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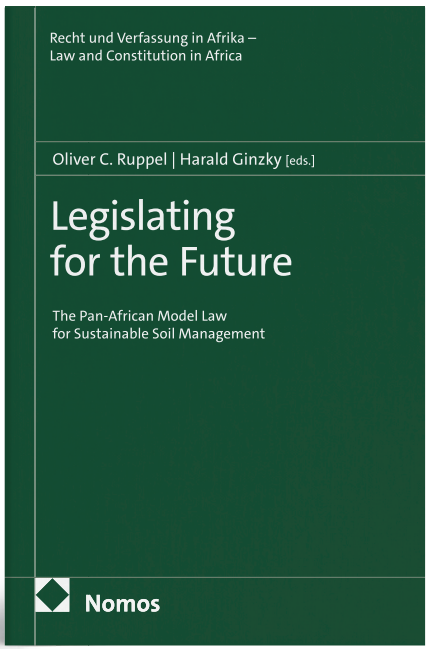
Sustainability Needs Legal Protection



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Oliver C. Ruppel | Harald Ginzky [Eds.]

Legislating for the Future
The Pan-African Model Law for Sustainable Soil Management

2026, approx. 398 pp., pb., approx. € 139.00
ISBN 978-3-7560-3274-7
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(Recht und Verfassung in Afrika – Law and Constitution in Africa, vol. 50)
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This publication is based on a project funded by the German Federal Ministry for Economic Cooperation and Development (BMZ) on a 'Model Law for Sustainable Soil Management in Africa'. The Model Law consists of a Framework Law with general soil governance principles and a number of commentaries. Designed for adaptability, the Model Law offers a flexible and modular framework that can be domesticated on demand, i.e. tailored to diverse legal systems and national circumstances across different African Union member countries and regions in Africa. The Model Law shall serve as a guidance for the national legislation concerning an effective governance of sustainable soil management.

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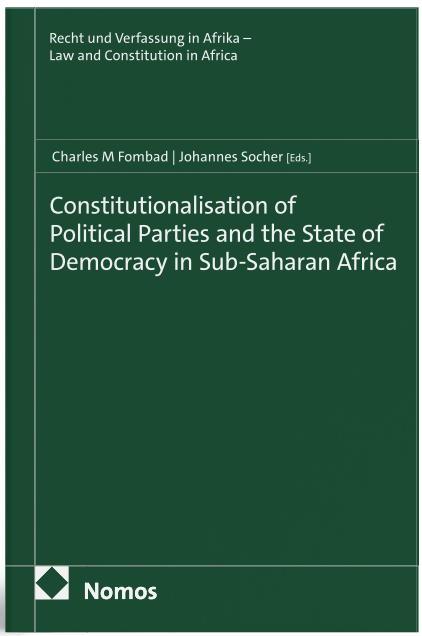

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Charles M Fombad | Johannes Socher [Eds.]

Constitutionalisation of Political Parties and the State of Democracy in Sub-Saharan Africa

2025, 574 pp., pb., € 119.00
ISBN 978-3-7560-3353-9
E-Book 978-3-7489-6316-5
(Recht und Verfassung in Afrika – Law and Constitution in Africa, vol. 48)

Edited by C. Fombad and J. Socher, this volume offers unique insights into the regulation of political parties and its impact on constitutionalism and multiparty democracy in Sub-Saharan Africa. Building on an examination of the relevant international and African regional standards and drawing on experiences in continental Europe, it presents a detailed framework for analysing the constitutionalisation of political parties in Sub-Saharan Africa. Further contributions on 12 countries — Cameroon, Ethiopia, Kenya, Liberia, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa, Uganda, and Zimbabwe — analyse the experiences with the constitutionalisation of political parties in concrete cases. A concluding chapter outlines key findings and some recommendations for reform.

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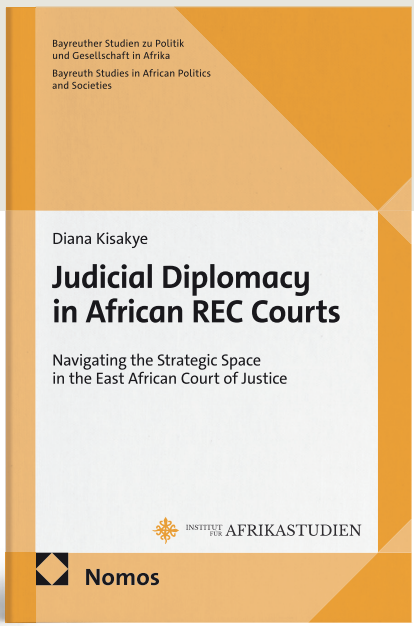
Understanding Changes in International Judicial Relations



Diana Kisakye

Judicial Diplomacy in African REC Courts

Navigating the Strategic Space in the East African Court of Justice

2025, 317 pp., pb., € 84.00
ISBN 978-3-7560-2016-4
E-Book 978-3-7489-5553-5
(Bayreuther Studien zu Politik und Gesellschaft in Afrika | Bayreuth Studies in African Politics and Societies)

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This book offers an intricate account of the legal, socio-economic, and political considerations that young international courts go through while trying to establish institutional authority. Drawing on a wealth of original ethnographic and archival data, it advances our understanding of international adjudication beyond prevailing state-centric explanations. Through the lens of judicial diplomacy, it offers a window into understanding the contemporary transformations of international judicial relations. It foregrounds judicial on-bench and off-bench activities as equally important attributes of the judicial process.

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Inhalt

FOREWORD

This volume follows volume 2025/4 and ensures the continuation of the exchange of ideas and inspiration throughout the "Leaders for Justice Workshops" for lawyers from anglophone countries which took place in Arusha, Tanzania from 29th August to 1st September 2022, Dar es Salaam, Tanzania, from 28th to 29th July 2023 and Entebbe, Uganda, from the 26th to 27th July 2024.

This exchange of thoughts is also in connection with the workshop in Dakar, Senegal, from 31st July to 03rd August 2025, which was organised by the Rule of Law Program for Sub-Saharan Africa of Konrad Adenauer Stiftung for lawyers from francophone countries.

Hannah Wamuyu, Kenya, presents "Analyzing the legal and institutional framework governing the establishment of a nuclear power program (NPP) in Kenya". The article examines the legal and institutional framework governing the establishment of a nuclear power program in Kenya owing to the heightened efforts by the government in laying out the plans to establish the first nuclear power plant amidst protests by the communities. The analysis is done by examining relevant international law, national law and the frameworks and plans for establishing a NPP.

George Ocen, Kenya, writes "An Assessment of the Legal Framework for the East African Monetary Union (EAMU): A Case Study of the EAC and Uganda". The legal framework of the EAMU consists of both EAC legal instruments and Partner State legal instruments. This paper assesses the legal framework and asks whether the EAC legal instruments are effective.

Pie Habimana and Protais BYIRINGIRO, Rwanda, present on "Uncounted Success: Rethinking the Role of Traditional Dispute Resolution in Africa". Their paper interrogates the paradox of "uncounted success" traditional justice mechanisms that consistently deliver meaningful outcomes yet remain excluded from official metrics, legal education, and institutional support. Drawing on comparative insights from Rwanda, Uganda, and South Africa, this paper traces the historical marginalization of customary systems, the persistence of legal hierarchies, and the structural challenges inherent in integrating plural justice models.

Ng'ani Chrisphine Ligadho, Kenya, examines "Artificial intelligence and intellectual property law in Kenya: Who owns AI-created works?" Kenya is rapidly adopting artificial intelligence and using it to drive the economy forward. However, Kenya's main laws on copyright and patents like the Copyright Act and Industrial Property Act were written with human creators in mind. This research looks into the murky nexus between AI and IP law in Kenya. It looks at how the current regulations play out when AI is involved, who ends up owning what, and where the biggest legal blind spots are.

Adolphe Kilomba Sumaili, DR Congo, analyses "From ambitions to actions: assessing new transitional justice institutions in DRC". The foundation of transitional justice in the history of the Democratic Republic of the Congo (DRC) dates to the *Conférence Nationale*

Souveraine (CNS) held in 1991/1992. This paper portrays the state of play of institutions specially created to handle transitional justice issues across the DRC.

Mohamed Ndiaye, Senegal, a participant of the 2025 Dakar workshop publishes his paper on "Responsiveness as a form of revitalizing the legal framework of the Senegalese political sphere: Towards a new form of engagement and appropriation of politics by youth". The papers' objective is to show that a law different from classical law is emerging in the political sphere. A law characterized by pragmatism and flexibility.

All articles published in this volume cover the continuation of cooperation and demonstrate the engagement of a young generation of African lawyers.

Special thanks go to all participants and organizers at the KAS Rule of Law Program, for their commitment and input.

Hartmut Hamann Stefanie Rothenberger

ANALYSING THE LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING THE ESTABLISHMENT OF A NUCLEAR POWER PLANT IN KENYA

By Hannah Wamuyu*

Abstract

The article examines the legal and institutional framework governing the establishment of nuclear power program in Kenya owing to the heightened efforts by the government in laying out the plans to establish the first nuclear power plant (NPP) amidst protests by the communities. The analysis is done by examining relevant international law, national law and policies laying down the frameworks and plans for establishing a NPP. Further, review of documents and literature has been done to support the analysis. Kenya needs to strengthen the legal and institutional framework by ensuring that critical treaties and supporting protocols are ratified in order to align with the international standards governing a NPP to guarantee safety of its people and protection of the environment while ensuring that Kenya progresses in development. There is need to lay out comprehensive laws and regulations and supporting mechanisms fortheir implementation and enforcement to enhance management of a NPP.

A. Introduction

A number of policies support lay out the basis of establishment of a NPP as a source of energy. The Kenya Vision 2030 has identified energy as a key enabler for its realization. The Sessional Paper No. 4 on Energy[1] highlighted Kenya's considerations of adopting nuclear power and its economic merit.[2] The Least Cost Power Development Plan (LCPDP)[3] and the Energy Act of 2019 do justify and provide a framework for the inclusion of nuclear energy in Kenya's energy mix.[4] The policy notes that nuclear energy has the potential to provide reliable baseload electricity to meet the country's growing energy demand.The Nuclear Power Energy Agency (NuPEA), established under the Energy Act, is the nuclear energy program implementing organization whose mandate is to promote the development

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1 Sessional Paper No. 4 on Energy (Government of Kenya, 2004).

2 *KIPPRA*, 'Road to Nuclear Power in Kenya' (KIPPRA Discussion Paper 341 2024), 5.

3 Ministry of Energy & Petroleum, Least Cost Power Development Plan 2024–2043.

4 NUPEA, 'Progress of Kenya Nuclear Power Development' https://www.nuclear.co.ke/about-us/our-business/progress-of-nuclear-power-development/> accessed November 17,2025.

of nuclear electricity generation in Kenya; and carry out research, development and dissemination activities in the energy and nuclear power sector.[5] The Kenya Energy Transition and Investment Plan (2023) introduces nuclear power as a clean energy solution in order to replace fossil fuels in order to help Kenya reduce carbon emissions.[6] Various nuclear applications are already in use in food & agriculture, human health, water resource management, industrial processes, education, research and training, water desalination, oil extraction and mining.[7]

Kenya's association with nuclear power can be traced back to as early as 1965, when the country became a member of the International Atomic Energy Agency (IAEA). The IAEA is an intergovernmental agency that promotes peaceful use of nuclear technology and nuclear power worldwide. The need to regulate development of nuclear technology for civilian uses culminated in the establishment of IAEA in July 1957 as the worlds "Atoms for Peace" organization tasked with the core mandate of ensuring that nuclear technology was applied exclusively for peaceful purposes through the establishment and administration of safeguards either at the request of the party state to the Statute of the IAEA, or pursuant to bilateral and multilateral arrangements.[8]

Several challenges impede the implementation of nuclear programs including: high construction costs, insecurity, corruption, political instability, lack of technical, financial and institutional capacity, poor institutional and regulatory frameworks and inadequate human capital and infrastructure.[9] Concerns over risk of accidents and spent fuel disposal have further hindered the adoption of nuclear energy.[10] It is therefore important to identify the minefields Kenya faces in order to set up and run a nuclear power plant effectively.There is need to set an elaborate regulatory framework that provides pathways to effective management of a NPP. The purpose of this article is to assess the suitability of Kenya's legal and regulatory framework concerning the management of a nuclear power plant (NPP).

B. Implementing a Nuclear Power Program in Kenya

Countries intending to develop a NPP usually do so by implementing a nuclear power program.[11] A nuclear power program refers to a plan that establishes the necessary infrastructure to support a nuclear power plant project during its planning, licensing, con-

5 Energy Act, 2019.

6 *KIPPRA* (n 2) 6.

7 *Ministry of Energy & Petroleum*, National Nuclear Policy, Final Report, April 2024 5.

8 Article II.A.5 of the IAEA Statute. *Catherine Kianji* et. al., Importance of Law and Policy on Successful Utilization of Nuclear Technology for Electricity Generation, (2013) Proceedings of 2013 Mechanical Engineering Conference on Sustainable Research and Innovation 62.

9 *KIPPRA* (n 2) 13.

10 *KIPPRA* (n 2) 13.

11 *KIPPRA* (n 2).

struction, commissioning, operation, fuel and waste management, and decommissioning. Construction, commissioning and operations are the core elements of a nuclear power plant project.[12] NuPEA is following the International Atomic Energy Agency (IAEA) Milestone Approach to implement the national nuclear program.

Effective implementation of these programs requires the necessary infrastructure, policies and regulations to be first developed and set up. The IAEA has a framework whose main purpose is to assist emerging nuclear countries in setting up a nuclear power program. The framework has three phases, each with its own milestone, and it is called the Milestone Approach.[13] The Milestones Approach sets out certain guidelines that a country may adopt to holistically evaluate its status (level of development) concerning 19 infrastructure issues as it embarks on the development of its nuclear power program.[14] Phase one consists of the considerations to be made before the launch of a nuclear program, the choice of whether to have a nuclear program or not. Phase two is the preparatory work once the decision in phase one has been made and, lastly, phase 3 has the implementation activities.[15]

NuPEA with assistance from the IAEA has done extensive work in the implementation of the nuclear power program in the country. The various activities undertaken as reported by the agency include: pre-feasibility study; human resource development, electric grid study, strategic environmental assessment; regulatory framework development and public engagement.[16] NuPEA needs to implement the program carefully cognizant of the challenges such as the high capital cost required to develop and sustain nuclear power program; stakeholder buy-in due to safety and environmental concerns; lack of regulatory framework for implementation of nuclear power; long duration and life cycle of developing nuclear energy and insufficient local expertise to develop nuclear power program[17]

One of the first requirement to be met is to establish a national position signifying the country's intent to develop nuclear power program. The national position is the outcome of a process that establishes the governmental strategy and commitment to develop, implement and maintain a safe, secure and sustainable nuclear power program. This process results in a national decision that clearly communicates the state's national policy, as well as the state's commitment to proceed according to the international obligations of the State and international norms and standards.[18] Kenya has fulfilled this requirement, with the gov-

12 *International Atomic Energy Agency* – IAEA (2007), "Milestones in the development of a national infrastructure for nuclear power". *Nuclear Energy Series*, No. NG-G3.1, IAEA, Vienna, Austria.

13 *International Atomic Energy Agency – IAEA* (2012), "Milestones in the development of a national infrastructure for nuclear power". *Nuclear Energy Series*, No. NG-G3.1, IAEA, Vienna, Austria.

14 *Kianji* et al. (n 8) 64.

15 *KIPPRA* (n 2) 2, 3.

16 *NUPEA*, 'Progress of Kenya Nuclear Power Development' https://www.nuclear.co.ke/about-us/our-business/progress-of-nuclear-power-development/> accessed November 17, 2025.

17 Ministry of Energy and Petroleum, Draft Energy Policy 2025–2034, 8.

18 *IAEA*, Building a National Position for a New Nuclear Power Programme, IAEA Nuclear Energy Series [2016] 2.

ernment already having developed a national nuclear policy and 15-year nuclear strategic plan. The nuclear power program is also incorporated in the country's main policies such as the development agenda (Kenya Vision 2030), the energy sector plans (LCPDP) and many other policies discussed in the paper.[19]

In the process of establishing a national position, the state must engage the public and relevant stakeholders during the development and implementation of the national position by using effective communication strategies and stakeholder involvement to lead to a more sustainable national position, while ensuring broader support for the development of a new nuclear power program.[20]

NuPEA has identified several possible sites where a nuclear power plant (NPP) could be set up one of them being Uyombo in Kilifi County. The residents of Uyombo staged protests rejecting the plans to have NPP set up in the area for lack of transparency, community engagement and the fact that the area is a biodiversity hotspot.[21] A petition was filed in court challenging the plans to set up the nuclear power plant raising concerns of lack of capacity to run a plant; lack of adequate public participation and inadequate policy and legal framework.[22] The next section looks at the international and national legal framework that regulates nuclear development by ensuring safe use which will help in identifying areas that need to be strengthened for better implementation of the nuclear power program.

C. The International Legal Framework governing use of Nuclear Power

Kenya as a member of the IAEA commits to cooperate in the development of nuclear power by aligning with international law that promote its peaceful use.

I. The Treaty on Non-proliferation of Nuclear Weapons (NPT)

The Treaty on Non-proliferation of Nuclear Weapons (NPT) establishes an international legal framework by which states work to steer the use of nuclear science and technology towards peace and development and away from development of nuclear weapons. This is primarily achieved through a safeguards system within the United Nations' International Atomic Energy agency (IAEA). Kenya is party to the NPT and has also signed a Comprehensive Safeguard Agreement and Additional Protocol with the IAEA.[23]

19 IAEA [2016](n 18) 20.

20 See (n 17).

21 *NTV Kenya*, 'Uyombo residents demand transparency in Nuclear Power project'https://www.youtube.com/watch?v=qrbyJVSKigI accessed November 17, 2025.

22 *Ngolo & another* v *Nuclear Power Energy Agency (NuPEA) & 2 others; County Attorney-Kilifi County Government & 2 others (Interested Parties)* [2024] KEELC 14071 (KLR).

23 Ministry of Energy & Petroleum, National Nuclear Policy, Final Report, April 2024, 1.

II. The 1963 Vienna Convention on Civil Liability for Nuclear Damage

The 1963 Vienna Convention,[24] sought to allow prompt and equitable compensation and the enforcement being enabled by the national legal systems.[25] Similar conventions and protocols were developed to strengthen the liability and compensation regimes after 1986 following the Chernobyl accident.[26] The regimes bear features of liability which help in the process of holding those responsible for nuclear damage undertake prompt and equitable compensation.[27] The liability of the operator for nuclear damage under the convention is absolute[28] and the liability is channeled to the operator which minimizes litigation as liability is already channeled to the operator.[29] The time limitation of raising such claims is 10 years from the time of the incident.[30] But, where the law of the installation state requires the operator to be covered by insurance, other financial security or by state funds, for a period longer than ten years, then the law of the limitation shall be guided by the law of the installation state and therefore can be longer than 10 years.[31]

The regimes provide funding mechanisms for compensation which guarantee availability of meaningful compensation in the event of a nuclear incident. Various sources are provided from which funds can be sourced.[32] There is a mandatory requirement of undertaking insurance for the unforeseen risks and therefore the operator is required to

24 1063 UNTS 265.

25 *Ben McRae*, Convention on Supplementary Compensation for Nuclear Damage e(CSC) and Harmonisation of Nuclear Liability Law within the European Union (2011) 87 Nuclear L Bull 74.

26 The protocols are the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention (Joint Protocol), the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage (Protocol to the Vienna Convention), ' the Convention on Supplementary Compensation for Nuclear Damage (CSC), the Protocol to Amend the Convention on Third Party Liability in the Field of Nuclear Energy (Protocol to the Paris Convention) and the Protocol to Amend the Convention of January 31, 1963 Supplementary to the Convention of July 29, 1960 on Third Party Liability in the Field of Nuclear Energy (Protocol to the Brussels Supplementary Convention); Protocol to Amend the Convention of 31 January 1963 Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy, <available at https://www.oecdnea.org/law/brusselssupplementaryconvention.pdf.>.

27 *Ben McRae*, The Compensation Convention: Path to a Global Regime for dealing with Legal Liability and Compensation for Nuclear Damage (International Nuclear Law in Post Chenorbyl Period), Nuclear Law Bulletin,193, *Michael Faure & Tom Borre*, Compensating Nuclear Damage: A Comparative Economic Analysis of the US and International Liability Schemes[2008] 33 (5) 227.

28 Article IV (1), *Jonathan Bellamy*, Civil Liability for Nuclear Damage in Countries Developing Nuclear Built Programmes, Journal of World Energy Law and Business [2018] 5.

29 *Ben McRae* 197, Jonathan Bellamy 5.

30 *Jonathan Bellamy(n28)* 6.

31 Vienna ConventionArticle VI(n 24).

32 *Ben McRae*, The Compensation Convention: Path to a Global Regime for dealing with Legal Liability and Compensation for Nuclear Damage (International Nuclear law in Post Chenorbyl Period) 191.

maintain insurance or other financial security covering his liability for nuclear damage in such amount, type and terms as the installation state may require.[33] The state is required to cover payment of claims for compensation for nuclear damage which have not been covered under the insurance or other financial security.[34] Kenya has not yet ratified these conventions and protocols on liability despite their importance in providing redress mechanisms.

III. The Convention on Early Notification of a Nuclear Accident

The Convention on Early Notification of a Nuclear Accident[35] requires a notification of the accident and the setup of preventive measures upon the occurrence of an accident. The disclosure of an accident and prevention measures would mitigate harm and therefore ease the burden of compensation.[36] The state is required to rapidly avail available information in order to limit the radioactive consequences in other countries.[37] Information that should be disclosed includes time, location and nature of accident, the installation or activity concerned, the presumed or known cause, the likely evolution of the accident and the general characteristics of radioactive discharge.[38] The response measures do assist in mitigating damage, as taking prompt action can go a long way to limit the scope of compensation. Kenya is not a party to this convention despite the important measures it provides.

IV. Convention on the Physical Protection of Nuclear Material (CPPNM)

This is the key international legal instrument in nuclear security and the only internationally legally binding counter-terrorism instrument.[39] The CPPNM establishes legal obligations for parties regarding the physical protection of nuclear material used for peaceful purposes; the criminalization of certain offences involving nuclear material; and international cooperation, for example, in the case of theft, robbery or any other unlawful taking of nuclear material or credible threat.[40] The Amendment to the CPPNM extends the scope of the

33 Vienna Convention Art VII, *Bellamy* (n 26). *Michael G. Faure and Tom Borre*, Compensating Nuclear Damage: A Comparative Economic Analysis of the U.S. and International Liability Schemes, Wm. & Mary Envtl. L. &Pol'y Rev 33 (2008) 219, 238.

34 Article VII.

35 Sep 1986, 1439 U.N.T.S 275.

36 Art 1 (f) CSC convention.

37 Art 2 b, in *Alexendre Kiss*, State Responsibility and Liability of Nuclear Damage 35 (1) 2006 Denver Journal of International Law and Policy 75.

38 art 5 (1) a-d.

39 The CPPNM entered into force on 8 February 1987 and subsequent amendments to the Convention were done in 2005; *Kianji et al* (n 8), 62.

40 IAEA, Convention on the Physical Protection of Nuclear Material (CPPNM) and its Amendment https://www.iaea.org/publications/documents/conventions/convention-physical-protection-nuclear-material-and-its-amendment#scope accessed November 28, 2025.

original treaty to cover physical protection of nuclear facilities and nuclear material used for peaceful purposes in domestic use, storage and transport. It criminalizes offences related to illicit trafficking and sabotage of nuclear material or nuclear facilities while providing for strengthened international cooperation in the assistance and information sharing in the event of sabotage.[41] Kenya is a party to the Convention and its amendment,[42] therefore the state is obliged to comply with the provisions therefrom.

V. Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency 1987

The convention provides an international legal framework to facilitate the prompt provision of assistance in the event of a nuclear accident or a radiological emergency to mitigate its consequences.[43] Kenya is yet to ratify the convention, although it has expressed the intention to accede to support the nuclear power development.

VI. The Convention on Nuclear Safety 1994

The Convention on Nuclear Safety (CNS)[44] provides a framework for enabling states to achieve and maintain a high level of nuclear safety worldwide through the enhancement of national measures and international co-operation including, where appropriate, safety-related technical co-operation; establish and maintain effective defences in nuclear installations against potential radiological hazards to protect individuals, society and the environment from harmful effects of ionizing radiation from such installations; and prevent accidents with radiological consequences and to mitigate such consequences should they occur.[45] Kenya is yet to ratify this convention.

VII the Joint Convention on the Safety of Spent Fuel and Radioactive Waste Management (1997)

The convention provides a framework for enabling safety in spent fuel and radioactive waste management, through the enhancement of national measures and international co-operation; ensuring that effective defenses are in place during all stages of spent fuel and radioactive waste management to guard against potential hazards to protect individuals, society and the environment from harmful effects of ionizing radiation and preventing

41 See above.

42 Kenya acceded to the original CPPNM on February 11, 2002, and accepted the Amendment on August 1, 2007.

43 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency 1987, Art 1.

44 CNS, IAEA Doc. INFCIRC/449, 1963 UNTS 293.

45 CNS, art 1.

accidents with radiological consequences and to mitigate their consequences should they occur during any stage of spent fuel or radioactive waste management.[46] Kenya is yet to ratify the convention. Kenya's nuclear policy recognizes the importance of adopting these conventions to fully develop the nuclear power program.[47]

D. The National Legal Framework

Internal treaties, conventions,protocols and or agreements ratified by Kenya form part of the applicable law in Kenya. In addition, the Constitution of Kenya lays down the normative framework that for safe use of nuclear energy through the entrenchment of governance principles of sustainable development and the obligation of the state to protect ad safeguard human rights.Therefore, development of a nuclear power program should be done in a way to support sustainable development and respect of human rights. The constitution requires that state ensures that there is sustainable exploitation of natural resources they same which should benefit the citizens of Kenya and while at it, the state should eliminate processes or activities that are likely to cause harm to the environment.[48] Developmenment of a nuclear power program should therefore ensure it meets the requirement of the constitution.

The supporting statutes and regulations give life to the constitutional provisions and international standards set to enable safe use of nucleartechology and creating enforceable obligations.

I. Nuclear Regulatory Act (NRA)

NRA provides a comprehensive framework for the regulation of safe, secure and peaceful utilization of atomic energy and nuclear technology; the production and use of radiation sources and the management of radioactive waste.[49] The objects of the law are to regulate the safe, secure and peaceful development, production, possession, use, storage, transport, transfer, disposal or handling of nuclear and radioactive materials, activities and facilities and other apparatus generating radiation; and protect persons, property and the environment in relation to nuclear and radioactive material, activities and facilities and other apparatus generating ionizing radiation.[50]

The Kenya Nuclear Regulatory Authority (KNRA), an institution established by the Act, is mandated to ensure the safe, secure and peaceful use of nuclear science and technology; protect persons, property and the environment against the harmful effects of

46 Joint Convention on the Safety of Spent Fuel and Radioactive Waste Management (1997), art 1.

47 *Ministry of Energy*, National Nuclear Policy June 2022, 28.

48 Constitution of Kenya, art 69.

49 NRA, Chapter 243 Laws of Kenya.

50 NRA s 3.

ionizing radiation through the establishment of a system of regulatory control and exercise regulatory control over siting, design construction, operation, among other functions.[51]

KNRA scope of work covers regulatory control: notifications, authorizations, inspections and enforcement.[52] The authority has oversight responsibilities over the enforcement activities done by the inspectors.[53] The person subject to enforcing action shall take necessary measures to remedy compliance as directed by the authority or as soon as practically possible and prevent recurrence. The authority may, where the case presents an immediate safety or security hazard to people, property or the environment, require the authorized person to suspend its activities until the situation has been remedied.

The authorized person must plan and implement the technical and organizational measures necessary to ensure adequate safety, including effective defenses against radiological hazards; prepare and implement an appropriate emergency plan; ensure compliance with the dose limits established by the authority and monitor the radiation exposure of workers; possess adequate human and financial resources to conduct the proposed activity in a manner that ensures safety and security; not modify the conduct of any authorized activity in a manner that could affect the protection of workers, patients and the public or the environment without seeking the written approval of the authority; and provide upon request by the Authority, all information considered to be necessary by the authority.[54]

Where an authorized person undertakes an activity likely to cause public exposure to neighboring states, the authorized person shall notify the Authority of the intended activity,[55] who shall then notify the neighboring state. Failure to comply can result in being ordered to paying a fine of not exceeding ten million shillings or to imprisonment for a term not exceeding ten years or to both.[56] This is a provision which should be reviewed to incorporate more stringent measures because such public exposure may lead to irreversible damage.

1. Safety and Responsibility for Radiation Sources and Facilities

The authority must establish a system of control over radiation sources to ensure they are safely managed and securely protected during and at the end of their useful lives; and prescribe a categorization of sources based on the potential injury to people and the environment.[57] An authorized person must bear the primary responsibility for ensuring the

51 s 7 (3) NRA.
52 S 21 NRA.
53 NRA s 31.
54 NRA s 33(c-h).
55 NRA s 36 (1).
56 NRA s 36.
57 NRA s 37.

safe and secure use of radiation sources.[58] The authority must establish and maintain a national register of radiation sources; establish the categories of radiation sources required to be included in the national register; and ensure protection of information contained in the national register to guarantee the safety and security of these sources as appropriate.[59] An authorized person shall promptly report to the authority any loss of control over radiation sources, or any other situation; or incident in connection with a radiation source that may pose a significant risk of radiological injury to persons or substantial damage to property or the environment.[60]

The authority must establish a system for recovery and safe management of orphan sources; be responsible for coordinating the response to radiological emergencies as a result of orphan sources; bear the primary responsibility of the safety of orphan sources of which it has notice; establish programs aimed at detecting orphan sources in places where such sources are generally suspected to be; draw up appropriate response plans and measures for handling orphan sources; and give specialized technical advice and assistance to persons not normally involved in operations subject to radiation protection requirements and who suspect the presence of an orphan source.[61] KNRA must work together with NEMA to ensure that the environment is protected, consequently NEMA may issue clean up and remediation measures where necessary.

2. Safety of Nuclear Facilities and Decommissioning

KNRA plays a critical role in the authorization for siting, constructing, operationing and decommissioning nuclear facilities.[62] The authority must prescribe requirements in connection with the authorization, review and assessment of a nuclear facility, including the requirements for nuclear facility design; siting; construction; commissioning; operation; decommissioning; remediation; and such other activity relating to construction and operation, as may be necessary.[63]

It is the responsibility of KNRA to ensure that the general public is informed and consulted at appropriate steps during the authorization process of a nuclear facility.[64] The authorized person shall bear the primary responsibility for ensuring safety and security of the facility and all activities associated with it.[65]

58 NRA s 38.
59 NRA s 39.
60 NRA s 40.
61 NRA s 41.
62 NRA s 43(1,2).
63 NRA s 43(3).
64 NRA S 43 (6).
65 NRA S 44.

A person applying for a site authorization for a nuclear power plant shall prepare a site evaluation report.[66] The site evaluation report must contain critical information that is necessary to determine whether such a site is ideal for setting up a nuclear facility. The information must include: the frequency and severity of external natural and human induced events and phenomena that could affect the safety of the facility; the foreseeable evolution of natural and man-made factors in the region that may have a bearing on safety for a time period that encompasses the projected lifetime of the facility; the hazards associated with external events that are to be considered in the design of the facility, including the potential combined effects of hydrological, hydrogeological and meteorological conditions; particulars relating to safety such as the storage and transport of nuclear material; the possible non-radiological impact of the facility, due to chemical or thermal releases, and the potential for explosion and dispersion of chemical products; the potential for interactions between nuclear and non-nuclear effluents; the potential radiological impacts in operational states and conditions on people in the region, including impacts that could lead to emergency measures or potential impacts outside the territory of the Republic of Kenya; and the total nuclear capacity to be installed on the site, with provision for re-evaluation of the site if the installed capacity is to be significantly increased beyond the level assessed in a previous site evaluation.[67]

To bolster the safety measures, the authority must review and assess a number of things before granting authorization for construction and operations. The authority must review the competence and capability of the applicant or authorized person to meet relevant authorization requirements during construction and operation; the site evaluation report, to confirm its acceptability, and related information needed for the design of the proposed facility; the potential environmental impact of the proposed facility; the basic design of the proposed facility, to confirm that it can meet relevant safety, security and physical protection requirements; the management systems of the applicant or authorized person; research and development plans and arrangements for decommissioning and management of radioactive waste including financial mechanisms.[68]Inevitably, the authority must have the capacity to review the competence and the capability of the applicants.

Before granting an operation authorization for a nuclear power plant, the authority shall review and assess the commissioning program and, if needed, establish a schedule for further review and assessment prior to operation; as-built design and construction and manufacturing quality of the facility; results of non-nuclear commissioning tests; limits and conditions for operation during commissioning, with a staged approach, if necessary; provisions for radiation protection; adequacy of operating instructions and procedures, especially the main administrative procedures, general operating procedures and emergency operating procedures; recording and reporting systems; arrangements for training and qualification

66 NRA S 45 (1) .
67 NRA S 45 (2).
68 NRA S 46(1-2).

of facility personnel, including staffing levels and fitness for duty requirements; management systems for operation; emergency preparedness program; accounting measures for nuclear and radioactive material; adequacy of physical protection measure arrangements for periodic testing, maintenance, inspection and control of modifications and surveillance; arrangements for decommissioning and management of radioactive waste; results of commissioning tests; and limits and conditions for operation.[69]

The requirements for the decommissioning of nuclear facilities where radioactive sources are produced, used or stored must be set up by KNRA.[70] Setting decommissioning requirements ensures that nuclear energy development remains safe, financially responsible and environmentally sustainable throughout its full lifecycle, thereby protecting present and future generations.[71]

The applicant must perform a baseline survey of the site, including radiological conditions, prior to construction; and develop information prior to construction for comparison with the end state after decommissioning; ensure that relevant documents and records prepared by the authorized person are maintained for a specified period of time before, during and after decommissioning; establish criteria for determining when a nuclear facility or part of a facility must be permanently shut down; and evaluate the end state of the facility after decommissioning activities have been completed to ensure that relevant regulatory requirements have been met.[72]

The regulatory requirements to be met include safety and environmental criteria, including conditions on the end state of decommissioning; limits and conditions for the removal of regulatory controls for facilities containing radionuclides; criteria for the clearance of radioactive material during and following decommissioning; and such other requirements as may be prescribed. KNRA shall release an authorized person from regulatory control upon demonstrating that the end state in the decommissioning plan has been reached and all other regulatory requirements have been met.[73] It is very critical that the authority gets the required capacity to set these requirements to ensure safe establshment of a NPP.

The Decommissioning Plan

At the design stage of facilities, the applicant for an authorization to construct and operate a facility shall prepare an initial decommissioning plan for approval by the authority which shall be commensurate with the type and status of the facility and the hazards that

69 NRA S 47(3).

70 NRA Art 48 (1).

71 International Atomic Energy Agency (IAEA), *Decommissioning of Nuclear Power Plants, Research Reactors and Other Nuclear Fuel-Cycle Facilities — Specific Safety Guide (SSG-47)* (2018).

72 NRA S 48 (1).

73 NRA S 48(2).

may be associated with its decommissioning.[74] The authority must ensure that the public and interested parties are provided with an opportunity to review and comment upon the decommissioning plan prior to its approval.[75] Public participation is clearly a priority in this case of setting a decommissioning plan. The authority must require the authorized person to provide periodic reviews and updates of the decommissioning plan and shall specify the maximum time interval between such reviews and updates; where specific circumstances result in significant changes to the initial decommissioning plan, require the authorized person, to revise and update the plan to reflect these changed circumstances and submit it to the Authority for approval.

A final decommissioning plan must be prepared and submitted for approval prior to the implementation phase of decommissioning activities. The authority must ensure that a program to implement and monitor compliance with remaining regulatory requirements has been established for sites where decommissioning has been completed but where authorizations or restrictions on future use of the site remain.[76] The authority shall, upon completion of decommissioning, ensure that appropriate records for confirmation of the completion of decommissioning activities are maintained in accordance with the approved decommissioning plan including the records of the premises and of the disposal of radioactive waste and material.[77]

A decommissioning fund[78] shall be administered by the authority[79] and shall cater for decommissioning and the management of radioactive waste and spent fuel.[80] The sources of funds for the fund shall consist of all moneys appropriated by the National Assembly, or paid into, or allocated to the Fund under the provisions of any other law; domestic and foreign grants; and any property or amount of money received or acquired from any other legal sources.[81] The Cabinet Secretary, in consultation with the National Treasury, may make regulations on the administrative operations of the Fund and the financial requirements for decommissioning.[82] By National Assembly setting apart funds needed means that the sources of such funds are from the taxes and or government revenues which can be burdensome for the country as such funds are needed for other recurrent expenditureand development needs. Reliance on grants is not a gurantee on the availability of such funds. An operator of the plant should make provision for decommissioning by providing financial

74 NRAS 49 (1–2) .
75 NRA S 49 (3).
76 NRA S 49.
77 NRA S 49.
78 NRA S 52.
79 NRA S 54.
80 NRAS 55.
81 NRA S 53.
82 NRA S 56.

resources or commitments which aligns with the polluter pays principle and precautionary principle.

3. Emergency Preparedness and Response

KNRA (the authority) in liaison with the national body responsible for responding to national emergencies must define the criteria for classification of emergencies; review and approve emergency preparedness and response plans developed by an authorized person; and advise and provide technical support on radiological emergencies and nuclear accidents.[83] The KNRA ought not to approve any activity, operation, facility, or possession or use of a source unless an appropriate emergency preparedness and response plan has been developed by the applicant and approved by the Authority.[84] The national body responsible for responding to national disasters is the National Disaster Operation Center established pursuant to an executive order. Unfortunately its mandate is not supported by any statute therefore making it inadequate and less reliable in provision for funds and proper coordination.[85]

An on-site and off-site emergency plan shall be prepared in the prescribed form and manner for any facility, activity, or source. The emergency preparedness and response plans shall take into account an assessment of the nature, likelihood and potential magnitude of resulting damage, including the population and territory at risk from an accident, malicious act or incident; the results of any accident analyses and any lessons learnt from the experience or incidents and accidents that have occurred in connection with similar activities.[86] The plans must be periodically reviewed as directed by the KNRA.[87] The authorized person shall, in the event of a nuclear or radiological emergency, implement the emergency preparedness and response plan as approved by the Authority.[88]

4. Transportation of Radioactive Material

The Authority is mandated to regulate transportation of radioactive material in accordance with international standards.[89] Every carrier must maintain a radiation protection transport plan during transportation of nuclear material or radiation sources.[90] The transport plan

83 NRA S 57.

84 NRA S 58.

85 KC Rono-Bett, '*A political economy analysis of decision-making on natural disaster preparedness in Kenya*' (2018) 10(1) Jàmbá: Journal of Disaster Risk Studies <https://pmc.ncbi.nlm.nih.gov/articles/PMC6014147/> accessed 19 March 2026.

86 NRA S 59 (1).

87 NRA S 59 (3).

88 NRA s 60.

89 NRA S 63(1).

90 NRA S 66(1).

shall take into account the nature and extent of the measures to be taken in respect of the likelihood and magnitude of radiation exposures or environmental contamination; and adopt a structured and systematic approach including consideration of the interfaces between the mode of transport and other activities.[91] Failure to comply attracts criminal liability.[92]

In the event of an accident or incident during the transportation of a nuclear material or radiation source, a carrier must initiate its radiation protection transport plan approved by the Authority.[93] Illicit trafficking of nuclear material or radiation source attracts hefty criminal sanctions.[94]

5. Radioactive Waste and Spent Fuel Management

The Authority must establish a classification of radioactive waste to ensure the safe and secure management of radioactive waste in Kenya.[95] The primary responsibility for ensuring the safety and security of radioactive waste and spent fuel in a radioactive waste or spent fuel management inside or outside a facility throughout its life rests with the holder of the relevant authorization.[96] An authorized person shall be responsible for the safe management of radioactive waste generated by the activities for which the authorization is issued and shall take all necessary measures to ensure that generation of the activity and volume of radioactive waste are kept to the minimum practicable level by suitable design, operation and decommissioning of its facilities; radioactive waste is managed by appropriate classification, segregation, treatment, conditioning, storage or disposal, and maintaining records of such activities; management of radioactive waste is not unnecessarily delayed; and information sought by the Authority is furnished as requested.[97] To carry out the functions a waste management plan must be submitted by the authorized person.[98]

A waste management plan shall provide for the appropriate management of radioactive waste. It must include the following: an outline of the processes generating waste, and a description of the waste generated; a description of the environment into which the waste will be discharged or disposed, including the baseline radiological characteristics; a description of the proposed system for waste management including the facilities and procedures involved in the handling, transportation, treatment, storage or disposal of radioactive waste; prediction of environmental concentrations of radionuclide and radiation

91 NRA S 66(2).
92 NRA S 66(3).
93 NRA S 67(1).
94 NRA S 72.
95 NRA S 75.
96 NRA S 74 (1).
97 NRA S 74(2).
98 NRA S 101.

doses to people from the proposed waste management practices, including demonstration of adherence to the radiation protection requirements under this Act; a program for monitoring the concentration of radionuclides in the environment and assessment of radiation doses to members of the public arising from the waste management practices; emergency plans for dealing with accidental releases, or circumstances which might lead to uncontrolled releases of radioactive waste, to the environment; a schedule for reporting on the operation and results of monitoring and assessments required by this plan; a plan for decommissioning the operation and the associated waste management facilities and remediation of the site; and a system of periodic assessment and review of the adequacy and effectiveness of procedures instituted under the plan to ensure currency and to take account of potential improvements consistent with best practicable technology.[99]

An authorization must be given to allow for storage, management, transfer or disposal of radioactive waste. The authorized person must take appropriate measures to keep generation of radioactive waste and its environmental impact to the minimum practicable.[100] Failure to comply attracts hefty criminal fines and or an imprisonment for a term not exceeding five years, or to both.[101] Criminal liability is not sufficient, the authorised person should also incur civil liability should the disposal of such radioactive waste cause harm to the environment to cater for remediation of the environment and compensation to victims.

An authorized person shall ensure that radioactive waste from authorized activities is not discharged to the environment unless such discharge is within the limits specified in the authorization and is carried out in a controlled manner using authorized methods; or the discharge is confirmed to be below the radioactivity clearance level prescribed by the Authority.[102] An applicant for an authorization for a radioactive waste and spent fuel management facility shall meet safety requirements for the protection of persons, property and the environment by appropriate planning for the siting, design, construction, operation and maintenance of the respective facility, including provisions for eventual retrieval of the waste; and design the facility.[103]

The importation of radioactive waste and spent fuel generated outside the territory of Kenya is prohibited[104] but the one generated within the Republic of Kenya may be exported only upon authorization by the Authority.[105] In determining export authorization for radioactive waste and spent fuel, the authority shall consider whether the importing State has been notified of the transfer of radioactive waste and spent fuel prior to its receipt and has consented to such transfer; movement of the intended exported material shall be

99 NRA S 76(2).
100 NRA S 77(23).
101 NRA S 77(4).
102 NRA S79(1).
103 NRA S 80.
104 NRA S 81.
105 NRA S 82(1).

conducted in conformity with relevant international obligations in all States through which the material will transit; and the importing State possesses the regulatory infrastructure and technical capacity necessary to manage the exported radioactive waste and spent fuel.[106]

6. Safeguards for peaceful use of nuclear material

In enabling the application of safeguards, KNRA must ensure the implementation of the obligations of Kenya arising from ratified international treaties and conventions; by providing to International Atomic Energy Agency (IAEA) the applicable international entity information required to fully implement Kenya's international and national obligations; facilitating entry into, access within the Republic of Kenya and offering necessary support to designated inspectors of the applicable international entity; and ensuring all agencies of the Government of Kenya and authorized persons cooperate fully with the applicable international and national entities in application of safeguard measures.[107] It is important for Kenya to ratify treaties and conventions concerning safe use of nuclear energy. Similarly it is important to strengthen existing legislation and regulations to ensure alignment with international standards and as a guarantee of safe use of nuclear technology.

Inspection subject to the safeguards regime by an inspector of the Authority and a designated inspector of the IAEA must be allowed with a view of conducting verification activities.[108] The Authority must effectively manage the system of accounting for and control of nuclear material by making regulations to ensure the effective implementation of safeguards in Kenya by establishing and implementing a system for the measurement of nuclear material; a system for the evaluation of measurement accuracy procedures for reviewing measurement differences; procedures for carrying out physical inventories; a system for evaluation of unmeasured inventories; a system of records and reports for tracking nuclear material inventories and flows; procedures for ensuring that accounting procedures and arrangements are being operated correctly; and procedures of reporting to the applicable international entity.[109]

7. Nuclear Security and Physical Protection

KNRA must co-ordinate threat assessment which is to be carried out by the national security institutions.[110] It is the responsibility of an authorized person to ensure security measures are put in place in accordance with the threat identified.[111] An authorized person

106 NRA S 82(3).
107 NRA, s 84(1-2).
108 NRA S 85.
109 NRA, S 87.
110 NRA, S 89 (1).
111 NRA, S 89(2.

is primarily responsible for ensuring the physical protection of nuclear material, radioactive material and related facilities under its control.[112] Where there has been theft, threat of theft or loss of nuclear material, an authorized person must notify the Authority without delay of the incident and circumstances.[113]

The Authority must issue guidelines to on protection from attempted or actual unauthorized access of or illicit trafficking of nuclear and radioactive materials or sabotage of their associated facilities.[114] In the event of an unlawful taking or threat of unlawful taking of nuclear material, the Authority must inform other States that may be affected of the circumstances of the incident and the relevant international entity.[115] KNRA is the lead authority responsible for coordinating recovery and response in the event of any theft or unlawful taking of nuclear material.[116] The Authority shall provide information on incidents involving unlawful taking of nuclear material, equipment and technology to the applicable international entity.[117] The Act prescribes sanctions for anyone who commits an offence relating to nuclear facilities[118] The Director of Public Prosecutions may, on the request of the Authority, gazette any officer of the Authority to be a public prosecutor for the purposes of prosecuting offences under the NRA.[119] A Memorandum of Understanding (MoU) was recently signed between the Office of the Director of Public Prosecutions (ODPP) and the NuPEA,[120] about strengthening inter-agency collaboration to address nuclear power-related offences, particularly emerging and complex crimes linked to Kenya's advancing nuclear energy programme.[121]

II. The Environment Management and Coordination Act

The Environment Management and Coordination Act (EMCA) provides for the establishment of the National Environmental Management Authority (NEMA) as the principal agency of government in the implementation of all policies relating to environmental management.[122] NEMA oversees the process of environmental impact assessment (EIA), strategic environmental assessment for projects like the establishment of a NPP that are

112 NRA, S 90(1).
113 NRA, S 90 (2).
114 NRA S 90(3).
115 NRA S 91(1).
116 NRA S 91(2).
117 NRA S 91 (3,4).
118 NRA S 94.
119 NRA S 97.
120 The MoU was signed on 17 March 2026.
121 Uzalendo News, DPP, Nuclear Agency Seal Landmark Deal to Tackle Nuclear-Related Offences(2026, March 17) < https://uzalendonews.co.ke/dpp-nuclear-agency-seal-landmark-deal-to-tackle-nuclear-related-offences/>accessed March 24, 2026.
122 EMCA, Act No.8 of 1999(Laws of Kenya).

potentially deleterious to the environment.[123] NEMA implements the polluter pays principle where pollution occurs by requiring the polluter to effect remediation measures to the degraded environment.[124] Nonetheless, the primary responsibility of managing nuclear waste lies with KNRA.[125] NEMA may be involved as a player because it is the coordinating agency in environmental matters.

Nuclear waste will require licensed facilities, segregation, and minimization, maintenance of waste inventories, transport manifests, and decommissioning plans with financial assurances.[126] EMCA does control effluent discharges and water abstraction while monitoring forms of thermal pollution that may be caused by running nuclear power plant.[127]

EMCA criminalizes importation, processing, mining, exportation, possession, transport, use, or disposal of radioactive materials or other source of dangerous ionizing radiation without a licence that has been validly issued by the Authority.[128] The EIA framework is the cornerstone of sustainable energy development, balancing the need for energy generation with sustainability of ecosystem.[129]

III. The Energy Act

The Energy Act (EA) establishes the Nuclear Power and Energy Agency,[130] which is the nuclear energy program implementing organization and promotes the development of nuclear electricity generation in Kenya; and carry out research, development and dissemination activities in the energy and nuclear power sector.[131]

In order to carry out the functions, the agency is mandated to propose policies and legislation necessary for the successful implementation of a nuclear power program; undertake extensive public education and awareness on Kenya's nuclear power program; identify, prepare and facilitate implementation of an approved roadmap for a nuclear power program; in collaboration with the relevant government agencies develop a comprehensive legal and

123 EMCA S 58 .

124 EMCA, s2. S9.

125 NRA (s 6, 73-82)

126 Environmental Management and Coordination (Waste Management) Regulations, 2006 (Legal Notice No. 121).

127 Environmental Management and Coordination (Water Quality) Regulations, 2006 (Legal Notice No. 120.

128 EMCA, S 65.

129 *Ahmad Mahadi*, 'An analysis of Policy, Regulatory and Environmental Impact Assessment Requirements to Support Sustainable Development of Nuclear Energy in Malaysia' Master of Science (Graduate Programs in Sustainable Energy Development) 24.

130 Energy Act, S 54 .

131 Energy Act,S 56 (1).

regulatory framework for nuclear electricity generation in Kenya; identify appropriate sites in Kenya for the construction of nuclear power plants and their related amenities.[132]

Conclusion

Kenya has majorly progressed in meeting the legal and regulatory frameworks prerequisites. However, further development of these frameworks is needed for them to cover all aspects of nuclear law and implementation of international legal instruments and accommodate various sizes of aspects of the nuclear power program.[133] Kenya needs to effectively engage people on the nuclear power program and genuinely commit to carefully implement it to avert any nuclear incident. Kenya will need to ratify the treaties and supporting protocols it has not ratified to fully protect the people of Kenya and the environment. The legal framework for disaster management needs to be developed as such a management of disaster emanating from nuclear damage cannot be managed through presidential directives. The legal architecture has to align to the international legal framework for disaster management.

132 Energy Act, S 56 (2) .
133 KIPPRA (n) 42.

An Assessment of the Legal Framework for the East African Monetary Union (EAMU): A Case Study of the EAC and Uganda

By George Ocen*

Abstract

The legal framework of the East African Monetary Union (EAMU) consists of both EAC legal instruments and Partner State legal instruments. The Community legal instruments designate the priority areas for harmonisation in preparation for the EAMU. These guides on which Partner State laws may be relevant to the EAMU. Laws on banking, taxation, payment systems, and other commercial laws regulate fiscal policy, monetary policy, exchange rate policy, surveillance, compliance, and payment systems. These are also the areas envisaged under the Protocol as priority areas for harmonisation. In our assessment of the legal framework, therefore, we ask whether the EAC legal instruments are effective. Issues like lack of strict timelines, requirement for consensus in making key decisions, failure to explore and provide for more successful theoretical and practical alternatives, and lack of enforcement and sanction mechanisms render these laws ineffective. Regarding Partner State laws, their divergence from one state to another, non-recognition of EAMU goals, provisions conflicting with EAMU goals, and political barriers implicit in their texts present challenges for actualisation of the EAMU. We make conclusions, and suggest actionable recommendations for stakeholders at all levels.

A. Introduction.

The legal framework for the East African Monetary Union (EAMU) comprises Community and Partner State legal and policy instruments. Community instruments include the Treaty Establishing the East African Community (the Treaty), the Protocol on the Establishment of the East African Monetary Union (the Protocol), Acts of the East African Legislative Assembly (EALA), including the East African Monetary Institute Act 2019 (the EAMI Act), and relevant regulations; decisions; directives; and opinions of the Council of Ministers of the EAC (the Council) and Sectoral Committees.[1] Relevant Partner State instruments

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1 *Tralac*, EAC Legal Texts and Policy Documents, https://www.tralac.org/resources/by-region/eac.html (accessed 15 December 2025).

include their Constitutions, Central Bank Acts, Financial Institutions' Acts, Income Tax Acts, Budget Framework Papers, and Budget Speeches, among others.

The EAMU traces its origin to the defunct East African single currency area that operated between 1919 and 1965. This was not formulated by a Treaty, but was constituted by the UK Secretary of State for the Colonies, named the East African Currency Board (EACB), and it commenced operations.[2] It was governed through a series of regulations, including its Constitution, Secretary of State Approvals, and Orders in Council. It issued and regulated the East African Shilling in Uganda, Kenya, Tanganyika, Zanzibar, Eritrea, Ethiopia, Somalia, and the Middle Eastern territory of Aden (present-day Yemen).[3]

The single currency supplied and controlled by the EACB was the East African Shilling. Through the regulations, the EA shilling was backed by sterling securities. Hence, for every single EA shilling that was issued by the board, there was an equivalent in sterling securities reserved as security in London.[4] This practice ensured the stability of the single currency area. One downside, however, was the lack of flexibility of the individual countries in dealing with shocks. Nevertheless, the single currency area thrived up to 1965 when the three Ministers of Finance for Kenya, Tanzania, and Uganda announced that they would be creating their respective national central banks.[5]

The EACB continued for a time as the currencies of the three newly independent countries were still backed by sterling securities. In 1967, however, the pound sterling was devalued by up to 14.3 % causing a substantial drop in the value of the Commonwealth's foreign reserves in London.[6] Finally, in 1972, the British government withdrew its guarantee agreement for the sustained convertibility of its currencies.[7] Other arrangements of a monetary union nature, such as cooperation in fiscal and monetary policies, continued under the East African Community (EAC). The collapse of the EAC in 1977 ended all forms of cooperation on monetary and fiscal policies among the three countries.

2 *IMF*, The East African Currency Board, https://www.elibrary.imf.org/view/journals/024/1966/002/article-A003-en.xml (accessed 15 December 2025).

3 *Mwangi Wambui*, Of Coins and Conquest: The East African Currency Board, the Rupee Crisis, and the Problem of Colonialism in the East African Protectorate, Comparative Studies in Society and History, 43(4), 2001, 765.

4 *International Bank for Reconstruction and Development*, The Economy of Uganda, https://documents1.worldbank.org/curated/en/155551468349440654/pdf/multi0page.pdf (accessed 15 December 2025).

5 *Lubega Henry*, When Plan for Single East African Currency came crumbling down in 1965, https://www.monitor.co.ug/uganda/magazines/people-power/when-plan-for-single-east-african-currency-came-crumbling-down-in-1965-1855868 (accessed 15 December 2025).

6 *Cardiff University*, The Sterling Devaluation of 1967, the International Economy and Post-War Social Democracy, https://orca.cardiff.ac.uk/id/eprint/13695/1/912.full%20Newton.pdf (accessed 15 December 2025).

7 *Ezeoha A*. et al, The United Kingdom, the Sterling Area operations, and reserve management in Nigeria: The politics of the Sterling Guarantee Agreement (1931–1979), https://www.tandfonline.com/doi/full/10.1080/20780389.2025.2495614#abstract (accessed 15 December 2025).

It took 38 years, up to 2015, for another monetary union agreement amongst the countries to come into force. As noted above, the constitution of the EACB and operationalisation of its constitution, regulation, and orders in council were concluded in December 1919, and implementation started immediately the same year. In contrast, the EAMU Protocol came into force in 2015, ten years later in 2025; there is no implementation of its provisions. This article, therefore, looks at the legal factors that could be responsible for this protracted delay.

It begins with the introduction, which gives a historical peek into the first successful single currency area in East Africa. The second section gives a comprehensive background of the community's legal instruments, pointing out the weaknesses embedded therein. The third section looks at the national legal instruments of Uganda, assessing them against preparedness for the monetary union. The fourth provides actionable recommendations for the EAC, Uganda, and other Partner States. It ends with a conclusion.

B. Community Instruments

I. The Treaty

The Constitutive Treaty of the EAC provides for the EAMU under articles 5(2), 82, and 151 thereof. It sets up the EAMU as the third stage of integration after the customs union and the common market. The fourth and final stage, unique to the EAC, is the political federation. Prior cooperation in monetary policy, fiscal policy, and maintaining the convertibility of currencies among the Partner States is required. Furthermore, after ascertaining the proper operations of the customs union and the common market, the Council exercised its mandate as the EAC's policy institution and proposed the EAMU Protocol to the Summit of Heads of States (the Summit).[8]

The Treaty envisions a progressive attainment of the aforementioned stages of EAC integration. However, it omits strict timelines for the full realisation of each stage. A stage does not need to be fully implemented before the subsequent stage can commence. This has led to simultaneous implementations of the customs union, common market, and now the monetary union.[9] These two former stages commenced in 2005 and 2010, respectively, a five-year gap. The same was attempted for the EAMU. Its Protocol was adopted in 2015. The five-year gap sequencing has proved insufficient, as there remain many challenges with the implementation of both the customs union and the common market.[10] These include non-tariff barriers, non-alignment of national policies, and lack of political will, among others. These directly undermine the commencement of the EAMU.

8 *EAC*, The Monetary Union, https://www.eac.int/monetary-union, (accessed 15 December, 2025).

9 *Makame Abdullah*, The East African Integration: Achievements and Challenges, https://ecdpm.org/work/trade-and-development-making-the-link-volume-1-issue-6-august-2012/the-east-african-integration-achievements-and-challenges, (accessed 15 December 2025).

10 Ibid.

Writing on the failures of the customs union, Okumu and Nyankori opine that, as much as the tariff barriers have been eradicated in the region, non-tariff barriers have eradicated all the gains that were attributed to that eradication in the region.[11] Technical considerations as to quality and standards, have led to immense difficulty in intra-regional trade. Similarly, the free movement of goods, services, and persons (labour) and rights to establishment and residence under the Common Market Protocol are yet to be fully realised. Chilangazi and Magasi identify 'political barriers, high transportation costs, food insecurity, discrepancies in standards, limited logistics and trade services, and restricted access to finance" as the major emerging challenges in the EAC common market.[12] Hence, the failure of the Protocol to provide for full implementation before transition has led to the current stagnation in the integration process at the Monetary Union level.

The success of a monetary union requires harmonisation of fiscal and monetary policies. Because of the imperfection of the customs union and common market, these policies cannot be easily harmonised. For example, the failure of the free movement of goods and services results in stagnation of regional payments and settlement systems. The immense burden of the non-tariff barriers discourages intra-regional trade, and systems that should have been advanced by continued usage are stagnated by the low volumes of Trade among the Partner States.[13] Similarly, banking prudential and regulation rules do not get a regional application due to the lack of usage of the preparatory system of the EAMU.

The elements pertinent to the customs union and the common market, such as productivity levels, growth rates, diversification, trade openness and integration, labour mobility, and capital mobility, are the prime indicators of real convergence in a monetary union.[14] As will be shown below, the EAMU does not focus on real convergence, that is, the convergence that assesses the structural and economic similarity of States that want to enter a monetary union. These should ideally be attained through the proper functioning of the preliminary steps. Because the Treaty did not emphasise their perfection, their imperfect implementation has drastically affected nominal convergence, which is required in the EAC. This has led to the current reluctance by Partner States to enter a Monetary Union with states whose economies are not structurally similar to their own, hence the protracted delay of over 10 years.

11 *Okumu Luke* and *Nyankori Okok*, Non-Tariff Barriers in EAC Customs Unions: Implications for Trade Between Uganda and other EAC Countries, https://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASHa807/88fd7b10/2b933020/3b.dir/EPRCseries75.pdf (accessed 15 December 2025).

12 *Chilangazi Eliah*, and *Magasi Chacha*, Emerging challenges in implementing the common market protocol for free movement of goods in the East African community, https://www.ssbfnet.com/ojs/index.php/ijrbs/article/view/2642 (accessed 15 December 2025).

13 *Drummond Paulo,* et al., Toward a Monetary Union in the East African Community: Asymmetric Shocks, Exchange Rates, and Risk-Sharing Mechanisms, https://www.imf.org/external/pubs/ft/dp/2015/afr1506.pdf?utm_source=chatgpt.com (accessed 15 December 2025).

14 *Dirk Willem te Velde*, Regional Integration, Growth and Convergence, Journal of Economic Integration, 26(1), 2011, 1.

The Treaty also provides for all decisions of the Summit to be made by consensus. This gives each country a de facto veto power. In the EAMU operationalisation process, this veto power has prolonged the process by at least two years. Currently, the Summit is having discussions on the location of the Headquarters of the EAMI. This has been carried over for two meetings. It could have been dispensed with in a single sitting if it were subject to other decision-making formats, such as a simple majority among others. This has also affected the establishment of some of the vital institutions mentioned above in the earlier parts of this essay.

II. The Protocol

The EAMU came into force through the Protocol on the EAMU. It provides for the harmonisation of monetary, fiscal, exchange rate, interest rate, surveillance, compliance, and enforcement, payment and settlements, and bank regulation and prudential control policies and systems. At the core of the Protocol are the mandatory convergence criteria that should be attained and maintained for three years by all the Partner States. The protocol portrays all these as preparatory stages and briefly hints at institutions and laws necessary for the actual operation of the EAMU. Prime among these are the East African Central Bank and, Statistics Institute.

As stated, the convergence criteria including (a) a ceiling on headline inflation of 8 %; (b) a ceiling on fiscal deficit, including grants of 3 % of Gross Domestic Product; (c) a ceiling on gross public debt of 50 % of Gross Domestic Product in Net Present Value terms; and (d) a reserve cover of 4.5 months of import, form the core of the Protocol. These are to be attained and maintained for three consecutive years before the EAMU can be operationalised. These are nominal convergence criteria which focus mainly on macro-stability, that is, achieving a stable macro-economic environment and aligning with key monetary and fiscal indicators. These are easier to achieve than the real convergence criteria, but as stated above, they lead to less structural similarity amongst the Partner States, and affect the ability of the monetary union to effectively respond to asymmetric shocks as a bloc.[15]

Additionally, the convergence criteria approach is based on the optimum currency area (OCA) theory that posits that when the convergence criteria are met and sustained, the single currency area is ready to commence operation.[16] This is the approach that was preferred by Europe, albeit they also abandoned it and commenced the single currency area

15 *Olorunsola E. Olowofeso*, et al, Comparative Analysis of Nominal and Real Convergence in West African Monetary Zone (WAMZ): Time Varying Parameter Approach, https://www.wami-imao.org/sites/default/files/2024-07/OPS%2033%20%20Comparative%20analysis%20of%20nominal%20and%20real%20convergence%20in%20the%20WAMZ.pdf (accessed 15 December 2025).

16 *Mundell A. Robert*, A Theory of Optimum Currency Areas, file:///C:/Users/ADMIN/Downloads/9781557756527-ch002.pdf (accessed 15 December 2025).

in the European Union (EU) without the full attainment of the OCA.[17] There is very little evidence of any regional economic community (REC) in the world, at the monetary union level, that has actually obtained the OCA requirements and sustained them. This is a rather taxing requirement if all evidence points to its impossibility.

Additionally, the OCA approach at the core of the protocol ignores political factors in the success or failure of a monetary union. It solely focuses on economic factors. Dr. Annie Barbara Chikwanha has stated that most of the failures of the EAC so far are directly attributable to political factors.[18] The EA single currency area of old came into being by way of a political pronouncement. Similarly, all the monetary unions currently on the African continent are in place as a result of political pronouncements, and not the attainment of convergence criteria. Cécile Couharde et al opine that these areas, despite not starting as OCAs, have performed well as single currency areas.[19] In recognition of the fact that political decisions play a big factor, the Protocol should have expressly provided how the political decisions as to the commencement of the monetary union would be taken with hard deadlines, such that failure to meet them would render it obsolete. This would have prevented the current situation of uncertainty over whether or not the EAMU will ever become operational.

III. Acts of the Community

Under the Protocol, the East African Monetary Institute EAMI) is described as the preparatory institution for the EAMU. Ligami reported that the EAC had adopted the EAMI Bill and the Bill establishing the EA Statistics Bureau to fast-track the EAMU.[20] Consequently, the EAMI was formally established under section 3 of the EAMI Act 2019. It is set up to coordinate the harmonisation of (i) the monetary and exchange rate policies of the Partner States; (ii) the legal framework for the regulation and prudential supervision of banking systems of the Partner States; and (iii) payment and settlement systems of the Partner States. As such, all the preliminary harmonisation steps to create the best macro-economic environment for the EAMU are supposed to be coordinated by the EAMI.

17 *European Central Bank*, Speech by Otmar Issing, Member of the Executive Board of the ECB, Helsinki, 24 March 2006, https://www.ecb.europa.eu/press/key/date/2006/html/sp060324.en.html, (accessed 15 December 2025).

18 *Annie Barbara Chikwanha*, The Anatomy of Conflicts in the East African Community (EAC): Linking Security with Development, https://www.ascleiden.nl/pdf/lectureanniechikwanha.pdf (accessed 15 December 2025).

19 *Cécile Couharde, et al*, Revisiting the theory of optimum currency areas: Is the CFA franc zone sustainable? https://www.cepii.fr/PDF_PUB/wp/2012/wp2012-13.pdf (accessed 15 December 2025).

20 *Ligami Christabel*, EAC adopts Bills to pave the way for monetary union, https://www.theeastafrican.co.ke/tea/business-tech/eac-adopts-bills-to-pave-the-way-for-monetary-union-1392658 (accessed 15 December 2025).

However, the Act provides that it will come into force upon gazetting. The decision over gazettement is supposed to be recommended to the Summit by the Council. The decision has to be a by way of consensus.[21] There are new Partner States that were not part of the ratification in 2015. These, according to the legal framework, still have a veto power over such decisions owing to the consensus rule. Important questions arise as to the practicality of the consensus model. As a result, since 2019, the Act has never been gazetted. This defeats the purpose of the legislation process, and most importantly, it has curtailed the monetary integration process and set it behind already by six years.

Needless to mention that the Bill establishing the EA Statistics Bureau has never been enacted into law since it was adopted in 2017. In our considered opinion, the Protocol is a missed opportunity in ensuring timely implementation of the EAMU. First it provides under Article 5 (1) (a) that the EAMU can only commence operations after the 'full' implementation of the customs union and common market protocols. It omits to define what 'full implementation' means. As such it is assumed that the earlier highlighted simultaneous implementations of the customs union and common market stages, coupled with the attendant challenges also highlighted above, amount to fully implementing the respective protocols. If it were not so, the Protocol and relevant community Acts would have been delayed pending full implementation of the prior stages.

This lack of clarity has, in turn, negatively impacted the community's Acts relevant to the EAMU. Just like the Treaty, the EAMU Protocol omits to set timelines for the attainment of EAMU goals. It also adopts nominal convergence criteria instead of real convergence criteria. As such, Partner State economies are structurally dissimilar, are ill-equipped to handle asymmetric shocks, and the political arms have a plethora of reasons to delay the implementation of the EAMU. It should have taken lessons from protracted operationalisation and continued deferment of timelines in the West African Monetary Zone (WAMZ).[22] The WAMZ delays are attributable to the same reasons highlighted here.[23]

IV. Lacunae

Since none of the community acts that actualise the protocol are in force, this is, in reality, a description of the entire community legal framework in relation to the EAMU. It is riddled with gaps and non-functional instruments. Earlier, we intimated that the EAMU aspires for harmonisation of "monetary, fiscal, exchange rate, interest rate, surveillance, compliance, and enforcement, payment and settlements, and bank regulation and prudential control policies and systems." It follows that the community should provide Acts for each of these aspects, which, in line with Article 8 (4) of the Treaty, which states that "Community

21 *Rwengabo Sebastiano*, Consensus and the Future of the East African Community, https://www.acode-u.org/uploadedFiles/PBP36.pdf (accessed 15 December 2025).

22 *Daily Trust*, Another postponement of ECOWAS common currency, https://dailytrust.com/another-postponement-of-ecowas-common-currency/ (accessed 15 December 2025).

23 Ibid.

organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty.", should supersede Partner State laws on the same subjects. However, these Acts are mostly not in place.

C. The Legal Framework in Uganda

Uganda is a founding Partner State of the EAC. It has a robust legal framework, albeit criticised for poor implementation.[24] Uganda is a dualist country, and ideally, all community laws should be domesticated through enabling legislation before they are applicable in Uganda.[25] The constitution of Uganda 1995 predates the EAC Treaty and hence makes no express mention of the status of community laws and policies. As such, the implementation of community laws and policies by the courts of law in Uganda has been seldom and far in between.

Uganda was a beneficiary of the World Bank-funded modernisation of commercial law statutes to align them with the EAC standards.[26] As such, the contracts, insolvency, banking, employment, and procurement Acts were revised in the mid-2000s. These laws largely capture the thematic areas of harmonisation and approximation required under the Treaty and the EAMU Protocol. However, as we shall show shortly, these laws mirrored international standards dictated by the donors, but fell short of harmonizing and encouraging common practices among the Partner States of the EAC. The review process was another missed opportunity towards fast tracking integration stages including the monetary union.

I. Fiscal Policy: The Income Tax Act and National Budget

The Income Tax Act of Cap 338 is the primary taxation statute. Regarding EAC affairs the East African Customs Management Act and the East African Excise Management Act were enacted to actualise the provisions of the Customs Union Protocol.[27] This is complemented by the national budget through which the government indicates its taxation policy for the

24 Nakamwesi Dorothy, Government good at policy formulation, poor at implementation – Badagawa, https://www.monitor.co.ug/uganda/business/prosper/government-good-at-policy-formulation-poor-at-implementation-badagawa-1634748 (accessed 15 December 2025).

25 *Jamil Ddamulira Mujuzi*, International human rights law and foreign case law in interpreting Constitutional rights: The Supreme Court of Uganda and the death penalty question, https://scielo.org.za/pdf/ahrlj/v9n2/10.pdf (accessed 15 December 2025).

26 *Mugasha Agasha*, The Reform and Harmonisation of Commercial Laws in the East African Community, https://repository.essex.ac.uk/21491/1/EJLR_Law%20Reform.pdf (accessed 15 December 2025).

27 *Dentons*, Taxation in Uganda, https://www.gtuganda.co.ug/globalassets/_markets_/uga/media/doing_business_in_uganda_taxation.pd, (accessed 15 December 2025).

financial year, introduces new taxes, adjusts existing ones, and offers tax incentives.[28] Together, they form the backbone of the fiscal policy of Uganda. The EAC has introduced simultaneous reading of the national budgets of all Partner States, and all Partner States follow the same financial year cycle.[29] However, the role of coordination of the fiscal policies for the EAMI is still falling short. Other than the budgets being read on the same day, encouraging nations like Burundi to adjust their budget cycles, and comparisons as to budget amounts, there is little evidence of effort to align the budget provisions (hence the fiscal policies) towards the attainment of the convergence criteria. For instance, Kuteesa states that studies have largely found that there is no budget deficit convergence in the region.[30]

Additionally, there is no indication in Uganda's taxation law that it is attempting harmonisation with the rest of the taxation laws in East Africa. Save for the coincidence that laws of the three British ex-territories of Tanzania, Uganda, and Kenya are almost in *pari materia* in terms of the tax laws, there is actually no guidance as to practice in modern times. This guidance is needed in matters that may result in economic shocks, such as tax holidays for non-EAC individuals and companies (so-called investors), issuance of supplementary budgets, wealth redistribution programmes, and distribution of bonuses to tax-collecting bodies from tax revenues. UNU-WIDER found that foreign firms in Uganda are overrepresented among the beneficiaries of tax incentives, with associated losses to Uganda peaking at $42 million in 2020. On average, Uganda loses 0.12 of its GDP to these incentives, and these benefit the individual businesses at the expense of the wider economy.[31] Some of these practices may not be sound, leading to scepticism among other Partner States to fiscally integrate with others orchestrating such practices.

II. Monetary Policy: Banking

The major law for bank regulation and prudential supervision in Uganda is the Financial Institutions Act, Cap 57. This Act provides for the Bank of Uganda (the Central Bank) as the single regulatory and prudential supervisory authority in Uganda. As such, the Central

28 *Ndagire Betty*, Hidden tax changes in the 2025/2026 Budget, https://www.monitor.co.ug/uganda/business/prosper/hidden-tax-changes-in-the-2025-2026-budget-5105814, (accessed 15 December 2025).

29 *Umidha Steve*,Why EAC Nations' Budget Reading is held on a Wednesday, https://www.financialfortunemedia.com/why-this-years-budget-reading-is-on-wednesday/ (accessed 15 December 2025).

30 *Annete Kuteesa*, East African Regional Integration: Challenges in Meeting the Convergence Criteria for Monetary Union, https://eprcug.org/publication/east-african-regional-integration-challenges-in-meeting-the-convergence-criteria-for-monetary-union-a-survey/?ind=1603362778069&filename=East%20African%20Regional%20Integration%20Challenges%20in%20Meeting%20the%20Convergence%20Criteria%20for%20Monetary%20Union%20A%20Survey.pdf&wpdmdl=11849&refresh=68d45a434dbdf1758747203 (accessed 15 December 2025).

31 *UNU-WIDER*, What is the impact of Corporate Tax Incentives in Uganda?, https://www.wider.unu.edu/sites/default/files/Publications/Research-brief/PDF/RB-2024-1-What-impact-corporate-tax-incentives-Uganda.pdf?utm_source=chatgpt.com, (accessed 15 December 2025).

Bank is the one that provides standard operating procedures for banks, and is at the same time responsible for monitoring, supervising, and punishing errant banks. This model has been widely criticised for overburdening the Central Bank, causing conflicts of interest, and discouraging specialisation of entities.[32] Recent legislation, for example, the Kenya Banking Act Cap 488, has moved away from and adopted the twin peaks model, where the regulatory authority is separated from the supervisory authority. This avoids conflict of interest and concentrates the specialisation of capacity. In the absence of a guiding EAC law, this disparity has been allowed. It is therefore difficult for countries like Kenya and Uganda, with no structural similarity in the banking sector, to willingly enter into the monetary union.

The second important law is the Bank of Uganda Act, Cap 54. This establishes the Bank of Uganda and defines its roles to be performed independent of government interference. It is mandated to lend to the government and to control the flow of money in the economy through setting interest rates, selling bonds, and other measures. Mutebile opines that the effectiveness of Bank of Uganda (BoU) should be judged on its ability to control inflation.[33] Under the Protocol, the Central banks like BoU are supposed to cede some of their powers to the East African Central Bank (EACB). There is nothing in the letter of the BoU Act envisaging such a cessation of powers. Also, there is no indication under the Act that the Central bank should cooperate with other national central banks in the EAC as required under the Protocol.

III. Other Policies

In addition to the fiscal and monetary policies, Uganda has legislations that pertain to the requisite thematic harmonisation requirements already highlighted above. For example, the National Payment Systems Act Cap 59 regulates the efficiency and safety of payment systems in the country. In relation to regional integration, this Act does not refer to ongoing developments in regional payment systems. It does not provide for cross-border payment systems. This Act was enacted in 2020. The East African Payments System (EAPS), an initiative of the EAC Central Bank Governors, was launched in 2016, envisioning "a real-time gross settlement basis by utilising the linkage between the various Partner States' Real Time Gross Settlement (RTGS) systems.[34]" This shows that the lack of integration of

32 *Donato Masciandaro*, Should Banks also be supervisors: A political economy perspective, https://www.suerf.org/publications/suerf-policy-notes-and-briefs/should-central-banks-also-be-supervisors-a-political-economy-perspective/?utm_source=chatgpt.com, (accessed 15 December 2025).

33 *Emmanuel Tumusiime-Mutebile*, The role of the central bank in the post-2015 era to promote local ownership of monetary and fiscal policies and processes, https://www.bis.org/review/r141119f.htm, (accessed 15 December 2025).

34 *Tralac*, Launch of the East African Payment System (EAPS), https://www.tralac.org/news/article/5782-launch-of-the-east-african-payment-systemeaps.html, (accessed 15 December 2025).

monetary union goals is not only reflected in the older pieces of legislation, but also in the post-2015 pieces of legislation.

D. Conclusions

From the foregoing, the following conclusions can be made about the legal framework for the EAMU:

There is a delayed enactment and implementation of critical pieces of legislation. All the legislation meant to actualise the EAMU is either non-existent or non-operational. As a result, there is no standard for the Partner States to follow in the enactment of their own domestic legislation, to harmonise with other partner States, or to approximate accordingly. This has led to differing legal and institutional setups in the Partner States, which limit real, nominal, and institutional convergence. This has led to this unconscionable delay in the operationalisation of the EAMU.

Secondly, the legal frameworks at both the Community and Partner State levels are inadequate to guarantee autonomy, especially of Central Banks. The BoU Act, for instance, does not provide adequate safeguards prohibiting government instructions to BoU. This has been exacerbated by the appointment procedures under the Act. For example, section 27 (1) of the BoU Act provides that the Governor and Deputy Governor shall be appointed by the President on the advice of the cabinet. This mode of appointment potentially affects the personal autonomy of the officials. As such, they may be susceptible to abiding by state instructions which are against sound Central Bank standards, undermining the autonomy that is required for the success of the EAMU.

Thirdly, there are sovereignty transfer issues that go to the root of the foundations of the Partner States. For example, BoU is created under Article 161 of the 1995 Constitution of Uganda. Its powers are enunciated thereunder; it is designated as the only authority to issue the currency of Uganda. As seen above, under the Treaty and EAMU Protocol, it is required that BoU and other national central banks should cede this sovereignty to the EACB. However, this process has not yet been streamlined. There are no guidelines as to how the central banks will cede this sovereignty, which aspects to be ceded, and the timeline thereof.

The legal frameworks for public finance management are divergent and poorly coordinated. This also suffers from a lack of standard setting at the community level through Acts of the Community. Reporting on data, tax policies, and financial institutions regulation is not yet harmonised. Some national laws and policies conflict with the monetary union objectives. It becomes extremely difficult to operationalise a region-wide fiscal policy. It should be noted that the Partner States favour independent fiscal policies for dealing with shocks. They are reluctant to cede this to the community.

The assessment of the legal framework has not revealed a formidable enforcement mechanism. For example, what are the consequences for non-compliance by Partner States? This question is neither raised nor answered in the Treaty, the Protocol, or the supporting

community Acts. For example, some countries have acted erroneously in ways that undermine the attainment of the convergence criteria. Some have enacted laws relevant to the EAMU and did not refer to it in their post-2015 legislation. The absence of clear sanctions mechanisms for non-compliance in the legal framework undermines the credibility of the EAMU.

E. Recommendations

Following the conclusions above, we make the following recommendations to ensure effective and timely implementation of the EAMU:

In addition to consideration of the economic factors, political factors should be considered and addressed. For example, decisions regarding ceding sovereignty of national central banks, ceding control over fiscal policy by national banks, and regulating government instructions to national central banks are almost entirely political decisions disguised as economic. These form the bedrock of resistance towards the actualisation of the EAMU. As such, there should be engagements with the top decision makers of each of the Partner States, they should be consulted on their reservations towards the EAMU, and these reservations should be transparently addressed.

From the previous point, it is discernible that the legal framework of the EAMU, greatly influenced by the OCA theory, ignores political factors. It also ignores the fact that nominal indicators are not as convincing as real indicators are, especially to Partner State decision makers. Kuteesa makes a clear distinction between the two thus:

> *Real convergence relates to the equalization of economic welfare and social structure. In this case, similarities in the level of competitiveness, labor and macroeconomic performance as measured by real economic outcomes of per capita incomes, productivity, industrial indicators, trade links, business cycle synchronization etc. reveal the extent real convergence. On the other hand, nominal convergence relates more to the movement of nominal variables including budget deficits, inflation, exchange rates etc.) directed to the achievement of macroeconomic stability and greater uniformity.*

The indicators of real convergence criteria are more visible than those of nominal convergence. The protocol should be revised to make the real convergence criteria mandatory. We are of the view that the nominal criteria may be easy to attain on paper, but they cannot compel the political decision that gets monetary unions running. On the other hand, real convergence criteria may take a long time to achieve on paper, but even mere efforts directed towards their achievement force structural similarities of the economies of the countries in the union, and present better prospects of dealing with asymmetric shocks as a bloc. As pointed above, the ECOWAS single currency saga is a clear example of the failure of the easier route of nominal convergence. EAC should learn from that and opt for the more practical real convergence criteria.

Thirdly, the EAC should utilise its various decision-making institutions to set strict timelines for full implementation of prior stages of integration, including the customs union and the common market. The incomplete implementation of the stages has a negative ripple effect on the prospects of the EAMU. The EAMU should not be built on the weak foundations of an imperfect customs union and a weak common market. Thereafter, strict timelines should also be set for the attainment of milestones under the EAMU. Based on the analysis above, the current 2031 deadline announced by the Secretary-General appears to be a mere suggestion, rather than a binding deadline by which all parties concerned must work diligently to comply with. We desire the latter option for the effectiveness of the EAMU.

For the timelines to be effective, there must be clear enforcement mechanisms and sanctions for non-compliance among the Partner States. The East African Court of Justice (EACJ) is set up under the Treaty as the autonomous judicial arm of the EAC. It has not yet tried any cases of non-compliance by Partner States with the provisions of the EAMU. It is difficult to adjudicate on vague provisions, for instance, regarding timelines; state instructions to central banks, and failure to cede sovereignty to the EACB. These should first be designated as violations under a clear legal framework, and then they can be enforced through the relevant organs of the EAC.

F. Conclusion

The legal framework of the EAMU appeared robust and effective. However, upon trial with the real conditions on the ground, it has turned out ineffective to attain the commencement and implementation of the EAMU. The challenge is twofold, that is, embedded in the Community legal framework and the relevant Partner State laws. The Community Law consists of the Treaty, the Protocol, and the Acts of the Community is mostly composed of inactive instruments, with the exception of the Treaty. The Partner State laws on the other hand are divergent, some are against the goals of the EAMU, and others ignore the ideals of the EAMU despite being enacted post-2015. This causes a challenge that may compel revision of this legal framework, operationalisation of inactive instruments, and enforcement through sound institutions and sanctions for non-compliance.

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Uncounted Success: Rethinking the Role of Traditional Dispute Resolution in Africa

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Abstract

Traditional dispute resolution mechanisms (TDRMs) have long served as foundational tools for managing conflict across African societies. Grounded in communal norms and restorative justice principles, these systems provide accessible, culturally legitimate, and often highly effective alternatives to formal litigation. Yet, despite their enduring relevance and demonstrable success, TDRMs remain insufficiently recognized within formal legal frameworks, marginally represented in policy debates, and largely overlooked in contemporary justice sector reforms.

This paper interrogates the paradox of "uncounted success" — traditional justice mechanisms that consistently deliver meaningful outcomes yet remain excluded from official metrics, legal education, and institutional support. Drawing on comparative insights from Rwanda, Uganda, and South Africa, this paper traces the historical marginalization of customary systems, the persistence of legal hierarchies, and the structural challenges inherent in integrating plural justice models. It further engages with rights-based critiques and procedural concerns, while outlining reform pathways that safeguard cultural legitimacy and strengthen legal accountability.

By rethinking the place of traditional dispute resolution in Africa's justice landscape, the paper advances a more inclusive and pluralistic conception of justice—one that recognizes and values effective practices, even when they operate beyond the boundaries of the courtroom.

A. INTRODUCTION

The administration of justice across the African continent has long been characterized by the coexistence of formal dispute adjudication mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs).[1] TDRMs are community-based approaches to conflict resolution grounded in customary laws, cultural norms, and the authority of elders, chiefs, and

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1 *Orimaye Oluwafemi, et al,* Traditional Conflict Resolution Mechanisms and The Managing Dispute in Protected Areas in Nigeria: A review, Research Square, https://doi.org/10.21203.rs-6887124/v1 (accessed on 18 December 2025), p. 1.

other respected local leaders.[2] They emphasize dialogue, negotiation, and consensus-building, prioritizing social harmony and reconciliation over adversarial confrontation.[3] In many societies, these mechanisms are not only accessible and affordable but also culturally legitimate, reflecting the values and traditions of the communities they serve.[4] Their significance is particularly evident in rural areas, where formal courts may be geographically distant, financially burdensome, or linguistically inaccessible.[5]

According to Professor David McQuoid, TDRMs encompass negotiation, mediation, conciliation, adjudication, and reconciliation.[6] Although these categories are often presented as exhaustive, the practical landscape is far more diverse. Each society develops its own variations of dispute resolution. For example, in Sudan, customary mediation, compensation, and restitution mechanisms[7] are widely used, while other countries employ problem-solving workshops, councils of elders, informal mediation, traditional courts, and collective compensation systems such as diya.[8]

Despite their widespread use and proven effectiveness, the contributions of TDRMs remain largely unrecognized in official records, legal education, and national justice statistics. This paper refers to this phenomenon as "uncounted success"—a term that captures the reality that most disputes are resolved peacefully through traditional mechanisms, yet these outcomes remain invisible.[9] The concept highlights a persistent gap between the practical impact of community-based justice and its recognition within formal legal frameworks. In African justice systems, "uncounted success" reflects the under-acknowledged role of TDRMs in maintaining social stability, preventing conflict escalation, and fostering restorative justice.

Several interconnected issues arise from this situation. First is the paradox of effectiveness without recognition: TDRMs resolve disputes efficiently and are often preferred over formal courts, yet they lack official acknowledgment and institutional support.[10] Second, the absence of a clear legal framework creates uncertainty regarding the validity

2 *Matome Emmanuel Malatsi,* Investigating the restorative nature of the Traditional dispute Resolution Methods (Doctoral dissertation, University of Pretoria), Pretoria 2024, p. 1.

3 *Orimaye,* note 1 , p. 5 & 6.

4 *Muigua Kariuki,* Traditional Dispute Resolution Mechanisms Under Article 159 of The Constitution of Kenya 2010, Nairobi 2014, p. 12.

5 *Kariuki Francis,* Traditional dispute resolution mechanisms in the administration of justice in Kenya. In: E.I. Nwauche (ed), Citizenship and Customary Law in Africa (2020), p.33 – 68.

6 *David McQuoid-Mason,* Could traditional dispute resolution mechanisms be the solution to reducing the volume of litigation in post-colonial developing countries, particularly in Africa, Onati Social-legal Series, 11(2021), p. 7–9.

7 *Samuel Wassara*, Traditional Mechanisms of Conflict Resolution in Southern Sudan, Berlin, p. 8.

8 *Muigua,* note 4, p. 14.

9 *McQuoid-Mason,* note 6, pp. 598–599.

10 *Kariuki Muigua,* Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects, ADR, 10(2022), p. 1.

and enforceability of TDRM decisions.[11] Third, while formal courts—often shaped by colonial legacies and international standards—may not reflect the lived realities of local communities,[12] TDRMs embody indigenous knowledge systems developed organically to meet societal needs.[13]

Fourth, the undervaluation of TDRMs within legal and institutional structures threatens their sustainability and deprives communities of recognition for their own justice practices.[14] This uncertainty also leaves disputants unsure about the appropriate forum to approach or how TDRMs complement formal litigation when disputes escalate.[15] Fifth, the absence of oversight and standardization can perpetuate discriminatory practices, particularly affecting women, children, and marginalized groups.[16] Indeed, although TDRMs offer accessible and culturally appropriate forums, some customary practices may conflict with constitutional guarantees such as equality and non-discrimination.[17] Sixth, TDRMs often operate with minimal financial support, as state resources are disproportionately directed toward formal courts, despite the fact that TDRMs handle the majority of disputes.[18] This disparity reflects a systemic bias toward visible, formal institutions, even though TDRMs deliver most justice services.

This paper argues that addressing this gap is essential to ensure that TDRMs are not only preserved but also meaningfully integrated into legal frameworks, legal education, and institutional support systems. Such integration would enhance inclusivity, accessibility, and cultural legitimacy within African justice systems. Moreover, formal recognition would promote the continued use of TDRMs while ensuring that they operate within constitutional and human-rights-based parameters.

The research findings presented here are based on desk research using a doctrinal methodology to analyze legal doctrines and principles. The study relies on secondary sources, including legal texts, academic articles, statutes, commentaries, etc. This approach enables the identification of legal gaps and inconsistencies and supports a descriptive and analytical examination of the issues.

11 *Kariuki,* note 5, p. 59.

12 Totsuya *Obuchi,* Role of the court in the process of informal dispute resolution in Japan: Traditional and modern aspects, with special emphasis on in-court compromise, Law Japan, *20* (1987), p. 74.

13 *Kariuki Muigua,* Institutionalizing traditional dispute resolution mechanisms and other community justice systems, Nairobi 2017, p. 9.

14 *Ibid.*

15 Derara Ansha *Roba,* The interplay between traditional dispute resolution institutions and the formal justice in Ethiopia: The case of Jaarsa Biyyaa, African Journal on Conflict Resolution, 24(1) (2024), p. 3–5.

16 *Muigua,* note 13 , p. 15.

17 *Ibid.,* p. 15.

18 *Ibid.,* p. 16.

This paper is structured into six sections. Section One provides the introduction. Section Two discusses the historical and cultural foundations of TDRMs. Section Three highlights their efficiency and effectiveness. Section Four explains why the success of TDRMs remains uncounted. Section Five proposes strategies for re-valuing and strengthening the role of TDRMs. Section Six concludes the paper.

B. HISTORICAL AND CULTURAL FOUNDATIONS

The history of Traditional Dispute Resolution Mechanisms (TDRMs) in Africa is deeply rooted in community-based approaches that long predate the introduction of colonial legal systems.[19] Prior to colonial rule, African societies developed their own methods for monitoring, preventing, managing, and resolving disputes.[20] Each region, clan, lineage, or territorial community maintained distinct mechanisms tailored to its social structure and cultural norms. These mechanisms often relied on shrines, oath-taking, divination, and appeals to supernatural forces, reflecting a worldview in which wrongdoing was addressed through spiritual and communal processes rather than punitive condemnation.[21]

In this context, disputes were understood as threats to collective well-being rather than merely private disagreements. Consequently, dispute resolution was grounded in shared communal values rather than the individualism later introduced through colonial legal systems.[22] Concepts such as Ubuntu and Ubumuntu in Rwanda, or Nguni values in South Africa, emphasized dignity, harmony, humanity, and mutual care.[23] These values promoted cooperation for the common good and discouraged adversarial competition that could escalate conflict.[24]

Accordingly, dispute resolution was not conceived as a process of determining winners and losers but as an effort to restore relationships and mend the social fabric.[25] Community figures—elders, chiefs, religious leaders, and other respected authorities—facilitated these processes, drawing on their mastery of customary norms and shared values.[26] Because of

19 *Ejovi Austine., Iwerbgu Chuks Justus, A. Iwegbu,* Traditional Mechanisms of Conflict Resolution in Africa: A Pathway to Sustainable Peace in Nigeria, Zamfara International Journal of Humanities 2023, p. 61.

20 Ejovi/Iwerbgu, note 19, p. 63.

21 *Ibid.,* p. 62.

22 *Yaro, David Suaka, Ibrahim Mohammed Nuru-Deen, and Daniel Dramani Kipo-Sunyehzi*, Traditional Leadership and Conflict Management in Africa: An Examination of the Bole Chieftaincy in Ghana, African Quarterly Social Science Review, 1(2024), p. 57–9.

23 *Barbara Nussbaum,* African culture and Ubuntu, Perspectives, 17(2003), pp. 1–12.

24 *McQuoid-Mason*, note 6, p. 7.

25 *Yaro/Nuru-Deen/Kipo-Sunyehzi,* note 22 , p. 4.

26 *Ibid.,* p. 11.

the deep trust and moral authority vested in these figures, decisions were generally accepted without appeals procedures.[27]

Traditional justice systems were therefore anchored in principles of reconciliation, constructive dialogue, and community cohesion.[28] Emphasis was placed on reintegrating disputants into the community and repairing not only interpersonal relationships but also the broader communal bonds affected by the dispute.[29] These mechanisms were premised on the belief that social cohesion is a foundational pillar of societal stability. A dispute between two individuals was understood to have ripple effects across families, clans, and the community as a whole. Resolutions were thus designed to repair social harm, foster accountability, and prevent further conflict. This holistic approach to justice—highlighting consensus, empathy, and community stability—provides an important foundation for contemporary restorative justice models.[30]

Unfortunately, many traditional mechanisms were weakened or eliminated during the colonial period.[31] As Oyiniyi Abe observes, "with the advent of colonial administration, African values and beliefs which provided the foundational basis for TDRMs were eroded".[32] During colonial rule, traditional mechanisms coexisted with imported legal systems, but the latter prioritized individual rights, adversarial procedures, and the determination of liability. Unlike TDRM, conciliation and restorative justice were not actually central objectives of colonial courts.[33]

Over time, the colonial legal system systematically displaced African traditional legal practices, resulting in a dual legal structure in which customary systems survived but were subordinated to colonial frameworks. The formal courts required the participation of trained lawyers, effectively excluding traditional authorities—elders, chiefs, and other community leaders—from formal adjudication.[34] This exclusion significantly impeded the natural evolution and institutional development of TDRMs.

The marginalization of traditional dispute resolution mechanisms during the colonial period was justified on the pretext that these systems were allegedly unsuitable for handling

27 *Abe Oyeniyi,* Conflict Resolution in the Extractives: A Consideration of Traditional Conflict Resolution Paradigms in Post-Colonial Africa, Willamette Journal of International Law and Dispute Resolution, 25(2017), pp. 56–7.

28 *Skelton,* Regional reviews, in: Handbook of restorative justice, Cullompton 2007, p.468.

29 McQuoid-Mason, note 6, p. 6.

30 *Francis Kariuki,* Conflict Resolution by Elders in Africa: Success, Challenges and Opportunities, Alternative Dispute Resolution (9 July 2025), p.1.

31 *Ejovi/Iwegbu*, note 19 , p. 63.

32 *Oyeniyi,* note 27 , p. 56–7.

33 *Kinyanjui Sarah,* Restorative Justice in Traditional Pre-Colonial Criminal Justice System in Kenya, Tribal Law Journal 10 (2009), p. 1.

34 *Kehinde, Adeola Olufunke, and Modupe Nancy Wiwoloku,* Alternative Dispute Resolution: Historical and Contemporary Perspectives on Enhancing the Role of Traditional Rulers in Nigeria, Štát a právo, 200.

large-scale or complex disputes, particularly commercial matters involving foreigners. This rationale prompted colonial administrations to channel such disputes into formal courts, thereby creating a racially discriminatory judicial framework in which colonial settlers accessed formal adjudication while Africans were relegated to local courts and customary forums.

Colonial authorities often dismissed TDRMs as inadequate for handling complex or large-scale disputes, particularly commercial matters involving foreigners. This rationale justified the expansion of formal courts and produced a racially discriminatory judicial framework in which colonial settlers accessed formal courts while Africans were relegated to local or customary forums. Over time, the colonial legal system marginalized indigenous legal practices, resulting in a dual legal structure in which traditional systems survived but were subordinated. The requirement that formal adjudication be conducted by trained lawyers further excluded traditional authorities and impeded the evolution of TDRMs.

The dominance of colonial and Western legal systems also affected countries that were not formally colonized. Ethiopia, for example, was never colonized by European powers, yet the modernization reforms of Emperor Haile Selassie (1930–1974) introduced Western legal codes that displaced customary law and TDRMs.[35] This situation persisted until the adoption of the 1995 Constitution of the Federal Democratic Republic of Ethiopia, which formally recognized the coexistence of formal and informal justice systems, including religious and customary courts.

On the bright side, despite the historical dominance of formal legal systems, TDRMs continue to play a significant role in many African countries. For instance in Rwanda, succession-related disputes must first be addressed by the family council before being brought to the competent court or the Abunzi Committee.[36] Similarly, disputes arising from systematic land registration and boundary demarcation are initially resolved at the district level, with mediation available upon appeal.[37] In Uganda, land disputes are commonly handled by local leaders, traditional institutions, and elders using customary mechanisms.[38] In Nigeria, most land-related disputes continue to be resolved through traditional forums.[39] In Kenya, TDRMs remain widely used: in 2017, only 10 % of Kenyans with disputes sought court-based resolution, 19 % took no action, and 71 % relied on traditional mechanisms.[40]

35 *Roba,* note 15, p. 1.

36 Law no. 71/2024 of 26/06/2024 governing persons and family, Official Gazette (no special of 30/07/2024), art 386.

37 Law no. 27/2021 of 10/06/2021 governing land, O.G (no special of 10/06/2021), art 73(1,2).

38 Noel Kiiza Kansiime, Promoting Traditional Ways of Handling Land Disputes in Western Uganda. American Research Journal and Social Sciences 2(2019), pp. 17–25.

39 Law no. 27/2021, art. 73(4).

40 Judiciary of Kenya, Most Kenyans resolve their conflicts through Alternative Dispute Resolution (ADR)-CJ Koome. available at https://judiciary.go.ke/most-kenyans-resolve-their-conflicts-through-alternative-dispute-resolution-adr-cj-koome/ (accessed on 1 December, 2025).

TDRMs are also entrenched in the constitutional frameworks of several African states. The Constitution of Kenya mandates the promotion of alternative dispute resolution, including traditional mechanisms, as a guiding principle of judicial authority.[41] In Uganda, Article 37 of the 1995 Constitution recognizes the right to practice customary traditions, including dispute resolution. In Rwanda, Article 10 of the Constitution encourages the resolution of disputes through dialogue and consensus.[42] In South Africa, sections 34, 211, and 212 of the 1996 Constitution acknowledge the role of customary law and traditional leadership within the justice system.

C. TDRM'S EFFICIENCY AND EFFECTIVENESS

Traditional dispute resolution mechanisms have, from time immemorial, played a central role in resolving conflicts across African societies.[43] Their enduring significance lies in their embodiment of indigenous norms, procedures, and shared values that long predate the adversarial models introduced through colonial legal systems. The efficiency and effectiveness of these mechanisms are reflected in several interconnected strengths, including their capacity to maintain social cohesion, promote restorative justice, ensure accessibility, and foster sustainable peace. Together, these attributes underscore the continued relevance of TDRMs as culturally grounded and community-responsive approaches to justice.

I. Key strengths

In African tradition, disputes between two individuals are understood as threats to the well-being of the entire community. Communal life has long been a foundational principle of African societies, where individuals perceive themselves as part of a unified social whole.[44] Scholars further observe that even a seemingly minor dispute between two people, families, or communities can escalate into widespread violence, including the destruction of property and loss of life.[45] Against this backdrop, one of the defining strengths of Traditional Dispute Resolution Mechanisms (TDRMs) is their restorative justice orientation. Unlike adversarial litigation—which focuses on determining fault, assigning blame, and imposing punishment—TDRMs emphasize reconciliation, restitution, and the restoration of relation-

41 The Constitution of Kenya, 2010, art. 159 (2) (c).

42 The Constitution of the Republic of Rwanda, Official Gazette (no Special of 04 August 2023), art. 10 (1) (f).

43 *Sergon Joseph/Scholastica Omondi,* Analysis of the Weakness of Traditional Dispute Resolution Mechanisms (TDRMS) As an Avenue of Dispute Resolution in Kenya, IOSR Journal of Humanities and Social Science (2019), p. 1.

44 *Yaro/Nuru-Deen/Kipo-Sunyehzi,* note 22, p. 6.

45 *Osisioma Basil Chinedu Nwolise,* Traditional models of bargaining and conflict resolution in Africa, in: Perspectives on peace and conflict in Africa, Ibadan 2005, p. 155.

ships between disputants and the broader community.[46] As Ifeanyi notes, TDRMs prioritize community participation, the restoration of social relationships, communal well-being, and reconciliation. They offer a holistic approach to justice that aligns with African values and socio-cultural contexts, in contrast to formal court systems that emphasize punitive measures and adversarial procedures.[47] *Yaro/Nuru-Deen/Kipo-Sunyehzi*

Additionally, many African societies prefer traditional mechanisms because they are inexpensive, swift, accessible, and culturally resonant compared with formal litigation.[48] TDRMs are flexible, not bound by strict evidentiary rules, and typically conducted publicly within the community before respected figures such as elders, local leaders, and religious authorities. These mechanisms require minimal financial resources, operate through adaptable procedures, and reflect cultural norms. Their accessibility ensures that even economically marginalized individuals or those unfamiliar with formal legal processes can meaningfully pursue justice.[49]

Equally important, the long-standing use and effectiveness of TDRMs have earned them substantial legitimacy. Their authority derives from shared customs, cultural values, and traditions, which form the foundation of many African justice systems.[50] Scholars also emphasize that the legitimacy of TDRMs stems from their consensual and voluntary nature, as disputants willingly participate in processes they perceive as fair and culturally appropriate.[51]

Furthermore, several states have formally recognized these mechanisms due to their accessibility, flexibility, speed, voluntary character, and cost-effectiveness—not to mention their role in reducing case backlogs in formal courts.[52] Elders and other respected community figures who administer TDRMs possess deep knowledge of shared norms and values and enjoy significant social trust. Their decisions are rarely appealed and are generally respected and voluntarily enforced. This not only prevents the escalation of conflicts but

46 *Joseph/Omondi,* note 43, p. 5.

47 *Ifeanyi A. Chukwudebelu,* Reconciling Cultural Values with Legal Principles: Traditional African Justice Systems in Contemporary Context, Journal of Legal Subjects, 44 (2024), p. 13.

48 *Billy Moonga,* Traditional and modern dispute resolution mechanisms: an analysis of the preferred method by the people of senior chief Ndubeni's chiefdom, PhD diss, University of Zambia (2022). p. 40–48.

49 *Serges Djojou Kamga*, Forgotten or included? Disabled Children's Access to Primary Education in Cameroon, African Disability Rights YearBook 1 (2013), p. 29.

50 *Kariuki,* note 13, p. 9.

51 *Orna Rabinovich-Einy,* The legitimacy crisis and the future of courts, Cardozo J. Conflict Resolution 17 (2015), p. 25.

52 *Francis Kariuki,* African traditional justice systems, The Asia Pacific Journal of Anthropology, 8 (2007), p. 14.

also reduces the likelihood of future disputes, as parties perceive the outcomes as legitimate and aligned with community expectations.[53]

In contrast to formal adjudication—which is often slow, costly, highly technical, and inaccessible—traditional mechanisms are typically faster, especially for interpersonal, family, and land disputes. They are also more culturally resonant and better suited for early intervention, which is crucial in preventing conflict escalation.[54] Consequently, many individuals continue to resolve land-related disputes and other community conflicts through traditional dispute resolution mechanisms.

II. TDRMs case studies

As demonstrated in the preceding sections, Traditional Dispute Resolution Mechanisms (TDRMs) in Africa have historically proven to be both effective and efficient in resolving a wide range of disputes. The selected case studies from various African countries illustrate how TDRMs have managed complex conflicts rapidly, at minimal cost, and with outcomes that formal litigation processes would have struggled to achieve under similar circumstances. The following discussion elaborates on sampled case studies.

The first example is Rwanda's Gacaca Courts. Historically, Gacaca functioned as a communal mechanism for resolving family and community disputes, with a primary focus on reintegrating wrongdoers into the community and fostering conciliation.[55] In the aftermath of the 1994 Genocide against the Tutsi, the post-genocide government faced an overwhelming challenge in delivering justice through conventional judicial structures.[56] This context necessitated the revival and adaptation of the Gacaca system, which had long been recognized for its speed, accessibility, and capacity to promote accountability, unity, and reconciliation at the community level.[57]

In contrast to the International Criminal Tribunal for Rwanda (ICTR), whose processes were markedly slow and resource-intensive, the Gacaca Courts achieved an unprecedented scale of justice. Between 2002 and 2012, they tried 1,958,634 cases—1,320,554 relating to property offences and 638,080 concerning crimes committed against persons.[58] The cost differential was equally striking: Gacaca is estimated to have cost approximately USD 40

53 *Fonkem Achankeng,* Conflict resolution in the extra-activities: A consideration of traditional conflict resolution paradigms in post-colonial Africa, Willamette journal of international law and dispute resolution, 25(1) (2017), pp. 56–7.

54 *Mussa S. Muhoja/ Regina John Lyakurwa,* From conflict to cohesion: community-based grievance redress in informal settlements regularization projects in emerging urban centers in Tanzania, Cogent Social Sciences, 11(1), (2025), Article 2540421, p. 13.

55 Ministry of Justice, Republic of Rwanda, The concept of transitional justice (2020), p. 5.

56 *Ibid.,* p. 7.

57 *Leonard Maveneka/ Zebedee Ruramaira,* Final end of the programme evaluation of the support to access to justice for all, the foundation for good governance and poverty reduction, Rwanda (2008–2013) (2013), p. 39.

58 *Ibid*., p. 40.

million, whereas the ICTR spent over USD 1.3 billion while adjudicating only around 60 cases.[59] Research further indicates that, had the national courts relied solely on formal judicial processes, it would have taken at least a century to resolve the caseload that Gacaca completed within a decade.[60]

The second example is Rwanda's *Abunzi* Committees. These committees comprise recognized lay mediators who reside within the communities they serve and are mandated to mediate disputes—primarily those involving family and land matters.[61] The *Abunzi* system predates colonial rule and has long functioned as an accessible, community-based mechanism for resolving conflicts. Its procedures are characterized by speed, low cost, and inclusiveness, enabling broad community participation.[62] In the post-genocide era, the Government of Rwanda revitalized this mechanism to promote prompt, affordable, and universal access to justice. Importantly, *Abunzi* processes prioritize conciliation and the restoration of relationships, not only between disputing parties but also between the disputants and the wider community.[63] This mechanism has significantly reduced case backlogs, as the majority of civil disputes are effectively resolved at the local level without reaching formal courts.[64]

The third example is Uganda's *Mato Oput*, a traditional Acholi process and ritual ceremony designed to restore relationships between families or clans affected by intentional or unintentional killings.[65] Among the Acholi in Northern Uganda, *Mato Oput* is often preferred over formal justice systems because it addresses both the social rupture and the moral dimensions of wrongdoing.[66] A killing—whether deliberate or accidental—creates a profound rift between the perpetrator's and victim's families, leading to the cessation of shared meals, social interactions, and communal engagement. This estrangement persists until the *Mato Oput* ceremony is performed.

The process begins with the offender confessing before the elders. An arbiter from a neutral clan is then appointed to work with the elders and the aggrieved family to determine appropriate compensation, commonly referred to as "blood money." The reconciliation

59 *Alek Barovic,* Unveiling the Significance of Gacaca Courts: A Socio-Legal Analysis, in: The Palgrave Handbook of Criminology and the Global South, Cham: Springer Nature Switzerland 2025, pp. 1–16.

60 *Maveneka/Ruramaira,* note 57, p. 35.

61 *Martha Mutisi*, Local conflict resolution in Rwanda: The case of Abunzi mediators, in: Integration of Traditional and Modern Conflict Resolution: Experience From Selected Cases in Eastern and the Horn of Africa, Durban: ACCORD 2012, pp. 41–74.

62 *Maveneka/Ruramaira,* note 57 , p. 30.

63 Mutisi, note 61 , p. 60.

64 *Ibid.,* p. 61–62.

65 *Patrick Tom*, The Acholi Traditional Approach to justice and the War in Northern Uganda, Beyond Intractability (2006), available at: https://www.beyondintractability.org/casestudy/tom-acholi (accessed on December 3, 2025).

66 Patricia Bako, Does Traditional Conflict Resolution Lead to Justice? The Mato Oput In Northern Uganda, Pretoria Student Law Review 3 (2009). p. 101.

ceremony takes place in a designated public space, attended by elders, arbiters, and community members.[67] During the ritual, the arbiter invokes the ancestors and the Supreme Being, affirms the commitment to peace, and acknowledges the offender's remorse and payment of compensation, and then appeals for blessings upon the renewed relationship and calls for an end to hostilities between the families.[68] Through this process, social harmony is restored, and the families are reintegrated into mutual coexistence.

The fourth is still in Uganda with the Ekika System of Conflict Resolution (ESCR), a traditional and community-based mechanism used by the Baganda people.[69] In this system, disputants are assisted by a neutral third party—typically elders, clan leaders, kinship heads, or other respected community figures—who facilitate mediation, negotiation, and reconciliation.[70] The process is implemented in a structured and supervised manner to uphold cultural norms and social values. Its primary objective is to help disputants reach a durable settlement, thereby restoring their relationship and reinforcing community cohesion.[71]

The fifth example is the Community Courts of South Africa. These courts emerged in the 1990s in response to widespread distrust of the formal justice system, which many communities perceived as unfair, inaccessible, and ineffective. Over time, Community Courts evolved through generational practice and pilot initiatives in regions such as Gauteng and the Western Cape. They operate on principles of restorative justice, aiming to address local disputes, reduce case backlogs, and promote community participation in resolving minor offences.[72]

These courts typically handle family-related disputes and conflicts concerning access to natural resources. They are administered by family heads, elders, chiefs, and traditional leaders, and unlike informal or ad hoc mechanisms, Community Courts are structured to reflect indigenous needs and social values.[73] Scholars consistently note that these courts are

67 *Ibid*., p. 267.

68 *David-Ngendo Tshimba,* Beyond the Mato Oput Tradition: embedded contestations in traditional justice for post-massacre Pajong, Northern Uganda, Journal of African Conflicts and Peace Studies 2(2) (2015), p. 69–83.

69 *Amos Deogratius/ Willy Obol Olango*, Reconciliation among the central Iuo of Northern Uganda: The ingredients and process of Mato Oput. Cogent Social Sciences 9(1) (2023), Article 2177395.

70 *Mutisi,* note 61, pp. 1 – 2.

71 *Ashad Sentongo/ Andrea Bartoli*, Conflict resolution under the Ekika system of the Baganda in Uganda, in: Integrating Traditional and Modern Conflict Resolution: Experience from Selected Cases in Eastern and the Horn of Africa, Accord Africa Dialogue, Accord Monograph Series 2(2012), p. 13.

72 *Daniel Nina,* Community Justice in a Volatile South Africa: Containing Community Conflict, Clermont, Natal, Social Justice, 20(3/4) (1993), pp. 129–142.

73 *Janine Ubink/ Sindiso Minisi Weeks,* Courting Custom: Regulating Access to Justice in Rural South Africa and Malawi, Law & Society Review, 51(4) (2017), pp. 825–58.

accessible, cost-effective, expeditious, and capable of delivering a simplified yet meaningful form of justice.[74]

The sixth example is Somalia's Guurti. Traditionally, the Guurti referred to councils of respected elders who resolved disputes using customary law and Islamic principles.[75] In its contemporary institutional form, the term denotes the Upper House of Parliament, which is responsible for enacting legislation related to religion, culture, and security. Scholars widely acknowledge the effectiveness of the Guurti in addressing security challenges, facilitating disarmament, supporting demobilization and reintegration processes, and promoting social cohesion and peacebuilding.[76] However, critiques have also emerged: because the Guurti relies heavily on customary norms and Sharia law, it has been accused of impeding the advancement of women's rights and of resisting legislation aimed at promoting gender equality.[77]

The seventh example is Maslaha in Kenya, a traditional dispute resolution mechanism used predominantly within Somali communities. Maslaha is overseen by elders and is designed to facilitate amicable settlement of disputes while prioritising the restoration of relationships among neighbouring families and clans. The process is administered by male relatives of both the perpetrator and the victim, and resolutions typically involve compensation, either in monetary form or through livestock.[78] The emphasis on reconciliation and social harmony underscores Maslaha's role as a culturally grounded mechanism for maintaining cohesion within Somali communities in Kenya.

The eighth example concerns the traditional dispute resolution practices of the Yoruba, Igbo, and Hausa communities in Nigeria. These mechanisms represent long-standing indigenous systems through which these groups address and resolve conflicts.[79] Among the Yoruba, dispute resolution follows a clearly defined hierarchy that begins within the nuclear family, where the Baale (Chief),[80] as head of household, addresses conflicts promptly to

74 *Sanette Nel,* Community courts: Official Recognition and Criminal jurisdiction-A comparative Analysis, Comparative and International Law Journal of Southern Africa, 34(1) (2001), pp. 87–108.

75 *Dunia Zongwe*, The limits and possibilities of the Guurti in solving problems in Somaliland: The protection of Women's rights, SSRN Working Paper No. 2530587 (2007), available at: https://ssrn.com/abstract+253058> (accessed on 10 December, 2025), p. 5.

76 *Carolyne Gatimu,* Traditional Structures in Peace and Security Consolidation: The Case of the House of Elders (Guurti) in 'Somaliland', Occasional Paper, Nairobi: International Peace Support Centre (2014), p. 36.

77 *Zongwe,* note 75, p. 9.

78 *Koriow Zamzam Mohamed/ Peter M. Muriithi,* A critical analysis of Maslaha as a traditional dispute resolution mechanism in North Eastern Kenya, Journal of Conflict Management & Sustainable Development 5(1) (2020), p. 31.

79 *Fidelis Isomkwo Aboh/ Emmanuel Paul Ngele/ Emmanuel N. Okom/ John Augustin Iteh/ James Nwachukwu Eze,* A Review of Traditional Methods of Conflict Resolution from a Nigerian-African-Perspective, Journal La Sociale (4(4), pp. 195–97.

80 *Ibid.*, p. 195–97.

preserve harmony. In extended families, the Mogaji, typically the eldest and most respected member, exercises significant authority in mediating disputes. At the broader community level, more serious matters are adjudicated by the Baale (Chief). This tiered structure reflects a system designed to restore peace progressively, moving from the household to the community as needed, and illustrates a deeply rooted commitment to restorative social order.

The Igbo approach, by contrast, integrates both human and spiritual dimensions. Dispute resolution involves the family, councils of elders, and wider community participation, but also relies on deities and oracles to ensure impartiality, particularly in cases involving witchcraft or other perceived societal transgressions. This blend of communal deliberation and spiritual adjudication underscores the Igbo belief in cosmic justice as an essential component of social equilibrium.[81]

The Hausa method incorporates Islamic principles and emphasises patience, restraint, and the cultural values associated with Pulaaku. Elders serve as mediators and employ strategies such as oath-taking and avoidance to prevent escalation. The integration of spiritual authority, communal norms, and practical conflict-management techniques reflects a holistic commitment to maintaining social harmony and order.[82]

The ninth example is the Jaarsa Biyyaa method in Ethiopia, a traditional dispute resolution institution administered by community elders within the Arsi Oromo culture.[83] Elders are selected based on their honesty, wisdom, and deep knowledge of customary law. They may be approached directly by disputants or may initiate mediation upon learning of a conflict. Within this structure, one elder is designated as the Abbaa Murtii (judge), while two others serve as Oora Lamaan (investigators).[84] The Jaarsa Biyyaa system addresses a wide range of disputes—including civil, commercial, and criminal matters—and exemplifies a culturally grounded model of community-centred adjudication that prioritises reconciliation, legitimacy, and social cohesion.

The tenth example is the Judiyya method in Sudan, a longstanding traditional institution rooted in the cultural and belief systems of Darfuri ethnic groups and predating colonial rule. It is practiced widely across Sudan, the Sahara, and Chad.[85] Judiyya is administered by the Ajaweed, respected patriarchs of extended families, clans, or tribes who often

81 *Grace Umezurike,* Traditional society and conflict resolution in Nigeria: An appraisal of Ibgo traditional method of conflict resolution, IDOSR Journal of Current Issues In Social Sciences (International Digital Organization for Scientific Research, ISSN: 2579–765) (2016).

82 *Usman/ T.M. Ahmed/ S. O. Odobo,* Achieving Effective Conflict Resolution through Alternative Dispute Resolution (ADR) Mechanisms in Nigeria, Journal of Guidance and Counselling Studies 9(1) (2025), pp. 1–15.

83 *Eskedar Girum,* The Role of Traditional Conflict Management Institution among the Aleltu Oromo Community: The Case of Jaarsa Biyyaa (2010), p. 128.

84 *Roba,* note 15, pp. 1–27.

85 *Abdul S. Wahab,* The Sudanese Indigenous Models for Conflict Resolution: A case study to examine the relevancy and the applicability of the judiyya model in restoring peace within the ethnic tribal communities of the Sudan (2018), pp. 9–11.

hold titles such as Sultan, Chief, or Sheikh. These figures mediate disputes by guiding parties through a structured reconciliation process and overseeing the implementation of resolutions within their communities.[86] Despite the expansion of the formal justice system, Judiyya remains vibrant and continues to play a significant role in reconciliation, particularly in rural areas where customary authority structures retain strong legitimacy.[87]

The eleventh example is Collective Compensation (Diya) in Somalia, Chad, and Sudan.[88] In these contexts, conflicts over natural resources frequently escalate into serious harm, including killings. Resolution is therefore essential for community stability and continuity. Diya involves negotiated agreements between clan leaders and the payment of blood compensation for lost lives.[89] The system is administered by a Diya-paying group, which manages collective responsibilities, including the obligation to compensate when a member harms someone from another group or is harmed in return. This mechanism preserves shared values, reinforces communal responsibility, and strengthens social cohesion. Crucially, it prevents cycles of revenge by acknowledging harm and providing compensation, transforming conflict into an opportunity for relationship repair and long-term peacebuilding.[90]

D. WHY TDRM'S SUCCESS REMAINS "UNCOUNTED"

I. Limited formal recognition

A central paradox in the study of African Traditional Dispute Resolution Mechanisms (TDRMs) is that, despite their long-standing effectiveness in resolving conflicts, restoring relationships, and sustaining community peace, they continue to receive limited formal recognition within statutory and judicial systems.[91] This marginalization does not stem from deficiencies in their performance; rather, it reflects historical, ideological, and institutional dynamics that have shaped legal development on the continent.[92]

86 *Dhieu Wol,* Juba Peace Agreement (JPA): Bridging Traditional and Modern Conflict Resolution Mechanisms, Journal on Political Sciences & International Relations 3(1) (2025), pp. 1–7.

87 *Salome Bronkhorst,* Customary mediation in resource scarcities and conflicts in Sudan: Making a case for the Judiyya, Africa Dialogue (2012), p. 121.

88 *Abdullahi EI-Tom,* From war to peace and reconciliation in Darfur, Sudan: Prospects for the Judiyya, African Dialogue Monograph Series 2(2) (2013), pp. 99–120.

89 *Mahdi Egge/ Pchai Tongdeelert/ Savitree Rangsipaht/ Sayan Tudsri,* Collective Actions and the Management of Collectively Provided Rangeland Resources and Activities in Awbere District of Somali Regional State, Ethiopia, Kasetsart Journal of Social Sciences 32(3) (2011), p. 552.

90 *Mohamed Sheik Mohamed/ Joshua Miluwi/ Charles Bilali*, Influence of Clan-Based Reconciliation Mechanisms on Conflict Resolution in Mogadishu, Somalia, Academic Journal of Humanities and Social Sciences Research 2(1) (2025), p. 5.

91 Ibi., p. 3.

92 *Buluma Bwire,* Integration of African customary legal concepts into modern law: restorative justice-A Kenyan example, Societies 9(1) (2019), p. 17.

Colonial administrations deliberately undermined African customary justice systems, replacing them with imported legal models and entrenching a hierarchy that privileged Western norms. These legacies persisted into the post-independence era, constraining the evolution and institutionalization of TDRMs.[93] Unlike TDRMs—which are flexible, culturally grounded, and adapted over generations to meet the needs of indigenous communities—formal justice systems prioritize uniformity, predictability, and codification, making it difficult for pluralistic and context-specific mechanisms to gain formal recognition.[94]

TDRMs also face structural barriers arising from tensions between customary practices and modern constitutional principles, particularly those relating to human rights and gender equality.[95] Concerns about potential inconsistencies with constitutional norms have often led policymakers to hesitate in granting formal status to customary mechanisms. Additionally, institutional self-interest plays a role: formal judicial bodies may perceive the recognition of TDRMs as a threat to their authority, resources, and jurisdiction, thereby resisting reforms that would elevate customary systems. Their predominantly oral and informal nature further complicates formal recognition. Because TDRMs rely on unwritten norms rather than codified rules, they are often viewed as lacking the procedural certainty required by modern legal frameworks. This perception persists despite their demonstrated capacity to deliver accessible, legitimate, and community-centred justice.

Consequently, many TDRMs continue to operate outside statutory or constitutional structures. Some legal scholars argue that, given their widespread use and social legitimacy, TDRMs have effectively achieved de facto recognition, even in the absence of explicit legal codification.[96] This pattern is observable across numerous African jurisdictions, where customary mechanisms remain central to everyday dispute resolution despite their limited formal status.

II. Absence from official justice metrics and legal education

The integration of TDRMs into African legal education and judicial training remains limited, largely due to the enduring influence of post-colonial legal systems that privileged Western jurisprudence. For decades, African legal education has prioritized Western legal philosophies and positivist traditions, producing professionals whose training is largely detached from customary justice practices.[97] This disconnect is compounded by structural challenges, including a shortage of skilled trainers and insufficient funding for initiatives

93 *Awet Halefom,* Integrating Traditional and State Institutions in Conflict Prevention: Institutional, Legal and Policy Frameworks in Ethiopia, Mizan Law Review 16(2) (2022), pp. 339–68.

94 Joseph/*Omondi,* note 43, p. 2.

95 *Muwai Samuel Maina/ Macharia James Muriuki,* Going Back to the Roots; Resolving Disputes through Alternative Means with a Bias in Traditional Justice Systems (2021), p.15.

96 *Halefom,* note 93, p. 1.

97 *Joshua Mawere,* Decolonizing legal education in South Africa: A Review of African Indigenous law in the Curriculum, Pretoria Student Law Review 14 (2020), p. 31.

aimed at incorporating TDRMs into formal curricula.[98] As a result, despite their proven effectiveness in community healing and reconciliation, TDRMs remain marginalized, contributing indirectly to overburdened courts and delays in formal justice delivery.[99]

This educational gap reinforces a perception of inferiority surrounding TDRMs. Legal practitioners trained primarily in Western doctrines often overlook the significant role that TDRMs play in delivering restorative and relationship-centred justice.[100] The legacy of colonial legal systems further entrenches this marginalization: early post-independence reforms failed to reintegrate customary justice into national legal frameworks, leaving TDRMs unacknowledged despite their social legitimacy and practical relevance.

The perception of inferiority is shaped by several factors, including the colonial legacy, legal formalism, concerns about procedural fairness, questions of enforceability, and biases within the formal legal profession.[101] Critiques also arise from documented human-rights concerns: some TDRMs have been criticised for practices that disadvantage women, including discriminatory norms, corporal punishment, or situations where young girls may be compelled into early marriage or required to comply with resolutions reached by elders.[102] Another scholar further notes additional limitations, such as the absence of a formal legal framework, lack of documentation, limited resources, undefined jurisdiction, inconsistency in decision-making, and the evolving nature of communities—all of which contribute to the persistent lack of formal recognition.[103]

Post-independence legal reforms in many African states sought to modernize and harmonize national legal systems. However, these reforms largely reproduced and retained colonial legal structures, failing to acknowledge the legitimacy of indigenous dispute-resolution methods.[104] The result has been a dual legal system in which formal courts—often limited in reach and accessibility—coexist with traditional forums that remain socially central yet legally marginalized.[105] This duality undermines both efficiency and inclusivity: although African communities continue to rely on TDRMs for restorative justice, reconciliation, and culturally embedded dispute resolution, these mechanisms lack meaningful formal recognition or reintegration into national legal frameworks.[106]

To address these challenges, legal education should incorporate the values and principles of TDRMs and equip judges with hybrid adjudicative approaches capable of valida-

98 *Mawere,* note 97, p. 38.

99 *Julena Jumbe Gabagambi*, A Comparative analysis of restorative justice practices in Africa, Hauser Global Law School Program (2018), p. 17.

100 *Volker Boege,* Traditional approaches to conflict transformation: Potentials and limits (2006), p. 18.

101 *Kariuki,* note 52, p. 12.

102 *Kariuki,* note 52, p. 13.

103 *Muigua,* note 13, p. 15.

104 *Gabagambi,* note 99, p. 15.

105 *Kariuki,* note 52, pp. 75–91.

106 *Moonga,* note 48, p. 40.

ting outcomes from traditional forums.[107] Such integration would bridge the gap between formal and customary systems and enhance access to justice.

Western legal systems also entrenched hierarchies of legitimacy that privileged the formal, adversarial model, characterized by codified laws and rigid procedures. As a result, legal professionals internalized the belief that Western legal systems were inherently superior to TDRMs.[108] This perspective gradually displaced indigenous justice systems that had long governed social order.[109] Scholars have shown that colonial rule not only marginalized TDRMs but also introduced an ideological hierarchy of norms that equated written, formal law with modernity, thereby casting indigenous practices as inferior.[110]

Despite this historical erosion, several African countries have begun to revive and reintegrate TDRMs, demonstrating both resilience and institutional renewal. Rwanda and South Africa, in particular, have made notable progress in incorporating traditional mechanisms into their justice systems.[111] Other states—including Kenya, Uganda, Ghana, and Nigeria—are also moving toward formal integration, driven in part by growing public interest in restorative and community-centred justice.[112] This shift reflects widespread recognition of the limitations of the Western adversarial model and the enduring relevance of indigenous approaches to conflict resolution.

E. PATHWAYS TO RE-VALUING TDRM'S ROLE

The continued marginalization of Traditional Dispute Resolution Mechanisms (TDRMs) reflects both enduring historical legacies and gaps within contemporary legal frameworks. Colonial administrations systematically displaced indigenous justice systems by imposing Western-style courts and creating hierarchies that privileged imported legal structures over mechanisms that had been crafted and inherited across generations. These traditional systems were tailored to the cultural dynamics and practical needs of indigenous communities, yet they were dismissed as inferior or incompatible with "modern" governance.

Although post-independence reforms were framed as efforts toward modernization, this study demonstrates that they largely replicated colonial legal frameworks, failing to reintegrate TDRMs into national legal orders. Consequently, TDRMs remain socially relevant

107 *Rashri Baboolal-Frank, Louis Naude,* An evaluation of alternative dispute resolution mechanisms in African mechanisms in the African region, Obiter, 45(1) (2024), p. 74.

108 *Sandra Fullerton Joireman,* Inherited legal systems and effective rule of law: Africa and the colonial legacy, The Journal of Modern African Studies 39(4) (2001), pp. 571–96.

109 George Mousourakis, Indigenous Legal Traditions and Legal Pluralism in Africa, in: Traveling Legal Traditions: Perspectives on Comparative Law and Legal History, pp. 299–316, Cham: Springer Nature Switzerland (2025).

110 *Martin Chanock, Law,* Custom and Social Order: The Colonial Experience in Malawi and Zambia (1985).

111 *Joseph/Omondi,* note 43 , p. 36.

112 *Gabagambi,* note 99 , p. 16–17.

and widely preferred—particularly in rural areas—yet they are legally disregarded. This disconnect undermines inclusivity and limits access to justice, as communities continue to rely on TDRMs for restorative, relationship-centred dispute resolution while formal systems overlook their legitimacy.

These challenges will persist unless effective models for integration are developed. A comprehensive approach requires statutory recognition, institutional support, and procedural safeguards that ensure both legitimacy and rights protection.

First, courts should be empowered to refer appropriate disputes to accredited TDRMs, with outcomes recognized as consent judgments subject to limited judicial review.[113] Indeed, formal courts should validate and enforce TDRM outcomes in the same manner as other recognized enforcement orders.[114] Such a model preserves the community-based legitimacy of TDRMs while ensuring that the rights of all parties are protected within a hybrid, pluralistic justice framework.

Secondly, the adoption of hybrid tribunals offers a promising pathway for integrating Traditional Dispute Resolution Mechanisms (TDRMs) into contemporary legal systems. Panels composed of customary leaders, elders, and legally trained professionals can adjudicate specific categories of disputes within clearly defined jurisdictions, applying customary norms while upholding constitutional guarantees. Such tribunals are particularly well-suited for matters involving land, family relations, obligations, and succession.[115] Scholars argue that customary rules should be applied at the first instance, with the contemporary legal system intervening only at the appellate stage. This approach reinforces the principle that TDRMs should serve as the primary avenue for dispute resolution, while formal legal rules operate as a last resort.[116]

Rwanda's Abunzi Committees exemplify the effectiveness of hybrid structures that combine community-based justice with statutory oversight. The Abunzi handle a wide range of disputes—including succession, property, and breach of contract—provided the value does not exceed 300,000 RWF, as well as family matters not reserved for the courts.[117] Collaboration between systems is institutionalized: primary courts hear appeals from Abunzi decisions, ensuring complementarity and procedural safeguards.[118] Rwanda has also introduced court-annexed mediation, which further demonstrates the incorporation of TDRMs into the formal justice system. This mechanism may be initiated by the parties,

113 *Joseph/Omondi,* note 43, p. 98.

114 *Ibid.,* p. 99.

115 *Leigh T. Toomey,* A Delicate Balance: Building Complementary Customary and State Legal Systems, Law and Development Review 3 (2010), p. 157.

116 *Ibid.,* pp. 1–5.

117 Law no 37/2016 of 08/09/2016 determining organization, jurisdiction, competence and functioning of Abunzi Committee, Official Gazette (no 37 bis of 12/09/2016), art. 10.

118 Law no 30/2018 of 02/06/2018 determining the jurisdiction of courts, Official Gazette (no special of 02/06/2018), art. 28.

the court registrar, or even the judge at any stage of the proceedings, reinforcing a culture of negotiated settlement.[119]

Similarly, South Africa employs a hybrid dispute-resolution system that integrates traditional courts with Alternative Dispute Resolution (ADR) methods such as Med-Arb and Arb-Med. Key features include mandatory mediation under High Court Rule 41A, adaptive mechanisms for consumer and online disputes, and the incorporation of customary law. Across these systems, parties are encouraged to pursue ADR before resorting to adjudication, reflecting a broader commitment to restorative and participatory justice.[120]

Thirdly, statutory recognition is essential for the meaningful integration of TDRMs. Legislatures are uniquely positioned to establish accredited frameworks that grant TDRMs legal recognition, jurisdictional authority, and enforceability powers. Such frameworks provide the most comprehensive pathway for ensuring the holistic incorporation of TDRMs into national justice systems.[121] Equally important, systematic documentation and reporting would enhance transparency, accountability, and public trust in these mechanisms.

Effective integration of Traditional Dispute Resolution Mechanisms (TDRMs) must be supported by policy reforms that provide constitutional, institutional, and procedural guarantees. Constitutional recognition—exemplified in South Africa and Kenya—offers a foundational layer of legitimacy by aligning customary practices with constitutional rights and international human-rights standards.[122] In Kenya, the integration of TDRMs is expressly embedded in Article 159 of the Constitution, which provides that, in exercising judicial authority, courts and tribunals shall be guided by the principle that *reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms* should be promoted, provided they are not repugnant to justice and morality, nor inconsistent with the Bill of Rights, the Constitution, or written law. This provision establishes a constitutional mandate for pluralistic justice.[123]

Similarly, in South Africa, Section 12 of the Constitution recognizes the institution and role of traditional leaders in dispute resolution, provided their practices comply with constitutional norms. Traditional authorities operating under customary law may function within the framework of relevant legislation, and courts are required to apply customary law where appropriate, so long as it does not contravene constitutional stipulations. Section 212 further empowers national legislation to define the role of traditional leadership at the local level and to establish houses and councils of traditional leaders to manage matters re-

119 Law no. 22/2018 of 29/04/2018 relating to the civil, commercial, labour, and administrative procedure, Official Gazette (no special 29/04/2018), art. 9(2), 28, 29, 30.

120 *Barney Jordaan,* Hybrid ADR processes in South Africa, ADR Bulletin 12(5) (2009), p. 2.

121 *Chukwudebelu,* note 47, p. 19.

122 *Petrit Nimani/ Shefqet Avdija/ Artan Maloku,* Customary law and modern legal systems: A comparative perspective, Corporate law & Governance Review 7(2) (2025), pp. 77–83.

123 Constitution of the Republic of Kenya 2010, art. 159.

lated to customary practices. These provisions collectively illustrate a constitutional model that balances customary legitimacy with rights-based safeguards.

For sustainable re-evaluation and integration of TDRMs, states should develop practical guidelines and regular oversight mechanisms that ensure procedural fairness, gender inclusivity, and protection of vulnerable groups.[124] Given that some TDRMs have been criticized for practices that may infringe upon human rights—particularly those affecting women and children[125] —continuous monitoring is essential to achieve an accurate and rights-compliant valuation of traditional justice systems.

Equally important is capacity building for judges, legal professionals, policymakers, and traditional authorities. Holistic training and certification programmes for both formal justice actors and community-based practitioners are vital for strengthening and professionalizing traditional justice.[126] A recent example is the training conducted by Haramaya University, which focused on enhancing the knowledge and capacity of *Aba Gedas* and customary court elders in the Hararghe region. The initiative aimed to improve justice delivery through customary courts established under Oromia Regional State proclamations, reinforcing the Gada system as a foundation for democratic governance and effective dispute resolution within the community[127]

It is indispensable to emphasize that documentation of customary practices and their underlying rationales constitutes a vital pathway for re-valuing Traditional Dispute Resolution Mechanisms (TDRMs).[128] Systematic documentation serves multiple purposes: it enhances consistency in decision-making, supports education and training, and provides a reliable reference point when similar disputes arise. Moreover, documentation preserves cultural heritage and facilitates harmonization with statutory law, ensuring that customary norms can be meaningfully integrated into contemporary legal frameworks.[129]

The reintegration of TDRMs must be guided by the fundamental principles of compatibility and complementarity. Customary norms should be applied when they promote reconciliation, social harmony, and community cohesion, but they must not contravene constitutional rights.[130] Accordingly, safeguards such as informed consent of the parties, access to formal courts, gender-sensitive procedures, and judicial review of alleged rights

124 *Ibid.,* p. 6.

125 *Phathekile Holomisa, Balancing law and tradition:* The TCB and its relation to African systems of justice administration, South African Crime Quarterly,35 (2011), pp. 17–22.

126 *Janine M. Ubink/ Thomas Maclnerney (eds.),* Customary justice: perspectives on Legal Empowerment (2011), pp. 15–16.

127 *Haramaya University,* Capacity-Building Training Delivered For Judges, Elders and Elders of Customary Courts (15–16 March 2023), available at: https://www.haramaya.edu.et/capacity-building-training-delivered/.

128 *Ubink/Mclnerney,* note 126, p. 107.

129 *Nimani/ Avdija/ Maloku,* note 122, p. 5.

130 *Ibid.,* p. 3.

violations are essential. These measures ensure that cultural legitimacy does not compromise fundamental protections but instead operates in a complementary manner.[131]

In sum, formal justice systems must recognize indigenous practices as legitimate, complementary, and rights-compliant. The referral approach, hybrid tribunals, and statutory recognition offer viable models for integrating TDRMs, provided they are supported by constitutional guarantees, policy reforms, capacity-building initiatives, and robust documentation. Collectively, these measures would not only contribute to the decolonization of African legal frameworks but also strengthen access to justice by bridging the gap between legality and lived legitimacy.

F. CONCLUSION

TDRMs remain a vibrant and indispensable component of Africa's legal ecosystem, particularly in contexts where access to formal courts is constrained by cost, distance, and procedural complexity. Their continued prevalence is rooted in communal values, social cohesion, community participation, and a commitment to restorative outcomes—elements that play a central role in conflict management. The emphasis on these culturally grounded principles not only reflects norms that resonate deeply with indigenous communities but also demonstrates the efficiency and social relevance of TDRMs in addressing the specific needs of African societies.

Despite their enduring significance, TDRMs continue to be marginalized within statutory frameworks, constitutional design, legal education, and formal justice systems. This marginalization does not reflect a lack of relevance; rather, it reveals the persistence of colonial and neo-colonial legacies, the dominance of Western legal models, and the continued acquiescence of African states to externally imposed legal hierarchies. Concerns about standardization, constitutional compatibility, and human rights protections are often cited as barriers to reform. However, the exclusion of TDRMs alienates communities from justice institutions, perpetuates inequalities in access to justice, and contributes to the overburdening of formal courts—ultimately resulting in justice delayed and, for many, justice denied.

To address these challenges, this study proposes the following policy and institutional reforms for policymakers, legal scholars, community and religious leaders, and other relevant stakeholders:

- Adopt a legally pluralistic justice model that reflects a hybrid system. TDRMs and formal courts should not be conceptualized as competing institutions but as complementary mechanisms capable of advancing accessible, restorative, and community-centered justice, particularly in civil, family, and land-related disputes.
- Undertake statutory and constitutional reforms to formally recognize TDRMs. Such recognition should clearly define their jurisdiction, establish minimum procedural safe-

131 *Chukwudebelu, note* 47, p. 15.

guards, and articulate their relationship with formal courts, including referral pathways, validation and enforcement of outcomes, and appropriate judicial oversight. Here, policy recognition is a critical gateway to harmonization and successful integration, enhancing legal certainty while preserving cultural legitimacy.

- Reform legal education to reshape perceptions of TDRMs. Law curricula should incorporate courses on legal pluralism, customary law, and traditional dispute resolution as core subjects. This would equip future judges, lawyers, and policymakers with the conceptual and practical skills necessary to engage meaningfully with pluralistic justice systems. Clinical legal education and community-based learning can further bridge the gap between theory and practice, fostering respect for indigenous mechanisms alongside formal legal training.
- Invest in capacity building for TDRM practitioners—including community leaders, elders, religious authorities, and local administrators—who play a central role in dispute resolution. Training should focus on aligning traditional practices with constitutional guarantees and international human rights standards, particularly regarding equality, inclusiveness, and procedural fairness. Dialogue between TDRM actors and formal justice institutions, coupled with documentation of customary norms, can enhance transparency and legitimacy while preserving the restorative ethos of TDRMs.
- Mobilize sustained support from both state and non-state actors. Financial, technical, and institutional support from governments, civil society organizations, and international partners is essential for the sustainability of TDRMs. Such support is necessary to ensure their effective integration into national justice systems and to promote a comprehensive, culturally grounded, and accessible justice framework.

In brief, revitalizing and integrating TDRMs is not merely a matter of cultural preservation; it is a pragmatic and necessary step toward building inclusive, efficient, and contextually relevant justice systems in Africa. Recognizing and strengthening TDRMs offers a pathway to a more holistic and equitable legal order—one that reflects the lived realities of African communities while upholding constitutional and human rights standards.

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ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY LAW IN KENYA: WHO OWNS AI-CREATED WORKS?

By Ng'ani Chrisphine Ligadho*

ABSTRACT

Kenya is rapidly adopting artificial intelligence (AI), and using it to spark new ideas, fuel creativity, and drive the economy forward. One can feel the country's ambition to become Africa's top AI destination. AI is evidently used everywhere from art and music to tech, healthcare, farming, and public services. It has enabled people to have powerful new tools to solve problems, speed up innovation, and express themselves in ways that just weren't possible before.

However, the law isn't keeping up. Kenya's main laws on copyright and patents like the Copyright Act and Industrial Property Act were drafted with human creators in mind. These laws never envisioned a world where AI could create art, music, or even inventions on its own. Therefore, when AI works without real human help, those creations do not fit into the current legal system. There is no clear way to recognize or protect them, which leaves such creations and investions in a rather tough spot.

Research shows that most Kenyan artists and inventors use AI as a tool to help with their projects. In those situations, people still get credit as the authors or inventors. That uncertainty about ownership of AI makes people nervous about investing or sharing these works. On top of that, most AI tools and data come from outside Kenya, which can lead to cultural bias and push African stories and knowledge to the sidelines.

If Kenya wants to get the most out of AI, it needs to update its regulations. This means rethinking who gets credit when AI is involved, making sure ownership is clear, and building a legal system that actually fits this new reality. The country needs laws that protect AI-generated work, stronger institutions to enforce them, and clear regulations for all creators, investors, and the public. If done correctly, this approach will protect local talent, encourage new ideas, and put Kenya in a strong position as a leader in AI. Ultimately, getting this balance right helps everyone who is driving growth, making sure no one is left out, and keeping Kenya's culture alive in a fast-changing world.

This research looks into the murky nexus between AI and Intellectual Propert (IP) law in Kenya. It looks at how the current regulations play out when AI is involved, who ends up owning what, and where the biggest legal blind spots are. It leans on Kenya's AI

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Strategy, picks apart the statutes, and pulls in real-world examples from the creative and tech industries. The truth is, AI is moving fast in Kenya, but the law is lagging behind. The bottom line is that Kenya needs clear legal framework on AI and IP. Without them, creators and innovators are left unprotected. Cultural interests hang in the balance, and the country risks missing its shot to lead the region in ethical and sustainable AI.

INTRODUCTION

Kenya's Artificial Intelligence Strategy sets out a bold goal which is to make Kenya the top spot for AI innovation, research, and real-world application in Africa. This is not just about technology for acknowledgment's sake. The strategy sees AI as a real driver for growth, jobs, and a fairer society. At the same time, it's clear about protecting what matters such as data sovereignty, cybersecurity, and strong ethics so that people can actually trust AI and know that it is working for everyone, not just a few.[1]

This strategy did not emerge from a vacuum.[2] The government brought in voices and stakeholders from all over private companies, universities, non-profits, international groups, and everyday Kenyans.[3] The assembled team was essential since the whole approach is grounded in Kenya's own values and priorities and not just what's trending globally. At the heart of it, Kenya proposed an all-in strategy on developing and commercializing AI that solves real problems that Kenyans and their neighbors face.[4] The plan zeroes in on building a solid governance structure, getting AI into key areas like farming, health, security, education, and public services, and growing a lively local AI scene.[5] The strategy also puts equity at the front and center, making sure even the most vulnerable groups are not left behind as AI moves ahead. Kenya seeks to be the go-to place in the region for AI research, big ideas, and growing talent.[6]

The strategy stands on three main pillars including digital AI infrastructure, a strong national data system, and world-class AI research and innovation. These pillars are also based on numerous concepts such as solid governance, growing local talent, more investment, and a real push for ethical, inclusive AI. None of these works without teamwork, government involvement, industrial sector, schools, civil society, and local communities, all which have

1 *Gikunda, Patrick, Benson Kituku, Juliet Moso, Wai Lok Woo, and Pingfan Wang*. "Kenya's Ai Ethics and Governance Framework 2025." (2025).

2 Ibid.

3 *Jaldi, Abdessalam*. "Artificial Intelligence Revolution in Africa: Economic opportunities and legal challenges." Policy Cent. New South 7 (2023).

4 Ibid.

5 *Jaldi, Abdessalam*. "Artificial intelligence revolution in Africa: Economic opportunities and legal challenges." Policy Cent. New South 7 (2023).

6 *Nyakiongora, Geoffrey Mosoti*. "Bridging the Health Divide: Achieving Equitable Healthcare Access in Kenya through Artificial Intelligence." PhD diss., Massachusetts Institute of Technology, (2024).

a role to play. Kenya is rolling this out in stages starting with the basics, then moving to national policies, research centers, pilot projects, and ongoing checks to keep things on track. In the end, Kenya is aiming high, to lead the way in responsible, sustainable AI in Africa, and to make sure everyone gets to share in the benefits.[7]

THE KENYA COPYRIGHT ACT

Kenya's Copyright Act does not mention artificial intelligence directly, but it still lays out how the law treats AI-generated works.[8] In *Section 2*, the Act defines an "author" as a person. As such AI systems do not qualify as authors or copyright owners. The same section talks about "computer-generated work" and states that the author is whoever made the necessary arrangements to create it. That is about as close as the Act gets to talking about AI-generated content.[9]

Section 22(1) states that copyright only protects original works created by an author, which really means there has to be some human creativity involved. Since AI is not a legal person and doesn't have creativity the way humans do, it just cannot clear that originality bar on its own.[10]

Section 23 deals with the duration, residence and nationality of such copyright and again, it demands actual human intellectual effort something AI cannot provide independently. The Act doesn't address newer questions either, like who owns content AI produces on its own, how training data should be handled, or who is responsible if AI infringes someone's copyright. So, while the law doesn't talk about AI directly, its regulates around authorship and originality sending a clear message that in Kenya, only works created or guided by humans can get copyright protection.[11]

THE INDUSTRIAL PROPERTY ACT, CAP 509

Kenya's Industrial Property Act, Cap 509 does not talk about artificial intelligence at all. It does not mention AI or set any rules for inventions that come from AI systems. But if you look at certain sections, you start to see how the law handles anything related to AI.

Section 2 says an "inventor" is the person who comes up with the invention. So, basically, only real or legal persons can be inventors. AI systems are neither real or legal persons. Resultantly, AI cannot be listed as an inventor or be given patent rights. *Section 21(1)* of the act doubles down on this. Every patent application has to include the inventor's name, which is most often than not a human name or the name of a legal person and not

7 Ibid.
8 The Kenya Copyright Act Cap 130, Laws of Kenya.
9 The Kenya Copyright Act Cap 130, laws of Kenya.
10 Ibid.
11 Ibid.

a machine's. *Section 23*, on the other hand, states that only the inventor or someone the inventor assigns can own a patent. Again, AI is out of the picture it cannot own or transfer rights.[12]

Section 22(1) lays out what makes an invention patentable. The invention has to be new, novel, and useful in some industry. The law assumes a human was involved in the process of coming up with the idea. In that case, if an AI tool produces anything absolutely independent, it probably will not meet that unspoken rule that human touch has to be involved. The Act does not speak to anything concerning inventions made entirely and absolutely by machines, who owns them, or whether AI could ever count as a co-inventor.[13] Hitherto, only inventions involving human inventors get recognized in Kenya. Inventions created by AI purely are left in a sort of legal lacuna, with no clear way to claim ownership or protection.

COPYRIGHT AND ARTIFICIAL INTELLIGENCE CREATED WORKS.

Kenyan artists and other stakeholders are moving into the world of AI, weaving new technology into their creative work. This is straight from a recent study by Creatives Garage, part of Mozilla's Africa Mradi research on how AI is shaking things up in Eastern and Southern Africa.[14] Their report, "Artificial Intelligence in Africa," looks into how Kenyan creatives use AI tools, what they're getting out of it, and the hurdles in their way. It also delves into how these artists are working with tech personnel and policymakers.[15]

The research brought together over 100 people artists, AI developers, IP experts, government officials, and representatives from national institutions to give a wider scrutiny into Kenya's creative and tech scene. It turns out that AI is already in use everywhere, more than three-quarters of the 130 creatives surveyed were already using tools like ChatGPT, Google Gemini/Bard, Canva, Grammarly, Google Translate, and Midjurney. They use these AI tools for everything from generating images to editing videos and polishing up their writing. None of these AI tools are made in Kenya.[16]

Most creatives see AI as a powerful boost, but they are clear that it is not magic, and it cannot replace the spark of human creativity.[17] There are some big worries, too. People and creators are anxious about losing jobs, dealing with copyright headaches, and watching

12 Ibid.

13 Kenya Industrial Property Act, Cap 509.

14 *Creatives Garage – AI/KE Report 2024* "Artificial Intelligence in Africa: Investigating the impacts of AI on the Creative Community in Kenya." Available at: https://creativesgarage.org/aike-report-2024 (Accessed 11 November 2025).

15 *Creatives Garage – AI/KE Report 2024* "ARTificial Intelligence in Africa: Investigating the impacts of AI on the Creative Community in Kenya." Available at: https://creativesgarage.org/aike-report-2024 (Accessed 11 November 2025).

16 Ibid.

17 Ibid.

western perspectives crowd out local voices especially since so much African cultural information is missing in these AI systems and tools.[18] Numerous stakeholders affirm that it is time to overhaul IP laws to handle AI-generated content and protect cultural heritage. There is also a real gap in how well creatives understand their own IP rights.

The report doesn't just point out problems. It calls for strong policies to protect artists' work, keep AI development transparent, and make sure AI is used ethically. The report also pushes for training programs for policymakers, African-built AI tools, and richer, more representative datasets. The goal is to get local artists involved so that AI actually reflects Kenyan and African realities.[19]

KEY OWNERSHIP SCENARIOS IN KENYA

In Kenya, who owns AI-generated work really comes down to how much a human actually contributes. The law right now, mainly the Copyright Act (Cap 130) and the Industrial Property Act only recognizes human involvment or humans as authors and inventors.[20]

First, when someone uses AI just as a tool, maybe an artist, a writer, or a programmer. He or she leans on AI to help out and nothing more. They are still making all the important choices such as deciding what to feed into the AI, tweaking what comes out, shaping the final product, or blending AI results into their bigger project. That person, the law calls him or her the author. *Section 2* of the Copyright Act emphasizes this concept, since the human is the one putting in the actual creative effort, which *Section 22* of the Copyright Act demands. Same goes for inventions, the human stays the inventor under the Industrial Property Act. This is the present clear situation, and it fits well with how the law already works.[21]

On the other hand, when the human's role is lighter, maybe they just set things up, tell the AI what to do, and step back. They might write prompts, pick data, fiddle with settings, or spell out what they want. Even in such cases where the AI does most of the heavy lifting after that, the person who set it all in motion is still the legal author.

Section 2 of the Copyright Act indicates that whoever makes the arrangements for a computer-generated work is the author. If a filmmaker in Kenya uses AI to generate scenes,

18 *Eke, Damian, and George Ogoh*. "Forgotten African AI narratives and the future of AI in Africa." The International Review of Information Ethics 31, no. 1 (2022).

19 *Ndungi, Rebeccah, and Maria Ulfah Siregar*. "The effects of artificial intelligence on the Kenyan society." *Indonesian Journal of Electrical Engineering and Computer Science* 32, no. 2 (2023): 1199–1205.

20 Ibid.

21 *Ngaruiya, Njeri, Jonathan Donner, Joshua Kinuthia Baru, and Babra Wanjiku Chege*. "The domestication of AI by Kenyan digital creators." In Proceedings of the 4th African Human Computer Interaction Conference (2023):71–75.

or a designer types up prompts to create images, they actually own the copyright even if the AI does most of the actual creating.[22]

Despite this, things get complicated when AI runs on its own. If an AI system churns out something new without any real human input or direction, the law does not foresee how to address the same. Presently, Kenyan law does not recognize AI as an author or inventor. It has to be a person, someone who adds their own originality or brainpower. If there is no human touch, the work does not get copyright or patent protection. That means nobody owns what AI independently produces, it therefore, falls straight into the public domain. This leaves a big gap, and it is a headache for everyone from tech innovators to artists and policymakers. Honestly, with the rapid advancement in AI, Kenya's laws need a serious and comprehensive update and restructure to keep up.[23]

INDUSTRIAL PROPERTY LAW IN PATENTS AND AI-GENERATED INVENTIONS

As earlier inidcated, figuring out who owns AI-generated work really concerns the extent of human involvment. Kenyan laws only recognize people as authors and inventor's, however, machines do not count. Any person who uses AI just as a tool to help with their creative process is still in control and directs the AI tool. The act of controlling and shaping the final product is human input. That in itself is enough for the law to regard an individual as the "author," since the person is bringing original ideas and effort. Similarly, the same works for patents especially if one is using AI to help invent something, but the real spark comes from the person who then becomes the inventor.[24]

When a person sets up the parameters for an AI tool to bear most of the work, the law still sides with the human. The Copyright Act, as indicated above states that the author of a computer-generated work is the person who arranged for it to be created. In case one is giving prompts, picking data, or setting up the AI to make something, even if the machine runs with it, then the person legally becomes the author. A Kenyan filmmaker using AI to generate scenes, or a designer crafting images through prompts can still own the copyright since he or she is the person who kicked things off, not the AI.[25]

On patents, the Industrial Property Act is pretty clear that patents are issued to persons. The law defines the inventor as a human and only allows humans, or someone they have assigned their rights to, to apply for and hold patents. There is no room in the rules for AI to be named as an inventor. This is not just legal nitpicking, it means if an AI invents

22 *Koros, Chebet.* "Right To Research and Copyright Law in Kenya." (2023).

23 *Yamamoto, Takashi*. "AI Created Works and Copyright." Patents & Licensing 48, no. 1 (2018): 1–16.

24 *Giczy, Alexander V., Nicholas A. Pairolero, and Andrew A. Toole.* "Identifying artificial intelligence (AI) invention: A novel AI patent dataset." *The Journal of Technology Transfer* 47, no. 2 (2022): 476–505.

25 Ibid.

something completely on its own, without real human direction, there is no straightforward way to get a patent for it in Kenya.

Essentially, there are three main scenarios in practice. First, if a human uses AI as a tool but supplies the main idea, that person gets the patent.[26] This matches how the Kenyan Industrial Property Institute (KIPI) describes patent law. There is a need for novelty, an inventive step, and practical use, but the human has to be behind it. Second, if one builds the framework, set up the model, picks the training data, or write the prompts that lead to a new technical solution they are still the inventor in the eyes of the law. The key element is that an individual is directing the process, not just watching the AI work.

Then there is the other scenario where AI creates something new entirely on its own, with barely any human input. Kenyan law doesn't have a clear answer here.[27] No one can list an AI as the inventor, and international cases like the "*DABUS SAGA*" show how messy this can get. Experts in Kenya have confessed that the law needs an update, or else we will see inventions where no one able to claim or protect them. Presently, if there's no human inventor, the invention probably cannot get a patent, or someone would have to step in and claim the rights, which opens up a 'whole can of worms' on fairness and incentives.[28]

Eventually, in Kenya, if there is meaningful human involvement, that person or whoever they assign their rights to, owns the AI-created work or invention. If not, the law does not really suggest what to do, at least not yet.[29]

POLICY GAPS IN KENYA'S AI & IP FRAMEWORK

Kenya does not have a law that really focuses on artificial intelligence. There are rules about data protection, cybercrime, consumer rights, and intellectual property, but those were all enacted before AI became a big deal and a sector in need of regulation. These laws do not cover the complicated, sophisticated and tricky concers that AI brings forth.[30]

Due to this, there is no clear rulebook or regulation for how to copyright or patent products created through AI should be protected. This applies to art, books, or any other invention. In intellectual property law, there is a big lacuna since the law states that inventors or authors have to be actual humans. That leaves AI and its place in intellectual property in a sort of a lacunae. When an AI tool comes up with something new on its own, with little or no help from a person, the law becomes inadequate. There is absolutely

26 *McCarthy, John*. "Artificial intelligence, Logic, and Formalising Common Sense." *Machine Learning and the City: Applications in Architecture and Urban Design* (2022): 69–90.

27 *Kang'Ethe, Mitchelle*. "Me, Myself, and AI: Should Kenya's Patent Law be Amended to Recognise Machine Learning Systems as Inventors?." *Strathmore L. Rev.* 8 (2023): 73.

28 Ibid.

29 *Kang'Ethe, Mitchelle*. "Me, Myself, and AI: Should Kenya's Patent Law be Amended to Recognise Machine Learning Systems as Inventors?." *Strathmore L. Rev.* 8 (2023): 73.

30 *Gikunda, Patrick, Benson Kituku, Juliet Moso, Wai Lok Woo, and Pingfan Wang*. "Kenya's Ai Ethics and Governance Framework 2025." (2025).

no way to give credit, ownership, or rights to the people who built, own, or use the AI. This happens in some instance since AI was built for autonomy or semi-autonomy. The real challenge then comes when trying to convince people to invest resources or time into building new AI tech.[31]

Apart from this, there are multiple laws which all work on their own and distinct from the others. Data protection, cybercrime, consumer rights, intellectual property are all handled separately. This separation makes things complicated. It is cumbersome to deal with issues like who controls data, how to prevent bias in algorithms, or how to make sure automated decisions are fair and transparent. Kenya does not have a single, unified approach to regulate any of that.[32]

Numerous agencies that are supposed to regulate and enforce these laws also exist, except that they do not have enough expertise or resources to adress these challenges. Most of them are not equipped to handle complex AI systems or figure out who really made what, and protect rights around AI-created work.

Kenya does not have a proper strategy and law on how to put a price on intellectual property that comes from AI, or to help people actually make money from it. Without clear regulations on who owns what, or how to enforce those rights, investors and innovators are going to think twice before investing in AI research and development.

Apart from the ethical, social, and cultural side of things, the law does not indicate that AI developers have to be open about what data they used to train their systems. There are no requirements to guard against bias, or to make sure local knowledge and culture is protected. Without such safeguards, there's a real risk that AI could exploit community knowledge or creative work without consent, without protecting culture, and without sharing any benefits.[33]

WHY THESE GAPS MATTER

Presently, the gaps in Kenya's policies leave creators and inventors guessing about what is actually allowed or protected when it comes to AI. No one is really sure who owns things like AI-generated art, patents, or code. As a result, a lot of people just ignore the process of trying to protect their work. This hurts innovation, scares away investment, and slows down local skills from growing. Additionally, when most of the AI tools come from outside the country, there's a real risk of people getting exploited or even losing parts of their cultural identity.[34]

31 Ibid.

32 *Iseko, Achi.* "Rethinking AI Superintelligence Preparedness through a Justice Lens." International Journal of Science, Technology and Society 13, no. 5 (2025): 177–189.

33 Ibid.

34 *Owiny, Patrick*. "Catching Up With Technology: Utilization of Artificial Intelligence in Kenya: Issues, Opportunities and Challenges." Opportunities and Challenges (February, 2025) (2025).

The truth is, Kenya's laws are presently not fashioned for the complex and complicated world of AI-generated products. If Kenya actually wants to stand out as a regional leader in AI and make sure local creators don't get left behind it needs to step up. That means clear AI-focused IP and governance laws, stronger institutions, and smart policies that actually protect people while encouraging new ideas. Balance is key, there is a need to promote innovation, and keep things ethical, honor local culture, and make the rules which are clear for everyone.[35]

CONCLUSION

Systems of production, creativity and innovation are being reconfigured globally by Artificial intelligence (AI) and Kenya is not left behind.[36] With digital technology, increasingly integrated into economic and social organization, AI is now extending its reach.[37] For instance, AI is becoming more prevalent in creation of works, analysis of data, design work in software development, and technical troubleshooting,. In acknowledging this change, Kenya has articulated a forward-looking national strategy on Artificial Intelligence (AI) whose purpose is to position the country as Africa's leading anchor for AI's research, model building and applications.[38]

The approach presents AI as a driver of effective and resilient solutions in sustainable development, economic growth, and social inclusion, while also highlighting national priorities domains such as data sovereignty, cybersecurity governance or equitable access. This vision puts AI not as a mere technology that companies can take advantage of, but a strategic asset with important legal, economic, and social implications.[39]

AI and intellectual property law in Kenya are on a collision course, and honestly, not enough stakeholders are talking about it. The whole point of intellectual property is to encourage people to create new things, whether that's art, inventions, or stories, by giving them exclusive rights over what they make. But AI has completely shaken things up. Machines can now pump out music, art, and even inventions that sometimes match or outdo what humans ordinarily create.[40]

35 Ibid.

36 *Sampene, Agyemang Kwasi, Fredrick Oteng Agyeman, Brenya Robert, and John Wiredu*. 'Artificial Intelligence As A Pathway to Africa's Transformations." Artificial Intelligence 9, no. 1 (2022).

37 *Abbas Khan, Muhammad, Habib Khan, Muhammad Faizan Omer, Inam Ullah, and Muhammad Yasir*. "Impact of artificial intelligence on the global economy and technology advancements." In Artificial General Intelligence (AGI) Security: Smart Applications and Sustainable Technologies, Singapore: Springer Nature Singapore, (2024): 147–180.

38 *Gikunda, Patrick, Benson Kituku, Juliet Moso, Wai Lok Woo, and Pingfan Wang*. "Kenya's Ai Ethics and Governance Framework 2025." (2025).

39 Ibid.

40 *Munywoki, Teresia*. "AI Systems and the Future of Intellectual Property Regimes." *The Commonwealth Cyber Journal*: 59.

This raises numerous questions. Some include; (i) *where does this status leave us? (ii) Who actually owns something an AI creates? (iii) Can you protect AI work under current IP laws?* and *(iv) what happens when a person barely touches the process, or maybe isn't involved at all?*[41].

Right now, Kenya's main IP laws the Copyright Act (Cap 130) and the Industrial Property Act (Cap 509) do not comprehensively address these issue. Both laws stick to the idea that only people and not machines can be authors or inventors. The Copyright Act mentions "computer-generated works" in passing, and patent law only recognizes human inventors, but neither one really deals with the reality that AI can act on its own or with very little help from people.[42] Due to this, a lot of AI-generated works have no proper legal protection and such rights are seldom considered in any law. The same is a nightmare for creators, investors, and anyone trying to make policy within the AI and Intellectual property space.[43]

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Koros, Chebet. "Right To Research and Copyright Law in Kenya." (2023).

41 Ibid.

42 *Koros, Chebet*. "Right To Research and Copyright Law in Kenya." (2023).

43 Ibid.

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From ambitions to actions: assessing new transitional justice institutions in DRC

By Adolphe Kilomba Sumaili.*

Abstract

The foundation of transitional justice in the history of the Democratic Republic of the Congo (DRC) dates back to the *Conférence Nationale Souveraine* (CNS) held from August 7, 1991 to December 1992. The CNS lasted for 17 months after successive suspensions by President Joseph-Désiré Mobutu. Throughout this conference, 23 committees alongside numerous other sub-commissions were set to document various areas of public affairs. Among the committees and submissions, two were dedicated to document large scale human rights abuses and ill-gotten goods: the commission of assignation and human rights violations and the commission of ill-gotten goods. The reports issued by these committees were overshadowed by political race to nominate the prime minister to conduct the political transition. To all human rights abuses that occurred before 1990, the DRC has undergone the deadliest conflict after World War II from 1998 to 2003 with over 6 millions of victims.[1] From 2006 to 2025, the conflicts broke out and still killing thousand and thousand with any transitional justice process in response. This paper portrays the state of play of institutions specially created to handle transitional justice issues across the DRC. Therefore, it reminds the standard of a credible process of transitional justice (1), then examines one by one each transitional justice institution created by the DRC government (G-DRC) (2). It also questions the political will of the G-DRC on transitional justice matters and deems it insufficient (3). The paper ends by a short conclusion with perspectives for a better future for transitional justice in the DRC.

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1 See IRC, *Crise au Congo: 5,4 millions des morts*, available at www.rescue.org/news/crise-du-congo-54-millions-de-morts-selon-une-tude-de-1-4332 accessed on 20 November 2025 at 11:45; sel also the UN Mapping report available at https://www.ohchr.org/en/countries/africa/2010-drc-mapping-report accessed in November 2025 a 3:11 pm.

Introduction

1. The standard for a credible transitional justice process

In the legal scholarship, transitional justice is defined as a response to large scale human rights abuses. It is meant to accompany the transition from barbaric regimes to democratic regimes and the building of the rule of law. Ruti Teitel describes it as a mechanism that « refers to the view of justice associated with periods of political change, as reflected in the phenomenology of primarily legal responses that deal with the wrongdoing of repressive predecessor regimes.»[2] In turn, the International Center for Transitional Justice (ICTJ) defines transitional justice as follows: «[T]he set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms. »[3] To strike the right balance, the United Nations has provided its own understanding of transitional justice: « both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programs, institutional reform or an appropriate combination thereof». In 2010, the UN General Secretary reminded the following: „Whatever combination is chosen must be in conformity with international legal standards and obligations. »[4]

Based on multiple transitional justice experiences across the world, we theorized the international experiences of transitional justice into a triptych of transitional justice models namely *holistic-selective-monolithic*.[5] We call the holistic model of transitional justice, the combination of five pillars namely the right to truth, the prosecution of large scale human rights abuses, the clemency, the reparations and finally the guarantees of non-recurrence. Both together form the holistic approach of transitional justice. In turn, the selective model of transitional justice is a combination of at least two pillars while the monolithic model activates only one pillar to the detriment of the remaining others.

2. Institutions of transitional justice in the DRC

From the end of the CNS in December 1992 to date (November 2025), some transitional justice institutions were created to address the war legacy across the DRC. Let us examine one by one.

2 See *Ruti Teitel*, « Transitional Justice in a New Era », *Fordham International Law Journal*, Vol 26, n°4, 2003, p.893.

3 See *International Center for Transitional Justice*, «What Is Transitional Justice? » *ICTJ Website* : http://ictj.org/about/transitional-justice accessed in November 20, 2025 at 4:08 pm.

4 *United Nations*, Guidance Note of the Secretary-General. The UN Approach of Transitional Justice, March 2010, disponible au http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf accessed in November 20, 2025 a 4:07 pm.

5 See *Adolphe Kilomba Sumaili*, La justice transitionnelle au miroir des réalités congolaises, Enghien, 2019, p167.

2.1. The Truth and reconciliation commission

The TRC was the first transitional justice institution to address transitional justice issues such as truth-telling, prosecution, clemency, reparations and guarantees of non-recurrence. This institution was created by the law n° 04/018 of July 30, 2004. The provision 5 outlines the main tasks assigned to this commission: "The Truth and Reconciliation Commission's mission is to establish the truth and promote peace, justice, reparation, forgiveness, and reconciliation, with a view to consolidating national unity. In this capacity, it provides: – citizen support during the transition; – conflict prevention or management, should they arise, through mediation between divided communities; -creation of a space for dialogue among Congolese people: political, economic, social, and cultural actors, to consolidate peace and national unity through truth, forgiveness, justice, and reconciliation;- efforts to heal trauma and restore mutual trust among Congolese people." In other words, the Congolese TRC was in charge of telling the truth to Congolese people. Through truth-telling, the TRC was meant to promote peace, justice, reparation, forgiveness and reconciliation to strengthen the national unity. Its *ratione temporis* jurisdiction covered the period from June 30, 1960 to the end of the political transition (2006) according to the provision 6, paragraph 3 to supplement the work achieved by the two CNS's commissions above mentioned. This time frame was divided into two periods: the first period from June 30, 1960 to 1992 while the second period departs from 1993 to the end of the political transition (2006).

According to the provision 7 of the TRC's founding law, the following objectives were assigned: To fulfill its mission, the Truth and Reconciliation Commission pursues the following objectives: "a) to consolidate national unity and cohesion, as well as social justice; b) to establish the truth about the political and socio-economic events that have occurred in the Democratic Republic of Congo; c) to reconcile political and military actors with each other, with the people, and the people with themselves; d) to contribute to the emergence and consolidation of the rule of law in the Democratic Republic of Congo; e) to revive a new national and patriotic consciousness; f) to bring those who govern closer to those who are governed; g) to restore a climate of mutual trust between the different communities and encourage peaceful inter-ethnic coexistence; h) to secure recognition of the crimes committed against the Republic; i) to establish individual and collective responsibility for the wrongs and crimes committed and to obtain reparations; j) to work towards the eradication of tribalism, regionalism, intolerance, exclusion and hatred in all its forms."

The provision 8 of the TRC's law lists the main activities entrusted to the TRC: "a) drafting its rules of procedure; b) receiving complaints, denunciations, confessions from perpetrators, or any witness statements related to massive human rights violations, particularly those related to the rape of women and girls during wartime; c) investigating the nature, causes, and extent of political crimes and massive human rights violations committed by both Congolese and foreigners against the Congolese nation and/or population, both within and outside the national territory, from June 30, 1960, until the end of the transition; d) investigating political, socio-economic, and other events that have disrupted peace and

justice in the Democratic Republic of Congo; e) identifying perpetrators and determining individual and/or collective responsibility for these crimes and violations; f) identifying victims and determining the extent of the harm suffered (g) to seek any appropriate protection mechanism requested by individuals who have been questioned and who fear adverse consequences to their safety as a result of their statements; (h) subject to the amnesty law to be passed by the National Assembly, to propose to the competent authority the acceptance or rejection of any individual or collective request for amnesty for acts of war and political and opinion-based offenses; (i) to train its members in techniques for the peaceful resolution and transformation of conflicts; (j) to build upon the achievements of the Sovereign National Conference and the Inter-Congolese Dialogue; (k) to cooperate with other national, sub-regional, regional, and international initiatives pursuing the same objectives to consolidate peace; (l) to prepare a comprehensive report on the activities of the Truth and Reconciliation Commission, including the results achieved, the measures proposed, and the reforms necessary to prevent the recurrence of human rights violations and the commission of related crimes. »

Though the law has not used the expression "transitional justice", the examination of provisions 7 and 8 suggests that all participants at the Inter-Congolese dialogue held in Sun-city in South Africa chose the holistic model of transitional justice to end the Congolese war. All participants adopted the holistic model in terms of truth-telling; prosecution since the TRC was tasked to identify perpetrators and determine at which extent they were responsible; promote clemency through proposing an amnesty law; reparations for victims in determining the extent he harms suffered as well as suggesting necessary reforms to prevent the recurrence of large-scale human rights abuses. While the law was promulgated in July 2004, its facilitators were presented to the National Assembly on December 10, 2004, and sworn in by the Supreme Court of Justice on December 3, 2004.[6] The TRC was composed of 21 members, 8 members of the *bureau* and 13 commissioners. The 21 members constituted the TRC's plenary assembly, the decision-making body. It was composed of two special commissions: the special commission for truth with 12 commissioners and the special commission for reconciliation with 11.[7]

Each special commission was subdivided into three sub-commissions called sections. The special commission for truth had the following sections: section on political crimes and massive human right violations; section on social, economic, environmental crimes and ill-gotten gains and the section on violence against women and children. On the other hand, the special commission on reconciliation was composed by the section on pacification and Inter-Ethnic coexistence; the section on reparation, rehabilitation, forgiveness, and amnesty as well as the section on conflict prevention, mediation, and education for

6 See the final report of the Congolese Truth and Reconciliation Commission, p3 at https://atjhub.csvr.org.za/wp-content/uploads/2022/03/DRC-Final-Report-French.pdf accessed November 27, 2025 at 11:37.

7 TRC's final report, p9 available at https://atjhub.csvr.org.za/wp-content/uploads/2022/03/DRC-Final-Report-French.pdf accessed November 27, 2025 at 11:37.

a culture of peace.[8] Due to the lack of political will, financial constraints alongside an inexperienced work force, the TRC was denied enough time to fulfill its mandate. Three steps were planned for the implementation of its agenda: the preparatory step followed by the operational one and a final step. From July 2004 to February 2007, the TRC remained at its preparatory step.[9] In other words, the political transition ended while the TRC has not kicked off its operational step. Moreover, instead of being maintained in the new institutional architecture set by the new constitution as an institution to support the democratic process, the TRC was suppressed and its office closed after submitting its final report to the Parliament. This is to say that the TRC did not operate and its mandate remains unfulfilled to date.

2.2. The National Fund for Reparations for Victims of Conflict related to sexual violence and victims of Crimes against peace and security (FONAREV)

The National Fund for Reparations for Victims of Conflict related to sexual violence and victims of Crimes against peace and security (FONAREV)[10] was created in December 2022 by the provision 21 of the law n° 22/065 of December 26, 2022,[11] establishing the fundamental principles related to the protection and reparation of victims of conflict-related to sexual violence and victims of crimes against peace and security of humanity. The article 23 provides: "A Fund is established to support access to justice, reparation, empowerment and community recovery for victims and their beneficiaries." Its mission is outlined at the provision 22 as follows: „The Fund's missions are: – to identify victims; – to help victims access justice, including the right to compensation and the recovery of damages awarded to them, and to benefit from free support and appropriate legal assistance provided by lawyers; – to award reparations to victims."

In other words, FONAREV is a technical body to assist victims. Then how does one be recognized as a victim to access FONAREV's assistance? The status of victim is awarded by a judgment of the *Tribunal de Grande Instance* as provided by article 4 of the law: "The status of a victim, as defined in Article 2(y) of this Law, is established by a first-instance decision rendered by the Regional Court of the place where the offense occurred (paragraph1).This decision is subject to appeal within 15 days of its notification by the appellant and within 30 days by the Public Prosecutor acting in the interest of the

8 TRC's final report, p11 available at https://atjhub.csvr.org.za/wp-content/uploads/2022/03/DRC-Final-Report-French.pdf accessed November 27, 2025 at 11:37.

9 TRC's final report, p4 available at https://atjhub.csvr.org.za/wp-content/uploads/2022/03/DRC-Final-Report-French.pdf accessed November 27, 2025 at 11:37.

10 See further on FONAREV at https://www.fonarev.cd/ accessed 7 June 2025 at 11:40.

11 See law n° 22/065 of December 26, 2022, establishing the fundamental principles related to the protection and reparation of victims of conflict-related to sexual violence and victims of crimes against peace and security of humanity, Kinshasa, *Journal Officiel*, *Numéro spécial*, 21 January 2023,pp1–27.

law(paragraph 2)." In fact, without the recognition by the *Tribunal de Grande Instance*, nobody can claim any assistance at FONAREV. This provision shed light on how tough the path is awaiting all people directly affected by armed conflicts across the DRC. Almost all people living in areas affected by conflicts live under the threshold of poverty. Living in a country where the quality of road infrastructures is among the lowest in the world, victims will have difficultly reaching areas accommodating tribunals and courts to get victim status to access FONAREV's assistance. The DRC ranks 136th out of 141 countries studied according to the Global economy report issued in 2019.[12] The provision 4 of the law creating FONAREV appears therefore as the first legal obstacle for victims on their ways to justice.

The financing of FONAREV is organized by the provision 25 of the aforementioned law: "The Fund's resources come from: – budgetary subsidies; – contributions from policyholders, which are added to the amount of property insurance premiums and are based on all premiums paid by policyholders to insurance companies. This contribution is collected monthly by the Fund. A Ministerial Order issued by the Minister responsible for insurance sets the rate of this contribution; – default interest due to late payment of damages and interest awarded to victims, in the event of assignment of claims; – late payment interest due to delayed payment of damages and interest awarded to victims, in the event of assignment of claims; – 11 % of the mining royalties paid by holders of mining concessions, allocated as follows: 6 % to the State, 2 % to the provincial administration, 1 % to the decentralized territorial entity, and 2 % to the Mining Fund for Future Generations, in accordance with the provisions of Article 242 of Law No. 007/2002 of July 11, 2002, concerning the Mining Code, as amended and supplemented by Law No. 18/001 of March 9, 2018; – 2 % of the portion of profits from the sale by private economic operators of carbon certificates related to the process of reducing emissions from deforestation and forest degradation, reserved for the Congolese State, without prejudice to the existing allocation formula; – Proceeds from Fund investments; – Reimbursements and realization of securities and real estate; – Contributions from donors, international and philanthropic organizations; – Funds raised exceptionally through national and international solidarity; – Donations and bequests; – Any other resources allocated to the Fund."

Additionally, to victims' concerns of getting such a status, the financial management of FONAREV remains questionable. Like other state-owned bodies, FONAREV is criticized for the lack of transparency and financial orthodoxy. People are less informed on how the financial resources it allocated are being managed and how its personnel was recruited. Since its founding law acknowledges the power of awarding the victim status, to a tribunal one wonders to whom FONAREV provides its services since there is no judgment issued by any tribunal across the DRC? Therefore, on which base does FONAREV award financial assistance? The process to benefit FONAREV's services has to start with a judgement

12 See https://www.theglobaleconomy.com/rankings/roads_quality/ accessed in November 29, 2025 at 10:19.

issued by a *Tribunal de Grande Instance*. Otherwise, it becomes illegal and this is the case for FONAREV to date. It unlawfully grants victim status to whoever seeks it instead of referring all demands to tribunals. Nowadays for instance, far away from its mandate, FONAREV has started providing assistance even to Congolese refugees and IDPs.[13] Its political personnel is recruited based on political affiliation to the presidential political party. Championed by the first lady Denise NYAKERU TSHISEKEDI, FONAREV is more an extension of the staff of the presidential office than a neural civil service. Like the stillborn truth and reconciliation commission (TRC) in 2023, FONAREV is managed by political activists instead of experts on transitional justice matters. The way its operates demonstrates amateurism and no outcome has been achieved. The managing personnel lacks expertise to deliver transitional justice services to victims such as truth, prosecutions, clemency and reparations (collective and individual) as well as guaranties of non-recurrence. FONAREV operates as a stand-alone body while it should have been an element of a holistic strategy of transitional justice to dope its impact. Its siloed interventions will be dissolved into the ocean of victim's needs in terms of truth, prosecutions, guarantees of non-recurrence and clemency. FONAREV should then be reformed to strengthen its impact.

2.3. The Inter-institutional commission for assistance to victims and support for reforms (CIAVAR)

The law creating FONAREV has also created the inter-institutional commission for assistance to victims and support for reforms at its provisions 45 and 63. The presidential order n°23/056-B of May 12, 2023 organizes this organ.[14] Its preamble explains the rationale behind its creation as follows: "Considering the need to coordinate and control, at the highest level of the State, the monitoring of the implementation of programs and reforms on issues of transitional justice in its pillar of reparations and for victims of conflict-related sexual violence and victims of crimes against peace and the security of humanity." Like FONAREV, CIAVAR is also an extension of the staff of the presidential office where people are recruited based rather on their political activism than technical expertise on transitional justice issues. CIAVAR's personnel is part of the staff of presidential office as enshrined in article 25 of the presidential order.

According to article 1 of the presidential order n° 23/184 of September 7, 2023, CIAVAR is animated by 27 people. All of them have been recruited without any public

13 See *ACP*, Agression rwandaise : les réfugiés congolais au Burundi bénéficient de l'assistance du gouvernement, available at https://acp.cd/affaire-judiciare-et-droits-humains/agression-rwandaise-les-refugies-congolais-au-burundi-beneficient-de-lassistance-du-gouvernement/ accessed in December 21, 2025 at 20:51.

14 See Presidential order n°23/056-B of May 12, 2023 Order No. 23/056-B of 12 May 2023 concerning the organization and operation of the inter-institutional commission for assistance to victims and support for reforms, Kinshasa, *Journal Officiel,* First part, Numéro spécial, December 27, 2023, pp12–13.

job offers. They are political activists without technical qualification on transitional justice issues as it was with the truth and reconciliation commission set in 2003. The same mistakes are repeated to end up with no result on victims' needs. Thus, since their creation, FONAREV and its counterpart CIAVAR have proven useless *vis-à-vis* victims' needs. They have become more job providers for political activists than transitional justice issues-solver. In 2003, transitional justice institutions were considered as institutions to support the democratic process. To date, they are centered around the office of the President of the Republic with limited impact on victims. They operate without any national policy and strategy on transitional justice as whole. All of this shows how this critical issue has been downgraded while it represents an opportunity for reforms and stability for the Democratic Republic of the Congo.[15]

The article 3 of the presidential order aforementioned lists the mission of CIAVAR: "- To conduct research and analysis to support measures surrounding the transitional justice process, particularly by formulating recommendations for reforms to the national institutional and legal framework likely to guarantee the non-recurrence of crimes against peace and the security of humanity; – To monitor the implementation of programs on victim assistance issues covered by the Law; – To issue opinions and propose reforms on victim assistance and reparations, including decisions of the National Fund for Reparations for Victims of Conflict-Related Sexual Violence and other crimes against peace and the security of humanity; – To serve as the liaison between public authorities and victims, victim support associations, civil society, and communities affected by conflict, with a view to reconciliation and national cohesion; – Collaborate with national and international institutions with similar missions to exchange information and experience;- Ensure the effectiveness and improvement of the Fund's victim support mechanisms;- Collaborate with the Fund in organizing tributes and commemorations for victims; – Collaborate with the Fund in developing and implementing reparation programs; Ensure the Fund adheres to the fundamental principles relating to victim reparation and formulate recommendations for the Fund to improve victim support."

In the words, CIAVAR is a technical body to support FONAREV's activities. It is as task force to play the role of a transitional justice think tank inside the office of the president of the Republic. The mission as heralded above will surely not be delivered due to the lack of expertise. CIAVAR and FONAREV have been created as though the DRC was at its first experience of transitional justice. Why, starting from scratch instead of capitalizing past transitional justice experiences, were they unsuccessful? The *Conférence Nationale Souveraine*'s experience and the one from the truth and reconciliation commission in 2003 would surely enlighten the way forward. Therefore, it becomes necessary to reform CIAVAR to make it a piece of a transitional justice puzzle to increase is impact.

15 See *Adolphe Kilomba Sumaili,* Initiating transitional justice in the Democratic republic of the Congo: opportunities for stability and reform, December 5, 2025, available at https://www.csvr.org.za/initiating-transitional-justice-in-the-democratic-republic-of-the-congo-opportunities-for-stability-and-reform/ accessed in December 21, 2025 at 10:43 pm.

2.4. The Special Fund for Reparation and Compensation for Victims of Ugandan Armed Activities in the DRC (FRIVAO).

FRIVAO was initiated by decree No. 19/20 of December 13, 2019, establishing, organizing and operating the Special Fund for the Distribution of Compensation to Victims of Illegal Activities of Uganda in the Democratic Republic of Congo or to their beneficiaries, abbreviated as « FRIVAO ». FRIVAO started operating four years later with the appointment of its steering committee by the Presidential order in May 2023.[16] This institution has been created to supervise the distribution of funds to be paid by Uganda following its condemnation by the International Court of Justice (ICJ) in December 19, 2005 of its unlawful activities in the territory of the DRC.[17] After negotiations failed between the parties to determine the amount of reparations, the court delivered a judgment on the question in February 9, 2022 awarding 225,000, 000 $US for damage to persons; 40,000,000 $US for damage to property and $60,000,000$ US for damage related to natural resources. The ICJ stated the payment should be paid in five annual installments of US$65,000,000 starting on 1 September 2022. In case of delay, post-judgment interest of 6 per cent would accrue on any overdue amount. To ensure the fair distribution of the amount, the G-DRC created FRIVAO and headquartered it in Kisangani. This city witnessed *the six-days war* between Ugandan and Rwandan armies, fighting to control diamonds trading posts from 5 to 10 June 2000 through the two armies remained true to their official objective to topple President Mzee Laurent Désiré Kabila.[18]

The mission of FRIVAO is outlined at the provision n°4 of its founding decree as follows: „Without prejudice to the provisions of the forthcoming judgment of the International Court of Justice, the Fund's mission is to distribute individual and collective compensation to victims and to public and private entities affected by Uganda's unlawful activities, in accordance with applicable international law and national laws compatible therewith(Paragraph1). It manages, with complete independence, fairness, and transparency, all funds allocated to the Democratic Republic of Congo as reparations for damages caused by Uganda's unlawful activities on Congolese territory (Paragraph 2). To this end, it performs, in particular, the following tasks: • Collecting all funds allocated for victim

16 See *RDC* : Félix Tshisekedi nomme les animateurs du Fonds Spécial de Réparation de l'Indemnisation aux Victimes des activités illicites de l'Ouganda en RDC (FRIVAO), May 4, 2023, available at https://actualite.cd/2023/05/04/rdc-felix-tshisekedi-nomme-les-animateurs-du-fonds-special-de-reparation-de accessed in December 27, 2025 at 09:10.

17 See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) available at https://www.icj-cij.org/case/116 accessed in December 24, 2025 at 5:13 pm.

18 See *Hranjski, Hrvoje* (12 June 2000), *Rwanda Routs Uganda in Congo Battle*, available at https://www.washingtonpost.com/archive/politics/2000/06/12/rwanda-routs-uganda-in-congo-battle/daf087b3-414d-40f9-a83f-8898f2448504/ accessed in December 26, 2025 at 11:03. See also Lara Santoro, Behind the Congo war: diamonds Yesterday, Rwanda and Uganda faced off over control of an airport – and the loot, August 16, 1999 available a https://www.csmonitor.com/1999/0816/p1s4.html accessed in December 26, 2025 at 11:28.

compensation; • Organizing the registration of all victims eligible to receive reparations for damages suffered as a result of Uganda's armed activities; • Collect all necessary data and information to ensure effective redress for all harm suffered and to enable all victims to exercise their respective rights; • Ensure optimal communication to victims regarding all procedures and steps to follow to obtain effective redress; • Identify and publish the locations where victims can collect their funds; • Distribute the funds to the various victims or their beneficiaries; • Ensure the regularity, efficiency, and transparency of the redress process."

The first installment was remitted on September 1, 2022 by the Republic of Uganda. The second one was made in 2023 and the third in 2024, crediting FRIVAO's account with 130,000, 000 $ US instead of 195,000 $ US.[19] To date, FRIVAO has identified 14,814 victims of which 4,131 were declared eligible to compensation according to criteria set by the ICJ's judgment.[20] The others are still being examined by FRIVAO. Victims have received from 200$ US to 2,000$ US to compensate for the wrong suffered. In fact, FRIVAO is meant to ensure a fair distribution of the money paid by the Republic of Uganda to victims. This task should be performed, the text says, with complete independence, fairness, and transparency. Nevertheless, since Uganda remitted the first installment on September 1, 2022 with 65,000,000$ US, the respect of the aforementioned moral values as enshrined in the founding law became a struggle. FRIVAO was neither independent, fair nor transparent. Its initial steering committee was reshuffled by the former minister of Justice Constant MUTAMBA, alleging the funds misappropriation based on the report of the *Inspection Générale des Finances* (IGF). He then appointed his personal secretary to lead the fund. Some months later, the Minister Constant MUTAMBA was himself found guilty of FRIVAO's funds misappropriation by the *Cour de cassation* and sentenced for 3 years of forced works and 5 years of ineligibility.[21] The minister unlawfully ordered the remittance of 19,000,000 $ US of FRIVAO's funds to build a prison in Kisangani.[22] According to the *Cour de cassation*, Constant MUTAMBA breached the Congolese public procurement law and embezzled 19,000,000$ US to build a fictional prison in Kisangani.

The autonomy of FRIVAO remains theoretical to date. While its decree does not foresee any role for the President of the Republic, he was the one to appoint its steering committee, which is illegal. The appointees were thereafter removed by the order of the

19 See *Caleb Kazadi*, DRC: victims' fund overhauled amid embezzlement suspicions, Octobre 24, 2025, available at https://www.justiceinfo.net/en/137058-drc-victims-fund-overhauled-amid-embezzlement-suspicions.html accessed in December 27, 2025 at 09:19.

20 See *Caleb Kazadi,* DRC: victims' fund overhauled amid embezzlement suspicions, Octobre 24, 2025, available at https://www.justiceinfo.net/en/137058-drc-victims-fund-overhauled-amid-embezzlement-suspicions.html accessed in December 27, 2025 at 09:19.

21 See the footage of the trial available at https://www.youtube.com/watch?v=SxXteM6ARI4 accessed in December 27, 2025 at 10/02.

22 See *Caleb Kazadi,* DRC: The Justice Minster caught by the law, September 5, 2025, available at https://www.justiceinfo.net/en/149425-drc-justice-minister-caught-by-law.html accessed in December 27, 2025 at 10:08.

Minister of justice, aggravating the unlawfulness of the situation. Yet, FRIVAO's founding decree considers administration council as the highest organ of this technical body. The lack of transparency is another debilitating shortcoming of FRIVAO. While it is meant to manage all funds to compensate victims, facts show that the Minister of Justice of the central government is the person habilitated to activate FRIVAO's bank account. This was confirmed by the testimony of Rose MUTOMBO, the former minister of justice during Constant MUTAMBA's trial. Constant MUTAMBA's trial demonstrates the low level of transparency that characterizes the management of FRIVAO. This technical body does not avail information on how it operates to select victims. Also, it does not provide criteria that specify the selection of victims and how amounts of money awarded are calculated. The recruitment process of the FRIVAO's personnel remains also opaque.

3. Questioning the G-DRC's political will for transitional justice?

Based on facts, one notices the political will of the G-DRC to create and sustain a transitional justice momentum across the country. This political will is evidenced by the creation of the TRC (2003–2006) and recently FONAREV, CIAVAR and FRIVAO. Those institutions demonstrate the beginning of a long process to address transitional issues across the DRC. Through them, public funds are awarded to victims despite the disrespect of public procurements law and the law level of transparency. Nevertheless, the creation of transitional justice institutions seems insufficient vis-à-vis the demand across the Congolese territory. Victims are countless due to the violence of numerous armed groups and the most recent AFC/M23's rebellion that ambitions to topple the Félix TSHISEKEDI's regime. Moreover, the G-DRC should avoid any ambiguity while engaging in transitional justice matters. In December 15, 2025, the French *Cour d'assises* sentenced the former warlord Roger LUMBALA for 30 years for wartime atrocities considered as war crimes and crimes against humanity in the early 2000s in Bafwasende/Province Orientale-DRC.[23] The silence of the G-DRC was more revealing: its political will for transitional justice is not sharp enough.[24] Throughout his trial, Roger LUMBALA heavily charged Jean-Pierre BEMBA

23 See *Hemery Makumero*, French court sentences ex-DR Congo rebel and politician to 30 years in jail, Décember 16, 2025, available at https://www.bbc.com/news/articles/c4ge7412evlo accessed in December 27, 2025 at 11:28; See also *Pierre Lepidi*, L'ancien chef de guerre congolais Roger Lumbala condamné à trente ans de réclusion criminelle à Paris pour complicité de crimes contre l'humanité, December 15, 2025, available at https://www.lemonde.fr/afrique/article/2025/12/15/l-ancien-chef-de-guerre-congolais-roger-lumbala-condamne-a-trente-ans-de-reclusion-criminelle-a-paris-pour-complicite-de-crimes-contre-l-humanite_6657740_3212.html accessed in December 27, 2025 at 11:27.

24 See *Adolphe Kilomba Sumaili*, Initiating Transitional Justice in the Democratic Republic of the Congo: opportunities for stability and reform, December 2025, available at https://www.csvr.org.za/initiating-transitional-justice-in-the-democratic-republic-of-the-congo-opportunities-for-stability-and-reform/ accessed in December 2025 at 11:40; See also *Adolphe Kilomba Sumaili*, Droit à la vérité dans la région des grands lacs: base légale, état des lieux de l'offre et de la demande, in Librairie Africaine d'Etudes Juridiques, August 2022, available at https://www.nomos-elibrary.de/

GOMBO, the current minister of transportation. Normally, this should have led to the resignation of this former warlord from the Government. The Government should have also fully cooperated with the French tribunal to clarify the role of Jean-Pierre GOMBO as well documented by the UN Mapping Report.[25] Neither of this expected reaction was made the G-DRC. Instead, the G-DRC decided to ignore the trial for political reasons. All interrogations by the civil society ran up against the wall of silence. This attitude reveals how far the G-DRC is ready to go in transitional justice issues. This is to say that actions remain insufficient vis-à-vis the claimed ambition by the G-DRC on transitional justice matters.

4. Conclusion

This paper outlines the state of play of transitional justice institutions in the Democratic Republic of Congo as a sign of the G-DRC political will. Since the two CNS commissions that documented large scale human rights abuses and ill-gotten gains of Mobutu's regime, the DRC set a Truth and Reconciliation commission (TRC) from 2003 to 2006 to support the democratic process towards free and fair elections held in 2006. From 2006 to 2018, amnesty was the sole transitional justice mechanism activated by the G-DRC to settle armed conflicts across the Congolese national territory. That said, in 2019, FRIVAO was created to manage fairly the funds paid as reparations by the Republic of Uganda following its condemnation by the ICJ in 2005. It is only after 4 years that FRIVAO started operating to serve victims. FONAREV and CIAVAR came to life in 2002 to address victims' needs. Like FRIVAO, FONAREV and FRIVAO suffer the same debilitating shortcomings in terms of respecting their founding laws and transparency. Instead of being real transitional justice institutions, instead, they are populated by political activists without any expertise on transitional justice convoluted issues. They are the extension of presidential office's staff. Whereas the founding texts of FONAREV and CIAVAR reserve for the *Tribunal de Grande Instance* the power of recognizing or denying the status of victim to applicant, facts show that FONAREV and CIAVAR are operating contrary-wise. They call people victims without any judgement, which is illegal. Moreover, the G-DRC should avoid starting from scratch when dealing with transitional justice matters. I should capitalize the CNS and TRC's experience.

Although the creation of the FRIVAO, FONAREV and CIAVAR demonstrates a clear sign of the G-DRC's political will to engage in transitional justice matters, there is still shortage of evidence to confirm such a determination. The most recent development is the Roger Lumbala's trial at the French Cour d' assises where the G-DRC decided to ignore the trial while one of its influential members, Jean-Pierre BEMBA GOMBO was

10.5771/2363-6262-2022-3-224/droit-a-la-verite-dans-la-region-des-grands accessed in December 27, 2025 at 11:37.

25 See N Mapping report a https://www.ohchr.org/en/countries/africa/2010-drc-mapping-report accessed in December 27, 2025 at 11:12.

repeatedly charged with allegations of war crimes and crimes against humanity. Arguably, the ambition to address transitional needs is openly claimed but actions remain insufficient. To increase credibility for its actions in the field of transitional justice, the G-DRC should *inter alia* draft a national public policy on transitional justice alongside its national strategy elaborated around the holistic approach of transitional justice; create a truth and reconciliation commission as standalone institution as it was in 2003; make FONAREV, FRIVAO and CIAVAR as its components; recruit transitional justice experts instead of political activists to make transitional justice institutions really delivering; promote transparency and accountability within transitional justice institutions; always associate civil society actors while deciding on transitional justice issues; avoid appointing people charged by alleged war crimes and crimes against humanity, etc.

L'Exigibilité: une forme de redynamisation du cadre juridique de la sphère politique sénégalaise

By Mohamed Ndiaye*

L'objectif est de montrer qu'un autre droit diffèrent du droit classique est en train d'émerger dans la sphère politique. Il s'agit, effectivement, d'un droit caractérisé par le pragmatisme (…) et la flexibilité (…)[1]. Car, si l'on s'en tient à l'idée d'une réforme en profondeur des pratiques politiques, seul un processus de fabrication du droit[2], à travers différentes formes de luttes, permettrait à une société d'aboutir à la traduction juridique de ses aspirations.

The objective is to show that a law different from classical law is emerging in the political sphere. It is, indeed, a law characterized by pragmatism (…) and flexibility (…). For, if we stick to the idea of a thorough reform of political practices, only a process of law-making, through different forms of struggle, would allow a society to achieve the legal translation of its aspirations.

INTRODUCTION

Si les citoyens et les peuples[3] doivent se conformer à la chose politique, les jeunes, une cohorte soudée, se l'approprient pour la façonner d'une autre manière. Fort de cela, les jeunesses en politique luttent constamment pour des alternances. En tout cas, longtemps marginalisées ou peu prises en compte dans les décisions, elles se révoltent à chaque fois que le besoin se présente.

Il convient de souligner que la variabilité épistémique entre les tranches d'âges ou générations n'est pas nouvelle. Elle a traversé les époques et les géographies dans l'optique de faire société, Etat ou nation. Seulement, c'est le modus operandi qui varie en fonction des réalités culturelles, cultuelles ou des imaginaires démocratiques. Ce qui, inéluctablement,

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1 Jean Chevallier, « Vers un droit post-moderne? Les transformations de la régulation juridique », *Revue du droit public* (RDP), n° 3, 1993.

2 C. Creda-Guzman, « L'importation d'objets juridiques et la cohérence de l'ordre juridique administratif chilien », *Revue internationale de droit comparé*, n° 2, 2007, p. 30.

3 M. Diakhaté, *Le peuple dans le constitutionnalisme africain : réflexion sur les minorités et les peuples autochtones dans le cas du Congo et du Cameroun*. Aussi, Godefroy Moyen et Don Joïra Baheta Oueleke (Université Marien Ngouabi, Brazzaville), « Le peuple dans le constitutionnalisme africain », *Cahiers Africains de Droit International*, n° 006, juin 2019.

découle et déteint en même temps sur l'institutionnel, le non-institutionnel et les non-dits d'une géographie ou d'une époque donnée. Le tout, dans une dpolitiquement.

La nécessité de se doter de régimes politiques indépendants avait justifiée l'importation de régimes issus de la fabrique des anciens pays colonisateurs[4] (…). Ce qui a impacté, naturellement, sur le système politique dans sa globalité. Par la suite, les spécificités politiques, économiques et sociales du continent africain ont dicté la nécessite d'essayer de la réinvention par la substitution et/ou la combinaison de techniques juridiques inventées d'ici ou d'ailleurs. Ce qui, malgré tout, complique davantage le destin des sociétés politiques. Mais, sur le fondement d'aspirations combinées, à travers un mouvement sinusoïdal fait d'alternances, il apparait dans l'évolution politique africaine l'ambition de trouver la formule institutionnelle idoine, le régime politique approprié et le mode de gouvernement adapté[5] aux réalités nouvelles.

C'est effectivement ce qui anime la nouvelle génération politique au Sénégal. Elle est composée en majorité de jeunes, qui renforcent leurs techniques de lutte par le droit. Car, sachant l'importance de disposer d'un cadre juridique adapté aux aspirations des sociétés, la jeunesse sénégalaise n'attend plus le politique. Elle propose et assure le suivi. L'exigibilité constitue, de ce fait, un moyen plus ou moins efficace pour impulser des réformes en profondeur sur le système politique, par considération aux facteurs historiques, politiques et juridiques.

La méthode varie. Elle peut se faire sous forme des revendications pacifiques ou violentes. En réalité, ce qui compte pour la jeunesse politique après s'être engagée, c'est la redynamisation du cadre juridique pour une meilleure prise en considération de ses aspirations.

Ce qui a commencé à prendre forme depuis le début des années deux mille, avec la première alternance systémique. Crescendo, les jeunesses se sont successivement relayées dans cette logique. C'est seulement le format qui change en fonction des époques.

Les idéologies politiques sont-elles dépassées? L'interrogation nous parait légitime du moment où les nouvelles revendications (d'une partie de la jeunesse politique africaine, notamment sénégalaise) sont faites tantôt sur le fondement d'idéologies libérales, souverainistes, socialistes ou conservatrices. L'essentiel est pour elle d'être pragmatique dans ses aspirations, souhaits et ambitions pour aboutir à l'instauration d'une nouvelle société ancrée aux valeurs et cultures. De cette doctrine d'endogénéité née une nouvelle conscience politique. C'est celle d'une répulsivité singularisée du politiquement institutionnel (I), soutenue par le développement de la créativité dans la consolidation d'acquis démocratiques (II).

4 I. M. Fall, « Les dynamiques de la construction des régimes politiques en Afrique », *Annales africaines*, nouvelle série, numéro spécial, 2014, CREDILA.

5 D. Sy, « Normativité et juridicité (brèves réflexions sur la normativité juridique) », *Annales africaines*, n° 1, 2009.

On s'accorde à reconnaitre que l'univers juridique n'épuise pas la régulation sociale, et que la normativité ne se confond pas avec la juridicité[6]. Cependant, l'inadéquation entre le droit et sa société peut interrompre la traduction juridique des aspirations politiques. Sous ce rapport, l'analyse des relations entre le droit, la politique et la jeunesse sénégalaise nous permettra de mesurer l'impact des phénomènes politiques sur les dynamiques de réforme de la norme, des institutions et du système politique en général.

A côté d'une volonté de consécration des droits et devoirs de l'individu marquée par l'œuvre du Président Léopold S Senghor _dans sa proposition en marge de la rencontre de Dakar pour l'adoption de l'avant-projet de la charte africaine des droits de l'homme[7]_, les différentes revendications ont été à l'origine de transformations diverses. Le but est d'arriver à consolider et à densifier la normativisation.

Etant entendu que « la conception d'un individu à la fois totalement libre et totalement irresponsable, et, en même temps opposé à la société, n'est pas conforme à la philosophie africaine »[8], il faut constamment cultiver l'équilibre dans l'univers de la légistique pour en faire, comme disait le professeur Babacar Gueye, « le porte-parole de la démocratie participative en Afrique »[9]. Les difficultés de mise en œuvre ne manquent pas d'impacts sur les besoins de transformation des règles de fonctionnement de l'Etat.

L'ambition est de montrer qu'un autre droit diffèrent du droit classique est en train d'émerger dans la sphère politique. Il s'agit, effectivement, d'un droit caractérisé par le pragmatisme (…) et la flexibilité (…)[10]. Car, si l'on s'en tient à l'idée d'une réforme en profondeur des pratiques politiques, seul un processus de fabrication du droit[11] à travers différentes formes de luttes, permettrait à une société d'aboutir à la traduction juridique de ses aspirations.

I- Une répulsivité singularisée du politiquement institutionnel.

Dans l'imagination du politiquement exigible (1), les répulsivités se singularisent en fonction de la normalité éligible du temps. C'est, bien entendu, pour donner sens aux aspirations évolutives concrètes que la normativité change. Elle se le doit d'ailleurs pour faire bloc

6 L. Boy, « Normes », disponible sur : www.reds.msh-paris.fr/communication/textes/boy/l.htm (consulté le 29 mars 2026).

7 A. B. Fall, « La Charte africaine des droits de l'homme et des peuples : entre universalisme et régionalisme », *Pouvoirs*, 2009/2, n° 129, p. 82.

8 Réunion des experts pour l'élaboration d'un avant-projet de Charte africaine des droits de l'homme et des peuples, Dakar, 28 novembre–8 décembre 1979, Doc. OUA, CAB/LEG/67/3/Rev. 1, p. 2, cité par F. Ouguergouz, *La Charte africaine des droits de l'homme et des peuples : une approche juridique des droits de l'homme entre tradition et modernité*, Genève, Institut des hautes études internationales, 2018, pp. 233–254.

9 B. Gueye, « La démocratie en Afrique : entre succès et résistances », *Pouvoirs*, 2009/2, n° 129, p. 9.

10 J. Chevallier, op. cit.

11 C. Creda-Guzman, art. cit., p. 30.

avec le peuple. La redynamisation du cadre juridique dans la sphère politique est devenue constante. Elle replace ses racines dans l'endogénéisation des pratiques politiques (3), que les dispositions constitutionnelles, législatives et règlementaires ont cherché à traduire au mieux depuis plusieurs années.

À cette quête d'identité, s'ajoute l'ambition d'un souverainisme mesuré que la jeunesse sénégalaise a, depuis plus d'une vingtaine d'années, affiché. D'ailleurs, empreintes de particularisme, les volontés de changement sont révélatrices d'un désamour avec le politiquement institutionnalisé jusque-là.

D'une manière évolutionnaire, la singularité dans la répulsion de la morale politique murie d'ailleurs s'est façonnée avec la jeunesse sénégalaise à travers diverses luttes. Avec comme objectif de faire du neuf, redynamiser le cadre juridique dans la sphère, reviendrait à juridiciser le magma d'aspiration (2) au détriment de l'institutionnalisme des transplantations.

1- L'imagination du politiquement exigible

L'imagination en question n'est pas abstraite. Bien au contraire, elle est le fruit d'une évolution sinusoïdale de notre dynamique démocratique. Elle provoque l'idée de la fabrique d'une carte d'identité constitutionnelle du Sénégal[12]. Ce qui n'a pas fini d'impacter sur les dynamiques institutionnelles, législatives, réglementaires, jurisprudentielles et coutumières.

Il s'agit d'une aspiration à la non-régression démocratique, portée en majorité par une jeunesse politiquement ancrée aux valeurs, à la morale ou à l'éthique en politique. À cela s'ajoute l'intangibilité d'une exigence détonante, au point d'ériger l'immoralité en crime de lèse-majesté.

Ce qui passe, cahin-caha, par une répulsion singularisée des pratiques politico-institutionnelles jusque-là érigées en dogmes par les pouvoirs publics[13]. Pour s'en débarrasser, une sorte de nivellement des formes de lutte s'est dessinée avec l'arsenal du droit public, du droit constitutionnel notamment. À bien y voir, il est devenu un point de cristallisation et de canalisation des contestations hétéroclites et polysémiques des jeunes[14].

Les réseaux sociaux et l'accès à la presse nationale et internationale ont contribué à la finitude de l'epoque du dispositif impérial implanté[15], qui se traduisait par une politique d'échanges de services depuis la fin de la première guerre mondiale. Des foules intelligentes se construisent au gré d'une nouvelle fabrique idéologique. Guidées par des revendications de dignité, d'égalité et de transparence, elles s'impliquent davantage en

12 *Textes fondamentaux de la République*, op. cit., p. 60 et s.

13 S. Awenengo-Dalberto, « Sénégal : les nouvelles formes de mobilisations de la jeunesse », *Les Carnets du CAP*, 2011, n° 15, pp. 37–65, spéc. p. 25, disponible sur HAL : halshs-00705411.

14 Ibid., p. 15.

15 S. D'Angelo, *Politique et marabouts au Sénégal (1854–2012)*, thèse, p. 124.

politique, tout en révélant une volonté forte de fonder un nouveau pacte moral, de nouvelles règles sociales et politiques.

L'objectif est clair: ériger des normes intangibles sur lesquelles la régression est inimaginable. Ici, l'effet générationnel bas son plein[16] et s'apparente irrésistible. Il se nourrit d'imagination et point d'imaginaire que traduisait la civilisation institutionnelle imitée d'ailleurs.

Car aujourd'hui, une sorte de mépris de la chose politique triomphe au détriment des modèles institutionnels applicables. C'est une crise de la moralité généralisée qui boulverse les appartenances. Ainsi, de l'interdit traditionnel transgressé à la negation du sacré[17], le pouvoir s'atomise avec le temps. Le temps d'un exercice solitaire du pouvoir qui s'éloigne de nos cieux.

Le politiquement exigible fait son chemin via la co-construction. Il passe par des revendications pacifiques et violences pour aboutir aux dialogues. Ces derniers drainent l'hyperpuissance des consensus[18], et traduisent en même temps la réalité de notre démocratie à palabre.

Par considération aux revendications diversifiées, l'institutionnel, le non-institutionnel et les non-dits ont permis, à travers le droit, la formation *d'*un magma d'aspirations qui a acquis avec le temps, la valeur normative. Le tout dans une imagination, non pas guidée forcement par une troisième vague de démocratisation, mais plutôt par un détonateur en puissance qu'est le temps de la créance généralisée d'une nouvelle forme de gouvernance politique africaine.

Décomplexée et dynamique, la nouvelle génération tente de finir avec ce que Kuassigan appelait la civilisation technicienne[19]. La seule idéologie qui vaille est la défense de ses droits politiques, anciens ou modernes, mais imagés.

La jeunesse sénégalaise, n'en est pas moins consciente. Elle s'est érigée, à plusieurs reprises, en bouclier de la démocratie et des droits politiques nimbés d'idéologies propres et variables.

L'exigibilité, comme arme de lutte et de prévention, est bien usée par le peuple. Elle est, le plus souvent, et à la fin de chaque crise, brandie. Mieux, elle façonne la nouvelle philosophie normative au point de finir, si nécessaire, avec un passé non désiré[20].

16 Ibid.

17 S. Awenengo-Dalberto, art. cit., p. 15.

18 J.-B. Tine, ministre de l'Intérieur et de la Sécurité publique, propos tenus à l'occasion de la clôture du dialogue national sur les institutions politiques, in *Vers la refondation du système politique sénégalais*, Bureau d'information et de communication du Gouvernement (BIC-GOUV).

19 A. Kuassigan, *Afrique: Revolution ou diversité des possibles,* p.13–14:
« L'Occident, après avoir perdu son unité idéologique, propose au monde son image en deux versions originales correspondant à deux logiques : la logique capitaliste et la logique socialiste. […] Il impose, à ses propres fins, son modèle de socialisme après avoir assuré par tous les moyens l'expansion de son idée du libéralisme… ».

20 I. M. Fall, op. cit.

Seule l'onction populaire compte. Le mode opératoire importe, mais peu[21]. Par les techniques d'une nouvelle mouture ou modifications[22], il faut viser l'essentiel. Il s'agit pour l'autorité de s'intercaler entre la non-régression et l'intangibilité, devenus crescendo des instruments de mesure de la démocratie magnifiée.

Démocratie, bonne gouvernance et bien-être guident les imaginations du politiquement exigible. C'est parce qu'ils sont difficilement quantifiables, qu'ils se singularisent en fonction des peuples. Ils sont devenus des arguments pour la jeunesse dans sa volonté de juridiciser le magma d'aspirations.

2- La juridicisation du magma d'aspirations.

On assiste actuellement à une fin de la technostructure dans l'élaboration des normes politico-démocratiques. L'œuvre du constituant se métamorphose. Celle du législateur s'en suit. Elle suit les dynamiques répulsives du tout-déconsolidant et table sur les aspirations normatives que les peuples cherchent à juridiciser. Il est ici question de légitimer les blocs de revendications à travers l'instauration de normes à tous les niveaux de la hiérarchie de pansement.

De ce fait, la légistique n'a pas besoin de miser sur l'abondance. Elle doit plutôt traduire la profondeur des messages, souhaits et revendications pour faire droit. Sauver le Sénégal du péril de l'instabilité[23] suite aux crises, ou même anticiper sur d'éventuels perturbations, est devenue un motif d'engagement de la jeunesse. L'essentiel est d'arriver, par méthodes et persévérances, à trouver la formule qui coïncide avec sa propre situation[24].

Dans ce sens, la fondamentalité de certains principes est caracteriée dans les dispositifs. Ce qui est relevé aussi bien dans l'organisation des pouvoirs politiques que dans la globalité[25] du système normatif. Le statut de l'opposition et de son chef, les droits et libertés, le droit de propriété sur les ressources naturelles[26], la concrétisation des droits économiques, sociaux et culturelles, l'écologie (…), qui, pendant longtemps, étaient considérés comme de simples aspirations proclamées des générations préambulaires, sont devenues, par la force des évolutions et mobilisations, de véritables normes juridiquement invocables, techniquement défendables et politiquement conciliables.

21 I. M. Fall, *Textes fondamentaux de la République*, Paris, L'Harmattan, 2021, p. 60 et s.

22 Ibid., p. 60 et s.

23 Ibid., p. 60 et s.

24 Ibid.

25 Ibid., p. 60 et s.

26 Constitution de la République du Sénégal du 22 janvier 2001, modifiée, art. 25-2:
« L'exploitation et la gestion des ressources naturelles doivent se faire dans la transparence et de façon à générer une croissance économique, à promouvoir le bien-être de la population en général et à être écologiquement durables. L'État et les collectivités territoriales ont l'obligation de veiller à la préservation du patrimoine foncier. Chacun a droit à un environnement sain. La défense, la préservation et l'amélioration de l'environnement incombent aux pouvoirs publics […] ».

La jeunesse sénégalaise s'en est appropriée pour faire argument à l'occasion de ses revendications. Car, au début de la fin de l'inculture constitutionnelle savamment entretenue[27], écrire son histoire revient à réclamer et incarner son identité juridique, et à se débarrasser des goulots d'étranglement multiformes.

Les besoins sont immédiats[28] par apparence, mais regorgent d'énormes vœux ardents. C'est dans ce fondant d'aspirations que se façonne le magma. Il est celui du rêve imagé d'un bien-vivre. Cela transite par la démocratie sociale pour devenir le socle catalytique de nouvelles mesures.

Au-delà de la défense des traditions républicaines et des valeurs fondamentales faisant la particularité de la nation sénégalais, l'adéquation entre les règles de gouvernance et les aspirations est devenue nécessaire. En effet, elle transcende les époques et guident la légistique moderne. De là, le démotisme juridique, qu'il soit constitutionnel ou infra, guide le rédacteur dans ses hypothèses.

De véritables points de jonctions entre les générations, jeunes comme moins jeunes, s'érigent en sentinels dans l'endogénéisation des pratiques politiques. Il s'agit, avec la juridicisation, de dialoguer avec l'atemporel pour faire nation sur les fondements d'un système politique fiable et d'un régime politique qui l'incarne[29]. En témoigne la dernière alternance politique au Sénégal (du 24 mars 2024) avec l'élection du plus jeune Président de la république et plus jeune Président élu démocratiquement en Afrique (Bassirou Diomaye Faye avait remporté l'election présidentielle en tant qu'opposant à 44ans dès le premier tour avec 54,28 % des voix).

3- L'endogénéisation des pratiques politiques

Dans l'art de la fabrique de ses propres instruments juridiques, la sphère politique est assurément un des champs d'expérimentation inévitable. Elle doit même conditionner les droits politiques pour arriver à mettre en commun légalité et légitimité. Le but est de déterminer les caractéristiques dominants du régime voulu ou imaginé, son acceptabilité par la société, sans omettre les conséquences et inconséquences dans sa mise en œuvre. Car, en effet, malgré les efforts de déstructuration par la colonialité, la conception du pouvoir politique regorge une part d'emprise non négligeable sur les mentalités et les pratiques. Ne pas en tenir compte et agir autrement, c'est inverser l'ordre des choses[30].

27 I. M. Fall, op. cit., p. 9.

28 . S. Awenengo-Dalberto, op. Cit, « Sénégal : les nouvelles formes de mobilisations de la jeunesse », *Les Carnets du CAP*, octobre 2011, « À quelques mois de l'élection présidentielle prévue pour le 26 février 2012, des mobilisations sociales et politiques multiformes se multiplient à Dakar et dans les centres urbains. Elles traduisent l'exaspération de la population face à des problèmes immédiats […] Les 23, 26 et 27 juin 2011, ces mobilisations ont pris une ampleur inédite […] ».

29 J.-B. Tine, op. cit.

30 S. Awenengo-Dalberto, *art. cit.*, pp. 28–29.

Les aspirations d'endogénéisation des pratiques politiques, en tout cas au Sénégal, mettent fin petit-à-petit au tâtonnement juridique et à la précipitation[31]. Il faut associer le peuple à tout, à la chose politique, notamment!

C'est cet impératif qu'a revendiqué la jeunesse depuis un certain temps. Celle-ci, équilibrée et constante dans sa volonté de changement, incarne la philosophie politique selon laquelle: les différences entre les sociétés humaines et la diversité des expériences ne doivent pas faire oublier l'unicité cognitive de l'espèce humaine. En conséquence et par ailleurs, la recherche et la défense de la plénitude de son identité ne doivent mener ni au mépris, ni à la négation d'autrui.

Revendiquer son identité, c'est redevenir sujet de son histoire, mais c'est aussi « accepter l'identité des autres » en vue d'entamer un dialogue conduisant à l'avènement d'un monde nouveau[32].Il s'agit là d'une nouvelle affirmation de soi dans l'engagement[33] et la citoyenneté. Car, au même titre que le revisionnisme, le mimétisme accentué a montré ses inconséquences[34].

Le temps de la réinvention s'impose et est porté par la nouvelle génération de jeunes politiques. Il suffit de comprendre et de cristalliser les aspirations pour bénéficier d'une légitimation. Ce qui passe nécessairement par la formalisation des pratiques politiques d'adhésion massive pour faire une démocratie debout, résolue à avancer par la parole, par l'écoute et par l'action.[35]. Le politiquement exigible découlant, ce faisant, du dialogue entre parole, ecoute et consensus pour arriver à une réinvention endogène.

En réalité, rechercher une communauté de destin reviendrait ici à se façonner une identité propre et differente de la conception senghorienne d'alors[36]. Cette nouvelle génération politique croit au dialogue, à la transparence dans la gouvernance et à la réduction des comptes. Reste à préciser que tout cela doit être en accointance avec son entendement et les valeurs qu'elle défend par tous les moyens. Il s'agit là de principes[37] fondamentaux longtemps prononcés, mais avec un faible degré de mise en œuvre.

31 I. M. Fall, *Textes fondamentaux de la République*, op. cit., p. 23.:
« La Constitution de la République du Sénégal du 24 janvier 1959 a été élaborée et approuvée selon une procédure accélérée […] la Constitution de la Fédération du Mali du 22 janvier 1959 étant au-dessus des constitutions de ses États composants ».

32 A. Kuassigan, *op. cit.*, p. 6.

33 Ministère de la Promotion de la bonne gouvernance et des Relations avec les institutions, *Cadre de participation et de contrôle citoyens au sein des collectivités locales*, 2014 : « Plus généralement, on assiste à une prise de distance avec les consignes de vote des aînés sociaux et des marabouts […] »

34 I. M. Fall, *op. cit.*, p. 43 : « Quelques insuffisances majeures liées au mimétisme juridique et institutionnel peuvent cependant être relevées […] Une nouvelle Constitution est adoptée par référendum le 3 mars 1963 ouvrant la voie à la deuxième République du Sénégal […] ».

35 J.-B. Tine, « Discours lors du dialogue politique », 2025, op. cit..

36 S. D'Angelo, op. cit., p. 184.

37 Charte africaine de la démocratie, des élections et de la gouvernance, art. 10:

C'est d'ailleurs pour cette raison que la charpente du régime institué est certes importante, mais elle est appreciée en sa capacité d'absorption des véritables imaginations de la jeunesse en soif de progrès dans son génie propre et sa situation présente. Ainsi, durant les moments de récréation démocratique, la redynamisation du cadre juridique de la sphère politique est portée par la jeunesse, qui s'érige en bouclier contre la démocrature. Et, à chaque sortie de crise, jaillit la lumière d'un fétichisme constitutionnel et/ou institutionnel muri de plateformes revendicatives ancrées dans la consolidation d'acquis.

II- De la créativité dans la consolidation d'acquis démocratiques.

L'exigibilité met progressivement fin au tâtonnement dans l'action politique. L'heure est à la transformation des souhaits en droit. Il s'agit donc, dans l'effort d'arpentage d'une nouvelle philosophie (1) de droit africain en général et sénégalais en particulier, d'assurer une participation approfondie de la jeunesse dans l'effort de construction d'un nouvel édifice juridique (2), d'inspiration panoramique certes, mais avec une dose d'ancrage aux valeurs endogènes. Le tout se fait dans une intelligibilité par les mailles du droit, fondements d'une nouvelle contractualisation de la souveraineté (3).

1- La puissance dans l'effort d'arpentage d'une nouvelle philosophie.

Le choix est assumé. Les nouvelles générations politiques revendiquent leur identité dans toutes les sphères de la vie publique. C'est pour cette raison que, par le levier de l'engagement politique, la jeunesse sénégalaise, misant sur l'instrument juridique pour panser ses maux, cherche en même temps, à se reconnecter avec sa société[38].

Une société qu'elle compte rebâtir avec ses arcanes. Ainsi, l'engagement, les pratiques politiques et la démocratie suivent la logique évolutive de la mutabilité normative. Le tout guidé par une exigibilité justifiée par les circonstances malencontreuses, crises de confiance et désenchantements. Pourtant au départ se posait le problème de l'Etat au sens d'appareil étatique. À ne pas oublier également les techniques juridiques mises en œuvre ou reconnues dans le but de créer les règles de droit que l'appareil d'Etat a pour mission d'incarner[39]et de faire respecter[40].

« Promouvoir la création des conditions nécessaires pour faciliter la participation des citoyens, la transparence, l'accès à l'information, la liberté de la presse et l'obligation de rendre compte de la gestion des affaires publiques »

38 Ministère de la Promotion de la bonne gouvernance, op. cit

39 I. M. Fall, *Textes fondamentaux de la République*, op. cit.

40 P. F. Gonidec, « Avant-propos », in *Encyclopédie juridique de l'Afrique*, t. I, 1982 (rééd. 2020), p. 20.

Aujourd'hui, la question ne se trouve plus à ce niveau. Bien au contraire, le curseur change. Il est orienté vers les nouvelles forces de pénétrations du droit[41]. Celles qui, contrairement à l'essence, font précéder le sens. Le sens du droit qui parle haut et fort[42].

Et, si l'on s'en tient à la question socratique du pourquoi et du comment[43], la réponse n'est rien d'autre qu'un dépassement de l'ordinaire des acquis panoramiques pour arpenter une philosophie dans l'effort d'aller vers un droit démotique.

Elle est, justement, une consolidation des legs, aussi bien de l'univers-droit, que de l'empirisme du droit unissant. Le tout combiné cure, au point que l'immédiateté se juridicise et bouscule les exigences politiques, économiques, écologiques et procédurales.

Osons se le dire : l'engagement politique de la jeunesse a, en quelque sorte, guidé la cadence rythmique des systèmes législatifs qui veulent s'inscrire dans la contemporanéité. Ce faisant, souvent, même si les révisions constitutionnelles peuvent être caractérisées par des ambitions cachées qui en sont les sous-jacentes révisionnelles ou révisionnisme...[44], les constitutions modernes ne sont pas moins des réceptacles de maux qu'elles tentent de panser, faisant ressortir, çà et là, le droit empirique. De plus en plus donc, une vue sur les institutions clarifie le débat sur la constitution quoi de neuf.

Les juges suivent la tendance au même titre que les parlementaires au Sénégal. L'objectif est de surpasser, par la stabilisation du système politique[45], les balbutiements qui aboutiront à des crises. Les clauses d'éternité dans la constitution du 22 janvier 2001modifiée sont éloquentes à ce niveau.

Cette ingénierie juridique qui donnait l'image d'un va et vient entre acquis et rejets, entre rejet des acquis et retour aux acquis[46], semble trouver son nid. Il s'agit de la réadaptation du droit aux exigences issues d'une fabrique en puissance. Ainsi, la conscience qu'ont les citoyens de leur droit n'est pas négligeable dans la construction d'un nouvel édifice juridique, d'autant que sa philosophie est de plus en plus maitrisée.

2- Vers la construction d'un nouvel édifice politico-juridique.

L'édifice vise l'efficacité du système politique. Tendanciellement, les circonstances et les peuples assurent l'érection de nouvelles règles dans un « souci du long terme », comme di-

41 C. Roux, « L'environnementalisation du droit », in *Études en l'honneur de Sylvie Caudal*, 2020, p. 20.

42 Ibid.

43 Ibid.

44 M. S. Abdou-Salami, « La révision constitutionnelle du 31 décembre 2002 », *RBSJA*, n° 19, 2007, pp. 53–94.

45 I. M. Fall, *Textes fondamentaux de la République*, op. cit., pp. 86–87.

46 Kpodar, « Bilan sur un demi-siècle de constitutionnalisme en Afrique noire francophone », *Afrilex*, 2013

sait Pierre Rosanvallon[47]. Le but est connu : il faut arriver à consolider, par les moyens dont dispose la jeunesse, des prises de conscience nationales et internationales sur les libertés, droits et devoirs en démocratie, tout en maintenant les acquis validés par le citoyen.

Par conséquent, de la globalisation du droit[48], à la recherche d'une l'identité partenariale, l'édifice politico-juridique, s'est renouvelé. Il est composite dans sa construction et mouvant dans sa capacité d'adaptation.

Aujourd'hui, un bon encadrement de la sphère politique pour un épanouissement de la jeunesse passerait par un droit intelligible dans sa tradition des aspirations et dans sa détermination des relations institutionnelles et non-institutionnelles. Pour la traduction des choix en termes normatifs, la gouvernance démocratique, le renforcement des droits et libertés, la constitutionnalisation du statut de l'opposition et de son chef, le renforment des droits fondamentaux (…) ne sont pas moins des évolutions empreintes d'engagement et d'exigence.

Les voies de cloisonnement se clarifient : tantôt ce sont des droits nationaux qui inspirent des solutions internationales, tantôt des principes internationaux pénètrent les règlementations et les orientent (...) »[49]. Nonobstant, la spécificité sénégalaise réside dans l'institutionnalisation du dialogue politique avec des conclusions innovantes, gages de stabilité.

Il s'agit en réalité, dans la consolidation de l'État de droit, de la démocratie et de la bonne gouvernance, d'inviter les citoyens en majorité jeunes[50] et de recueillir leurs propositions transformables en règle de droit[51]. Car, « nous sommes tous embarqués sur le Titanic, même si certains voyagent en première classe » (Susan George).

La jeunesse ne se limite pas à interroger l'adéquation entre les législations et les réalités locales. Elle tente de faire et de faire-faire les transformations en profondeur pour les rapprocher des vécus. Ce qui n'est pas moins une solidarité intergénérationnelle. En effet, les idéologies allant dans ce sens ne sont pas nouvelles. Elles sont réincarnées et manifestées différemment.

Mieux, il faut le dire, elles sont désormais les moteurs ou les curseurs des nouvelles transformations constitutionnelles, institutionnelles et politiques. De ce fait, il est né en Afrique une nouvelle forme de Constitution[52], axée sur le continent, le peuple, son histoire,

47 P. Rosanvallon, « Le souci du long terme », in D. Bourg et A. Papaux (dir.), *Vers une société sobre et désirable*, Paris, PUF, 2010, pp. 151–162.

48 J.-B. Auby, *La globalisation du droit : le droit et l'État*, Paris, LGDJ, 2010.

49 M. Beaud, C. Beaud et M.-L. Bouguerra (dir.), *L'état de l'environnement dans le monde*, Paris, La Découverte, 1993, p. 420.

50 C. Gueye, « Discours lors du dialogue national », 2025.

51 Ibid.

52 S. Bolle, « Les Constitutions *made in* Afrique », communication au VIe Congrès français de droit constitutionnel, Montpellier, 9–11 juin 2005.

sa culture et ses transformations. C'est de là que la souveraineté nationale, exclusive dans son fondement[53], tire sa force. Elle se réinvente sous le modèle contractuel.

3- La construction d'une nouvelle souveraineté contractuelle

L'exigibilité, à travers les concepts de transparence et de réduction des comptes, oriente le débat dans la sphère politique sénégalaise. Ses instruments de mesures ont permis la création ou l'émergence d'une nouvelle conscience politique basée sur la droiture, la transparence et le respect de la parole donnée. Pour réconcilier la souveraineté du Peuple avec le principe démocratique _c'est-à-dire, une forme de « Rule of Men » avec une forme de « Rule of Law) _, la doctrine a cherché à apporter des réponses[54] par rapport aux techniques et méthodes.

Elle ne s'en limite pas. Plus loin, elle retrace les dynamiques institutionnelles pour interpréter le sens et l'impact du constitutionnalisme moderne. L'objectif est de mesurer l'implication réelle des peuples dans les processus.

En réalité, qu'elle soit dépassée, périmée, obsolète ou désuète[55], la souveraineté se reconstruit et se replace dans son temps. Il s'agit du temps contractuel des nouvelles générations préambulaires. De plus, elle est élastique, car regroupe et reflète les fondamentalités d'un ensemble de droits transgénérationnels.

Ce qui est d'autant plus vrai que les transformations de l'État autour des questions de gouvernance font émerger une souveraineté coopérative[56] en politique. Et, à bien y voir, il est remarqué l'émergence de philosophies intergénérationnelles, de regrets et d'alertes qui se sont formalisés dans le temps. Ainsi, le syllogisme selon lequel tout est mouvement, tout est changement, rien n'est immuable[57], regorge toute sa pertinence au regard de la souveraineté évolutive[58] et contractuelle.

Une mutualisation qui fait du peuple le centre de gravité et de sa jeunesse le bouclier contre toute tentative d'accaparement. Un droit politiquement coopératif s'est façonné et guide les pratiques. Ceci est la résultante d'un ensemble de droits souverains, puisés dans la nouvelle conception ou sens de la souveraineté qui se veut mutuelle et collaborative.

III- Conclusion.

Le peuple reprend, par la force des revendications, manifestations et luttes diversifiées, sa souveraineté. Il se dégage progressive l'impression d'un engagement politique du retour

53 P. Gaïa, op. cit.

54 L. B. Tremblay, art. cit.

55 B. Bonnet, « Repenser le "bloc de constitutionnalité" », in B. Bonnet (dir.), *Traité des rapports entre ordres juridiques*, 2016, p. 33.

56 G. Moyen et S. S. Ban Bhiote, art. cit.

57 Tremblay, L. B., op. cit.

58 Id.

à la surveillance directe par la sanction dans l'immédiateté et de l'interpellation avant fin mandat. Ainsi, de jure ou de facto, la souveraineté, tremplin de la réimplantation de l'axe de coopération entre politique, jeunesse, puissance et puissance de la norme, prend l'allure de la réinvention sociale. Elle passe par plusieurs domaines de la vie publique. Ainsi, par la volonté d'une jeunesse engagée politiquement, et qui choisit de ne pas détruire[59], le rêve d'une démocratie avancée repousse les méfaits de la gouvernance.

La redynamisation du cadre juridique au Sénégal en est la preuve vivante. Elle est la conséquence souvent de désaccords sur l'interprétation du droit pouvant aboutir à des révoltes. C'est de ce droit politique que provient la sève du neuf et du voulu, à côté de l'imagination propice d'un changement. La gouvernance s'adapte à l'endogénéité. Les principes s'améliorent. Le droit suit l'engagement et le pragmatisme.

59 E. O. Wilson, « Biodiversité », in *L'Atlas de l'environnement*, *Le Monde diplomatique*, hors-série, 2007.

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