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Data Ethics and Kenya National Examination Results Release Strategies: A Constitutional Moral Imperative on Personal Protections

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Abstract

This paper assesses the ethical conduct of public officials in Kenya's education sector with respect to how they engage in the public release of personal data. This is analyzed in the practice of public announcement of national examination results with all the identifiers in place. While addressing the broader interest in ethics in the handling and usage of personal data, this article uses content analysis method to review industry, academic and other literature on examination results release practices in Kenya. The discussion applies the Data Protection Act and the Constitution of Kenya, 2010, to review the examination results release practices in the Ministry of Education (MoE) and by teachers across the country. The discussion applies several ethical theories to draw recommendations that can inform public officials and the concerned institutions on ethical decision-making processes in the release of personal data. Both the deontological and utilitarian approaches are found to be viable for concerned authorities and actors to reach ethical decisions and actions.

Key Words: *Data; Ethics; KCPE Exam; KCSE Exam; Ethical Theories; Kenya National Examination Results; the Constitution of Kenya; Data protection act; Education*

1. Introduction

Academic tests and examinations, usually done at the end of a certain period, are important in establishing students' levels of understanding of the concepts taught during that time. To the student, this is a moment of great anxiety as they prepare to sit for these examinations, and more so the national examinations. The performance of the primary school candidate, sitting for the Kenya Certificate of Primary Education (KCPE), and for the high school student, taking the Kenya Certificate of Secondary Education (KCSE), is eagerly awaited for by family, school, community members, and even the nation. Although the national examination results (as well as in-class term test results) comprise personal data that exclusively belongs to the student and their guardians the trend depicted by schools and the Cabinet Secretary (CS) of the Ministry of Education (MoE), as collectors of students' data in Kenya, is very troubling. Schools and the MoE appear to be in clear contravention of the stipulations dictated by the Data Protection Act (Republic of Kenya, 2019, Nov. 11) and the Constitution of Kenya (Kenya Law Reports, 2010) on the rights of all persons in Kenya as well as the obligations of public officials. These individual rights to privacy are inalienable by any authority and are crucial in upholding the dignity of the person.

This paper purposes to assess the Kenya national examination results release practices and to provide for more sensitive and ethical alternatives. The section begins by defining a few concepts followed by a description of Kenya's education system. This is followed by the problem statement, research questions that this paper is striving to answer as well as the objectives.

The Markkula Center for Applied Ethics (2021) defines ethics as "well-founded standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues." In essence, ethics refers to the rules and standards that impose reasonable obligations on the decision maker and which, therefore, serve to guide the decision-making process by revealing what ought to be,



from which the decision maker is then able to distinguish between right and wrong in a given situation. Thus ethics, as moral rules and standards, could be rooted in culture, religion, morality, rights, law, education, even experience. For any heterogeneous society to function there has to be a national code of ethics that is defined in the constitution, and upheld by the judicial process, to mitigate and direct public officials, and other decision makers, in determining what ought to be and thus what is right and what is wrong.

The other terms that will be used in this discussion, and that also need defining, are data subject; personal data; data controllers, and data processors. The Data Protection Act of 2019 defines a *data subject* as “an identifiable natural person who is the subject of personal data (Republic of Kenya, 2019, p. 906).” In this paper, such persons are the students who are enrolled in academic institutions. During their tenure as students, both in the schools they attend and as candidates (with the Kenya National Examination Council –KNEC-) data subjects generate *personal data*. *Personal data* is defined as “any information relating to an identified or identifiable natural person (p. 907)” while *data controllers* are the “natural or legal persons, public authorities, agencies or other bodies which, alone or jointly with others, determine the purpose and means of processing of personal data (p. 906).” On the same token, this act defines *data processors* as the “natural or legal person, public authority, agency or other body which processes personal data on behalf of the data controller (P. 906).” In this paper, KNEC, teachers and schools, the Ministry of Education (MoE) and the Ministry of Higher Education Science and Technology (MoHEST) are both the data controllers and data processors of personal data generated by data subjects who are the students/candidates.

In this paper, the terms student –although referring more to those enrolled in school- may at times be applied synonymously with the term candidate. The term candidate refers to students who are awaiting to sit for or have sat for the national examinations and are in the stage of waiting to receive their results. Also in this paper, the terms high school and secondary schools may be applied interchangeably to refer to post primary school education.

The Republic of Kenya gained her independence from Britain on December 12th 1963 and instituted a presidential system of government. The Government of Kenya (GoK) has three independent arms; the executive, legislature and the judiciary. The executive branch has the political obligation to run the education sector, a responsibility placed within the jurisdiction of the MoE and MoHEST. These ministries’, through their cabinet secretaries (CS’s), are responsible for championing the formulation and implementation of educational policies.

Kenya’s education system is divided into various educational sectors which includes early childhood development and pre-primary education, followed by primary, secondary and then university education (MoE, 2013). At the end of both primary and secondary education, which constitutes Kenya’s basic education level, students sit for a national exam as dictated by the curriculum. For the last 37 years, Kenya’s education has been based on the 8-4-4 curriculum which was institutionalized in 1985 after phasing out the 7-4-2-3 system. The 8-4-4 system entails 8 years of primary education, 4 years of high school, and a minimum of 4 years in university for a bachelor’s degree. At the culmination of 8 years of primary education (with the different levels being referred to as standard), students sit for the KCPE examinations, administered by the MoE through the Kenya National Examination Council (KNEC). High school education, which lasts for four years, is culminated by the KCSE examination also administered by the MoE through the KNEC.

The academic calendars for both primary and secondary schools run concurrently. In Kenya, the academic year usually starts in early January and ends in late October or early November for all students in primary as well as secondary schools, with the exception of the candidates who are to sit for their national examinations (while other students are on vacation). The academic year is divided into three terms punctuated by three vacations in between. The first term runs from early January to early April when schools close for about 3-4 weeks for the Easter break. Schools then reopen in early May for the second term which runs until early August when students proceed for their second vacation. In late August schools reopen once more for the third and shortest term which ends in late October. The MoE determines the term dates and schools are supposed to adhere to these dates. At the end of each term, a student’s assessment marks, in each course, are averaged to determine their position in class. Class teachers are known to type this *personal data*, print it and pin it in defined locations for all students and any other party to see. In both public and private classrooms all across Kenya, the story is the same; a clear violation of the data subject’s right to privacy.

Fortunately, as of 2018, the 8-4-4 curriculum is set to be replaced with what is said to be a more student-sensitive system being referred to as the Competence Based Curriculum (CBC). The CBC is also being referred to as the 2-6-3-3-3 system (these numerals representing the number of years in a particular level). In 2018, the process of out-phasing the 8-4-4 curriculum on a yearly basis began at the Standard 3 level and below and has now progressed to Grade 7. However, calculations indicate that the last batch of the 8-4-4 candidates will sit for KCPE examinations



in the year 2023 and for their KCSE examinations in 2027. If detailed (with identifiers) public exam result releases are typical of the 8-4-4 curriculum of education, then, this problem will predictably last until 2027. Such longevity of an unethical practice means that it is likely to endure beyond 8-4-4 and so affect the implementation of the Competence Based Curriculum.

To facilitate an understanding of data ethics, it is crucial to present the history of ethical principles in the world today. The current principles of ethics in research trace their origins from the *Nuremburg Code* formulated after the trial of war criminals in Nazi Germany for their inhuman use of human participants in their experiments (United States National Institute of Health -USNIH-, 1949). This code is cited for being explicit in its requirement for voluntary consent of subjects and its insistence that harm to humans be minimized or avoided (Norwegian National Research Ethics Committees, 2016). The Nuremburg code was followed by *The Declaration of Helsinki* which was developed by the World Medical Association in 1964. This declaration, which provided ethical principles for medical research involving human subjects, declared the duty of physicians to safeguard health and privacy, and emphasized the need to protect human dignity. This declaration was followed by *The Belmont Report*, published in the United States in 1974 after the infamous *Tuskegee Study of Untreated Syphilis in the Negro Male*, which, for 40 years, had led to the suffering of participants because their rights were violated. The Belmont Report identifies the principles of 1) respect for persons, 2) beneficence, and 3) distributive justice as key to protecting human participants in various situations (United States Department of Human and Health Services –USDHHS-, 2016). In 2002, the Council of International Organizations of Medical Science (CIOMS), founded by the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), published ethical principles (CIOMS, 2002). These principles, which include those in The Belmont Report and 21 other guidelines, were designed to be specifically applicable in developing countries. These reports all touch on issues of privacy, respect, rights and harm, and seeks to protect the participant from such incidences.

In regards to Kenya, ethical principles in research, as well as in public service, are yet to be embraced and practiced. Even though the Constitution of Kenya (2010) and the Data Protection Act (2019) are clear on the rights of data generators and the obligation of data processors and data controllers, public announcements of personal data remain the norm in as far as education in Kenya is concerned. Briefly stated, the objective and purpose of the Data Protection Act was to:

- (a) To regulate the processing of personal data;
- (b) To ensure that the processing of personal data of a data subject is guided by the principles set out in section 25;
- (c) To protect the privacy of individuals;
- (d) To establish the legal and institutional mechanism to protect personal data; and
- (e) To provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act. (Republic of Kenya, 2019, p. 908).

Based on these objectives, as well as on the Constitution of Kenya, this paper seeks to deliberate on the following problem statement. The problem being deliberated on here is the unconstitutional and unethical public release of personal data with all the identifiers in place. This is a problem because this practice clearly violates some articles, as dictated in the Constitution of Kenya (2010) as well by the Data Protection Act (Republic of Kenya, 2019).

The main objective of this paper is to interrogate the public release of national examination results and their place in modern Kenya. The specific objectives are:

1. To interrogate how (and why) the MoE releases national examination results.
2. Discuss what the Constitution of Kenya and the Data Protection Act stipulates in relation to personal data.
3. Discuss the options available to the public officer, confronted by ethical dilemmas, when handling personal data.

2. Methodology

To examine this problem and answer the stated questions, this paper engages in content analysis of literature as well as an interrogation of practices that are public in nature and which touch on the identified problem.

3. Discussion

3.1. The Kenya National Examinations Results Release Practices



So then, how are examination results, which comprise of personal data, released to the students both during the school year and upon sitting for their national examinations? As earlier stated, during the course of the term, teachers and schools, as *data controllers and data processors*, are responsible for test results which they usually pin up on notice boards for all to see, besides giving the students and/or their guardians a report card.

The Kenya National Examination Council (KNEC), as the national *data controllers and data processor*, is obligated with the setting and grading of national examinations (KCPE and KCSE) and the release of the results to the concerned parties, i.e. the candidates, parents, schools and the MoE. What has been happening in Kenya is that upon grading of these national examinations KNEC releases the results to the CS of the MoE who then holds a press conference and announces the results to the public to alert them of how schools and candidates have performed (Kimani, 2022; Mito, 2022). In the candidate performance list, the results (which is personal data) released to the public through the press, have identifiers like; full names of the candidate, school of attendance (name and index number of school), marks attained in each subject, and the total marks out of a possible 500 points (Advance Africa.com, 2022; Kimani, 2022; Media Team, 2022b; Mito, 2022; Musau, 2022; Nation Team, 2019 Nov. 18; Wanzala, 2019). Additionally, this list ranks participating schools, per their position nationally and per county, as dictated by their mean score. During the exam release, the MoE, through the CS, announces how parties concerned can access their KCPE or KCSE results.

The following three options have been available, at least, since the 2018 KCPE and KCSE exam releases:

- i) The first option is to receive the results *via an sms* (short message service). Here, one is required to send in the candidate's index number via the code 20076.
- ii) The second option is to get results via the KNEC *online portal*. Here, one needs to have internet connection in order to access the KNEC webpage, fill in required details as in option (i) and get the results.
- iii) *Go to school*: KNEC also sends hard copies of the results directly to all schools, which is preferable for students and parents that are technologically constrained. Upon receiving the results, school officials are known to pin these on the school notice board for all to see. Again, these result lists have identifiers such as; candidate's full name(s), index number, performance in each subject and total points; all of which is personal data.

(Media Team, 2022a; Omar, 2019)

Although these three options, provided by KNEC to facilitate access to results, may appear to only allow the rightful people to access the data, there is no guarantee that other people, with the proper details, cannot access the data. This digitalization of access to personal data needs to go a notch higher and guarantee security and privacy of personal data as constitutionally required. How certain is the MoE that the privacy of the candidate is not being violated? Is the MoE and KNEC aware that some candidates indeed find out their results through their friends or other people who were quick to access one of the three options provided and this without the authority of the concerned candidate or guardian? Clearly, KNEC needs to do more, much more in order to secure personal academic data and to comply with the ethical principles dictated by the Data Protection Act and by the Constitution of Kenya.

Does MoE appear to handle personal data as stipulated in the Constitution? It seems unlikely so. For a while now, more so after the promulgation of the 2010 Constitution of Kenya, the MoE and schools across the nation have consistently released national examination results publicly with all the identifiers in place. At no point during the press release, or when results arrive at the school, is data discretion, of any level (even anonymity), made. Clearly it is unethical for the CS to publicly release exam-results with all the identifiers in place and for school officials to pin these up for all to see, photograph and share via social media such as WhatsApp. It is quite disheartening to see your child's full names and score in each subject via WhatsApp and know that everybody can see and share this information as they please. It is also quite impious of private schools to put a child's photograph and score in the newspaper (Advance Africa.com, 2022). All these acts are a clear violation of Article 31 of the Constitution of Kenya, 2010 which dictates the right to privacy for all citizens. Although the Data Protection Act (Republic of Kenya, 2019) dictates that such violations should incur data processors and data controllers a penalty of 3 million Kes or imprisonment for a term not exceeding 10 years, or to both, violators are yet to face any consequence and sadly, the practice continues.

At this juncture, one may ask; why the public release of personal data? This practice can be explained by three things. First, by the effort put in to prepare students for examinations. In anticipation of the national examinations, students, parents and schools undergo thorough preparations to increase the chances of a student passing with 'flying colors. Could this be the reason why literature on education in Kenya has centered on the issue



of cheating during examinations? Possibly so because students, and even schools, are known to engage in examination malpractices to increase their chances of passing. According to both Kangethe (2018) and Spooner (2018) pressure from parents, teachers, peers and society to produce good grades and the desire to make it to the next level of schooling, beating stiff competition, were the reasons students in Kenya cheat in examinations. Although over the last couple of years the MoE has taken steps to try and lessen the levels of cheating -by reducing contact between candidates and outsiders during the third term, as well as reducing the exam period from six weeks to four, and putting head teachers directly in charge of the tests in their respective schools-, cheating is still rampant. Clearly, the effort and determination to perform well has perpetuated both cheating during exams, as well as the need to have national results publicly announced.

The admission of students from public and private primary schools into well performing national high schools provides the second explanation for the public release of examination results. The GoK's noble gesture to admit into national high schools, all the KCPE candidates who score 400 points and above, from both public and private primary schools has spelled pressure from private schools for the MoE to announce the results. The good performance of a private school simply translates into financial return as parents will strive to enroll their children in this 'good' school. The only way for the public to know this is a 'good school' is if the results are publicly announced. This explains the pressure the MoE may be silently feeling to rank the candidates and schools nationally and to announce this ranking publicly. On the other hand, candidates sitting for the KCSE examinations too must pass with good grades to be admitted into a public university. All this puts a lot of pressure is on the candidate to perform well and for the MoE to rank the students and schools per performance.

So why has the practice of publicly announcing national examination results lasted for so long? This brings us to the third reason; societal attitude towards good grades. Given that both parents and schools highly value good grades it is quite socially desirable and prestigious for your child to be announced in the media as a top performer. It is also likely that the MoE has continued to announce the results because no one has seriously complained about this practice. The lack of literature on this issue can be taken as an indication of societal approval of this practice. With the parents' silence as an indication of approval, schools have also upped the game of preparation by putting the student through rigorous and long hours in class and countless tests and examinations as ways to prepare for the national examinations. The 8-4-4 system, initially intended to prepare the Kenyan student for the job market by imparting practical and appropriate skills, has instead generated students who are simply professional test takers; cramming content in order to pass a series of internal and national examinations so as to have the school and student appear on the list of well performers.

The attempt to answer the first research question has facilitated the achievement of the first objective which was to interrogate how (and why) the MoE publicly releases national examination results. To achieve the second objective, which is to discuss what the Constitution of Kenya and the Data Protection Act stipulates in relation to personal data, the following section seeks to answer the second question.

3.2. What are the Ethical Issues in The Public Release of Examination Results?

In Kenya, the executive branch is politically obligated to run the education sector. The GoK, through the MoE and the MoHEST, as well as all the schools and their teachers, are obligated to ethically run the education sector, which deals with instruction and assessment of students among other duties. However, the conduct of these institutions in as far as the release of examination results in Kenya are concerned raises several ethical issues; rights (privacy), protection from harm, informed consent, and property rights. These issues will be discussed in light of the Constitution of Kenya 2010.

The first issue is that of privacy which also touches on rights. Article 31 of the Constitution of Kenya stipulates that:

“Every person has the right to privacy, which includes the right not to have (a) their person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed (Kenya Law, 2010, p. 44).”

Essentially, this Article guarantees the privacy of persons in Kenya. With this understanding, the MoE and KNEC must be mindful, at all times, of possible infringements on the right to privacy of the student's personal data. What has been practiced in Kenya in terms of examination result releases, and the options provided by KNEC to access examination results, exposes the candidates to security issues and more so to identity theft. Although 8-4-4 has been accused of ranking students, this does not require sharing a students' personal data with the other students



let alone the public. Ranking must provide privacy to the owners of the data and should therefore, as a minimum requirement, keep the owner of the data anonymous. The data subjects and owner(s), (students and/or their guardians), should instead be the ones to decide when and with whom to share this information with. Thus, no data with identifiers should be publicly shared either by school officials or by the MoE or KNEC officials. The ministry should also be weary of succumbing to the pressure of the media and schools to reveal the identifying details of the students concerned. The MoE must undertake measures to uphold and maintain the anonymity and privacy of students so as to be in compliance with Article 31 of the Constitution of Kenya.

The second ethical issue is that of *harm whether physical, social or psychological*. Clearly, there is need to protect the student from all kinds of harm that maybe directly or indirectly connected to their learning process including release of examination results. As stated in Article 29 (d)

“Every person has the right to freedom and security of the person, which includes the right not to be subjected to torture in any manner, whether physical or psychological (Kenya Law, 2010, p. 43).

Physical and psychological harm are issues of social justice as they may result in social stigma and discrimination of the candidate thus should be avoided at all times (Parker, 2015). From the point of view of the candidate that has performed very well, it is a temporary moment of joy and pride when one emerges as being among the top 100 candidates nationwide, which is aired by the press. But is all this publicity positive? If a candidate performed very well in their KCPE the whole nation is alerted to their academic potential and neighbors will not give them a break. They are often subjected to snide and rude remarks from those envious of their success, hence causing them psychological harm. Come KCSE four years later, the whole community still expects this same student to outshine the rest and top the nation once more. Apparently, those that top KCPE are nowhere to be found in the KCSE list of the top 100 candidates four years later, and this could be because of the psychological harm they experienced earlier.

Conversely, if the ‘smart’ ones are subjected to such psychological harm and pressure, what of those that perform poorly? Some parents, and even community members, may be meaner, subjecting these poor performers to ridicule, making them feel inadequate, like failures and thus cultivating feelings of low self-esteem and lack of self-confidence. Clearly, releasing examination results this way is emotionally and mentally harming young Kenyans and should cease. The MoE, as well as school officials and class teachers engaged in displaying students results for all to see, must consider the consequences of their actions on particularly the student’s psychological health. It is critical and advisable to all those in positions of authority, data processors and data controllers, to anticipate all sorts of harms (physical, psychological, social or even legal) that could emerge as a consequence of openly sharing personal data. These officials need to remember that according to Article 53 (2) that “A child’s best interests are of paramount importance in every matter concerning the child (Kenya Law, 2010, pg. 64).”

The third issue is that of *informed consent*. As a universal principle of ethics, *informed consent* requires that both the parents and the students, freely and voluntarily, without compulsion or threats from school teachers or heads, consent to their information being shared. The Data Protection Act defines consent as;

Any manifestation of express, unequivocal, free, specific and informed indication of the data subject’s wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data relating to the data subject; "data" means information which — (a) is processed by means of equipment operating automatically in response to instructions given for that purpose; (b) is recorded with intention that it should be processed by means of such equipment; (c) is recorded as part of a relevant filing system (Republic of Kenya, 2019, p. 905).

When enrolling children in school, the application forms do not, in any way, disclose to the parents how personal data generated by their child will be shared, at that moment or in the future. Thus the schools, throughout the entire enrollment and teaching process, in both primary and high school, fail to disclose, and therefore fail to get *written informed consent* from the parent and also from the data subject. Schools need to be aware that displaying of internally conducted school tests and examination results in class, or to in any way, announce a student’s performance to the other students is in complete violation of their right to privacy. Since students in both primary and high school levels are minors, informed consent must be gotten from both the child and the parent on a variety of academic issues. The parent needs to be duly informed on what is going to be shared and the level of sharing. If consent is denied by either one or both parties, then no information relating to the child should be publicly shared. Parents and their children should never be caught unawares that their examination results are being shared in school (class, secretary or head teacher’s office) or in any media and without their written consent. Schools need to also be aware that consent from parents or the students cannot, and should not be deemed to have been given during or by



enrolling in the school, or by the joyful celebration of those that did well or by adhering to unethical national practice/tradition of sharing examination results that is synonymous of Kenya. Informed consent needs to have been acquired long before the results are pinned up or released to the public through the press. Moreover, schools need to be aware that they can never, in any circumstance, be deemed to replace the authority of the parent, and therefore disregard the right of the child to privacy, in any scenario. Thus failure by MoE, KNEC and schools, to get informed consent is contrary to Article 28 of the Constitution of Kenya which states that “Every person has inherent dignity and the right to have that dignity respected and protected (Kenya Law, 2010, pg. 42).”

The fourth principle of ethics is *to respect intellectual and property rights* of both the student and their parents. Academic institutions need to understand that the data they hold and share with other students, parents and the public is constrained by the *students/parents intellectual property rights*. Article 40 (3) of the Constitution of Kenya stipulates that

“The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description (Kenya Law, 2010, p. 50).”

Simply put, data generated by the student cannot be assumed to belong to the school. It is what is referred to as personal data and so belongs to the data subject and their parents and consent must be gotten from both of them before sharing. Whether or not the parents pay tuition for their child, officials and institutions should not downplay data ownership rights. Since data has its owners, informed consent must be obtained before sharing it in whichever way or at whatever level, and the rights and privacy of data subjects must be upheld at all times. The MoE and KNEC need to be the epitome of upholding the Constitution of Kenya as well as the Data Protection Act and should thus require schools to give parents/guardians their due respect and authority when it comes to deciding who, what and when their children’s personal data should be shared to preserve their wellbeing and dignity.

This section has clearly depicted what both the Constitution of Kenya and the Data Protection Act stipulates in relation to personal data, and has thus achieved the second objective. In pursuit of the third objective, the following section seeks to deliberate on the available options for the public official faced with ethical dilemmas.

4. Resolving Ethical Dilemmas: The Constitution and Theories in Ethics

So what options exist to assist the public officer when they are confronted with ethical dilemmas?

This section discusses relevant ethical theories that are constitutionally supported, as the necessary guidelines to address ethical dilemmas that may arise concerning the issue of personal data.

The first ethical theory, supported by both the Constitution of Kenya (2010) and the Data Protection Act, and which is applied here to advise these institutions is the *rights theory*. This theory is based on the human rights that have been dictated by a given society and which are therefore protected by their laws and endorsed by majority of their members. In the Kenyan society, the Constitution has outlined the Bill of Rights which dictates the basic human freedoms, and which, consequentially are valued and need to be upheld by all Kenyans (Kenya Law, 2010, Chapter 4). Chapter 4, on the Bill of Rights, Article 19 (2) provides the reasons for protecting human rights. It states that:

“The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings (Kenya Law, 2010, p. 32).”

Further, in the same chapter, Article 19 (3) states that “the rights and fundamental freedoms in the Bill of Rights:

- (a) Belong to each individual and are not granted by the State;
- (b) Do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this chapter (Kenya Law, 2010, p. 32).”

Fortunately for Kenya, the Bill of Rights (Chapter 4) clearly defines the rights of all Kenyans and dictates the fundamental liberties that each Kenyan deserves to live by. Essentially, the Constitution provides the necessary and sufficient authority for individuals to demand the observance of these liberties, and for them to fully enjoy these without restrictions. Further, Article 10 (2) (b) defines the national values and principles of governance that need to be upheld by the holders of public offices. These values include; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized (Kenya Law, 2010, p. 25). Despite this constitutionally based ethical code, violations of individual rights still persist in schools. This begs the question, who then is to uphold and or adhere to these stipulations?



Deontological theory offers an answer to this question. Also referred to as duty theories, deontological theories advance the notion that ethics are based on the position, duty and obligation of the decision maker (Kaptein and Wempe, 2002). When hired to serve in a certain job capacity, the Kenyan official is expected to adhere to a stipulated code of job performance, regardless of how the officials may personally feel about those stipulations. To apply the deontological theory in the examination results release scenario, the CS, MoE, KNEC, school officials and teachers need to perform their duties as defined by their position and the authority conferred to them and as dictated by the Basic Education Act (MoE, 2013). According to Article 21 (1) of the Constitution;

“It is a fundamental duty of the State and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights (Kenya Law, 2010, p. 34).”

Moreover, Article 73 (1), which stipulates the responsibilities of leadership, states that:

“The authority of a state officer (a) is a public trust to be exercised in a manner that

(c) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people; and

(iv) promotes public confidence in the integrity of the office. (Kenya Law, 2010, p. 83).”

Further, section (2) of Article 73 defines the guiding principles of leadership and integrity as including:

(b) Objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favoritism, other improper motives or corrupt practices;

(c) Selfless service based solely on the public interest, demonstrated by (i) honesty in the execution of public duties (Kenya Law, 2010, p. 84).”

Further, the Data protection act requires that “anonymization”, which means the removal of personal identifiers from personal data, so that the data subject is no longer identifiable (p. 905) is applied to protect the well-being of data contributor. This means that the MoE, KNEC, schools and teachers as well as the press, are all obligated to uphold the rights of every individual in Kenya, more so those of minors. This deontological perspective is what is correct and appropriate as it will ensure consistency and quality of service in Kenya. Moreover, Article 73 (2)(d) obligates those in authority to not only make ethical decisions, as defined by the law, but also to justify/account for their decision every time whether they adhere to the law or not. The *ethical principle of justice states* that decision makers should focus on actions that are fair to those involved. It is in the expedience of justice that one is interrogated on where or not their decision upholds utilitarianism.

As the name suggest, the theory of *utilitarianism*, which is derived from the term ‘utility’, states that a decision maker should attempt to generate the largest ratio of good over evil possible in the world (Smart and William, 2008). This means that public decisions must always consider that which generates harms and deviate from it and instead choose the one with more benefits for the most people. What if the choices have harmful consequences? Then it is recommended that the alternative with the least harms, for the most people, be upheld. When one considers both the Kenya Constitution and the principles of ethics outlined here, then the decision is apt to be more ethical as the demand to choose that which “yields the greatest benefit to the most people” is the one that is ethically correct. The MoE and KNEC need to act and rule utilitarian. To *act utilitarian* means that a person performs the acts that benefit the most people, regardless of personal feelings or the societal constraints (Chonko, 2012; Smart and William, 2008). On the other hand, to *rule utilitarianism* takes into account the law and is concerned with fairness. To *rule utilitarian* thus seeks to benefit the most people but through the fairest and most just means available. Therefore, *rule utilitarianism* accesses the consequence of the act and thus values justice and includes beneficence at the same time (Chonko, 2012; Smart and William, 2008). Although sometimes complicated by critics who deem it necessary to be rational, calculating and attaching a value to each alternative, in the academic sector, predicting the consequences of public exam releases in the manner in which they have been traditionally released, necessitates a utilitarian approach.

In the examination results release scenario, utilitarianism would ask; who are the ‘most people’? The answer lies in how many candidates performed ‘poorly’ as dictated by the cut-off mark to proceed to the next level. Data for the 2021 KCPE exam indicates that only 11,857 scored between 400 and 500 (Muia, 2022). This is about 9.88% of the 1.2 million candidates that sat for this exam. Apparently, about 90% of these candidates are consequentially deemed average or below average performers, hence psychological harm is imposed on them, even though at varying degrees. Is this form of examination results release utilitarian then? Therefore, as utilitarianism requires, what is ‘good’ for the majority is not to name those who have excelled. This requires public officials to deviate from the reasoning that ‘the end justifies the means’ because in education this is not applicable.



Clearly, these constitutionally supported theories provide enough guidance to the concerned public officials and institutions on how academic data should be handled and the last objective of this paper, has been consequently achieved.

5. Recommendation

The main objective of this paper was to interrogate the public release of national examination results and their place in modern Kenya. This objective, together with the specific objectives were achieved in the discussion presented here in. Essentially, the discussion offered various constitutional and theoretical alternatives/ recommendations to the decision maker who may be in an ethical dilemma regarding examination results –personal data- and how to achieve the greatest good for the greatest number of people. This deliberation showed that this kind of practice has no place in modern Kenya and should be done away with as soon as possible.

6. Conclusion

The manner in which KCPE and KCSE examinations results have traditionally been released has clearly contravened the rights of individuals as dictated by the Constitution of Kenya and the *Data Protection Act*. The most significant violation is the issue of privacy. The need to observe data ethics and to respect data subjects, obligates the MoE to champion for policies and practices that ensure that people’s personal data is being collected, shared and used in appropriate and ethical ways. The Government of Kenya, through the MoE, needs to endeavor to reduce, to the minimum level possible, the social and psychological harms to students by anticipating both immediate and long-term effects of sharing results publicly. When and if there is an ethical dilemma, then the rights and interest of the child/student must take precedence above and beyond the rights and interests of any other party. Concerned officials in Kenya’s basic education sector must perform their duties as dictated by the Constitution and also seek to rule utilitarian so as to afford the Kenyan student and their parents/guardians, that which they deserve. Adherence to the constitution and ethical practices will facilitate and sustain a just and prosperous Kenyan society.

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