name of the partners

to the outfit you are about to register

The current PC (s) /receipt of payment for all partners

Advocates can send the requests by mail or email to practicestandards@lsk.or.ke for further processing.

Note: The letters of no objection do not attract any charges from the LSK.

Budget frequently reveal instances of unexplained expenditures, outstanding bills, and noncompliance with procurement requirements, particularly at the county level.

Oversight is critical to ensure that public finances are managed responsibly. Kenya's oversight framework includes the;

- National Assembly and Senate, which scrutinise budget proposals, approve expenditures and hold government officials accountable.
- The Auditor-General audits public finances and reports to Parliament.
- The Controller of Budget authorises withdrawals from public monies and oversees budget execution.
- Civil society organisations (CSOs), media, and the general public all play important roles in seeking accountability. Initiatives such as open budgeting, participatory budgeting forums, and the posting of budget implementation reports promote openness and inclusiveness.

Despite these foundations, several problems underpin efficient public financial management in Kenya: -

- Corruption and impunity: High-profile corruption scandals have damaged public trust and redirected cash away from vital areas.
- Weak enforcement of financial laws: Institutions frequently lack the ability or desire to ensure compliance.
- Political interference: Budgeting and resource allocation are occasionally impacted by political reasons rather than policy objectives.
- Limited public engagement: While the Constitution requires public participation in financial concerns, execution is lacking at both the national and county levels.

The following steps are critical to strengthening Kenya's responsible management of public finance, revenue, borrowing, and spending:

For National government:

- That there is need to foster collaboration between public and private institutions such as civil society and on the stakeholders such as judiciary, development partners and the public. Continuous engagement and capacity for civil society and members of the public is critical in sustaining pressure on policy makers.
- Parliamentary oversight ought to be enhanced by strengthening the legislative and approval process of debts. A better way of reporting.

For the County Government,

- That counties improve OSR mobilisation to satisfy financial responsibilities even when there are delays in the transfer of equitable shares.
- Establish extensive and open mechanisms for documenting and reviewing all pending bills in order to facilitate auditing, supervision, and, eventually, payment.
- To provide procedures to ensure transparency in PFM at large, ranging from revenue predictions and actual revenues collected to expenditures and financial commitments (procurement and contract awards).
- Ensure that county-level oversight institutions (particularly the County Assembly and non-state actors) are proactive in evaluating audit reports and requiring responses to audit queries.
- The Constitution requires, under principles of public finance, transparent reporting and public participation in all finance matters.
- Enhancing institutional capability to provide PFM institutions with enough resources, training, and autonomy so that they can effectively carry out their mandates.
- Improved transparency: Encourage public access to budget records, audit reports, and debt registers.
- Strengthening fiscal discipline: Implement sanctions for mismanagement and ensuring audits and investigations are completed on schedule.
- Encouraging inclusive budgeting, facilitate meaningful public engagement and ensure that the budget reflects the requirements of all demographic groups.
- Leveraging technology: To decrease corruption and increase efficiency, deploy e-procurement, e-citizen platforms, and integrated financial management systems (IFMIS).

Responsible public financial management in Kenya is critical for attaining economic progress, decreasing inequality, and promoting trust in governance. Kenya has made significant progress in developing strong legal frameworks and institutions, but ongoing problems undermine their efficacy. Moving forward, the government and stakeholders must prioritise openness, fiscal discipline, and citizen involvement. Only by a coordinated effort will Kenya be able to ensure that public resources be used to benefit all and in accordance with the Constitution's goal.

The Author is Advocate of the High Court of Kenya.

Silencing the Citizen: State Overreach and the Suppression of Dissent in Kenya

By Ivyn Chepkurui and George Skem

Introduction

Walter Khobe Ochieng in '*The Independence, Accountability and Effectiveness of Constitutional and Independent Offices in Kenya', Kabarak Journal of Law and Ethics, 4(1), 2019* avers that the 2010 Constitution of Kenya marked a pivotal moment in the nation's history, promising a shift from authoritarianism to a democratic, rights-based governance system anchored in the rule of law and the sovereignty of the people. It guaranteed fundamental freedoms expression, assembly, association, and access to justice intended to empower citizens and curb state excesses. Yet, over a decade later, the resurgence of state overreach and the suppression of dissent reveal a troubling divergence from this constitutional vision. This article examines the mechanisms through which dissent is stifled in post-2010 Kenya, the institutional failures enabling this erosion, and the urgent need for reforms to restore the constitutional order.

Historical Context: A Legacy of Repression

Kenya's pre-2010 political landscape was defined by a dominant executive, weak judicial oversight, and the systematic use of security forces to silence opposition, journalists, and activists. State-sanctioned violence and a culture of impunity fostered widespread fear, stifling civic engagement. The 2010 Constitution sought to reconfigure this balance, establishing institutions to serve the people rather than oppress or enslave them as Willy Mutunga posits in '*Kenya: a new constitution: Willy Mutunga on the culmination of almost five decades of struggles', Socialist Lawyer, No. 65, October 2013.*' However, the persistence of repressive practices post-2010 underscores the fragility of these reforms. From abductions to extrajudicial killings, the state's actions echo a troubling return to authoritarian tactics.

The Erosion of Civic Space

Despite constitutional guarantees, the post-2010 period has seen a steady contraction of civic space. Laws and policies, often justified under the guise of national security, have been weaponized to delegitimize dissent. Security agencies, particularly the police, remain central to this suppression. The establishment of oversight bodies like the Independent Policing Oversight Authority (IPOA) and the National Police Service Commission (NPSC) aimed to enhance police accountability, but these institutions have been undermined by political interference and institutional resistance. In a statement released by KNCHR on December 27th 2024, despite CCTV evidence, the government and police had denied involvement in 82 abductions since June 2024, with victims reporting torture, yet no prosecutions have followed, underscoring IPOA's limited effectiveness. Another statement released by the Commission following the June 25th protests in 2025 detailed 400 reported casualties, 61 arrests and 8 fatalities from gunshot wounds across the country.

A regression to a "national security" doctrine prioritizes regime stability over constitutionalism, enabling police impunity to flourish. For instance, reports from civil society and human rights organizations document ongoing use of excessive force against protesters and arbitrary arrests of activists, signaling a failure to internalize the 2010 reforms.

The judiciary, envisioned as a guardian of constitutional rights, has shown inconsistency. While some rulings have upheld the right to dissent, others reflect judicial abdication, allowing state overreach to go unchecked. This mixed record raises questions about the judiciary's independence and capacity to counter executive excesses. Legislative complicity further exacerbates the issue, with parliament often enacting or failing to repeal repressive laws that curtail freedoms.

Consequences of Suppressing Dissent

The suppression of dissent carries profound risks for Kenya's democracy. It fosters civic disengagement, as citizens lose trust in institutions meant to protect them. This erosion can fuel radicalization and heighten the potential for state-citizen confrontation. The delegitimization of dissent undermines the state's legitimacy, as it violates the social contract enshrined in the 2010 Constitution. Moreover, the suppression of civil rights and intimidation by the state represents missed opportunities to safeguard democratic gains.

Eventually, the institutions and safeguards supposed to sustain democracy risk erosion as the political landscape shifts towards authoritarian control. The nature of state crackdown on dissent through abductions, for instance, throws these persons' families into a bureaucratic maze in search of their kins, some who are never found. The state seems to have usurped 'absolute power', which, going by Lord Acton's words, "corrupts absolutely".

The Role of the Legal Fraternity

Lawyers and legal institutions bear a unique responsibility to defend the constitutional order. As advocates for justice, they must act as a bulwark against tyranny, challenging unlawful state actions through litigation, advocacy, and public engagement. The LSK, in

particular, has the mandate to hold the state accountable. Yet, the responses from the legal community have often been reactive rather than proactive. Strengthening the legal fraternity's role requires strategic collaboration with civil society, the media, and academia to amplify calls for accountability and protect civic space.

Pathways to Reform

To reverse this democratic backsliding, comprehensive reforms are essential. First, police accountability must be prioritized through robust implementation of oversight mechanisms and ending political interference in institutions like IPOA and NPSC. Repealing or amending repressive laws, such as those restricting assembly and expression, is critical to aligning legal frameworks with constitutional guarantees. Civil society groups, including the LSK have condemned the abductions as unconstitutional and petitioned the High Court to refer them to the ICC as crimes against humanity, reflecting the urgent need for external accountability when domestic systems fail. Strengthening judicial independence through training, funding, and protection from executive overreach will ensure consistent enforcement of rights. Protecting whistleblowers and journalists, who expose state abuses, is equally vital. Finally, widespread civic education on constitutional rights can empower citizens to demand accountability and resist suppression.

Conclusion: A Call to Constitutional Conscience

The 2010 Constitution was a promise of a new social contract, one where dissent is not a threat but a democratic necessity. Silencing citizens undermines not only their rights but the legitimacy of the state itself. Kenya stands at a crossroads: it can recommit to the constitutional vision or risk further democratic erosion. By revitalizing collaboration between civil society, legal institutions, the media, and academia, Kenya can rebuild strong, independent institutions that honor the sovereignty of the people. The rain began beating Kenya when the state prioritized control over constitutionalism. The path forward lies in returning to the principles of 2010.

The Authors are Law Students at Kabarak University.

Mainstreaming ESG Frameworks and Digital Trust: The Legal Imperative in Kenya

By Haggai Okeyo Onguka

Introduction

As Kenya journeys through rapid digital transformation and aligns itself with global sustainable development agendas, legal practitioners must embrace a renewed mandate one that places Environmental, Social, and Governance (ESG) principles and digital trust at the core of their practice. ESG, once relegated to corporate social responsibility reports, has now emerged as a central determinant of legal risk, corporate legitimacy, and investment eligibility (KPMG, 2021). Similarly, digital trust, shaped by data governance, cybersecurity, and ethical technology use, has become a critical requirement in ensuring transparency, protecting rights, and building resilient institutions (World Economic Forum, 2020). This article contends that the Kenyan legal profession must evolve from traditional models into an integrated, interdisciplinary, and future-oriented force, capable of steering ESG and digital trust mainstreaming through proactive reform, interpretation, advocacy, and innovation.

ESG and Digital Trust in Kenya's Legal Framework

Kenya's existing statutory and constitutional frameworks already embed ESG and digital governance principles, albeit in a fragmented manner. The **Constitution of Kenya (2010)** under Articles 10 and 69 emphasizes sustainable development and environmental protection, while Article 31 guarantees the right to privacy, laying a foundational link between environmental justice and data protection. The **Environmental Management and Coordination Act (No. 8 of 1999)** operationalizes environmental governance mandates, providing regulatory standards for pollution control, climate protection, and sustainable resource management.

Furthermore, the **Companies Act (No. 17 of 2015)** incorporates provisions on corporate governance and director duties, which implicitly support ESG principles, especially regarding transparency and accountability in corporate operations. The **Data Protection Act (No. 24 of 2019)** complements this framework by embedding digital rights, mandating data protection officers, and aligning Kenya with international norms such as the **General Data Protection Regulation (GDPR)** (European Parliament and Council, 2016). However, while these frameworks provide a strong starting point, their implementation requires nuanced legal interpretation, institutional strengthening, and capacity building among lawyers.

The Role of Lawyers in ESG and Digital Ethics

Lawyers are no longer confined to the courtroom or transactional desk. The evolving global legal landscape demands that advocates adopt the roles of sustainability stewards, interdisciplinary advisors, and digital ethics gatekeepers. As ESG concerns increasingly influence investor decisions, procurement requirements, and legal liability, lawyers must guide clients not only on compliance but also on ethical alignment and long-term sustainability integration (Gidwani & Dube, 2023).

In the digital arena, trust is earned through responsible data stewardship, transparent use of algorithms, and respect for user autonomy. Advocates must therefore possess digital literacy sufficient to interrogate surveillance practices, contest algorithmic bias, and advise on data breach protocols. These competencies position lawyers not only as defenders of privacy but also as architects of ethical digital infrastructure.

The importance of this shift is echoed globally. In **Milieudefensie v. Royal Dutch Shell** (District Court of The Hague, 2021), the Dutch court-imposed climate obligations on a private corporation, signaling a new era of ESG litigation. This precedent should awaken Kenyan lawyers to similar possibilities where advocacy could shape jurisprudence around climate justice, social inclusion, and corporate accountability.

Legal Technology and Professional Innovation

Legal technology is growing quickly in Kenya and around the world, making legal work faster, easier, and more accessible. Tools like artificial intelligence, blockchain, and data analysis are changing how lawyers do their jobs. However, these tools must be used responsibly to ensure fairness and protect people's rights. Lawyers have a key role in making sure new technologies in the justice system are used in a fair and ethical way, especially when it comes to sensitive areas like bail, sentencing, and corporate reporting.

Legal Education and Institutional Reform

One major challenge to promoting ESG and digital trust in Kenya is that many lawyers lack the necessary knowledge and skills, as legal education has not kept up with changes in sustainability and technology. To fix this, institutions like the Law Society of Kenya and the Council of Legal Education should update training to include ESG law, data protection, cybersecurity, and legal innovation. Practical programs like ethics clinics, legaltech hubs, and ongoing professional training can help lawyers gain the right skills and encourage responsible, forward-thinking legal practice.

Policy Development and Regulatory Oversight

To operationalize ESG and digital trust mainstreaming, Kenya requires a coordinated policy ecosystem. This involves aligning ESG-related disclosures, procurement regulations, and reporting frameworks with global standards like the **Task Force on Climate-related Financial Disclosures (TCFD)** and the **Sustainable Finance Disclosure Regulation (SFDR)** (Financial Stability Board, 2020).

Similarly, digital trust requires proactive regulation of emerging technologies, including **artificial intelligence**, **facial recognition**, **biometrics**, and **cross-border data transfers**. Kenya's Office of the Data Protection Commissioner (ODPC) must collaborate with legal practitioners, tech companies, and civil society to develop sector-specific guidelines, conduct data audits, and promote privacy awareness. Lawyers, in this regard, can play a strategic role in advising regulators, drafting policy, and shaping jurisprudence that promotes ethical digitization.

ESG Litigation and Public Interest Lawyering

As global ESG litigation rises, Kenyan advocates must prepare for a similar wave of rights-based, climate-focused, and governance-driven lawsuits. Legal professionals must not only defend corporate entities but also initiate public interest litigation (PIL) on behalf of affected communities, whistleblowers, or environmental defenders.

Cases relating to pollution, unfair labor practices, greenwashing, or data surveillance could become central to Kenya's legal landscape. Proactive lawyering emphasizes preventive legal strategies, compliance audits, and stakeholder consultation is necessary to mitigate legal exposure and foster sustainable business conduct.

Moreover, as investors and consumers demand greater transparency, ESG compliance is fast becoming a prerequisite for accessing capital and markets. Advocates who understand the interplay between sustainability, law, and finance will be best positioned to guide clients through this transition.

Conclusion

In conclusion Kenya stands at a critical juncture, where the fusion of sustainability and digital transformation defines the path to inclusive development. Lawyers have a profound responsibility not only to interpret the law but to shape it to become agents of ethical innovation, defenders of digital dignity, and architects of sustainable justice. The integration of ESG frameworks and digital trust principles into legal practice is not optional, it is the legal imperative of our time.

Through collaborative reform, robust advocacy, and ethical foresight, the Kenyan legal profession can lead the charge toward a future that is just, accountable, and resilient. In doing so, it will not only elevate its relevance in the digital age but also affirm its role in securing the promise of the Constitution and the vision of sustainable development for all.

The Author is Advocate of the High Court of Kenya.

Protecting Constitutionalism and the Rule of Law: Ensuring Accountability in Kenya.

By Washika Wachira

The foundation of any democratic society is constitutionalism and the rule of law. Kenya's 2010 Constitution was a game-changer, promising a new era of accountability, devolution of authority, respect for human rights, and governance. But even after more than ten years, there are still many obstacles in the way of achieving these goals. The importance of preserving Kenyan constitutionalism and the rule of law is examined in this essay, which also assesses the systems in place to guarantee accountability in public institutions. It also addresses the challenges in accomplishing these goals and offers doable suggestions.

Constitutionalism is the notion that government must act within the constraints established by a constitution, and that the constitution must be regarded as the highest law of the country. It implies a division of powers, checks and balances, respect for fundamental rights, and institutional independence. The rule of law, on the other hand, holds that all individuals and institutions, both public and private, are subject to the law, and that justice must be dispensed without fear or favour. In Kenya, the Constitution's Articles 10 and 19-22 affirm these concepts by emphasising national values, human dignity, equity, social justice, and individual rights.

The adoption of the 2010 Constitution was a watershed moment in Kenya's history. It reformed the executive, built a bicameral legislature, established independent commissions, and decentralised authority to bring governance closer to the people. Notable accomplishments include:

1. Devolution: The formation of 47 county administrations has enhanced service delivery, citizen participation and local accountability.
2. Judicial Independence: The judiciary now functions independently, aided by the Judicial Service Commission (JSC), which is responsible for appointing and disciplining judges.
3. Oversight Institutions: The Ethics and Anti-Corruption Commission (EACC), Office of the Auditor-General and Office of the Controller of the Budget have all played important roles in ensuring transparency and accountability.
4. Bill of Rights: The Constitution protects extensive civil, political, economic, and social rights, which courts have increasingly affirmed in public interest cases.

Challenges to Constitutionalism and the Rule of Law

Despite these advances, significant systemic and structural obstacles remain to threaten constitutionalism and the rule of law in Kenya:

a. Corruption: Corruption is still firmly established in public institutions, hindering effective service delivery and undermining public trust. High-profile scandals frequently go unpunished, demonstrating a disconnect between law and practice.

b. Executive Overreach: Attempts by the Executive to meddle with the Judiciary, Parliament, and independent offices violate the theory of separation of powers. The "Handshake" politics and the Building

Bridges Initiative (BBI), which was ruled unconstitutional by the courts, demonstrated how easily constitutional norms can be caved in.

c. Weak Oversight: Despite the existence of oversight agencies, political favouritism and inadequate funding limit their independence and effectiveness. Parliament frequently ignores auditor-general reports.

d. Impunity: The lack of political will to punish high-ranking officials promotes impunity. In many circumstances, institutions tasked with enforcing the law are seized or manipulated.

e. Police Brutality and Human Rights Violations: Extrajudicial killings, unjust detentions, and dissent suppression continue to occur, particularly during elections and protests, thereby breaching constitutional rights.

f. Accountability: Legal and Institutional Mechanisms Accountability is a core principle of successful government. In Kenya, there are numerous means to enforce it:

g. Parliamentary Oversight: The Public Accounts Committee (PAC) and the Public Investments Committee (PIC) oversee government spending and hold public officials accountable.

h. Judicial Review: Citizens can dispute the State's unconstitutional conduct in court. Landmark verdicts, such as the invalidation of the 2017 presidential election and the BBI decision, demonstrate judicial activism in protecting the Constitution.

i. Chapter Six of the Constitution: This chapter on leadership and integrity requires public officers to display honesty, responsibility, and dedication to public service. However, enforcement has been inadequate.

j. Auditing and Budgeting Frameworks: The Office of the Auditor-General and Controller of Budget monitors public spending to ensure that monies are used lawfully.

k. Civil society and the media: A strong civil society and independent media have been critical in uncovering corruption and campaigning for reforms.

Recommendations

Strengthening constitutionalism and the rule of law

To improve constitutional governance and accountability in Kenya, the following steps should be taken:

a. Strengthening Oversight Institutions: In order to operate freely and efficiently, agencies such as the EACC, DPP, and the judiciary must be appropriately funded and protected from political interference.

b. Improving Civic Education: Citizens must be informed about their constitutional rights and obligations. An informed public is more inclined to call for accountability and reject impunity.

c. Political Accountability: Political parties should be required to maintain integrity in nominations and to penalise errant members. Electoral reforms must also address concerns like vote buying and electoral violence.

d. Implementing Leadership and Integrity Laws: To provide more transparent procedures for screening public servants and removing dishonest people from office, the Leadership and Integrity Act should be modified.

e. Digital Governance and Transparency: Technology ought to be used to monitor public procurement, spending, and service provision. Expanding and improving the usability of platforms such as e-Citizen and IFMIS is necessary.

f. Judicial Protection: Other branches of government must refrain from retaliating against the judiciary and maintain its independence. Reducing the backlog of cases and enhancing access to justice should be the main goals of judicial reforms.

In conclusion Constitutionalism and the rule of law are not abstract concepts, but rather actual means for securing justice, equity, and progress. Kenya's 2010 Constitution established a solid and robust framework for governance, but its full and complete potential has yet and remains to be realised and unachieved due to entrenched and deep-rooted impunity, political intervention, and institutional shortcomings/ deficiencies. To protect and safeguard democracy and accountability, Kenya must reaffirm the principles established and set out in its Constitution and enable/ empower individuals, institutions, and the legal system to defend and uphold them without bias, hesitation, fear or favour. Only then can the nation create a more just, transparent, and accountable society.

The Author is Advocate of the High Court of Kenya.

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"Kamata Kamata" Fridays: Kenya's Quiet Assault on Due Process

By Ian Bahati

That the police have power to arrest with or without a warrant of arrest, under Section 59 of the National Police Service Act, is not a matter that needs redundant discourse. The law speaketh clearly on the matter. Yet such authority is not unbridled; it is tethered to solemn conditions and mandatory obligations, the breach of which invites personal culpability, both as a disciplinary infraction and, where circumstances demand, a criminal offence.

The delicate balance between lawful authority and individual liberty especially on the matters of arrests is precisely the reason why the drafters of our constitution penned with deliberate clarity Article 49 (1) (f) which, noting the history of Kenya where arbitrary detentions without arraignment in court were the rule and not the exception, insisted that as a safeguard against misuse of state authority, any person arrested must be arraigned before a court of law as soon as reasonably possible, and in any event, within twenty four (24) hours. Where that 24 -hour window lapses outside ordinary court hours or on a non-court day ,such as weekends or public holidays , the person must be presented by the end of the next court day. A provision not merely procedural in nature, but deeply principled in its defence of human dignity.

However, this safeguard has become the very loophole, cleverly exploited through the now infamous *kamata kamata* Friday arrests. These arrests are not, at least in the eyes of the public, a true and sober attempt at living the national values and principles of governance of our constitution but are viewed as calculated manoeuvres designed to ensure that "*enemies of the powers that be*" get an inhospitable pro longed detention in the confines of police cells. A clear message that "we are not sure the charges we have against you might stick but we are sure you shall know we can get you and put you in police custody" and to what Kenyans would say "*ndio uskie hivyo!.*"

To the mind of the petty tyrant, this loophole gleams with irresistible allure. It is not justice they seek, but the illusion of procedural compliance wrapped around an act of overt cruelty. Consider the familiar script known all too well to the Friday detainee - your local drunk and always disorderly might recount even better - that an arrest late in the day, means no court sitting over the weekend, and a mandatory wait until Monday for arraignment not unless luck has it that you get released on police bail which is particularly rare where "orders are from above". That is, of course, if Monday is not a public holiday. If it is, then the calendar is pushed to Tuesday.

The arithmetic becomes even more obscene when one is arrested on a Thursday and Friday is declared a public holiday. Any Kenyan would know that this is not far-fetched. On the evening of October 31,2024, I kid you not, acting Interior Cabinet Secretary Musalia Mudavadi declared, vide gazette notice, that the following day, Friday November 1 would be a public holiday to facilitate the swearing in of Deputy president designate Kithure Kindiki.

Worse still, imagine the misfortune of arrest on the eve of Easter – a season of redemption for some, but five long nights of detention for others, unless, again, providence intervenes in the form of police bail. And if one were to devise a chilling but perfectly legal message to send to the uninitiated, to the jail virgins, the untested, or those fragile of spirit – this would be it; a punishment delivered not by conviction, but by calendar.

Kenya is witnessing an overt but insidious surge that is the pattern in the *kamata kamata* Friday arrests. Unfolding at a time when the criminal justice system is overwhelmingly being weaponized and repurposed as a political tool, an apparatus calibrated to suppress dissent, often with the tacit nod, if not outright endorsement, from the highest office in the land and some of its most loyal affiliates. At the time of writing this article, one Rose Njeri, a software developer and digital activist, was still in police custody four days after her arrest on Friday may 30 2025 for creating a web application that enabled Kenyans to express opposition to certain clauses in the 2025 finance bill. She has since been charged under *section 16* of the *Computer Misuse and Cybercrimes Act* for unauthorized interference with computer systems and released on personal bond awaiting a ruling later in the month of June on whether she should stand trial for the charges levelled against her. A charge that, by many accounts, bears the hallmarks of fabrication, thinly veiled in legality but deeply saturated in political intent. Indeed, this latest arrest serves not merely as a procedural overreach but as a form of inflicted suffering, a chilling warning meant to deter others of similar mind and courage.

She is far from alone. Other *Kamata kamata* Friday casualties include the likes of Nicholas Gichuki, Brian Adagala, Mark Denver Karubiu and Chris Wamae: filmmakers of the

widely acclaimed BBC Africa eye Documentary "*Blood parliament*", whose work peeled back the layers of state violence and impunity with an unflinching lens. Another incident involves that of Mumias East Member of Parliament, Peter Salasya, arrested on Friday May 16, 2025, and charged for alleged hate speech. These arrests offer an unmistakable commonality: each individual, in one form or another, has stood in defiance of the state's excesses. It is not coincidence but pattern. A quiet purge of the unyielding. the questioning, the defiant.

Article 49(1)(f) speaks in unequivocal terms, an obligation echoed and reinforced by Section 36A of the Criminal Procedure Code. These provisions are not merely a matter of procedural formality, but a constitutional guarantee designed to prevent the very abuse it now fails to forestall. Section 37 of the same Code further imposes a duty upon Officers in Charge of police stations to report, to the nearest magistrate, every arrest made without warrant—regardless of whether the individual has been admitted to bail or not but we have witnessed incidences where the detainee is arrested in one county for allegations levelled against them in that county and arraigned in a different county altogether.

These safeguards are not unique to Kenya. They are the universal refrain of a global legal conscience: from the International Covenant on Civil and Political Rights, to the European Convention on Human Rights and the African Charter on Human and Peoples' Rights - all speaking with one voice against prolonged, arbitrary detention, and in favour of swift judicial oversight. Oversight bodies such as the European Court of Human Rights, the Inter-American Commission and Court, the African Commission and Court, and the UN Working Group on Arbitrary Detention exist precisely to uphold these standards, issuing rulings, investigating breaches, and recommending remedies, including immediate release and compensation.

Yet, in Kenya as in many parts of the world, these lofty provisions often wither under the weight of politicized enforcement. The machinery of justice, instead of dispensing fairness, is increasingly redirected on silencing the dissenter rather than pursuing the genuine offender. While the true scale remains obscured by a lack of reliable data, it is widely acknowledged, both in whispers and in court corridors, that the incidence of *kamata kamata* Friday arrest is unacceptably high.

In February 2023, Belgut MP Nelson Koech, then a victim of *Kamata Kamata* Fridays and who now appears to dance to the tune of the King, sponsored "The Criminal Procedure Code (Amendment) Bill 2023," seeking to amend the Criminal Procedure Code (Cap. 75) to address concerns about arrests made on Fridays and it would appear the same has since abated. Legal discourse, however, continues to highlight concerns, with eminent legal practitioners and civil society groups noting they take the country back to "dark days".

"Men die, kings die, but the record of a just cause cannot be buried." –

Ranulf Higden, 14th-century English historian

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FREQUENTLY ASKED QUESTIONS (FAQS) ON MEMBER SERVICES DEPARTMENT

1. How do I log into my portal for the first time and set my password

A:

Search (online.lsk.or.ke) on your browser. Click on the login button on the top right corner, enter your admission number and click on "Proceed", click on "Forgot Password / Activate Account" feature. An OTP will be sent to the email address/ phone number registered with LSK.

In case you don't receive the OTP in your inbox, check in the spam/junk folder.
Always use the most recent OTP in case you have tried severally and received multiple links.

Note:
a. Always use the most recent OTP.
b. Avoid requesting for the OTP too many times to avoid being locked out of your account.
c. When you request for an OTP, there may be delays, please be patient, check your email/phone before requesting for another.

2. How do I apply for my Practising Certificate?

A:

Log into your portal and press the 'click to apply for my 2024 Practicing Certificate' prompt on your dashboard. Proceed to fill in your declaration form then download and print it. Depending on what you have declared as your nature of engagement, the documents to be uploaded are as follows: -

For members practicing as Sole proprietors/Partners:
a. A fully signed and witnessed declaration to accompany the application for PC.
b. A valid professional indemnity cover.
c. The accountant's certificate whereby the accounting period should be for the previous year e.g. 01-01-2023 to 31-12-2023 for PC application 2024.
d. Certificate of registration of the firm.

For members practicing as Associates/In-house Counsel/Legal Officers/Company Secretaries/State Counsel/Academic:
a. A fully signed and witnessed declaration to accompany the application for PC.
b. A duly filled, signed and commissioned statutory declaration form.
NB The receipt shall only be issued once all the requisite documents have been uploaded on the portal

3. How do I change or update my physical address?

A:

Attach a signed letter requesting to change or update your physical address. The letter should be addressed to:
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P.O Box 72219 - 00200 | Nairobi, Kenya

Attach a copy of your national ID. Please, note to include your P.105. Share the documents via **memberservices@lsk.or.ke** or drop them at our offices.

LAW SOCIETY OF KENYA

FREQUENTLY ASKED QUESTIONS (FAQS) ON MEMBER SERVICES DEPARTMENT

4. How do I change or update my email address?

Q:

A:

Attach a signed letter requesting to update or change your email address.
Attach a copy of your national Identity Card and a copy of your Certificate of Admission.
The signed letter to be addressed to:

The Secretary/CEO
Law Society of Kenya
Lavington, opp Valley Arcade, Gitanga Road
P.O Box 72219 - 00200 | Nairobi, Kenya

Share the documents via memberservices@lsk.or.ke or drop them at our offices.

5. How do I update or change my profile photo on the search engine?

Q:

A:

Share the photo to be uploaded, attach a copy of your Certificate of Admission and a copy of your national Identity Card to memberservices@lsk.or.ke

6. How do I apply for a Certificate of Good Standing as an individual?

Q:

A:

The Certificate of Good Standing for individuals is done online.
Follow the following steps to access/activate your portal account.
To set up your LSK Account password, search for online.lsk.or.ke on your browser. Click the login button on the top right corner, enter your admission number and click on "Proceed", click on “Forgot Password / Activate Account” feature. An OTP will be sent to the email address/ phone number registered with LSK.
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Note:
a) Always use the most recent OTP
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After login click on click here to apply for Certificate of Good Standing, click proceed, submit and print the certificate.

For more enquiries, reach out to LSK Member Services via memberservices@lsk.or.ke or call 0111 671458.

Poems

By Paul Ngotho, A Charted Arbitrator.

Brother John

Go to the villages
Baptise the peasants
Tell then pray
Obey my decrees
And pay all taxes

And pray
Don't interfere
With my family
Or with my kingdom
Leave politics to me

I beseech you Bro John
Fast and pray
Preach to them
Fast and furious
For you're a free man

Curse the traitors
Curse the dissidents
Curse all my enemies
Just mind your head
And never cross my path

Brother John can't stand
The King's lies
However hard he tries
So he defies
And dies

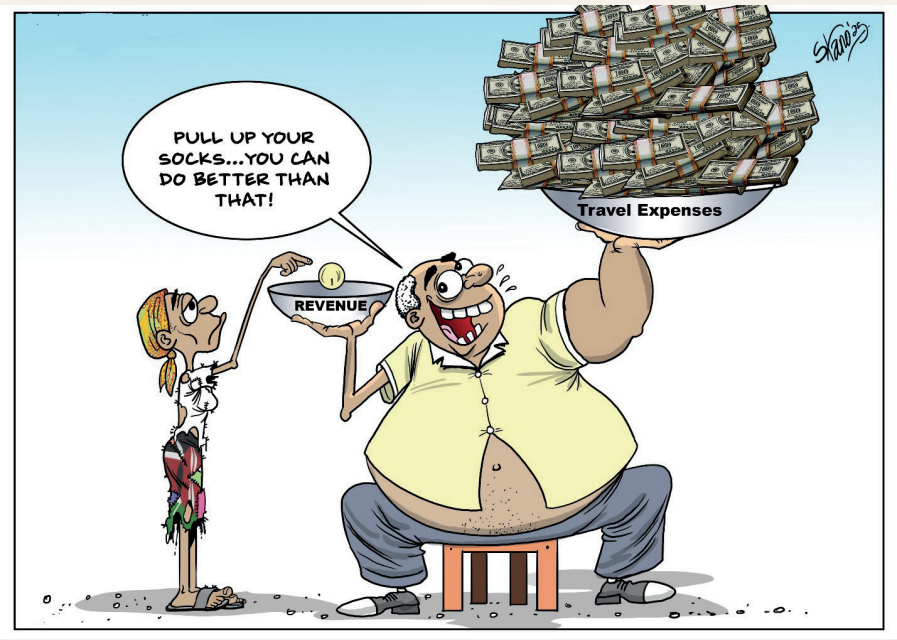
By Sophie Kaibiria, Advocate

The 3 As

Tuzidii, let's propel initiative
The timing ever-present
The quest is itching for success
Arise, activate, actualise

Tujitume, in good governance
The measure ever-present
The Constitution is also ripe
Arise, activate, actualise

Tulinde, for all generations
The prayer ever-whispered
The spirit walking with us
Arise, andamana kwa uzalenda.



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