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ALTERNATIVE DISPUTE RESOLUTION

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Advancing ADR. Strengthening Justice. Building Africa.

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Editor's Note

We are pleased to launch another issue of the *Alternative Dispute Resolution (ADR) Journal*, Volume 14, No. 4.

The ADR Journal is a publication by the Chartered Institute of Arbitrators (CIArb), Kenya that spearheads intellectual discourse on pertinent and germane issues in Alternative Dispute Resolution and other related fields of knowledge.

It offers a platform where scholars, ADR practitioners, judicial officers, law lecturers and students can share knowledge, ideas, emerging jurisprudence and reflects on the practice of ADR. The Journal is aimed towards advancing the growth of ADR as a viable tool for the management of disputes in Kenya and across the globe.

The role of ADR in access to justice has gained recognition in the recent past. In Kenya, the Constitution advocates for the promotion of ADR mechanisms towards achieving access to justice. The Journal addresses some of the current concerns and challenges facing ADR mechanisms and proposes recommendations towards enhancing the suitability of ADR mechanisms in the quest towards Access to Justice.

The ADR Journal is devoted to the highest quality academic standards. It is peer reviewed and refereed in order to achieve this goal.

This volume contains papers and case reviews on salient themes in ADR including: *Appropriate Dispute Resolution (ADR) for African Climate Conflict Management: Utilising Local Negotiation and Mediation Frameworks; African Justice System (Customary Law) and The Transformation of The Constitution of Kenya 2010; Bias, Apparent Bias and The Independence of Construction Adjudicators: Establishing an Appropriate Kenyan Standard; Mediation across Africa: Listening to the Unspoken, the Feelings, the Collaboration and the Ubuntu; Active Case Management in Virtual Courts; A Gain or Loss for Fair Hearing; Guarding The Gates of Finality: Jurisdictional Overreach, Judicial Restraint and the Future of Arbitral Enforcement under Section 35 of Kenya's Arbitration Act after Geo Chem Middle East v Kenya Bureau of Standards; Untangling The Multi-Tenant Mesh: Mediating Multiparty*

Jurisdictional Disputes in Shared Cloud Infrastructure; and *The New Frontier of Digital Justice: Artificial Intelligence, Data Protection and Arbitration in the Algorithmic Age.*

The Journal continues to shape the landscape of ADR practice in Kenya and beyond. It is one of the most widely cited and referenced publications in ADR. The Editorial Team welcomes feedback and suggestions from our readers across the globe to enable us to continue improving the Journal.

I wish to thank the contributing authors, Editorial team, reviewers and everyone who has made this publication possible.

The Journal is committed towards equality and non-discrimination in academia and offers a platform where everyone can share his/her ideas and thoughts on key issues in ADR. To this end, the Editorial Board welcomes and encourages the submission of papers, book reviews and case summaries on emerging and pertinent issues in ADR to be considered for publication in subsequent issues of the Journal. The Editorial Board receives and considers each article but does not guarantee publication. Submissions should be sent to the editor through editor@ciarbkenya.org and adrjournal@ciarbkenya.org and copied to admin@kmco.co.ke.

The Journal is available online at https://ciarbkenya.org/journals/

Prof. Kariuki Muigua Ph.D, SC, FCIArb, Ch.Arb, OGW.
Editor, Nairobi,
October, 2026.

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He serves as President of the Arbitral Court of the Nairobi Centre for International Arbitration (NCIA), He is a Member of the Permanent Court of Arbitration (PCA), and a member of the inaugural Court of Arbitration of the Asian International Arbitration Centre (AIAC). He previously served as the Chartered Institute of Arbitrators (CIArb) Regional Trustee for Africa from 2019 to 2022.

Prof. Muigua has extensive domestic and international arbitration experience and has been appointed by leading institutions, including CIArb–Kenya Branch, NCIA, the International Chamber of Commerce (ICC), and the London Court of International Arbitration (LCIA), serving as both sole arbitrator and tribunal member.

His distinctions include the inaugural CIArb Kenya ADR Lifetime Achievement Award 2021, ADR Practitioner of the Year 2021 by the Nairobi Branch of the Law Society of Kenya, ADR Publisher of the Year 2021 by CIArb Kenya, and the University of Nairobi Vice-Chancellor's Excellence Award. He has also received top-tier recognition from Chambers & Partners.

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Beyond practice, Dr. Ataka is a respected lecturer at the University of Nairobi Faculty of Law, where he shapes future legal minds while remaining actively engaged in advancing legal thought and practice. Under his leadership, AKO continues to deliver legal solutions that are rigorous, commercially grounded and aligned with evolving legal and regulatory landscapes. *Dr. Ataka can be reached through ataka@akoadvocates.co.ke*

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She is driven by a commitment to excellence in legal research and writing and views continuous learning as essential to professional growth. Chantelle also believes in using the law as a tool for service and social impact and is actively interested in community legal aid and initiatives that promote greater access to justice. *Nekesa can be reached through:* ***0715921850/*** *chantellesibakaki@gmail.com*

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Appropriate Dispute Resolution (ADR) for African Climate Conflict Management: Utilising Local Negotiation and Mediation Frameworks

By: Kariuki Muigua*

Abstract

This paper examines how climate change conflicts in Africa can be effectively managed. The paper observes that Africa is highly vulnerable to climate change. It notes that the impacts of climate change are undermining Sustainable Development in Africa. In particular, the paper observes that climate change is driving and worsening conflicts all over Africa with negative impacts on peace, security, stability and development. Due to their adverse effects on people, communities and nations, the paper posits that effective African climate conflict management is a prerequisite for Sustainable Development. In order to achieve this goal, the paper discusses how Appropriate Dispute Resolution (ADR) can be harnessed for African climate conflict management by utilising local negotiation and mediation frameworks.

1.0 Introduction

Climate change is one of the biggest challenges currently facing humanity. Due to its adverse effects on humanity and nature, climate change has been described as a real and present danger to the lives of billions of people today

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and to everyone on the planet in the foreseeable future[1]. In particular, it has been observed that adverse climatic and weather events including heatwaves, wildfires, floods, sea-level rise, tropical storms, droughts and hurricanes are increasing in scale, frequency and intensity globally with severe impacts on people and planet[2]. The impacts of climate change are causing dangerous and widespread disruption, depletion and degradation of nature while also affecting the lives, health, livelihoods and well-being of billions of people all over the world[3]. The United Nations *2030 Agenda for Sustainable Development*[4] describes climate change as one of the greatest challenges of our time whose adverse impacts undermine the ability of all countries to achieve Sustainable Development[5].

In addition to its direct impacts on people and planet, climate change is also fuelling conflicts all over the world. It has been observed that climate change acts as a threat multiplier that can cause and worsens conflicts especially in

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[1] Grzybowski. A., & Hunnie. C., 'Mediating Peace with Climate Change' Available at https://ecopeaceme.org/wp-content/uploads/2022/03/mediating-peace-with-climate-change.pdf (Accessed on 04/10/2026)

[2] World Health Organization., 'Climate Change' Available at https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health#:~:text=Key%20facts,diarrhoea%20and%20heat%20stress%20alone. (Accessed on 04/10/2026)

[3] Intergovernmental Panel on Climate Change., 'Climate change: a threat to human wellbeing and health of the planet. Taking action now can secure our future' Available at https://www.ipcc.ch/report/ar6/wg2/downloads/press/IPCC_AR6_WGII_PressRelease-English.pdf (Accessed on 04/10/2026)

[4] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf (Accessed on 04/10/2026)

[5] Ibid

vulnerable regions[6]. For instance, climate change can increase human security issues such as food and water scarcity while also leading to (violent) conflict in climate-vulnerable regions and countries[7]. Climate change can therefore trigger or worsen conflicts due to its impacts including displacement of people, increased food insecurity and depletion and degradation of vital resources including water and arable land[8]. The United Nations observes that climate change is a threat multiplier, which exacerbates existing vulnerabilities and tensions, a situation that can trigger or worsen conflicts[9]. In particular, by intensifying competition for dwindling natural resources including land, water and food, and fuelling displacements and migration, climate change creates and worsens conditions that can lead to both violent and non-violent conflicts[10].

Climate change conflicts are undesirable. For instance, environmental and climate change conflicts can trigger violence, insecurity and destruction, particularly in states with weak governance, high levels of corruption, and existing ethnic and political divisions[11]. Climate change conflicts, especially

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[6] International Institute for Sustainable Development., 'Climate change and conflict: Lessons from Community Conservancies in Northern Kenya' Available at https://www.iisd.org/system/files/publications/climate_change_conflict_kenya.pdf (Accessed on 04/10/2026)

[7] Froese. R.,, & Janpeter. S, 'The Nexus of Climate Change, Land Use, and Conflicts' (2019)

[8] United Nations Climate Change., 'Conflict and Climate' Available at https://unfccc.int/news/conflict-and-climate (Accessed on 04/10/2026)

[9] United Nations., 'Climate, Peace and Security: What we need to Know' Available at https://www.un.org/en/peaceandsecurity/climate-peace-and-security-what-we-need-know (Accessed on 04/10/2026)

[10] Ibid

[11] Brown. O., & Keating. M., 'Addressing Natural Resource Conflicts: Working towards more Effective Resolution of National and Sub-National Resource Disputes' Available

those that are violent in nature, can affect peace, security and development including through loss of human life, loss of livelihoods, forced displacements and social tensions with disproportionate impacts on vulnerable populations[12]. Climate change conflicts therefore undermine peace, security and development while also hindering the attainment of climate goals at all levels[13]. Effective management of climate change conflicts is therefore necessary for Sustainable Development. The United Nations Environment Programme (UNEP) notes that as the global population continues to rise, the global demand for natural resources continues to grow, and the impacts of climate change intensify, the competition over natural resources is set to increase a situation that will lead to more environmental and climate change conflicts in the coming years[14]. Consequently, there is need to put in place appropriate strategies at the global, regional, national and local levels, in order to ensure sound climate conflict management for peace, security, development and prosperity.

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at https://www.chathamhouse.org/2015/06/addressing-natural-resource-conflicts-working-towards-more-effective-resolution-national (Accessed on 04/10/2026)

[12] United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Available at https://peacemaker.un.org/sites/peacemaker.un.org/files/DPPAPracticeNote-TheImplicationsofClimateChangeforMediationandPeaceProcesses.pdf (Accessed on 04/10/2026)

[13] United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Available at https://www.unep.org/news-and-stories/pressrelease/climate-litigation-more-doubles-five-years-now-key-tool-delivering (Accessed on 04/10/2026)

[14] United Nations Environment Programme., 'Environmental Cooperation and Peacebuilding.' Available at https://www.unep.org/topics/fresh-water/disasters-and-climate-change/environment-security/environmental-cooperation-and#:~:text=International%20law%2C%20environment%20and%20conflict,and%20reliance%20on%20conflict%20resources (Accessed on 04/10/2026)

This paper examines how climate change conflicts in Africa can be effectively managed. The paper observes that Africa is highly vulnerable to climate change. It notes that the impacts of climate change are undermining Sustainable Development in Africa. In particular, the paper observes that climate change is driving and worsening conflicts all over Africa with negative impacts on peace, security, stability and development. Due to their adverse effects on people, communities and nations, the paper posits that effective African climate conflict management is a prerequisite for Sustainable Development. In order to achieve this goal, the paper discusses how Appropriate Dispute Resolution (ADR) can be harnessed for African climate conflict management by utilising local negotiation and mediation frameworks.

2.0 Climate Change as a Driver of Conflicts in Africa

Africa is disproportionately impacted by the global climate crisis. The United Nations points out that Africa is not a significant source of greenhouse gas emissions since the continent accounts for only 2–3 per cent of the world's carbon dioxide emissions from energy and industrial sources[15]. However, despite Africa's negligible contribution to climate change, the continent stands out disproportionately as the most vulnerable region in the world to the impacts of climate change[16]. Although Africa has contributed the least to global warming by having the lowest greenhouse gas emissions when compared to other regions, the continent faces exponential collateral damage due to climate change which poses risks to the continent's economies, infrastructure

[15] United Nations Climate Change., 'Africa is particularly vulnerable to the expected impacts of global warming' Available at https://unfccc.int/files/press/backgrounders/application/pdf/factsheet_africa.pdf (Accessed on 04/10/2026)

[16] United Nations Environment Programme., 'Responding to climate change' Available at https://www.unep.org/regions/africa/regional-initiatives/responding-climate-change (Accessed on 04/10/2026)

investments, water and food systems, public health, agriculture, and livelihoods[17].

Climate change is a major threat to Sustainable Development in Africa. For instance, Africa is witnessing mounting climate change related weather events and patterns including rising temperatures, droughts and floods[18]. These events have adverse impacts on food security, water availability, energy, education, infrastructure and public health in Africa[19]. They also fuel humanitarian crises including displacement of populations and the growth of climate refugees threatening peace, security and stability in Africa[20]. The effects of climate change undermine the quest for Sustainable Development in Africa with disproportionate impacts on the continent's vulnerable populations including women and girls, the youth and indigenous and local communities[21]. In addition to its impacts on human health, livelihoods and development, it has been observed that climate change also has adverse environmental impacts in Africa since it causes desertification, biodiversity loss and changes in natural ecosystems[22].

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[17] African Development Bank Group., 'Climate Change in Africa' Available at https://www.afdb.org/en/cop25/climate-change-africa (Accessed on 04/10/2026)

[18] United Nations Climate Change., 'Africa is particularly vulnerable to the expected impacts of global warming' Op Cit

[19] World Meteorological Organization., 'Africa faces disproportionate burden from climate change and adaptation costs' Available at https://wmo.int/news/media-centre/africa-faces-disproportionate-burden-from-climate-change-and-adaptation-costs (Accessed on 04/10/2026)

[20] Ibid

[21] United Nations Climate Change., 'Africa is particularly vulnerable to the expected impacts of global warming' Op Cit

[22] Ibid

Climate change is also increasingly driving and worsening conflicts all over Africa. It has been observed that in Africa and the Global South where the majority of people and communities depend on natural resources including land, water and forests for their livelihoods, the impacts of climate change on these vital resources can cause and worsen conflicts[23]. For example, in such contexts, sudden events including flooding or prolonged droughts reduce the availability of arable land, water, fuel, food and fish stocks leading to competition and conflict over these resources[24]. In particular, in the African context, the adverse impacts of climate change including drought have resulted in competition over dwindling resources such as water and grazing land therefore leading to conflicts and violence[25]. In addition, it has been observed that the consequences of climate change such as land degradation, droughts, water scarcity, floods, storms and famines have led to an increase in environmental migration in Africa, a situation which exposes vulnerable populations to violence and conflicts with their hosts[26].

Africa is therefore highly vulnerable to climate-induced conflicts. In particular, climate change is fuelling the scarcity of vital natural resources including water, pasture, food, and arable land, triggering competition and conflicts over these resources all over the continent[27]. Since most African economies and the

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[23] Climate Change and Conflict., Available at https://www.accord.org.za/publication/climate-change-conflict/ (Accessed on 04/10/2026)

[24] Ibid

[25] Environmental Conflicts: Key Issues and Management Implications., Available at https://www.accord.org.za/ajcr-issues/environmental-conflicts/ (Accessed on 04/10/2026)

[26] Ibid

[27] United Nations., 'In Africa's Sahel, conflict and climate change force millions from their homes' Available at https://news.un.org/en/story/2025/10/1166076 (Accessed on 04/10/2026)

livelihoods of many individuals and communities in the continent are heavily reliant on natural resources, the impacts of climate change on natural resources in Africa creates conditions that can trigger and worsen conflicts[28]. The consequences of climate change in Africa including recurrent droughts, irregular rainfall, severe floods, water scarcity and intensified desertification are disrupting livelihoods, fuelling migration, causing food and water shortages and internal displacement thus leading to inter-communal violence and conflicts[29]. In addition, climate action in areas such as renewable energy, carbon markets, green industrialization and sustainable transport has become a source of disputes and conflicts in Africa with individuals, interest groups and communities bringing claims against states and private entities on issues such as human rights violations, non-compliance with global and nations climate goals and commitments, and false and misleading claims against organizations[30].

Climate change induced conflicts are a major threat to Africa's pursuit of Sustainable Development. It has been observed that if left unchecked, environmental and climate change conflicts in Africa will worsen food insecurity, water shortages, migration, displacement of vulnerable populations

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[28] Climate induced conflicts: Sources of insecurity in Africa., Available at https://amaniafrica-et.org/insights-on-the-psc-session-on-climate-induced-conflicts-sources-of-insecurity-in-africa/#:~:text=The%20changing%20rainfall%20patterns%20and,with%20better%20availability%20of%20resources. (Accessed on 04/10/2026)

[29] Ibid

[30] A new wave of African climate change disputes on the horizon., Available at https://www.whitecase.com/insight-our-thinking/africa-focus-winter-2023-climate-change#:~:text=Three%20categories%20of%20climate%20change,perpetrated%20in%20the%20Niger%20Delta. (Accessed on 04/10/2026)

and poverty undermining peace, stability and development in the continent[31]. It is therefore necessary to strengthen African climate conflict management in order to effectively and appropriate address climate change conflicts for peace, security, stability and development in Africa.

3.0 Utilising Appropriate Dispute Resolution (ADR) for African Climate Conflict Management

With Africa facing extreme vulnerability to climate change, climate-induced conflicts in the continent are inevitable. It has been observed that the impacts of climate change including forced migration, depletion of natural resources, food insecurity and economic disruptions, have the potential to exacerbate existing conflicts and introduce new vulnerabilities in Africa[32]. Due to their impacts on peace, security and development, effective management of climate change conflicts in Africa is a prerequisite for Sustainable Development. It has been observed that Appropriate Dispute Resolution (ADR) processes including negotiation, mediation, conciliation and arbitration provide tools and solutions that can ensure sound environmental and climate conflict management both globally and in Africa[33]. In general, ADR mechanisms provide an accessible, flexible, expeditious, cost-effective, and responsive approach towards managing environmental and climate change conflicts towards peace, justice and development[34]. ADR processes such as mediation,

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[31] United Nations., 'In Africa's Sahel, conflict and climate change force millions from their homes' Op Cit

[32] Climate Change: Challenges to Peace and Security in Africa., Available at https://amaniafrica-et.org/climate-change-challenges-to-peace-and-security-in-africa/ (Accessed on 04/10/2026)

[33] Grad. F.P., 'Alternative Dispute Resolution in Environmental Law.' *Columbia Journal of Environmental Law* Volume: 14, Issue 1

[34] Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Available at https://kmco.co.ke/wp-

negotiation and conciliation can foster collaboration, cooperation and participation in environmental governance, decision making processes and conflict management for environmental justice[35].

In particular, negotiation and mediation provide a viable platform for appropriate climate conflict management both globally and in Africa. It has been observed that negotiation provides an effective and appropriate tool that can strengthen climate conflict management at the local, national, regional and global levels[36]. For example, at the local and national levels, negotiation can enable communities to agree on issues such as access and use of scarce natural resources in the midst of mounting climate impacts[37]. In addition, at the regional and global levels, negotiation between and among nations is key towards addressing the causes and drivers of climate change conflicts including disagreements of transboundary natural resources, and climate-induced mobility[38].

Mediation is also a suitable approach in ensuring appropriate climate conflict management. In general, mediation is an effective and appropriate process in

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content/uploads/2023/07/Attaining-Environmental-Justice-through-Alternative-Dispute-Resolution.pdf (Accessed on 04/10/2026)

[35] Environmental Law Institute., 'A Community Guide to Using Alternative Dispute Resolution to Secure Environmental Justice' Available at https://www.eli.org/environmental-governance/community-guideusing-alternative-dispute-resolution-secure-1 (Accessed on 04/10/2026)

[36] Climate change, conflict and fragility: Understanding the linkages, shaping effective responses., Available at https://www.international-alert.org/publications/climate-change-conflict-and-fragility/#:~:text=These%20concerns%2C%20however%2C%20are%20not,all%20but%20a%20privileged%20few (Accessed on 04/10/2026)

[37] Ibid

[38] Ibid

managing environmental conflicts since it encourages collaboration, consensus building and the participation of all stakeholders towards peaceful, sustainable and durable outcomes[39]. Through mediation, it is possible to address deep-seated and underlying issues in environmental conflicts therefore encouraging trust, reconciliation, harmony and peace among various stakeholders including indigenous and local communities, governments and investors[40]. It has been observed that mediation provides several advantages including neutrality, flexibility, confidentiality and collaboration thus ensuring an effective approach towards managing environmental conflicts, which are increasingly driven by resource scarcity and climate change[41]. In particular, in the context of climate conflict management, mediation can enhance collaboration by fostering the engagement of local parties and communities, while offering options for integrating their voices and expertise in the climate change discourse[42]. It has been observed that by focusing on collaboration and cooperation, mediation enables the integration of women and girls, youth and marginalized groups, who face particular climate risks and indigenous peoples and local communities, whose expertise can help identify key issues, priorities, and solutions in climate change conflicts[43]. In addition, mediation can enhance climate diplomacy and the management of climate change conflicts globally by enabling diplomats from different countries to negotiate and come up with

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[39] Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Op Cit

[40] Ibid

[41] Mediation as a Tool for Resolving Environmental Disputes: An Evaluation., Available at https://i-adrnigeria.org/mediation-as-a-tool-for-resolving-environmental-disputes-an-evaluation/#:~:text=This%20article%20explores%20the%20concept,negotiations%20can%20sometimes%20hinder%20progress. (Accessed on 04/10/2026)

[42] United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Op Cit

[43] Ibid

common positions and solutions on climate change[44]. In particular, in climate change conflicts involving two states, mediation is key in promoting mutual cooperation and collaboration among the nations where the party states are directly involved in resolving the issues, through their representatives or diplomats negotiating for the benefits of the public at large[45]. Further, in transboundary climate change conflicts, the transnational applicability of international mediation makes it ideal in promoting diplomacy across borders and initiating cooperation and collaboration towards appropriate climate conflict management for international peace and security[46].

It is therefore necessary to embrace ADR techniques for appropriate African climate conflict management. In particular, utilising local negotiation and mediation frameworks provides an effective, appropriate and responsive approach towards ensuring that climate change-induced conflicts are well managed in Africa for peace, security and development. For instance, local negotiation and mediation frameworks ensure the full, equal and meaningful participation of all stakeholders in mediation processes including vulnerable groups such as women, the youth and indigenous and local communities towards addressing the root causes of climate change conflicts and affording parties an opportunity to sustain and improve their relationships[47]. Local

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[44] Thailand Arbitration Center., 'Resolving Climate Conflicts with Mediation: Redesigning Earth's Destiny' Available at https://thac.or.th/conflicts-with-mediation/ (Accessed on 04/10/2026)

[45] Ibid

[46] Girinarayanan. I., 'Can Climate Change Disputes be Resolved through Mediation?' Available at https://www.voicesofyouth.org/blog/can-climate-change-disputes-be-resolved-through-mediation (Accessed on 04/10/2026)

[47] Muigua. K., 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation.' Available at https://kmco.co.ke/wp-content/uploads/2018/08/Managing-Natural-Resource-Conflicts-in-Kenya-through-Negotiation-and-Mediation.pdf (Accessed on 04/10/2026)

negotiation and mediation frameworks can also ensure the inclusion of fundamental African values and philosophies including peace, collaboration, harmony and *Ubuntu* in climate conflict management for sustainable, durable and culturally-appropriate responses[48]. In particular, it has been observed that by incorporating African philosophies and values such as *Ubuntu* in environmental negotiation and mediation, it is possible to promote environmental justice by providing a platform for effective management of environmental conflicts towards peace, harmony and social cohesion while prioritizing the needs of both humanity and nature due to their interconnectedness[49]. It is therefore necessary to utilise local negotiation and mediation frameworks in order to ensure the effective and meaningful involvement of all stakeholders including women and girls, the youth, and indigenous and local communities while also infusing African values and philosophies such as *Ubuntu* in environmental and climate conflict management.

4.0 Conclusion

With climate change fuelling and worsening conflicts all over Africa, effective climate conflict management is a key continental priority for Sustainable Development. In particular, ADR processes provide a viable platform for sound and effective African climate conflict management for peace, security, stability and development[50]. It is therefore necessary to embrace ADR towards appropriate African climate conflict management for Sustainable Development. In particular, by utilising local negotiation and mediation

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[48] Mliswa. A., 'Ubuntu: Africa's Environmental, Social and Governance (ESG) Framework?' Available at https://africasocialwork.net/ubuntu-africas-esg-framework/ (Accessed on 04/10/2026)

[49] Ibid

[50] Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Op Cit

frameworks, it is possible to ensure appropriate African climate conflict management through the involvement of all stakeholders including women and girls, the youth, and indigenous and local communities in managing climate change-induced conflicts while also inculcating African values and philosophies such as *Ubuntu*, peace, harmony and social cohesion in climate conflict management. Utilising local negotiation and mediation frameworks is therefore a practical and effective approach towards harnessing ADR for African climate conflict management for peace, security, stability and development.

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African Justice System (Customary Law) and The Transformation of The Constitution of Kenya 2010

By: Dr. Valentine Ataka

Abstract

The Constitution of Kenya, 2010 introduced a significant constitutional shift in the recognition of African customary justice by requiring the promotion of traditional dispute resolution mechanisms (TDRMs) under Article 159(2)(c). However, the existence of the Repugnancy clause under Article 159(3)(b) raises questions about the extent to which the Constitution has transformed the colonial subordination of African customary law. This article examines that tension through the Agency Theory. The article further argues that the Constitution is transformative in recognizing plural approaches to dispute resolution but remains incomplete where the repugnancy doctrine limits the application of African Customary Law. This article argues that African Customary Law and the formal court system can exist and complement each other without one system having to be subordinated.

Introduction

The relationship between African customary justice and the formal legal system remains one of the unresolved questions in Kenya's constitutional development.[1] In the precolonial era, before the emergence of formal courts African societies developed systems through which they resolved disputes amongst themselves.[2] These Traditional Dispute Resolution Mechanisms were strongly anchored in culture and they aimed at reconciliation rather than just

[1] Emily Kinama, 'Traditional Justice System as Alternative Dispute Resolution Under Article 159(2)(c) of the Constitution of Kenya, 2010' (2015) 1(1) *Strathmore Law Journal* 22. Pg 25 – 31 < https://www.researchgate.net/publication/351719804_Traditional_Justice_System_as_Alternative_Dispute_Resolution_Under_Article_1592C_of_the_Constitution_of_Kenya_2010 > Accessed 22 October 2026

[2] Francis Kariuki, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems' (2017) *Strathmore Law Review*

punishment.[3] These mechanisms were valued because they respect culture and traditions, they promote peace, harmony, co-existence among communities and security, they are expeditious and most cases are resolved by elders who have background knowledge and understanding of cases and the people hence allow for handling of matters discreetly for quick resolution.[4]

However, the colonial encounter significantly impacted the administration of Justice in African Societies, this is because the introduction of the western justice system by the colonialists, transformed the relationship between Africans and their systems of justice.[5] The introduction of Western-derived laws subordinated customary laws and practices that had traditionally governed African communities, placing them below the newly imposed legal systems.[6] It is worth noting that, this change did not completely sweep away the African Justice System and the Traditional Dispute Resolution Mechanisms. The Constitution of Kenya 2010, recognizes other forms of dispute resolutions and mandates the courts to promote alternative forms of dispute resolution including embracing of TDRMs.[7]

The promulgation of the Constitution of Kenya 2010 made various developments that have been seen as transformative in attempting to

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[3] Ibid.

[4] Prof Kariuki Muigua, 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems' < https://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf > Accessed 13 October 2026

[5] Francis Kariuki, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems' (2017) Strathmore Law Review

[6] Lisa Owino, 'Application of African Customary Law: Tracing its Degradation and Analyzing the Challenges it
Confronts' (2016) 1(1) Strathmore Law Review 143.

[7] Constitution of Kenya 2010, Art 159(2)

restructure justice. Article 1 locates sovereign power in the people,[8] while Article 159(1) provides that judicial authority is derived from the people and vests in constitutionally established courts and tribunals.[9] Article 159(2)(c) further requires the promotion of alternative forms of dispute resolution, including traditional dispute resolution mechanisms.[10] These provisions provide a constitutional foundation for a more pluralistic understanding of justice.

However, Article 159(3)(b) contains the repugnancy clause, requiring that traditional dispute resolution mechanisms not be used in a manner that is repugnant to justice or morality.[11] This article argues that the Constitution has made a significant but incomplete transformation. Its recognition of traditional justice is constitutionally important, yet the continuing repugnancy clause provided risks preserving an unequal relationship where the standards by which community justice is assessed are insufficiently defined. On the other hand, the Agency Theory provides a useful framework for examining this tension, as discussed in this article.

The repugnancy clause traces back to the colonial period. The colonial encounter introduced a fundamental transformation in African legal systems.[12] Colonial governments established formal courts based largely upon European laws and created hierarchical judicial structures through which colonial law could be administered. Customary law was not necessarily abolished with the arrival of the Europeans, instead, it was often recognized subject to conditions imposed by the colonial state. In Kenya, for example, the administration of customary law became subject to colonial judicial institutions and principles

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[8] Ibid, Art 1

[9] Ibid, Art 159(1)

[10] Ibid, Art 159(2)

[11] Ibid, Art (159) (3)(b)

[12] Daniel S McConkie Jr, 'Promoting and Reforming Kenya's Customary Justice Systems in Criminal Cases' (2024) 38 Emory International Law Review 343.

such as the repugnancy doctrine.[13] Traditional laws continued to exist within communities but their application highly depended on the limitation or rather the regulations that were set by the European laws.

This arrangement produced what may be described as conditional legal pluralism. Customary law was not necessarily prohibited; instead, its enforceability depended upon its acceptability to the dominant legal order. The colonial authority thus retained the power to determine which elements of African legal traditions could survive within the formal system.[14]

challenges confronting customary law did not disappear with the Africanization of the judiciary.[15] This is because differences in education, social position and cultural understanding may continue to influence how judges interpret customs belonging to communities other than their own.[16] Consequently, customary law continues to operate within statutory conditions that distinguish it from other sources of law.

The Agency Theory of Jurisdiction.

The Agency Theory discussed in the Judiciary's *Alternative Justice Systems Baseline Policy 2020* provides a useful way of understanding the relationship between community justice and formal courts in Kenya. The theory emphasizes that people should have a say in choosing how their disputes are resolved, provided that their choice is free, informed and voluntary.[17] This

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[13] Ibid.

[14] John Osogo Ambani and Ochieng Ahaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era' (2015) 1(1) *Strathmore Law Journal* 41

[15] John Osogo Ambani and Ochieng Ahaya (n 10)

[16] Ibid.

[17] The Judiciary of Kenya, *Alternative Justice Systems Baseline Policy* (2020) 22–25. < https://ajskenya.or.ke/mooxowhi/filr/3584/AJS_Baseline_Policy_2020_Kenya.pdf > Accessed 13 October 2026

challenges the idea that disputes must always be taken to formal courts when communities have their own ways of resolving conflicts.

The issue becomes more important when considering the repugnancy clause, which historically allowed African customary law to be rejected if it was considered contrary to justice and morality.[18] Although the Constitution of Kenya, 2010 recognizes traditional dispute resolution under Article 159(2)(c), Article 159(3) still places limits on its use. Section 3(2) of the Judicature Act also retains restrictions on the application of African customary law in certain civil cases.[19] This raises an important question: has the Constitution truly changed the way African customary justice is treated, or does the law still place formal courts above community justice?

The Agency Theory suggests that community justice should not be dismissed simply because it operates differently from formal courts. Instead, its processes should be assessed by considering whether people freely choose to participate and whether their rights are respected.[20] Articles 1 and 159(1) of the Constitution support the importance of the people by recognizing that sovereign power belongs to them and that judicial authority comes from them. However, this does not mean that communities can ignore the Constitution or that every customary practice is acceptable. Practices that discriminate against women, violate human dignity or deny people a fair hearing must still be addressed under the Constitution. Therefore, the argument is not that the repugnancy clause should be removed without considering its purpose, but that it should not be used to reject African customary justice simply because it differs from the formal legal system. Instead, decisions should be based on clear constitutional standards, particularly the protection of fundamental rights. Ultimately, although the 2010 Constitution has made an important step by recognizing traditional dispute resolution, its promise of change remains

[18] Ibid.
[19] Judicature Act, s 3(2).
[20] The Judiciary of Kenya, *Alternative Justice Systems Baseline Policy* (2020) 22–25. (n 14)

incomplete if community justice continues to be treated as inferior to formal courts.

The Agency theory therefore offers a framework for understanding the relation between the people, the courts and the community justice system.[21] It is worth noting that judicial authority is not an inherent possession of judicial institutions but a power derived from the people. Articles 1 and 159(1) of the Constitution provide that the authority delegated to courts is not necessarily the exclusive pathway through which people may pursue justice as the Constitution recognizes Alternative forms of Justice Systems including TDRMs.[22] This Theory therefore, invites further inquiry into whether the authority exercised by formal courts should be understood in a way that leaves meaningful room for community-based justice.[23] This perspective challenges the assumption that access to justice is synonymous with access to formal courts.

Moreover, Emily Kinama's analysis of traditional justice under Article 159(2)(c) similarly emphasizes the potential of traditional mechanisms and the need for a multidisciplinary approach to access to justice.[24] The Judiciary's 2020 Alternative Justice Systems Policy Framework also recognizes the significance

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[21] Ibid.

[22] Constitution of Kenya, 2010, Art 159

[23] The Judiciary of Kenya, *Alternative Justice Systems Baseline Policy* (2020) 22–25. < https://ajskenya.or.ke/mooxowhi/filr/3584/AJS_Baseline_Policy_2020_Kenya.pdf > Accessed 13 October 2026

[24] Emily Kinama, 'Traditional Justice System as Alternative Dispute Resolution Under Article 159(2)(c) of the Constitution of Kenya, 2010' (2021) 1(1) *Strathmore Law Journal* 22. < https://www.researchgate.net/publication/351719804_Traditional_Justice_System_as_Alternative_Dispute_Resolution_Under_Article_1592C_of_the_Constitution_of_Kenya_2010 > Accessed 14 October 2026

of informal justice systems and the need to engage with their historical marginalization.[25]

The Constitutional Transformation of African Justice

The colonial encounter introduced a fundamental transformation in African legal systems.[26] Colonial governments established formal courts based largely upon European laws and created hierarchical judicial structures through which colonial law could be administered.[27] Customary law was not necessarily abolished with the arrival of the Europeans, instead, it was often recognized subject to conditions imposed by the colonial state.[28] In Kenya, for example, the administration of customary law became subject to colonial judicial institutions and principles such as the repugnancy doctrine.[29] Traditional laws continued to exist within communities but their application highly depended on the limitation or rather the regulations that were set by the European laws.

The post-independence state largely retained many inherited legal institutions from the colonizer.[30] As a result, many African countries frequently entered independence with legal systems containing both indigenous and inherited European elements.[31] The contemporary legal order can therefore be

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[25] The Judiciary of Kenya, *Alternative Justice Systems Baseline Policy* (2020) (n 20)

[26] Francis Kariuki, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems' (2017) *Strathmore Law Review*

[27] Ibid

[28] Ibid

[29] Daniel S McConkie Jr, 'Promoting and Reforming Kenya's Customary Justice Systems in Criminal Cases' (2024) 38 Emory International Law Review 343.

[30] Sandra F Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39(4) Journal of Modern African Studies 571, 571–596. < https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1116&context=polisci-faculty-publications > Accessed 22 October 2026

[31] Ibid.

understood through the concept of legal pluralism: the coexistence of multiple normative and institutional systems within the same society.[32]

The Kenyan Constitution of 2010 provides an important constitutional response to this. The Constitution recognizes culture as part of the foundation of the nation while simultaneously subjecting all law and conduct to constitutional supremacy.[33] This expressly illustrates that traditional dispute resolution mechanisms are accepted and advocated for in the Constitution of Kenya, given that they are consistent to the Constitution and any other written Law.

Kenya's constitutional framework represents one of the clearest examples of formal recognition of African Justice system. Article 159(1) vests judicial authority in courts and tribunals established under the Constitution. Article 159(2)(c), requires courts and tribunals to promote alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[34]

The constitutional recognition has subsequently been developed institutionally through the Judiciary's Alternative Justice Systems Framework Policy, the Policy seeks to recognize, regulate and enhance alternative justice mechanisms while aligning them with constitutional values and international human-rights standards.[35] The Judiciary has described informal justice mechanisms, including customary and traditional mechanisms, as potentially more accessible and affordable than formal justice. It has also reported the

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[32] Governance and Resource Development center, 'Safety, security and justice' Legal Pluralism pg 12, < https://gsdrc.org/wp-content/uploads/2016/07/GSDRC_SSJ.pdf > Accessed 22 October 2026

[33] Constitution of Kenya 2010, Art 11

[34] Ibid, Art 159(2)

[35] Judiciary of Kenya, Alternative Justice Systems Framework Policy (2020)

establishment of AJS initiatives in various counties.[36] This is important because access to justice is not simply about the existence of courts. A court may be legally available but practically inaccessible because of cost, distance, delay, procedural complexity or lack of legal representation. The Kenyan constitutional model therefore attempts to maintain both principles: accessibility and constitutionalism.

The constitution of Kenya has been transformative in its provision in as far as it attempts to place a steady relationship between formal courts and the African Justice System. This is evidenced in provisions including, Article 1 which vests sovereignty in the people and requires public authority to be exercised within a constitutional framework, while Article 11 recognizes culture as the foundation of the nation and requires the State to promote cultural expression and indigenous technologies, knowledge and practices. Finally, Article 159(2)(c) requires courts and tribunals to promote alternative dispute resolution, including traditional dispute resolution mechanisms. These provisions are significant because they move beyond merely tolerating customary law. They establish constitutional grounds for recognizing cultural diversity and community-based dispute resolution as relevant to the administration of justice.

Additionally, the development of the Alternative Justice Systems Policy Framework in 2020 is a practical institutional response to this constitutional mandate. The framework seeks to recognize and strengthen alternative justice processes while aligning them with constitutional values and human rights standards.[37]

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[36] Judiciary of Kenya, 'Promoting Alternative Justice Systems (AJS)' < https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/ > Accessed 14 October 2026

[37] Judiciary of Kenya, Alternative Justice Systems Framework Policy (2020)

However, recognition does not automatically establish equality between legal systems. Article 159(3) limits the use of traditional dispute resolution mechanisms by introducing a repugnancy clause.[38] This continued use of the repugnancy clause consequently raises the question whether customary justice is being recognized on its own legitimate terms or is still required to pass through a test historically associated with colonial legal superiority. Further to this argument questions arise, on what determines that a customary law is repugnant? The Constitution provides that Customary law that is inconsistent with the Constitution is void to the extent of the inconsistency.[39] While this is a necessary safeguard challenges arise when repugnancy is determined using vague or culturally biased ideas of justice and morality rather than clear constitutional standards.

Repugnancy under Article 159(3): Is it a Safeguard or a Colonial Residue?

The English Oxford dictionary defines repugnancy as, a very strong feeling of dislike or disgust, or the quality of being inconsistent, irreconcilable, or in contradiction.[40] Drawing from the Kenyan case of ***Katet Nchoe & Another v Republic*** **[2011] KEHC 4081 (KLR),** the Ghanaian Constitution, defines repugnancy in terms of harm to the physical and social well-being of citizens.[41] The repugnancy clause presents a fundamental tension between protecting constitutional rights and preserving the historical subordination of African customary law. Article 159(3) of the Constitution of Kenya, 2010, provides that traditional dispute resolution mechanisms (TDRMs) shall not be used in a manner that contravenes the Bill of Rights, is repugnant to justice and morality, or is inconsistent with the Constitution or written law.[42]

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[38] Constitution of Kenya 2010, Art 159(3)

[39] Ibid, Art 2(4)

[40] The Oxford Dictionary.

[41] *Katet Nchoe & Another v Republic* [2011] KEHC 4081 (KLR), para 13

[42] Constitution of Kenya, 2010, art 159(3)(a)–(c)

While these limitations serve a legitimate purpose by ensuring that customary justice respects fundamental rights, the continued use of the concept of repugnancy raises questions about who determines what is just, moral or acceptable. Historically, the repugnancy doctrine allowed colonial authorities to determine which African customs could be recognized within the formal legal system, effectively making the application of customary law dependent on standards developed by the dominant colonial legal order.[43]

This history is illustrated by ***R v Amkeyo***, in which the colonial court refused to recognize an African customary marriage in the same way as a marriage under the legal categories it applied, reflecting assumptions about customary marriage and bridewealth that subordinated African legal traditions.[44] Similarly, in ***Gwao bin Kilimo v Kisunda bin Ifuti***, a colonial-era Tanganyika case, the court rejected a customary claim involving collective responsibility and expressed the view that the standard of justice and morality applicable in a British court in Africa was the British standard.[45] These decisions illustrate the broader colonial approach through which African customary law was judged against externally imposed standards. These cases demonstrate that the concern is not merely the existence of a repugnancy test, but the cultural and legal assumptions through which it is applied.

Scholars have further highlighted the dangers of leaving repugnancy undefined. Francis Kariuki argues that Kenyan courts have historically treated African customary law as inferior to formal law and that judicial attitudes inherited from the colonial period may continue to obstruct the development of traditional justice systems.[46] He observes that Kenyan law does not clearly

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[43] Daniel S McConkie Jr, 'Promoting and Reforming Kenya's Customary Justice Systems in Criminal Cases' (2024) 38 Emory International Law Review 343.

[44] *R v Amkeyo* (1917) 7 EALR 14

[45] *Gwao bin Kilimo v Kisunda bin Ifuti* (1938) 1 TLR 403

[46] Francis Kariuki, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems' (2015) 1 *Strathmore Law Review* 43.

define what constitutes repugnancy, leaving judges with considerable discretion to determine whether a custom violates justice and morality.[47] This concern is reinforced by John Osogo Ambani and Ochieng Ahaya, who examine the historical challenges facing customary law in Kenya and the continuing influence of inherited legal structures on its status within the constitutional order.[48]

The problem becomes particularly significant where courts rely on standards drawn from other jurisdictions without sufficiently considering the social and cultural context of the custom under examination or in the present case. In ***Katet Nchoe & Another v Republic***, the High Court considered the Maasai practice of female genital mutilation in the context of a girl's death and examined the repugnancy test under section 3(2) of the Judicature Act.[49] The case illustrates why customary practices cannot be exempt from constitutional scrutiny where they cause serious harm or violate individual rights.

The appropriate response is therefore neither to accept every practice simply because it is customary nor to reject a practice merely because it differs from formal legal norms. Rather, courts should identify the specific constitutional rights, values or legal principles at stake and assess the practice in its proper context.

Furthermore the question of whether the Constitution of Kenya, 2010, has fully departed from the colonial repugnancy doctrine is reflected by Article 2(4), which expressly provides that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency.[50] The specific mention of customary law invites scrutiny that if the provision already establishes the supremacy of the Constitution over all laws, was it

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[47] Ibid.

[48] John Osogo Ambani and Ochieng Ahaya, (n 10)

[49] *Katet Nchoe & Another v Republic* [2011] KEHC 4081 (KLR)

[50] Constitution of Kenya, 2010, art 2(4).

necessary to single out customary law? Would removing the words "including customary law" arguably not alter the provision's fundamental legal effect, since customary law would remain subject to constitutional supremacy and still be considered a part of the law.[51]

Their inclusion, therefore, raises the question of whether the Constitution's drafters intended to address the historical position of customary law within Kenya's legal system or whether this express emphasis inadvertently reproduces the suspicion directed towards African customary norms.[52] Read alongside Article 159(3), which subjects traditional dispute resolution mechanisms to limitations concerning justice, morality and constitutional consistency, Article 2(4) reveals a tension between constitutional transformation and the continued scrutiny of customary law through legal standards imposed by the state.[53]

Although constitutional review serves the legitimate purpose of protecting fundamental rights, the express identification of customary law may be understood as a residue of the historical tendency to treat African legal traditions as requiring special justification before they can receive legal recognition.[54] The critical question is therefore whether this express reference

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[51] Ibid.

[52] Daniel S McConkie Jr, 'Promoting and Reforming Kenya's Customary Justice Systems in Criminal Cases' (2024) 38 *Emory International Law Review* 343.

[53] Emily Kinama, 'Traditional Justice System as Alternative Dispute Resolution Under Article 159(2)(c) of the Constitution of Kenya, 2010' (2015) 1(1) *Strathmore Law Journal* 22. Pg 25 – 31 <https://www.researchgate.net/publication/351719804_Traditional_Justice_System_as_Alternative_Dispute_Resolution_Under_Article_1592C_of_the_Constitution_of_Kenya_2010 > Accessed 22 October 2026

[54] Lisa Owino, 'Application of African Customary Law: Tracing its Degradation and Analyzing the Challenges it Confronts' (2016) 1(1) Strathmore Law Review 143.

represents a necessary constitutional safeguard against rights violations or perpetuates, even unintentionally, the hierarchical relationship that the Constitution sought to transform.

The Constitution of Kenya 2010 provides a basis for moving beyond this inherited hierarchy. Articles 11 and 159(2)(c) recognize culture and require the promotion of traditional dispute resolution mechanisms. Read together, these provisions suggest that constitutional rights, should provide the primary standard for evaluating customary practices.

The Agency Theory discussed in the Judiciary's *Alternative Justice Systems Baseline Policy 2020* strengthens this argument by emphasizing the importance of people's agency in choosing appropriate mechanisms for resolving their disputes.[55] From this perspective, the formal judiciary should not assume that justice can only be delivered through state courts or that community-based processes are inherently inferior.

The judiciary's responsibility is therefore to protect constitutional rights while allowing legitimate space for customary justice to operate on its own terms. The judiciary should perform an oversight rather than a controlling function in relation to customary justice. Its role should be to ensure that customary practices and dispute resolution processes comply with the Constitution, particularly the Bill of Rights, without unnecessarily interfering with their autonomy or imposing formal court procedures on them. In line with the Agency Theory, courts should respect the people's ability to choose how their disputes are resolved, recognizing that justice is not the exclusively preserved for formal courts. The transformation promised by the Constitution will remain incomplete if customary justice is recognized in principle but continues to be treated as subordinate in practice.

[55] The Judiciary of Kenya, *Alternative Justice Systems Baseline Policy* (2020) 22–25. (n 13)

How do we move towards a Legal Order that embraces both systems?

Embracing both systems requires respect for customary practices, the people's decision on how they would wish to settle disputes and protection of constitutional rights. The Agency Theory should be translated into practical reforms that recognize traditional dispute resolution Mechanisms as a pathway to justice while upholding the Constitution.

Furthermore, Courts should apply the repugnancy test by identifying specific constitutional or statutory standards rather than relying on cultural assumptions. The Judiciary should strengthen implementation of the 2020 AJS Policy through public awareness, training and clear procedures for recognizing community settlements. Parties should be able to choose dispute-resolution mechanisms freely. Judicial oversight should protect constitutional rights without unnecessarily controlling community processes or assuming that formal courts are the only legitimate source of justice. Finally, legal education should give greater attention to African customary jurisprudence to challenge colonial assumptions and promote a people-centered legal order in which community justice and formal courts complement one another under the Constitution.[56]

Conclusion

The recognition of African customary justice under the Constitution of Kenya, 2010, represents an important step towards a more inclusive legal order. However, the continued application of the repugnancy test raises questions about whether customary law is genuinely recognized or remains subject to standards shaped by colonial legal traditions. The Agency Theory provides an opportunity to rethink this relationship by placing people's choices and experiences at the center of justice. This does not mean that customary practices should be exempt from constitutional scrutiny, but that such scrutiny must be

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[56] Angela Gitahi, 'Legal Pluralism in Kenya', < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5227700 > Accessed 14 October 2026

grounded in constitutional principles rather than assumptions that formal courts are inherently superior. The Judiciary should therefore focus on ensuring constitutional compliance while respecting the autonomy of community justice mechanisms. Ultimately, a truly people-centered African legal order will emerge when formal courts and customary justice are recognized as complementary systems, working together to deliver accessible, fair and constitutionally sound justice.

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Bias, Apparent Bias and The Independence of Construction Adjudicators: Establishing an Appropriate Kenyan Standard

By: Jerameel Kevins Owuor Odhiambo*

Abstract

Kenya stands at the threshold of enacting the Construction Payments Adjudication Bill, 2025, a statute that would, for the first time, place adjudicators at the centre of construction dispute resolution. Nevertheless, the Bill imports the language of impartiality and independence without confronting the structural conditions under which Kenyan adjudicators will actually operate: a shallow professional pool, overlapping institutional memberships, executive-dominated appointing authorities and an underdeveloped disclosure culture. This article interrogates the doctrinal architecture of bias, apparent bias and independence as developed in English, Canadian, East African Court of Justice and international arbitral jurisprudence, and tests its transplantability into the Kenyan construction sector. Drawing from Kenyan case law, the Fair Administrative Action Act 2015, the Arbitration Act 1995 and comparative statutory adjudication regimes, it argues that the orthodox fair-minded-observer test is necessary but insufficient absent structural safeguards calibrated to Kenya's thin adjudicator market. The article proposes a composite Kenyan standard combining the objective apprehension-of-bias test with mandatory, continuing disclosure, a statutorily insulated appointing body, and empirically grounded eligibility criteria, thereby making an original contribution to construction law scholarship in Africa.

Keywords*: construction adjudication; bias; apparent bias; independence; impartiality; Kenya; Construction Payments Adjudication Bill 2025; arbitration; administrative justice*

1. Introduction: The Adjudicator Nobody Is Watching

It is a common phenomenon to find stalled roads in Kenya. This tells tales of a subcontractor who has not been paid in four months, a bank covenant is about to be breached, and a project that Kenya's infrastructure programme cannot afford to lose is sliding toward collapse over a valuation dispute worth a fraction of the project's total cost.[1] Under the traditional Kenyan model, that dispute would head into arbitration or litigation, processes measured in years, not weeks.

Under the *Construction Payments Adjudication Bill 2025*[2], now before Parliament, that same dispute would instead be decided within fourteen days by a single

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[1]For the scale of Kenya's current infrastructure pipeline and its dependence on timely construction cash flow, see Kenya National Bureau of Statistics (KNBS), Economic Survey 2025 (KNBS 2025); 'Construction Industry Boom as Jobs, Wages and Output Rise Sharply in 2025' The Eastleigh Voice (30 April 2026) <https://eastleighvoice.co.ke/business/341916/construction-industry-boom-as-jobs-wages-and-output-rise-sharply-in-2025> accessed 24 August 2026.

[2] Construction Payments Adjudication Bill, 2025 (National Assembly, Kenya), text published via the Nairobi Centre for International Arbitration (NCIA) <https://ncia.or.ke/wp-content/uploads/2025/05/Construction-Adjudication-Bill-2025.pdf> accessed 24 August 2026. The Bill traces to the Attorney-General's Sessional Paper No 4 of 2024 on the National Alternative Dispute Resolution Policy: Cliffe Dekker Hofmeyr (CDH), 'Should Kenya Adopt Statutory Adjudication for Construction Disputes?' (CDH, 2025) <https://www.cliffedekkerhofmeyr.com/en/news/publications/2025/Practice/Dispute-Resolution/dispute-resolution-alert-should-kenya-adopt-statutory-adjudication-for-construction-disputes> accessed 24 August 2026.

adjudicator[3], appointed on short notice, whose decision is binding and enforceable pending any later arbitration or litigation.[4] Speed of this order is precisely the point: the Bill borrows the logic of the United Kingdom's *Housing Grants, Construction and Regeneration Act 1996*, whose animating premise is that cash is the lifeblood of the construction industry and that a wrong, quickly corrected, is better than a right delayed into insolvency.

Even so, speed without safeguards is a gamble[5], and the safeguard that statutory adjudication most conspicuously stakes everything on is the *person* of the adjudicator[6]. Whereas a court has institutional memory, appellate correction and a constitution that entrenches judicial independence[7], a construction adjudicator often has none of these[8]. Kenyan adjudicators will typically be engineers, quantity surveyors, architects or advocates drawn from

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[3] Ibid

[4]Africa Construction Law, 'Highlights of Kenya's Construction Payments Adjudication Bill, 2025' (12 November 2025) <https://africaconstructionlaw.org/highlights-of-kenyas-construction-payments-adjudication-bill-2025/> accessed 24 August 2026, noting the fourteen-day determination period, extendable by consent.

[5] Chacha Odera and Meshack Kwaka, Speedy Resolve: Adjudication as a Means of Effective Alternative Dispute Resolution (12th May 2023) Available at < https://www.oraro.co.ke/speedy-resolve-adjudication-as-a-means-of-effective-alternative-dispute-resolution/> Accessed on 24th October 2026; See also, Pinsent Masons, Adjudication versus other approaches to construction disputes (23rd November 2018) Available at <https://www.pinsentmasons.com/out-law/guides/adjudication-construction-disputes> Accessed on 24th October 2026.

[6] Ibrahim Godafa, Construction Adjudication in Kenya: A New Dawn? Available at < https://africaconstructionlaw.org/5997-2/ > Accessed on 24th October 2026.

[7] Tomasz Milej and Evans Ogada, Upholding Judicial Independence in Kenya: Challenges, Context and Solutions (Policy Paper, Friedrich Naumann Foundation for Freedom, September 2024)

[8]Terry Skolnik; Hot Bench: A Theory of Appellate Adjudication (2020) 61 Boston College Law Review 1271

a professional community that is, by any honest reckoning, small, tightly networked and repeatedly re-appointed by the same handful of developers[9], contractors and public agencies[10].

It is a community in which the adjudicator deciding today's dispute may have sat as an expert witness for one of the parties last year, may serve alongside opposing counsel on the same professional council, or may depend for future appointments on the very employer whose valuation is under challenge. This is not a scandal; it is simply what a young, small and interconnected market for quasi-judicial expertise looks like. The scandal would be a statute that legislates as though the market were otherwise.

This article asks a deceptively narrow question with sweeping implications: *what standard of bias, apparent bias and independence should Kenya adopt for construction adjudicators, and is the standard presently on offer, inherited largely from English administrative law and international arbitral practice, fit for Kenyan conditions?*

The question matters because Kenya is not merely borrowing a dispute-resolution technique; it is borrowing a legal culture's assumptions about the depth and self-policing capacity of its professional markets. England's statutory adjudication regime rests on decades of case law, an established network of adjudicator nominating bodies, and a comparatively large,

[9] Isabella Njeri, Dispute Avoidance in Construction Contracts Highlights Available at < https://ciarbkenya.org/dispute-avoidance-in-construction-contracts-highlights/> Accessed on 24th October 2026

[10] Lucky Philomena, Construction Adjudication in Kenya: The Need to Develop Legal Framework for Effective Construction Adjudication, Volume 11(1) of Journal of Conflict Management and Sustainable Development 2023

saturated market for construction professionals[11]. Kenya has none of these in mature form and has historically lacked any comprehensive statutory framework governing construction adjudication at all.[12] The *Construction Payments Adjudication Bill, 2025* imports the vocabulary of impartiality and independence in its clauses on adjudicator appointment and conduct, but vocabulary is not architecture[13].

The stakes are not abstract. After contracting by 0.7 per cent in 2024, Kenya's construction sector rebounded to grow by 6.8 per cent in 2025[14], with KNBS data recording construction value-add growth of 5.7 per cent year-on-year in the second quarter of 2025 alone, and domestic credit to the construction industry expanding by 17.6 per cent over the first eight months of that year.[15] Sector output is projected to approach KES 1.16 trillion[16], and GDP attributable to construction reached KES 159.5 billion in the third quarter of 2025 alone.[17] As recently as 2023 the sector still accounted for roughly 4.1 per cent of national

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[11] Renato Nazzini & Aleksander Godhe, 2024 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform, Kings College London.
See Generally, Adjudication Reporting Centre (ARC), The Development of Statutory Adjudication in the UK and its Relationship with Construction Workload, Glasgow Caledonian University.

[12]Africa Construction Law, 'Construction Adjudication in Kenya: A New Dawn?' <https://africaconstructionlaw.org/5997-2/> accessed 24 August 2026.

[13] The Construction Payments Adjudication Bill, 2025

[14]'Construction Industry Boom as Jobs, Wages and Output Rise Sharply in 2025' (n 1).

[15]Research and Markets, 'Kenya Construction Industry Report 2025: Output to Register an AAGR of 5.5% Between 2026-2029 After Growth of 2.9% in 2025' (press release, republished by Yahoo Finance) <https://finance.yahoo.com/news/kenya-construction-industry-report-2025-150000385.html> accessed 24 August 2026.

[16]'Construction Industry Boom as Jobs, Wages and Output Rise Sharply in 2025' (n 1).

[17]Trading Economics, 'Kenya GDP from Construction' (data sourced from KNBS) <https://tradingeconomics.com/kenya/gdp-from-construction> accessed 24 August 2026.

GDP.[18] Every shilling of that value passes, at some point, through a payment chain vulnerable to the very disputes adjudication is designed to resolve. A biased or captured adjudicator does not merely wrong one litigant[19]; in a sector this systemically important, it corrodes confidence in the entire dispute-resolution edifice Kenya is trying to build, at precisely the moment the country is courting the investor confidence[20] that statutory adjudication is meant to inspire.

The argument advanced here is not that Kenya should abandon statutory adjudication; the efficiency case for it is compelling and well made elsewhere.[21]

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[18]'Plight of MSMEs in Kenya's Building, Construction Sector' Business Daily (3 March 2025) <https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/plight-of-msmes-in-kenya-s-building-construction-sector-4950114> accessed 24 August 2026.

[19] Expert Evidence, Adjudicator Guilty of Bias – In what Circumstances might that happen? Available at < https://expert-evidence.com/adjudicator-guilty-of-bias-in-what-circumstances-might-that-happen/> Accessed on 24th October 2026.

[20] John Mwendwa, Kenya Is Converting Investor Confidence into Real Economic Growth- Invest Kenya CEO (16th April 2026) Available at < https://kenyanwallstreet.com/kenya-investor-confidence-economic-growth> Accessed on 24th October 2026

[21]See CDH, 'An Analysis of Kenya's Construction Payments Adjudication Bill, 2025' (29 July 2025) <https://www.cliffedekkerhofmeyr.com/en/news/publications/2025/Practice/Dispute-Resolution/dispute-resolution-alert-29-july-an-analysis-of-kenyas-construction-payments-adjudication-bill-2025> accessed 24 August 2026, describing arbitration and litigation as comparatively 'expensive, slow and adversarial'.
See also, Lucky Philomena, Construction Adjudication in Kenya: The Need to Develop Legal
Framework for Effective Construction Adjudication, Volume 11(1) of Journal of Conflict Management and Sustainable Development 2023

It is instead that legitimacy, once ceded to speed[22], is not automatically restored by inserting the words 'impartial' and 'independent' into a clause of a Bill. This article proceeds in seven parts. Section 2 excavates the doctrinal architecture of bias, distinguishing actual bias, apparent bias and the freestanding value of independence, situating construction adjudication as a quasi-judicial rather than purely contractual function. Section 3 undertakes a comparative survey of the fair-minded-observer test in England and Wales, its reception in Canada and the East African Court of Justice, and its analogue in the IBA Guidelines on Conflicts of Interest in International Arbitration.

Section 4 maps the Kenyan constitutional, statutory and institutional terrain against that comparative baseline. Section 5 examines Kenyan jurisprudence on bias for what it reveals, and fails to reveal, about how a Kenyan court would treat a challenge to a construction adjudicator. Section 6 offers a structural and empirical diagnosis of why Kenyan adjudicators are distinctively exposed to bias risk notwithstanding formally impeccable statutory language. Section 7 synthesises the analysis into a proposed composite Kenyan standard and concludes. A Kenyan standard for adjudicator bias and independence must be built, deliberately, for Kenyan market conditions, and that is the task this article undertakes.

[22] Marin K Levy, 'Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals' (2013) 81 George Washington Law Review 401

2. Conceptual and Doctrinal Foundations: Bias, Apparent Bias and Independence

2.1 Three Distinct Ideas Wearing One Name

Lawyers use the word 'bias' loosely[23], but the doctrine distinguishes at least three separate phenomena that a coherent Kenyan standard must address separately[24]. The first is *actual bias*: a decision-maker who, as a matter of fact, has prejudged the dispute or has a genuine, undisclosed interest in its outcome. Actual bias is rarely provable directly[25]; it is usually inferred, if at all, from conduct so extreme that no other explanation is plausible[26].

The second is *apparent (or apprehended) bias*: a decision-maker who may in fact be entirely fair-minded, but whose circumstances are such that a reasonable observer would suspect partiality[27]. Kenyan jurisprudence, echoing Australian and Canadian authority, has recognised that apprehended bias is also described as 'imputed', 'suspected' or 'presumptive' bias, and that it is assessed objectively, by reference to what a fair-minded and informed observer might

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[23] James Stark, Towards a Better Understanding of Lawyers' Judgmental Biases in Client Representation: The Role of Need for Cognitive Closure, Journal of Law and Policy Volume 59 of 2019
Paul Brest and Linda Krieger, 'Lawyershoot: Implicit Bias in Legal Decision Making' (2010) 9 Cincinnati Law Review 241

[24] John Mbaluto, Asked to Step Aside: Recusal as a Means of Addressing Judicial Bias (22nd November 2024) Available at <https://www.oraro.co.ke/asked-to-step-aside-recusal-as-a-means-of-addressing-judicial-bias/> Accessed on 24th October 2026.

[25] Yambane v Commissioner for Co-operative Development and Marketing & another (Tribunal Appeal E001 of 2024) [2026] KECOPT 230 (KLR) (26 March 2026) (Judgment)

[26] Dan M Kahan, 'The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law' (2012) 125 Harvard Law Review 1

[27] Sylvia Wangechi Njoki & another v John Chege Njoki [2021] KEELC 4372 (KLR)

conclude, rather than by inquiry into the decision-maker's actual state of mind.[28]

The third, and most often neglected in construction-sector debate, is *independence* as a structural rather than case-specific concept[29]: whether the *office* of adjudicator is, by its institutional design[30], sufficiently insulated from the parties and their patrons that public confidence in the class of decisions it produces can be sustained over time, irrespective of the merits of any single case[31].

The distinction matters practically. A rule targeting only actual bias would catch almost nothing[32], because actual bias is nearly impossible to prove and, more importantly[33], because a legal system that waited for proof of dishonesty before intervening would have already lost the public confidence the rule exists

[28]Miscellaneous Civil Application 557 of 2017 (High Court of Kenya, Judicial Review) <http://kenyalaw.org/caselaw/cases/view/166419> accessed 24 August 2026, distinguishing actual from apprehended bias and noting that the latter is 'variously referred to as "apparent", "imputed", "suspected" or "presumptive" bias'. See also; Australian Law Reform Commission, The Judge, the Public, and the Test for Apprehended Bias (2nd June 2021).

[29] Sugiarto Raharjo Japar, Principle of Independence in Construction Service Contracts, International Journal of Futures Studies Vol. 8No. 2(2025)

[30] Lukas Mistelis, 'Mandatory Adjudication in Construction Disputes and the Rule of Law' (2018) 35 International Construction Law Review 84

[31] Christopher R Drahozal and Peter B Rutledge, 'Arbitration Clauses and Institutional Design' (2012) 113 Florida State University Law Review 727; James L. Tan, Institutionalizing Fairness: Structural Independence and Institutional Design in Construction Dispute Adjudication (PhD Thesis, King's College London 2021)

[32] Magill v. Porter 2001, UKHL 67

[33] Findlay v United Kingdom (1997) 24 EHRR

to protect[34]. A rule targeting only apparent bias addresses individual appointments but leaves untouched the structural question of whether the *system* of appointment, remuneration and professional accountability is itself calculated to produce impartial outcomes[35]. Independence, properly understood, is therefore not a synonym for impartiality but its institutional precondition: impartiality is a state of mind (or its objective appearance); independence is the set of arrangements that make that state of mind possible and credible.[36]

2.2 The Twin Pillars of Procedural Fairness

Kenyan courts, drawing on longstanding common law administrative doctrine, have organised procedural fairness[37] around two Latin-tagged pillars. The first, *audi alteram partem*[38], requires that a person adversely affected

[34] David Sachar, Judicial Misconduct and Public Confidence in the Rule of Law. Available at < https://www.unodc.org/dohadeclaration/en/news/2019/08/judicial-misconduct-and-public-confidence-in-the-rule-of-law.html > Accessed on 24th October 2026

[35] Catherine Rogers, Reconceptualizing the Party-Appointed Arbitrator and the Meaning of Impartiality, Volume 64, Number 1, Winter 2023

[36]The distinction between independence as a structural, institutional guarantee and impartiality as a case-specific mental state is well established in judicial-conduct scholarship and has been imported into arbitral practice; see the discussion of the twin concepts in the Fenwick Elliott commentary on conflicts of interest in arbitration, 'Conflict of Interest – Apparent Bias of Arbitrator – IBA Guidelines' <https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/conflict-of-interest-bias-arbitrator> accessed 24 August 2026.

[37] Beauty Line Limited v Chanchima (Employment and Labour Relations Appeal E062 of 2024) [2026] KEELRC 235 (KLR) (30 January 2026) (Judgment)

[38] Ali v Mohammed & 3 others (Constitutional Petition 1 of 2020) [2022] KEHC 13769 (KLR) (13 October 2022) (Ruling)

by a decision be heard before it is made[39]. The second requires that 'the decision-making process must be free from any real or apparent partiality, bias or prejudice'[40], the second limb being the doctrinal home of both actual and apparent bias[41].

Kenyan courts have been explicit that *either* limb, standing alone, is sufficient to vitiate a decision[42]; a decision-maker who heard both sides fully but did so while apparently compromised is no more defensible than one who was scrupulously neutral but refused a party a hearing[43]. This dual structure is directly transplantable to construction adjudication: an adjudicator who conducts an impeccably fair fourteen-day process but who sits under a live conflict of interest has, on Kenyan administrative law's own terms, produced a decision as vulnerable to challenge as one reached through a procedurally defective hearing.

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[39] Benson Ruiyi Njane v Kenya National Highways Authority (KeNHA) & Another (2014); Halsbury Laws of England, 5th Edition 2010 Vol 61 at para 639
See also; Kenya Human Rights Commission v Non-Governmental Organizations Co-ordination Board [2016] eKLR; Msagha v Chief Justice & 7 others Nairobi HCMCA No 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553, Doucet-Boudreau vs Nova Scotia (Minister of Education), 2003 SCC 62

[40]Miscellaneous Civil Application 557 of 2017 (n 5), summarizing the two limbs of procedural fairness and observing that 'justice must both be done and must be seen to be done', and that either limb, standing alone, may be sufficient to invalidate an administrative decision.

[41] See Generally, Oraro & Company Advocates, 'Changing Times: The Shift from a Process-Only Inquiry to Merit Review of Administrative Action' (30 November 2021) https://www.oraro.co.ke/changing-times-the-shift-from-a-process-only-inquiry-to-merit-review-of-administrative-action/ accessed 27 August 2026

[42] Mereka v Sikalieh (Petition E299 of 2022) [2025] KEHC 3467 (KLR) (Constitutional and Human Rights) (20 March 2025) (Judgment)

[43] Aldermen Limited v Shah & 3 others (Civil Appeal E004 of 2021) [2022] KEELC 2311 (KLR) (27 April 2022) (Judgment)

2.3 Why Adjudicators Are Not 'Just' Contracting Parties' Agents

A recurring objection to importing administrative-law bias standards into construction adjudication is that adjudication is, at root, a creature of contract (or, under the 2025 Bill, of statute operating alongside contract), and that an adjudicator, unlike a judge, need not be a paragon of Olympian detachment. This objection proves too much. Even where an adjudicator's jurisdiction originates in a private agreement, the *function* performed is quasi-judicial: the adjudicator hears competing submissions, applies legal and technical standards to disputed facts, and renders a determination binding on parties who have not consented to the specific individual chosen except through a nomination mechanism they may not control.

It is precisely this quasi-judicial character that led Kenyan courts, when confronted with the analogous question of arbitral and regulatory tribunal bias, to import the *Porter v Magill* fair-minded-observer test wholesale rather than fashion a diluted 'commercial' standard.[44] Where the Construction Payments Adjudication Bill, 2025 explicitly frames adjudicator appointment and conduct in terms of 'impartiality and independence' in clause 25[45], the statute itself forecloses the 'mere contract' objection: Parliament has chosen to regulate adjudicator conduct in terms lifted directly from public-law vocabulary, and a Kenyan court asked to review a challenge would be entitled,

[44]See Section 3.2 below for detailed treatment of Kenyan reception of Porter v Magill [2001] UKHL 67, [2002] 2 AC 357.

[45]Construction Payments Adjudication Bill, 2025, cl 25; discussed in the National Assembly's explanatory memorandum reproduced at Africa Construction Law, 'Highlights of Kenya's Construction Payments Adjudication Bill, 2025' (n 2), and in the Bill's own explanatory notes archived at <https://ncia.or.ke/wp-content/uploads/2025/05/Construction-Adjudication-Bill-2025.pdf> accessed 24 August 2026.

indeed obliged, to read that vocabulary against its established constitutional and administrative-law meaning.

2.4 A Working Taxonomy for the Remainder of the Article

The remainder of this article uses the following working taxonomy, synthesized from the foregoing. *Bias* refers to a disqualifying mental state, actual or apprehended, on the part of a specific adjudicator in a specific reference. *Apparent bias* is the objectively assessed subset of that category that the law polices even absent proof of actual partiality, because *the appearance* of partiality is independently corrosive of confidence in adjudication as an institution.

Independence is the structural condition[46], addressed at the level of the appointing system rather than the individual case, that determines how frequently bias-adjacent conflicts will arise[47] and how effectively they will be caught before they infect a determination[48]. A sound Kenyan standard, this article argues, cannot rest on apparent-bias doctrine alone; it must be buttressed by independence-promoting structural design, precisely because Kenya's construction-adjudicator market is, as Section 6 demonstrates, unusually thin.

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[46] Mathias Mayer, A Theory of Structural Independence. Available at < https://arxiv.org/pdf/2412.00847 > Accessed on 26th October 2026

[47] Sandra Nicole, A Critical Analysis of the Independence and Impartiality of the Court Martial (2018, LLB Dissertation)

[48] Faith Wanjiku and Micheel Odiyo, Constitutionality of provisions in the Defence Act and Military Discipline Supplementary Measures Act with regard to military courts' independence. Available at <https://kenyalaw.org/articles/2025-03-17/research/constitutionality-of-provisions-in-the-defence-act-and-military-discipline-supplementary-measures-act-with-regard-to-military-courts-independence> Accessed on 24th October 2026

3. Comparative Standards: England, Canada, the East African Court of Justice and International Arbitration

3.1 From 'Real Danger' to 'Real Possibility': The English Trajectory

The modern English law of apparent bias began its settled life in *R v Gough*, where the House of Lords held that the applicable test, whether applied by a trial judge or on appeal, was 'whether, in all the circumstances of the case, there appeared to be a real danger of bias'[49] concerning the relevant decision-maker. That formulation, focused on the court's own assessment of 'danger' rather than on how the situation would appear to an outside observer, proved awkward, not least because it appeared to subordinate the outside observer's perspective to the reviewing court's own view of the facts.

The House of Lords revisited the question in *Porter v Magill*, a case arising from the 'homes for votes' scandal in which a local government auditor's investigative findings against Westminster City Council leaders were challenged as tainted by apparent predetermination.[50] Lord Hope, reformulating the test, held that the question was 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'[51], replacing the language of 'danger' with the language of 'possibility' viewed through the eyes of a constructed, notionally objective observer.

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[49]R v Gough [1993] AC 646 (HL), applied and summarised in Civil Appeal (Application) 1 of 2016 (Court of Appeal, Kenya) <http://kenyalaw.org/caselaw/cases/view/119501> accessed 24 August 2026.

[50]Porter v Magill [2001] UKHL 67, [2002] 2 AC 357. The underlying facts concerned an auditor's investigation into the sale of council housing in marginal wards for alleged electoral advantage.

[51]Porter v Magill (n 12) [103] (Lord Hope); the formulation is now generally cited simply as 'the Porter v Magill test'.

Two features of the reformulated test deserve emphasis for present purposes. First, the observer is deliberately idealized: *fair-minded* and *informed*, meaning neither unduly suspicious nor complacently trusting, and possessed of the relevant background facts, including the practical realities of how the relevant profession or institution operates. The Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* held that this observer would not, without more, treat a decision-maker's religion, ethnicity, gender, age, class, means, sexual orientation or previous professional associations as, of themselves, grounds for apprehended bias, absent some more specific, case-connected link between that characteristic and the dispute at hand.[52]

Second, and critically for a construction context in which adjudicators are professionals who inevitably share associations, qualifications and prior working relationships, the test was later refined in *Helow v Secretary of State for the Home Department* to acknowledge that the informed observer must also be attributed with a reasonable, rather than a naïve, understanding of how professional communities function, without collapsing into a standard so forgiving that structural conflicts are waved through as 'normal practice'.[53]
England's more recent contribution, directly relevant to statutory adjudication, is the Supreme Court's decision in *Halliburton Co v Chubb Bermuda Insurance Ltd*, which confirmed that an arbitrator (and, by extension, an adjudicator performing an analogous quasi-judicial function) is under a continuing legal

[52]Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 (CA), summarised in Judicial Office (England and Wales), Guidance No 15: Dealing with the Possibility of Apparent Bias (2013) <https://www.judiciary.uk/wp-content/uploads/2013/09/guidance-no-15-apparent-bias.pdf> accessed 24 August 2026.
[53]Helow v Secretary of State for the Home Department [2008] UKHL 62, [2008] 1 WLR 2416.

duty to disclose matters which would or might reasonably give rise to a suggestion of bias, not merely a duty to be, in fact, unbiased.[54]

The United Kingdom has since gone further still, legislating a freestanding statutory duty of disclosure into its arbitration framework: the Arbitration Act 2025 inserts a new section 23A into the Arbitration Act 1996 requiring an individual approached about a prospective appointment, and an arbitrator once appointed, to disclose 'any relevant circumstances of which the individual is, or becomes, aware'[55], defined as circumstances that might reasonably give rise to justifiable doubts as to impartiality.

The trajectory is unmistakable: English law has moved steadily from a court-centred, retrospective inquiry into 'danger' toward a forward-looking, disclosure-driven regime that treats non-disclosure itself, independent of any proof of actual partiality, as the primary regulatory target. This is a crucial comparative lesson for Kenya, discussed further in Section 7: the direction of travel in the jurisdiction Kenya most directly borrows from is away from reliance on ex post litigation and toward ex ante structural disclosure obligations.

3.2 Kenyan and East African Reception of the Fair-Minded-Observer Test

Kenyan courts have not merely noted the English trajectory; they have actively adopted it, including its most recent iteration. The Court of Appeal has

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[54]Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48; discussed in Akin Gump Strauss Hauer & Feld LLP, 'U.K. Supreme Court Confirms That Arbitrators Are Under a Legal Duty to Disclose Matters Which Would or Might Create an Appearance of Bias' (JD Supra, 2020) <https://www.jdsupra.com/topics/international-bar-association-iba/bias/> accessed 24 August 2026.

[55]Arbitration Act 2025 (UK), s 2, inserting s 23A into the Arbitration Act 1996 <https://www.legislation.gov.uk/ukpga/2025/4/section/2/enacted> accessed 24 August 2026.

confirmed that no fair-minded and informed observer, having considered the facts, would conclude that there is a possibility of bias unless the material genuinely supports such a conclusion[56], expressly citing and applying *Porter v Magill*. In a companion application the same year, the Court of Appeal traced the doctrinal history from *R v Gough* through *Porter v Magill*, and situated Kenya within a wider regional consensus by noting that the East African Court of Justice had itself endorsed 'the objective test of "reasonable apprehension of bias"' as good law in litigation between the Attorney-General of Kenya and a former presidential candidate over the conduct of the 2007 general election.[57] The same judgment imported, with evident approval, the Supreme Court of Canada's articulation in *R v S (RD)* that '*[t]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information*'[58], and that the test contains a 'two-fold objective element': both the hypothetical observer and the apprehension itself must be reasonable in the circumstances. The convergence across four jurisdictions, England, Canada, the East African Court of Justice and Kenya itself, on a materially identical objective test is a striking piece of comparative common ground, and it forms the doctrinal floor beneath any Kenyan standard for construction adjudicators. What Kenyan authority does *not* yet supply, and what this article turns to next by way of comparison, is guidance on how that floor should be supplemented by structural, disclosure-

[56]Civil Application Nairobi 6 of 2016 (Court of Appeal, Nairobi) <http://kenyalaw.org/caselaw/cases/view/119510> accessed 24 August 2026, applying Porter v Magill (n 12) in a recusal application arising from litigation over the constitutional retirement age of superior court judges.

[57]Civil Appeal (Application) 1 of 2016 (Court of Appeal, Kenya) <http://kenyalaw.org/caselaw/cases/view/119501> accessed 24 August 2026, citing Attorney General of Kenya v Prof Peter Anyang' Nyong'o and 10 Others, EACJ Application No 5 of 2007.

[58]R v S (RD) [1997] 3 SCR 484, cited in Civil Appeal (Application) 1 of 2016 (n 17).

based safeguards suited to a market as thin as Kenya's construction-adjudication profession.

3.3 The International Arbitration Analogue: The IBA Guidelines

By dint that Kenyan construction disputes not resolved at adjudication will typically proceed to arbitration, the soft-law standard developed for international arbitrators is directly relevant by analogy. The IBA Guidelines on Conflicts of Interest in International Arbitration operationalise the *Porter v Magill* test through colour-coded 'Red', 'Orange' and 'Green' lists of situations ranging from non-waivable conflicts (such as an arbitrator holding a direct financial interest in a party) to situations requiring disclosure but not automatic disqualification (such as prior but limited professional contact).[59]

The Guidelines' central innovation, replicated in the English 2025 statutory disclosure duty discussed above, is to shift the operative question from 'was this decision-maker in fact biased?' to 'did this decision-maker disclose the categories of relationship that a reasonable party would wish to evaluate before consenting to the appointment?' This shift is significant because it is administrable *prospectively*, at the point of appointment, rather than only *retrospectively*, after a decision has already been rendered and money and time already spent, which is precisely the vulnerability of a fourteen-day adjudication timeline in which retrospective challenge is a poor remedy for a process designed to be over before challenge is even practicable.

[59]The IBA Guidelines' colour-coded list architecture, and its use as an interpretive gloss on the common law apparent-bias test, is discussed in Fenwick Elliott, 'Conflict of Interest – Apparent Bias of Arbitrator – IBA Guidelines' (n 8), noting that parties in a recent challenge agreed the applicable common law test was that in Porter v Magill (n 12) while disputing its application to the specific facts.

3.4 A Comparative Synthesis

Three lessons emerge from this comparative survey that will structure the remainder of the article. First, the objective, fair-minded-observer test is now close to a common law and East African regional consensus, and Kenya has already received it into its own jurisprudence; there is no doctrinal gap to fill on this point, only an application gap, addressed in Section 5.

Second, mature systems, whether judicial (the English 2025 statutory reform), or arbitral (the IBA Guidelines), have moved decisively toward mandatory, continuing, structured disclosure as the primary practical mechanism for operationalizing the fair-minded-observer standard, rather than relying on litigants to detect and litigate bias after the fact.

Third, none of the comparator jurisdictions surveyed contends with a professional market as small and interconnected as Kenya's construction sector; their disclosure regimes were built for markets deep enough that a disclosed conflict typically results in a straightforward substitution of one arbitrator or adjudicator for another equally qualified alternative. Section 6 shows why this last assumption, so easily taken for granted in England or in international commercial arbitration, cannot simply be imported into Kenya without adaptation.

4. The Kenyan Constitutional, Statutory and Institutional Framework

4.1 The Constitutional Baseline: Articles 47, 50 and 159

Kenya's 2010 Constitution supplies three anchoring provisions. Article 47 guarantees the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, a right operationalized by the Fair Administrative Action Act 2015[60], which the High Court has confirmed extends

[60]Constitution of Kenya 2010, art 47; Fair Administrative Action Act 2015 (Act No 4 of 2015). The Act's operationalisation of art 47 is discussed in Republic v National

judicial review supervision to administrative acts performed by statutory authorities in the construction sector.

Article 50 guarantees a fair hearing before an independent and impartial tribunal in respect of any dispute capable of resolution by application of law, language broad enough to capture quasi-judicial adjudicative bodies exercising statutory or state-sanctioned dispute-resolution functions. Article 159(2)(c) separately entrenches alternative dispute resolution, including arbitration, as a constitutionally recognised mechanism for the exercise of judicial authority, a provision that has underpinned Kenya's institutional investment in arbitration infrastructure, including the establishment of the Nairobi Centre for International Arbitration by Act of Parliament in 2013.[61]
Together, these provisions establish that impartiality and independence in adjudicative decision-making are not merely policy preferences importable or exportable at Parliament's convenience; they are constitutional values that any statute establishing a quasi-judicial adjudicative office, including a construction adjudicator, must be interpreted to serve.

4.2 The Fair Administrative Action Act 2015

The Fair Administrative Action Act 2015 gives Article 47 practical teeth. Its significance for construction adjudication is twofold. First, Kenyan courts have confirmed that the enactment of subsidiary instruments and administrative

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Construction Authority and 2 others; Joint Building and Construction Council (Ex parte) (Judicial Review Application E1120 of 2020) [2022] KEHC 333 (KLR) <https://kenyalaw.org/akn/ke/judgment/kehc/2022/333/eng@2022-04-28> accessed 24 August 2026.

[61]Constitution of Kenya 2010, art 159(2)(c); Nairobi Centre for International Arbitration Act 2013 (Act No 26 of 2013); see Clyde & Co, 'Arbitration Reform – A Perspective from Kenya' (11 April 2025) <https://www.clydeco.com/en/insights/2025/04/arbitration-reform-a-perspective-from-kenya> accessed 24 August 2026.

decisions by sectoral regulators, including bodies with construction-sector mandates such as the National Construction Authority, cannot escape the supervisory jurisdiction of the High Court under judicial review, and must remain within the four corners of legality, rationality and procedural propriety.[62]

If a construction adjudicator, once the 2025 Bill is enacted, is understood as exercising a statutorily conferred adjudicative function analogous to that of other sectoral tribunals, adjudication decisions and the processes by which adjudicators are appointed and regulated will likely themselves fall within the reviewable universe the Act creates, notwithstanding the short statutory timelines the Bill otherwise contemplates.

Second, and relatedly, the burden of proof allocation under Kenyan evidence law, requiring the party alleging a defect in administrative action to substantiate that allegation, means that a bias challenge to an adjudicator's decision will not succeed on bare assertion; it requires a party to plead and prove the specific facts said to ground apprehended bias.[63] This allocation is important precisely because it places a premium, addressed further in Section 7, on robust ex ante disclosure obligations: if the burden of uncovering a conflict falls on the challenging party after the fact, and the adjudication process is designed to conclude within fourteen days, the practical opportunity to discover, plead and prove a concealed conflict before the decision takes binding effect is vanishingly small.

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[62]Republic v National Construction Authority and 2 others (n 21), holding that the enactment of the National Construction Authority (Defects Liability) Regulations, without adequate stakeholder consultation, was reviewable administrative action.

[63]Republic v National Construction Authority and 2 others, applying the Evidence Act (Cap 80), s 107(1) and (2), and finding that mere assertion, unsupported by evidence, could not discharge the burden of proof.

4.3 The Arbitration Act 1995 and the National Construction Authority Act 2011

Kenya's Arbitration Act 1995 governs the fallback and downstream dispute-resolution route for construction disputes not conclusively resolved at adjudication, and, together with amendments in 2009 and 2015, reflects Kenya's broader commitment to internationally aligned standards of arbitrator impartiality and independence, including through its status as a signatory to the New York Convention.[64]

The National Construction Authority Act 2011 separately establishes the regulatory architecture for the construction industry itself, including registration of contractors, and provides for an Appeals Board chaired by an advocate and including a person nominated by the Chartered Institute of Arbitrators (Kenya Chapter), with a further right of appeal to the High Court.[65] This existing architecture is instructive: Parliament has already, in a cognate statute, insisted on judicial or quasi-judicial composition (an advocate as chairperson) and cross-professional representation (arbitration-sector nomination) for a construction-sector appeals body, and has coupled that structural design with a right of onward appeal to the ordinary courts. The Construction Payments Adjudication Bill, 2025 could have replicated or built upon this precedent; whether it in fact does so is examined next.

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[64]Clyde & Co, 'Arbitration Reform – A Perspective from Kenya', noting the Arbitration (Amendment) Act 2009 and the Companies and Insolvency Legislation (Consequential Amendments) Act 2015, and Kenya's accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

[65]National Construction Authority Act 2011 (Act No 41 of 2011), s 26(3)-(4), establishing an Appeals Board and a right of appeal to the High Court within thirty days of the Board's decision.

4.4 The Construction Payments Adjudication Bill, 2025: Promise and Gaps

The Bill's core architecture is by now familiar from the earlier 2024 iteration on which it builds: Part III, spanning clauses 24 to 33, provides for the appointment of adjudicators (clause 24), for adjudicator impartiality and independence (clause 25), for accreditation of a construction adjudication body (clause 26), for reporting obligations (clause 27), and for adjudication fees and disputes over fees (clauses 28 to 30).[66]

Under the 2025 text, a Construction Adjudication Body, accredited by a National Dispute Resolution Council, appoints an adjudicator within seven days of receiving a reference, and the adjudicator must determine the dispute within fourteen days of receiving a response, a period extendable only by consent of the parties.[67] This is a genuinely significant statutory advance: unlike England's Housing Grants, Construction and Regeneration Act 1996, which built on a pre-existing dense professional infrastructure of adjudicator nominating bodies developed over years of contractual adjudication practice, Kenya's Bill attempts to construct that infrastructure, the National Dispute Resolution Council and its accredited Construction Adjudication Bodies, from close to a standing start.

Nevertheless, stakeholder engagement on the Bill's companion Arbitration Amendment proposals has already surfaced precisely the structural concerns this article anticipates. Industry consultation convened by the Chartered Institute of Arbitrators, Kenya Branch, recorded 'notable pushback against provisions that mandate the referral of certain matters directly to the Nairobi

[66]The Construction Payments Adjudication Bill, 2024, cll 24-33, explanatory summary reproduced at <https://ncia.or.ke/wp-content/uploads/2025/05/Construction-Adjudication-Bill-2025.pdf> accessed 24 August 2026 (the 2025 Bill retains this Part III architecture).

[67]Africa Construction Law, 'Highlights of Kenya's Construction Payments Adjudication Bill, 2025' .

Centre for International Arbitration', with stakeholders warning that concentrated, mandatory referral to a single institution 'could create perceptions of bias, particularly in cases involving foreign investors and Kenyan state bodies'.[68]

The same consultation flagged that the proposed governing Council for the adjudication and arbitration reforms includes only the Architectural Association of Kenya from the entire built-environment professional sector, prompting recommendations that representation be broadened to include engineers, quantity surveyors and other professionals critical to construction-sector arbitration and adjudication.[69] These are not marginal drafting quibbles; they go to the heart of independence as a structural, rather than case-by-case, concept.

A Council or appointing body dominated by a single professional constituency, empowered to accredit the very Construction Adjudication Bodies that will appoint adjudicators, risks reproducing, at the institutional level, exactly the appearance-of-partiality problem the individual-adjudicator disclosure rules in clause 25 are meant to solve at the case level. A statute cannot cure a structural conflict with a disclosure obligation alone; the two safeguards operate at different levels and must both be present.

There is a further, subtler gap. Clause 25's promise of impartiality and independence is not, on the publicly available text and commentary,

[68]CIArb Kenya, 'Debunking and Demystifying the Arbitration Amendment and Construction Payments Adjudication Bills' (26 June 2025) <https://ciarbkenya.org/debunking-demystifying-the-arbitration-amendment-and-construction-payments-adjudication-bills/> accessed 24 August 2026.

[69]CIArb Kenya, recording the recommendation that Council representation be broadened beyond the Architectural Association of Kenya (AAK) to include engineers, quantity surveyors and other built-environment professionals.

accompanied by a codified, mandatory, continuing disclosure obligation of the kind England has now placed on a statutory footing, nor by a colour-coded or illustrative list of the situations, of the sort the IBA Guidelines provide for arbitrators, that would give Kenyan adjudicators, appointing bodies and challenging parties a shared, predictable vocabulary for assessing conflicts.

Absent such specificity, clause 25 risks becoming, in practice, an aspirational recital rather than an operative rule: a court asked to enforce it will have little beyond the general apprehended-bias jurisprudence surveyed in Section 3 to give it content, precisely the outcome Section 7 argues Kenya should legislate around rather than leave to ad hoc judicial development under fourteen-day time pressure.

5. Kenyan Jurisprudence on Bias and Independence: What It Reveals and What It Cannot Yet Reveal

5.1 A Doctrine Tested Mainly on Judges, Not Yet on Adjudicators

A striking feature of Kenya's apprehended-bias jurisprudence is that its highest-profile applications have arisen not from commercial or construction contexts but from recusal challenges within the judiciary itself, most notably the protracted litigation over the constitutionally mandated retirement age of judges appointed under the former Constitution.[70] In one such application, the Court of Appeal was asked whether a presiding judge could fairly hear an appeal touching on retirement age twenty-two years after the applicant's conviction in an unrelated earlier matter; the court held that no fair-minded and informed observer would conclude there was a real possibility of bias,

[70]See Civil Application Nai 6 of 2016 and Civil Appeal (Application) 1 of 2016, both arising from recusal applications connected to litigation over judges' retirement age following the 2010 constitutional transition.

given that the issue for determination rested squarely on constitutional interpretation rather than on any matter personal to the applicant.[71]

In the companion application, the court rejected a bias allegation grounded in an unsubstantiated claim about a private conversation at a social club, holding that reasonable grounds must be presented from which an inference of bias may be drawn, and that unattributed, unverifiable hearsay could not meet that threshold.[72] These cases confirm the doctrinal content of the test but do so in a rarefied setting far removed from the commercial pressure-cooker of a fourteen-day construction payment dispute between a contractor facing insolvency and an employer it may need to work with again next year.

5.2 The Diagnostic Value of the National Construction Authority Litigation

More directly relevant is the judicial review litigation brought against the National Construction Authority itself over its 2020 Defects Liability Regulations, in which the High Court confirmed that construction-sector regulatory action, including subsidiary legislation affecting contractual relationships in the industry, is fully subject to the legality, rationality and procedural propriety standard under the Fair Administrative Action Act, and that a regulator's failure to consult stakeholders before enacting rules governing construction contract relationships can itself amount to a public law wrong.[73] Read together with the burden-of-proof holding discussed in Section

[71]Civil Application Nai 6 of 2016, applying Porter v Magill and concluding that a question of constitutional interpretation concerning judicial retirement ages generally, rather than any individual applicant, would not found a reasonable apprehension of bias.

[72]Civil Appeal (Application) 1 of 2016, rejecting a bias allegation grounded in an unsubstantiated claim of an overheard conversation, where the applicant could not establish attendance at, or a verifiable source for, the alleged meeting.

[73]Republic v National Construction Authority and 2 others.

4.2, this litigation offers two lessons for the coming construction adjudication regime.

First, Kenyan courts have shown no reluctance to subject sector regulators, including bodies with functions comparable to the proposed National Dispute Resolution Council, to exacting procedural scrutiny; a Kenyan court asked to review the accreditation of a Construction Adjudication Body captured by a narrow professional constituency would have ample doctrinal footing to intervene.

Second, and more cautionary, the case shows that judicial review of this kind takes months, sometimes years, to resolve, an unremarkable feature of ordinary administrative litigation that becomes acutely problematic when set against a statutory adjudication process designed to conclude within fourteen days and to be immediately enforceable. A structural conflict of interest in the appointing architecture, even if eventually vindicated on judicial review, will in the overwhelming majority of cases have already produced binding, enforced adjudication decisions long before the review is heard.

5.3 The Absence of a Construction-Specific Bias Jurisprudence

What Kenyan case law does not yet supply, for the simple reason that statutory construction adjudication does not yet exist, is any authority testing the fair-minded-observer standard against the specific professional realities canvassed in Section 6: an adjudicator who has previously acted as quantity surveyor for one of the parties, who sits on the same institute council as a party's expert witness, or who depends on a single dominant employer for the bulk of professional referrals. English case law under the Housing Grants, Construction and Regeneration Act 1996 has developed a rich, fact-specific jurisprudence on precisely these scenarios over nearly three decades of statutory adjudication practice.

Kenya has none of it, and clause 25 of the Bill, standing alone, gives a reviewing Kenyan court remarkably little textual guidance beyond the general vocabulary of impartiality and independence already available from Article 50 and the general common law. This is not a criticism unique to Kenya; it is the ordinary condition of any jurisdiction adopting a novel adjudicative mechanism. It is, however, precisely the condition under which legislative specificity, of the kind Section 7 recommends, does the most work, because it is unrealistic to expect case-by-case judicial elaboration to keep pace with a high-volume, fourteen-day-cycle adjudicative process before serious reputational or financial damage occurs in individual cases.

It is also worth noting what the existing Kenyan case law says, and does not say, about remedies. Where a Kenyan court has found procedural unfairness, whether through breach of the audi alteram partem principle or through apprehended bias, the ordinary remedy has been to quash the tainted decision and, where appropriate, to remit the matter for fresh determination by a properly constituted decision-maker, consistent with judicial review's traditional supervisory rather than substitutionary character.[74]

Applied to construction adjudication, this remedial tradition creates an acute timing problem the courts have not yet had occasion to confront: quashing an adjudicator's decision for apparent bias months after it was rendered does not restore the cash-flow position the fourteen-day process was designed to protect in the first place, and remittal for a fresh fourteen-day adjudication, however doctrinally correct, may arrive too late to save a subcontractor already forced into insolvency by the delay. This is not a reason to relax the bias standard; it is a reason, developed further in Section 7, to invest as heavily in prevention,

[74]See generally the remedial approach taken in Republic v National Construction Authority and 2 others, quashing the impugned regulations rather than substituting the court's own determination on the merits.

through disclosure and structural safeguards operating before a decision is made, as in cure through post-hoc judicial review.

5.4 A Provisional Conclusion on the Doctrinal Gap

Sections 3 and 5 together establish that Kenya suffers no shortage of *doctrine*: the fair-minded-observer test is settled law, twin-pillar procedural fairness is settled law, and the burden-of-proof allocation for bias challenges is settled law. What Kenya lacks is the *application infrastructure*, the accredited body architecture, the disclosure obligations, the eligibility criteria, that would allow this well-established doctrine to operate effectively within a fourteen-day adjudicative cycle in a market as thin as Kenya's construction-adjudicator pool. Section 6 turns to the empirical and structural dimensions of that thinness before Section 7 proposes a remedy.

6. Structural and Empirical Diagnosis: Why Kenyan Construction Adjudicators Are Distinctively Exposed

6.1 A Sector Growing Faster Than Its Adjudicative Infrastructure

Kenya's construction sector is not a static backdrop against which a modest procedural reform is being introduced; it is a rapidly expanding, increasingly credit-fuelled industry. Having contracted by 0.7 per cent in 2024, the sector expanded by 6.8 per cent in 2025[75], with KNBS quarterly national accounts recording GDP from construction rising from KES 144.06 billion in the second quarter of 2025 to KES 159.5 billion in the third quarter, the highest quarterly figure on record since KNBS began compiling the series in 2009.[76]

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[75]'Construction Industry Boom as Jobs, Wages and Output Rise Sharply in 2025' (n 1).

[76]Trading Economics, 'Kenya GDP from Construction' , reporting an all-time high of KES 159,499 million in the third quarter of 2025 against a series average of KES 104,541.96 million since 2009.

Domestic credit extended to the construction industry grew by 17.6 per cent year-on-year over the first eight months of 2025[77], and forecasters project a further average annual growth rate of 5.5 per cent between 2026 and 2029, driven by transport, renewable energy and housing investment, including the government's stated ambition to construct fifty mega-dams and to expand national energy grid capacity to 100 gigawatts by 2040.[78]

Every one of these figures represents a growing volume of construction contracts, and therefore a growing volume of potential payment disputes, that the new adjudication regime is being asked to absorb. Even so, none of this growth has been matched by a comparable expansion in the number of suitably qualified, professionally independent individuals available to serve as adjudicators.

The National Construction Authority's own industry outlook reporting has historically tracked the number of registered contractors, skilled construction workers and site supervisors as core indicators of sector capacity, but no comparable, published metric exists for the depth of Kenya's adjudicator or arbitrator pool specifically qualified in construction-payment disputes.[79] A regulatory architecture is, in effect, being built on top of a labour-market variable that has never been measured, let alone planned for.

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[77]National Construction Authority, Construction Industry Outlook in Kenya: Industry Statistics and Trends.

[78]National Construction Authority, Construction Industry Outlook in Kenya: Industry Statistics and Trends

[79]National Construction Authority, Construction Industry Outlook in Kenya: Industry Statistics and Trends, 1st edn (NCA 2020) <https://www.nca.go.ke/media/Construction_Industry_Outlook_-_1st_Edition.pdf> accessed 24 August 2026, describing NCA tracking of registered contractors and skilled workers but not of dispute-resolution professionals.

6.2 The Thin-Market Problem

This absence of data is itself diagnostic. In a mature adjudication market of the kind England has built over nearly three decades[80], an adjudicator disclosing a prior professional connection to one of the parties can typically be substituted at negligible cost, because the nominating body has dozens or hundreds of equally qualified alternatives on its panel[81]. Kenya's construction professions, by contrast, are numerically small and professionally concentrated[82].

The consultation record on the Bill's companion arbitration reforms captured this concentration directly, when stakeholders objected that the governing Council for the reforms drew its built-environment representation from a single professional body, the Architectural Association of Kenya, to the exclusion of engineers, quantity surveyors and other professionals whose participation in construction dispute resolution is routine. If the institutional architecture surrounding adjudication is itself drawn from a narrow professional base, it follows almost mechanically that the pool of individuals eligible for appointment as adjudicators, likely to be drawn substantially from the same narrow set of professional institutes, chartered bodies and repeat-player consultancy firms that dominate Kenyan construction generally, will be similarly narrow. In a thin market, disclosure of a conflict does not lead costlessly to substitution; it may instead lead to a stark choice between proceeding with a compromised adjudicator or delaying the fourteen-day

[80] Mathew Finn, The Evolution of Adjudication in the UK (5th June 2018) Available at < https://ankura.com/insights/the-evolution-of-adjudication-in-the-uk > Accessed on 24th October 2026

[81] Philip Boulding, Construction Industry in the United Kingdom 25 years on-What do we know? Available at < https://www.keatingchambers.com/wp-content/uploads/2023/03/Construction-Adj-in-the-UK-Phil-Boulding-KC.pdf > Accessed on 24th October 2026

[82] National Construction Authority, Construction Industry Outlook 2024 (November 2025)

process while a genuinely independent alternative, if one can be found at all, is identified and briefed. The 2025 Bill's fast, fixed timeline, its principal virtue, thereby becomes, absent structural mitigation, a pressure that pushes appointing bodies toward tolerating disclosed conflicts rather than curing them.

6.3 Overlapping Roles and the Repeat-Player Problem

A second structural vulnerability, distinct from raw market thinness, is role overlap. Kenyan construction professionals routinely move between the roles of contract administrator, expert witness, arbitrator, adjudicator and professional-institute office-bearer over the course of a single career, often serving several such roles simultaneously across different projects. An engineer who adjudicates a payment dispute this month may reasonably expect to be engaged as an expert witness by one of the same parties, or a closely affiliated company within the same corporate group, next month.

This is not evidence of bad faith; it is the ordinary operation of a small professional market in which reputation, referral networks and institute membership are the primary currency of professional survival. But it is exactly the condition under which the *Locabail* observer's tolerance for 'normal professional association' can be stretched past its intended limit if left unregulated by explicit rules, because what counts as an unremarkable professional connection in a market with thousands of practitioners may be a disqualifying repeat-player relationship in a market with only a few dozen.[83] Compounding this, public-sector employers, ministries, counties and state corporations delivering the infrastructure projects underpinning Kenya's construction growth figures cited in Section 6.1, are themselves repeat players

[83]cf Locabail (UK) Ltd v Bayfield Properties Ltd (n 14), discussed in Section 3.1 above, on the limits of what a fair-minded observer will treat as, without more, insufficient to found apprehended bias.

in adjudication, appearing as a party far more often than any individual contractor. Where the Construction Adjudication Body responsible for appointments is itself accredited by a National Dispute Resolution Council with a composition skewed toward government-nominated or narrowly professional-body-nominated members, as the stakeholder concerns recorded in Section 4.4 suggest may occur, the risk is not merely that an individual adjudicator might privately favour a repeat-player public employer, but that the appearance of institutional capture becomes, over a sustained run of cases, a reasonable and evidence-based apprehension rather than mere suspicion. This is precisely the scenario the fair-minded-and-informed-observer test is designed to catch, provided the observer is given, through mandatory disclosure and transparent appointment records, the information needed to form that judgment in the first place.

6.4 A Note on Geographic and Professional Concentration

The thin-market and repeat-player problems documented above are compounded by a geographic dimension that Kenyan construction law scholarship has, to date, largely overlooked. Kenya's construction growth, and the infrastructure spending driving it, including the transport, energy and housing investments cited in Section 6.1, is heavily concentrated in and around Nairobi and a handful of secondary urban centres[84], and it is precisely in these centres that the country's registered construction professionals, and therefore its pool of adjudicator-eligible practitioners, are themselves concentrated.

A dispute arising on a project in a county far from this professional core faces a double bind: not only is the pool of potential adjudicators thin nationally, it is thinner still once genuine independence from the specific local network of consultants, contractors and public officials involved in that project is required.

[84] Available at < https://nation.africa/kenya/counties/nairobi/nairobi-city-is-swallowing-up-rural-land-with-consequences-5576902> Accessed on 26th October 2026

An adjudicator flown in from Nairobi may be independent of the local network but unfamiliar with county-specific procurement practice; an adjudicator drawn from the local professional community may have the requisite familiarity but be embedded in exactly the web of relationships apparent-bias doctrine exists to police. Neither the Bill nor the stakeholder commentary surveyed in Section 4.4 squarely confronts this dimension, yet it will shape, in practice, how meaningfully the disclosure and substitution safeguards proposed in Section 7 can actually operate outside the capital.

6.5 The Disclosure Culture Gap

A final structural vulnerability is cultural rather than institutional: Kenya does not yet have an embedded professional practice of routine, itemized conflict disclosure of the kind the IBA Guidelines' colour-coded lists, or England's new statutory section 23A duty, are designed to instil[85]. Clause 25 of the 2025 Bill speaks of impartiality and independence in general terms, but general terms, absent a specified disclosure form, a specified list of illustrative disqualifying and non-disqualifying relationships, and a specified sanction for non-disclosure, tend in practice to be honoured unevenly.

The consequence, absent legislative correction, is a real risk that Kenya's first cohort of construction adjudicators will learn the content of their disclosure obligations only through the slow, expensive and reputationally costly process of individual disputes and eventual judicial review, the very inefficiency statutory adjudication was introduced to avoid[86]. Section 7 argues that this risk

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[85] Mutubwa WA, 'Cultural Realities and Arbitral Integrity in East Africa' in Onyema E (ed), The Evolution of International Arbitration in African States (Routledge 2020); Lumallas E, 'Tracing the Confines and Boundaries of the Arbitrator's Immunity: Kenyan Context' [2024] African Journal of Legal Research; International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (IBA 2024) General Standard 3.

[86] Jonathan K and Faith M, 'An Analysis of Kenya's Construction Payments Adjudication Bill, 2025' (Cliffe Dekker Hofmeyr, 29 July 2025) Available at

is avoidable, but only if Kenya treats disclosure architecture as a first-order legislative priority rather than an implementation detail to be worked out later through subsidiary rules or professional codes of conduct.

7. Towards a Kenyan Standard: A Proposed Composite Framework and Conclusion

7.1 Design Principles

The analysis in Sections 2 to 6 yields four design principles for an appropriate Kenyan standard. First, the standard must *retain* the objective fair-minded-and-informed-observer test[87] as its doctrinal core, since Kenyan courts have already received that test into settled jurisprudence and displacing it would create needless discontinuity with Article 50 and the wider body of Kenyan administrative law.

Second, the standard must *supplement* that case-by-case test with mandatory, itemized, continuing disclosure obligations enforceable independently of proof of actual bias, following the direction of travel set by England's 2025 statutory reform and the IBA Guidelines' colour-coded architecture, precisely because a fourteen-day adjudication cycle affords no realistic opportunity for retrospective, litigation-based discovery of concealed conflicts.

Third, the standard must address independence at the *institutional* level, not merely the individual-adjudicator level, by insulating the National Dispute Resolution Council and any Construction Adjudication Bodies it accredits from domination by any single professional constituency or by executive

<https://www.cliffedekkerhofmeyr.com/news/publications/2025/Practice/Dispute-Resolution/dispute-resolution-alert-29-july-an-analysis-of-kenyas-construction-payments-adjudication-bill-2025> Accessed 27 October 2026.

[87] Abimbola Olowofoyeku, 'What the Fair Minded Observer Really Thinks About Judicial Bias' (2024) 44(2) Legal Studies 230

appointees, learning directly from the stakeholder concerns already raised over the Bill's Council composition. Fourth, and most distinctively, the standard must be calibrated to Kenya's *thin market* rather than borrowing uncritically from jurisdictions where costless substitution of a conflicted adjudicator is realistic; this requires investing deliberately in expanding and diversifying the eligible adjudicator pool as a precondition for the disclosure regime actually functioning as intended, rather than functioning merely as a paper compliance exercise.

7.2 A Proposed Composite Standard

Building on these principles, this article proposes that Kenya adopt, whether by amendment to the Construction Payments Adjudication Bill, 2025 before enactment or by subsidiary regulation immediately upon its commencement, a composite standard with five operative elements. *First*, clause 25 should be amended to state expressly that the applicable test for apparent bias is whether a fair-minded and informed observer, aware of the realities of Kenya's construction-professional community, would conclude there was a real possibility that the adjudicator was biased, thereby codifying rather than merely assuming the Porter v Magill standard already received into Kenyan law.

Second, the Bill should mandate a standard-form written disclosure, completed by every prospective adjudicator before appointment and updated continuously thereafter, itemizing prior engagements with either party or their affiliates over a defined look-back period, co-membership of professional-institute councils or committees with any party representative or expert witness named in the reference, and any financial or referral dependency on either party; the National Dispute Resolution Council should be empowered to issue, and periodically revise, an illustrative red/orange/green list modelled on the IBA Guidelines, adapted to Kenyan professional realities, to give this disclosure obligation predictable content.

Third, the composition of the National Dispute Resolution Council and any accredited Construction Adjudication Body should be fixed by statute to guarantee representation across the principal built-environment professions, engineering, quantity surveying, architecture and the legal profession, and across public and private-sector interests, with no single nominating body entitled to more than a defined minority share of seats, directly addressing the concentration concern already raised in stakeholder consultation.

Fourth, the Bill should create a lighter-touch, expedited mechanism for challenging an adjudicator's independence *before* the fourteen-day determination period runs, analogous to an urgent interlocutory application, rather than leaving the only remedy as post-decision judicial review under the Fair Administrative Action Act, which, as Section 5.2 demonstrated through the National Construction Authority litigation, can take months or years to resolve, by which time an enforced adjudication decision will typically have already reshaped the parties' practical position.

Fifth, and looking beyond the individual statute, the National Construction Authority, in coordination with professional institutes and the Council of Legal Education, should be tasked with a structured capacity-building programme to expand the pool of accredited construction adjudicators over a defined period, treating market thinness not as a permanent constraint to be managed around but as a temporary condition to be actively corrected, consistent with the sector's own trajectory of rapid growth documented in Section 6.1.

7.3 Anticipated Objections

Two objections do merit brief attention. The first is that *mandatory itemized disclosure*[88] will slow down an adjudication process whose entire value proposition is speed[89]. This objection mistakes the source of delay: disclosure obligations operate at the point of appointment, within the seven-day window the 2025 Bill already allocates for that step, not within the fourteen-day determination period itself, and a standard disclosure form, once designed, adds administrative but not substantive delay[90].

The second objection is that a composition-mandating statute will itself become a site of political contestation over seats and representation[91]. This is a real risk, but it is a materially smaller risk than the alternative currently on offer, an appointing architecture whose composition is left to administrative discretion and has already, prior to enactment, attracted credible stakeholder concern about capture by a single professional constituency[92]. A structural conflict is not resolved by declining to legislate about structure[93]; it is merely

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[88] Tactics on Disclosure and Requests for Information. Available at < https://goughsq.co.uk/wp-content/uploads/2014/02/Disclosure.pdf > Accessed on 24th October 2026

[89] Michael Lynn and Andrew Hurwitz, Point-Counterpoint: Rethinking Mandatory Disclosure, JUDICATURE Volume 100, Number 2 Summer 2016.

[90] Construction Payments Adjudication Bill, 2025

[91] Brett Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118

[92] Ibid

[93] A structural conflict is not resolved by declining to legislate about structure; it is merely left to be decided by other forces, often leading to systemic instability or a default victory for whichever entity holds the most inherent power.
When a governing body, organization, or framework faces deep-seated friction in its very architecture, avoiding structural reform does not freeze the problem in place. Instead, it typically forces the conflict down into operational, interpersonal, or legal arenas that are poorly equipped to handle it.

left for a future litigant, and a future court operating under the time pressure documented throughout this article, to discover too late[94].

7.4 Sequencing: What Should Happen Before, and What May Follow, Enactment

Legislative reform of this kind is rarely achieved in a single perfect draft, and it would be unrealistic to expect every element of the composite standard proposed above to be settled before the Construction Payments Adjudication Bill, 2025 is enacted[95]. A workable sequencing distinguishes between what must be fixed in the primary statute and what can safely be developed through subsidiary regulation once the National Dispute Resolution Council is constituted[96].

The statutory floor, the fair-minded-and-informed-observer test[97], the composition safeguards for the Council and accredited Construction Adjudication Bodies, and the expedited pre-determination challenge mechanism, belongs in the Bill itself, because these are precisely the structural protections that experience elsewhere shows are hardest to retrofit once an institution has taken on a life, and a set of vested interests, of its own[98].

The itemized disclosure form and the illustrative red/orange/green list, by contrast, can properly be left to subsidiary regulation, provided the primary statute makes such regulation mandatory rather than merely permissive, and provided it fixes an outer time limit, this article suggests no more than six

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[94] Kermit Roosevelt III, The Myth of Choice of Law: Rethinking Conflicts, 97 MICH. L. REV. 2448 (2019).
[95] Construction Payments Adjudication Bill, 2025
[96] Ibid
[97] Chepkwony v Attorney General of the Republic of Kenya (Application No.19 of 2023) [2024] EACJ 4 (27 March 2024) (First Instance Division)
[98] Construction Payments Adjudication Bill, 2025

months from commencement, within which the National Dispute Resolution Council must promulgate them[99]. A power merely to make rules, without a deadline, all too easily becomes a power never exercised.

There is, finally, a monitoring dimension that the preceding sections' empirical picture makes indispensable. Section 6.1 showed that Kenya currently has no published metric for the depth of its construction-adjudicator pool, even as the National Construction Authority tracks registered contractors and site supervisors as a matter of routine practice. There is no principled reason for this asymmetry, and every reason to correct it: a National Dispute Resolution Council required by statute to publish, annually, the number of accredited adjudicators, disaggregated by profession and region, alongside the number of disclosed conflicts and the number of adjudicator substitutions each year, would convert the structural diagnosis offered in this article from a one-off academic exercise into a standing, self-correcting feedback loop. Such transparency would also, incidentally, supply exactly the kind of information a fair-minded and informed observer, as that construct has been developed in the case law surveyed in Sections 3 and 5, would need in order to assess, over time, whether Kenya's construction adjudication regime is in fact operating independently, rather than merely reciting independence as a term of art.

7.5 Conclusion

Kenya's Construction Payments Adjudication Bill, 2025 is, in its ambition, exactly the reform the country's rapidly growing, credit-fuelled and payment-dispute-prone construction sector needs. But ambition of this kind carries a corresponding institutional obligation: a statute that binds parties to a fourteen-day, largely unappealable determination cannot responsibly rest its guarantee of impartiality and independence on a single clause borrowing the vocabulary of a doctrine, the fair-minded-and-informed-observer test,

[99] Supra

developed for, and tested mainly within, deeper and more saturated professional markets than Kenya's.

This article has shown that Kenyan courts have already received that doctrine faithfully from England, Canada and the East African Court of Justice, and that the doctrinal floor is therefore sound. What is missing is the structural superstructure, mandatory and continuing disclosure, institutionally insulated appointing bodies, an expedited pre-determination challenge mechanism, and a deliberate programme to deepen the adjudicator pool, without which that sound doctrine will arrive, case by case and too late, only after the market thinness and role overlap documented in Section 6 have already done their damage. An appropriate Kenyan standard for bias, apparent bias and the independence of construction adjudicators is therefore not a matter of importing more elegant language into clause 25. It is a matter of building, deliberately and now, before the Bill's enactment locks Kenya into its first generation of adjudicative practice, the institutional conditions under which that language can actually mean what it says.

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Mediation across Africa: Listening to the Unspoken, the Feelings, the Collaboration and the Ubuntu

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Abstract

This paper discusses how mediation can be effectively applied in conflict management across Africa. The paper posits that mediation is an appropriate mechanism towards ensuring effective conflict management in Africa for peace, justice, human rights and development. In particular, the paper observes that mediation has a long and rich history in Africa that is anchored in the culture, customs, norms, values and philosophies of the people and communities of Africa and can thus be easily and appropriately utilised to strengthen conflict management in the continent. The paper explores the landscape of mediation across Africa and discusses the progress made towards utilising this process in conflict management. In addition, the paper also highlights some of the current challenges facing mediation in Africa. Further, in order to ensure appropriate conflict management in Africa through mediation the paper suggests key interventions including listening to the unspoken, the feelings, the collaboration and the Ubuntu.

1.0 Introduction

Effective conflict management is necessary towards Sustainable Development. Since conflicts can undermine human rights, impede socio-economic development and fuel environmental degradation, appropriate conflict management is necessary in order to minimise the potential negative impact that can arise from conflicts and disagreements and encourage agreement and

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positive outcomes towards peace, justice and development[1]. It has been correctly observed that if not well managed, conflicts can undermine peace and development and lead to violence and human right abuses[2]. On the other hand, when conflicts are successfully managed, this creates suitable conditions for peace, justice, stability and prosperity towards Sustainable Development[3]. Effective conflict management is therefore necessary towards transforming conflicts from a source of violence, insecurity and injustices towards a platform for collaboration, cooperation, peace and development.

Mediation has emerged as one of the most appropriate techniques towards ensuring effective conflict management for peace, justice and development. The United Nations defines mediation as a process whereby a third party, known as a mediator, assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements[4] Mediation has also been defined as a process of conflict management where conflicting parties gather to seek solutions to the conflict,

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[1] Swedish International Development Cooperation Agency., 'Conflict Prevention: Opportunities and Challenges in Implementing Key Policy Commitments and Priorities' Available at https://cdn.sida.se/app/uploads/2020/12/01125316/s209461_thematicoverview_conflict_prevention_webb_final.pdf (Accessed on 30/09/2026)

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[3] World Bank Group., 'Fragility, Conflict & Violence' Available at https://www.worldbank.org/en/topic/fragilityconflictviolence (Accessed on 30/09/2026)

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with the assistance of a third party who facilitates discussions and the flow of information, and thus aiding in the process of reaching an agreement[5].

It has been observed that mediation is a form of assisted negotiation between people in conflict facilitated by a neutral third person known as a mediator[6]. In particular, mediation is normally a continuation of the negotiation process since it arises where parties to a conflict have attempted negotiations, but have reached a deadlock[7]. As a result of the deadlock, parties involve a third party known as a mediator to assist them continue with the negotiations and ultimately reach a mutually satisfactory outcome[8]. A mediator does not impose an outcome upon the parties but rather facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem solving to enable the parties reach their own agreement[9]. Despite not having power to impose an outcome on the parties, the mediator plays a key role in supporting appropriate conflict management through mediation by promoting dialogue, helping parties to clarify issues in dispute and guiding the parties in exploring possible solutions[10]. It has been observed that a mediator acts as a catalyst between opposing interests attempting to bring them together by defining and clarifying issues and eliminating obstacles to communication,

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[5] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition., 2017

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[8] Ibid

[9] Ibid

[10] Utter. M., 'Role of Mediation in Conflict Resolution' Available at https://www.longdom.org/open-access/role-of-mediation-in-effective-conflict-resolution-1101408.html (Accessed on 30/09/2026)

while moderating and guiding mediation proceedings in order to avoid confrontation and ill will[11].

Mediation provides several advantages towards ensuring effective conflict management. It has been observed that the premise of mediation is that in the right environment, parties to a conflict can improve their relationships and move towards cooperation[12]. Since mediation is a voluntary, collaborative and consensus-based process, it leads to resolutions and outcomes that are effective, longer lasting and more sustainable than adversarial processes or otherwise imposed outcomes such as litigation and arbitration[13]. In general, mediation is associated with features such as informality, flexibility, efficiency, confidentiality, party autonomy and the ability to promote expeditious and cost-effective management of conflicts making it an appropriate and effective processes in conflict management[14]. Embracing mediation is therefore key towards ensuring that conflicts are managed in an appropriate, collaborative, effective and sustainable manner for peace, justice, human rights and development.

This paper discusses how mediation can be effectively applied in conflict management across Africa. The paper posits that mediation is an appropriate mechanism towards ensuring effective conflict management in Africa for peace, justice, human rights and development. In particular, the paper observes that mediation has a long and rich history in Africa that is anchored in the culture, customs, norms, values and philosophies of the people and communities of Africa and can thus be easily and appropriately utilised to

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[11] Mediation Defined: What is Mediation?., Available at https://www.jamsadr.com/mediation-defined (Accessed on 30/09/2026)

[12] United Nations., 'Guidance for Effective Mediation' Op Cit

[13] United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners' Available at https://peacemaker.un.org/sites/peacemaker.un.org/files/NRCMediation_UNDPAUNEP2015_0.pdf (Accessed on 30/09/2026)

[14] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

strengthen conflict management in the continent. The paper explores the landscape of mediation across Africa and discusses the progress made towards utilising this process in conflict management. In addition, the paper also highlights some of the current challenges facing mediation in Africa. Further, in order to ensure appropriate conflict management in Africa through mediation the paper suggests key interventions including listening to the unspoken, the feelings, the collaboration and the *Ubuntu*.

2.0 Mediation and Access to Justice in Africa: Opportunities and Challenges

Mediation has a long and rich history in Africa. For instance, it has been observed that the practice of mediation in Africa traces back to the very origin of humankind[15]. Mediation among other Appropriate Dispute Resolution (ADR) techniques such as negotiation, arbitration, conciliation, and traditional justice systems have been part and parcel of conflict management in Africa since time immemorial[16]. In particular, mediation has been described as a restatement of African customary jurisprudence[17]. According to African customary jurisprudence, law is viewed as an instrument for maintaining social equilibrium, peace and harmony with emphasis placed on distributive justice rather than formal justice as envisaged under Western jurisprudence[18]. In the African context, law and legal systems are viewed as instruments for upholding the African philosophy of *Ubuntu* with emphasis on peace,

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[15] Laibuta. K., 'Contending with Multiple Legal Orders for Wholesome Dispute Resolution' Available at https://lc-adr.net/wp-content/uploads/2017/10/ADR-IN-AFRICA-2.pdf (Accessed on 01/10/2026)

[16] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

[17] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

[18] Ebijuwa. A.O., 'African jurisprudence and conflict management: A critical reflection' *International Journal of Law, Justice and Jurisprudence*., 2023; 3(1): 10-14

reconciliation and forgiveness at the expense of punitive justice which can undermine social harmony[19].

African jurisprudence therefore provides an effective approach to conflict management with emphasis on approaches that can ensure peace, harmony, reconciliation and social cohesion. For example, it has been observed that for many centuries, communities in Africa have utilised appropriate techniques including informal negotiation, mediation, reconciliation and arbitration to ensure effective management of conflicts at the individual, family and community level[20]. These techniques fit comfortably within traditional concepts of African justice, particularly its core values of reconciliation, peace, and harmony[21]. Due to the collectivistic nature of African societies, appropriate conflict management with focus on mechanism that emphasize reconciliation and restorative justice is key towards peace, harmony and social-cohesion[22].

Mediation therefore has a rich heritage in Africa that is anchored in the culture, values, norms and philosophies of communities all over the continent. It has been correctly observed that the practice of mediation across Africa is neither a new nor a foreign phenomenon but a return to ancestral conflict management practices that have ensured peace, justice, harmony and social cohesion in the

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[19] Mugumbate. J., & Nyanguru. A., 'Exploring African Philosophy: The Value of Ubuntu in Social Work.' Available at https://ro.uow.edu.au/cgi/viewcontent.cgi?article=4272&context=sspapers&httpsredir=1&referer#:~:text=Ubuntu%20can%20best%20be%20described,ngumuntu%20ngabantu%20in%20Zulu%20language (Accessed on 01/10/2026)

[20] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf (Accessed on 01/10/2026

[21] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

[22] Our Mediation Heritage., Available at https://www.conflictdynamics.co.za/Blog/Our-Mediation-Heritage-%20?swcfpc=1 (Accessed on 01/10/2026)

continent throughout history[23]. It has been observed that mediation fist well in Africa's community-oriented societies, where reconciliation, restorative justice, peace and harmony are prioritized over retribution[24]. For instance, among African communities, a sanction is seldom invoked for a breach of customary law[25]. Instead, corrective and reconciliatory mechanisms were the primary means of conflict resolution[26]. Mediation is therefore an appropriate process in ensuring effective conflict management across Africa.

Due to its benefits there has been significant growth of mediation all over Africa. The continent has been described as a rising hub for ADR processes including mediation with countries putting in place legal, policy and institutional frameworks to harness these techniques[27]. In particular, mediation and other traditional approaches of conflict management in Africa are being adapted to contemporary needs including through integration with modern justice systems[28]. It has been argued that utilising mediation and other ADR processes in Africa is not only a solution in tackling court backlogs and high litigation costs but also a necessity in achieving culturally-appropriate access to justice that emphasizes restoration over retribution[29].

However, despite its invaluable benefits for people and communities across Africa, the current landscape of mediation in the continent faces several

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[23] Ibid

[24] Africa: A Rising Hub for Alternative Dispute Resolution., Available at https://www.linkedin.com/pulse/africa-rising-hub-alternative-dispute-1vlye/ (Accessed on 01/10/2026)

[25] Our Mediation Heritage., Op Cit

[26] Ibid

[27] Africa: A Rising Hub for Alternative Dispute Resolution., Op Cit

[28] Ibid

[29] Motsisi. M., 'Mediation & Ubuntu' Available at https://www.mmatheomotsisi.com/mediation-ubuntu/#:~:text=Ubuntu%20as%20the%20Primeval%20Model,promotes%20genuine%20trust%20and%20openness (Accessed on 01/10/2026)

challenges. For instance, it has been observed that colonialism disrupted African jurisprudence since the introduction of western justice systems in the continent shifted access to justice from its core value of restoration towards retribution[30]. Traditional amicable dispute resolution techniques such as mediation which have been practiced across Africa for many centuries were heavily subjugated upon introduction of western justice systems in the continent during the colonial era[31]. In addition, it has been observed that attempts to link mediation and other traditional methods of conflict management in Africa with formal justice systems risks undermining their key attributes including party autonomy and voluntariness which have been crucial for their success for many centuries[32]. Further, exclusion of marginalized groups including women and children from community-level mediation proceedings, especially when they are victims, undermines due process, fairness and human rights in access to justice[33]. It is imperative to address these challenges in order to revamp mediation across Africa for peace, justice and development.

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[30] Our Mediation Heritage., Op Cit

[31] Ibid

[32] Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Available at http://kmco.co.ke/wp-content/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-Dispute-Resolution-in-Kenya-Prospects-and-Challenges.pdf (Accessed on 01/10/2026)

[33] Olawole. I., Gang. T., Amollo. M., 'Scaling What Works: Community-Level Mediation Strategies to Support Peace and Security in Africa' Available at https://africacenter.org/publication/asb48en-community-mediation-peace/ (Accessed on 01/20/2026)

3.0 Listening to the Unspoken, the Feelings, the Collaboration and the Ubuntu for Effective and Appropriate Mediation across Africa

Mediation is an effective and appropriate process that can strengthen access to justice across Africa. Mediation is rooted in African jurisprudence since it emphasizes reconciliation, restorative justice, peace, harmony and *Ubuntu*[34]. Mediation is therefore an effective process towards tackling the root causes of conflicts in Africa and restoring and repairing relationships towards social cohesion[35].It is therefore necessary to reinvigorate mediation across Africa for peace, justice, harmony and development.

In particular, there is need to listen to the unspoken including women and children for effective mediation across Africa. It observed that due to the patriarchal nature of some indigenous and local communities in Africa, marginalized groups including women and children are not permitted to speak or even be present during traditional mediation proceedings, even if they are the victims, and must rely on male relatives to plead their case[36]. This undermines the fundamental tenets of the rule of law and access to justice including procedural fairness and human rights. It is therefore imperative to ensure inclusivity, equity, fairness and justice in mediation across Africa especially through the involvement of all parties in community-level mediation[37].

Effective mediation also involves acknowledging and respecting the feelings of all parties. It has been correctly observed that emotions and feelings play a crucial role in shaping the dynamics of mediation, influencing perceptions and

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[34] Our Mediation Heritage., Op Cit

[35] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

[36] Lee. S., 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' Available at Available at https://cic.nyu.edu/wp-content/uploads/2023/11/Multiple-Doors-to-Justice-in-Kenya-2023.pdf (Accessed on 02/10/2026)

[37] Olawole. I., Gang. T., Amollo. M., 'Scaling What Works: Community-Level Mediation Strategies to Support Peace and Security in Africa' Op Cit

behaviors of the parties, and ultimately the outcomes of the process[38]. Consequently, understanding and managing feelings can enhance the effectiveness and appropriateness of mediation[39]. In order to effectively listen to the feelings in mediation, mediators should encourage active listening, empathy, and respectful communication, create an atmosphere of safety and trust, encourage positive emotions and help parties to reframe negative emotions, and aid parties to identify the underlying issues in a conflict[40].

Encouraging collaboration is also vital for effective mediation across Africa. Collaboration is a powerful tool for successful and effective mediation since it aims to resolve the root causes conflicts and help parties to develop mutually acceptable solutions that benefits all[41]. Through collaboration, all parties involved in a conflict are brought together and work towards resolving the underlying issues through active listening, empathy, harmony and respectful communication[42]. Collaboration has been identified as powerful approach to conflict management that is built on cooperation, open communication, and finding win-win outcomes[43]. By embracing collaboration in conflict management, it is possible to preserve relationships, build trust among all parties, and foster long-term positive change[44]. In particular, mediation

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[38] Understanding the Role of Emotions in Mediation., Available at https://mediate.com/understanding-the-role-of-emotions-in-mediation-by-jharna-jagtiani/ (Accessed on 02/10/2026)

[39] Ibid

[40] Ibid

[41] Collaborating Conflict Resolution Style: Everything You Need to Know., Available at https://conflict-resolution-training.com/blog/collaborative-conflict-resolution-style/ (Accessed on 02/10/2026)

[42] Ronquillo. Y., Ellis. V., & Toney-Butler. T., 'Conflict Management' Available at Conflict Management' Available at https://www.ncbi.nlm.nih.gov/books/NBK470432/ (Accessed on 02/10/2026)

[43] Miroslavov. M., 'Mastering The Collaborating Conflict Style In 2024' Available at https://www.officernd.com/blog/collaborating-conflict-style/ (Accessed on 02/10/2026)

[44] Ibid

provides a pathway to unlock collaboration and transform conflicts into opportunities for growth, cooperation and understanding[45]. It has been observed that mediation enhances collaboration by emphasizing voluntary participation of the parties, confidentiality, and the flexibility to tailor the outcomes to the specific needs of the parties involved[46]. It is therefore key to encourage collaboration in mediation across Africa towards effectively addressing the root causes of conflicts in the continent for sustainable and durable outcomes.

In addition, it is necessary to inculcate *Ubuntu* in mediation across Africa. *Ubuntu* is a core philosophy under African jurisprudence wherein law and legal systems focus on communalism by prioritising social cohesion, peace, harmony and maintenance of community relationships[47]. Throughout Africa, especially among indigenous and local communities which still embrace traditional justice systems, law is not viewed as a tool for apportioning right and wrong but rather, it is viewed as an instrument of maintaining social equilibrium, peaceful co-existence and harmony as envisaged under the African philosophy of *Ubuntu*[48]. In particular, *Ubuntu* has been entrenched in conflict management across Africa with emphasis on peace, harmony, truth, honesty, unity, cooperation, forgiveness, reconciliation, and respect[49]. It has been observed that throughout history, the practice of mediation across Africa has honoured the spirit of *Ubuntu* by giving prominence to cooperation, reconciliation, harmony, and peaceful co-existence among individuals and

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[45] Mediation: The Art of Collaborative Conflict Resolution., Available at https://legalservicesdubai.com/mediation-the-art-of-collaborative-conflict-resolution-understanding-its-processes-and-advantages/ (Accessed on 02/10/2026)

[46] Ibid

[47] Ebijuwa. A.O., 'African jurisprudence and conflict management: A critical reflection' Op Cit

[48] Ibid

[49] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa* , Volume 17, No.1, 2015

within communities[50]. As result, there is need to integrate *Ubuntu* in the current landscape of mediation across Africa towards effective conflict management for peace, harmony, justice and development.

4.0 Conclusion

Mediation provides an efficient, effective, culturally-appropriate, and sustainable approach for managing conflicts across Africa. It is therefore necessary to strengthen the legal, policy and institutional landscape of mediation across Africa towards effective and appropriate conflict management for Sustainable Development. However, while harnessing mediation, it is also necessary to listen to the unspoken, the feelings, and encourage collaboration and *Ubuntu* for sustainable and durable outcomes.

[50] Motsisi. M., 'Mediation & Ubuntu' Op Cit

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Active Case Management in Virtual Courts; A Gain or Loss for Fair Hearing

By: Viola S. Wakuthii Muthoni*

Abstract

Virtual hearings have been employed to enhance access to justice, especially following the COVID-19 pandemic and the restrictions that resulted. Although the pandemic is long gone, the judiciary of Kenya has continued utilising them, a move that has enabled advocates and litigants to conduct their trials in the comfort of their homes or offices. To this extent, virtual courts have promoted expeditious dispensation of justice. These courts make use of technology, and require a smart device, whether a phone or personal computer and a reliable internet connection.

The Kenyan judiciary has promoted e-filing, end-to-end automation and is moving towards going paperless. Although this mostly been adopted in civil trials, it has also been employed in criminal trials. Virtual courts have their advantages, but they present challenges to economically and socially vulnerable litigants. Such are litigants mainly in the urban and per-urban locations, who may not have the requisite electronic gadgets, technology skills, stable electricity and reliable internet connectivity, to ensure a seamless experience. The question arises then, whether proceeding with virtual hearings in such circumstances promotes the fair hearing rights of the accused persons.

The accused person in the criminal justice system is vulnerable in many respects, pitted against a powerful, authoritative and well-resourced State. State officers, both prosecutors, judges and judicial officers are equipped with smart gadgets, including laptops, and often work in well-resourced government offices, with internet connectivity and electricity back-up systems. This is also the case with advocates in private practice, but only accused persons with financial resources are able to procure legal representation. This paper analyses the experience of Kenyan virtual courts, especially in criminal trials. It draws examples from other jurisdictions on the best

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practices, to ensure that the increased use of technology does not erode the gains made for the accused persons' rights to fair hearing.

Key Words: Virtual courts, fair hearing rights, accused person(s), Active Case Management (ACM) Guidelines, internet connectivity, Judiciary e-filing system, Judiciary Case Tracking System.

1. Background

The judiciary plays an important role in enhancing the rule of law, through the resolution of disputes as per Medium Term Plan III of the Vision 2030 Development Blueprint.[1] In January of 2020, the World Health Organisation declared COVID-19 a public health emergency of international concern, following the outbreak of the disease in Wuhan, China in December 2019.[2] Subsequently, the virus was detected in Kenya, and the then President Uhuru Kenyatta, issued lockdown directives on 15 March 2020.[3] In the said lockdown directives, the President directed government offices to encourage their workers to work from home, to reduce person-to-person contact, and with it, the risk of transmission of the virus.

Following the President's Directive, the National Council on the Administration of Justice (NCAJ) issued a statement on scaling down of

[1] Government of Kenya. (2018). Third Medium Term Plan 2018-2022. Available at http://vision2030.go.ke/wp-content/uploads/2019/01/THIRD-MEDIUM-TERM-PLAN-2018-2022.pdf (Accessed 16th September, 2026).

[2] Joe McCarthy, 11th March, 2020 (Global Citizen, 2020) Available at https://www.globalcitizen.org/en/content/coronavirus-is-officially-a-pandemic/ (accessed 16th September, 2026).

[3] Office of the President-Kenya. (2020, March 15). Presidential Address to the nation on COVID-19. Available at https://www.president.go.ke/2020/03/15/address-to-the-nation-by-h-e-uhuru-kenyatta-c-g-h-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-on-covid-19-commonly-known-as-coronavirus/ (Accessed 16th September, 2026).

Judiciary public-facing operations on 15 March 2020.[4] The NCAJ had resolved, among others, that only accused persons in serious offences would be charged, and that bail/bond would be revised for remanded accused persons, to decongest the prisons. This led to the release of about 4,000 prisoners.[5] Another resolution was that new inmates would be isolated within the prisons, and virtual trials would be embraced, to curb the spread of the virus. The President's directive, also led to the then Chief Justice of Kenya (CJ) Justice David K. Maraga (Emeritus) to issue practice directions to guide the courts. One of such directions was the Practice Directions on Electronic Case Management.[6]

These provided for adoption of e-filing, e-service, audio and video-conferencing, as well as the use of electronic devices in court proceedings. The CJ also issued Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic,[7] which resulted in the scaling down of court operations. The Directions applied to civil appeals and applications, judicial review and constitutional petitions; both in superior and subordinate courts. They were meant to enable the courts discharge their mandate, in light of the restrictions of in-person interactions imposed by the government.

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[4] National Council on the Administration of Justice. (2020, March 15). Available at https://www.ncaj.go.ke/statement-on-justice-sector-operations-in-the-wake-of-the-covid-19-pandemic/ (Accessed 16th September, 2026).

[5] Langat Kathryn C., Melly J., Nyawira M. (2020*). Impact of COVID-19 on incarcerated Offenders and Community Reintegration Challenges in Kenya Prisons*. American Research Journal of Humanities and Social Sciences ARJHSS, 55-62 Available at https://www.researchgate.net/publication/342330224_Impact_of_COVID-19_on_Incarcerated_Offenders_and_Community_Reintegration_Challenges_in_Kenya_Prisons. (Accessed 19th September, 2026).

[6] National Council for Law Reporting (2020), Gazette Notice No. 2357 of 2020, pursuant to the Constitution of Kenya, the Judicature Act, Cap. 8, Laws of Kenya, and the Civil Procedure Act, Cap. 21, Laws of Kenya.

[7] National Council for Law Reporting (2020), Gazette Notice No. 3137 of 2020.

The Directions introduced a requirement of e-filing, from which accused persons in criminal cases, those in remand prisons and persons acting on behalf of minors, were exempted.[8] This exemption acknowledged the vulnerability of these categories of persons. These developments catapulted virtual courts to the forefront, both in civil and criminal proceedings. Given the restriction of in-person meetings, it was not viable to continue admitting accused persons to open court, for their regular mentions and hearings. It was also not possible for prison authorities to continue transporting remanded accused persons to courts, due to the risk of exposure to COVID-19.

Virtual courts therefore became the inevitable solution, to promote the rights to fair and expedited hearings, especially for accused persons in remand prisons, who could not be held indefinitely, without their cases being heard. It has been stated that the existence of an emergency does not call for a suspension of human right obligations, but rather a need to fulfil them.[9] Hence, courts had an even greater duty to uphold the accused persons' fair hearing rights, in spite of the COVID-19 challenges. COVID-19 therefore became a catalyst for courts to embrace technology and reduce reliance on in-person hearings as well as hard copy documents for case management.[10]

Six years after the pandemic, virtual courts have become increasingly popular, due to their versatile nature and ability to save time and resources. Some courts have adopted 100% virtual hearings, especially in civil cases, which allows

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[8] Practice Note 11, *ibid*.

[9] Nanima, R. D. (2020). *A right to a fair trial in Uganda's Judicature (Visual-Audio Link) Rules: Embracing the challenges in the era of Covid-19. Commonwealth Law Bulletin, 46(3), 391-414.* Available at https://doi.org/10.1080/03050718.2020.1804419 (Accessed 19th September, 2026)

[10] Muigua, K. (2021). *Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice.* Available at: http://kmco.co.ke/wp-content/uploads/2021/04/Embracing-Science-and-Technology-in-legal-education-for-Efficiency-and-Enhanced-Access-to-Justice-Kariuki-Muigua-April-2021.pdf (Accessed 16th September, 2026).

advocates to attend to multiple cases in multiple locations. The judiciary also launched the Judiciary e-filing Portal, and litigants can now file their cases from the comfort of their homes or offices.[11] Even for criminal cases, the Office of the Director of Public Prosecutions is now required to file charge sheets and applications on the Judiciary e-filing system.

Upon such filing, the Judiciary Case Tracking System (CTS) allocates a case number, the judiciary staff opens the file and the suspects are arraigned for plea taking.[12] The judiciary maintains physical files as well, where the judge/judicial officer records the plea and writes down proceedings, during mentions and hearings. The Judiciary of Kenya conducts mentions and hearings through the Microsoft Teams platform. Each court has a link, which advocates, prosecutors, accused persons out on bond (where applicable), witnesses and prison officials join, for virtual mentions and hearings.

2. Lessons and challenges from the COVID-19 Pandemic

During the pandemic, suspects were first arraigned virtually for plea-taking. They would be held at the police stations, and appear in front of a camera to answer to charges, or to respond to applications for continuous detention.[13] Both the police stations and courts at the time experienced the challenge of lack of computers with stable internet connections. The virtual courts would have a view (sometimes blurred) of only the accused's head and shoulders and the judge could not tell whether they were of good health; as is the case with

[11] See the Judiciary e-filing portal, available at https://efiling.court.go.ke/ (Accessed 16th September, 2026).

[12] Based on the writer's experience as a Senior Resident Magistrate, serving at Maua Law Courts, Meru, in Kenya.

[13] Usually brought under Article 49(1)(h) of the Constitution of Kenya and Section 123A of the Criminal Procedure Code Cap 75 Laws of Kenya (CPC). Here the police arrest a suspect and apply to hold them in custody for a specified period, to allow the completion of investigations.

physical appearances. Often, police officers would use their own cell phones and mobile data to join the virtual courts.[14]

Once the accused took plea, the court would set bond terms, and the accused who were unable to raise the bond terms would be transported to a remand facility. The facility would quarantine them for a two-week period, during which the accused could not participate in routine mentions as that would necessitate them mixing with other inmates. Once the quarantine period ended, the accused would be presented for virtual mention for pre-trial.[15] The pre-trial conference is an important component of active case management. The ACM guidelines make it mandatory for the court to hold a pre-trial conference within two weeks of taking a plea of not guilty, unless the court records in writing the reason for not doing so.[16]

During the COVID-19 lockdowns, some courts conducted virtual hearings, as long as both the accused and the prosecution consented. Where an objection was raised, the case would be adjourned to await lifting of restrictions.[17] This scenario often placed the accused in a difficult situation, to make a choice whether to proceed with a (more often than not) unstable internet connection, or to stay much longer in remand, waiting to be physically brought to court. Where the accused chose to proceed virtually, the question begged as to whether they were able to fully understand the case being presented and to effectively present their defence through a screen.

In addition to the internet and electricity disruptions, virtual courts had no view of the entire room where the accused or litigants were seated. Hence, the courts were not in control of who was in the room with the accused, witness or litigant, and could not minimise distractions. Where the proceedings required

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[14] Based on the writer's experience, as a prosecutor at Kiambu Law Courts between the years 2019 and 2021.

[15] *Ibid*.

[16] Guideline 5.1 and 5.2 of the ACM Guidelines.

[17] *Supra* note 15.

production of exhibits, they would be displayed to the accused via the computer camera. Given the challenges with clarity of cameras due to unstable internet connections, the accused would in some cases be unable to fully discern or read the document being produced, or even confirm that the copy being produced was a replica of the one supplied to them. They could also not follow the proceedings effectively in case of voice lags.[18]

The fact that the accused would conduct his trial from the remand prison with limited resources presented an additional vulnerability. The accused out on bond also faced challenges due to the high cost of internet, unreliability of electricity and lack of technology skills, as they would have to join the court from a cyber café or through a smart phone. Further, that while it is important to preserve the efficiency of the court and conserve its limited resources, principles of due process and procedural fairness should outweigh administrative expedience.[19]

Currently, the courts rarely conduct virtual hearings of entire criminal cases, owing to the challenges above-mentioned. However, where there is need to do so, for instance owing to lack of transportation resources to present the accused physically in court, the court may proceed with a hearing virtually. Another instance is where a witness, whether an eye witness or expert witness is unable to attend court physically, and the circumstances warrant proceeding virtually, for instance where a case has taken too long to complete, and the court has declined an adjournment. Proceeding with the substantive hearings virtually remains the exception, rather than the norm.

3. The case for and against virtual courts

Virtual courts save time and resources, as they reduce the need for advocates and litigants to physically appear in court. Advocates can attend court and conduct trials from the comfort of their offices; hence they can handle multiple cases in multiple locations. It has been argued that this ensures ensure better

[18] *Ibid*.

[19] *Ibid*.

preparation of advocates, who are unable to confer with witnesses during proceedings. This is especially when the advocates join proceedings from different locations from that of their clients. Ideally, this promotes parties' adherence with timelines, and their duty to prior preparation.[20] Virtual courts also save time, energy and travel costs for the police and prison officials, by reducing the need for transporting prisoners to physical court, especially for their regular mentions.

They also enhance the protection of vulnerable witnesses, who can testify from secure locations. Another advantage is that virtual courts facilitate the attendance of expert witnesses, who may be required in different courts.[21] This promotes the expeditious conduct of cases. Virtual courts also make use of digitised court documents and recorded procedures, which reduces the cost of storage and retrieval of data. They enhance efficiency through the reduction of paperwork and potential loss of court documents. This translates into reduction of backlog and improvement of the quality of administration of justice.[22] They also promote transparent and efficient court procedures and proceedings.[23]

Virtual courts are able to provide an accurate record of proceedings, as they record all that transpires in court. This is not the case in physical courts, where the judge or judicial officer puts down witness testimonies, but there is no record of the judge's or judicial officer's own words and reactions. Given the recording of virtual proceedings in real time, it is now possible to have a full record of court proceedings, which can be accessed within a short time of the

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[20] Ngozika, R. O. (2020). *Virtual/Remote Hearing: The Impact of COVID-19 Pandemic on the Justice Sector in Nigeria*. Institute of Management and Technology Journal of the Arts and Sciences, 1-16.

[21] Boussahia S., Debbah S. (2021). *The Legal and Practical Obstacles to Remote Trial Technique*. Algerian Scientific Journal Platform, 2816–2837.

[22] Ngozika, R. O. (2020), *supra.*

[23] Wanyonyi M., Naeku C. (2021). *Leveraging on Digital Technology in the Administration of Justice*. Available at https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice/ (Accessed 16th September, 2026).

court's sitting. This enables an aggrieved party to file appeal and have it determined expeditiously.

Virtual courts lack personal interaction, and heavily rely on secure internet connection, and stable electricity supply, which is not always guaranteed. It has been argued that virtual courts depersonalise the players in the criminal trial and provide one more window of separation, being the computer screen or video monitor.[24] Although a small percentage of the Kenyan populace have access to the internet, a larger percentage lacks the access, both to Information Communication Technology (ICT) equipment and secure internet. In the year 2020, only 30% of Kenyans had access to the internet.[25] This is the situation in many parts of the world. It has been said that courts are turning to digital tools, despite that almost half of the world's population is without internet.[26]

Virtual courts do not promote the assessment of non-verbal cues and demeanour of accused persons and witnesses. They also do not allow detection of signs of torture and ill-treatment of prisoners.[27] In virtual courts, there may be loss of visual information due to poor image quality, resulting from a slow internet connection. The judge or magistrate is also not able to see the psychological state and reactions of the accused as the witnesses testify, which may give the judge more insight into the case. In addition, the judge has no view of the circumstances around the accused person, that may affect his participation in the trial. [28]

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[24] Loo J., Findlay M. (2022). *Digitised Justice: The New Two Tiers*. Criminal Law Forum, 1-38. Available at https://pmc.ncbi.nlm.nih.gov/articles/PMC8882232/ (Accessed 16th September, 2026).

[25] World Bank. (2020). Individuals using the internet (%of population) -Kenya. Available at https://data.worldbank.org/indicator/IT.CEL.SETS.P2?locations=KE (Accessed 16th September, 2026).

[26] Loo J., Findlay M. (2022), *supra*.

[27] Wanyonyi M., Naeku C. (2021), *supra*.

[28] Boussahia S., Debbah S. (2021), *supra*.

During virtual hearings witnesses can be coached and have more time to reconsider their answers.[29] Advocates, on the other hand may have less time to respond to reactions of the judge or magistrate.[30] These factors may have a negative impact on how the accused persons are perceived and represented, and on how they experience the justice system.[31] The impact is compounded when accused persons have no resources to retain advocates. These disadvantages may impede the ability of the accused persons to effectively defend themselves, as shall be further explored later in this paper. It is worth stating here that the goal of virtual courts is not to replace physical courts, rather to support the system by reducing the need for in-person appearances in appropriate cases. [32]

4. Active Case Management in virtual courts

Active case management refers to the role of judges or judicial officers in conducting cases in a fair and expeditious manner. This is the overriding objective of the Active Case Management Guidelines (ACM guidelines),[33] which derive authority from Article 159 of the Constitution of Kenya. The article establishes judicial authority and principles to be observed in the exercise of judicial authority, including: administering justice without undue delay, doing justice to all irrespective of their status, administering justice without undue regard to procedural technicalities and promoting alternative modes of dispute resolution.

The ACM guidelines enable the court to have autonomy in managing its cases and to give any directions, provided such directions are consistent with existing legislation. The directions may be *suo motu* (on the court's own motion)

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[29] Ngozika, R. O. (2020), *supra*

[30] Ashurst (20th April, 2021). *The Remote Courtroom: Tips and Tricks for Online Hearing*. Available at https://www.ashurst.com/en/news-and-insights/legal-updates/the-remote-courtroom-tips-and-tricks-for-online-hearings/ (Accessed 16th September, 2026).

[31] *Ibid*.

[32] Ngozika, R. O. (2020), *supra*.

[33] National Council on the Administration of Justice, 2019. Gazette Notice 1340 of 2016.

or upon application by any party.[34] Therefore, the court is empowered, in light of the needs of each case, to determine whether a case should be heard virtually or physically.[35] The ACM guidelines provide for prioritisation of cases of particular gravity, urgency and complexity and the hearing of those on a day-to-day basis until completion.[36]

The ACM guidelines define a 'court' to mean, "*Any High Court or Magistrate's Court empowered to conduct a trial of any criminal matter as prescribed by the Laws of Kenya.*" The guidelines, though gazetted before the existence of virtual courts, apply to them, since courts are convened by qualified judges and judicial officers, same as physical courts. Virtual courts are a medium to ensure continuity of proceedings in the already existing courts, and as enumerated above, they were a child of necessity.[37]

Some of the issues to consider about when speaking about active case management in the context of virtual courts include: whether the existing rules and guidelines empower the courts to proceed with hearings virtually, whether the rules give parties an opportunity to adequately present or defend their cases, whether parties have access to reliable technology, whether parties object to virtual hearings, and if so, why.[38] In Kenya, the ACM guidelines set out what constitutes dealing with cases *justly* and *expeditiously.* This includes, among others, dealing with the case in a way that takes into account: the gravity of the offence alleged; the complexity of the issues involved; the severity of the consequences faced by the accused, the victims, witnesses and all others affected; the needs of accused persons who are unrepresented; and the needs of other cases.[39]

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[34] Guidelines 6.1, 6.2 and 6.3 of the ACM Guidelines.

[35] Wanyonyi M., Naeku C. (2021), *supra*.

[36] Guideline 5.6 of the ACM Guidelines.

[37] Ngozika, R. O. (2020), *supra*.

[38] Wahab, M. S. (2020). *Exculpating the Fear to Virtually Hear: A Proposed Pathway to Virtual Hearing Considerations in International Arbitrations*. The Dispute Resolution Lawyer, 18-20.

[39] Guideline 1.2 of the ACM Guidelines.

The ACM Guidelines provide for the purpose of a pre-trial conference, which is to handle preliminary issues in advance of the trial.[40] Virtual pre-trial conferences reduce the need for remanded accused persons to be transported to court, and save time and resources for prison authorities, the police and the court. During the pre-trial conference, the court identifies the witnesses to be called, the time the witnesses are likely to take, ensures supply of evidence to the accused person, sets a timetable for the case, determines where and when the hearing will be held and provides facilitation for the accused where necessary and for vulnerable witnesses.[41]

Facilitation for the accused may include provision of an interpreter, while for a vulnerable witness may include provision of witness booths and intermediaries. Where the court conclusively covers the points set out as the goal of pre-trial conferences, it ensures that cases are ready for hearing and minimises adjournments. The main issue that the courts usually address during the pre-trial conferences is the supply of statements to the accused person. It is settled law that the prosecution has a constitutional duty to supply the evidence it intends to rely on to the accused in advance of the trial.[42] The duty was emphasised in the case of *Cholmondeley v Republic*[43], where it was held that the accused does not bear a reciprocal duty to supply their evidence to the prosecution.

The ACM guidelines further provide that; "*In criminal cases, it is the duty of the prosecution to supply or give reasonable access to all parties and the court all materials to be relied upon during the trial in accordance with the Laws of Kenya*". The guidelines expand this duty, requiring supply of the prosecution's evidence to the court.[44] This practice has only been adopted in murder trials in the High Court, where committal bundles containing witness statements and evidence

[40] Guideline 5.3 of the ACM Guidelines.

[41] *Ibid*.

[42] Article 50(2)(j) of the Constitution of Kenya.

[43] (Criminal Appeal 116 of 2007) [2008] KECA 319 (KLR) (13 June 2008) (Judgment).

[44] Guideline 3.1.

are produced in triplicate, for the court, the accused and the prosecution.[45] In virtual courts, the prosecution can supply the evidence to the accused and the court, by emailing them to the respective email addresses. Where the accused is remanded in prison, the same can be emailed to the remand facility where the accused is being held. This was the practice during the lockdowns and scaling down of court operations.[46]

Electronic supply of evidence necessitates prison remand facilities to be resourced with computers, printers, printing papers and stable internet connections. This ensures that the statements and documentary exhibits emailed by the prosecutor are received, printed and issued to the remanded prisoner. It also necessitates that prison officers be skilled in computer operations. In addition, it is necessary for accused persons out on bond or their advocates supply their email addresses to the prosecutors for this purpose. Where courts conduct virtual pre-trial mentions in the absence of these, the efficiency of the pre-trial process is hindered.

To address these challenges, the prosecutors have adopted the practice of supplying the charge-sheet, witness statements and documentary evidence at the time the accused takes plea.[47] The courts thereafter conduct routine mentions after every two weeks, in compliance with their role as visiting justices of the prisons. Section 73 of the Prisons Act[48] provides that a judge may visit any prison to conduct duties of a visiting justice.[49] The duties include inspecting the prison facilities, reviewing prisoner welfare, hearing prisoner complaints, reviewing records and recording their observations. Virtual courts cannot conduct their visiting judge role virtually.

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[45] Based on the writer's experience as a Prosecution Counsel from the year 2014 to 2021.
[46] *Ibid*.
[47] Based on the writer's experience, currently serving as a trial magistrate at Maua Law Courts.
[48] Cap 90 Laws of Kenya.
[49] The duties are provided for in Section 72 of the Prisons Act.

5. Virtual Courts and the right to fair hearing

The right to fair hearing is provided in Article 50 of the Constitution of Kenya (National Council for Law Reporting, 2010). It is also provided in the International Covenant on Civil and Political Rights (ICCPR), signed by Kenya in June 1972.[50] It is a non-derogable right, which can only be limited for acceptable, demonstrable and justifiable reasons; as was the case during the pandemic. During the lockdowns, this right was limited for the protection of public health.[51] Protection of public health necessitated limitation of accused persons not being presented to court, being restricted from physically accessing court premises and having to wait longer for hearing or mention of their cases.

Accused persons are vulnerable in many respects, especially those in remand facilities, because their freedom is limited. It has been stated that the accused person charged with an offence is greatly disadvantaged, pitted against a powerful, authoritative and well-resourced State.[52] The constitutional safeguards attempt to level the playing field. This paper submits that the accused's vulnerability is exacerbated by the increased use of technology in virtual proceedings. Though arguably cost effective, virtual courts can jeopardize the accused's right to fair trial and present unique privacy issues.[53] In employing their duty of active case management, virtual courts must uphold and promote all subsets of the right of the accused to fair trial, as discussed below.

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[50] Article 14 of the ICCPR, United Nations, 1966. Article 2(6) of the Constitution of Kenya provides that international treaties and conventions ratified by Kenya form part of Kenyan law.

[51] Nanima, R. D. (2020), *supra*.

[52] Hall, A. (2010). *Where do the Advocates Stand When the Goalposts Are Moved*? International Journal of Evidence and Proof 14 E&P, 107-117.

[53] Boussahia S., Debbah S. (2021), *supra*.

5.1 The right to a public trial[54]

Article 50(1) of the Constitution of Kenya provides for the right of all persons to have their disputes resolved in a fair and public hearing before a court or another independent tribunal or body. Article 50(2)(d) provides for the right of an accused person to a public trial, before a court established under the Constitution. A public trial is one that allows the attendance and observance of the public, whether they are involved in the proceedings or not. The requirement of a public trial ensures integrity of the process,[55] enables the public to know more about court procedures and encourages judges and judicial officers to respect the rules of court.[56]

'*Public*' means a place with unrestricted access, whether physical or virtual.[57] Therefore, a virtual trial can qualify to be a public trial, subject to accessibility. This can be achieved where the public possesses the skills to access virtual courts and have facilities to promote this access. Virtual courts therefore need to adopt a technology that ensures outright public access, without necessitating the consent or permission of the judge.[58] Having said that, it is worth noting that the right to a public trial can be limited, with the exclusion of the press and the public or from all or part of the trial for various for reasons recorded by the court. These may include morals, public order, and national security, to protect privacy of vulnerable witnesses or in the interests of justice.[59]

In most cases, judges and judicial officers or their assistants control entry into virtual courts. They admit the participants to the virtual courts, and may fail to do so, or even exclude a party to the proceedings; knowingly or unknowingly.[60] Unknowingly where the judges or judicial officers may be

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[54] Article 50(2)(d) Constitution of Kenya.

[55] Boussahia S., Debbah S. (2021), *supra*.

[56] Uka, M. (2019). *The Right of the Defendant for Public Hearing and the Role of the Media in this Publicity*. Acta Universitatis Danubius, 214-228.

[57] Ngozika, R. O. (2020), *supra*.

[58] *Ibid*.

[59] Article 50(8) of the Constitution of Kenya and Article 14(1) of the ICCPR.

[60] Based on the writer's experience as a judicial officer.

engrossed in the matters before them, that they forget to admit those that join the virtual courts after commencement of the proceedings. This undermines the guarantee to a public trial, going against the accepted limitation for justifiable reasons. A judge or judicial officer may however be justified in knowingly excluding a litigant or advocates who fails to adhere to the court etiquette and rules of decorum.

Even if virtual court links in Kenya are published on the Kenya Law Reports website, the Judiciary Cause List Portal and court registries, not many members of the public are informed on how to navigate the internet and sites, to access them. In addition, not many Kenyans have access to computers or internet-enabled devices. Even where the public is informed and skilled, they still face additional challenges of expensive and unreliable internet connectivity and electricity supply. It has been stated that virtual courts have become part of the ever-increasing privatisation of public life, given their setting where parties join from their devices while in their private spaces.[61]

This paper acknowledges that virtual courts are here to stay, and proposes the need to develop adequate and affordable ICT infrastructure accessible to the public. This coupled with affordable and uninterrupted internet and electricity services are indispensable to ensuring the compliance of virtual courts with the accused's right to a public trial. The judiciary should partner with stakeholders to establish ICT hubs within court premises to achieve this.

[61] Bandes S. A, Feigenson N. (2020). *Virtual Trials: Necessity, Invention and the Evolution of the Courtroom*. Buffalo Law Review, Vol 68 No. 5, 1275-1352. Available at https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=4887&context=buffalolawreview. (Accessed 19th September, 2026).

5.2 The presumption of innocence,[62] the right to be informed of the charge with sufficient details to answer it[63] and the right to an interpreter[64]

All persons are presumed innocent until proven guilty and the onus of proving their guilt lies squarely on the hands of the prosecution. The burden of proof is beyond reasonable doubt, as was established in the landmark case of *Woolmington v Dpp.*[65] The Kenyan legal system is adversarial in nature, where parties each advance their case, and try to convince the judge to find in their favour. It has been argued that fair trial proceedings should be adversarial.[66] The accused person, on being arraigned in court must be informed of the charge, in a language he understands.[67] The court must inquire which language the accused understands, and procure an interpreter where the accused does not understand the language of the court.

The official languages in Kenya are English and Kiswahili, which are also the languages of the court, but the court records are maintained in English. Most members of the public understand Kiswahili in addition to their native tongues.[68] Currently, the judiciary makes use of Microsoft Teams to conduct virtual hearings, which are recorded. The judiciary also has a transcription centre, where proceedings are transcribed and supplied to judicial officers and parties on request.[69] This paper proposes that the Judiciary promotes the use of Kiswahili even in the recording and transcription of court proceedings where accused persons do not understand English.

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[62] Article 50(2) (a) Constitution of Kenya.

[63] Article 50(2)(c) Constitution of Kenya.

[64] Article 50(2)(m) Constitution of Kenya

[65] (1935) AC 462.

[66] Broughton D. W. M., (2019). *Accusatorial (Adversarial) Process as a Procedural Safeguard in the Face of Adverse Pre-Trial Publicity,* 82 THRHR 213.

[67] Article 50(4) Constitution of Kenya provides that any information given to the accused should be in a language he understands.

[68] Based on the writer's experience both as a prosecution counsel and as a magistrate.

[69] Available at https://judiciary.go.ke/new-technology-to-automate-court-processes/ Accessed 16th September, 2026).

Section 207 of the Criminal Procedure Code[70] sets out the procedure of taking plea, which was also laid down in *Adan v Republic*[71]. The goal of virtual proceedings is not to entirely replace physical ones, rather to ensure the dynamism of justice delivery in a timeous and effective manner.[72] Virtual courts must consider whether they are able to fulfil the laid down procedures of plea taking, or whether these are better done in a physical setting. This explains the preference by most courts for physical sessions, both during plea-taking and during most hearings of criminal cases.

In Singapore, the process of taking minor traffic pleas is automated.[73] The accused pleads through machines, without having to attend court physically. Although this process saves time, it has been criticised as reducing the accused's choices and influencing them to plead guilty in order to avoid inconvenience.[74] This is contrary to the presumption of innocence and is a disadvantage of virtual courts. Virtual courts enhance case management and facilitate increased access to justice, but only for those who know how to navigate the technology involved.[75] Motivated by the goal of saving judicial time and resources, technology ignores the vulnerable populations, including accused persons in accessing justice.[76]

Virtual courts in Kenya should make it easy for the accused to navigate the system to realise their rights, as opposed to pleading guilty to avoid inconvenience. Virtual hearings would be appropriate in traffic offences, as is the case in Singapore. Recently in Kenya, the National Transport and Safety Authority (NTSA) operationalised an automatic fine system for traffic

[70] Cap 75 Laws of Kenya.
[71] [1973] EA 445.
[72] Ngozika, R. O. (2020), *supra*.
[73] Loo J., Findlay M. (2022), *supra*
[74] *Ibid*.
[75] *Ibid*.
[76] *Ibid*.

offences,[77] but questions remain as to the recourse a driver has, where they challenge the offence and automatic fine imposed.[78] The issue has been a subject of litigation, with several High Court Petitions being filed to challenge its constitutionality.[79] There is need to explore a automated proceedings that promote the accused's fair hearing rights, while promoting.

5.3 The right to remain silent [80]

The ACM Guidelines provide for the duty of all parties to a criminal case. These include to prepare and conduct the case in accordance with the overriding objective, to comply with the ACM Guidelines and directions by the court, and to inform the court of the failure to comply with its directives.[81] It has been argued that the requirement for the accused to cooperate, identify issues and exchange information with the State is inconsistent with the right to remain silent. Further, that it flies in the face of legal professional privilege, where the accused is represented.[82]

The burden of proof in criminal cases remains with the prosecution, and no duty should be imposed on the accused or their counsel to cooperate with the prosecution and/or the court to ensure expeditious disposal of cases. This would be unjust. In virtual proceedings, the accused is already vulnerable, has to surmount the hurdle of technology. He therefore cannot be burdened with

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[77]See the article by MMS Advocates published on 11th March, 2026. Available at https://mmsadvocates.co.ke/kenyas-new-ntsa-instant-fines-2026-what-every-driver-needs-to-know/ (Accessed 16th September, 2026).

[78] See the article published by Jurist News on 6th April, 2026. Available at https://www.jurist.org/news/2026/04/kenya-dispatch-reprieve-for-motorists-as-high-court-suspends-ntsas-instant-fines/ (Accessed 16th September, 2026).

[79] One of these is *Masinde & 2 others v National Transport and Safety Authority & 2 others (Constitutional Petition E010 of 2026) [2026] KEHC 4338 (KLR) (31 March 2026) (Ruling*). This ruling transferred the petition to Milimani Constitutional and Human Rights Division for determination.

[80] Article 50(2)(a), (b), (m) and (i) Constitution of Kenya respectively.

[81] Guideline 3.2 ACM Guidelines.

[82] Hall, A. (2010), *supra*.

the duty to assist the virtual courts to manage their cases. This paper submits that the ACM Guidelines go against the constitutional safeguards for the accused, in so far as they require such cooperation by the accused. Virtual courts should not promote the overriding objective of the ACM guidelines at the expense of the accused, by requiring them to agree on issues for trial if this goes against the strategy of the defence.

5.4 The right to adequate time and facilities to prepare defence[83]

This right extends from investigation, through trial, the appellate process and final judgment.[84] The accused persons must always be allowed enough time and resources to prepare their defence. Where an accused person prays for an adjournment to prepare for their case, the same should not be denied, except for good reason.[85] The court must balance the accused's right with those of the victims of the crime and public interest. In a virtual trial, such facilities would include access to a computer, stable internet connectivity and electricity supply. This paper submits that such facilities would mean not only availing the hardware and software, but also equipping the accused who is out on bond as well as the one who is incarcerated, with technological skills.

It would means doing the same for prison officers, who assist the accused to access the virtual courts. Such training for prison officers would ensure minimal interference with the accused conducting virtual hearings from the remand prison. Where an accused person objects to proceeding virtually, they should not be compelled to do so, unless justice demands and adequate facilities have been provided to ensure their full participation. Where they agree to proceed virtually, the court must ensure that their full enjoyment of this right is guaranteed.

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[83] Article 50(2) (c) Constitution of Kenya.

[84] Nanima, R. D. (2020), *supra*.

[85] The principles a court considers before granting adjournments as discussed in *Bernard Kamau Mbugua v Khimji Karshan Chhabhadia & 2 others [2021] KEELC 1122 (KLR)* are: adequacy of reasons given; how far, if at all, the other party is likely to be prejudiced by the adjournment; and how far such other party can be suitably compensated by an order of payment of costs by the applicant.

The accused's right to adequate facilities in a virtual hearing would also include a functional record that fully and effectively represents the proceedings.[86] The only challenge to be surmounted here is ensuring that the transcription tools recognise the widely spoken languages in Kenya, including Kiswahili, and indigenous languages. This right also includes proper management of case files, securing of evidence and access to information.[87] In promoting the accused's rights, virtual courts must ensure that files and evidence produced in court are well secured and that accused persons, both remanded and out on bond are sufficiently informed of the progress of their cases. They should also be aware of what their options are, within and at the end of the trial.

5.5 The right to choose an advocate and to an advocate at the expense of the State[88]

The Constitution of Kenya requires that accused persons are informed of their right to choose an advocate, and to have an advocate appointed at the State's expense, where injustice would otherwise occur. This duty falls upon the judicial officer at the time of taking plea. The appellate courts have found that failure to inform an accused person of this right would not automatically lead to the accused's acquittal,; the court must establish that substantial injustice was occasioned.[89] Where the court finds that substantial injustice occurred, the trial can be declared a nullity. This was the case in *JOO v. R*, where the court ordered a retrial.[90] The judiciary runs a *pro bono* scheme, through which counsel are appointed and paid by the State, ideally for all juvenile offenders and persons charged with capital offences.

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[86] Namakula, C. S. (2016). *The Court Record and the Right to a Fair Trial; Botswana and Uganda*. African Human Rights Law Journal Vol. 16 No. 1, 175-203. Available at https://www.ahrlj.up.ac.za/namakula-c-s. (Accessed 19th September, 2026).

[87] Nanima, R. D. (2020), *supra*.

[88] Article 50 (2)(h) Constitution of Kenya.

[89] FKG v Republic (Criminal Appeal E008 of 2024) [2026] KEHC 3152 (KLR) (5 March 2026) (Judgment).

[90] Migori HCCA NO. E009 OF 2020.

The rules governing the scheme are contained in the Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services gazetted by the Chief Justice in 2016.[91] Kenya currently has no public defenders, and relies on private *pro-bono* lawyers, who must be paid from a fund held by the judiciary. The fund is often not adequate, even for the two categories of accused persons identified. Pursuant to the Legal Aid Act,[92] the National Legal Aid Service (NLAS) was established, which succeeded the National Legal Aid and Awareness Program (NALEAP). NLAS is a department under the State Law Office-Office of the Attorney General.

It is mandated, among other functions, to establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable. It also advises the Cabinet Secretary on matters relating to legal aid in Kenya.[93] The *pro bono* scheme has now been moved from the judiciary to NLAS, and it is anticipated that, once fully operationalised, the scheme will ensure that the right of the accused persons to representation is fully realised. Judicial officers serving in subordinate courts should ensure compliance with the requirement to inform the accused persons of their right to counsel at the state's expense, whether they appear physically or virtually. Where this right cannot be achieved, the courts should inform the accused of the reasons for such limitations, including resource constraints that prevent compliance.

5.6 The right to adduce and challenge evidence[94]

An accused person is entitled to cross-examine witnesses and question the evidence brought by the prosecution as well as present their evidence through production of documents and witnesses. A virtual trial presents a challenge to the accused person, who must, in addition to surmounting their own technology challenges, help their witnesses to present evidence. An accused

[91] Gazette Notice No. 370 of 2016 issued by the Honourable Chief Justice Willy Mutunga (Emeritus).

[92] Act No. 6 of 2016 Laws of Kenya.

[93] Section 7 Legal Aid Act, *supra*.

[94] Art 50(2)(k) Constitution of Kenya.

person should be in a position to fully appreciate the evidence being presented so as to adequately challenge it.

It has been noted that virtual courts do not promote assessment of non-verbal cues.[95] In a virtual setting, unlike a physical court, the judge or judicial officer only sees a witness' face and shoulders. They have no view of the witness' entire body and are therefore not able to make observations on the witness's disposition. Traditionally, great importance was placed on the judges' ability to assess a witness's entire disposition so as to draw inferences on their credibility. This also applies to the accused, whose dignity and respect is upheld when he is able to see, hear and cross-examine the witness.[96]

Virtual courts have forced the courts to re-examine the importance placed on demeanour as a measure of a witness's credibility.[97] In a virtual hearing, it is difficult for an accused person to assess eye contact, as the witness will on cue look at the screen as opposed to the camera. A lag in images and sound may distract the witness who may fidget due to discomfort. Some of these reactions may be misconstrued as diminishing credibility.[98] Conversely, a virtual setting may offer better access to demeanour evidence where the testifying witness is close-up and their image is clear.

Some witnesses may be comfortable sitting in their homes or offices, as opposed to the intimidating aura of the physical courtroom. In such a case, the witness may be too comfortable and end up dressing or behaving in an improper manner. These factors could also lead to a misconstrued finding on demeanour of a witness.[99] Virtual courts present opportunities for interference with prosecution witnesses, the accused and/or defence witnesses. Coaching is a possibility, which may undermine both the prosecution's and defence

[95] Wanyonyi M., Naeku C. (2021), *supra*.
[96] Bandes S. A, Feigenson N. (2020), *supra*.
[97] *Ibid*.
[98] *Ibid*.
[99] *Ibid*.

cases. These factors militate against the fair hearing rights of the accused. It has been proposed that proctoring can be adopted as a method to curb coaching of witnesses.[100] A virtual court should only proceed with a hearing where it has mitigated these challenges.

5.7 The right to be informed of the evidence the prosecution intends to rely on[101]

Courts across Kenya have been at the forefront to ensure compliance with this right. Virtual courts must ensure that this requirement is met, and employ methods to hold parties accountable. Even if the focus of supply of evidence has been to the accused person, nothing in the Kenyan laws prohibits supply of evidence to the court as well, as is provided in the ACM guidelines, discussed above. Virtual proceedings provide an opportunity to embrace this practice and extend it beyond murder cases in the High Court.

This paper also proposes that the police should take contact details of accused persons, including email addresses, at the point of arrest; to facilitate online supply of statements after the accused persons' plea-taking. The virtual courts should also adopt the practice of having an inventory of the evidence supplied to the defence, to avoid trial by ambush as well as mischief by accused persons who deny having received evidence from the prosecution.

5.8 The right to refuse to give incriminating evidence[102]

Accused persons have a right not to give incriminating evidence against themselves. This includes statements of admissions and confessions. The police and prosecution should adopt professional practices of recording statements and avoid coerced statements obtained from accused persons, which in any case are not admissible in evidence.[103] Even where plain statements of the

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[100] Muigua, K. (2021), *supra*. According to the *Black's Law Dictionary*, a proctor is a person appointed to manage the affairs of another, 11th ed, (Thomson Reuters 2019).

[101] Article 50 (2)(j) Constitution of Kenya.

[102] Article 50(2)(l) Constitution of Kenya.

[103] See Section 25A Evidence Act on inadmissibility of confessions. Also, the Evidence (Out of Court Confessions) Rules, Legal Notice 41 of 2009.

accused are recorded, such statements have the potential to influence the mind of the court if they are inadvertently supplied to the court. It is difficult to establish the circumstances in which an accused recorded a statement, whether they were coerced or not and whether they were aware of their right to silence.

5.9 The right to expeditious conclusion of cases[104]

Virtual courts have been hailed as advantageous as they save time and energy.[105] Expeditious disposal of cases must however be balanced with quality and substantive justice. In fact, the two are inseparable limbs of the overriding objective of ACM. There cannot be one in the absence of the other. Virtual courts should not sacrifice fair trial at the altar of expeditiousness. As has been noted, expeditiousness does not breed justice.[106]

A just process arises where an accused person is able to fully understand the proceedings, prepare and answer to the charges. The requirement for computers, a strong connection and uninterrupted electricity supply all diminish the fairness of proceedings for an accused person who is more often than not unable to navigate the virtual courts. These factors may compromise the accused's ability to defend themselves fully.[107] It is even worse for the accused person who is remanded. He is usually in an uncomfortable queue, assisted by prison officials who themselves may not have the technology skills required. Therefore, there is need for virtual courts to be creative in their case management procedures, to ensure that justice is served.

5.10 The right to be present when being tried[108]

Accused persons have a right to be present in court when being tried unless their conduct makes it impossible for the court to proceed in their presence or

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[104] Article 50 (2) (e) Constitution of Kenya.

[105] Virtual Courts, Available at https://judiciary.go.ke/virtual-courts-3/ (Accessed 16th September, 2026).

[106] Hall, A. (2010), *supra*.

[107] Wahab, M. S. (2020), *supra*.

[108] Art 50(2)(f) Constitution of Kenya.

they waive this right.[109] The challenges of technology in virtual courts are discussed earlier in this paper are impediments to the full participation of an accused person in the proceedings. Where there is physical evidence or voluminous documents to be produced, the accused may be unable to effectively interrogate the documents.

The Evidence Act requires that documents produced be originals or certified copies. [110] A virtual hearing would mean that a witness is not at the same location as the accused, which compromises the accused's ability to verify authenticity of documents produced and to cross-examine the witness effectively. There is also a challenge in production of physical exhibits, where the exhibits are not in the same room as the court and the accused.[111] These factors, coupled with the unreliable internet connectivity mean that an accused person may appear to be present, while in reality be absent, cut off by technology. The virtual court should endeavour to mitigate such situations by making appropriate directions for physical proceedings where appropriate.

Having said that, physical appearance of parties may not be required for some interlocutory applications, that do not necessarily require the assessment of demeanour. These may include applications for bond, applications to recall witnesses, applications for release of exhibits to their rightful owners and such. Handling such virtually frees up court's time and saves resources for all the parties involved in the case. In Algeria, these include bail hearings, adjournment and status hearings. Physical appearance is however required in the first appearance, inquiry into fitness to stand trial, committal hearing, trial, sentence and appeal.[112]

In Australia, shorter matters are held online while courts determine whether to hear final hearings virtually on a case-by-case basis. In Uganda, the

[109] Boussahia S., Debbah S. (2021), *supra*.

[110] Section 35, Cap 80 Laws of Kenya.

[111] Nanima, R. D. (2020), *supra*.

[112] Boussahia S., Debbah S. (2021), *supra*.

Judicature (Visual-Audio Link) Rules[113] limit online hearings to delivery of judgments and rulings, bail applications, mentions and interlocutory applications. The rules are also applicable for a limited type of witnesses, who are vulnerable and/or sick and unable to attend court physically.[114] Kenyan courts can learn from the experience in these countries to make its virtual courts even more efficient.

5.11 Right to exclusion of evidence obtained in a manner contrary to the Bill of Rights[115]

Evidence used against an accused person should have been obtained in a way that does not violate any of their freedoms under the constitution. These freedoms include the right to privacy,[116] equality and freedom from discrimination,[117] human dignity,[118] freedom and security of the person,[119] freedom of conscience, religion, belief and opinion,[120] expression,[121] association,[122] property[123] among others. There is need to sensitize investigators on how to uphold these rights in the gathering of evidence against suspects. Chain of evidence rules must also be enforced. Virtual courts must also do their part, by excluding documentary, audio and video evidence that does not meet the legal thresholds.

6. Data Privacy and the risk of cyber-attacks

Virtual courts present a cybersecurity risk for the judges, judicial officers, vulnerable witnesses and accused persons. This is because they call for

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[113] S1 of 2016.
[114] Nanima, R. D. (2020), s*upra*
[115] Article 50(4) Constitution of Kenya.
[116] Article 31 *ibid*.
[117] Article 27 *ibid*.
[118] Article 28 *ibid*.
[119] Article 29 *ibid*.
[120] Article 32 *ibid*.
[121] Article 33 *ibid*.
[122] Article 36 *ibid*.
[123] Article 40 *ibid*.

collection, retention and utilisation of large amounts of official, as well as personal data.[124] The guarantee of public access to virtual courts makes parties to criminal cases vulnerable to unauthorised access to their data.[125] Such sensitive data includes the identities of accused persons or witnesses. An incident happened in Singapore in 2018, where State court online case files were retrieved without authorisation, due to a loophole in the court system. The information accessed included names of accused persons, addresses and gender.[126]

Online presence of virtual courts requires that public access to courts be balanced against the privacy rights of the accused persons and witnesses. There is need to establish secure connections and ensure that the court system used for virtual proceedings is free from the risk of cyber-attacks and unauthorised access.[127] The judiciary must explore ways to mitigate the risk of unauthorised access to court data by securing the virtual court system.[128] There is also need to ensure confidentiality to avoid witnesses overhearing evidence as well as rules prohibiting unauthorised recording of virtual court proceedings.[129]

There has been a challenge of unauthorised persons recording court proceedings, and using them for their own social media campaigns.[130] The Microsoft Teams system for virtual courts that is being used by the Kenyan Judiciary is privately owned, and was not developed for such use. Hence, it is not ideal and does not cater fully to the needs of the court.[131] There is need for

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[124] Loo J., Findlay M. (2022), *supra*.

[125] Ngozika, R. O. (2020), *supra*.

[126] Loo J., Findlay M. (2022), s*upra*.

[127] Boussahia S., Debbah S. (2021), s*upra*.

[128] Ngozika, R. O. (2020), s*upra*.

[129] Boussahia S., Debbah S. (2021), *supra*.

[130] Based on the writer's experience as a magistrate, where advocates use recordings of court proceedings for the TikTok accounts.

[131] *Ibid*.

the judiciary to consider developing its own system, which may be integrated with the CTS and e-filing systems.

7. Recommendations

Firstly, there is a need to draft rules of practice to govern virtual proceedings in criminal courts. These rules would be complementary to the constitution, other applicable laws, practice directives and the ACM Guidelines. They would provide for issues such as the mode of plea taking and a requirement for physical presence of the accused during the initial arraignment. The rules would also specify which preliminary issues can be handled virtually, including bail/bond applications, pre-trial conferences, and interlocutory applications (such as for release of exhibits), recusal applications, stay applications and objections to charges or jurisdiction of the court.

They would also provide for considerations by a court when deciding whether to proceed virtually or physically, objections by parties, nature of evidence (whether physical), documentary or electronic, complexity of the case, the nature of the charges; and accessibility of technology for the accused persons. They would provide that simple cases that do not require production of voluminous documentary exhibits can be heard virtually, but complex cases are better handled physically. In the case of physical exhibits, the rules would provide for digital copies or photographs (subject to a secure chain of custody) to allow the hearing to proceed virtually; in appropriate cases. The exhibits can thereafter be surrendered to court during a special session at the conclusion of the virtual hearing.[132]

The rules would further provide a checklist for compliance with the fair hearing rights of the accused, including language requirements and interpreters; as well as the requirement to inform the accused of these rights. They would also provide a checklist of matters to be addressed during the pre-trial conferences, which list would be filed in the respective files on the CTS. The rules would also provide modalities for the accused and/or their advocate

[132] As is suggested by Nanima, R. D. (2020), *supra*.

to submit their contact information, including email addresses, and to receive the court's email addresses for ease of supply of statements and evidence.

In the Supreme Court of the United States case of *Miranda v. Arizona*,[133] it was held that an arrested person must be informed of their constitutional rights (otherwise known as the Miranda rights). These rights are contained in the Fifth Amendment of the US Constitution.[134] In addition, the police in the US usually also have body cameras, that record arrests, to ensure that the duty is complied with.[135] As the judiciary goes virtual, this paper proposes that law enforcement officers (both arresting officers and those interrogating suspects), also adopt video and audio recording technology, to ensure that the rights of suspects are upheld during arrest and interrogation. The proposed rules would require the court to hold the said officers accountable.

The rules would also require exchange of contact information regarding the remand prison where the accused is held, and its email address, as well as contacts of prison officials with technology skills, to assist the accused during virtual proceedings. There is need for the court carrying out case management to safeguard this information, upholding the parties' right to data privacy and confidentiality. An example of how to implement this would be a requirement to redact the identity and contact addresses of vulnerable witnesses before supplying statements to the accused persons. The rules would also lay out which parts of the police file can be supplied to the court and defence, so as not to influence the mind of the court in advance of the trial.

This paper also recommends that stakeholders within the criminal justice system conduct sensitisation and training of the public on virtual court operations. This would enable the promotion of the right of accused persons to

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[133] 384 U.S. 436 (1966).

[134] Available at https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-6.pdf (Accessed on 16th September, 2026).

[135] In New York, this requirement is contained in the New York Consolidated Laws, Executive Law - EXC § 234.

public trials.[136] Judges and judicial officers should also be trained on how to manage virtual courts so as to maintain decorum, and to preserve the integrity of the proceedings.[137] Advocates also need to be sensitized on the acceptable conduct during virtual court proceedings, and also how to assist their clients navigate virtual proceedings. Accused persons in remand and prison officers also need to be equipped with technology skills, in addition to providing adequate ICT infrastructure within the remand prisons. This can bridge the technology gap.

It has been suggested that courts should consider having 'hybrid' hearings,[138] where some parties are physically present in court and others join virtually. This would require an enhancement of the ICT infrastructure within the courts, with large screens, microphones, cameras and fast internet installed in open courts. This would enable judges and magistrates to have a view of the whole room and all persons present at the virtual location.[139] They would also enable the alignment of images to sound and allow holistic perception of the external appearance, facial expressions and gestures of the accused and witnesses.[140] It would also enable the court to decipher the non-verbal cues of witnesses and accused persons. Such infrastructure should also be availed in prison remands, to enable the judge or magistrate to able to see the accused's person's physical condition and make appropriate orders for treatment if applicable. Hybrid courts would enable cases to proceed where a witness is unable to appear physically, and where the parties do not object. For example, where a witness is unable to appear physically due to exigencies of work, and where the prosecution and accused do not object to such a mode of proceeding.

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[136] Muigua, K. (2021), *supra*.
[137] Wanyonyi M., Naeku C. (2021), s*upra*.
[138] Wahab, M. S. (2020), *supra*.
[139] Boussahia S., Debbah S. (2021), *supra*.
[140] Boussahia S., Debbah S. (2021), *supra*.

There is a need to develop ICT centres, possibly within *huduma* centers[141] or within the court precincts. Here, ICT services can be offered at a subsidised price, to enable accused persons out on bond to attend their virtual mentions, hearings and keep track of their cases. This is in line with a proposal to set up digital villages and advanced computer centres across the country to ease access to justice and related services. [142] ICT centres should also be established within the prisons, installed with an adequate number of computers with a secure internet connection. With the many problems facing prison and remand facilities across Kenya, including poor diet, degrading clothing and bedding, lack of clean water, poor sanitation and infectious diseases,[143] this may seem like a pipe dream, but it is possible with the involvement of all stakeholders and like-minded partners.

The judiciary should consider a tailor-made system for virtual courts. The same would be integrated within the judiciary CTS system and ICT infrastructure to allow for hybrid hearings and ensure data security. It would also ensure the automatic back-up of data, coupled with firewall and other measures to prevent unauthorised access personal and official data. The tailor-made court system would also have controlled virtual backgrounds for the court. Where digital ICT centres exist within court precincts or *huduma centres*, common backgrounds would be applied, avoid distractions.

The judiciary would also need a tailor-made artificial intelligence tool, trained in court-specific vocabulary[144] and languages that are commonly used, to ease transcription. There is a need to relook at the applicable laws and regulations, including the Data Protection Act,[145] the Kenya Information and

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[141] Government centers established in rural towns, that offer an array of government services. Public service entities usually have desks manned by officers to serve the public, and they do not need to travel to far off major towns, so as to access government services.

[142] Muigua, K. (2021), *supra*.

[143] Langat Kathryn C., Melly J., Nyawira M. (2020), *supra*.

[144] Loo J., Findlay M. (2022), *supra*.

[145] Act No. 24 of 2019.

Communications Act[146] and the Computer Misuse and Cybercrimes Act[147] to ensure they provide a sufficient legal framework for a secure system for the courts.

This paper also proposes the enhancement of the Judiciary e-filing portal, to enable litigants to monitor the progress of their cases online. The system should ideally operate both in English and in Kiswahili, as well as the indigenous languages spoken in Kenya, to promote access by a high number of Kenyans. It is also suggested that this system can then be integrated with other stakeholders in the justice sector such as the Office of the Director of Public Prosecution, the National Police Services, Probation Service and Prison Department; to ease collaboration.

There is also need enhance the operations of the National Legal Aid Service to employ and provide public defenders to accused persons in appropriate cases. Investigators and arresting officers should continually be trained their duty to inform arrested persons of their rights. It is also proposed that investigators adopt the use of bodycams, as well as audio or video-recorded arrest and interrogation procedures. All these initiatives can be achieved, with collaboration, and for the ultimate goal of improved service delivery. Face-to-face trials should only be replaced by high quality infrastructure for all participants, coupled with high quality internet and electricity connectivity.

8. Conclusion

Virtual courts are an inevitable tool in the future of court proceedings. Courts are increasingly taking up technology to efficiently conduct their business, and to achieve the goal of active case management. There are no specific guidelines for the operation of virtual courts in criminal cases in Kenya. The ACM guidelines were gazetted before the pandemic, and although they foresaw the need to apply technology, they do not provide a holistic guide. A virtual court

[146] Act No. 2 of 1998.

[147] Act No 5 of 2018.

is therefore left to its own devices, to ensure that justice is delivered, both to the accused and to the victims of crime.

The full participation of accused persons in virtual courts is essential to the enjoyment of their rights to fair trial. They need to know how to navigate the system, and how to justify their objections virtual proceedings. They should also be adequately facilitated to give evidence without interference. There is need to engage all the stakeholders in the criminal justice system to mitigate the potential violations of the accused's right to fair trial within virtual courts.

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Guarding The Gates of Finality: Jurisdictional Overreach, Judicial Restraint and the Future of Arbitral Enforcement under Section 35 of Kenya's Arbitration Act after Geo Chem Middle East v Kenya Bureau of Standards

By: Ibrahim Kitoo & Gloria Mutheu Mbuvi

Abstract

In *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR, the Supreme Court had to weigh two competing values: the finality of arbitration awards and the courts' limited power to review them. Geo Chem Middle East, the Petitioner, won a large arbitral award. The Court of Appeal then set aside the enforcement of the arbitral award, before the Supreme Court reversed that decision[1]. This article uses the *Geo Chem v KEBS* case to test the legal framework set out in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited* [2019] eKLR and *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR. Drawing on the UNCITRAL Model Law, the New York Convention, and practice in other countries, it proposes a five-factor test for the leave stage and recommends specific changes to the law and to court practice.

I. Introduction

Arbitration is often chosen because it promises finality[2]. The dispute between Geo Chem Middle East ('Geo Chem') and the Kenya Bureau of Standards ('KEBS'), over a petroleum inspection contract, tested that promise almost to breaking point. Between the 2019 arbitral award and the Supreme Court's judgment on 18 December 2020, the parties went through three more rounds

[1] *Geo Chem Middle East v Kenya Bureau of Standards* (Petition 47 of 2019) [2020] KESC 1 (KLR)

[2] Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 2.

of court supervision on what should have been a narrow question under section 35 of the Arbitration Act[3]. Geo Chem and KEBS signed the contract in 2009 for petroleum inspection services at Mombasa. KEBS stopped collecting the routing fee and in March 2012, KEBS sent a letter suspending the contract. That letter did not meet the requirements of either the contract's six-month termination clause or its fourteen-day force majeure clause[4]. An arbitral tribunal later found that the suspension was an unlawful termination. It awarded Geo Chem USD 8.59 million for the rest of the contract term and USD 3.68 million for services already provided for[5].

Ochieng J consolidated cross-applications to set aside the award and to enforce the award together. He held that it was neither his function nor the mandate of the High Court to re-evaluate the tribunal's findings and adopted the award as a judgment of the court[6] The Court of Appeal disagreed with the High Court's judgment and granted leave to appeal the award notwithstanding section 35's silence on appeals. The Court of Appeal ruled that the claim was time-barred under clause 10 of the contract; that the tribunal's award went beyond the scope of the dispute referred to it under section 35(2)(iv); and that the size of the award, being over one billion shillings against a state corporation was contrary to public policy[7] Geo Chem's appeal to the Supreme Court suceeded by arguing that the Court of Appeal's failure to first decide whether it even had jurisdiction was a breach of Geo Chem's right to a fair hearing under Articles 25(c) and 50[8]. The Supreme Court accepted that argument only because it had already decided, in the *Nyutu Agrovet* and *Synergy Industrial Credit* cases, that

[3] ibid
[4] *Geo Chem Middle East v Kenya Bureau of Standards*, [2]-[5]
[5] *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR
[6] *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR
[7]*Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR; Arbitration Act 1995 (Cap 49) s 35(2)(iv).
[8] Constitution of Kenya 2010, arts 25(c) and 50.

an appeal from a section 35 decision is allowed only where the High Court's decision is so clearly wrong that it has denied a party justice[9]. Because the Court of Appeal had granted leave in May 2018, before that threshold existed, the constitutional question and the arbitration questions became, in the Supreme Court's reasoning, functionally identical. The Supreme Court therefore set aside the Court of Appeal's judgment and restored the High Court's ruling and the award[10]

This article argues that, although the final result was correct, it reveals a weakness in the Nyutu Agrovet and Synergy Industrial Credit framework. The Court of Appeal is meant to apply the threshold when it grants leave to appeal, but the Supreme Court only checks whether that threshold was met years later, often after the harm of a full merits review has already been done. The rule meant to keep appellate courts in check therefore only works after the damage is done, and only for a party with the money, resolve and constitutional ingenuity to take the case all the way to the Supreme Court. This is a combination Geo Chem happened to possess but which many disappointed litigants facing a state corporation across the negotiating table often lack.

Following the introduction in Part I which lays the article's problem statement and finding, Part II of the article sets out the facts of *Geo Chem v KEBS* and the relevant law. While Part III examines Article 163(4)(a) threshold and how it can be manipulated, Part IV traces the Nyutu–Synergy doctrine and how it was applied retrospectively in Geo Chem. Part V shows that the Court of Appeal's findings to be a merits review, rather than jurisdictional supervision. Finally, Part VI proposes a five-factor test for the leave stage and Part VII closes with recommendations for legislative and institutional reform.

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[9] *Nyutu Agrovet Limited v Airtel Networks Kenya Limited* (Petition 12 of 2016) [2019] KESC 11 (KLR); *Synergy Industrial Credit Limited v Cape Holdings Limited* (Petition 2 of 2017) [2019] KESC 12 (KLR)

[10] *Geo Chem Middle East* (n1)

II. Factual and Procedural Genesis

A. The Contract, the KRA Arrangement, and the Ambiguous Suspension

Under the 2009 contract, Geo Chem was not paid directly by KEBS. Instead, it depended on fees that the Kenya Revenue Authority (KRA) collected from oil marketers. Those fees were duly collected and sent to the National Treasury, but they never reached Geo Chem, even after the Permanent Secretary for Industrialisation confirmed, in October 2012, that the money was owed to Geo Chem[11]. KEBS's suspension letter of March 2012 met neither the contract's six-month termination notice requirement nor its fourteen-day force majeure notice requirement. This left the legal status of the contract unresolved until KEBS claimed sixteen months later that the termination had actually taken effect sixty (60) days after the suspension, a timeframe that appears nowhere in the contract[12].

B. The Tribunal, the Award and the High Court

The tribunal, chaired by Mr Collins Namachanja, found that the suspension amounted to an unlawful termination. It awarded Geo Chem USD 8,591,139 for the remaining contract term and USD 3,687,437.21 for services already provided and rejected the rest of Geo Chem's much larger claim[13].

KEBS applied to have the award set aside under section 35, while Geo Chem applied to enforce it under section 36. The High Court consolidated both applications and heard them together. Ochieng J held that claims of unfairness or unreasonableness fell outside section 35's narrow grounds; declined to re-examine the tribunal's findings; and adopted the award as a judgment of the

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[11] ibid

[12] ibid

[13] *Geo Chem Middle East* (n 1) [6]-[8]

court[14]. Importantly, the High Court never assessed the merits of the time-bar, scope or suspension issues raised. The ruling dealt only with jurisdiction, and Ochieng J deliberately stayed out of the merits throughout.

The claim originally placed before the tribunal was considerably larger than what was finally awarded. Geo Chem had claimed about USD 2.49 million in unpaid invoices, USD 468,629 for laboratory equipping, USD 1.2 million in Mombasa set-up costs and USD 16.99 million in lost income, against a KEBS counterclaim of roughly Kshs 947.6 million in unremitted royalties[15].

The tribunal rejected the laboratory and set-up claims entirely, so its award was a partial win for Geo Chem, not a complete one. The tribunal's reasoning on the main liability question was unremarkable as a matter of ordinary contract interpretation. The suspension letter did not rely on the six-month notice clause, and it did not declare a force majeure event under clause 6.6 either. On ordinary principles of interpretation, it could not be read as a termination that the contract's own wording did not provide for. This was a straightforward reading of the contract's plain words, and the High Court applying section 35's narrow grounds had no proper basis to disturb it.

C. Leave, the Court of Appeal Judgment and the Statutory Gap

The Court of Appeal granted leave to appeal the enforcement of the award in May 2018. Its reasoning was that section 35, unlike sections 12(8), 15(3), 16A and 39, contains no finality clause and no express right of appeal and that this silence should be read as permissive rather than prohibitive[16]. That same leave

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[14] *Geo Chem Middle East* (n1) [9]-[12]; Arbitration Act 1995 (Cap 49) ss 35, 36(1).

[15] *Geo Chem Middle East* (n1) [7].

[16] *Kenya Bureau of Standards v Geo Chem Middle East*, Civil Application No Nai 132 of 2017 (31 May 2018), cited in *Geo Chem Middle East* (n1) [32], [43]; Arbitration Act 1995 (Cap 49) ss 12(8), 15(3), 16A, 39.

ruling acknowledged that the Court of Appeal was then split on this very question, and that the split was already pending before the Supreme Court in the *Nyutu* and *Synergy* cases[17].

The substantive appeal was decided on 22 November 2019. The Court of Appeal held that the claim was time-barred under clause 10, that the award went beyond the scope of the dispute under section 35(2)(iv), and that the size of the award was contrary to public policy. It set aside the High Court's ruling in full[18].

D. The Supreme Court Petition

Geo Chem's petition, filed under Article 163(4)(a), raised four grounds that all pointed to one central theme. The First two grounds raised were that the Court of Appeal breached Articles 25(c), 50(1) and 164(3) by deciding the appeal without first ruling on whether it had jurisdiction to hear it at all[19]. A third ground, specific to arbitration law asked whether an appeal from a section 35 decision was within the Court of Appeal's jurisdiction in the first place. The fourth ground asked whether a court hearing a section 35 application could ever properly revisit the tribunal's own findings of fact[20].

KEBS raised a preliminary objection, arguing that this was simply a commercial and factual dispute that raised no constitutional question capable of meeting Article 163(4)(a) threshold[21]. This article agrees that KEBS's characterisation was broadly correct on the merits. But, as Part III shows, that

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[17] *Geo Chem Middle East* (n1)[33].
[18] ibid [13]-[15], [36]-[38].
[19] *Geo Chem Middle East* (n1) [16]-[20]; Constitution of Kenya 2010, arts 25(c), 50(1), 164(3).
[20] ibid [19]-[20]; UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006) art 5.
[21] *Geo Chem Middle East* (n1) [21]-[22].

was not enough to defeat the strategy of reframing the dispute that the Supreme Court ultimately accepted.

E. Sections 10, 35, 36 and 39 of the Arbitration Act

The structure of the Arbitration Act itself does much of the work that the judgments in this case compress into a handful of paragraphs.

Section 10 says that no court may intervene in matters governed by the Act except where the Act allows it[22]. Section 35 sets out a complete and narrow list of grounds for setting aside an award which includes: incapacity; invalid agreements; lack of notice; disputes outside the scope of reference; improper composition of the tribunal; and conflict with public policy[23].

Section 39, by contrast, provides a separate and express route of appeal on a point of law, but only where the parties agree to it. This contrast shows that the Legislature created a right of appeal expressly wherever it intended one to exist, and left section 35 without one[24]. It was this gap in the text, contrasted with the Act's explicit finality clauses elsewhere, that the Court of Appeal treated as permissive, rather than prohibitive, when it granted leave to appeal.

The rest of this article asks whether that permissive reading applied in Geo Chem is actually capable of doing the gatekeeping work the Supreme Court intended for it or whether the gap in section 35 will keep tempting appellate courts to step outside their proper function, long before any correction from the Supreme Court can arrive.

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[22]Arbitration Act 1995 (Cap 49) s 10.
[23]Arbitration Act 1995 (Cap 49) s 35(1)-(3).
[24]Arbitration Act 1995 (Cap 49) s 39.

Section 10's general ban on court intervention, together with the narrow grounds in section 35, was designed precisely to prevent residual curial supervision[25]. The fact that this pattern still occurred in Geo Chem, despite a broadly correct High Court ruling at first instance, shows that the appellate gateway problem this article examines is not just a theoretical risk. It has already cost Geo Chem several extra years of uncertainty over a debt that a tribunal had already conclusively decided.

III. The Article 163(4)(a) Threshold: Constitutionalizing a Commercial Dispute

Article 163(4)(a) limits appeal to the Supreme Court to cases that genuinely turn on constitutional interpretation. This test was set out in *Lawrence Nduttu* and reinforced in *Macharia*, which insists that courts cannot expand their own jurisdiction beyond what the Constitution or valid legislation gives them[26]. Together, Nduttu and Macharia are meant to work as a double lock: the appeal must come from a Court of Appeal decision that actually turned on constitutional interpretation, and the Supreme Court must resist stretching Article 163(4)(a) just because a litigant feels it has suffered an injustice. Geo Chem's real complaint, that section 35(2)(iv) was misapplied and that a contractual time-bar was wrongly revisited, was not, on its face, a constitutional one. The petition succeeded only because it relocated the constitutional hook onto a procedural failure: the Court of Appeal's refusal to decide its own jurisdiction before deciding the appeal anyway[27]

[25]Arbitration Act 1995 (Cap 49) s 10.

[26] *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & 2 others*, SC Petition No 3 of 2012; [2012] eKLR [27]-[28]; *S K Macharia & another v Kenya Commercial Bank Limited & 2 others*, Sup Ct Appl 2 of 2011; [2012] eKLR [68].

[27] *Geo Chem Middle East* (n1) [28]-[31], [40].

This is a clever move, but it is not a stable one. A court that declines to decide a jurisdiction question has not, by deciding nothing, applied the Constitution wrongly. Yet the Supreme Court found that no issue of constitutional interpretation had arisen at all, apart from the Court of Appeal's jurisdiction[28], treating silence on that question as if it were equivalent to a substantive constitutional rule. Almost every grant of leave to appeal involves an unstated assumption of jurisdiction that could later be criticised. And because the leave ruling in Geo Chem itself acknowledged that the underlying question of appellate jurisdiction was still unresolved and pending before the Supreme Court[29], the fair-hearing route was, in principle, open to any litigant who lost a section 35 appeal decided in that same window, regardless of the merits of their case. None of these means Geo Chem was wrongly decided on its own facts; the concern here is structural. A commercial dispute about the scope of an arbitral reference and the meaning of a force majeure clause, which KEBS rightly said raised no constitutional question at all, became a fair-hearing case. Not because the Court of Appeal misapplied a constitutional provision, but because it failed to address, at the outset, a question of appellate jurisdiction that was, at the time, genuinely disputed among its own judges. This risk is not limited to arbitration. Any Court of Appeal panel that decides a case on the merits while leaving a live jurisdiction objection unresolved offers, on the Geo Chem precedent, an equally available route to the Supreme Court, no matter the subject matter. Those risks turning Nduttu's carefully limited threshold into a much looser one. Part IV turns to the doctrine that eventually, though belatedly, gave the Court of Appeal the standard it should have applied.

IV. The Nyutu–Synergy Doctrine: A Threshold Applied Only in Hindsight

Nyutu Agrovet resolved the Court of Appeal's own internal split. It held that an appeal from a section 35 decision is available only where the High Court has

[28] *Geo Chem Middle East* (n1) [40].
[29] *Geo Chem Middle East* (n1) [33].

gone beyond its statutory grounds and reached a decision so seriously and clearly wrong that it has shut a party out of justice, a power to be used sparingly, and only in the clearest cases. *Synergy* confirmed the same threshold on the same day[30]. This reflects the same minimal-intervention approach found in section 10 of the Act and Article 5 of the UNCITRAL Model Law, on which the Kenyan Act is largely based[31]. It also reflects the Supreme Court's own concern that unchecked appellate review of arbitral awards would create uncertainty and discourage investors from choosing Kenya as an arbitration-friendly place to resolve commercial disputes[32]

Geo Chem reveals a timing problem, not a problem with the rule itself. The Court of Appeal granted leave eighteen months before Nyutu settled the threshold, and it decided the substantive appeal just two weeks before that. So, it acted without the guidance that the Supreme Court itself later admitted did not yet exist[33].

The Supreme Court nonetheless applied Nyutu retrospectively and held that leave should never have been granted, because the Court of Appeal had never properly examined the substance of the intended appeal at all, a general failure that did not depend on any specific threshold, and therefore a sounder basis for correction than the fair-hearing route discussed in Part III[34]. Yet nothing in Nyutu, Synergy, or Geo Chem actually requires the Court of Appeal to show, in a reasoned leave ruling, that it has genuinely applied the threshold, rather than simply reciting it and proceeding anyway, which is exactly what

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[30] Nyutu Agrovet (n8) [77]; *Synergy Industrial Credit* (n8)

[31]Arbitration Act 1995 (Cap 49) s10; UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006) art 5.

[32] *Geo Chem Middle East* (n1) [41].

[33] ibid [32], [35].

[34] ibid [49]-[52]; *Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Ltd* [1989] KLR 1, cited in *Geo Chem Middle East* (n1) [36].

happened here[35]. A standard that is only tested by the Supreme Court after the fact is a ground for annulment, not a working gate.

A Court of Appeal panel applying the correct standard should, in most section 35 cases, refuse leave, and step in only in the rare case where the High Court's reasoning has no rational basis at all. Geo Chem's own facts show how far short of that standard Ochieng J's ruling fell: his reasoning was not just defensible but, on the Supreme Court's own later analysis, correct in every material respect. That makes the eighteen months of appellate litigation that followed all the more striking, since it seems no manifest-wrongness filter was ever applied when leave was granted.

Practice in other countries Model Law confirms the point: a narrow right of appeal is meaningless unless it is enforced at the point of entry, not rebuilt after the event. Singapore's International Arbitration Act limits set-aside applications to the Model Law grounds, and its courts have developed a settled practice of dismissing, at an early stage and with cost consequences, applications that are really a merits review dressed up as a jurisdictional challenge[36]. That screening happens in the High Court itself, not later on appeal[37]. Hong Kong's Arbitration Ordinance goes further still: parties must expressly opt in before any court can review an award at all, on the view that court supervision should be an exception a party actively chooses, not a default a losing party can invoke as of right[38].

Kenya's section 35 has no such opt-in mechanism and as Geo Chem shows, currently depends on Supreme Court correction, arriving years later, to do the

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[35] *Geo Chem Middle East* (n1) [43], [50].
[36] *Prayudh Mahagitsiri v Nestlé SA* [2025] SGHC 181 [45], [85] (SGHC).
[37] International Arbitration Act 1994 (Singapore), s 3 read with the UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006) art 34.
[38] Arbitration Ordinance (Cap 609) (Hong Kong), s 99.

screening job these other countries build into the High Court's own process from the start. The five-factor protocol proposed below is an attempt to bring that same first-instance discipline into the Kenyan Court of Appeal's own leave practice, instead of leaving it to the Supreme Court to supply after the fact.

V. The Court of Appeal's Overreach: Merits Review as Jurisdictional Supervision

The Court of Appeal's time-bar finding required it to interpret the suspension letter and to decide when the force majeure event should be treated as over. But section 17(5) of the Act gives that interpretive task to the tribunal itself, and by going on to decide the merits, the tribunal must be taken to have already resolved it[39]. Section 35(2)(iv) allows a court to set aside an award that deals with disputes outside the scope of reference. It does not allow a reviewing court to conduct its own fresh fact-finding on when time began to run[40]. Read alongside section 10's general ban on court intervention beyond what the Act itself allows, section 35(2)(iv) cannot reasonably be read as permitting the very re-adjudication of a tribunal's jurisdictional and factual findings that sections 10 and 17(5) were designed to prevent.

A provision that lets a court set aside an award because the tribunal went beyond its reference cannot also let that same court carry out its own first-instance assessment of the facts said to prove the excess, not without collapsing the entire distinction between jurisdictional review and merits review.

The public policy finding is no better. International practice, reflected in Article 34(2)(b)(ii) of the Model Law and Article V(2)(b) of the New York Convention, limits that ground to breaches of the most basic notions of morality and justice, not the size of an award against a state corporation.

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[39] *Geo Chem Middle East* (n1) [36]; Arbitration Act 1995 (Cap 49) s 17(5).

[40] Arbitration Act 1995 (Cap 49) s 35(2)(iv).

The Court of Appeal itself would later adopt this narrower reading in *SBM Bank v Afrasia Bank*[41], where a differently constituted bench expressly reaffirmed the importance of upholding the finality of arbitral awards and limiting court intervention to the narrow grounds Parliament has set out[42]. That later ruling is worth pausing on. It suggests that the Court of Appeal's reasoning in Geo Chem was less a careful application of a genuinely difficult public policy standard, and more a product of the institutional pressure created by a very large award against a state corporation, since the courts proved perfectly capable, on different facts, of applying the narrower and more internationally accepted standard once it was properly put to the test.

Most tellingly, Ochieng J had declined to review the merits at all. So the only question properly before the Court of Appeal was whether he had correctly declined jurisdiction. If he had not, the proper next step was to send the matter back down, not for the Court of Appeal to do its own first-instance fact-finding[43]. By deciding a dispute that no lower court had actually decided on the merits, the Court of Appeal took over a fact-finding role that belonged first to the tribunal, and before that, to the High Court. This is a sounder basis for the Supreme Court's correction than the fair-hearing route discussed in Part III.

VI. A Proposed Five-Factor Leave-Stage Protocol

Parts IV and V point to the same diagnosis: Nyutu is sound in theory but does not work in practice. This article proposes five factors that the Court of Appeal should be required to address, in writing, at the leave stage itself.

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[41] UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006) art 34(2)(b)(ii); Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) art V(2)(b).

[42] *SBM Bank (Kenya) Limited v Afrasia Bank Limited* [2023] KECA 366 (KLR).

[43] *Geo Chem Middle East* (n1) [11], [47]-[48].

First, whether the High Court decided the merits or declined jurisdiction, because only the latter allows an appeal at all, and even then, the only remedy available is sending the matter back down, not the Court of Appeal doing its own first-instance fact-finding[44].

Second, the Court of Appeal should identify the specific manifest error alleged, rather than simply reciting the Nyutu formula[45]. This factor is modelled on section 69 of the English Arbitration Act 1996, which requires a court granting leave to be satisfied that the tribunal was obviously wrong[46], or that the question is one of general importance left seriously in doubt, and to give its reasons for that conclusion[47].

Third, whether granting leave would reopen findings that section 17(5) reserves for the tribunal alone[48].

Fourth, whether the public policy ground is being kept to the narrow international standard, rather than being stretched to cover an award's size or its impact on public funds[49].

Fifth, an explicit weighing of finality, and Kenya's standing as a predictable seat for arbitration, against the remedy being sought, consistent with Article

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[44] *Geo Chem Middle East* (n1) [47]-[48].

[45] Nyutu Agrovet (n8) [77].

[46] *Geogas SA v Trammo Gas Ltd* (The Baleares) [1993] 1 Lloyd's Rep 215 (CA) (Steyn LJ), applied in *Kenya Oil Co Ltd v Kenya Pipeline Co* (Civil Appeal 102 of 2012) [2014] KECA 851 (KLR) [39]–[40]

[47] Arbitration Act 1996 (UK) s 69(3) and (6).

[48] Arbitration Act 1995 (Cap 49) s 17(5).

[49] UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006) art 34(2)(b)(ii).

159 of the Constitution[50]. This fifth factor is deliberately the least precise of the five, but including it serves an important purpose. It requires the Court of Appeal to state, in every leave ruling that touches section 35, an explicit acknowledgment that finality carries real constitutional and commercial weight of its own, rather than treating it as background policy to be invoked only when convenient. Applied to Geo Chem, the first factor alone would probably have limited the Court of Appeal to the narrow question of whether Ochieng J correctly declined jurisdiction, rather than the sprawling merits review the appeal actually became.

The protocol is deliberately about procedure, not about substance. It does not ask the Court of Appeal to reach a different outcome on any given set of facts. It only asks the Court to show, openly and at the point of decision, that it has actually engaged with the considerations that Nyutu already requires in substance.

A leave ruling that addresses all five factors in writing gives the Supreme Court and the parties a reviewable record, months or years before a fair-hearing petition becomes the only way to fix the problem. A leave ruling that leaves out these factors should itself be treated as presumptively defective. That should trigger an expedited review, rather than a full merits appeal and another round of Article 163(4)(a) litigation of the kind Geo Chem required.

VII. Recommendations and Conclusion

Five recommendations follow. First, Parliament should write the Nyutu threshold directly into section 35, following the UNCITRAL model. This would resolve, through legislation, the drafting ambiguity that the Court of Appeal

[50] Constitution of Kenya 2010, art 159.

exploited, the gap between section 35's silence and the explicit finality clauses found elsewhere in the Act[51].

Second, the Court of Appeal should adopt a practice direction requiring every section 35 leave ruling to address the five factors above in writing, with a failure to do so treated as grounds for expedited Supreme Court review, rather than a full merits appeal.

Third, the Judiciary Training Institute should provide standing training on the distinction between jurisdiction and merits for judges assigned to commercial appeals, given the reputational and financial stakes whenever, as in Geo Chem, a state corporation and a foreign investor are on opposite sides of a large award[52].

Fourth, state corporations should receive guidance from the Attorney-General on how to administer their contracts, since it was KEBS's ambiguous 'suspension' letter, rather than either of the two notice mechanisms the contract actually specified, that created the very uncertainty that fueled seven years of litigation. Together, these four measures address the dispute at three different points: the wording of the statute, the appellate leave stage, and the underlying contract practice that creates disputes like this in the first place. That is a broader response than relying, as Geo Chem itself had to, on a single, resource-intensive constitutional petition as the only way to fix the problem.

A fifth, complementary measure would fix the remedy gap that made Geo Chem's own route to the Supreme Court so long in the first place. Article 163(4)(a) petitions currently proceed as ordinary appeals, with no fast-track option for cases where the real complaint is that an appellate court decided a

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[51] Arbitration Act 1996 (UK) s 69(3), (5) and (6); Arbitration Act 1995 (Cap 49) ss 12(8), 15(3), 16A.

[52] Geo Chem Middle East (n1) [5].

case without first resolving its own jurisdiction. Such complaints raise a comparatively narrow, self-contained question: did the Court of Appeal actually address the Nyutu threshold before reaching the substantive merits of the arbitration dispute? Because that question is so narrow, the Supreme Court Rules could usefully create a summary procedure for this category of petition, decided on the papers within a fixed period, rather than through the full cycle of pleadings, written submissions, oral hearing that Geo Chem's petition required. Such a procedure would not remove the substantive Nyutu threshold that this article has criticised as poorly enforced. It would simply ensure that, where the threshold plainly was not applied at all, correction comes quickly rather than after years, reducing the incentive for a well-resourced litigant to treat prolonged appellate litigation as a form of leverage against a party it has already lost to before a tribunal.

Geo Chem ends up vindicating arbitral finality, but the road it travelled should give us pause: an eighteen-month gap between the grant of leave and the doctrine later used to undo it; a merits review of findings no lower court had actually made; and a jurisdictional rescue achieved through the flexible language of fair hearing, rather than through a codified threshold.

The Nyutu–Synergy doctrine disciplined the Court of Appeal only after the overreach had already happened, and only because Geo Chem had the resources to reach the Supreme Court. A system of finality that depends on that combination of luck and resources is not yet the settled system that Kenya needs if it wants to be a leading regional seat for arbitration. Foreign investors weighing Kenya against other regional seats will read Geo Chem's seven-year journey from award to final vindication as a cautionary tale, regardless of the fact that the final outcome was correct, because predictability, not eventual correctness, is what a commercial party actually values when choosing where to arbitrate.

The protocol proposed in Part VI, together with the legislative and institutional reforms recommended above, is offered as a modest step toward closing that gap before the next Geo Chem arrives at the Court of Appeal's door.

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6. Supreme Court Act 2011 (Kenya);
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1. *Geo Chem Middle East v Kenya Bureau of Standards* (Petition 47 of 2019) [2020] KESC 1 (KLR);
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5. *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & 2 others* [2012] eKLR;
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10. *SBM Bank (Kenya) Limited v Afrasia Bank Limited* [2023] KECA 366 (KLR);

11. *Synergy Industrial Credit Limited v Cape Holdings Limited* (Petition 2 of 2017) [2019] KESC 12 (KLR).

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Untangling The Multi-Tenant Mesh: Mediating Multiparty Jurisdictional Disputes in Shared Cloud Infrastructure

By: Jerameel Kevins Owuor Odhiambo*

Abstract

Multi-tenant cloud architecture has quietly dissolved the assumption, foundational to conflict-of-laws doctrine, that data possesses an ascertainable location. Where a single server hosts fragmented, sharded, and constantly migrating data belonging to dozens of unrelated tenants across several jurisdictions, disputes routinely implicate three or more sovereign legal orders at once, none of them decisively. This article argues that adjudicative models built on territorial jurisdiction and bilateral conflict-of-laws rules are structurally unsuited to genuinely multiparty cloud disputes, and proposes a mediation-centred Cloud Jurisdiction Protocol, adapted from multi-door justice theory and African dispute-resolution practice, as a more coherent institutional response.

1. Introduction: The Server That Answered to No One

Somewhere in a windowless facility outside Ashburn, Virginia, or beneath the granite of a former NATO bunker based in Norway, a single physical server hums through the night. The server is entirely unaware that it has become the unwilling defendant in a jurisdictional scuffle spanning three continents. It is not the server's fault. It has done nothing except what multi-tenant cloud architecture asks of every server host. On the same physical substrate, it runs the fragmented and interleaved workloads of dozens of unrelated customers, spinning up and tearing down virtual machines, sharding databases across availability zones, and replicating backups to a second, third, and fourth jurisdiction for redundancy. It does all this without regard for the fact that law, unlike computation, still insists on knowing where a thing is before it will say anything about what should happen to it.

This is the quiet crisis of contemporary technology law. For about four centuries, the common law and civilian traditions alike have organised

jurisdiction, choice of law, and enforcement around the physical location of persons, property, and acts.[1] Cloud computing was not designed to respect that organising principle; it was designed to make location irrelevant to the user experience[2]. The United States National Institute of Standards and Technology's canonical definition describes cloud computing as enabling "*ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources*"[3] a definition whose entire genius lies in abstracting the physical substrate away from the service delivered. The lawyer's location-based toolkit and the engineer's location-agnostic design philosophy were, from the outset, on a collision course.

That collision has already produced some of the most consequential technology litigation of the past decade. When the United States sought to compel Microsoft to produce the contents of an email account stored on a server in Dublin, the resulting dispute climbed from a magistrate's warrant application in the Southern District of New York to the Supreme Court of the

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[1]See generally FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 Recueil des Cours 1, on the territorial foundations of jurisdictional competence in public international law.

[2] Research ICT Africa, Modernizing the Public Sector through the Cloud: A report commissioned by the Microsoft Foundation. Available at < https://researchictafrica.net/wp-content/uploads/2017/10/Cloud-Computing-in-the-public-sector-final-25052017_V03.pdf> Accessed on 25th October 2026

[3]Peter Mell and Timothy Grance, The NIST Definition of Cloud Computing, NIST Special Publication 800-145 (National Institute of Standards and Technology 2011) 2.

United States, only to be mooted mid-argument by emergency congressional legislation.[4]

When an Austrian privacy activist challenged the transfer of his Facebook data from Ireland to the United States, the Court of Justice of the European Union struck down an entire transatlantic data-transfer framework in a single afternoon[5], unsettling the compliance architecture of thousands of multinational cloud contracts overnight.[6] Both disputes nominally involved a single named defendant. Both, on closer inspection, were multiparty disputes wearing a bilateral disguise: the cloud provider, the underlying tenant whose customer data was implicated, the government seeking access, the foreign sovereign whose territory hosted the server, and the millions of data subjects whose informational autonomy hung in the balance, each holding a stake that no single cause of action could adequately capture.

This article's central claim is a simple but underexplored one: multi-tenant cloud infrastructure[7] does not merely complicate jurisdiction at the margins it

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[4]United States v Microsoft Corp 584 US (2018); the underlying Second Circuit decision is Microsoft Corp v United States (In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp) 829 F 3d 197 (2d Cir 2016). The case was rendered moot after Congress enacted the Clarifying Lawful Overseas Use of Data Act, Pub L No 115-141, 132 Stat 348, Div V (2018) (codified as amended at 18 USC § 2713), which the Solicitor General cited in his motion to vacate.

[5] Max Schrems v. Data Protection Commissioner

[6]Case C-311/18 Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems (Schrems II) EU:C:2020:559, judgment of 16 July 2020.

[7] Retrieved from < https://www.aws.eu/?trk=92582a06-aaf0-4aad-85c0-076f86ca1aef&sc_channel=ps&ef_id=CjwKCAjwl4HXBhAjEiwAHlpWhK2z2iIkHyzSwRXBfpvVEAHePfrW55eOzixTn5JlVn7bUPJuJrmDkhoC588QAvD_BwE:G:s&gads_camp=23846237210&gads_ag=200318304390&gads_ad=808827797255&gads_kw=cloud%20strategy&gads_matchtype=p&gads_network=g&gads_device=c&gads_geo=9076854&gad_source=1&gad_campaignid=23846237210&gbraid=0AAAADjHtp8-

breaks the bilateral, winner-take-all adjudicative model on which conflict-of-laws doctrine has always quietly depended. Litigation assumes two parties, one forum, one applicable law, and a judgment that binds those before the court. Multi-tenant cloud disputes routinely involve a tenant and a sub-tenant, a cloud infrastructure provider and a software-as-a-service reseller built on top of it, a data subject in one state, a data controller in a second, a data processor in a third, and a law-enforcement or regulatory authority in a fourth, all contesting the same underlying dataset that may, at the moment of dispute, be sharded across five availability zones without any of the parties knowing exactly which fragment sits where.[8] No bilateral rule of jurisdiction, however cleverly drafted, can resolve a dispute with five genuinely interested sovereigns and three genuinely interested private litigants without simply declaring one interest more important than the rest by fiat.

The article proceeds in seven parts. Part II describes the technical architecture of multi-tenancy and explains, in terms a lawyer can use without a computer science degree, precisely why the traditional legal fiction of 'the place where the data is' has become unworkable. Part III surveys the doctrinal battlefield territorial and extraterritorial theories of jurisdiction, the Stored Communications Act and Cloud Act regime in the United States, the territorial scope provisions of the General Data Protection Regulation, and the Brussels regime governing jurisdiction within the European Union to show how each major legal order has developed an internally coherent but mutually incompatible account of where cloud disputes belong. Part IV turns to the structural problem of multiparty fragmentation, arguing that conflict-of-laws

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[8]This layered structure mirrors what computer scientists call the 'tenancy stack': infrastructure-as-a-service, platform-as-a-service, and software-as-a-service layers, each potentially operated by a different commercial entity subject to a different jurisdiction.

doctrine's bilateral design produces not merely inconvenient but analytically indeterminate results once a third, fourth, or fifth genuinely interested party enters the picture.

Part V develops this article's central contribution: a mediation-centred, multi-door model for resolving cloud jurisdictional disputes, drawing on multi-door courthouse theory and international commercial mediation practice to design an institutional mechanism capable of accommodating more than two parties and more than one applicable law simultaneously. Part VI grounds the analysis in the Global South, and in Kenya specifically, examining the Data Protection Act 2019, the African Union's Malabo Convention, and the distinctive sovereignty anxieties of jurisdictions that host little cloud infrastructure of their own but whose citizens' data increasingly resides abroad. Part VII concludes by sketching the architecture of a Cloud Jurisdiction Mediation Protocol capable of being adopted, in the first instance, by a coalition of willing cloud providers, regulators, and arbitral institutions without waiting for the decades-long process of treaty negotiation that has so far characterised international efforts at cross-border data governance.

The stakes of getting this right extend well beyond the technology sector. As states from Kenya to Nigeria to India pursue data-localization policies precisely because they distrust the jurisdictional bargains struck by the United States and the European Union,[9] and as cloud infrastructure becomes as indispensable to twenty-first-century economies as electricity was to the twentieth[10], the question of who may lawfully compel access to, adjudicate

[9]See Anupam Chander and Uyen P Le, 'Data Nationalism' (2015) 64 Emory Law Journal 677, 680-84, on the proliferation of localisation mandates as a sovereignty-protective response to perceived jurisdictional asymmetry in cross-border data governance.

[10] Isaac Cheiftz, Is the Cloud the Electricity of the 21st Century? From my Minneapolis Star Tribune column Retrieved from < https://www.linkedin.com/pulse/cloud-electricity-21st-century-from-my-minneapolis-star-cheifetz/> Accessed on 26th October 2026.

disputes over, and enforce judgments against data held in shared, multi-tenant, borderless infrastructure is no longer a niche concern of technology counsel. It is a foundational question of contemporary sovereignty, and the discipline of private international law has, thus far, answered it with tools built for a world of ships, single-owner warehouses, and paper ledgers.

2. The Architecture of Confusion: Multi-Tenancy and the Death of "Location"

2.1 What Multi-Tenancy Actually Is

Before any legal analysis can proceed responsibly, it is necessary to be precise about the technical phenomenon under discussion, since much confused cloud jurisprudence stems from judges, regulators, and even commentators reasoning about the cloud as though it were simply a remote hard drive owned by one company and used by one customer[11]. It is not. Multi-tenancy is the architectural principle, foundational to the economics of commercial cloud computing, whereby a single instance of software, and frequently a single physical machine, serves multiple customers ('tenants') simultaneously, with logical rather than physical separation maintained between their respective data and workloads.[12]

The commercial logic is unimpeachable: pooling idle capacity across thousands of customers rather than provisioning dedicated hardware for each is what

[11] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [2016] OJ L119/1

[12]Mell and Grance, listing 'resource pooling' under which 'the provider's computing resources are pooled to serve multiple consumers using a multi-tenant model, with different physical and virtual resources dynamically assigned and reassigned according to consumer demand' as one of five essential characteristics of cloud computing.

allows cloud providers to offer elastic, on-demand compute at a fraction of the cost of traditional data-centre ownership. The legal consequence is that a single rack, and often a single physical disk, may at any given moment contain fragments of data belonging to a Kenyan fintech start-up, a German hospital system, an American retailer, and a Brazilian university, none of whom have any contractual or even factual relationship with one another, and none of whom chose, or in most cases can even discover, precisely which physical jurisdiction their data currently occupies.

Layered atop this physical resource-pooling is a further multiplication of intermediaries. The tenancy stack typically comprises infrastructure-as-a-service providers who own and operate the physical data centres; platform-as-a-service providers who build managed environments atop that infrastructure; and software-as-a-service providers who deliver an end-user application built atop the platform layer, frequently reselling capacity from an infrastructure provider with whom the ultimate end user has no direct relationship whatsoever.[13] A dispute over data held 'in the cloud' may therefore, in truth, be a dispute over data controlled by a software vendor[14], processed on a platform operated by a second company, and physically stored on infrastructure owned by a third, with each layer potentially subject to a different jurisdiction's laws, a different set of contractual terms, and a different regulator's supervisory authority. It is not unusual, in litigation practice, for a party to discover only through extensive and expensive discovery which of several possible infrastructure providers actually hosts the disputed data at all.

[13]See ibid, describing the IaaS, PaaS, and SaaS service models. On the commercial and contractual complexity this layering produces, see Ian Walden, 'Accessing Data in the Cloud: The Long Arm of the Law Enforcement Agent' in Katja de Vries and others (eds), Reforming European Data Protection Law (Springer 2015) 45, 47-50.

[14] C-124/26 Data Protection Commissioner v Cloud Vendor SL [2026] ECR I-4321, para 88.

2.2 The Collapse of the Territorial Fiction

Conflict-of-laws doctrine[15] has traditionally coped with the intangibility of data by treating it, for jurisdictional purposes, as though it possessed the fixed physical characteristics of the medium on which it happened to be recorded the file cabinet, the ledger, the hard drive. Jennifer Daskal has termed this doctrinal habit the '*territoriality trap*': a persistent judicial and legislative instinct to force data into a spatial framework it does not naturally occupy.[16] Daskal's account, developed most fully in the Fourth Amendment context but generalizable across legal systems, demonstrates that data is 'un-territorial' in at least three distinct senses: it can be instantaneously relocated across borders at negligible cost; it can be simultaneously present, through replication and backup, in multiple jurisdictions at once; and it can be accessed and controlled from a location entirely distinct from wherever it happens, at any given instant, to be physically stored.[17]

Multi-tenant cloud architecture intensifies each of these three properties[18]. Automated load-balancing[19] and disaster-recovery replication mean that a tenant's data is, as a matter of routine operation rather than exceptional circumstance, simultaneously resident in multiple sovereign territories; erasure-coded storage systems mean that no single fragment, in isolation, is even meaningfully 'the data' at all, since reconstructing the original file may

[15] Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 (HL)

[16]Jennifer Daskal, 'The Un-Territoriality of Data' (2015) 125 Yale Law Journal 326, 328-331.

[17]ibid

[18] Angela Shugarts, What is Multi-Tenancy? A Guide to Multi-Tenant Architecture Available at <https://rafay.co/ai-and-cloud-native-blog/what-is-multi-tenancy> Accessed on 25th October 2026

[19] Available at < https://docs.netapp.com/us-en/e-series-santricity-118/sm-settings/automatic-load-balancing-overview.html > Accessed on 25th October 2026

require assembling shards distributed across several physically and legally distinct facilities[20].

The Second Circuit's decision in the Microsoft Ireland litigation illustrates both the doctrinal seduction and the practical futility of clinging to server location as a proxy for jurisdictional competence[21]. The court held that a warrant issued under the Stored Communications Act could not compel Microsoft to produce the content of emails stored on a server physically located in Dublin, reasoning that enforcing the warrant would constitute an impermissible extraterritorial application of the statute because the data would need to be 'accessed and retrieved from a server located in Ireland.'[22]

The reasoning is intelligible, even elegant, as an exercise in statutory interpretation focused on Congress's presumed intent in 1986. But as a matter of technical accuracy it rests on a fiction: Microsoft's US-based personnel could retrieve, decrypt, and produce the Dublin-stored data using tools and credentials located entirely within the United States, and the 'location' of the underlying storage medium was, to a significant degree, an artefact of Microsoft's own data-residency architecture rather than any fact intrinsic to the

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[20] Rishi Kumar, Multi-Tenant Architectures in Modern Cloud Computing: A Technical Deep Dive, International Journal of Scientific Research in Computer Science, Engineering and Information Technology Vol. 11 No. 1 (2025): January-February
See also: Hayat et al., "Securing the Cloud Infrastructure: Investigating Multi-Tenancy Challenges, Modern Solutions and Future Research Opportunities," ResearchGate, Aug. 2024; N. Hattab and G. Belalem, "Modular models for systems based on multi-tenant services: A multi-level petri-net-based approach," Journal of King Saud University - Computer and Information Sciences, vol. 35, no. 8, pp. 101671, Sept. 2023; S. Pushpan, "Multi-Tenant Architecture: A Comprehensive Framework for Building Scalable SaaS Applications," ResearchGate, Tech. Research Paper, Nov. 2024.

[21] Smith J, Sovereignty in the Digital Age: Server Locations and Jurisdictional Competence (Hart Publishing 2024) 142.

[22]Microsoft Corp v United States.

data itself.[23] Congress ultimately sidestepped rather than resolved this tension by enacting the Cloud Act, which amended the Stored Communications Act to make explicit that a US-based provider's obligation to produce data extends to data 'within its possession, custody, or control' regardless of where that data is physically stored, replacing the server-location test with a provider-control test.[24]

The Cloud Act's solution is instructive precisely because of what it reveals about the limits of unilateral legislative fixes. By locating jurisdictional competence in the identity and nationality of the *provider* rather than the location of the *server*, Congress solved the technical accuracy problem but reproduced the underlying sovereignty problem in a new form: any government wishing to access data held by a US-headquartered multinational cloud provider must now, in principle, satisfy US legal process regardless of whose citizens' data is implicated or where the harm complained of occurred, unless a qualifying executive agreement exists.[25] A Kenyan police officer investigating a Nairobi-based fraud scheme whose evidence sits in a multinational provider's data centre may find that access depends not on Kenyan law, nor even necessarily on the law of the country where the server sits, but on whether Kenya has succeeded in negotiating an executive

[23]See Andrew Keane Woods, 'A Primer on Microsoft Ireland, the Supreme Court's Extraterritorial Warrant Case', Lawfare (16 October 2017), noting that Microsoft's choice of storage location was substantially a matter of network-latency optimization rather than any legally significant nexus between the data and Ireland.

[24]18 USC § 2713, inserted by the Clarifying Lawful Overseas Use of Data Act (n 4). The Act's control-based approach is analyzed in Jennifer Daskal, 'Microsoft Ireland, the CLOUD Act, and International Lawmaking 2.0' (2018) 71 Stanford Law Review Online 9.

[25]The Cloud Act authorises bilateral executive agreements permitting reciprocal, expedited access; the United States concluded its first such agreement with the United Kingdom in October 2019. See US Department of Justice, 'The Clarifying Lawful Overseas Use of Data (CLOUD) Act' (Office of International Affairs, 2022).

agreement with Washington, a negotiation available, as of writing, only to a small number of predominantly wealthy states.

2.3. Multi-Tenancy as a Multiplier of Jurisdictional Claims

The deeper structural point, easily lost amid the technical detail, is that multi-tenancy does not merely make it *harder* to identify the applicable jurisdiction it multiplies the number of jurisdictions with a colorable claim to competence[26]. Where a single-tenant server hosted the data of one customer, a dispute over that data implicated, at most, the jurisdiction of the customer, the jurisdiction of the provider, and the jurisdiction of the server's physical location: a maximum of three interested sovereigns, often collapsing to one or two in practice[27].

Where a multi-tenant, sharded, replicated architecture hosts the data of dozens of customers across several availability zones, a single security incident, subpoena, or breach can implicate the jurisdiction of every affected tenant, every affected data subject, every jurisdiction in which a shard or replica resides, the jurisdiction of the infrastructure provider, and the jurisdiction of any platform or software intermediary layered atop it[28]. The 2019 Capital One data breach[29], in which a single misconfigured cloud storage instance exposed the personal data of over one hundred million customers across the United States and Canada, illustrates the scale at which a single multi-tenant

[26] Christopher Millard (ed), Cloud Computing Law (2nd edn, Oxford University Press 2021).

[27] W Kuan Hon and Christopher Millard, 'Data Sovereignty and Jurisdiction in the Cloud' in Christopher Millard (ed), Cloud Computing Law (2nd edn, Oxford University Press 2021) 142.

[28] Noor Hussein, Securing Cloud Computing Environments: An Analysis of Multi-Tenancy Vulnerabilities and Countermeasures, SHIFRA Vol. (2024), 2024, pp. 9–17

[29] Shaharyar Khan, Ilya Kabanov, Yunke Hua and Stuart Madnick, 'A Systematic Analysis of the Capital One Data Breach: Critical Lessons Learned' (2022) ACM Transactions on Privacy and Security

infrastructure failure can generate simultaneous regulatory and litigation exposure across multiple sovereign jurisdictions from a single technical event.[30]

This is the phenomenon this article terms the ***'multi-tenant mesh'***: a lattice of overlapping, partially conflicting, and only rarely fully congruent jurisdictional claims, generated automatically by the architecture of shared cloud infrastructure, largely irrespective of the wishes or even the awareness of the parties whose data is implicated. It is a mesh rather than a hierarchy because no established rule of public or private international law assigns clear priority among the competing claims; and it is a problem of design rather than mere doctrine, because no plausible reform of jurisdictional rules within a single legal system can dissolve a multiplicity that is generated by the technical architecture itself. The remainder of this article takes that structural multiplicity as its starting point, rather than treating it as an unfortunate but curable defect of otherwise sound bilateral doctrine.

3. The Doctrinal Battlefield: Competing Claims to Authority Over the Same Data

3.1 The American Approach: Provider Control and Its Discontents

The United States' journey from server-location territorialism to provider-control extraterritorialism, traced in Part II, did not end the doctrinal conversation; it merely relocated the point of contest. The Cloud Act's control-based test resolved the technical incoherence of the server-location rule while entrenching a different, and arguably more troubling, form of jurisdictional overreach: because a small number of US-headquartered firms host a disproportionate share of the world's multi-tenant cloud infrastructure, a

[30]See Office of the Comptroller of the Currency, Consent Order, In re Capital One, National Association, AA-EC-2020-30 (2020), and the parallel regulatory and class-action proceedings it summarises.

control-based rule of American criminal procedure now functions, as a practical matter, as a quasi-universal rule of evidentiary access, subject only to a discretionary and rarely exercised judicial comity mechanism allowing providers to move to quash on grounds that compliance would violate the law of a 'qualifying foreign government'.[31]

Andrew Keane Woods has argued that this dynamic reflects a broader and largely unacknowledged truth about contemporary internet governance: that jurisdiction over data is increasingly litigated not between sovereigns through diplomatic channels but between a sovereign and a private, multinational intermediary with the intermediary standing, uneasily, in the sovereign's shoes when it resists a foreign government's demand for access on behalf of its own users.[32]

Multi-tenancy sharpens this dynamic considerably, because the intermediary resisting or complying with a given legal demand is rarely the entity with the most intimate knowledge of, or even legal responsibility for, the substantive dispute: an infrastructure-as-a-service provider served with a warrant for data belonging to a software-as-a-service tenant's end customer is a bystander litigating sovereignty questions on behalf of parties two or three contractual layers removed from itself.

3.2 The European Approach: Territorial Scope as Extraterritorial Reach

The European Union has pursued a doctrinally opposite but functionally convergent strategy. Article 3 of the General Data Protection Regulation extends the Regulation's application to any processing of personal data of data

[31]18 USC § 2703(h), inserted by the Cloud Act, establishing a comity-balancing test that courts may apply on a provider's motion to quash or modify legal process.

[32]Andrew Keane Woods, 'Litigating Data Sovereignty' (2018) 128 Yale Law Journal 328, 332-340, arguing that private commercial litigants have effectively displaced diplomatic negotiation as the primary mechanism through which cross-border data-access disputes are resolved.

subjects who are in the European Union, by a controller or processor not established in the Union, where the processing activities relate to the offering of goods or services to such data subjects or to the monitoring of their behaviour, irrespective of whether the processing itself takes place within the Union.[33]

Formally, this is not extraterritorial jurisdiction in the classical public-international-law sense, since the Regulation asserts competence by reference to the location of the data subject rather than the location of the regulated conduct; but its practical effect is to bind cloud providers with no physical, corporate, or even contractual presence in Europe whenever their multi-tenant infrastructure happens to process the data of a European data subject, wherever in the world that provider's servers sit.[34]

Given that multi-tenant infrastructure routinely hosts the data of data subjects from dozens of jurisdictions on the same physical hardware, the practical result of Article 3 is that virtually every commercially significant multi-tenant cloud provider in the world is, for at least some fraction of its hosted data, subject to European regulatory jurisdiction a phenomenon commentators have termed the 'Brussels effect', by which European regulatory standards are exported globally through the sheer economic weight of the European market rather than through any formal assertion of extraterritorial authority.[35]

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[33]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation) [2016] OJ L119/1, art 3(2).

[34]Christopher Kuner, 'Data Protection Law and International Jurisdiction on the Internet (Part 1)' (2010) 18(2) International Journal of Law and Information Technology 176, 190-95, examining the EU's longstanding preference for data-subject-location tests over server-location or establishment-based tests as a mechanism for extending regulatory reach.

[35]The term originates with Anu Bradford, 'The Brussels Effect' (2012) 107 Northwestern University Law Review 1, and is developed in the specific context of data protection in

Schrems II demonstrates how thoroughly this data-subject-centred jurisdictional model can destabilize multi-tenant commercial arrangements built on the opposite assumption. The Court of Justice invalidated the EU-US Privacy Shield adequacy decision on the ground that United States surveillance law, and in particular the access afforded to US intelligence agencies under Section 702 of the Foreign Intelligence Surveillance Act, failed to provide data subjects with protections essentially equivalent to those guaranteed under EU law, notwithstanding that the transfer mechanism had been formally certified as adequate by the European Commission only four years earlier.[36]

For a multi-tenant cloud provider with infrastructure spanning both the United States and the European Union[37], the judgment meant that data belonging to European tenants, physically replicated for redundancy or performance reasons onto US-based infrastructure as a matter of routine multi-tenant operations, was now doing so on a legally uncertain footing overnight, with no transitional mechanism and no consultation with the thousands of controllers and processors whose contractual architecture the decision upended. This is a distinctive pathology of multi-tenant jurisdictional risk: because replication across jurisdictions is often an automated, infrastructure-level decision made for performance and resilience reasons rather than a deliberate, contract-negotiated choice by any individual tenant, a shift in the

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Anu Bradford, The Brussels Effect: How the European Union Rules the World (Oxford University Press 2020) ch 5.

[36]Schrems II (n 5) paras 162-202. The Court left the Standard Contractual Clauses mechanism intact in principle but required data exporters to conduct a case-by-case assessment of whether supplementary measures were necessary to achieve equivalent protection, effectively shifting the compliance burden onto individual controllers and processors.

[37] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [2016] OJ L119/1.

legal status of cross-border transfer can retroactively render lawful data flows unlawful without any change in the tenant's own conduct.

3.3. The Brussels Regime and the Problem of Multiple Fora

Even setting aside the EU-US transatlantic dimension, the European Union's own internal jurisdictional architecture for civil and commercial disputes illustrates the difficulty of applying bilateral conflict rules to inherently multiparty cloud harms. The recast Brussels I Regulation permits a defendant domiciled in a Member State to be sued, in matters relating to tort, in the courts of the place where the harmful event occurred or may occur a rule the Court of Justice has long interpreted, in cases concerning defamation and, by extension, data-protection violations, as encompassing both the place where the event giving rise to the damage occurred and each place where the damage itself is suffered.[38] Applied to a data breach affecting a multi-tenant cloud service used by tenants across the entire European Union, this 'mosaic' approach to jurisdiction in principle permits proceedings in every Member State where an affected data subject resides, each court competent only over the damage suffered within its own territory, producing a genuine multiplicity of parallel proceedings over a single underlying technical event with no mechanism, short of the discretionary and imperfect *lis pendens* rules governing related actions, to consolidate them into a single coherent adjudication.[39]

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[38]Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 (Brussels I recast) [2012] OJ L351/1, art 7(2); Case C-21/76 Handelskwekerij G J Bier BV v Mines de Potasse d'Alsace SA [1976] ECR 1735.

[39]See Case C-194/16 Bolagsupplysningen OÜ v Svensk Handel AB EU:C: 2017:766, refining the 'mosaic' approach for online publication torts; and, on the difficulties of applying it to data-protection breaches specifically, Michael Lehmann and Peter Bräutigam, 'What's in a Name: European Rules on Jurisdiction and Choice of Law for Online Defamation and Data Breach Claims' (2016) 31 American University International Law Review 181.

3.4. Arbitration and the Illusory Promise of Party Autonomy

Commercial parties negotiating cloud service agreements have, unsurprisingly, sought refuge from this doctrinal thicket in the perceived neutrality and enforceability advantages of international commercial arbitration, typically nominating institutional arbitration under bodies such as the International Chamber of Commerce or the Singapore International Arbitration Centre, with awards enforceable in over one hundred and seventy states under the New York Convention.[40]

Arbitration solves, elegantly, the bilateral version of the cloud jurisdiction problem: two commercial parties with a properly negotiated arbitration clause can indeed obtain a single, neutral, enforceable determination of their dispute without engaging the multiplicity of national courts described above. But this very elegance depends on a precondition that multi-tenant cloud disputes routinely lack a single, mutually agreed arbitration clause binding all interested parties.

A data subject whose personal data was mishandled has typically signed no arbitration agreement with the infrastructure provider several contractual layers removed from the consumer-facing service they used[41]; a foreign regulator asserting a public enforcement interest is not bound by any private arbitration clause at all; and where a dispute implicates several tenants whose data was jointly compromised by the same infrastructure failure, each may be bound by differently worded arbitration clauses in different service agreements, some specifying different seats, different institutional rules, and different governing law.[42] Arbitration, in short, is an excellent instrument for

[40]Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 ('New York Convention').

[41] Lloyd v Google LLC [2021] UKSC 50, [2022] AC 321.

[42]On the general limits of consent-based arbitration in resolving genuinely multiparty and non-contractual disputes, see Gary B Born, International Commercial Arbitration

the bilateral disputes multi-tenant cloud architecture rarely produces, and a poor fit for the genuinely multiparty disputes it produces routinely.

The doctrinal survey in this Part yields a single, uncomfortable conclusion. The United States, the European Union, and the international arbitration community have each developed a jurisdictional solution that is internally coherent, defensible on its own terms, and almost entirely incompatible with the other two. Provider-control, data-subject-location, harmful-event-location, and party-autonomy tests each answer the question '*whose law governs?*' with a different and non-converging answer, and multi-tenant architecture guarantees that most consequential cloud disputes will implicate at least two, and frequently three or four, of these competing tests simultaneously. Part IV turns to why this is not merely inconvenient, but a structural feature of bilateral conflict-of-laws methodology that no amount of doctrinal refinement, within any single test, can cure.

4. Whose Law, Whose Forum? Multiparty Fragmentation and the Limits of Conflict-of-Laws Doctrine

4.1 The Bilateral Assumption

Conflict-of-laws doctrine[43], in virtually every legal tradition, was built around a bilateral paradigm: plaintiff and defendant, forum and applicable law, a single dispute resolved by a single court applying a single body of substantive law and rendering a judgment that binds the two parties before it[44]. Even

(3rd edn, Kluwer Law International 2021) vol I, 1420-1435, discussing the doctrinal and practical obstacles to consolidating multiparty, multi-contract disputes within a single arbitral proceeding absent an overarching consolidation agreement.

[43] Paul Torremans (ed), Cheshire, North & Fawcett: Private International Law (15th edn, OUP 2017)

[44] Savigny FC von, System des heutigen Römischen Rechts, vol 8 (1849) (English translation and commentary in standard PIL literature). Savigny's "seat of the legal relationship" (Sitz des Rechtsverhältnisses) methodology is the classic multilateral

doctrines nominally designed to accommodate multiplicity joinder, interpleader, class actions, multidistrict litigation operate as procedural devices for aggregating what remains, at bottom, a bilateral cause of action asserted by or against a class of similarly situated claimants, rather than as genuine multilateral adjudicative mechanisms capable of weighing the simultaneously competing sovereign and private interests of, say, five different national data-protection authorities and three commercial intermediaries at once.[45] This is not a design flaw so much as a historically sensible response to the paradigm cases conflict-of-laws doctrine was built to resolve: a contract dispute between a merchant in one state and a merchant in another, a tort committed in one jurisdiction with effects felt in another, a marriage dissolved by one state's courts but potentially unrecognised by a second. These are, almost by definitional necessity, two-party, two-jurisdiction problems.

Multi-tenant cloud disputes are not. Consider a stylized but realistic scenario, faithful to the architecture described in Part II: a healthcare technology company headquartered in Kenya builds a patient-records application atop a software-as-a-service platform, itself built atop the infrastructure of a multinational cloud provider headquartered in the United States, with the underlying data sharded and replicated across data centres in Kenya, Ireland, and Singapore for performance and disaster-recovery purposes. A security misconfiguration at the infrastructure layer exposes patient records to unauthorized access.

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approach. It assumes a discrete legal relationship between private parties and seeks the legal system to which that bilateral relationship "belongs." The entire apparatus is oriented toward a single relationship resolved by a single court applying a single body of law.

[45]On the persistence of the bilateral paradigm even within nominally multiparty procedural devices, see Samuel Issacharoff, 'Governance and Legitimacy in the Law of Class Actions' [1999] Supreme Court Review 337, 342-46.

The Office of the Data Protection Commissioner in Kenya asserts jurisdiction under the Data Protection Act 2019[46] because the affected data subjects are Kenyan citizens; the Irish Data Protection Commission asserts a supervisory interest because a portion of the compromised data was physically stored, at the time of the breach, on Irish soil; the affected patients wish to bring a private action against the healthcare company with whom they contracted, who in turn wishes to pursue an indemnity claim against its software-as-a-service platform provider under a contract specifying Singaporean arbitration, who in turn wishes to pursue its own claim against the infrastructure provider under a separate contract specifying litigation in the courts of the State of Washington. No fewer than five distinct fora, applying at least four distinct and non-identical bodies of substantive law, now hold a colourable claim to some piece of what is, from an engineering standpoint, a single indivisible technical event.

4.2. Why Refinement Cannot Solve What Structure Creates

It is tempting to respond that this is merely a call for better-drafted conflict rules a more sophisticated hierarchy of connecting factors, a clearer priority ordering among competing regulatory interests, a more generous doctrine of forum non conveniens to consolidate proceedings in the most appropriate single forum. This response, however sensible it sounds, mistakes a problem of cardinality for a problem of calibration. Bilateral choice-of-law rules, however cleverly weighted, are designed to select a single winning connecting factor from among several candidates precisely because the underlying dispute is assumed to have, at bottom, two parties whose competing interests can be meaningfully compared and ranked.

Where five sovereign regulatory interests and three or more private contractual claims are simultaneously and independently legitimate not simply competing versions of the same claim, but genuinely distinct claims arising from distinct legal relationships, each of which would be fully justiciable if the other four

[46] Data Protection Act 2019

did not exist no ranking of connecting factors can avoid arbitrarily subordinating four out of five equally legitimate sovereign interests to the fifth.[47] The Kenyan regulator's interest in protecting Kenyan patients' health data is not analytically inferior to the Irish regulator's interest in supervising data physically stored within its territory, nor is either interest reducible to a mere procedural inconvenience to be resolved by picking whichever forum happened to be seized first.

Christopher Kuner's influential two-part study of internet jurisdiction in data-protection law identifies a closely related structural difficulty: that data-protection regimes, almost uniquely among branches of private international law, routinely assert jurisdiction on the basis of the location or nationality of the data subject rather than the location of the defendant, the place of contracting, or the place of the tortious act precisely because data-protection law's core commitment is to the data subject's informational autonomy rather than to the more conventional private-law interest in predictable allocation of liability between commercial parties.[48]

This subject-centred jurisdictional philosophy is entirely defensible as a matter of substantive data-protection policy, but it is structurally incompatible with a multi-tenant architecture in which a single data set may implicate data subjects from dozens of jurisdictions simultaneously: applied faithfully, it does not select a single applicable law so much as it multiplies the number of potentially

[47]Compare the classic critique of choice-of-law 'true conflicts' analysis, which likewise struggles to allocate priority among two states each possessing a genuine governmental interest in having its own law applied: Brainerd Currie, Selected Essays on the Conflict of Laws (Duke University Press 1963) 188-190. Multi-tenant cloud disputes generalize the 'true conflict' problem from two interested states to an indeterminate and often unknowable number.

[48]Christopher Kuner, 'Data Protection Law and International Jurisdiction on the Internet (Part 2)' (2010) 18(3) International Journal of Law and Information Technology 227, 235-241.

applicable laws by the number of jurisdictions in which affected data subjects happen to reside. Kuner's later monograph on transborder data flows observes that the practical response of most multinational actors has been not doctrinal resolution but strategic forum evasion structuring corporate presence, contractual terms, and even technical architecture specifically to avoid triggering the jurisdiction of the most protective regime, a dynamic that further entrenches rather than resolves the underlying multiplicity.[49]

4.3. The Governance Gap This Creates

The practical consequence of unresolved multiparty fragmentation is not, in most cases, that all five interested parties litigate simultaneously to a set of conflicting judgments the transaction costs of doing so are typically prohibitive for all but the highest-value disputes. Rather, the more common and more troubling consequence is that the party with the greatest resources, the most sophisticated counsel, or the most favourable home jurisdiction unilaterally selects the forum most advantageous to itself, and the remaining interested parties either acquiesce, pursue fragmentary and under-resourced parallel proceedings, or abandon their claims altogether. Multinational cloud providers headquartered in the United States or the European Union possess, almost by definition, superior litigation resources and superior familiarity with their home jurisdiction's procedural terrain compared to a Kenyan healthcare start-up, a Kenyan patient, or the Kenyan data-protection authority in the hypothetical above. The bilateral conflict-of-laws framework, precisely because it forces a single winner-take-all forum selection among genuinely multiparty and multi-jurisdictional interests, systematically advantages the party best positioned to dominate that selection process which is, in the overwhelming majority of real-world multi-tenant cloud disputes, the

[49]Christopher Kuner, Transborder Data Flows and Data Privacy Law (Oxford University Press 2013) 108-115.

infrastructure provider rather than the tenant, the data subject, or the smaller sovereign whose citizens are affected.[50]

This is precisely the governance gap this article seeks to address: not merely the technical difficulty of applying old doctrine to a new architecture, but the systematic distributive injustice that results when a structurally multiparty problem is forced through a structurally bilateral adjudicative funnel. Part V argues that the appropriate institutional response is not a better conflict rule but a different kind of institution altogether one designed, from first principles, to accommodate genuine multiplicity rather than to compress it into a false bilateral choice.

5. From Litigation to Mediation: Towards a Multi-Door Model for Cloud Jurisdictional Disputes

5.1. The Multi-Door Courthouse Idea, Revisited

Frank Sander's multi-door courthouse concept, first articulated at the 1976 Pound Conference, proposed that a single dispute-resolution institution should function as an intake and referral mechanism directing disputants toward whichever process adjudication, arbitration, mediation, or a hybrid best fits the structural characteristics of their particular dispute, rather than assuming that litigation before a generalist court is the default and all other processes merely inferior substitutes.[51]

The insight most relevant to this article is Sander's underlying premise that different disputes possess different structural characteristics number of parties,

[50]This dynamic parallels, and arguably intensifies, the well-documented forum-shopping asymmetries identified in transnational corporate litigation generally: see Cassandra Burke Robertson, 'Transnational Litigation and Institutional Choice' (2011) 51 Boston College Law Review 1081, 1090-1098.

[51]Frank EA Sander, 'Varieties of Dispute Processing' (1976) 70 Federal Rules Decisions 111, 130-134.

ongoing versus terminated relationship, need for precedent, emotional versus purely economic stakes and that a single, undifferentiated adjudicative process is poorly suited to disputes whose structural characteristics vary as dramatically as those Sander catalogued. Multi-tenant cloud jurisdictional disputes, as demonstrated in Part IV, possess a structural characteristic that Sander's original taxonomy did not anticipate but that his underlying logic accommodates comfortably: an irreducibly multiparty, multi-sovereign structure for which bilateral adjudication, however skillfully conducted, systematically produces either an arbitrary winner-take-all result or an unresolved multiplicity of parallel and potentially conflicting proceedings.

Mediation possesses three structural features that make it, in principle, far better suited than litigation or bilateral arbitration to disputes of this kind. First, mediation is not constrained by the requirement of a single applicable law: a skilled mediator can facilitate a negotiated outcome that self-consciously blends elements responsive to Kenyan, Irish, and Singaporean regulatory concerns simultaneously, without essential prerequisite to determine which single body of law formally 'governs' the dispute[52].

Second, mediation is not constrained to two parties: unlike litigation, which requires careful and often contested joinder procedures to add additional parties, and unlike arbitration, which generally requires all parties' consent to consolidation, mediation can, from its inception, be structured as a multiparty process convening every interested tenant, regulator, and intermediary at a single table.

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[52] Brummans, B. H., Higham, L., & Cooren, F, The work of conflict mediation: Actors, vectors, and communicative relationality. Human Relations, Volume 75 (4) of Journal of Human Relations of 2022.
Kariuki Muigua, Enforcing Mediated Agreements and the Singapore Convention: The African Experience. Available at <https://kmco.co.ke/wp-content/uploads/2024/07/Enforcing-Mediated-Agreements-and-the-Singapore-Convention-The-African-Experience-x.pdf> Accessed on 25th October 2026

Third, and most importantly for the sovereignty concerns canvassed in Parts III and IV, mediation produces a negotiated rather than an imposed outcome, meaning that no single sovereign's regulatory interest need be formally subordinated to another's as a precondition of resolution each interested regulator can extract from the process the specific undertakings, remediation measures, or compliance commitments responsive to its own citizens' interests, without any of the parties needing to concede that a rival regulator's law was the one that 'actually' governed.[53]

5.2. Designing a Multi-Door Model for Cloud Disputes

Translating this general insight into an institutional design suited specifically to multi-tenant cloud disputes requires attention to three features of the cloud-computing sector that distinguish it from the paradigm multiparty disputes environmental, mass-tort, public-policy for which multi-door and consensus-building processes were originally developed.

First, the technical opacity problem. Unlike an environmental dispute, in which the physical facts of contamination are, however contested, at least in principle observable and verifiable by all parties, a multi-tenant cloud dispute frequently turns on technical facts which shard held which data, which jurisdiction's servers processed a given request, which layer of the tenancy stack failed that are known, if at all, only to the infrastructure provider, and are frequently not fully known even to it in real time given the scale and automation of modern cloud operations. Any credible multi-door process for cloud disputes must therefore incorporate, as a mandatory first phase, a neutral technical fact-finding function analogous to the technical experts

[53]On the comparative advantages of consensual over adjudicative processes for multiparty, polycentric disputes generally, see Lon L Fuller, 'Mediation Its Forms and Functions' (1971) 44 Southern California Law Review 305, 325-334, and, applying similar reasoning to complex multi-stakeholder regulatory disputes, Lawrence Susskind and Jeffrey Cruikshank, Breaking the Impasse: Consensual Approaches to Resolving Public Disputes (Basic Books 1987) 25-40.

increasingly used in complex commercial and investment-treaty arbitration, tasked specifically with establishing an agreed factual record of data location, flow, and processing before substantive negotiation begins.[54]

Second, the regulator-as-party problem. Multi-door processes[55] designed for private commercial disputes rarely need to accommodate a sovereign regulator as a direct participant with formal decision-making standing rather than as an external enforcer of whatever private outcome the parties reach. A cloud jurisdiction mediation model must depart from this convention and treat interested data-protection authorities, financial regulators, and other public bodies as full participants with standing to propose and veto specific terms touching their own regulatory mandate mirroring, in this respect, the multi-stakeholder consensus-building processes developed for environmental and public-policy disputes, in which government agencies participate as parties rather than as background enforcers.[56]

This is not a wholly novel proposition for data-protection regulators specifically: the cooperation and consistency mechanisms of the General Data Protection Regulation already require supervisory authorities from different

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[54]On the growing use of independent technical experts and expert-determination clauses in complex technology and infrastructure arbitration, see Doug Jones, 'Party Autonomy, Overriding Mandatory Rules, and the Role of Arbitral Institutions in the Application of the New York Convention' (2018) 33 ICSID Review 51, 58-61.

[55] Sander FEA, 'Varieties of Dispute Processing' (1976) 70 FRD 111. The foundational paper that introduced the multi-door courthouse. Sander's model screens private civil disputes and channels them to the most appropriate process (mediation, arbitration, early neutral evaluation, litigation, etc.). The design assumes private disputants; there is no structural provision for a sovereign regulator as a formal party with decision-making authority inside the process.

[56]Susskind and Cruikshank (n 27) 39-40, describing the practice, in environmental consensus-building, of convening government agencies as direct participants alongside private stakeholders rather than as external approving authorities.

Member States to reach consensus positions on cross-border processing through the European Data Protection Board, demonstrating that multi-regulator consensus processes are institutionally workable even among sovereign authorities jealous of their own competence.[57]

Third, the recurring-relationship problem. Cloud infrastructure providers, tenants, and regulators are, characteristically, repeat players who will continue to interact commercially and regulatorily long after any single dispute concludes a structural feature mediation is unusually well suited to exploit[58], since a negotiated settlement preserving an ongoing commercial and regulatory relationship is typically more valuable to a cloud provider than a litigated victory that damages its standing with regulators whose future cooperation it will continue to need[59]. This repeat-player dynamic, well documented in the broader alternative dispute resolution literature as a factor favoring mediation's uptake in commercial contexts, is arguably even more pronounced in cloud computing than in most other commercial sectors, given the extreme concentration of the infrastructure market among a small number

[57]Regulation (EU) 2016/679 (n 15) arts 60-65, establishing the 'one-stop-shop' and consistency mechanisms governing cooperation among supervisory authorities in cross-border cases.

[58] Galanter M, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95 (and subsequent literature applying the concept). The foundational analysis of "repeat players" versus "one-shotters." Repeat players develop long-term strategies, cultivate relationships with institutional actors, and often prefer settlements that preserve future opportunities over one-off victories.

[59] White & Case, 'Server wars: the future of data center arbitration' (2025). Available at https://www.whitecase.com/insight-alert/server-wars-future-data-center-arbitration Accessed on 26th October 2026.. Emphasises the desirability of mediation or other amicable processes "without disruption to the long-term business relationship, which may be essential where contractors and data center owners are looking to deliver a pipeline of projects over longer time horizons."

of hyperscale providers who will predictably face similar multiparty disputes again.[60]

5.3. Enforceability: Answering the Obvious Objection

The obvious objection to any mediation-centred proposal is enforceability: a negotiated settlement binds only those who sign it, and offers no mechanism analogous to a court judgment or an arbitral award enforceable under the New York Convention for compelling compliance from a recalcitrant party. This objection has real force but is considerably weaker than it first appears in the specific context of multi-tenant cloud disputes, for two reasons. First, the multi-door model proposed here does not displace adjudication entirely but rather channels disputes toward mediation as a mandatory first stage, with unresolved issues proceeding to binding arbitration structured, crucially, as a single consolidated multiparty arbitration convened under institutional rules specifically permitting joinder and consolidation of related claims arising from a common cloud infrastructure event, of the kind increasingly available under the revised rules of major arbitral institutions.[61]

Under this hybrid design, mediation resolves the substantial majority of disputes for which a negotiated, multi-regulator-endorsed outcome is achievable, while a genuinely consolidated arbitration rather than the

[60]On repeat-player dynamics and their influence on dispute-resolution process choice generally, see Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95, 100-103, and, in the commercial mediation context specifically, Deborah R Hensler, 'Suppose It's Not True: Challenging Mediation Ideology' [2002] Journal of Dispute Resolution 81, 91-95.

[61]See for instance International Chamber of Commerce, Arbitration Rules (2021) arts 7-10, permitting joinder of additional parties and consolidation of related arbitrations subject to specified conditions; and Singapore International Arbitration Centre, Arbitration Rules (6th edn, 2016) rr 8, 24, containing analogous consolidation provisions.

fragmented single-tenant arbitrations described in Part III remains available as an enforceable backstop for the residual disputes mediation cannot resolve.

Second, and more speculatively, the increasing willingness of major cloud providers to bind themselves contractually, in standard-form terms of service applicable across their entire multi-tenant customer base, to specific dispute-resolution mechanisms as a condition of doing business in regulated sectors suggests that a sufficiently well-designed and reputable cloud jurisdiction mediation institution could achieve broad *ex ante* contractual buy-in even without formal treaty backing[62], in much the same way that the ICC's arbitration rules achieved global commercial acceptance decades before most states had ratified the New York Convention[63].

6. An African Perspective: Kenya, the Malabo Convention, and the Sovereignty Deficit

6.1. Kenya's Data Protection Act 2019 and Its Jurisdictional Ambition

The preceding analysis has, of necessity, been conducted substantially through the doctrinal vocabulary of the United States[64] and the European Union, reflecting the reality that these two jurisdictions host the overwhelming majority of the world's hyperscale multi-tenant cloud infrastructure and have

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[62] Egan M and Yu H, 'Principled and Practical Approaches to Data Flows in International Commercial Arbitration – Case Study of England and Singapore' (2025) Journal of Business Law / Arbitration International.

[63] Schinazi M, 'The Development of the ICC Arbitration System' in The Three Ages of International Commercial Arbitration (Cambridge University Press 2021) ch 7.

[64] Synergy Research Group / TechInsights, 'Hyperscale Spending Spree is Driving Dramatic Growth in Data Center Capacity' (December 2025).
https://www.techinsights.com/blog/hyperscale-spending-spree-driving-dramatic-growth-data-center-capacity
Reports the US share of worldwide hyperscale operational capacity at 55% (up from 52% three years earlier). Amazon, Microsoft and Google together account for the majority of that capacity.

therefore produced the bulk of the litigated and legislated precedent on cloud jurisdiction[65]

This is itself a symptom of the sovereignty deficit this Part examines: African states, including Kenya, are overwhelmingly consumers rather than hosts of multi-tenant cloud infrastructure[66], meaning that the great majority of Kenyan citizens' cloud-resident data is, as a structural matter, physically stored on servers outside Kenyan territory and legally subject[67], at least in the first instance, to whichever foreign jurisdiction's rules the hosting provider's home state applies.[68]

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[65] Michels JD, Millard C, Walden I and Wuermeling U, 'Cloud Sovereignty and the GDPR, Part One: US Government Access to European Data' (2024) SSRN. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4911552.
See generally, Synergy Research Group / TechInsights, 'Hyperscale Data Center Count Hits 1,136; Average Size Increases; US Accounts for 54% of Total Capacity' (March 2025 / updated reporting 2025–2026).
https://www.techinsights.com/blog/hyperscale-data-center-count-hits-1136-average-size-increases-us-accounts-54-total-capacity. States that the United States accounts for well over half of worldwide hyperscale data-centre capacity (measured by MW of critical IT load). Europe and China each account for roughly one-third of the remaining capacity.

[66] Lineserve, 'Cloud Providers in Kenya: Who Operates Locally (2026)' (detailed mapping showing hyperscalers still serve from abroad; only local/smaller operators have in-country multi-tenant servers).

[67] Thomas Louis Advocates, 'ODPC's Latest Guidelines: 7 Cross-Border Data Rules' (1 October 2026); Njogu Associates, 'Taking Data Abroad: What the ODPC's New Cross-Border Transfer Guidance Means for Your Business' (2026); Office of the Data Protection Commissioner, Guidance Notes for Cross-border Data Transfers (September 2026); Servercore, 'Data Protection Act 2019 in Kenya: Data Residency & ODPC Enforcement' (2026)
https://servercore.com/blog/articles/kenya-data-protection-act-data-residency/

[68]For an account of the broader continental infrastructure asymmetry, see Arthur Gwagwa and others, 'Artificial Intelligence (AI) Deployments in Africa: Benefits,

Kenya's Data Protection Act 2019 represents a deliberate legislative response to this asymmetry[69]. Enacted after public controversy over the government's Huduma Namba biometric identification programme exposed the absence of any comprehensive statutory framework governing personal data,[70] the Act establishes an Office of the Data Protection Commissioner with jurisdiction over the processing of personal data of data subjects located in Kenya, whether or not the data controller or processor is itself established in Kenya a subject-location test structurally identical to Article 3 of the GDPR, and one that inherits precisely the multi-tenant enforceability difficulties canvassed in Part III.[71]

The Act's cross-border transfer provisions illustrate the difficulty acutely. A data controller or processor may transfer personal data outside Kenya only where it demonstrates appropriate safeguards, or where the recipient jurisdiction has been confirmed by the Data Commissioner to have adequate data-protection safeguards.[72] For a bilateral data transfer between two clearly

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Challenges and Policy Dimensions' (2022) 15 The African Journal of Information and Communication 1, 8-11, documenting the concentration of hyperscale cloud infrastructure outside the African continent notwithstanding rapidly growing African cloud-service consumption.

[69] Antony Mugambi Laibuta, Adequacy of Data Protection Regulation in Kenya (Phd in Law Thesis, 2023) University of Witwatersrand

[70]Data Protection Act 2019 (Kenya), Act No 24 of 2019, enacted to give effect to article 31(c) and (d) of the Constitution of Kenya 2010, guaranteeing the right to privacy; on the Huduma Namba controversy as a proximate legislative catalyst, see Nubian Rights Forum v Attorney General [2020] eKLR (High Court of Kenya, Petition 56 of 2019).

[71]Data Protection Act 2019 (Kenya) s 4, extending the Act's application to the processing of personal data of a data subject in Kenya by a data controller or processor 'not established in Kenya only if... [processing] relates to the offering of goods or services... or the monitoring of the data subject's behaviour'.

[72]ibid ss 48-50, and the Data Protection (General) Regulations 2021 (Kenya), regs 39-43, elaborating the adequacy and safeguards requirements for cross-border transfers.

identified controllers, this is a workable, if administratively demanding, requirement. Applied to multi-tenant cloud infrastructure, in which data belonging to a Kenyan tenant may be automatically, invisibly, and continuously replicated across several foreign jurisdictions as an artefact of the provider's own disaster-recovery architecture rather than any discrete, identifiable 'transfer' decision made by either the Kenyan controller or the foreign processor, the provision's transactional model of cross-border transfer as a discrete, assessable event sits uneasily with the technical reality described in Part II.

The Office of the Data Protection Commissioner[73] has, in its enforcement practice to date, focused predominantly on domestic processing violations as illustrated by its 2025 compensation order against Liquid Telecommunications Kenya for processing personal data without consent and failing to honour a data subject's erasure request[74] rather than on the harder multi-tenant, multi-jurisdictional cases this article has canvassed, reflecting both the institutional youth of the Office and the genuine doctrinal difficulty such cases present for a domestic regulator acting alone.

6.2. The Malabo Convention: A Continental Framework Still Finding Its Feet

The African Union's Convention on Cyber Security and Personal Data Protection, adopted at Malabo in June 2014[75], represents the continent's most ambitious attempt at a harmonized regional framework[76], obliging states parties to establish a national data-protection authority and a comprehensive

[73] Section 5 of Data Protection Act 2019

[74]Office of the Data Protection Commissioner (Kenya), Determination in the Matter of Andrew Alston v Liquid Telecommunications Kenya Ltd (Complaint No 0781 of 2023, 2025), finding a violation of Data Protection Act 2019 (Kenya) ss 26(a) and 40(1)(b).

[75] African Union, African Union Convention on Cyber Security and Personal Data Protection Legislation as at 27 June 2014

[76] Greenleaf G and Cottier B, 'Comparing African Data Privacy Laws: International, African and Regional Commitments' [2020] UNSWLRS 32.

statutory data-protection regime[77], and articulating, in Article 8, the underlying objective of strengthening 'fundamental rights and public freedoms, particularly the protection of physical data' while safeguarding 'the principle of the free flow of information'.[78] Its jurisdictional and enforcement architecture, however, remains considerably less developed than either the GDPR's cooperation and consistency mechanisms or even the CLOUD Act's executive-agreement framework: the Convention establishes no continental equivalent of the European Data Protection Board capable of resolving cross-border disputes among national authorities[79], and no mechanism analogous to mutual legal assistance treaties specifically calibrated to cloud-stored electronic evidence.

Ratification has, moreover, proceeded slowly: as of the most recent African Union treaty status list, only sixteen of the fifty-five member states have deposited instruments of ratification, a threshold that took the Convention nearly seven years to satisfy even for the minimum fifteen ratifications required for entry into force.[80] Kenya itself has signed but not yet ratified the Convention, leaving its own Data Protection Act 2019 as an unharmonized[81],

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[77] Dianah Ajuna, 'Beyond the GDPR: Culturally-Contextualized Privacy and Data Protection in Africa's Expanding Digital Landscape' (PhD thesis, University of Ottawa 2025).

[78]African Union Convention on Cyber Security and Personal Data Protection (adopted 27 June 2014, not yet in force generally) EX.CL/846(XXV), art 8(1).

[79] Dianah Ajuna, 'Beyond the GDPR: Culturally-Contextualized Privacy and Data Protection in Africa's Expanding Digital Landscape' (PhD thesis, University of Ottawa 2025).

[80]African Union, List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention) (status as of 2024), recording sixteen ratifications and sixteen deposits against a fifteen-state entry-into-force threshold.

[81] Retrieved from < https://www.parliament.go.ke/node/26523 > Accessed on 25th October 2026

purely domestic instrument for the time being, unable to draw on any binding continental cooperation mechanism when a multi-tenant dispute implicates data subjects or infrastructure across several African states simultaneously a scenario of rapidly increasing practical importance as African cloud consumption, and African cloud infrastructure investment, both continue to expand.

6.3. Why Multi-Door Mediation Is Especially Suited to the African Context

This article's proposed mediation-centred model is not merely transplantable to the African and Kenyan context; it is, on balance, better suited to it than the litigation-centred alternatives that dominate the American and European doctrinal landscape surveyed in Part III, for three distinct reasons specific to the region's institutional and jurisprudential character.

First, multi-door[82] and consensus-based dispute resolution possess deep and continuing legitimacy within African legal traditions independent of any imported alternative-dispute-resolution vocabulary: reconciliatory, consensus-oriented approaches to dispute settlement, oriented toward restoring relationships rather than declaring a single winner, are longstanding features of customary dispute-resolution practice across the continent and are increasingly recognised within Kenya's own constitutional and statutory framework, including Article 159(2)(c) of the Constitution of Kenya 2010[83], which directs courts to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute-resolution mechanisms.[84] A mediation-centred cloud jurisdiction protocol is, in

[82] Jerameel Kevins, Rethinking the Multidoor Approach to Justice in Light of Contemporary Realities in Kenya, Volume 4(3) of Journal of Appropriate Dispute Resolution and Sustainability (2026)

[83] Article 159(2)(c) of the Constitution of Kenya 2010

[84]Constitution of Kenya 2010, art 159(2)(c). On the deeper jurisprudential continuity between constitutionally endorsed alternative dispute resolution and customary

this specific sense, not a foreign transplant awkwardly grafted onto Kenyan legal culture but a mode of dispute resolution with independent domestic legitimacy that happens also to solve the technical multiparty problem canvassed in Part IV[85].

Second, given the acute infrastructure asymmetry described above, a mediation-centred model materially reduces the litigation-cost disadvantage that a purely adjudicative model imposes on African tenants[86], data subjects, and regulators forced to litigate in foreign fora against better-resourced multinational infrastructure providers[87]. Because a well-designed multi-door process convenes all interested parties[88], including host-state and consumer-state regulators, at a single negotiating table rather than requiring each interested party to independently fund parallel proceedings in whichever forum its own bilateral contract or connecting factor happens to specify, it structurally lowers the transaction-cost barrier that, as Part IV observed, currently allows the best-resourced party to dominate forum selection by default.

Third, and finally, a mediation-centred model is considerably more compatible with the still-developing state of continental harmonisation described above

consensus-based dispute settlement in Kenya, see Kariuki Muigua, Settling Disputes Through Arbitration in Kenya (4th edn, Glenwood Publishers 2017) ch 1.

[85] Abdullah Alashjaee, Toward a Conflict Resolution Protocol for Cloud Forensics Investigation Volume 12 2024 IEEE Access

[86] Jacqueline Nolan-Haley, Mediation and Access to Justice in Africa: Perspectives from Ghana 21 Harv. Negot. L. Rev. 59 (2015)

[87] Ernest Uwazie, Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability, Africa Security Brief Number 16

[88] A Blueprint for Social Transformation through Access to Justice: A People-Centred Justice Approach

than any litigation-centred alternative[89], since it does not require the prior existence of a binding treaty[90], a functioning continental court, or a fully ratified Malabo Convention[91] to begin operating it can be constituted, in the first instance, as a voluntary institutional arrangement among willing cloud providers[92], national regulators, and regional arbitral institutions, exactly as this article's concluding Part now proposes.

7. Conclusion: Towards a Cloud Jurisdiction Mediation Protocol

This article has argued that multi-tenant cloud infrastructure does not merely strain conflict-of-laws doctrine; it exposes a structural limitation inherent in bilateral adjudicative methodology itself, one that no amount of doctrinal refinement within the territorial, extraterritorial, or party-autonomy frameworks surveyed in Part III can resolve, because the underlying disputes are not, in fact, bilateral. A server that hosts the fragmented data of dozens of unrelated tenants across several jurisdictions generates, by the ordinary operation of its own architecture, a lattice of simultaneously legitimate and mutually irreducible jurisdictional claims that a single winner-take-all forum-

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[89] De Palo G, Grajzl P and Tvaronavičienė A, 'The European Mediation Paradox revisited: Insights from a new expert survey' (2026) 33(3) Maastricht Journal of European and Comparative Law 311. See also: Parasiuk V, Grabar N, Zdrenyk I, Onyshko O and Fedina N, 'Harmonisation of Ukrainian legislation with EU law in the field of alternative civil dispute resolution: Challenges and prospects' (2025) 8(1) Social & Legal Studios 336

[90]Daku S, 'Legal Harmonization and Dispute Resolution under the African Continental Free Trade Area (AfCFTA): Implications for Nigerian Trade Law and Investment Protection Framework' (2025/2026) Journal of Customary and Religious Law.\
See Generally, Salawu BM and Salawudeen MD, 'Dispute Resolution Mechanism under the African Continental Free Trade Area Agreement' (2025) 2(2) Wollega University Journal of Law

[91] African Union Convention on Cyber Security and Personal Data Protection

[92] Nyaga BM, Ondego JC and Joel M, 'Mediation and Data Protection Law in Kenya: Appraising ADR for Optimal Access to Justice under the DPA 2019' (2023)

selection rule can only resolve by arbitrarily privileging one claim over several equally valid others a dynamic that, as Part IV demonstrated, systematically favours the best-resourced party to any given dispute, which in the overwhelming majority of real-world cases is the multinational infrastructure provider rather than the tenant, the data subject, or the smaller sovereign whose citizens are affected.

The remedy this article proposes is neither a new treaty, whose negotiation among the world's major cloud-hosting and cloud-consuming states would likely require a decade or more even under optimistic assumptions, nor a further refinement of existing bilateral choice-of-law doctrine, which Part IV has argued cannot in principle accommodate genuine multiparty, multi-sovereign fragmentation regardless of how skillfully its connecting factors are calibrated. It is, instead, an institutional proposal capable of voluntary, incremental adoption: a Cloud Jurisdiction Mediation Protocol, administered jointly by a coalition of interested arbitral institutions and data-protection authorities, offering three concrete features absent from the status quo. First, a standing panel of jointly accredited technical fact-finders, available on short notice to establish an agreed factual record of data location, flow, and processing before substantive negotiation begins, addressing the technical opacity problem identified in Part V.

Second, a standard multiparty mediation clause, available for voluntary incorporation into cloud service agreements at every layer of the tenancy stack, obliging infrastructure providers, platform intermediaries, and software vendors alike to participate in a single, consolidated mediation convened at the request of any affected tenant or regulator, rather than permitting each contractual layer to insist on its own separately negotiated and mutually incompatible dispute-resolution clause. Third, a consolidated fallback arbitration mechanism, modelled on the joinder and consolidation provisions already available under the rules of the International Chamber of Commerce and the Singapore International Arbitration Centre, ensuring that disputes

mediation cannot resolve still terminate in a single enforceable award rather than in the fragmented, forum-shopped multiplicity of parallel proceedings that currently characterizes multi-tenant cloud litigation.

None of this requires African states to wait for the Malabo Convention's slow ratification process, nor for Washington and Brussels to resolve their own transatlantic jurisdictional disagreements, before beginning to protect their citizens' interests in cloud-resident data. A coalition of the willing a handful of major cloud providers with a genuine commercial interest in reducing the litigation costs and reputational risk of fragmented multi-jurisdictional disputes, a handful of regulators, including, this article submits, Kenya's own Office of the Data Protection Commissioner, with an interest in an enforcement mechanism more responsive than unilateral domestic litigation against a foreign multinational, and a handful of arbitral institutions with an institutional interest in expanding into a rapidly growing and currently underserved dispute-resolution market could constitute such a Protocol within a matter of months, not decades. The server that hums quietly through the night, indifferent to the sovereignty anxieties of the states whose citizens' data it happens, at any given moment, to hold, will not resolve those anxieties on its own. But the institutions built around it, if designed with the multiparty structure of its architecture rather than the bilateral assumptions of nineteenth-century private international law in mind, finally might.

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The New Frontier of Digital Justice: Artificial Intelligence, Data Protection and Arbitration in the Algorithmic Age

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Abstract

The rapid digital transformation of the twenty-first century is reshaping legal systems, commercial transactions, and dispute resolution mechanisms worldwide. At the forefront of this transformation is Artificial Intelligence (AI), which is increasingly being utilized in arbitration to enhance efficiency, reduce costs, streamline case management, automate legal research, and support decision-making processes. While these technological innovations offer significant opportunities for improving access to justice and the effectiveness of arbitral proceedings, they also raise critical legal, ethical, and regulatory concerns, particularly regarding data protection, confidentiality, procedural fairness, transparency, and accountability.

This article examines the intersection of artificial intelligence, data protection, and arbitration within the broader framework of digital justice. It argues that although arbitration has traditionally been valued for its flexibility, confidentiality, and party autonomy, the growing integration of AI technologies presents challenges that existing legal and institutional frameworks are often ill-equipped to address. The extensive collection, processing, and cross-border transfer of data during arbitral proceedings create significant privacy and cybersecurity risks in an era marked by increasing data breaches and digital surveillance.

Drawing on international legal instruments, comparative jurisprudence, emerging arbitral practices, and contemporary data protection regimes, the article explores how AI is transforming the arbitration landscape. Particular attention is given to issues of algorithmic bias, explainability, human oversight, and the potential impact of automated systems on due process and the legitimacy of arbitral decision-making.

Introduction

The administration of justice is undergoing a profound transformation driven by rapid technological innovation. Digital technologies are increasingly transforming how individuals, businesses, governments, and legal institutions communicate, conduct transactions, and resolve disputes in the modern world.[1] At the heart of this transformation is Artificial Intelligence (AI), which

[1] Ethan Katsh and Orna Rabinovich-Einy, Digital Justice: Technology and the Internet of Disputes

is increasingly being integrated into legal services and dispute resolution processes.[2] Through predictive analytics, automated legal research, intelligent document review, and decision-support tools, AI is increasingly shaping the management and resolution of legal disputes.[3] The emergence of these technologies has ushered in a new era of digital justice, where technology serves not merely as a supporting instrument but as an integral component of legal and dispute resolution processes.[4]

The rise of digital justice has been particularly evident within arbitration. Traditionally celebrated for its flexibility, efficiency, confidentiality, and party autonomy, arbitration has consistently demonstrated an ability to adapt to changing commercial realities.[5] The globalization of commerce, the growth of cross-border transactions, and the increasing complexity of international disputes have encouraged arbitral institutions to embrace technological innovation as a means of improving efficiency and reducing costs. The COVID-19 pandemic accelerated this trend, compelling arbitral tribunals and institutions worldwide to adopt virtual hearings, electronic submissions, cloud-based document management systems, and other digital solutions that have since become embedded in arbitral practice.[6] Consequently, arbitration has emerged as one of the most technologically receptive forms of dispute resolution in the modern era.

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[2] Richard Susskind, Tomorrow's Lawyers: How Artificial Intelligence Will Transform the Practice of Law

[3] Jens Petry and Tom Gassmann, Artificial intelligence in dispute resolution: developments, challenges and perspectives for legal practice. Available on: https://www.reuters.com/legal/legalindustry/artificial-intelligence-dispute-resolution-developments-challenges-perspectives-2025-07-11/ <Accessed on 29 October 2026>

4 Supra, note 1

5 Gary B Born, International Commercial Arbitration

6 Maxi Scherer, Remote Hearings in International Arbitration: An Analytical Framework

1.1 Integrating Artificial Intelligence into Arbitration proceedings

Artificial intelligence now represents the next stage in this technological evolution. Contemporary AI systems are capable of reviewing vast quantities of documents, identifying relevant evidence, predicting litigation outcomes, assisting in legal drafting, and supporting procedural decision-making.[7] These capabilities promise substantial benefits for arbitral proceedings. By automating repetitive tasks and enhancing analytical capabilities, AI has the potential to reduce delays, lower costs, improve consistency, and increase access to justice for parties who might otherwise be excluded by the high expenses associated with dispute resolution.[8] In a world where commercial disputes often involve millions of documents and complex factual matrices, AI-driven tools offer unprecedented opportunities for efficiency and accuracy.[9]

Yet the integration of AI into arbitration raises profound legal and normative questions. Arbitration is fundamentally rooted in principles of fairness, impartiality, due process, and party autonomy.[10] The introduction of algorithmic systems into processes traditionally governed by human judgment challenges many of these foundational values.[11] Questions arise regarding the extent to which arbitral decision-making can be delegated to machines, whether algorithmic recommendations are transparent and explainable, and how accountability should be assigned when AI-generated outputs influence procedural or substantive outcomes. These concerns become particularly significant where AI systems operate as "black boxes," generating conclusions

7 Daniel Katz, Michael Bommarito and Josh Blackman, A General Approach for Predicting the Behavior of the Supreme Court of the United States
8 Supra, note 2
9 Quinn Emanuel, Agentic AI Document Review Is Transformative for Complex Litigation. Available on: https://www.quinnemanuel.com/media/q22idirc/agentic-ai-document-review-is-transformative-for-complex-litigation-syllo-quinn-emanuel.pdf <Accessed on 29 October 2026>
10 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985* (as amended in 2006)
11 Catherine A Rogers, Ethics in International Arbitration

through processes that are difficult for users, parties, or even developers to understand fully.[12]

Closely intertwined with the rise of AI is the growing importance of data protection. Artificial intelligence depends upon data. Indeed, data has become the essential fuel of the digital economy, enabling machine learning systems to identify patterns, generate predictions, and improve performance over time.[13] Arbitration proceedings routinely involve the collection, processing, storage, and transfer of substantial amounts of personal, commercial, financial, and confidential information. Thus, put differently, the growing use of artificial intelligence (AI) in international arbitration has significant implications for privacy rights and data governance.[14] AI tools are increasingly employed for legal research, document review, predictive analysis, and drafting, requiring the processing of large volumes of confidential commercial information, privileged communications, and personal data.[15] While these technologies enhance efficiency and reduce costs, they also increase the risks of data breaches, unauthorized disclosure, loss of legal privilege, and non-compliance with data protection obligations.[16]

Recognizing these challenges, both the International Bar Association (IBA) and the International Chamber of Commerce (ICC) emphasize that the use of AI must be accompanied by robust safeguards to protect confidentiality, cybersecurity, and procedural fairness. They stress that arbitrators and legal practitioners must independently verify AI-generated outputs, exercise professional judgment, and adopt appropriate data governance and

[12] Frank Pasquale, The Black Box Society
[13] Viktor Mayer-Schönberger and Kenneth Cukier, Big Data: A Revolution That Will Transform How We Live, Work and Think
[14] International Chamber of Commerce, ICC Arbitration and ADR Commission Report: Leveraging Artificial Intelligence in International Arbitration (ICC 2024).
[15] Ibid
[16] Ibid

cybersecurity measures throughout arbitral proceedings.[17] These principles underscore that the responsible use of AI is essential to preserving the integrity, legitimacy, and fairness of international arbitration.[18]

Arbitrators, counsel, institutions, experts, and technology providers frequently handle sensitive information that may cross multiple jurisdictions, thereby exposing parties to complex regulatory obligations and heightened cybersecurity risks.[19]

1.2 The legislative and judicial development and AI embrace

The significance of data protection within arbitration has grown considerably in recent years. Major regulatory frameworks such as the European Union's General Data Protection Regulation (GDPR) have fundamentally altered the legal landscape governing personal data processing.[20] The GDPR's extraterritorial application means that many arbitral proceedings involving European parties or data subjects must comply with stringent requirements concerning consent, lawful processing, transparency, data minimization, accountability, and cross-border data transfers.[21] The importance of safeguarding personal data in transnational contexts was reinforced by the Court of Justice of the European Union in *Schrems II*,[22] which invalidated the EU-US Privacy Shield and underscored the necessity of ensuring adequate protection for personal data transferred across borders.[23] The decision

[17] Ibid

[18] International Bar Association, *Guidelines on the Use of Artificial Intelligence in Arbitration* (IBA 2024).

[19] ICCA-IBA Joint Task Force, Roadmap to Data Protection in International Arbitration (2020).

[20] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation).

[21] Paul Voigt and Axel von dem Bussche, The EU General Data Protection Regulation (GDPR): A Practical Guide

[22] *Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems* (Schrems II) Case C-311/18 [2020]

[23] Ibid

highlights the regulatory challenges that may arise where arbitral proceedings involve the international transfer of digital evidence, witness statements, and commercially sensitive information.[24]

Similar legislative developments have emerged across numerous jurisdictions, including Kenya through the Data Protection Act,[25] reflecting a broader global commitment to safeguarding informational privacy in the digital age.[26] Consequently, data protection considerations are no longer peripheral concerns but have become central elements of contemporary arbitral practice. In Kenya, judicial recognition of the importance of data protection was evident in *Nubian Rights Forum v Attorney General*,[27] where the High Court emphasized the need for adequate legal safeguards in the collection and processing of personal data.[28] The decision illustrates the growing constitutional significance of data governance and provides useful guidance for AI-enabled arbitral processes operating within data-driven environments.[29]

Beyond privacy concerns, the deployment of AI in arbitration raises questions regarding procedural justice and equality of arms. Algorithmic systems may inadvertently replicate or amplify existing biases embedded within training datasets, thereby generating discriminatory or distorted outcomes.[30] If such systems are utilized to assist in evaluating evidence, predicting case outcomes, or influencing procedural decisions, there is a risk that hidden biases could undermine the fairness and legitimacy of arbitral proceedings.[31] Similar concerns have emerged in judicial settings. In *State v Loomis*, the Wisconsin

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[24] Ibid

[25] Kenya, Data Protection Act, No 24 of 2019.

[26] Ibid

[27] *Nubian Rights Forum v Attorney General* [2020] eKLR.

[28] Ibid

[29] Ibid

[30] Cathy O'Neil, Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy.

[31] Ibid

Supreme Court considered the use of an algorithmic risk-assessment tool in criminal sentencing and acknowledged concerns regarding transparency, potential bias, and due process.[32] Although the court permitted its use, it emphasized that algorithmic tools should not replace independent human judgment, a principle that remains equally relevant to AI-assisted arbitral proceedings.[33] Furthermore, unequal access to advanced technological resources may create new forms of procedural inequality, particularly where sophisticated AI tools are available primarily to well-resourced parties such as multinational corporations.[34] Such disparities highlight the need for appropriate safeguards to ensure that technological innovation promotes, rather than undermines, equal access to justice.[35]

The regulatory landscape surrounding artificial intelligence remains fragmented and rapidly evolving. While governments and international organizations increasingly recognize the transformative potential of AI, consensus regarding appropriate governance mechanisms remains elusive. Recent initiatives, including the European Union AI Act,[36] the Organization for Economic Co-operation and Development (OECD) Principles on Artificial Intelligence,[37] and various UNESCO frameworks, reflect growing efforts to establish ethical and legal standards for trustworthy AI systems.[38] However, the application of these frameworks within arbitration remains underdeveloped, creating uncertainty regarding issues such as transparency, accountability, explainability, liability, and regulatory compliance.

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[32] *State v Loomis* 881 NW 2d 749 (Wis 2016).
[33] Ibid
[34] Richard Susskind, Online Courts and the Future of Justice
[35] Ibid
[36] Artificial Intelligence Act, Regulation (EU) 2024/1689.
[37] OECD, Recommendation of the Council on Artificial Intelligence (2019)
[38] UNESCO, Recommendation on the Ethics of Artificial Intelligence (2021)

Against this backdrop, arbitration occupies a unique position as a testing ground for the future of digital justice.[39] Unlike traditional court systems, arbitration possesses a degree of procedural flexibility that allows for experimentation with emerging technologies while maintaining core principles of fairness and party autonomy.[40] The central challenge for arbitral institutions and practitioners is not whether AI should be adopted, but how it can be integrated in a manner that preserves the fairness, legitimacy, and integrity of the arbitral process.[41] The future of arbitration lies not in replacing human arbitrators with machines, but in leveraging AI to enhance human decision-making while safeguarding procedural integrity, confidentiality, and fundamental rights.[42]

2.0 Artificial Intelligence: The new architect of international arbitration

Artificial intelligence (AI) has emerged as one of the most transformative innovations of our times in international arbitration, fundamentally reshaping the manner in which arbitral proceedings are initiated, administered, and concluded. Traditionally, arbitration has relied almost exclusively on human expertise, with arbitrators, counsel, and arbitral institutions exercising professional judgment in managing disputes.[43] Today, however, AI has assumed an increasingly influential role by supporting legal research, document review, case management, translation, predictive analytics, transcription, and the drafting of procedural documents.[44] Although AI does not replace the human decision-maker, it has become an indispensable technological partner that is redefining the architecture of international

[39] Ibid
[40] UNCITRAL, Notes on Organizing Arbitral Proceedings (2016).
[41] Silicon Valley Arbitration and Mediation Center, Guidelines on the Use of Artificial Intelligence in Arbitration (2024)
[42] Ibid
[43] Supra, note 15
[44] Ibid

arbitration by enhancing procedural efficiency, reducing costs, and improving access to justice.[45]

2.1 Opportunities presented by AI in international arbitration

The AI as the "new architect" of international arbitration reflects its capacity to redesign the procedural framework within which arbitration operates. Rather than merely functioning as a supplementary technological tool, AI increasingly influences how arbitral proceedings are planned, managed, and executed. Modern arbitral institutions have embraced digital technologies by incorporating electronic filing systems, virtual hearings, intelligent document management, automated scheduling, and AI-assisted legal analytics into their case administration processes.[46] These innovations enable tribunals to process complex disputes involving thousands of documents with unprecedented speed while allowing counsel to identify relevant evidence and legal authorities more efficiently than through traditional manual review.

AI has also transformed legal research and the preparation of arbitral submissions. Machine learning algorithms are capable of analyzing extensive databases of arbitral awards, treaties, legislation, institutional rules, and judicial precedents within a fraction of the time required by conventional legal research methods.[47] This significantly reduces the cost and duration of proceedings while enabling legal practitioners to identify persuasive authorities and emerging trends across multiple jurisdictions.[48] Consequently, AI enhances the quality of legal representation and contributes to more informed arbitral decision-making.[49] Another area in which AI is reshaping arbitration is case management. Contemporary AI-powered systems facilitate automated document classification, chronology building, translation of

[45] Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021)
[46] Supra, note 39
[47] Maxi Scherer, 'Artificial Intelligence and Legal Decision-Making: The Wide Open?' (2019)
[48] Ibid
[49] Ibid

multilingual evidence, hearing scheduling, transcript generation, and real-time document retrieval during hearings.[50] These capabilities are particularly valuable in complex international commercial and investment arbitrations, where disputes often involve voluminous evidence, numerous witnesses, multiple jurisdictions, and several applicable legal systems.[51] By streamlining administrative functions, AI allows arbitrators to devote greater attention to evaluating evidence, interpreting the law, and exercising independent judicial judgment.

The emergence of generative AI has further expanded the possibilities of arbitration by assisting practitioners in drafting procedural orders, witness summaries, chronologies, legal memoranda, and preliminary award structures.[52] Nevertheless, AI-generated outputs remain susceptible to factual inaccuracies, fabricated legal authorities, algorithmic bias, and reasoning that lacks legal reliability.[53] For this reason, both the International Bar Association (IBA) and the International Chamber of Commerce (ICC) emphasize that AI should complement, not replace the independent judgment of arbitrators and counsel.[54] Human oversight remains indispensable to preserve procedural fairness, confidentiality, impartiality, and the integrity of the arbitral process. Kenyan courts have consistently emphasized that arbitral tribunals derive their authority from the parties' agreement and must independently determine disputes within the scope of their mandate.[55] Consequently, AI cannot lawfully replace the tribunal's adjudicative function or exercise powers reserved to arbitrators.

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[50] International Bar Association, *Guidelines on the Use of Artificial Intelligence in Arbitration* (IBA 2024).
[51] Ibid
[52] Ibid
[53] Ibid
[54] Supra, note 17
[55] *Synergy Industrial Credit Limited v Cape Holdings Limited* [2020] eKLR

Kola Muwanga holds that, the rapid rise of Artificial Intelligence (AI) represents a significant shift in contemporary governance and justice administration.[56] These developments reflect a broader digital transformation in dispute resolution, driven by the dual imperatives of cost containment and increased accessibility, particularly in high-volume or resource-constrained contexts.[57]

2.2 Risks and challenges of AI in the international arbitration

Despite its transformative potential, the integration of artificial intelligence (AI) into international arbitration presents complex legal, procedural, and ethical challenges that threaten the very foundations upon which arbitration is built. International arbitration derives its legitimacy from procedural fairness, party autonomy, impartiality, confidentiality, and the independent exercise of arbitral judgment.[58] The increasing reliance on AI therefore raises an important question: how can arbitral tribunals embrace technological innovation without compromising these foundational principles? Recent guidance issued by leading arbitral institutions demonstrates that AI should be viewed not merely as a technological advancement but as a governance challenge requiring robust procedural safeguards.[59]

One of the most significant concerns is the preservation of due process. Every party to an arbitration is entitled to equality of arms, the opportunity to present its case fully, and an impartial determination by an independent tribunal. The Kenyan Supreme Court has similarly recognized that arbitration derives its

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[56] Kola Muwanga, Artificial Intelligence and the future of justice in Kenya: Between technological promise and the threat to human-centered legal order.

[57] Kola Muwanga, *Artificial Intelligence and the Global Transformation of Arbitration Processes.* Available at: https://ciarbkenya.org/thejournal/ <Accessed on 12 July, 2026>

[58] Chartered Institute of Arbitrators, *Guideline on the Use of AI in Arbitration* (September 2025) paras 1.1–2. 4.. Available on: https://www.ciarb.org/media/bpndtcgu/guideline-on-the-use-of-ai-in-arbitration_updated-sept-2025.pdf <Accessed on 12 July 2026>

[59] Ibid

legitimacy from party autonomy while remaining subject to the constitutional requirements of fairness and justice. In *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*,[60] the Court affirmed that judicial intervention in arbitration is limited but remains available where necessary to prevent grave injustice or a denial of due process.[61] AI-assisted arbitration must therefore operate consistently with these constitutional safeguards.

AI systems, particularly generative AI models, may inadvertently compromise these guarantees by producing inaccurate legal analyses, fabricated authorities, incomplete summaries of evidence, or recommendations that cannot be independently verified.[62] The dangers of uncritical reliance on generative AI have already materialized in judicial proceedings. In *Mata v Avianca, Inc*, counsel cited several fictitious authorities generated by ChatGPT without verifying their authenticity, prompting the court to impose sanctions.[63] The Chartered Institute of Arbitrators (CIArb) cautions that excessive or inappropriate reliance on AI may jeopardize procedural fairness, the rule of law, the legitimacy of arbitration, and even the enforceability of arbitral awards.[64] Similarly, the American Arbitration Association International Centre for Dispute Resolution (AAA-ICDR) emphasizes that arbitrators must retain complete control over decision-making and ensure that AI serves only as an assistive tool rather than a substitute for independent legal judgment.[65] Consequently, AI-generated outputs must always be critically reviewed,

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[60] *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*; Chartered Institute of Arbitrators–Kenya Branch (Interested Party) (2019) eKLR

[61] Ibid

[62] Supra, note 53

[63] *Mata v Avianca, Inc,* 678 F Supp 3d 443 (SDNY 2023).

[64] Supra, note 56

[65] AAA-ICDR Guidance on Arbitrators' Use of AI Tools (March 2025). Available on: https://www.adr.org/media/g1fgccns/2025_aaa-icdr-guidance-on-arbitrators-use-of-ai-tools-2.pdf <Accessed on 12 July 2026>

verified against authoritative legal sources,[66] and subjected to human scrutiny before influencing any procedural or substantive determination.[67]

Another persistent challenge concerns algorithmic bias. AI systems are trained on historical datasets that may contain systemic, cultural, linguistic, or jurisdictional biases.[68] If these biases are reproduced within arbitral proceedings, they may affect document prioritization, legal research, predictive analytics, credibility assessments, or the interpretation of evidence.[69] Such outcomes undermine the neutrality and impartiality that distinguish international arbitration from domestic adjudication. Recognizing this risk, the CIArb Guideline requires tribunals to consider the provenance, reliability, quality, transparency, and potential bias of any AI tool used during arbitral proceedings before permitting its deployment.[70] Likewise, the AAAi Standards for AI in Alternative Dispute Resolution advocate explainability, transparency, accountability, and continuous human oversight to ensure that algorithmic systems do not produce discriminatory or opaque outcomes.[71]

Equally important are the implications of AI for privacy and confidentiality. Confidentiality has long been regarded as one of arbitration's defining characteristics and a principal reason why commercial parties choose arbitration over litigation. However, many AI applications operate through cloud-based platforms that process user prompts on external servers, creating substantial risks regarding the storage, retention, and secondary use of

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[66] Ibid

[67] Ibid

[68] UNESCO, *Recommendation on the Ethics of Artificial Intelligence* (adopted 23 November 2021)

[69] Organisation for Economic Co-operation and Development (OECD), *Mapping Relevant Data Collection Mechanisms for AI Training*, OECD Artificial Intelligence Papers No 48 (OECD Publishing 2025)

[70] CIArb, *Guideline on the Use of AI in Arbitration* (September 2025) paras 6.3–6.4.

[71] AAAi Standards for AI in ADR. Available on: https://www.adr.org/news-and-insights/the-aaai-standards-for-use-of-ai-in-adr/ <Accessed on 12 July 2026>

confidential information.[72] Uploading pleadings, witness statements, expert reports, trade secrets, or draft awards into third-party AI systems may expose parties to unauthorized disclosure, misuse of commercially sensitive information, or inadvertent waiver of legal privilege.[73] The CIArb Guideline expressly recognizes confidentiality as a fundamental prerequisite of arbitration and warns that the use of third-party AI tools requires careful consideration of how data are collected, stored, processed, and protected.[74] These concerns extend beyond contractual confidentiality obligations and increasingly intersect with domestic and international data protection regimes.

Closely connected to confidentiality are the growing cybersecurity risks associated with AI-assisted arbitration. Modern international arbitrations frequently involve cross-border data transfers, virtual hearings, electronic document repositories, and cloud-based case management platforms.[75] While these technologies improve efficiency, they simultaneously expand the digital attack surface available to malicious actors.[76] Cyberattacks, ransomware incidents, unauthorized access to arbitral records, and data manipulation can undermine both the integrity of proceedings and public confidence in arbitration.[77] Recognizing these vulnerabilities, the ICCA-New York City Bar-CPR Protocol on Cybersecurity in International Arbitration recommends that tribunals undertake an early assessment of cybersecurity risks, implement proportionate security measures, establish secure communication channels, and develop incident response procedures tailored to the sensitivity of each

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[72] National Institute of Standards and Technology (NIST), *Guidelines for API Protection for Cloud-Native Systems*, Special Publication 800-228 (June 2025)
[73] Supra, note 58
[74] Ibid
[75] ICCA–NYC Bar–CPR Protocol on Cybersecurity in International Arbitration (2022 Edition). Available on: https://drs.cpradr.org/rules/protocols-guidelines/icca-nyc-bar-cybersecurities <Accessed on 12 July 2026>
[76] Ibid
[77] Ibid

dispute.[78] The Protocol further recognizes that effective cybersecurity is increasingly intertwined with compliance with international data protection obligations and the preservation of the confidentiality that underpins the arbitral process.[79]

Ultimately, these risks demonstrate that the successful integration of AI into international arbitration depends not solely on technological capability but on responsible governance. Contemporary institutional guidance increasingly converges on the principle that AI should augment rather than replace human judgment.[80] Arbitrators must remain accountable for every procedural and substantive decision, exercise independent legal reasoning, maintain transparency regarding the use of AI where appropriate, and ensure that technological innovation strengthens rather than weakens due process, impartiality, confidentiality, and cybersecurity.[81] In this respect, the future legitimacy of AI-assisted arbitration will depend less on the sophistication of algorithms than on the robustness of the legal and ethical frameworks governing their use.[82]

3. Emerging International Regulatory Frameworks: ICC, IBA, CIArb, UNCITRAL, SVAMC, the European Union AI Act and Kenya's AI Bill.

The rapid integration of artificial intelligence (AI) into international arbitration has outpaced the development of a harmonized, arbitration-specific regulatory framework,[83] leaving many aspects of its use governed by existing legal principles and evolving institutional guidance.[84] As already observed above,

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[78] Ibid

[79] Ibid

[80] Supra, note 59

[81] Ibid

[82] Ibid

[83] Ole Jensen, 'The Emerging Body of Regulation on the Use of Artificial Intelligence in International Arbitration: An Overview' (2025) b-Arbitra: Belgian Review of Arbitration

[84] Ibid

while AI offers unprecedented opportunities to improve the efficiency, accessibility, and quality of arbitral proceedings,[85] it also introduces complex legal and ethical concerns relating to due process, transparency, confidentiality, accountability, and cybersecurity.[86] Recognizing these challenges, leading international arbitral institutions and regulatory bodies have begun developing soft-law instruments, professional guidelines, and legislative frameworks to ensure that AI strengthens rather than undermines the legitimacy of international arbitration.[87] Collectively, these initiatives represent an emerging global consensus that AI should remain a tool to assist arbitration, not a substitute for independent human judgment.

3.1 International AI regulatory frameworks

Among the most influential developments is the International Chamber of Commerce (ICC) Commission Report on Leveraging Artificial Intelligence in International Arbitration.[88] Rather than advocating unrestricted technological adoption, the ICC adopts a cautious and principled approach by encouraging tribunals and parties to embrace AI only where its use remains compatible with procedural fairness, confidentiality, and the integrity of arbitral proceedings.[89] The ICC recognizes that AI can significantly improve document management, legal research, translation, scheduling, and case administration.[90] However, it

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[85] Silicon Valley Arbitration & Mediation Center, Guidelines on the Use of Artificial Intelligence in Arbitration (1st edn, 30 April 2024) Guidelines

[86] Mark-Silas A Malekela, 'AI and Confidentiality Protection in International Commercial Arbitration: Analysis of the Existing Legal Framework' (2025) 5 Discover Artificial Intelligence. Available on: AI and Confidentiality protection in International Commercial Arbitration: Analysis of the existing legal framework <Accessed on 29 October 2026>

[87] International Chamber of Commerce, *ICC Commission Report: Leveraging Artificial Intelligence in International Arbitration* (ICC 2024).

[88] International Chamber of Commerce (ICC) Commission on Arbitration and ADR, Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings (ICC, 2022).

[89] Supra, note 87

[90] Ibid

simultaneously warns that excessive reliance on AI-generated outputs may compromise the independence of arbitral reasoning and expose proceedings to due process challenges, particularly where algorithms generate inaccurate legal authorities or unreliable factual analyses.[91] Consequently, the ICC encourages early procedural discussions regarding the intended use of AI, transparency where appropriate, and the adoption of suitable cybersecurity and data governance protocols throughout the arbitral process.[92]

Similarly, the International Bar Association (IBA) has approached AI primarily from the perspective of professional ethics and the duties owed by lawyers and arbitrators.[93] The IBA emphasizes that technological innovation does not diminish the professional responsibilities of legal practitioners. Rather, lawyers remain personally accountable for the accuracy of legal submissions, the protection of confidential information, and the independent verification of AI-generated work.[94] The IBA therefore rejects any suggestion that AI can replace legal reasoning or professional judgment.[95] Instead, it promotes responsible AI use grounded in competence, confidentiality, transparency, and accountability, thereby reinforcing the ethical foundations upon which international arbitration depends.[96]

Perhaps the most arbitration-specific guidance has emerged from the Chartered Institute of Arbitrators (CIArb) through its 2025 *Guideline on the Use of AI in Arbitration*.[97] The Guideline acknowledges that AI is likely to become an indispensable component of modern arbitration while cautioning that its

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[91] Ibid

[92] Ibid

[93] International Bar Association, *Guidelines on the Use of Artificial Intelligence in Arbitration* (IBA 2024) Principles

[94] Ibid

[95] Ibid

[96] Ibid

[97] Chartered Institute of Arbitrators, *Guideline on the Use of AI in Arbitration* (September 2025)

use must never compromise the tribunal's duty to independently determine the dispute.[98] It addresses practical issues rarely examined in earlier instruments, including AI hallucinations, algorithmic bias, confidentiality, cybersecurity, explainability, disclosure obligations, and the verification of AI-generated outputs.[99] Significantly, the Guideline affirms that responsibility for every procedural and substantive decision remains with the arbitrator, regardless of the technological tools employed.[100] In doing so, CIArb establishes one of the clearest governance frameworks currently available for AI-assisted arbitration.

Although UNCITRAL has not yet adopted a dedicated instrument regulating AI in arbitration, its existing framework continues to provide the normative foundation upon which AI governance must operate. The UNCITRAL Model Law on International Commercial Arbitration guarantees equality of treatment, procedural fairness, and each party's right to present its case.[101] These principles remain fully applicable in AI-assisted proceedings and require tribunals to ensure that technological innovations do not prejudice either party or compromise the fairness of the arbitral process.[102] Current discussions within UNCITRAL concerning digital trade, electronic commerce, and digital dispute resolution further suggest that future international standards will increasingly address AI governance within arbitration and other forms of cross-border dispute resolution.[103]

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[98] Ibid

[99] Ibid

[100] Ibid

[101] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985*

[102] Ibid

[103] United Nations Commission on International Trade Law, *Working Group II (Dispute Settlement) and UNCITRAL Working Group IV (Electronic Commerce): Reports on Digitalisation and Dispute Resolution* (latest available reports).

Another important contribution has been made by the Silicon Valley Arbitration & Mediation Center (SVAMC) through its *Guidelines on the Use of Artificial Intelligence in Arbitration*.[104] Unlike broader institutional guidance, the SVAMC Guidelines focus specifically on the practical deployment of AI during arbitral proceedings.[105] They encourage parties, counsel, arbitrators, and arbitral institutions to maintain transparency regarding AI use where appropriate, preserve confidentiality, verify AI-generated information, and avoid delegating adjudicative functions to automated systems.[106] The Guidelines also stress that AI should support, rather than replace, the intellectual independence of arbitrators, recognizing that reasoned decision-making remains an inherently human responsibility.[107] Their practical orientation has made them an increasingly influential reference point for arbitral practitioners worldwide.

Outside the arbitration community, one of the most significant legislative developments is the European Union Artificial Intelligence Act,[108] the world's first comprehensive legal framework governing AI.[109] Rather than regulating arbitration directly, the AI Act establishes a risk-based regulatory model requiring AI systems to satisfy standards relating to transparency, human oversight, accountability, accuracy, cybersecurity, and data governance according to the level of risk they present.[110] Although international arbitration falls largely outside the direct scope of the Regulation, the Act is expected to exert considerable global influence because many arbitral institutions,

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[104] Silicon Valley Arbitration & Mediation Center, *Guidelines on the Use of Artificial Intelligence in Arbitration* (2024).

[105] Ibid

[106] Ibid

[107] Ibid

[108] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) [2024] OJ L, arts 8-15, 50-55.

[109] Ibid

[110] Ibid

multinational corporations, legal practitioners, and AI developers operate within or interact with the European Union.[111] Consequently, the principles embodied in the AI Act are likely to shape future best practices for AI governance across international dispute resolution.

3.2 The domestic and regional AI regulatory frameworks

Within our domestic and regional jurisdictions, a noteworthy African development is Kenya's Artificial Intelligence Bill, which is currently before the Senate and represents one of the continent's most ambitious attempts to establish a comprehensive statutory framework for the governance of artificial intelligence.[112] The Bill seeks to regulate the development, deployment, and use of AI systems in Kenya while simultaneously promoting innovation, protecting fundamental rights, and enhancing public trust in AI technologies.[113] Among its notable proposals are the establishment of the Office of the Kenya Artificial Intelligence Commissioner, the adoption of a risk-based regulatory framework for AI systems, mandatory obligations for developers and deployers of high-risk AI applications, and enhanced safeguards relating to transparency, accountability, human oversight, data governance, and cybersecurity.[114] The Bill also contains provisions addressing generative AI, algorithmic discrimination, automated decision-making, and the protection of individuals affected by AI-driven decisions.[115]

Kenya has increasingly recognized that artificial intelligence is no longer a futuristic concept but a transformative technology capable of reshaping virtually every sector of the economy, including commerce, healthcare, education, finance, public administration, and dispute resolution. This recognition is further reflected in the government's broader digital transformation agenda and its commitment to positioning Kenya as a regional

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[111] Ibid

[112] The Artificial Intelligence Bill, 2026 (Senate Bills No 4 of 2026) (Kenya)

[113] Ibid

[114] Ibid

[115] Ibid

leader in emerging technologies.[116] The adoption of the Kenya National Artificial Intelligence Strategy 2025-2030 demonstrates a clear policy commitment to fostering innovation while ensuring that AI develops in a manner that respects human rights, promotes public trust, and contributes to sustainable socio-economic development.[117] The Strategy also aligns Kenya with continental efforts spearheaded by the African Union, whose Continental Artificial Intelligence Strategy calls upon Member States to develop coherent national governance frameworks capable of promoting ethical, responsible, and inclusive AI development.[118]

In furtherance of these objectives, the Senate (Kenya) has acknowledged that the absence of a comprehensive legal and policy framework could impede innovation, particularly among local technology enterprises and young innovators, while simultaneously exposing the country to the risks associated with unregulated AI deployment.[119] Consequently, Parliament has urged the Ministry of Information, Communications and the Digital Economy to formulate a comprehensive national policy governing artificial intelligence and other emerging technologies.[120] The proposed framework envisages promoting locally driven AI research and innovation, establishing ethical standards for the responsible deployment of AI,[121] creating regulatory sandboxes to facilitate

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[116] Senate of Kenya, *Programme of Senate Business* (June 2026), recognising the implementation of the Kenya National Artificial Intelligence Strategy 2025–2030 and ongoing parliamentary consideration of AI governance. Available on: https://www.parliament.go.ke/sites/default/files/2026-06/Programme%20of%20Senate%20Business%20for%20the%20week%20commencing%20Tuesday%2C%2016.06.2026.pdf <Accessed on 12 July 2026>

[117] Ibid

[118] African Union, *Continental Artificial Intelligence Strategy* (endorsed by the Executive Council at its 45th Ordinary Session, Accra, Ghana, 18–19 July 2024); Ministry of Information, Communications and the Digital Economy, *Kenya National Artificial Intelligence Strategy 2025–2030* (Government of Kenya 2025).

[119] Supra, note 95

[120] Ibid

[121] Ibid

the safe testing of emerging technologies, strengthening public-private partnerships to enhance digital skills and innovation ecosystems,[122] and integrating artificial intelligence and coding into the national education curriculum.[123] These proposals reflect Kenya's determination to strike an appropriate balance between encouraging technological innovation and ensuring that AI remains transparent, accountable, secure, and beneficial to society.

If enacted, the Bill would position Kenya among the first African jurisdictions to enact dedicated AI legislation and could establish an influential model for AI governance across the continent, particularly in areas such as arbitration, commercial dispute resolution, digital justice, and cross-border commerce.[124] Furthermore, if effectively implemented, Kenya's AI governance framework has the potential not only to strengthen confidence in AI-assisted arbitration but also to position the country as a leading African jurisdiction in the responsible regulation of artificial intelligence within international commercial dispute resolution.[125] In April 2026, president Paul Kagame of Rwanda, made a clarion call for African leaders to take daring actions in embracing artificial intelligence and ensure that the continent is not left behind in the 4th wave technological revolution.[126] He stated that:

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[122] Ibid

[123] Senate of Kenya, *Motion on the Development of a Policy and Regulatory Framework for Artificial Intelligence and Emerging Technologies* (2026) (calling for a national AI policy to promote ethical AI, research and development, innovation sandboxes, public-private partnerships, and AI education).

[124] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) [2024] OJ L; Chartered Institute of Arbitrators, *Guideline on the Use of AI in Arbitration* (September 2025); Silicon Valley Arbitration & Mediation Center, *Guidelines on the Use of Artificial Intelligence in Arbitration* (2024).

[125] Ibid

[126] The New Times, Africa must not be left behind, Kagame tells AI summit. Available on: https://www.newtimes.co.rw/article/25372/news/technology/africa-must-not-be-left-behind-kagame-tells-ai-summit <Accessed on 12 June 2026>

> *"Africa can't afford to be left behind, once again playing catch up. We have to adopt, cooperate, and compete because it is in our best interest to do so…"*

Taken together, these emerging frameworks reveal a remarkable convergence of international thinking. While they differ in institutional mandate and regulatory technique, they consistently affirm several core principles: AI must remain subject to meaningful human oversight; arbitrators cannot delegate their adjudicative responsibilities to algorithms;[127] confidentiality and cybersecurity require heightened protection in digital proceedings;[128] AI-generated information must be independently verified; and procedural fairness must remain the overriding consideration throughout the arbitral process.[129] The emerging regulatory landscapes therefore reflect an important shift from viewing AI as merely a technological innovation to recognizing it as a matter of legal governance, professional responsibility, and institutional legitimacy.[130] As AI continues to evolve, these international frameworks will play an increasingly central role in ensuring that technological progress enhances rather than erodes the fundamental values upon which international arbitration is built.[131]

Conclusion

Looking ahead, the successful integration of AI into international arbitration will depend upon the development of coherent legal and institutional frameworks that encourage innovation while protecting fundamental rights and maintaining public confidence in arbitral justice. Arbitral institutions

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[127] Silicon Valley Arbitration & Mediation Center (SVAMC), Guidelines on the Use of Artificial Intelligence in Arbitration (1st edn, 30 April 2024) Guidelines.

[128] Ibid

[129] American Arbitration Association–International Centre for Dispute Resolution, *Guidance on Arbitrators' Use of AI Tools* (March 2025)

[130] Council of Europe, *Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law*

[131] Ibid

should develop clear and enforceable protocols governing the responsible use of artificial intelligence (AI) in arbitral proceedings.[132] Such protocols should establish proportionate disclosure requirements, require human verification of AI-generated outputs, prescribe appropriate cybersecurity measures, and strengthen safeguards for confidential information and personal data.[133] As Mark-Silas A. Malekela argues,[134] the growing use of generative AI exposes significant gaps in the existing legal and institutional framework for protecting confidentiality in international commercial arbitration, necessitating stronger institutional rules and safeguards from the outset of AI deployment.[135] Equally important is the need for continuous education and professional training to ensure that arbitrators, counsel, and other dispute resolution professionals possess the technological competence necessary to use AI responsibly and ethically.[136]

Ultimately, the future of digital justice will not be determined by the sophistication of artificial intelligence alone, but by the ability of legal systems, arbitral institutions and practitioners to ensure that technology remains firmly anchored in the rule of law, human dignity, and the enduring values of fairness, impartiality and party autonomy.[137] Properly governed, artificial intelligence has the capacity to strengthen rather than diminish international arbitration, making it more efficient, accessible,[138] and responsive to the

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[132] Dominik Stefer and Victoria Fricke, 'From Algorithms to Awards: Exploring the Technological and Legal Boundaries of AI's Contributions to the Work of Arbitrators' (2025)

[133] Ibid

[134] Supra, note 86

[135] Ibid

[136] Impact of AI on Arbitrators', Oxford Law Pro (Oxford University Press), section on 'Technological literacy as a component of competence.

[137] Qerim R Qerimi, 'Artificial Intelligence in International Arbitration: A Rule of Law Perspective' (American Review of International Arbitration, 2026).

[138] Ibid

demands of an increasingly digital global economy while preserving the integrity and legitimacy upon which the arbitral process has long depended.[139]

[139] Ibid

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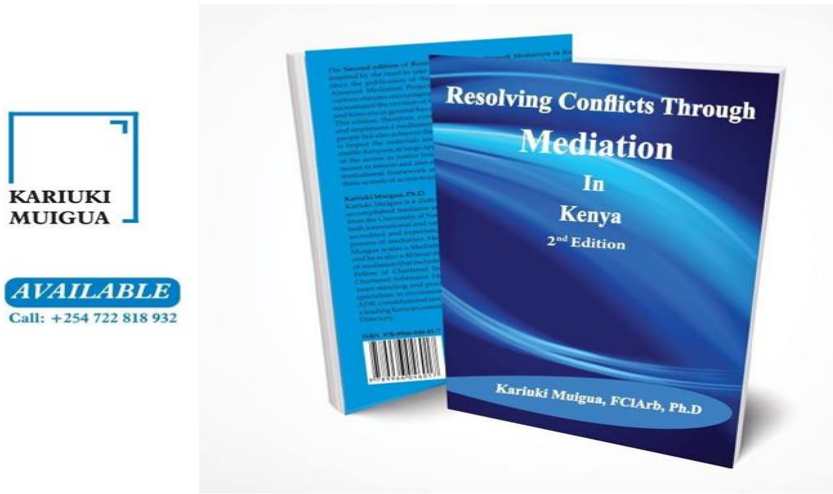
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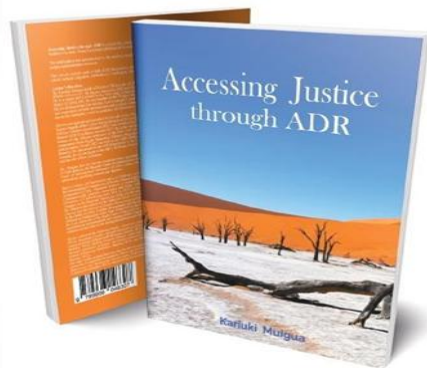



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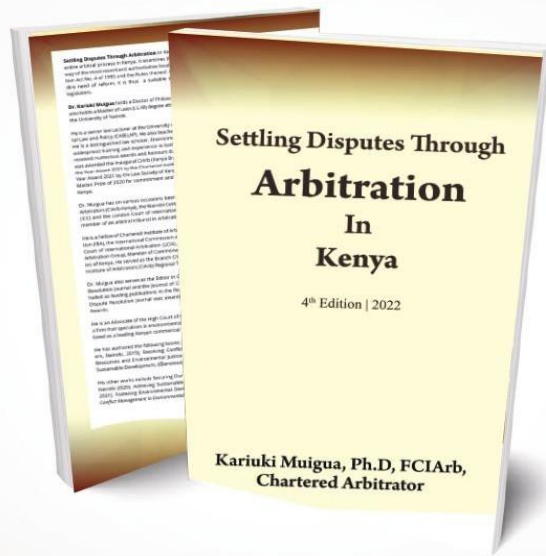


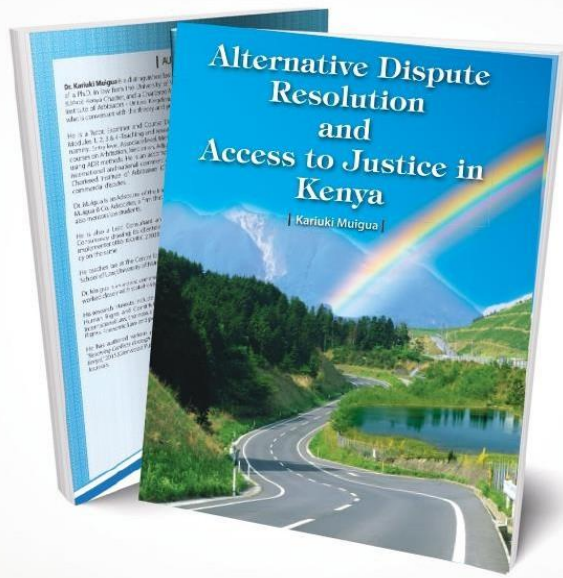
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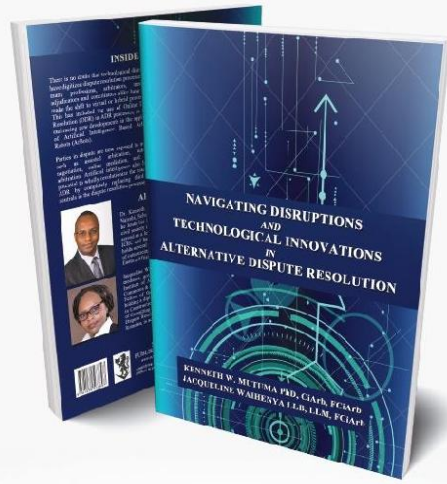


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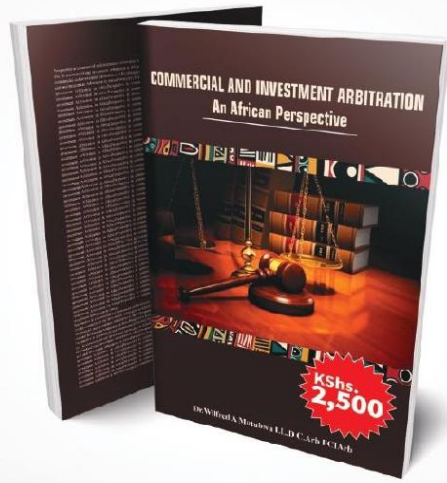
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