THE LAW SOCIETY OF KENYA JOURNAL

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Dr. Freda Mugambi Githiru	Transformative Constitutionalism
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theteam@marketpower.co.ke
www.marketpower.co.ke

Editorial

The current Editorial Committee was appointed in April 2018 following the expiration of the term of the previous members.

After a series of meetings and back and forth consultations between the authors and reviewers, the Board has published this issue of the LSK Journal Volume 15 (1) 2019. This issue contains five articles on diverse areas of law. The articles are on equitable benefit sharing of minerals and natural resources; constitutional transformation; consent and the constructive trust in transactions under the Land Control Board; international crimes in the context of the Statute of the International Criminal Court; state and religion in Kenya; and Kenya's devolved health system.

Remarkably, the Law Society of Kenya Journal has attracted authors drawn from academia, litigators, related practitioners and sitting judges. We undertake to improve the quality of this Journal in order to attract articles from Kenya, East Africa, Africa and the world.

The Committee meets every last Friday of the month and when the need arises. The Committee reviews papers and articles through email, via telephone, WhatsApp group and face to face. The following six are the highlights of the activities and resolutions.

First, the Committee is exploring possibilities of having the LSK Journal in an electronic format, as the LSK e-Journal.
Second, the Committee will be in charge of the production of the *Advocate* magazine as agreed with the Council and will publish a monthly *e-Advocate* magazine with a hard copy published annually comprising the articles featured in the *e-Advocate*.
Third, the Council appointed Mr Borniface Akusala to be the liaison Council Member to the Editorial Committee.
Fourth, the Committee is reviewing articles for the second volume of the 2019 LSK Journal and to pave way for a new call of articles for at least two journals thereafter.
Fifth, the Committee has finalized the Editorial Rules (Policy and Regulations) to facilitate the process of having the LSK Journal accredited by the Ministry of Education, Commission on University Education (CUE) and individual universities.
Sixth, the Committee is exploring ways of placing the LSK Journal on an online database.

The Committee is grateful for support from the LSK Council, LSK members and Secretariat and look forward to quality research and publishing of the LSK Journal and the *e-Advocate* magazine.

Prof Ben Sihanya, JSD (Stanford)
IP and Constitutional Professor and Advocate
Editor-in-Chief

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Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya

Kariuki Muigua[1*]

Abstract

This paper explores the concept of benefit sharing in natural resources exploitation in Kenya. The author argues that benefit sharing should be interpreted in its various forms, namely monetary and non-monetary since a narrower conception is likely to create confusion, potential conflict between investors and local communities as well as diminished hopes of improving the livelihoods of communities.The paper highlights the international best practices in the area of benefits- sharing in natural resources exploitation and briefly looks at Nigeria and Ghana to draw lessons on the likely effects of mismanagement of natural resources. The author gives tangible suggestions on some of the ways that Kenya can ensure that communities reap maximum benefits from exploitation of natural resources, including the recently discovered oil in the Northern part of the country.

1. Introduction

The role of government in establishing a framework to manage and invest revenues derived from oil, gas, and mining projects is crucial to ensure that the sector contributes positively to sustainable development.[2] It has also been observed that most private-sector investors realize that projects that are good for the host country and communities, and whose benefits are perceived to be shared reasonably, are less likely to face disruption, renegotiation, or

* LL.B (Hons), LL.M (Environmental Law), PhD in Law (Nrb); FCIArb (Chartered Arbitrator); Dip. In Law (KSL); Dip. In Arbitration (UK); FCPS (K); MKIM; Accredited Mediator; Consultant: Lead expert EIA/ EA NEMA; BSI ISO/IEC 27001: 2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law.

[2] Lohde, L.A., The Art and Science of Benefit Sharing in the Natural Resource Sector, (International Finance Corporation, February 2015), p. 11. Available at http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+Benefits+Sharing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b [Accessed on 26 April 2016].

even expropriation.[3] Effective Natural Resources Management (NRM) contemplates the use, access of resources to preserve and conserve for the good of all generations.[4] The NRM role is primarily bestowed upon the state but there is a duty to cooperate that lies with everyone to ensure that there is sound use of the natural resource.[5] It is also noteworthy that whereas some natural resources are renewable, others are not. Thus, it is necessary to take care of the natural resources to ensure that the benefits that accrue undoubtedly serve the present and the generations to come.[6] The issue of benefit sharing has been a great challenge as far as natural resource exploitation is concerned as many factors hinder communities from achieving an equitable share of the benefits that accrue from natural resource exploitation. This has largely been attributed to improper and ineffective management.[7]

This paper reflects on equitable benefit sharing in the context of the emerging extractives industry in Kenya. The author briefly discusses ways in which communities can benefit while drawing lessons from other countries on how best to avoid the 'resource curse' phenomenon. The discourse thus goes beyond reliance on extractive industries to educate communities on how best they can overcome the perennial problems of economic underdevelopment and the consequent poverty. The paper also highlights some of the principles that may need to be entrenched within the legal and institutional framework to promote inclusive and participatory decision-making in the benefit sharing framework.

[3] Ibid.

[4] Child, B., et al, Zimbabwe's CAMPFIRE Programme: Natural Resource Management by the People. (1997) IUCN-ROSA Environmental Issues Series No. 2.

[5] See Article 69, Constitution of Kenya 2010.

[6] See United Nations, World Economic and Social Survey 2013: Sustainable Development Challenges, E/2013/50/Rev. 1, ST/ESA/344. Available at https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf [Accessed on 22/05/2016]; See also Kibert, C.J., 'The Ethics of Sustainability,' available at http://rio20.net/wp-content/uploads/2012/01/Ethics-of-Sustainability-Textbook.pdf [Accessed on 22 May 2016].

[7] Ochola, O.W., et al (eds), Managing Natural Resources for Development in Africa: A resource Book. IDRC, 2010. Available at http://www.gbv.de/dms/zbw/646005146.pdf [Accessed on 30 May/2016].

2. Extractive Industries Resources: the New Canaan for Kenya?

In 2012, the then Kenyan President, Hon. Mwai Kibaki announced the discovery of oil in Turkana County.[8] Tullow Oil (London) and African Oil (Vancouver) evidenced the presence of enough crude oil viable for both the local and the international markets.[9] The three wells discovered were estimated to hold at least 250 million barrels.[10] This announcement has led to a change in perception of Turkana County which may have previously been considered as insignificant in its contribution towards national growth.

Expanding extractive industries, particularly in sub-Saharan Africa, is characterized by increasing levels of political, social, technical and environmental risk.[11] Changes brought about by extractive investment can have negative social impacts, such as rapid urban growth, physical and economic displacement of communities, weakening of traditional social structures, new conflicts, and even impoverishment.[12] The Sudan, the Democratic Republic of Congo (DRC) and Nigeria are just but few examples of African states that have experienced internal armed conflict because of their rich natural resources. The natural resources in DRC's tropical rain forest covers more than 100 million hectares. However, this has not benefited the general population of that country, and there has been recorded cases of terrible violence and immense human suffering.[13]

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[8] The Turkana County is geographically located in the North Western Kenya area which is predominantly a pastoralist populated area. Turkana County borders West Pokot County, Marsabit County, Baringo County in the South, South East and East respectively. The county also borders South Sudan and Uganda.

[9] Michira, M., 'Kenya would be among cheapest world oil producers, Tullow says' The Standard, Published Fri, February 12th 2016 at 00:00. Available at https://www.standardmedia.co.ke/business/article/2000191356/kenya-would-be-among-cheapest-world-oil-producers-tullow-says [Accessed on 11/11/2017].

[10] Kagwe, W., 'Kenya strikes new oil well, doubles estimates,' The Star, 4 July 2013. Available at http://allafrica.com/stories/201307040991.html [Accessed on 22/05/2016]; Liloba, H., 'Kenya: Tullow Hits another Oil Field,' East African Business Week (Kampala), 9 July, 2013.
Available at http://allafrica.com/stories/201307100096.html.

[11] Alstine, J.V., et al, Resource Governance Dynamics: The Challenge Of 'New Oil' In Uganda, Resources Policy, Vol. 40, 2014, pp.48–58, p. 48.

[12] Lohde, L.A., The Art and Science of Benefit Sharing in the Natural Resource Sector, (International Finance Corporation, February 2015), op cit. p. 55.

[13] Samndong, R.A. & Nhantumbo, I., Natural resources governance in the Democratic Republic of Congo: Breaking sector walls for sustainable land use investments, (International Institute for Environment and Development Country Report, February 2015), p. 11. Available at http://pubs.iied.org/pdfs/13578IIED.pdf [Accessed on 19 May 2016].

The war has largely impacted on the environment and native wildlife. Parties to armed conflicts have resorted to occupying natural habitats thereby scaring animals away. Further, the illegal trade in minerals led to the communities not being able to benefit from its resources.[14]

There is conflicting literature on the potential of extractive industries' capacity to promote national development. Proponents of resource-led development, (i.e. how the extractive industries can contribute to poverty alleviation and sustainable development in the developing world) argue that the inflow of foreign direct investment (FDI) into the country and a model of export based growth will provide jobs, economic growth and ultimately, poverty reduction.[15]

This, it would be expected, would be as a result of the foreign owned companies (like Tullow Oil, London and African Oil, Vancouver) creating opportunities for the locals to benefit both in monetary and non-monetary terms from the oil exploration and extraction. However, for many resource rich developing countries pursuing this model, the reality has been low economic growth, environmental degradation, deepening poverty, and in some cases, violent conflict.[16]

Kenya is no different as far as expectations are concerned. There have been renewed hopes of spurred economic growth and development in the country as a result of the recently discovered oil resources.[17] The North Western region of the country, where the deposits were first discovered, has been seen as the new frontier in driving Kenya's economy. However, Turkana County has been

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[14] See 'Diamonds in Sierra Leone, A Resource Curse?' available at http://erd.eui.eu/media/wilson.pdf [Accessed on 22/05/2016]; Kinniburgh, C., 'Beyond "Conflict Minerals": The Congo's Resource Curse Lives On,' Dissent Magazine, Spring 2014, available at https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on [Accessed on 22 May 2016]; Free the Slaves, 'Congo's Mining Slaves: Enslavement at South Kivu Mining Sites,' Investigative Field Report, June 2013. Available at https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf [Accessed on 22 June 2016].

[15] Alstine, J.V., et al, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, op cit, p. 48.
[16] Ibid, p. 48.

[17] See Institute for Human Rights and Business, 'Human Rights Risks and Responsibilities: Oil and Gas Exploration Companies in Kenya,' Background Paper, 2013. Available at http://www.americanbar.org/content/dam/aba/events/international_law/2015/06/Africa%20Forum/Security1.authcheckdam.pdf [Accessed on 18 May 2016].

documented as one of the Counties with the highest level of poverty in Kenya.[18] The distrust between local communities around the region against each other[19] has led to constant conflicts as well as cross border conflicts.[20] The conflicts are largely sparked by livestock rustling, harsh climate and boundary disputes.[21] Also, due to low literacy levels,[22] other communities have subsequently been employed because the locals had no skills for drilling and seismic work.[23]

Nonetheless, the local communities have viewed the oil discovery as 'heaven sent' as they perceive that it will help 'open' the region to development by the national government. While there are prospects of 'real' development in the region, experience gained from the international arena point to the possibility that the expected development may not be realized or may not achieve the desired outcome for the country, and specifically the locals.[24] Pegging hopes

[18] Turkana County –United Nations Joint Programme 2015-2018, (Executive Office, Turkana County Government, Lodwar, Turkana UN Resident Coordinator Office, Nairobi, Kenya), p. 4.

Available at https://info.undp.org/docs/pdc/Documents/KEN/ProDoc%20Turkana-UN%20Joint%20Programme%20final%205th%20%20March%202015-binder%20%282%29.pdf [Accessed on 26 May 2016].

[19] Bollig, M., "Ethnic Conflicts in North-West Kenya: Pokot-Turkana Raiding 1969—1984." Zeitschrift Für Ethnologie 115 (1990), pp. 73-90. http://www.jstor.org/stable/25842144. [Accessed on 19 May 2016].

[20] Johannes, E.M., et al, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?' African Geographical Review, Vol. 34, No.2, 2015, pp.142-164, p. 142.

[21] See generally, Schilling, J., Opiyo, F.E. and Scheffran, J., "Raiding pastoral livelihoods: motives and effects of violent conflict in north-western Kenya," Pastoralism: Research, Policy and Practice, Vol.2, no. 1, 2012, p. 25; Schilling, J., Akuno, M., Scheffran, J. and Weinzierl, T., "On raids and relations: Climate change, pastoral conflict and adaptation in northwestern Kenya," Conflict-sensitive adaptation to climate change in Africa, 2014, 241.

[22] Chikwanha, A.B., 'The Anatomy of Conflicts in the East African Community (EAC): Linking Security With Development,' *Keynote speech to Development Policy Review Network-African Studies Institute, Leiden University, the Netherlands, 2007*. Available at https://www.issafrica.org/uploads/EACANNIE.PDF [Accessed on 21 May 2016]. See also http://opendata.go.ke/Education/Percentage-disribution-of-population-15years-by-/jbxify92.

[23] See Cordaid, 'Oil Exploration in Kenya: Success Requires Consultation,' *Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya,* August 2015, p. 36. Available at https://www.cordaid.org/media/publications/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf [Accessed on 20/05/2016]. See also Turkana *is the least educated, says report*, Daily Nation November 25, 2013. Available at http://www.nation.co.ke/news/Turkana-is-the-least-educated-says-report-/-/1056/2087018/-/vvpnq1z/-/index.html; Kenya National Bureau of Statistics, *Exploring Kenya's Inequality: Pulling Apart or Pooling Together?*

[24] Sigam, C. & Garcia, L., *Extractive Industries: Optimizing Value Retention in Host Countries*, (UNCTAD,

of development on the extractive resources only may mean that the region could remain undeveloped or under-developed longer as the benefits of oil may not turn out as expected. If anything, it may add to other problems that have characterised the region in question. Thus, the fear of poor and low economic development despite the discovery of oil looms.[25] The worry is, failed economies usually end up in conflicts,[26] resulting from bad governance and the mismanagement of natural resources.[27]
It is expected that the economic gains that are likely to accrue from this venture will come with both rights and responsibilities for the concerned communities.

There have Government efforts meant to enhance transparency and accountability on the sector. One such move is the decision by the Ministry of Mining to cooperate with Regional Centre for Mapping of Resources for Development (RCMRD)[28] on mapping of resources.[29] Such efforts may have been informed by the fact that skewed distributions of benefits from natural resources can fuel social exclusion and conflict, threatening sustainability.[30]

2012). Available at http://unctadxiii.org/en/SessionDocument/suc2012d1_en.pdf [Accessed on 22 May 2016]

[25] See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics,* (New York: Columbia University Press, 2012.)

[26] Maphosa, S.B., *Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa.* ASIA Policy brief Number 74, 2012.

[27] Billion, P., *Wars of Plunder: Conflicts, Profits and Politics.* (New York: Columbia University Press, 2012.); See also Wiebelt, M., *et al*, 'Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,' (Kiel Working Paper No. 1696, May 2011). Available at https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf .

[28] The Regional Centre for Mapping of Resources for Development (RCMRD) was established in 1975 under the auspices of the United Nations Economic Commission for Africa (UNECA) and the African Union (AU). It is an inter-governmental organization and currently has contracting Member States in the Eastern and Southern Africa Regions. (http://www.rcmrd.org/about-us/about-rcmrd).

[29] Regional Centre for Mapping of Resources for Development, 'Kenya's Ministry of Mining to Cooperate with RCMRD on Mapping of Resources,' available at http://www.rcmrd.org/archives/302-kenya-s-ministry-of-mining-to-cooperate-with-rcmrd-on-mapping-of-resources.

[30] Saboe, N.T., 'Benefit Sharing Among Local Resource Users: The Role of Property Rights,' *World Development*, Vol. 72, pp. 408–418, 2015, p. 408; See also a Gap Analysis outcome carried out by the Ministry of Mining with the support of United Nations Development programme (UNDP), *Ministry of Mining - Gap Analysis Kenya,* 2016. http://www.ke.undp.org/content/kenya/en/home/library/poverty/extractives-project.html [Accessed on 11 November 2017]

This is especially true for Kenya because, unlike the common perception that extractive industries come with a lot of wealth, this sector also requires much capital to venture into, and this may eat into the cumulative wealth accruing to the country of origin. For instance, in the case of Kenya, there have been reports that the Irish oil firm Tullow, which was allocated the Lokichar Basin oil reserves, has so far incurred $ 1.5 billion (Kenya Shillings 150 billion) in exploration costs, and this amount is to be recovered once production begins.[31] This has led to the fears that in the absence of proper audits by Kenya, explorers such as Tullow Oil may inflate recoverable costs, ultimately denying Kenyans the full benefits of their national resource.[32]

The recovery of the full costs over production cycle is one of the contractual terms in the production sharing contracts signed between Kenya and oil explorers once the commercial production from the particular development area commences.[33] Indeed, Kenya has in the past been advised that, since it has a very short period within which it can maximize benefits from the oil sector before their depletion, it should continue to focus on key sectors such as agribusiness and services.[34]

Resource governance, which has been defined as the hard and soft rules which shape and constrain the way hydrocarbons contribute to sustainable development and poverty alleviation within host countries,[35] necessitates a discourse on evidence from other jurisdictions with a view to identifying ways in which the country can ensure that maximum benefits from extractive industries accrue to the locals without relying on what may be referred to as hand-outs from the government of the day. These benefits need not be direct. Thus, this article aims to suggest ways in which the country can achieve effective resource governance in the said sector and in other natural resource-reliant sectors.

[31] Herbling, D., 'Tullow's Sh 150bn Exploration bill Raises Queries on Costing methods,' *Business Daily*, Monday, AQpril 18, 2016 (Nation Media Group Publication No. 2331), pp. 1 & 4.

[32] *Ibid*, p. 1.

[33] See the Republic Of Kenya Model Production Sharing Contract, 2015. Available at http://www.erc.go.ke/images/docs/Model_Production_Sharing_Contract_2015-210115.pdf.

[34] *Ibid*, p. 4.

[35] Alstine, J.V., *et al*, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, *op cit*., p. 49.

3. Benefit Sharing: Community Rights And Responsibilities

Equitable benefit sharing can be defined as the access to benefits that accrue from natural resources by stakeholders including indigenous communities.[36] It has been noted that the notion of benefit sharing in natural resources was first formalised in international law in 1992 through the Convention on Biological Diversity (CBD), a move that was at the time expected to address problems with the governance of socio-ecological systems in developing countries.[37] The international recognition of the right to benefit from natural resources wealth may be predicated upon such recognised rights of communities as the right to self-determination, right to development and the right of peoples to freely dispose of their wealth and natural resources.[38]

At the regional level, article 21(1) of the African Charter on Human and Peoples' Rights[39] provides that all peoples shall freely dispose of their wealth and natural resources. This right is to be exercised in the exclusive interest of the people, and in no case should people be deprived of it. The free disposal of wealth and natural resources must however be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.[40]

The African Charter also obligates States parties to undertake to eliminate all forms of foreign economic exploitation, particularly that practised by international monopolies, so as to enable their peoples to fully benefit from

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[36] Jonge, B., W*hat is Fair and Equitable Benefit Sharing? Journal on agricultural and environmental ethics,* vol. 24, issue 2, 2011.

[37]Pham, T.T., *et al*, 'Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries,' Working Paper 108, 2013, CIFOR, Bogor, Indonesia, p. 1.
Available at http://www.cifor.org/publications/pdf_files/WPapers/WP108Pham.pdf [Accessed on 28 May 2016].

[38] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 1.

[39] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[40] Art. 21(3).

the advantages derived from their national resources.[41] Further, Article 22(1) provides that all peoples have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States also have the duty, individually and collectively, to ensure the exercise of the right to development.[42]

The international framework on natural resources and the environment envisages a scenario where the benefits accruing from the exploitation of the resources in a country or region will in turn benefit the lives of the concerned people through improved livelihoods and an improved national economy for overall development of the country. Indeed, one of the international principles of sustainable development is that states are under a duty to manage natural resources, including natural resources solely within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems.[43]

The principle of equitable benefit sharing is acknowledged in several international environmental and natural resources law instruments. The Convention on Biological Diversity,[44] which governs the activities of countries in biodiversity protection, in its third objective emphasizes the essential need to fairly and equitably share benefits from resources[45] taking into account rights over those resources.[46]

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[41] Art. 21(5).

[42] Art. 22(2).

[43] CISDL, 'The Principles of International Law Related to Sustainable Development,' available at http://cisdl.org/tribunals/overview/principles/1.html [Accessed on 28 May 2016].

[44] It was adopted in 1992 at the Earth Summit, Rio de Janeiro, Brazil; UNGA.

[45] The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable and the Fair and Equitable Sharing of Benefits Arising from their utilization to the Convention of the Biological Diversity was adopted in 2010 at the 10th Conference of Parties.

[46] An Ad-Hoc Open-ended Working Group was established between 2000 and 2007 to implement this objective and was mandated to come up with Bonn Guidelines to assist parties with the implementation of the benefit sharing.

The aim of natural resource management is to ensure the sound use of the environment for the food of the present and future generations. Working towards ensuring equitable benefit sharing may guarantee conservation and protection of natural resources, coexistence among communities, promote human rights and sustainable and economic development.[47] The OECD Energy Charter Treaty 1994 for its part obligates contracting states to strive to minimize in an economically efficient manner harmful environmental impacts by acting in a cost effective manner.[48]

Implementation of equal benefit sharing in natural resources requires balancing with the need to achieve sustainable development. Article 162 of the Constitution of Kenya[49] establishes the Environment and Land Court to deal with environmental matters. Through their decisions, the court has attempted to promote the right of communities to benefit from natural resources while at the same time safeguarding the need for the country to achieve sustainable development. In the case of R v Kenya Forest Services ex parte the National Alliance of Community Forest Association, the appellant sought orders to quash the respondent's decision[50] calling on individuals and interested institutions to apply for concessions in state forest plantations for parcels of between 1000 and 12000 hectares. The court granted their prayer to prohibit any processing of any bids that may be received by the officials, agents, servants or officers and compelled the respondent to comply with the constitutional requirement that forests and catchment areas in Kenya are protected and that a tree cover of at least 10% should be maintained in Kenya.

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[47] See Huggins, C., *et al*., 'Chapter 12: Environment for Peace and Regional Cooperation,' *Africa Environment Outlook 2: Our Environment, Our Wealth*. Available at http://www.unep.org/DEWA/Africa/docs/en/aeo-2/chapters/aeo-2_ch12_ENVIRONMENT_FOR_%20PEACE_AND.pdf [Accessed on 28 May 2016]

[48] OECD 1994, Article 19.

[49] Government printer, Nairobi, 2010.

[50] *R v Kenya Forest Service Ex parte and Clement Kariuki & 2 others suing as the Chairman, Secretary and Treasurer of the National Alliance of Community Forest Association*, Judicial Review Case No 285 of 2012.

As a potentially major exporter of oil in future,[51] the discovery of oil is deemed as a major boost to the Kenyan economy.[52] The economic value of oil is expected to be high and central to the development of the local community, even though it may have its own challenges.[53] Indeed, it has been reported that the discovery of oil has facilitated infrastructural developments such as schools, health amenities and making the area easily accessible. Within two years of discovery, buildings were erected and human population was recorded at 500% growth in several towns within Turkana County.[54] This is an indication of the high hopes that have been pegged on the potential benefits that may accrue from this venture. The Nagoya Protocol is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way.[55] One of the key factors informing the drafting of this protocol was the recognition that that public awareness of the economic value of ecosystems and biodiversity and the fair and equitable sharing of this economic value with the custodians of biodiversity are key incentives for the conservation of biological diversity and the sustainable use of its components.[56] It was also an acknowledgement of the potential role of access and benefit-sharing to contribute to the conservation and sustainable use of biological diversity, poverty eradication and environmental sustainability and thereby contributing to achieving the Millennium Development Goals.[57]

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[51] The 2015 Economic Survey Report by Kenya National Bureau of Statistics.

[52] http://www.tradingeconomic.com/kenya/imports.

[53] BBC (2012, March 26) Kenya oil discovery after Tullow Oil Drilling; The *paradox of plenty* is a fear that may hit the county In comparison to countries in Africa, those which are rich in minerals are the lowest in terms of development.

[54] Kenya County Fact Sheet, 2014; Kornet, J., 'Oil in the cradle of mankind - A glimpse of Africa's future,' available at http://www.frontiermarketscompendium.com/index.php/news-commentary/entry/oil-in-the-cradle-of-mankind-a-glimpse-of-africa-s-future [Accessed on 20 May 2016].

[55] Convention on Biological Diversity, 'The Nagoya Protocol on Access and Benefit-sharing,' available at https://www.cbd.int/abs/. Art. 1 thereof is to the effect that 'the objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.'

[56] Preamble to the Protocol.

[57] *Ibid*.

This Protocol is limited to genetic resources within the scope of Article 15 of the Convention and to the benefits arising from the utilization of such resources, as well as to traditional knowledge associated with genetic resources within the provisions of the Convention and to the benefits arising from the utilization of such knowledge.[58] It, however, also offers important guidelines on benefit-sharing. Of particular relevance is the Annex to the Nagoya Protocol which provides for both monetary and non-monetary forms of benefits. It envisages monetary benefits which may include, but not be limited to: access fees/fee per sample collected or otherwise acquired; up-front payments; milestone payments; payment of royalties; licence fees in case of commercialization; special fees to be paid to trust funds supporting conservation and sustainable use of biodiversity; salaries and preferential terms where mutually agreed; research funding; joint ventures; and joint ownership of relevant intellectual property rights.[59]

There are a number of non-monetary benefits, on the other hand. These benefits include the sharing of research and development results and collaboration, cooperation and contribution in scientific research and development programmes (particularly biotechnological research activities) where possible in the Party providing genetic resources. While this is specific to the genetic resources, it is within the type of natural resources that should be protected as envisaged under the Constitution of Kenya. The Constitution obligates the State to recognise the role of science and indigenous technologies in the development of the nation, and to promote the intellectual property rights of the people of Kenya.[60]

One of the ways of implementing the constitutional provisions is through ensuring that communities participate fully and meaningfully as envisaged by the Nagoya Protocol. The other forms of non-monetary benefit are through participation in product development; collaboration, cooperation and contribution in education and training; admittance to ex situ facilities of genetic resources and databases; transfer to the provider of the genetic resources of knowledge and technology under fair and most favourable terms, including on concessional and preferential terms where agreed, in particular, knowledge

[58] Art. 3.

[59] *Annex to the Nagoya Protocol on Access and Benefit-sharing.*

[60] Art. 11(2) (b) (c), Constitution of Kenya 2010.

and technology that make use of genetic resources, including biotechnology, or that are relevant to the conservation and sustainable utilization of biological diversity; strengthening capacities for technology transfer; institutional capacity-building; human and material resources to strengthen the capacities for the administration and enforcement of access regulations; training related to genetic resources with the full participation of countries providing genetic resources, and where possible, in such countries; access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies; contributions to the local economy; research directed towards priority needs (such as health and food security) taking into account domestic uses of genetic resources in the Party providing genetic resources; institutional and professional relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities; food and livelihood security benefits; social recognition; and joint ownership of relevant intellectual property rights.[61]

These approaches arguably form the core of an effective benefit sharing agreement. This is because they are geared towards building capacity for the local people that may go beyond the lifespan of the resources being exploited. They are also meant to address the real needs of the people by investing in tangible projects. This is a viable means of ensuring benefits accrue to the communities in ways that are not prone to corruption and wastage of resources, as it would be the case in the monetary forms of benefits.

It is also worth pointing out that most of these benefits are applicable to the exploitation of other types of natural resources, including oil. The Nagoya Protocol approach to benefits sharing can help in building benefit-sharing mechanisms applicable in the exploitation of the other forms of natural resources. These are important in ensuring that even as communities receive benefits in forms of access fees/fee per sample collected or otherwise acquired, up-front payments, milestone payments, payment of royalties and licence fees in case of commercialization, they also get to participate by engaging in activities that will ensure that they benefit from the exploitation of the resources beyond the resources' lifespan. The monetary forms of benefits may be limited in the ways they benefit communities while the non-monetary benefits are likely to reach a bigger group of beneficiaries and thus more effective.

[61] Annex to the Nagoya Protocol on Access and Benefit-sharing.

Capacity-building within the community ensures that communities become less dependent on the immediate benefits accruing from commercial exploitation of the resources but instead have enduring sources of livelihoods. Research may go a long way in helping communities realise the other forms of investments or economic activities that may be viable within their localities. Thus, communities should not only seek to receive the monetary benefits but should also take advantage by acquiring the relevant skills and investing in businesses or venture that will help them in the long term even after the oil reserves are depleted.

4. Legal Framework on Benefit Sharing and Natural Resource Exploitation in Kenya

One of the most important aspects of the Constitution of Kenya 2010 is the provisions on national values and principles of governance which include, inter alia: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.[62]

These values and principles are binding on all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[63] Arguably, one of the ways of implementing these principles as far as natural resources governance and management is concerned is equitable benefit-sharing. A viable benefit-sharing framework should be able to reflect and promote the foregoing values and principles of governance.

The Constitution also guarantees every person's right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.[64] The Constitution also

[62] Art. 10(2).

[63] Art. 10(1).

[64]Art. 42. Art. 70 (1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed

outlines the principles of land policy and provides that land in Kenya must be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the outlined principles that include equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas. Other principles include elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.[65] These principles are to be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.[66]

It is noteworthy that one of the adverse effects of mining is degradation of the environment which ultimately affects the livelihoods of the communities living within the affected areas. Affected communities must take into account such effects in comparison to the distribution of the returns from mining by the national Government.

Relevant to this discussion is the provision for community land which vested in and is held by communities identified on the basis of ethnicity, culture or similar community of interest.[67] The Constitution also provides that all land in

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or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

[65] Art. 60(1).

[66] Art. 60(2).

[67] Art. 63(1). Art. 63(2) provides that community land consists of— (*a*) land lawfully registered in the name of group representatives under the provisions of any law; (*b*) land lawfully transferred to a specific community by any process of law; (*c*) any other land declared to be community land by an Act of Parliament; and (*d*) land that is—
(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2). Clause (3) thereof further provides that any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held. Clause (4) also provides that community land must not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

Kenya belongs to the people of Kenya collectively as a nation, as communities,[68] and as individuals.[69] Land in Kenya is also classified as public, community or private.[70] Also noteworthy is that regardless of their location, the Constitution classifies all minerals and mineral oils as defined by law and all rivers, lakes and other water bodies as defined by an Act of Parliament as public land.[71]

There is a need to ensure that the public understands this concept as it is likely to generate misunderstandings especially in the face of devolution where counties have been demanding exclusivity in exploration and benefits accruing from natural resources located within their boundaries. It is important to clarify that, while the non-monetary benefits such as setting up of social amenities and other infrastructure may exclusively accrue to the local communities living within the mining localities, the monetary benefits are not to be treated in a similar way, but ought to be shared among the local communities, County government and the National Government.

The Constitution also outlines the obligations of the State in respect of the environment. These may be relevant as far as benefit sharing in natural resources exploitation is concerned. The State is required to, inter alia, ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits (emphasis added); protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; and encourage public participation in the management, protection and conservation of the environment. The obligations also extend to the protection of genetic resources and biological diversity as well as establishment of systems of environmental impact assessment, environmental audit and monitoring of the environment. Other obligations extend to elimination of processes and activities that are likely to endanger the environment and utilization of the

[68] See Community Land Act, No. 27 of 2016, Laws of Kenya (Government Printer, Nairobi, 2016). The Act was enacted to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.

[69] Art. 61(1).

[70] Art. 61(2).

[71] Art. 62(1) (f) (i).

environment and natural resources for the benefit of the people of Kenya.[72] The obligations are not just on the State. Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[73]

The Environment Management and Coordination Act (EMCA)[74] provides the legal and institutional framework for the management of the environment. In its preamble, it recognizes that the environment is the foundation of the economic, social, cultural and spiritual enrichment. Section 3 of the Act entitles every Kenyan to a healthy and clean environment and obligates them to safeguard and enhance the environment. The Government must thus be held accountable in ensuring that the investors meet their environmental conservation and protection obligations as far as mineral exploration and extraction are concerned.

The Constitution also tasks the Parliament to enact legislation ensuring that investments in property benefit local communities and their economies.[75] This may be strengthened by the provision that a transaction is subject to ratification by Parliament if it involves the grant of a right or concession[76] by or on behalf of any person, including the National Government, to another person for the exploitation of any natural resource of Kenya.[77] The resources in question range from wildlife resources and habitats, resources of gazetted forests, water resources, resources on community land and biodiversity resources.

These provisions are to be implemented through the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016. The Act is meant to give effect to Article 71 of the Constitution of Kenya, 2010 and for connected

[72] Art. 69(1).

[73] Art. 69(2).

[74] No. 8 of 1999, Laws of Kenya (Government Printer, Nairobi, 1999).

[75] Art. 66(2).

[76] " concession" is defined in the proposed legislation, *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2015*, to mean the right to exploit a natural resource pursuant to an agreement between the grantor and the beneficiary or a permit issued under national or county legislation (clause 2).

[77] Art. 71(1).

purposes.[78] Notably, the law outlines the relevant considerations in deciding whether or not to ratify an agreement. Under the Act the following must be considered: the applicable Government policy; recommendations of the relevant regulatory agency; and comments received from the county government within whose area of jurisdiction the natural resource that is the subject of the transaction is located. Other considerations o be borne in mind include adequacy of stakeholder consultation; the extent to which the agreement has struck a fair balance between the interests of the beneficiary and the benefits to the country arising from the agreement; the benefits which the local community is likely to enjoy from the transaction; and whether, in granting the concession or right, the applicable law has been complied with.[79]

While these provisions are commendable in that they acknowledge the need for public participation and benefit sharing in natural resources exploitation arrangements, the law is quiet on the thresholds necessary for such approval. This leaves room for political manipulation by powerful groups creating the likelihood of an elite capture scenario where the exploitation is approved by a few for their own selfish interests. The effectiveness of this legislation will largely depend on the goodwill of the law enforcers as well as the level of information held by the affected communities. It is also noteworthy that the means and extent of benefits accruing to the community is to be left to community or their representatives. Thus, the communities will get a deal as good as the negotiation ability of their representatives or the leaders.

The Community Land Act, 2016[80] is meant to give effect to Article 63(5) of the Constitution. It provides for the recognition, protection and registration of community land rights and the management and administration of community land. It also makes provision for the role of county governments in relation to unregistered community land and for connected purposes.[81] The law defines "community" to mean an organized group of users of community land who are citizens of Kenya and share any of the following attributes: common ancestry,

[78] See also S. 124A, *Environment (Management and Coordination) Act*, No.8 of 1999, Laws of Kenya.

[79] Clause 9.

[80] No. 27 of 2016, Laws of Kenya.

[81] *Ibid*, Preamble.

similar culture, socio-economic or other common interest, geographical space, or ecological space.[82] This definition is relevant in that it helps clarify the target group in case of benefits accruing from what would fall under community land and consequently avert potential conflict. This is affirmed under section 31 thereof which provides that every member of the community has the right to equal benefit from community land, where equality includes full and equal enjoyment of rights of use and access. This is a form of promoting benefitsharing as far as community land is concerned.

Section 36 provides that subject to any other law, natural resources found in community land should be used and managed sustainably and productively; for the benefit of the whole community including future generations; with transparency and accountability; and on the basis of equitable sharing of accruing benefits. This provision thus requires all those charged with administration of such jointly-owned resources to not only ensure equitable sharing of accruing benefits, but also sustainable and productive use and management of the same. Where need for concessions arise, the proposed law provides that an agreement relating to investment in community land should be made after a free, open consultative process which contains provisions on environmental, social, cultural and economic impact assessment; stakeholder consultations and involvement of the community; and continuous monitoring and evaluation of the impact of the investment to the community. The legislation requires payment of compensation and royalties and the rehabilitation of the land upon completion or abandonment of the project. It enjoins measures to mitigate any negative effects of the investment and advocates for capacity-building of the community and transfer technology to the community.[83]

The Environmental Management and Co-ordination (Amendment) Act, 2015[84] amends section 48 of EMCA by inserting subsection (3) to the effect that where a forested area is declared to be a protected area under section 54(1), the Cabinet Secretary may cause to be ascertained, any individual, community or government interests in the land and forests and shall provide incentives to promote community conservation.[85] This is an important clause that can

[82] *Ibid*, Clause 2.

[83] *Ibid*, Clause 37.

[84] No. 5 of 2015, Laws of Kenya.

[85] S. 31, *Environmental Management and Co-ordination (Amendment) Act, 2015.*

promote forest conservation through the use of incentives.The incentives can be in the form of benefits that accrue to the community from the forest resources. The Mining Act 2016, defines a "mineral" as a geological substance whether in solid, liquid or gaseous form occurring naturally in or on the earth, in or under water, in mine waste or tailing and includes the minerals specified in the First Schedule but does not include petroleum, hydrocarbon gases or groundwater.[86] The Act also defines mining operations to mean an operation carried out in connection with a mine to win a mineral from where it occurs; to extract metal or precious mineral from a mineral so won, or to beneficiate a mineral so won; or to dispose of a mine waste or tailings resulting from winning, extraction or benefaction.[87] The Act provides for accruing benefits in the form of financial and other benefaction to which communities in mining areas are entitled to receive from the proceeds of mining and related activities.

This clarification on what entails accruing benefits ensures that the targeted population does not direct all their focus on the monetary benefits while paying little attention to the non-monetary forms. This may be important in averting any disputes that may arise where a community's expectations of direct financial returns are not realized. The provisions may also be a good basis for working with the investors to get more involved in corporate social responsibility activities that directly benefit communities in terms of improved social amenities and infrastructure. Indeed, the 2009 Africa Mining Vision correctly points out that the benefits to the local community may come in various forms, including revenues which accrue to the community because of its location (property rates and land rents); benefits which are the community's share of central Government revenues from mining and non-income benefits such as employment for local residents; assistance to community health and educational institutions; access to the use of mine infrastructure by the general public, amongst others.[88]

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[86] Act No. 12 of 2016, Laws of Kenya, s.4.

[87] *Ibid*, s.4.

[88] African Union, *Africa Mining Vision*, 2009, p. 23.

The Petroleum (Exploration and Production) Act[89] defines petroleum as mineral oil including crude oil, natural gas and hydrocarbons produced or capable of being produced from oil shales or tar sands.[90] In the Act, "petroleum operations" is defined as the exploration for, development, extraction, production, separation, and treatment, storage, transportation and sale or disposal of, petroleum including natural gas processing but does not include petroleum refining operations.[91] The Petroleum (Exploration and Production) Act[92] provides that the relationship between the Government and an exploration and production company is governed by a Production-Sharing Contract (PSC).[93]

The PSC stipulates that the exploration and production company gets a share of the oil and gas produced and its share is in the form of oil barrels. Essentially, the petroleum exploration and production company does not own the oil or gas but rather the Government retains title to the oil or gas produced. Should the exploration and production company not find any oil, then the cost of exploration is borne solely by the company. The Government does not meet any exploration costs that do not result in any oil revenue. Therefore, should oil be produced, the exploration and production company can recover that cost from the oil produced.[94] Such contracts may be important in securing the Government income. However, other loopholes must be looked into to ensure that such companies do not bypass such contracts to maximize their returns through such means as tax exemption measures.

The proposed Natural Resources (Benefit Sharing) Bill[95] seeks to establish a system of benefit-sharing in resource exploitation between resource exploiters,

[89] Chapter 308, Laws of Kenya.

[90] *Ibid*, S. 2.

[91] *Ibid*.

[92] Chapter 308, Laws of Kenya.

[93] *Ibid*.

[94] See Muigua, K., *et al*, *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, August, 2015), pp. 248-251.

[95] 2018 (Government Printer, Nairobi, 2018).

the National Government, county governments and local communities, to establish the natural resources benefit-sharing authority and for connected purposes. The proposed legislation will apply with respect to petroleum and natural gas, among other natural resources. It seeks to provide the guiding principles to include transparency and inclusivity, revenue maximization and adequacy, efficiency, equity and accountability.[96] It proposes setting up a Benefit-Sharing Authority which will be mandated to coordinate the preparation of benefit-sharing agreements between local communities and affected organizations, review and, where appropriate, determine the royalties payable to affected organizations engaged in natural resource exploitation. The Authority will identify counties that require to enter into benefit sharing agreement for the commercial exploitation of natural resources within the counties and oversee the administration of funds sets out for county projects as identified and determined under and benefit-sharing agreement. It will monitor the implementation of any benefit-sharing agreement entered between a county and an affected organization and conduct research regarding the exploitation and development of natural resources and benefit-sharing in Kenya so as to recommend better exploitation of natural resources in Kenya. The Authority will be empowered to determine appeals arising out of conflict and advise the National Government on policy/enactment of legislation relating to natural resource benefit-sharing.[97]

Setting up an institutional and legal framework on implementing the legal requirements on benefit-sharing is a laudable step meant to achieve equity and promote social justice amongst other principles of governance. The personnel should, however, work hand in hand with community representatives to avert any feelings of exclusion amongst such communities.

The proposed Petroleum (Exploration, Development and Production) Bill, 2017, was developed to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations; and for connected purposes. If approved, the Bill will repeal Petroleum (Exploration and Production) Act.[98]

[96] S. 4.

[97] Clause 6, *Natural Resources (Benefit Sharing Bill),* 2015.

[98] Chapter 308, Laws of Kenya.

Notably, the Bill introduces the concept of "local content" which means the added value brought to the Kenyan economy from petroleum related activities through systematic development of national capacity and capabilities and investment in developing and procuring locally available work force, services and supplies, for the sharing of accruing benefits.[99] For the purpose of subsection (1) before engaging in upstream petroleum operations, the contractor must prepare and submit a long-term and annual local content plan which corresponds with the work program to the Authority for approval.[100] The local content plan would be required to address employment and training; research and development; technology transfer; industrial attachment and apprenticeship; legal services; financial services; insurance services; and succession plans for positions not held by Kenyans.[101]

The Bill requires the contractor and a sub-contractor conducting upstream petroleum operations to comply with local content requirements in all of the contractor's or sub-contractor's operations. They are required to give priority to services provided and goods manufactured in Kenya where the goods meet the specifications of the petroleum industry as prescribed by the Kenya Bureau of Standards or, in absence of a Kenyan standard, any other internationally acceptable standard that the (Upstream Petroleum Regulatory) Authority shall approve. They must also ensure that priority is given for the employment or engagement of qualified and skilled Kenyans at all levels of the value chain provided that the cost of local content should not be higher than at any other place.[102]

The requirement on local content can go a long way in enhancing benefit sharing mechanism in the extractive industry in Kenya, an aspect that was missing or inadequate in the Kenyan framework. The local content plan is a step in the right direction for not only addressing the plight of communities living and exposed to mining and oil exploration activities, but also guaranteeing maximum and diverse benefits which would accrue to the current and future generations, long after the resource extraction activities have stopped.

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[99] Clause 77(1), *Petroleum (Exploration, Development and Production) Bill, 2015*.

[100] *Ibid*, Clause 77(2).

[101] Clause 77(3).

[102] Clause 77(1), Petroleum (Exploration, Development and Production) Bill, 2015.

The National Sovereign Wealth Fund Bill, 2014 proposes to establish Kenya's National Sovereign Wealth Fund to undertake diversified a portfolio of medium and long term local and foreign investment to build a savings base for purposes of national development. The Fund will aim at stabilizing the economy at all times, enhancing interregional equity in Kenya, as well giving effect to the provisions of Article 201 of the Constitution of Kenya.[103] The object and purpose of the fund is to build a savings base for the people of Kenya, protect and stabilize the budget and economy from excess volatility in revenues or exports, and provide a mechanism for the diversification from non-renewable commodity exports. It will further seek to assist monetary authorities dissipate unwanted liquidity, increase savings for future generations, fund social and economic development, enhance sustainable long term capital growth and support and promote any other strategic objectives of the country.[104] This fund will also be important in promoting intergenerational and intragenerational equity in natural resource benefits sharing.

According to the draft National Energy Policy, 2014,[105] the Government shall adopt and implement the extractive industries transparency initiative (EITI)[106] as a demonstration of its commitment to good governance, increased scrutiny over revenue collection from petroleum and coal resources and improvement of the country's investment climate. The Policy seeks to reconstitute the National Fossil Fuels Advisory Committee (NAFFAC) and develop mechanisms for sharing of benefits between the National and County Governments as well the local communities in accordance with Article 69 of the Constitution. In the Policy, the Government also commits to establish a one stop shop for licensing of fossil fuel operations and undertakings with a view to enhancing development of the requisite infrastructure for fossil fuels.[107]

[103] Preamble, National Sovereign Wealth Fund Bill, 2014.

[104] National Sovereign Wealth Fund Bill, 2014, Clause 4.

[105] Draft National Energy Policy, 2014, Government Printer, Nairobi.

[106] See Extractive Industries Transparency Initiative (EITI) https://eiti.org/eiti. This is voluntary mechanism setting international standards for enhanced transparency and accountability in the oil, gas and mining sectors. The Extractive Industries Transparency Initiative (EITI) was launched at the World Summit on Sustainable Development (Earth Summit), held in Johannesburg, September 2002 as a way to address the resource curse phenomenon, globally. (Ugolor, D., *Briefing Paper on the Extractive Industries Transparency Initiative* (EITI) (Heinrich Boll Foundation). Available at https://www.boell.de/sites/default/files/assets/boell.de/images/download_de/intlpolitics/ugolor_nigeria.pdf [Accessed on 02 June 2016].

[107] Draft National Energy Policy, 2014, p. 4.

If fully implemented, the contents of these provisions are likely to impact positively on the community in ways that would ensure that the community becomes self-sustaining as far as livelihood sustenance is concerned. However, it must be noted that for the community to benefit through the ways contemplated above, they must be willing to take up opportunities that would be brought their way. They must be made to understand that the expected benefits will not come in monetary terms only, and must be made aware of the various non-monetary benefits that may accrue to them as envisaged under the Nagoya Protocol. Some of the forms would only be made possible through concerted efforts from both the concerned community and the investor and possibly with assistance from the county and national governments.

While there are other laws that may be resorted to, some of the issues that will arise may remain unaddressed. These may include social and cultural effects of the resource exploitation. This affects the 'social licence' required for such activities by both local and foreigner investors.

5. Regional Efforts in Promoting Sustainable Mining for National Development in African States

The African Union in collaboration with the United Nations Economic Commission for Africa developed the Africa Mining Vision as result of some challenges that had been identified. These challenges included, inter alia, the issue that although the benefits of mining to certain national economies could be evident, local costs (environmental impacts and social and cultural disruptions) associated with mining especially to local communities were not being adequately compensated for. It was also observed that the magnitude of special incentives offered to mining companies arguably reduced the share of rent on which African governments depended to fund their social and development programmes.
Moreover, mining had not fulfilled its poverty reduction role as poverty reduction had not been mainstreamed into mining policies, often due to weak linkages to the local, regional and national economies.[108]

With respect to benefit sharing, the Mining Vision highlights the changing approaches in new contractual arrangements and legal instruments to facilitate increased participation by local communities and other stakeholders, as well as new revenue (derived from royalties, income tax, land tax, lease rents etc.)

[108] African Union, *Africa Mining Vision*, February 2009, p.11.

distribution mechanisms for sharing, at local level, portions of centrally collected rents.[109]

The Africa Mining Vision recommends a tentative framework for action on what needs to be done at national, sub-regional and continental levels. This is presented in three stages of implementation, namely short-term (up to 5 years from the date the vision is adopted), medium-term (5-20 years) and long-term (20- 50 years), and where possible, roles and responsibilities have been assigned to key players.[110]

The Mining Vision also highlights the fact that, although the approaches described offer hope for the improvement of the mining legacy in Africa, more needs to be done to achieve change. The suggested measures include, but are not limited to recommendations that policies, legal and regulatory frameworks to facilitate equitable participation by local businessmen, communities and other stakeholders in mining activities need to be refined, and tools improved for revenue (derived from royalties, income taxes, land taxes, lease rents etc.) distribution at local level. It also advocates for transparency and efficiency in the management of revenue paid to various governmental authorities.[111]

It worthy pointing out that with the ever increasing awareness on human rights at the international, regional and national, more people have been demanding transparency, accountability and inclusion in the natural resource extraction decisions and the accruing benefits. They are concerned about how the natural resources in their countries are being used to improve their livelihoods.
From the Africa Mining Vision, it is clear that despite many African states being well endowed with natural resources, they have little to show on how they have utilised the same to improve their people's welfare. A few States have, however, made attempts to enhance utilisation of their mineral resources for the improvement of their economies. The two countries discussed below are not meant to present a full case study on their status on mining and benefit sharing, but are merely presented as examples on pitfalls that a country like Kenya can avoid to maximize their returns from their nascent mining sector.

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[109] Ibid, p.12.

[110] Ibid, pp. 30-37.

[111] Ibid, p.38.

5.1 Lessons From Ghana: Catapulting National Development Through Extractive Industries

It has been observed that many African countries do not have a strong track record of managing mineral wealth well. Ghana is, however, often considered a model of best practice, based on the government's distribution of a proportion of mining rents to mining affected communities.[112]

In Ghana's mining sector, the system devised to distribute mining wealth to local level is, by and large, through royalty with royalty agreements being set at between 3% and 6% provided directly to the government quarterly which is the main source of revenue derived from gold mining.[113] The mine revenue is paid to the Large Tax Unit of the Ghana Revenue Authority, which then dispenses the money into the Consolidated Fund. Of this, 80% is retained by the Government and used for general budget support. 10% is put into the Mineral Development Fund (MDF), which is ostensibly used to help fund public mining sector institutions and adhoc flagship projects in mining communities.[114]

Decentralization of mining revenue in Ghana is legislated as compensation for mining-affected communities. It is not a dividend or admission that citizens in mining areas have economic rights to mineral deposits.[115] It is noteworthy, however, that even in Ghana, as is the case in many countries, the relationship between industrial mining and communities is complex and highly contested. This is because, despite macroeconomic growth fuelled by the mining boom, Ghana remains a country with high rural poverty.[116] There have even been instances of misappropriation of mineral benefits distributed through the grassroots leaders, namely, village chiefs who are supposed to ensure that the funds are invested well for the benefit of the communities.[117]

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[112] Standing, A., 'Ghana's extractive industries and community benefit sharing: The case for cash transfers,' *Resources Policy*, vol. 40, 2014, pp.74–82, p. 74.

[113] *Ibid*, p. 75; See S. 25, *Minerals and Mining Act*, 2006 (Act 703), Laws of Ghana.

[114] *Ibid*, p. 75.

[115]Standing, A., 'Ghana's extractive industries and community benefit sharing: The case for cash transfers,' *op cit*, p. 74; See also Ayee, J., *et al*, 'Political Economy of the Mining Sector in Ghana,' *The World Bank Policy Research Working Paper 5730*, July 2011. Available at http://www.cmi.no/publications/file/4091-political-economy-of-the-mining-sector-in-ghana.pdf [Accessed on 29/05/2016].

[116] *Ibid*, p. 75.

[117] *Ibid*.

The result has been unending poverty despite the presence of vast resources. Nonetheless, Ghana can offer good lessons in terms of models of division, while ensuring that Kenya does not fall into the same problem of misappropriation of funds. Thus, while Ghana remains a model country for countries venturing into extractive industries, it demonstrates the important point that national development should not entirely be pegged on resources accruing from extractive industries, but local communities should be supported and encouraged to diversify their sources of livelihood in a way that ensures sustainability in income and growth for both the communities and the country.

1.2 Nigeria: Resource Curse or Blessing?

There has been documented evidence from the vast majority of resource-rich countries, especially those endowed with depletable natural resources (i.e. fuels, ores, minerals and metals) to suggest that resource riches can be a "curse" rather than a "blessing".[118] Some of the factors that contribute to such eventualities include unpredictable commodity prices with abrupt fluctuations, booms and busts in macroeconomic and fiscal balances that follow the swings in resource rents, inter- and intra-generational misallocation of resource revenues and increasing corruption.[119]

One such country is Nigeria, which is listed as one of the largest economies of the African continent and one of the leading oil producers in the world.[120] It is estimated that oil accounts for more than 90 percent of the country's exports, 25 percent of the Gross Domestic Product (GDP), and 80 percent of Government total revenues.[121] Notably, the oil boom of the 1970s led to the neglect of agriculture and other non-oil tax revenue sectors, expansion of the public sector, and deterioration in financial discipline and accountability.[122]

In Nigeria, oil revenues are divided between the three tiers of government: federal, state and local. The federal government typically gets about half

[118] Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,' *Resources Policy*, 38(2013), pp.181–195, p. 181.

[119] *Ibid.*

[120] See Agbaeze, E. K, 'Resolving Nigeria's dependency on oil – The derivation model,' Journal *of African Studies and Development*, Vol. 7(1), pp. 1-14, January 2015.

[121] *Ibid*, p. 3.

[122] *Ibid*, p. 2.

of revenues, the 36 state governments about a quarter, and the 774 local governments about a fifth. The rest flows to special funds.[123]

Despite the oil revenue, poverty rates are generally higher and infrastructure is poorer in the oil-rich States and there is disproportionate allocation of such funds.[124] It has been observed that while oil exports have fuelled real GDP growth of over 5 per cent per yea, the official unemployment rate r in Nigeria climbed from 15 per cent in 2005 to 25 per cent in 2011, and youth unemployment rates are estimated to be as high as 60 per cent.[125]

The negative effects of the extractive sector which is said to be poorly regulated have not only been the limited resources accruing to the locals. There has also been huge environmental damage. It is contested that the site of Nigeria's vast oil wealth is also the source of an ecological disaster that has destroyed livelihoods of farmers and fisher folk in the delta's inlets on a huge scale.[126] This is because environmental damage not only affects health and wellbeing but also decimates livelihoods, such as fishing and agriculture that depend upon natural resources.[127]

The scenario has led to legal battles. Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson, and Wiwa v. Shell Petroleum Development Company were three lawsuits filed by the Centre for Constitutional Rights (CCR) and co-counsel from EarthRight International on behalf of relatives of murdered activists who were fighting for human rights and environmental justice in Nigeria.[128]
Royal Dutch/Shell began using land in the Ogoni area of Nigeria for oil

[123] Shaxson, N., 'Nigeria's Extractive Industries Transparency Initiative: Just a Glorious Audit?' (Royal Institute of International Affairs, 2009), pp. 3-4.

[124] *Ibid*, p. 4.

[125] Africa Progress Panel, 'Equity in Extractives: Stewarding Africa's natural resources for all,' *Africa Progress Report* 2013, p. 31. Available at http://appcdn.acwupload.co.uk/wpcontent/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf [Accessed on 27 May 2016].

[126] *Ibid*, p. 32.

[127] *Ibid*,p. 33.

[128] Centre for Constitutional Rights, *Wiwa et al v. Royal Dutch Petroleum et al*., available at http://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al [Accessed on 29 May 2016].

production in 1958. Pollution resulting from the oil production has contaminated the local water supply and agricultural land upon which the region's economy is based. The Royal Dutch/Shell is also said to have worked for decades with the Nigerian military regime to suppress all demonstrations that were carried out in opposition to the oil company's activities.[129]

It has been alleged that Shell's aim for the lowest possible production cost including the practice of gas flaring, without regard for the resulting damage to the neighbouring people and surrounding land, has wreaked havoc on local communities and the environment.[130] In the early 1990s, the Ogoni, led by Ken Saro-Wiwa and the Movement for the Survival of the Ogoni People, began organized, non-violent protests against Shell's practices. Shell grew increasingly concerned with the heightened international prominence of the Ogoni movement and made payments to security forces whom they knew were engaging in human rights violations against the local communities. The military Government violently repressed the demonstrations, arrested Ogoni activists, and falsely accused nine Ogoni activists of murder. It bribed witnesses to give false testimony.[131]

From the foregoing, it is apparent that the Nigerian people have not benefited much, if at all, from the extractive industry in their country, but have instead suffered more tragedy as a result of the mining activities. Kenya should therefore avoid a scenario where oil exploration result in human rights abuse and environmental degradation which in turn affects the livelihoods of the people. Corruption should also be shunned as it would lead to the intended beneficiaries being locked out and instead, only a few people, both in the public sector and private individuals would benefit instead.

1. Opportunities: Making Natural Resources Wealth Count

Arguably, benefit-sharing mechanisms involve a variety of institutional means, governance structures and instruments for distributing finance and other

[129] *Ibid.*

[130] Centre for Constitutional Rights, *Settlement Reached in Human Rights Cases Against Royal Dutch/Shell*, New York, June 8, 2009. Available at http://ccrjustice.org/home/press-center/press-releases/settlement-reached-human-rights-cases-against-royal-dutchshell [Accessed on 29 May 2016].

[131] *Ibid.*

benefits.[132] Further, Benefit-sharing mechanisms can be organized along two main axes: a vertical axis of benefit sharing across scales from national to local, and a horizontal axis of sharing within scales, including within and across communities, households and other local stakeholders.[133]

It has been argued that free and prior informed consent of local communities and transparent and equitable benefit-sharing mechanisms can bring affected communities into the mainstream of a natural resource dominant development model.[134]

Understanding who the key stakeholders are, what their aspirations, concerns and expectations of a project are, and what drives them is important for judging the reasonableness of a benefit-sharing settlement and its legitimacy and durability over time.[135] Key stakeholders may include the Government (national and sometimes counties), investors, affected communities and citizens at large.[136]

Some Governments argue that no special transfer of revenues to producing regions is justified. They hold that the most effective approach to governance and development is for national governments to collect all tax revenues and then use them to benefit the country as a whole, including the producing areas. They feel that the producing regions will gain net benefits from projects, such as jobs, infrastructure and economic activity in their regions. So, no additional resources are justified. Other governments and commentators maintain that natural resource projects impose costs on the producing regions, and that communities should be compensated adequately for the 'loss' of a non-renewable resource.[137]

[132] Pham, T.T., *et al*, 'Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries,' *op cit*. p. 1.

[133] *Ibid*.

[134] Talbott, K. & Thoumi, G., 'Common ground: balancing rights and responsibilities for natural resource investments and community development,' 3rd April 2015, available at https://news.mongabay.com/2015/04/common-ground-balancing-rights-and-responsibilities-for-natural-resource-investments-and-community-development/ [Accessed on 28 April 2016]

[135] Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), *op cit*. p. 12.

[136] *Ibid*.

[137] *Ibid*, p. 37.

The UN Declaration on the Rights of the Indigenous Peoples, adopted by the UNGA, guarantees indigenous people to fully enjoy human rights and fundamental freedom without discrimination. Article 4 of the convention obligates state to take up special measure in accordance with their free wishes in protecting the vulnerable themselves, their culture, environment and property. Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[138] recognizes the right of States to self-determination including the right to freely determine their political status, pursue their economic social and cultural goals and manage and dispose of their resources. Equitable benefit-sharing is a prerogative of the government. From equitable benefit sharing stems economic development, co-existence and co-operation as well as sound natural resource management.

The preamble to the Constitution of Kenya 2010 acknowledges the people of Kenya as being proud of their ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation, respectful of the environment which is their heritage and determined to sustain it for the benefit of future generations, and committed to nurturing and protecting well-being of the individual, the family, communities and the nation. It recognizes the aspirations of all Kenyans for the government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. In exercising their sovereign and inalienable right, the people are thus entitled to determine the form of governance of their country having participated fully in the making of the Constitution.

On the other hand, State and State organs are bound by the constitutional values and principles of governance. The national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of people; human dignity, equality, social justice, inclusiveness, equity, human rights, non-discrimination and protection of marginalized; good governance, integrity, transparency and protection and accountability and sustainable development.[139]

[138] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

[139] Article 10, Constitution of Kenya, 2010.

The social and economic development is essential to enable a favourable living and working environment.[140] Natural resource management plays a key role in the conservation of the environment. The benefit of a clean environment extends to biodiversity and wildlife ecosystems which ultimately enables the enjoyment of other rights.[141] Human rights remain the obligation of the State to protect and may be done through inclusive decision-making processes.[142] Therefore, while it is important for the state to promote the people's right to benefit from their natural resources as envisaged in international and national legal and human rights instruments, this should be done within the framework of achieving sustainable development. All stakeholders must work towards implementing the sustainable development agenda which would mean that communities are obligated to diversify modes of development and production through adoption of more sustainable means.

It is, nonetheless, important for the Kenyan people to look beyond oil resources in the country and invest in innovation to boost production in other areas such as livestock and agriculture production as well as innovative business investment in creative technologies.

7.1 Foundations and Trusts

The approaches taken by Kenya towards resource management, for instance, have been through Foundations, Trusts and Funds (FTF) initiatives in the energy sector. FTFs represent a wider range of financial and institutional framework that channel revenues to local communities. This mode of benefit sharing enable for the operation of government payment, compensation and community investment. It is suggested that they establish a systematic, professional formal approach to development. This has been successful in jurisdictions such as Senegal, Ghana, Australia and Canada.[143]

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[140] Principle 8, UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

[141] Article 24 of the ACHPR provides that every person shall have a right to a general satisfactory environment for development. This right connects to other human rights such as the right to life and the right to standard health care.

[142] Aarhus Convention in Access to Information, Public participation in decision making and Access to Justice in Environmental Matters1989 recognizes the nexus between human right and the environment as being essential in the well-being of human beings.

[143] Muigua K., *et al*, *Natural Resources and Access to Environmental Justice in Kenya,* (Glenwood Publishers, Nairobi, 2015).

7.2 Enhancing Local Accountability and Capacity-Building

Minerals are non-renewable resources.[144] There is emphasis on the importance of sound environmental management and effective governance as priority to ensure rapid development and poverty reduction. There is demonstrable shift from a predominantly centralized natural resource management to devolved models such as community-based natural resource management (CBNRM).[145] Communities with more control over access and better common property management regimes play stronger decision-making roles.[146] They acknowledge that land-use decision-making is inherently a multilevel process since numerous actors are involved both directly and indirectly representing multiple sectors with different roles, interests and incentives.[147]

It has been suggested that in terms of transparency, resource fund establishments may provide what seems to be of great importance to the resource-rich countries: transparency on resource wealth management.[148] Arguably, resource funds (RF) may provide, even to a limited degree, a track record of windfalls.[149] It has also been suggested that, through corporate social responsibility (CSR) and social investment strategies, extractive firms can provide local socio-economic development where the government is unable or unwilling to do so. They may thus help mitigate against the potentially harmful impacts of resource-led growth.[150] Some of the suggested types of CSR and social

[144] Masters, L. & Kisiangani, E., *Natural resource Governance in Southern Africa*, (Institute of Global Dialogue, South Africa, 2010).

[145] Roe, D., *et al*, *Community management of natural resources: impacts experiences and future directions.* IIED Publishing.

[146] Myrers, R., *et al*, 'Benefit sharing in context: a comparative analysis of 10 land-use change case study in Indonesia,' *Infobriefs, No. 118, May 2015.* Available at http://www.cifor.org/publications/pdf_files/infobrief/5585-infobrief.pdf [Accessed on 26 May 2016].

[147] *Ibid*, p.1.

[148] Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,' *op cit*, p. 190; cf. Alstine, J.V., *et al*, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, *op cit*, p. 50. There is an argument that transparency in resource governance in and of itself may not be capable of facilitating good governance. The argument, thus, is that synergies with other poverty reduction and sustainable development initiatives need to be explored. One of the suggested approaches is synergy with CSR initiatives of extractive industry firms at the regional and local levels.

[149] *Ibid*.

[150] Alstine, J.V., *et al*, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, *op cit*, p. 50.

investment programmes include those relating to employment, such as practices of local hiring; environmental impact assessments and mitigation measures; and local community development projects, such as providing safe drinking water, building health centres and school classrooms, training peer educators for community health programmes and supplying equipment. It may also include providing microcredit schemes as well as scholarships for youth and women.[151] Notable is the assertion that the ideal goal is for private sector development interventions to supplement government service provision, to avoid a situation of dependency on the private sector, and not to impact the willingness or ability of the State to develop its capacity.[152] It is, however, noteworthy that CSR as a means of benefit sharing, albeit informally, may not be effective as it wholly depends on the goodwill of the company or corporation in question. It may, therefore, be necessary to have a more formalized framework under which thesame benefits can accrue to the communities in a more certain and sustainable manner. This may call for a framework that is anchored in law, to shield it from the uncertainties that come with CSR arrangements. This also increases accountability, not only to the local communities but also to the Government.

7.3 Achieving Right to Environmental Information

Environmental information comprises of information held by authorities of factors that affect the environment, research on the environment, and health and safety measures,[153] and reports on the implementation of environmental legislation among others.[154] Lack of environmental information regarding conservation and management becomes more technical in undertaking natural resource management.

Like many African countries that have natural resources, Kenya generally lacks the capacity to explore and extract them as well as the required equipment and knowledge on the same.[155] Illiteracy levels remain high in resource-rich counties as indeed is the case in many parts of the country.

[151] *Ibid*, p. 50.

[152] *Ibid*.

[153] Convention on Environment Impact Assessment in a Transboundary Context, 1991, calls for the establishment of EIA procedures that involves public participation.

[154] http://www.citizensinformation.ie/en/environment/environmental_law/access_to_environmental_information.htm.

[155] World Bank Investments Projects, www.ggr.org

African governments have entered into multinational contracts inviting foreign investors to their countries. The foreign investors, with the literacy, technology and advanced equipment, explore, extract and export the minerals to their countries for manufacturing. African countries import these finished products at a higher price.[156] As far as indigenous communities are concerned, their right to information should be upheld by ensuring that any information needed is received as soon as possible. Enabling access to environmental information forms the basis to access environmental justice.[157] Communities are also likely to understand the implications of extractive industries on their day to day lives as far as the environment is concerned.

7.4 Devolution and Benefit-Sharing

The 2010 Constitution requires that services be devolved and both the national and county governments to ensure reasonable access to its services so far as it is appropriate.[158]

Ideally, local communities should be allowed to access natural resources for them to be able to uphold their responsibilities to the future generations.[159] Natural resources are a source of livelihood as they from part of their economic activity. If natural resources are accessed and well managed, they provide the raw materials which are then processed to get products that are sold and thereby generate income. Allowing communities to access natural resources will undoubtedly promote sustainable development.

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[156] African Development Bank, *et al*, *African Economic Outlook 2013: Structural Transformation and Natural Resources*, 2013, available at http://www.undp.org/content/dam/rba/docs/Reports/African%20Economic%20Outlook%202013%20En.pdf, [Accessed on 29 May 2016].

[157] Muigua, K., *Natural Resources and Environmental justice in Kenya, op cit*; See also The Access to Information Bill, 2015 (Government Printer, Nairobi, 2015]; See also Art. 35 of the Constitution of Kenya 2010.

[158] Article 6, Constitution of Kenya, 2010.

[159] Article 40, United Nations Declaration on the Right of the Indigenous people, 2007; In *Joseph Letuya and 21 others v AG and 5 others elc civil suit no 821 of 2012*, the court was challenged to determine whether an indigenous community (Ogiek) had rights arising from their occupation of parts of the East Mau forest and whether their eviction was an infringement to their right. The court held that the applicant were indeed recognized as indigenous people being a minority, they had been discriminated upon by the said eviction. Their rights to life, dignity, economic and social rights had been infringed from the eviction.

However, fiscal decentralization has been criticised on account of the weak capacity of sub-national Governments (SNGs) to manage intrinsic volatility in revenue flows, and limited know-how of public financial management, planning and investments, and fragility of financial control systems. They also point to poor accountability of local authorities and corruption as a result. Moreover, complete decentralization of resource rents could deprive central government of funds necessary for providing national functions and could create geographical disparity and conflict.[160]In contrast, proponents argue that devolution would enhance allocative efficiency, as SNGs can more accurately determine the needs and find appropriate solutions. Importantly, supporters argue that the producing regions must be compensated for the negative impacts and for the loss of a non-renewable resource which local communities feel they own.[161]

Despite the foregoing arguments, it is important to make use of the devolved system to empower communities and build capacity through investing the accrued benefits in sustainable development projects which will go beyond the lifespan of oil exploration and at the same time uplift the livelihoods of the local people. The County governments are in a better position to identify the most viable and sustainable projects.

7.5 Public Participation

The principles that govern natural resource management have been enshrined in the 2010 Constitution of Kenya.[162] Public participation allows individuals to

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[160] Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), *op cit*. p. 33.

[161] *Ibid*, p. 33.

[162] Article 61, Constitution of Kenya, 2010; *Sustainable development* principle seeks to lessen the depletion of the non-renewable resources and pollution in the environment. The Brundtland Commission defined sustainable development as development that meets the needs of the present generation without comprising the ability of the future generations to meet their own needs. *Sustainable use* principle considers the need to reduce and eliminate unsustainable patterns of production and consumption. It is applied to determine the permissibility of the natural resource exploitation and is central to the principle of sustainable development. *Polluter pays principle* provides that where a person is responsible for causing the pollution, costs for such pollution should be borne by that person. States are held liable for internationally wrongful acts or omissions that arise out of their customary international law or treaty obligations. The concept of state responsibility protects fundamental values. In the *Corfu channel case*, it was held that states have an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states. *Precautionary principle* aims at averting danger to the environment before it actually occurs.

express their views on key governmental policies and laws concerning conditions in their communities. Fostering public participation will mean that authorities dispense their constitutional and legislative obligation, positive deviation in terms of contribution and motivation. In The Matter of the National Land Commission [2015] eKLR,[163] one of the issues that the Supreme Court of Kenya had to deal with was the role and place of public participation in the administration and management of land in Kenya. Mutunga, CJ observed that public participation was a major pillar, and bedrock of democracy and good governance. It was the basis for changing the content of the State, envisioned by the Constitution, so that the citizens had a major voice and impact on the equitable distribution of political power and resources. With devolution being implemented under the Constitution, the participation of the people in governance would make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority was derived from the people of Kenya, was the indestructible fidelity to the value and principle of public participation. The realization of the pillars of good governance would become weak and subject to the manipulation by the forces of status quo if the participation of the people was excluded.[164]

He went further to state that public participation was the community based process, where people organise themselves and their goals at the grassroots level and work together through governmental and non-governmental community organisations to influence decision-making processes in policy, legislation, service delivery, oversight and development matters. It was a two way interactive process where the duty bearer communicates information in a transparent and timely manner, engages the public in decision-making and is responsive and accountable to their needs. The definition could be applied to the management and administration of land in Kenya. In order to achieve efficient land administration and management, the national and county governments; the arms of government; and the commissions and independent offices, must conduct meaningful consultation, communication, and engagement with the people.[165]

The Chief Justice further rightfully stated that the principle of the participation of the people did not stand in isolation but was to be realised in conjunction with

[163] Advisory Opinion Reference No. 2 of 2014, December 2, 2015.

[164] *bid*, para. 45.

[165] *Ibid*, para. 47.

other constitutional rights, especially the right of access to information (article 35); equality (article 27); and the principle of democracy (article 10(2)(a)). The right to equality related to matters concerning land, where State agencies were encouraged also to engage with communities, pastoralists, peasants and any other members of the public. Thus, public bodies should engage with specific stakeholders, while also considering the views of other members of the public. Democracy was another national principle that was enhanced by the participation of the people.[166]

The Supreme Court's advisory opinion is an affirmation of the important role that the principle of public participation can play in enhancing people's appreciation of the management of natural resources in the country. Apart from enhancing people's role in management, public participation may promote co-existence among indigenous communities.[167] All the concerned groups may get a chance to express their fears and concerns as well as needs as far as resource exploitation is concerned. Although it may slow down the decision making-process, public participation will prevent conflict of decisions and may also enable the investors obtain the 'social license' to operate in the affected regions.[168]

If the state seeks to implement this principle, recourse must be paid to the existing traditional institutional structures which provide a structural base to public participation. In addition, promoting public participation contributes to their economic development.[169] It has also been observed that procedural equity, which concerns participation in decision-making and the inclusion and negotiation of competing views, is seen as critically important for any benefit-sharing mechanism.[170]

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[166] *Ibid*, para. 49.

[167]See Yagoub, A.M., 'Public Participation in Natural Resource Management in Sudan.'

[168] Mohair, P., *Public Participation and Natural resource Decision Making: the Case of RARE II Decisions,* Utah Agricultural Experiment Station, Journal Paper No. 3282.

[169] *R v Kenya Forest Services ex parte the National Alliance of Community Forest Association*.
[170]Pham, T.T., *et al*, 'Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries,' *op cit*. p. 31.

There is need to diversify the type of expected benefits from the exploitation of the existing resources. The benefits envisaged should be in both monetary and non-monetary forms where possible. Equitable benefit-sharing may take monetary or non-monetary forms. [171] It may also be direct or indirect. This may include participation, sharing scientific research and development results access to technology and payment of royalties and other compensation. Kenyan people and policy-makers, however, seem to be more concerned with royalties, at the expense of other forms of accruing benefits which may arguably have longer sustainability as far as improving the lives of the people is concerned.
The International Finance Corporation (IFC) suggests practical processes for sharing benefits with communities.[172] One of the ways that this can be achieved is through maintaining active relationships built on trust with communities through appropriate and effective communication. This implies that genuine consultations and participation in decision-making will happen whenever possible and that perceptions and expectations are closely aligned with reality. They also propose carrying out comprehensive, participatory baseline studies of the community's socioeconomic, cultural heritage, and socio-environmental context before project development, agreeing to joint objectives for the project's community programs, monitoring outcomes (including community feedback), and responding as needed. This, according to IFC, helps address misconceptions, manage expectations, and assuage fears or concerns.[173]

There is also the suggestion on establishing robust grievance mechanisms that are understood, accessible and linked directly to project performance measures. Where justified, third party mediation may be required. Foundations and other long-term approaches may also be good vehicles to achieve community development objectives if they ensure broader stakeholder participation and helping identify areas of focus and consistency of priorities across actors, such as company, governments, donors, and communities. Finally, integrating project development and community development plans as effectively as practicable with local and national Government planning to support development aspirations and balance the expectations and demands of different communities may be useful.

[171] Nandozie, K., *et al*, *African Perspective on Genetic Resources: A Handbook of Laws Policies and Institutions*. (Environmental Law Institute, Washington DC, 2003).

[172] Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), *op cit*. p. 61.

[173] *Ibid*, p. 61.

The suggestions by IFC are worth considering in the case of Kenya, to build sustainable and enduring local economies for the local people. These propositions are closely related to the non-monetary forms of benefits as envisaged in the Nagoya Protocol. They ought to be integrated into the national legal framework on natural resource management and benefit sharing since they are more practical and likely to result in realistic and viable outcomes for easy implementation. This is because by their very nature, they would be based on commendations from all the relevant stakeholders, including the affected communities. This enhances chances of the outcome being more acceptable to the community for purposes of social licence in natural resources exploitation.

7.6 Addressing Resource Capture Phenomenon and Corruption

It has been argued that rent-seeking models assume that resource rents can be easily appropriated, hence encouraging bribes, distorted public policies and diversion of public towards favour seeking and corruption.[174] Corruption has been termed as a threat to protected human security.[175] Global effort is needed to combat corruption.[176] Resources have fostered corruption, undermined inclusive economic growth, incited armed conflict and damaged the environment.[177] The Governments managing significant resource may find rent appropriation preferable when compared to the promotion of wealth creation policies.[178] The argument is based on the preposition that rent appropriation may dominate over wealth generation as it offers immediate economic and political gains. These gains appear quite appealing as they can, arguably, be highly personal, favouring the specific members of the ruling elite.[179]

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[174] Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,' *Resources Policy*, 38(2013), pp.181–195, p. 184.

[175] Alao, A., *Natural Resource Management and Human Security in Africa,* in Abass, A., *Protecting Human Security in Africa* (ISBN-13: 9780199578986, Oxford University Press, 2010).

[176] Lawson, T. R. & Greestein, J., 'Beating the resource Curse in Africa: A global Effort,' *Africa in Fact,* August 2012. Available at http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780 [Accessed on 26 May 2016].

[177] Aled, W., *et al*, *Corruption in Natural Resource Management: An introduction* (Bergen: Michelsen Institute, 2008). Available at http://www.cmi.no/publications/file/2936-corruption-in-natural-resource-management-an.pdf [Accessed on 29 May 2016].

[178] *Ibid*.

[179] *Ibid*.

8. Conclusion

It is a blessing that Kenya has natural resources that can be exploited. Effective management of these resources and equitable benefit-sharing are essential. The natural resources can assist Kenya to achieve sustainable development as envisaged in the United Nations Sustainable Development Goals.[180]

There is, however, need for debate and consensus on how best to manage natural resources and the extractive industry so as to avoid the resource curse and alleviate poverty and promote development. A strong legal framework for benefit sharing ought to be put in place covering the expectations, rights and obligations of all parties concerned.

[180] United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

Transformative Constitutionalism and its Challenges: Lessons from South Africa

Freda Mugambi–Githiru*

Abstract

The arduous struggle towards enactment of Kenya's Constitution is a story of a people keen to overthrow an old order and define a radically different order for themselves. The implementation towards this courageous decision began 8 years ago with a document that has been hailed as one of the most progressive in the region. An honest introspection of these 8 years discloses successes and gains as well as discomfort, resistance, fear and failure; the mixed results perhaps evidenced by the ongoing calls for constitutional referendum. This paper exposes the challenges that have been faced in almost similar transformational experiences in South Africa. It candidly discusses the realities and challenges of transformation in Kenya's constitutional framework.

1. Introduction

August 2018 marked 8 years into the implementation of the 2010 Constitution of Kenya. The pomp and celebration that greeted the promulgation of the no longer 'new' Constitution has settled into a rude reality as judges, lawyers, academics and the public embark on interpreting, understanding and applying the Constitution. All have awakened to the reality that writing the Constitution was the easier part; breathing life into the document being the more onerous task.[181]

Less than a decade into the new dispensation, there are already calls for a referendum to change the Constitution which had 8 years ago given the people of Kenya immense hope of a transformed society. There are concerns that some of the original projects of the constitution may have failed. Key justifications for the referendum include the urgent need to reorder the political and structural architecture of the country and the argument on over representation. Both of

[181] *LLB (Moi), LLM (Birmingham), LLD (Pretoria). Advocate of the High Court of Kenya and Deputy Director, Judicial Education and Curriculum Development, Judiciary Training Institute. The law is stated as at 1 January 2017.

PLO Lumumba & L Franchesci, *The Constitution of Kenya 2010; An Introductory Commentary* (Nairobi: Law Africa, 2010) 49; YP Ghai & J Ghai, *Kenya's Constitution; An Instrument for Change* (Nairobi: Katiba Institute, 2011)13.

these are seen as having ushered in a new dispensation of runaway spending. While some of these reasons are perhaps justified, Kenyans are also wary of the school of politicians who are not necessarily interested in auditing the document and amending it for Kenyans but for their individual benefits.[182]

Despite some of its extremely noble provisions, to many ordinary Kenyans, soft issues such as national healing and reconciliation, poverty, inequality and exclusivity still remain unresolved. Paradoxically as politicians clamour for change, life to the vast ordinary mwananchi remains unbearable whereby to the winner goes all the spoils and to the loser nothing literally'.[183] On this basis, the transformation dream remains largely unachieved. One may therefore say that despite numerous positive changes that have so far been witnessed under the current dispensation, more needs to be done to secure optimal transformation of the Kenyan society. This Constitution presents an era that has the potential to be totally different from Kenya's past if well implemented.[184] A referendum to change the constitution may not necessarily rid Kenya of all the challenges that the country continues to face.

It is against this background that I propose a debate on the possible value or consideration of the framework of transformative constitutionalism as one of the ways that may drive forward the process of transformation in Kenya. I am guided by the developments in South Africa where there is a significant body of literature on the subject and also because of the shared experiences between Kenya and South Africa and perhaps most important because the 2010 Constitution leans quite heavily on the expertise of South Africa.[185]
The history of both countries evidences constitutions that emerged following periods of conflict and historical injustice as a result of colonialism and apartheid

[182] K Opanga, 'To Get it Right, Audit the Constitution First before Clamouring to Change It' *Sunday Nation* 7 October, 33.

[183] Editorial, 'Yes Open up the Constitution but Don't Plunge Country into Chaos' *The Standard* 8 October 2018, 14.

[184] H Varney (2012) *Breathing Life Into the New Constitution; A New Constitutional Approach to Law and Policy in Kenya; Lessons From South Africa* ICTJ briefing – http://www.kenyainfor@ictj.org <accessed 21 October 2016>.

[185] W Mutunga (2012) *Elements of Progressive Jurisprudence in Kenya; A Reflection* http://www.judiciary.gov.ke/portal/assets/downloads/speeches <accessed 4 April 2013> 83;
K Rawal (2013) *Constitutional and Judicial Reforms; The Kenya Experience* Paper presented at the Southern African Chief Justices Forum annual conference, 2 August 2013 http://www.judiciary.go.ke/speeches <accessed 4 April 2013> 1; Varney (n 2 above) 4.

respectively.[186] Although Kenya did not go through a period of formal and institutionalized apartheid as South Africa did, both countries were colonized by the British. The patterns of colonialism bore political, social and economic similarities and so did the structures that the two countries inherited from the colonial government. As a result, both countries struggle to transform from similar injustices including land and property ownership reform, the acceptance of a human rights culture, accessibility to justice, equal representation and a say in governance, affirmative action and accountability within government. The structures of the two constitutions are therefore quite similar, especially on questions of sovereignty, supremacy of the constitution, national values, citizenship and the Bill of Rights.[187]

2. What is Transformative Constitutionalism?

Within South Africa's legal discourse, transformative constitutionalism entails a modest suggestion on how to account for transformation under the (South Africa's post-apartheid) Constitution. The suggestion has been taken up by some scholars and has made some impact in South Africa as a tool for constitutional and legal developments.[188] Outside of South Africa the framework is not new and has also been explored in jurisdictions like India and Brazil, although South Africa is arguably one of the most cited examples within contemporary constitutional discourse. This is so even as its proponents admit that the subject remains highly contested and difficult to formulate.[189]

In basic terms transformative constitutionalism implies a conscious and deliberate long term, permanent framework that is aimed at a substantive change of society.[190] It is a commitment by the legislature, the executive, judiciary and public to see to it that such substantive change is achieved through the laws that the legislature makes, the execution of decrees and the adjudication role of the judiciary. As such, it derives its presence from the constitution, guided by the

[186] A Lombard & G Wairire, *Developmental Social Work in South Africa and Kenya: Some Lessons for Africa* (April 2010) The Social Work Practitioner-Researcher 101; Varney (n 2 above) 5.
[187]Varney (n 4 above) 6.

[188] M Rapatsa, *Transformative Constitutionalism in South Africa: 20 Years of Democracy* (2014) 5 Mediterranean Journal of Social Sciences 889.

[189] P Langa *Transformative constitutionalism* (2006) 17 *Stellenbosch Law Review* 351; S Sibanda, *Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty* (2011) 22 Stellenbosch Law Review 488.

[190] Langa (n 9 above) 352.

impetus to change from an unjust past to building a democratic nation.[191] The idea of change is hence very central to this discussion.

The framework comprises two distinct concepts; transformation and constitutionalism.[192] Transformation generally implies change in a state of affairs from one that previously existed to something new. The Black's Law Dictionary defines it as a process of organization and radical changes,[193] while the free online dictionary describes it as a marked change in appearance or character, which is usually for the better.[194] While scholars converge at a point of the need for change, the substance of such change in society is captured in different ways.

Constitutionalism on the other hand denotes an appropriate system or approach that is applied so as to aid in the transformation process, with the idea of creating an egalitarian and democratic society. Within constitutional discourse it is particularly described as the act of distributing and limiting government powers by laws made by the people, which must be adhered to, obeyed and enforced by the government.[195] Constitutions limit government powers by establishing the rule of law, by providing for the separation of powers, by providing for checks and balances and also by participatory governance amongst other means.[196] Constitutionalism is in this sense associated with a structure that could bring and sustain stability to a legal and political system.

Ironically, these two concepts present a paradox from where part of the tension around transformative constitutionalism arises. South African scholar AJ Van der Walt presents a concern about this 'apparent contradiction of transformation in a constitutional democracy'.[197] This is so because 'transformation implies or even

[191] Rapatsa (n 8 above) 887.

[192] Rapatsa (n 8 above) 890.

[193] http://www.thelawdictionary.org <accessed on 25 October 2016>.

[194] http://www.thefreeonlinedictionary.com <accessed on 22 October 2016>.

[195] MK Mbondenyi & JO Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (Pretoria: Pretoria University Law Press, 2012) 8.

[196] Mbondenyi & Ambani (ibid).

[197] AJ Van der Walt, *Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) 12 Fundamina 4-5.

demands change which is in this case radical change, whereas constitutionalism seems to secure or even entrench stability'.[198] This paradox plays out as a constant challenge within the framework and continuously exposes the tension between the hope and desire for change on the one hand and the insistence to tradition and status quo on the other hand.[199]

Such is the shape of events that has characterized Kenya since the promulgation of the 2010 Constitution. While the Constitution calls for radical changes in the governance of Kenyans and presents a totally different social, political and economic order aimed at complete transformation, politicians are filled with tactics to ensure they clamor to power. Nominations and appointments are sometimes based on cronyism. Political choices are made on the basis of benefit to the political class. Legislation proposed to further the spirit in the Constitution has ended up being diluted by the political class. The gap between the rich and poor continues to grow, land issues and gender disparity continue to rock the country. All these notwithstanding the very clear instructions in the Constitution.

3. Transformative Constitutionalism and its Theoretical Underpinning

It is American scholar Karl Klare, through a seminal article written in 1998, who introduced the discussion on transformative constitutionalism in the context of South Africa.[200] Klare defines transformative constitutionalism as a legal, historical and political theory of interpretation and understanding of the South African Constitution, in the following terms:

> A long term project of constitutional enactment, interpretation, and enforcement committed (not in isolation of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction.[201]

[198] Van der Walt (ibid).

[199] Van der Walt (ibid) .

[200] KE Klare, 'Legal Culture and Transformative Constitutionalism' (1998)14 South African Journal of Human Rights 146.

[201] Klare (n 20 above) 150.

I will discuss 4 epitome characteristics of transformative constitutionalism arising from Klare's definition. These are:

i. The idea of change within the framework

ii. The place of historiography within the framework

iii. Institutional and normative establishment and its role

iv. Transformative adjudication habits within the framework.

3.1 Understanding the Idea of Change within Transformative Constitutionalism

As earlier stated, the core business of the transformative agenda is change. The question that scholars struggle to answer in their works is just how much change is possible and also desirable? The place of change as discussed by Karl Klare bases its theoretical assumptions on the Critical Legal Studies (CLS) movement, of which he is a prominent member. Scholarly articles and commentaries in support of Klare abound where transformation is generally expressed as a radical and unimaginable change in the socio, political, economic and cultural lives of people.[202] This extra ordinary change goes beyond mere formal change, sweeping and penetrating through the society and resulting to a complete change in individual lives, individuals' dreams and aspirations.[203] It also encapsulates a process of complete change of culture and thought by individuals, to begin viewing and understanding things in a different way from the way they did previously.[204] The transformation agenda must therefore be accompanied by a

[202] N Baraza (2011) *A Manifesto for a Modern Judiciary.* Paper presented at the 7th annual Judges Colloquium, 5 August 2011, Unpublished, on file with author 2; K Van Marle, *Meeting the World Halfway; the Limits of Legal Transformation* (2004) 16 Florida Journal of International Law 652-653; K Van Marle, *Transformative Constitutionalism as/and Critique* (2009) 20 Stellenbosch Law Review 289.

[203] Langa (n 9 above) 352, 353; C Albertyn & B Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality* (1998) 14 South African Journal on Human Rights 248; *Van Rooyen v S* 2002 8 BCLR 810 (CC) paragraph 50: 'Transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society…'; Van Marle (n 22 above) 652, 656-657; Klare (n 20 above) 153-155, 159; AJ Van der Walt, *Dancing With Codes; Protecting, Developing and Deconstructing Property Rights in a Constitutional State* (2001) 118 South African Law Journal 262, 263.

[204] D Cornell, Transformations; Recollective Imaginations and Sexual Difference (New York: Routledge

radical shift and reversal of structures to deal with the challenges affecting the society. Short of this, the agenda cannot be expected to provide real and visible benefits especially for the poor, disadvantaged and marginalized sectors of the society. Transformative constitutionalism is therefore not content with the idea of mere formal change on a small scale or a continuation of the status quo as a gauge to transformation.[205]

While the nature of change envisaged would be somewhat close to but not exactly a revolution, it is nonetheless one that occurs free of any violence.[206] In South Africa's case, such non belligerent state is made possible by the country being able to explore the potential of the post-apartheid Constitution and to use it to transform the society.[207] This makes the 1996 postliberal and transformative Constitution very crucial to the process.[208] Noting this, Klare enlists the key transformative elements of the Constitution; that it entrenches social and economic rights and duties as opposed to negative state duties, that it allows for a vertical and horizontal application of these rights, that it envisages participatory governance and is historically self-conscious.[209]

For these reasons, it not only seeks to deal with the past injustices of apartheid, but is also forward looking and contains marked departure from the apartheid Constitution.[210]

Like the South African Constitution, Kenya's 2010 Constitution also introduces a revolutionary break with the past order and is substantially different in character.[211]

1993) 2.

[205] Van Marle (n 22 above) 288; Langa (n 9 above) 352, 353; Van der Walt (n 23 above) 262, 263; Klare (n 20 above) 159.

[206] Langa (n 9 above) 352; Van Marle (n 22 above) 652; Klare (n 20 above) 153-155.

[207] Klare (n 20 above) 151.

[208] Klare (n 20 above) 153-155, Van Marle (n 22 above) 653.

[209] Klare (n 20 above) 151.

[210] S Liebenberg, Socio-Economic Rights: Adjudication under a Transformative Constitution (Cape Town: Juta & Co 2010) 27; Klare (ibid).

[211] International Commission of Jurists (Kenya) hereinafter ICJ (K) Report, *Transforming the Kenyan Judiciary After 2010,* http://www.kenyalaw.org/klr/fileadmin/pdf/downloads/judiciary 10 <accessed on 23

The Constitution begins with an elaborate, inspiring and reassuring preamble which celebrates the diversity of the Kenyan people and expresses satisfaction and acceptance by the people of Kenya.[212] It takes the earliest opportunity to enunciate the principle of sovereignty of the people and supremacy of the Constitution, themes which cut across it in various provisions.[213] It contains a comprehensive Bill of Rights that goes beyond the traditional civil political rights of the yester years to expansive social and economic rights.[214] The Bill of Rights binds both private and state actors.[215] It provides for a centralized limitation clause as opposed to numerous limitation clauses that had the effect of diluting rights to obsoleteness in the previous order.[216]

The Constitution also lays particular emphasis on affirmative action policies in addressing issues of women, older members of society, persons with disability, children, youth and members of minority or marginalized communities who are considered vulnerable groups from previous historical experiences.[217] In order to ensure maximum enforcement of the Bill of Rights the 2010 Constitution also provides rare impetus for anyone to approach the court without having to prove locus standi .[218]

The provisions on land and environment are aimed at ensuring transformation by establishing equality and outlining principles and mechanisms of dealing with past injustices involving land.[219] The Constitution contains instructions

September 2016>; B Sihanya, *Constitutional Implementation in Kenya 2010-2015, Challenges and Prospects,* http://www.innovativelawyering.com 1-2 <accessed 23 September 2016>.

[212] Ghai & Ghai (n 1 above) 33; Lumumba & Franchesci (n 1 above) 53.

[213] Article 1, 2.

[214] M Akech, *Institutional Reform in the New Constitution of Kenya,* A publication of the International Center for Transitional Justice http://www.ictj.org 20 <assessed 23 September 2016>.
[215]Article 20(1).

[216] Lumumba & Franchesci (n 1 above) 144.

[217] Article 21(3).

[218] Lumumba & Franchesci (n 1 above) 138. Contrary to the landmark decision in the environmental case of *Wangari Maathai v The Kenya Times Media Trust* Nairobi Civil Case No. 5403 of 1989where the High Court dismissed a suit brought by the plaintiff, a member of the public on grounds that she had no standing, since there was no damage or anticipated damage to her.

[219] Akech (n 34 above) 15.

for the revision, streamlining and consolidation of land laws in the country aimed at curing the multiple land law regimes that were developed by the different colonial policies.[220] In order to move away from the political executive influence in the management, administration and allocation of land that has been characteristic of previous regimes, the Constitution provides that land belongs to the people of Kenya collectively and not to the government as was the case in previous orders.[221] It further establishes the National Land Commission to exercise authority over land on behalf of the people of Kenya at county and national levels.[222]

The provisions on leadership and integrity are based on the need for public officers and elected leaders to break away from a past of corruption, mismanagement, misappropriation, nepotism, tribalism, impunity, poor governance and other such vices.[223] There is for the first time, established a thresh hold on integrity that all appointees to state office must meet.[224] Other additional qualifications are also provided for other public officers including judges.

The doctrine of separation of powers is well captured in the structure of government whereby there is established an elaborate and systematic definition and distribution of state power.[225] There is clear demarcation of the roles and personnel of each arm of government.[226] Also provided for are elaborate checks and balances on the executive and legislature with dispersed powers away from the presidency.[227] This as a result sets a firm foundation for the three arms to coexist and find unity of purpose without unnecessary conflict through a supreme

[220] Article 68(a). This has already been done by the enactment of the Land Act (2012) and the Land Registration Act (2012) which provide for a single substantive land law and registration law respectively.

[221] Article 61.

[222] Article 67. See also the National Land Commission Act (2012).

[223] Lumumba & Franchesci (n 1 above) 298.

[224] Chapter 6: Leadership and Integrity, Leadership and Integrity Act 2012.

[225] Chapters 8, 9 and 10 which address the Executive, Legislature and Judiciary respectively.

[226] Sihanya (n 31 above) 2.

[227] Sihanya (ibid).

constitution.[228] In recognition of contemporary constitutional discourse for an additional state organ from the traditional three organs, the drafters of Kenya's 2010 Constitution made provision for additional constitutional commissions and offices to provide extra checks on the three arms and serve as mechanisms for the public to hold the government accountable.[229] The Constitution enshrines a total of 10 commissions and instructs Parliament to also establish an Independent Ethics and Anti-Corruption Commission.[230] There are also two independent offices; that of Controller of Budget and the Auditor General.[231]

It is the introduction of a devolved system of government that has been taunted as perhaps the most fundamental break from the repealed Constitution and one of the main reasons for the tremendous support of the 2010 Constitution.[232] Devolved governments make room for citizens' participation in governance and also reduce significantly the causes of bad governance that have been blamed on the centralized form of governance.[233] Devolution also seeks to deal with issues of alienation, marginalisation, neglect and discrimination and provides greater security framework.[234]

For these reasons, the 2010 Constitution is no doubt a transformative document capable of inducing major socio, economic and political changes through irenic means.This is the point from where Klare begins her engagement of the framework. Once a transformative constitution has been put in place, in order to maximize the potential for constitutional transformation, a 'desirable' approach to reading it, interpreting it and enforcing that constitution is a must.

[228] Lumumba & Franchesci (n 1 above) 361.

[229] Lumumba & Franchesci (n 1 above) 641; Mbondenyi & Ambani (n 13 above) 71.

[230] Article 248(2). The commissions are the Kenya National Human Rights and Equality Commission, the National Land Commission, the Independent Electoral and Boundaries Commission, the Parliamentary Service Commission, the Judicial Service Commission, the Commission on Revenue Allocation, the Public Service Commission, the Salaries and Remuneration Commission, the Teachers Service Commission and the National Police Service Commission.

[231] Articles 228 and 229.

[232] Lumumba & Franchesci (n 1 above) 511; Sihanya (n 31 above) 2.

[233] Sihanya (ibid).

[234]Akech (n 34 above) 23.

A perfect example from Kenya is the long standing issue on the two thirds gender rule. Parliament continues to stall by refusing to enact legislation to enforce the constitutional principle that requires not more that two thirds of its members be of the same gender. [235] While part of the reason is that the constitution doesn't prescribe how the two-thirds gender requirement for parliament should be met, transformative constitutionalism requires deliberate effort and willingness from parliament to enact legislation notwithstanding the urge and pressure to hold on to the status quo from the male dominated parliamentarians. This historical bias against women in politics is a complex issue. There are still barriers and biases operating at multiple levels that inhibit the rise of women in political leadership despite several court orders.[236] Yet for women politicians and those aspiring to join politics, this would have marked a major transformation in a country that has been deeply rooted in patriarchy. On another front, land-related conflicts in Kenya are persistent and require comprehensive yet complex solutions. The wide structural inequities between the 'land-haves' and the 'land-have-nots' as a major cause of land-related conflicts shall have to be addressed. The solution would have far reaching effects on the haves who may have to give up parcels of land. For the have nots, transformation would be felt by their urgent need for change. This is what transformative constitutionalism advocates for. The Truth Justice and Reconciliation Commission's key recommendation was that authorities investigate fraudulent acquisition of land, design and implement measures to revoke illegally obtained titles and restore public ease.[237] But the popular, and perhaps the most politically-sensitive of them all, was to do with reparations

[235] Articles 26[6], 27[8] and 81[b] of the Constitution.

[236] Supreme Court Advisory Opinion No 2 of 2015 in which the court gave a specific timeline of August 27th, 2015 for a mechanism to be in place to actualize the not more than two thirds gender principle; This was not done forcing further Court action which resulted in a ruling from High Court Petition 182 of 2015 directing Parliament the Attorney General and the CIC to have in place legislation before the August 2015 deadline. In order to avoid failing to meet the August 2015 deadline Parliament exercised its power under Article 261 of the Constitution ,to extend the deadline by a period of 1 year which lapsed in August 2016; Nairobi High Court Petition No. 371 of 2016 declared that the failure by Parliament to enact the required legislation within the time frame specified in the Supreme Court Advisory Opinion and the Constitution was a violation of the Constitution. The High Court further issued orders directing Parliament to enact the required legislation within a period of sixty days. The period lapsed without Parliament enacting the required legislation to implement the two-thirds gender principle. Parliament went on recess on 28th May 2017 without enacting the necessary legislation to bring Parliament into compliance with the constitutional requirement on the two-thirds gender principle. Also see *Civil Appeal No 148 of 2017* amongst other cases filed on the issue.

[237] Report of the TJRC Vol. II B Chapter 12

for historical land injustices. If it is implemented, top politicians — serving or retired — would find themselves in the eye of a storm, as either owners or indirect beneficiaries of fraudulently acquired land. They will resist pressure to have the allocations nullified.

It is therefore not difficult to see why political will remains a major stumbling block to achieving transformation.

3.2 Historical Context of Transformation

Historiography and historical contingencies occupy a central position in Klare's discussion.[238] It is through historical consciousness that a country has the potential of reconstructing present orders and institutions by looking into the injustices of the past.[239] As such, Klare and other proponents of the CLS movement hold the view that historical self-consciousness of the 1996 Constitution plays a fundamental role in the transformation process in South Africa.[240] Adherents of Klare's theory also reflect on this significant role of history in various specific topics that they discuss, by using that history to find answers to current transformation issues in South Africa. Studies on the historical context of South Africa's Constitution have also been captured using metaphors. One such example is an article written by the late lawyer and scholar, Etienne Mureinik.[241] He described the interim Constitution of South Africa as a historic bridge meant to lead South Africa from one regime characterized by the injustices of apartheid to another radically different regime.[242]

In their discussions, supporters of the framework often make reference to the framework as one that is deeply rooted in a historical consciousness of South Africa's past and the hopes for a futuristic ideal.[243] Such an approach

[238] R Gordon, *Critical Legal Histories* (1984) 36 Stanford Law Review 57, generally; W Le Roux & K Van Marle, (ed) Law, Memory and the Legacy of Apartheid Years After AZAPO V President (Pretoria: University Law Press 2007) 248.

[239] Le Roux & Van Marle (ibid).

[240] Le Roux & Van Marle (ibid).

[241] E Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights* (1994)10 South African Journal on Human Rights 31.

[242] Mureinik (ibid).

[243] Van der Walt (n 23 above) 657; E Christiansen, *Transformative Constitutionalism in South Africa:*

presents the need for judges and lawyers, while interpreting the constitution in a transformative manner, to be aware of the way the South African Constitution came into being and the injustices that the post-apartheid Constitution of South Africa seeks to remedy.[244]

Likewise, the constitutional history of Kenya reveals a past marred with a culture of impunity, corruption, repression, undemocratic leadership, ethnicity, autocratic presidencies, injustices and inequalities amongst a host of other problems. The significance of this history is presented in the justification for the dire need of the nation to overthrow the then existing social order and to define a new social, economic, and political order for itself at all costs.[245] Secondly, it highlights the origin of key injustices and historical experiences from which Kenya seeks to transform and therefore the spirit behind the enactment of the 2010 Constitution. Finally, history is also tied up with the challenges and limitations, legal and otherwise, that may be a stumbling block to the transformative constitutionalism framework. In this regard history is a reminder that not all solutions within the transformation agenda will necessarily require legal solutions.

The courts have on several occasions pointed out to the critical role that historiography plays in transformative adjudication especially when dealing with gender inequality, land related disputes and the bill of rights generally.[246]

3.3 Institutional and Normative Establishment

The intended audience in Klare's paper was largely the judiciary (and lawyers). This notwithstanding, he emphasises that transformation must be driven by all the 3 arms of government (and the public) through a long term commitment

Creative Uses of the Constitutional Court's Authority to Advance Substantive Justice, (2010) 13 Journal of Gender, Race and Justice 576.

[244] *S v Mhulungu & 4 Others* [1995] ZACC 4, 1995(3) SA 867 (CC) 1995 (7) BCLR 793 (CC) per Sachs J para 127.

[245] W Mutunga, keynote remarks on the celebration of 200 years of Norwegian Constitution, University of Nairobi 19 May 2014 1.

[246] See for instance Supreme Court Advisory Opinion in *The Matter of the Principle of Gender Representation in the National Assembly and the Senate, Katiba Institute V Independent Electoral & Boundaries Commission* [2017] EKLR, *Margaret Wanjiru Ndirangu & 4 Others V Attorney General* [2015] EKLR, *Bernard James Ndeda & 6 Others V Magistrates And Judges Vetting Board & 2 Others* [2018] EKLR, *Centre For Rights Education & Awareness (CREAW) V Attorney General & Another* [2015] EKLR.

of transformative activities.[247] The collective effort between legal and other political institutions is informed by his reality that law is inevitably political and hence the inevitable political influence in legal institutions.

Apart from the arms of government, other public institutions established by the constitution to oversee transformation are also called upon to live up to the expectations of their creation. The 2010 Constitution establishes constitutional institutions and calls for institutional changes in various respects. These institutions must utilize their authority under the Constitution by all means to achieve substantive justice.[248] The institutions remain crucial particularly in safeguarding a people centred governance and safeguarding fundamental freedoms and human rights.[249]

South African scholar AJ Van der Walt invites the society in South Africa to be part of the transformative constitutionalism framework through change in culture and adoption of a new way of looking at things. He suggests the need for the society to open up to alternative ways that are not necessarily confrontational in resolving challenges so as to break from impasse.[250] This includes doing things in a substantially different way that would see the needs of the disadvantaged, weak and dispossessed black communities handled in a completely different way to begin dealing with issues.[251] This culture of care requires healing and a complete revolution of culture by the society.

The situation in Kenya is no different. The public is yet to rid itself of societal challenges such as deep rooted ethnicity. A history of lack of cooperation and continued wrangles between some of the constitutional institutions and politicians has also slowed down the transformation process considerably. The past 8 years have witnessed instances of political interference, power fights as well as wrangles over financial control between the national government and devolved governments. Some of these wrangles are a reflection of inefficiency,

[247] Klare (n 20 above)150; Rapatsa (n 8 above) 890.

[248] Rapatsa (ibid).

[249] Rapatsa (ibid).

[250] Van der Walt (n 23 above) 311. He was describing the challenges within the context of land right.

[251] Van der Walt (ibid).

partisan interests and the desire to keep to an existing status quo and avoid change. Owing to some longstanding cultures and attitudes propped by the previous Constitution, the public and politicians still continue to hold certain mind sets that are not helpful in the quest for transformation and which must be shed.

3.4 Transformative Adjudication

Since the South African Constitution neither provides a blue print nor stipulates the exact process that the judiciary would use to achieve the social change envisaged, Klare proposes the method of adjudication that he describes as transformative.[252] The new adjudicative method is justified by the substantially different post liberal text in the 1996 Constitution.[253] The Constitution differs from traditional liberal constitutions whose concern is in securing the rights of individuals against the state.[254] It is instead drafted with the agenda of collective social change, social equality and self-determination.[255] This essentially means that while the traditional Bill of Rights imposed duties on the state, the post liberal Bill of Rights binds not only the state, but also extends to private parties.

Interpretation of the 1996 Constitution would therefore require new imagination, reflection, analysis and reasoning, a new mind set and new methodology for achievement of social justice.[256]

An interpretation that seeks to pursue transformative constitutionalism is one that encourages innovation in interpretation.This innovation includes stretching the law and not limiting adjudication to traditional legal enquiry. Instead, social justice may demand reaching out to other disciplines in recognition of the multi-disciplinary effect of the law.[257] In fact, its proponents agree that the nature of the subject of transformative constitutionalism requires that it should

[252] Klare (n 20 above) 151, 156. He states: 'I would be quite prepared to contend that the post liberal reading is the *best* interpretation and therefore the one that should guide South African judges and lawyers'.

[253] Klare (n 20 above) 152.

[254] Klare (n 20 above) 153.

[255] Klare (ibid) .

[256] Klare (n 20 above) 156.

[257] Van Marle (n 22 above)288.

not be treated as a purely legal subject because of its bearing on socio, economic and political activities.[258] It is this multi-disciplinary nature of the subject that justifies the pivotal role of the Constitution in the transformation process since it is able to traverse all these fields.[259]

Klare identifies a major challenge to the transformative constitutionalism project; the conservative, formal and rigid legal culture of judges and lawyers in South Africa.[260] This arises from the traditional idea of adjudication in South Africa, where judges, in pursuit of the conservative culture, preferred to take a passive role in interpretation.[261] As far as the judges were concerned, their role had always been mechanical in the process of adjudication and that was to look for the intention of Parliament and to apply it.[262] The traditional approach was also to interpret law in favor of the executive for gains that were not necessarily in line with the transformative vision.[263] This legal culture creates a disconnect with the post-apartheid Constitution which actually empowers the judiciary. It does so through open ended text whose interpretation remains choice laden.[264] While the open ended text is in actual sense an advantage that allows judges an opportunity for discretion, Klare's worries about their choices. Since most judges in South Africa are schooled in this formal and conservative legal culture, it is likely that they may opt for a conservative and restrictive reading, while insisting that the approach is the only legal one.[265] However, a judge who is aware of the need for a different interpretation method may appreciate the inevitability of choice and engage, within reasonable bounds, with judicial freedom, instead of claiming to be absolutely constrained.[266] Such a judge recognizes that they will

[258] Van Marle (ibid).

[259] Van Marle (ibid).

[260] Klare (n 20 above) 162, 163.

[261] Klare (n 20 above) 152.

[262] Klare (ibid)

[263] Klare (ibid).

[264] Klare (ibid).

[265] Klare (ibid).

[266] Klare (n 20 above) 158.

have to consider external sources, but the test is in how they apply themselves to the influences.[267] For Klare, the candid admission of the tension between freedom and constraint is one issue that judges in South Africa will at all times have to deal with, owing to the indeterminacy of the law.[268]

The framework generally advocates for the exposure of various realities of adjudication that are otherwise usually hidden. Karin van Marle, also a proponent of the CLS movement is candid about some of the failed transformation projects in South Africa. She does not express worry about them or fear about the challenges of transformative constitutionalism in South Africa.[269] Instead, she sees the need for transformative constitutionalism in that it advocates for candid exposure of the multiplicity of tensions in the framework.[270]
This allows room for the various challenges to be acknowledged and dealt with as real challenges instead of being wished away.

Within this context the new adjudicative approach requires a further acknowledgment that legal materials and case law are not necessarily fully responsible for the outcomes of legal disputes.[271] Instead, judges will have to consult other external sources so as to come up with a decision. Whatever other external factors and values that are considered are also partly responsible for the end results of judgments. This inevitably makes the adjudication process highly subjective.[272]

The CLS movement therefore views the idea of legal reasoning as a myth that has been used to catalogue the unpleasant realities of the adjudicative role of judges.[273] Mostly judges will choose to conceal the influence of their personal

[267] Klare (n 20 above) 157, 158.

[268]Klare (n 20 above) 157-160.

[269]Van Marle (n 22 above) 651,652.

[270] K Van Marle, *Law's Time, Particularity and Slowness,* in Roux & Van Marle (n 58 above) 74.

[271] Hereinafter referred to as the CLS movement.

[272] Le Roux & Van Marle (n 58 above) 258.

[273] Klare (n 20 above) 158.

views by using the doctrine of stare decisis and legal rules as a cover up.[274] The adherents of CLS theory instead argue that not only are the precedents relied on by judges a result of external influence, but so too are the legal rules that they apply. If these external factors are also influences to the law itself they then further warn against assuming that the law is a 'stable, uncontroversial, natural and coherent set of rules'.[275] Instead, the paradoxes that exist in the law should be exposed so as to open up conversation on how to deal with them.

Like South Africa, judges in Kenya are trained in the commonwealth tradition which places a lot of weight on parliament's intention when making determinations. It is a rigid and conservative background that requires deliberate and conscientious Judges to move away from. The challenge would be in the judges who choose to remain in a rigid and conservative culture. Fortunately, within the Kenyan context there are numerous decisions that indicate the judiciary's achievements in navigating the obstacle of legal culture. Instead of claiming to have their hands tied by ambiguous laws or gaps in the law, judges continue to exercise creativity in giving purposeful interpretation to the Constitution.

The words of Mosoneke DCJ as cited in the Kenyan decision of M W K v another v Attorney General & 3 others best captures this reality.[276] He states as follows:

> The Constitution has reconfigured the way judges should do their work. It invites us into a new plane of jurisprudential creativity and self-reflection about legal method, analysis and reasoning consistent with transformative roles. The new legal order liberates the judicial function from the confines of the common law, customary law, statutory law or any other law to the extent of its inconsistency with the Constitution. This is an epoch making opportunity which only a few, in my view, of the High Court judges have cared to embrace or grasp. A substantive, deliberate and speedy plan to achieve an appropriate shift of legal culture at the High Courts and Magistrates' Courts is necessary. After all, it is the Constitution that confers substantial review powers on the judiciary. However, without an

[274] D Meyerson, Jurisprudence (Oxford: Oxford University Press 2011) 218; P Gabel, Rectification in Legal Reasoning (1980) 3 *Journal of Research in Law and Sociology* 17 generally. See also P Gabel, The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves (1984) 62 Texas Law Review 1563: generally.

[275] Meyerson (n 94 above) 217.

[276] [2017] EKLR.

> appropriate legal culture change the judiciary may become an instrument of social retrogression. In time the judiciary will lose its constitutionally derived legitimacy.[277]

Another major challenge to transformation stemming from this is the limited potential of the law to bring about the nature of transformation expected within the framework. Van Marle writes that in fact, the law would only lead us halfway into the transformation process.[278] Proponents of the CLS movement candidly admit that the law is hampered by its structural limits.[279] Firstly, it is selective and therefore marginalizes some parts of the society because it lacks the capacity to deal with every person as an individual.[280] For this reason, Van Marle agrees that it is still hard to achieve substantive transformation.[281] It is also indicated that law is almost always abstract and is based on theoretical and generalized assumptions of both the problems that it seeks to deal with as well as the people that have these problems.[282] In other words law deals with its subjects as an institution, a corporate body or as a designated group.[283] The end result is that even the most transformative laws fail to consider and accommodate all individual experiences and aspirations.[284]

The affirmative action provisions in the Kenyan Constitution are amongst these laws. Either owing to the social and cultural designs of the Kenyan society and the place of women in the largely patrilineal society, achieving gender equity has proved to be a tall order. Although the dictates of the constitution require that a formulae be used to ensure gender parity, this is beyond a legal question. Culture plays a very critical role in the transformation process and

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[277] In *Transformative Adjudication, the Fourth Bram Fischer Memorial Lecture*" (2002) 18 SAJHR 309 at 318.

[278] Van Marle (n 22 above) generally.

[279] Van Marle (n 22 above) 652.

[280] Van Marle (n 22 above) 656, citing Cornell (n 24 above) 1.

[281] Van Marle (ibid).

[282] Van Marle (ibid).

[283] Van Marle (n 22 above) 652; E Christodoulidis, *Constitutional Irresolution; Law and the Framing of Civil Society* (2003) 9 European Law Journal 413.

[284] Van Marle (n 22 above) 654.

can be a major challenge as well. Cultural tendencies may not necessarily create legal problems, and their solutions are not necessarily legal.

Owing to these challenges transformative constitutionalism warns against extreme optimism as a way of fixing historical injustices without looking deeper at more nuanced connections between law and modern issues.[285] Deliberate choices of intervention must be made in addition to legal transformation. Transformative constitutionalism also reminds us that as a result of these real challenges, the journey towards transformation should not be treated as a phenomenon to which specific timelines can be given. Instead it must be emphasized as a way of life and a permanent ideal which will constantly face challenges.[286]

4. Conclusion

The journey towards constitutional transformation and the conflict and conundrum that Kenya continues to witness is not novel. The forward and backward movement is bound to continue; with this or any other constitution that will be in place. Despite the challenges that have emerged over the framework, transformative constitutionalism presents a worthwhile approach for consideration to the enactment, interpretation and enforcement of the Constitution in Kenya. While it may not present 'the answer' to a transformed Kenya, it certainly is a good place to start.

[285] Van Marle (n 22 above)664; Christodoulidis (n 103 above) 401-432.

[286] Van der Walt (n 23 above) 297.

The Land Control Board Consent and the Doctrine of Constructive Trust

Oscar A. Angote[287*]

Abstract

Whereas Section 6 of the Land Control Act (LCA) of the Laws of Kenya makes it clear that failure to obtain the Land Control Board (LCB) consent in all controlled transactions in agricultural land renders any transaction or agreements null and void for all purposes, case law in Kenya indicate that aggrieved parties have sought to invoke the doctrine of constructive trust as a remedy leading to conflicting court decisions. On the one hand, some court decisions have held that, where the vendor has received the full purchase price, he creates an implied or constructive trust in favour of those persons who had paid the purchase price. On the other hand, some courts have been categorical that the provisions of the LCA are clear enough and that the principles of equity cannot be imported to oust the provisions of statutory law.

This paper seeks to interrogate the conflicting court decisions on the place of the doctrine of constructive trust as a remedy where a controlled transaction is voided by operation of law. This paper recommends that, where a land transaction is voided by operation of Section 6 of the LCA, a claimant can only succeed if they plead adverse possession. Where adverse possession cannot be pleaded, there is need to amend Section 7 of the LCA to provide for full compensation in the form of damages to the aggrieved party. This will deter unscrupulous sellers from unjust enrichment emanating from their own illegal acts and provide full compensation to purchasers who may not hold title to the land yet they had paid the full purchase price.

1. Introduction

Section 6 of the Land Control Act, Chapter 302 of the Laws of Kenya,[288] makes it mandatory for parties to obtain the Land Control Board (LCB) consent in

[287] * LL M (UoN), Advocate of the High Court of Kenya; Judge, Environment and Land Court.

[288] Government of Kenya, Land Control Act Chapter 302 of the Laws of Kenya (Government Printers, Revised edn 2017).

relation to controlled transactions in agricultural land. Failure to obtain consent of LCB renders controlled transactions or agreements in agricultural land void for all purposes by operation of law.[289] While Section 6 of the LCA is clear on the repercussions of not obtaining the LCB consent in accordance with the law, case law in Kenya indicate that, aggrieved parties have sought to invoke the doctrine of constructive trust arguing that where a purchaser pays the full purchase price and enters into possession of the land, it gives rise to the doctrine of constructive trust and the vendor becomes a trustee holding the property in favour of the purchaser, notwithstanding the lack of the LCB consent.[290]

A constructive trust is a doctrine of equity imposed by courts to benefit a person who has been wrongfully deprived and ask a person who would be unjustly enriched to transfer the property to the intended party.[291] Whether the doctrine can be invoked where a controlled transaction becomes void by operation of law has led to conflicting decisions. On the one hand, some courts have held that where the vendor has received the full purchase price, he creates an implied or constructive trust in favour of those persons who had paid the purchase price. The absence of the LCB consent, therefore, does not render such an agreement unenforceable. On the other hand, some courts have been categorical that the provisions of the LCA are clear enough and that the principles of equity cannot be imported to oust the provisions of statutory law.[292]

The conflicting decision on the place of the doctrine of constructive trust as a remedy where a controlled transaction is voided by operation of law has led to a conundrum between law and equity.[293] The recent conflicting decisions of the

[289] *See Daniel Ng'ang'a Kiratu v Samuel Mburu Kiratu,* Court of Appeal No 58 Of 2005*; Elizabeth Cheboo v Mary Cheboo Gimnyika, Court of Appeal No. 40 of 1978; Joseph Noro Ngera v Wanjiru Kamau Kaime & Another,* Court of Appeal No. 32 of 2000; *and Omuse Onyapu v Lawrence Opuka Kapla,* Court of Appeal No. 149 of 1992.

[290] In *Mwangi and another v Mwangi* (1986) KLR 328, the Court underscored that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.

[291] Simon Gardner, *An Introduction to the Law of Trusts* (Oxford University Press 2011) 231; Gbolahan Elias, *Explaining Constructive Trust* (The Lawbook Exchange Limited 1990) 294.

[292] *Willy Kimutai Kitilit v Michael Kibet,* Civil Appeal No. 51 of 2015 in the Court of Appeal at Eldoret*; Hirani Ngaithe Githire v Wanjiku Munge,* Civil Appeal No 158 of 1977.

[293] Christopher Brown, *The Law/Equity Dichotomy in Maryland* (1980) 39(3) Maryland Law Review 427.

Court of Appeal in Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri (Macharia case),[294]and David Sironga Ole Tukai v Francis Arap Muge and others (Tukai Case)[295] which were delivered in 2014, and the decision of the Court of Appeal in Willy Kimutai Kitilit v Michael Kibet (Kitilit case)[296] which was delivered in 2018, on whether or not an enforceable and void controlled land transaction can give rise to the doctrine of constructive trust, and the place of the Constitution of Kenya 2010 (the Constitution) in enhancing justice, is the basis upon which this paper is premised.

These three decisions raise fundamental questions on the demarcation of law and equity regarding the LCB consent, and the difficulty that the courts have had in dealing with a situation where substantive provisions of the law are in conflict with equity. This paper is divided into three parts. The first part provides an overview of Section 6 of the LCA, its historical background and the court's interpretation since the enactment of the Act in 1967. The second part seeks to answer the question whether the doctrine of constructive trust can be invoked and judicially imposed by courts to legalize a controlled land transaction voided by operation of the law under Section 6 of the LCA. The third part seeks to provide a solution to the conundrum created by the court's decisions in interpreting Section 6 of the LCA in regard to equity and the law by proposing that such a claim can only succeed under the doctrine of adverse possession and where the doctrine of adverse possession fails, then there is the need to amend Section 7 of the LCA to provide for full compensation to an aggrieved party.

2. An Overview of the Land Control Board Consent Under Section 6 of the Land Control Act

2.1 A Brief Historical Background of the Land Control Act

Land in Kenya is collectively owned by the people of Kenya as a nation, communities and individuals. It is classified under Article 61 of the Constitution as public, community and private land. Land ownership and management in

[294] Civil Appeal No 6 of 2011, [2014] eKLR http://kenyalaw.org/caselaw/cases/view/95635/<accessed 20 September 2017).

[295] Civil Appeal No. 76 of 2014, [2014] eKLR http://kenyalaw.org/caselaw/cases/view/105244/<accessed 20 September 2017).

[296] *Willy Kimutai Kitilit v Michael Kibet*, Civil Appeal No. 51 of 2015.

Kenya is governed by a legal,[297] institutional[298] and policy framework. However, land management and ownership has since colonialism remained an emotive issue in Kenyan politics culminating to major reforms aimed at addressing land conflicts and historical injustices.[299] It was one of the major issues that led to the 2007-2008 post-election violence triggering the enactment of the Constitution which provides for land governance and principles of land policy.[300]

The constitutionalization of the land policy principles was geared towards ensuring that land is held, used and managed in a manner that is 'equitable, productive and sustainable'.[301] These principles include:

> Equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land resources; transparent and cost effective administration of land; and elimination of gender discrimination in law, customs and practices related to land and property in land.[302]

These principles reflect the aspirations of Kenyans in land governance and must be enforced and realized at all times. The principle on security of land rights ensures that a purchaser of land is granted a title which is exclusive to other

[297] The legal framework include: Constitution of Kenya; Land Act, 2012; Land Registration Act, 2012; National Land Commission, 2012; Environmental Management and Coordination Act, 1999; Forest Act, 2005; Trusts Land Act Chapter 289 of the Laws of Kenya; Land Adjudication Act Chapter 294 of the Laws of Kenya; and Land Consolidation Act Chapter 283 of the Laws of Kenya.

[298] The institutional framework include Ministry of Land, Housing and Urban Development; Ministry of Environment, Water and Natural Sources; National Environmental Management Authority; Kenya Forest Service, Devolved Government; National Land Commission; Judiciary.

[299] Andy Catley, Ian Scoones and Jeremy Lind (eds), *Pastrolism and Development in Africa: Dynamic Change at the Margin* (Routledge 2013); Caesar Lukudu, *Alienation of Public Land in Kenya* (Catholic University of East Africa 2000); Smokin C Wanjala, *Land Law and Disputes in Kenya* (Oxford University Press 1990).

[300] Calestous Juma and JB Ojwang, *In Land We Trust: Environment, Private Property and Constitutional Change* (Volume 1, African Centre for Technology Studies 1996); Government of Kenya, Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration (Commission of Inquiry into the Land Law System of Kenya 2002); Robert Home (ed), *Essays in African Land Law* (Pretoria University Law Press 2011).

[301] Constitution 2010, art 60.

[302] *Ibid.*

users in accordance with the law. Since the promulgation of the Constitution, Parliament has taken key steps as required under Article 68 to revise, consolidate and rationalize existing land laws.303

Enacted in 1967, the LCA sought to provide for controlling transactions in agricultural land. Before the enactment of the LCA as we know it today, the same provisions existed during the colonial period under the Land Control (Native Lands) Ordinance No. 28 of 1959.[304] It is notable to note that, before the colonial period in Kenya, land was communally owned. However, during the colonial period, community ownership was seen as an obstacle to economic development.[305] The colonial regime while extending the application of the Foreign Jurisdictions Act of 1890,[306] which granted the imperial power to control and administer foreign lands, transferred land ownership from the community to the Crown in order to enhance land use and facilitate large scale farming.[307]

In a series of legislations, the colonial regime expropriated the African commons to the crown and made them available to the colonial settlers.[308] However, in 1944, the Land Control Ordinance was enacted putting an end to the exclusive land ownership by the white settlers in Kenya informed by the need to develop land by those who owned it. This Ordinance established the Land Control Board which had the powers to grant consent for any transaction and to impose conditions in regard to the development of the land. This consent was mandatory and the failure to obtain the consent rendered the transaction in question null and void. It is upon this regime that the LCA was enacted by the government of Kenya after independence.

303 See n 11.

304 HW Ogendo, *Tenants of the Crown: Evolution of the Agrarian Law and Institutions in Kenya* (Acts Press, 1991) p 74.

305 Simon Coldham, *Land Control in Kenya* (1978) 22 Journal of African Law 63.

306 Government of the United Kingdom, The Foreign Jurisdictions Acts 18.

307 HW Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' in *Amplifying Local Voices: Striving for Environmental Justice, Centre for International Environmental Law* (Arusha: Center for International Environmental Law, 2000).

308 Dileys Roe, Fred Nelson and Sandbrook Chris (eds), *Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions* (London: International Institute of Environment and Development, 2009).

After independence, however, the white settlers in Kenya continued to own large tracts of land alienating the native Africans population. The white settlers who sold land to the government sold it at exorbitant prices. In order to protect the natives, the government enacted the LCA and established the LCB requiring parties to apply for LCB consent in controlled transactions in agricultural land. Kwamboka notes that, 'due to rising cases of foreigners owning land outside municipalities, Parliament enacted the Land Control Act of 1967 that established the Land Control Boards to control land transactions in agricultural lands'.[309] The enactment of LCB was solely informed by public policy considerations of ensuring that the land Africans had fought for so hard, was used for economic development and for the benefit of Africans. Indeed, the LCA grants the LCB the power to refuse to grant consent where a controlled transaction involves a foreigner, unless exempted under the LCA.[310] The need to obtain LCB consent was seen as fundamental in ensuring that Africans owned land and it was put into proper use. During one of the Parliamentary debates in 1971, the then acting Deputy Speaker, Mr. Karungaru stated that:

> At the downfall of the colonial regime we had to buy land very exorbitantly and the owners of the land did not want us to have any compromise nor did they want to listen to those who wanted to buy land until our just government came forward and established…the Land Control Board. At the present moment, any willing seller and willing buyer of the land must go through the LCB.[311]

[309] Osiemo Emily Kwamboka, The *Role of the Kenya Land Control Boards: Should they be disbanded?* (Academia Edu 2016).
https://www.academia.edu/12644084/THE_ROLE_OF_THE_KENYA_LAND_CONTROL_BOARDS_SHOULD_THEY_BE_DISBANDED<accessed on 22 September 2017>.

[310] Land Control Act, Chapter 309 of the Laws of Kenya, s 9(1)(c)(i).

[311] The National Assembly Official Report (Hansard) 26th October to 26th December 1971, Vol.25, at 218; The National Assembly Official Report (Hansard) 5th July 1974, Vol. 25, at 20.

In David Sironga Ole Tukai v Francis Arap Muge and others Tukai, the Court examined at length the rationale of the land control transaction and underscored that:

> The enactment of the Land Control Act in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non-Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land.[312]

The policy considerations as encapsulated during the enactment of the LCA in 1967 are alive today as they were then. In a country where access to land, its use and management remains an emotive issue and is sometimes politically driven, the need to implement the LCA remains paramount. The need to apply for the LCB consent in controlled land transactions is fundamental in furthering the land policy principles as provided for under Article 60 of the Constitution as well as protecting the right to property under Article 40 of the Constitution. The rampant cases of land grabbing can be controlled by the refusal of the LCB to grant consent where the person to whom the land is disposed to already has sufficient agricultural land, amongst other reasons, in accordance with Section 9 of the LCA.[313]

2.2 The Consent of Land Control Board: An Overview of Section 6 of the LCA

The LCB is a body established under Section 5 of the LCA in a land control area. A land control area is defined as any area which the 'Minister by Gazette notice applies the LCA, if he considers it expedient to do so.'[314] The mandate of

[312] See Tukai case, *Supra* at 10 .

[313] Joseph Kieyah, *Ndung'u Report on Land Grabbing in Kenya: Legal and Economic Analysis* (Kenya Institute for Public Policy and Research 2010); Jacqueline M Klopp, *Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya* (2000) 47, Africa Today 7.

[314] LCA, s 3.

the LCB is to control transactions in agricultural land within a given controlled area under its jurisdiction. The LCA defines controlled transactions to mean those transactions specified under Section 6(1) of the Act other than those specified under Section 6(3).[315]Section 6 (1) of the LCA stipulates that:

> **6. (1) each of the following transactions that is to say:**
>
> (a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land, which is situated within a land control area;
>
> (b) The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply; is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act (Emphasis added).

Section 6(2) of the LCA provides that 'for the avoidance of doubt, it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).' Section 6(2) of the LCA was introduced in 1980 to clear confusion on whether a declaration of a trust on agricultural land was a controlled transaction which required the application of the LCB consent.[316] In the case of Yogendra Purshottam Patel v Pascale Mireille Baksh (Nee Patel) & 2 others,[317] the defendant argued that if the plaintiff claimed that the property in question was as a result of trust, it was void for all purposes for lack of the LCB consent. The plaintiff on the other hand claimed that the LCA did not apply to a trust, and if it did, then it did not apply to resulting trusts which come into being as a result of the operation of law. The plaintiff argued that the LCB only applies to express trusts declared by settlers.[318] The Court held that Section 6(2) of the LCA was introduced in

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[315] Section 2, Land Control Act, Chapter 302 of the Laws of Kenya.

[316] Government of Kenya, Statute Law (Repeal and Miscellaneous Amendments) Act 1980 No. 3 of 1980, Section 3 page 117.

[317] Civil Case 617 of 1995, [2006] eKLRhttp://kenyalaw.org/caselaw/cases/view/15536 <accessed on 23 September 2017>.

[318] *Ibid.*

1980 to clear the law following the confusions that had arisen over trusts on agricultural land as a result of the conflicting court decisions in the cases of Gitimu Kinguru v Muya Gachangi (Gitimu Kunguru case)[319] and Githuchi Farmers Co. Ltd v Gichamba.[320]

In the Gitimu Kinguru case, the Court had held that the creation of a trust over agricultural land did not constitute other disposals or dealing in agricultural land as stipulated under Section 6(1) of the LCA. However, the law was clear that any declaration of trust on agricultural land required the consent of the LCB and failure to obtain the consent rendered such transactions void and unenforceable.

While all controlled transactions and declaration of trusts over agricultural land require the consent of LCB, Section 6(3) provides for certain transactions over agricultural land that will not require the LCB consent. Transactions of agricultural land in controlled areas involving 'transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles' do not require the consent of the LCB.[321] Where such a transmission involves the subdivision of agricultural land, then the parties involved must apply for the consent of the LCB.[322] Further, transactions to 'which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party' are not controlled transactions for purposes of LCB consent.[323]

The procedure for application of the LCB consent is stipulated under Section 8 of the LCA and parties have to apply for the said consents within six months of making of the agreement relating to a controlled transaction. In some instances, where the High Court considers that there are sufficient reasons, it may extend the period of applying for the LCB consent, upon such conditions as it deems

[319] [1976] KLR 253.

[320] [1973] EA 8).

[321] Land Control Act, Chapter 302 of the Laws of Kenya, s 6 (3).

[322] *In re Estate of John Gakunga Njoroge (Deceased)* Succession Cause No. 256 of 2007, [2015] eKLR http://kenyalaw.org/caselaw/cases/view/116794/ <accessed on 23 September 2017>.

[323] *Ibid.*

fit.[324] It is the duty of all transacting parties to apply for the LCB consent within the stipulated period of time. In the case of Ezekiel Kisorio Tanui v Jacinta Ekai Nasak (Tanui Case),[325] it was held that Section 8 of the LCA places the duty to apply for the LCB consent on both parties. In this case, the defendant pleaded with the Court to extend the time within which to apply for the LCB consent after failing to do so arguing that the plaintiff had not subdivided his land to pave way for registration of her plot. The Court, quoting Section 8(1) of the LCA, refused to grant the extension and held that:

> It is clear from the above provision that any party to the agreement can apply for consent of the land control board. There is nowhere where it is indicated that the application should as of necessity be made by the person seeking to sub divide or sale land… It is therefore not correct for the defendant to claim that she was waiting for the plaintiff to make a first move.[326]

In interpreting Section 6(1) of the LCA, Courts have consistently held that failure to obtain LCB consent renders any agreement void and unenforceable for all intents and purposes.[327] In the case of Onyango and Another v Luwayi,[328] the Court held that the phrase 'void for all purposes' must be interpreted to mean what it means. In Silas Bartonjo Kiptala v James Kipkemboi Murei (Kiptala Case),[329] the defendant bought land, in the absence of LCB consent. The vendor later sold the land to the plaintiff and obtained LCB consent. The Court was called upon to determine the legal owner. The court in holding that the plaintiff was the legal owner stated that, 'Section 6 provides that if consent of the land control board is not granted for a transaction that requires such consent, then such transaction is void for all purposes'.[330]

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[324] Section 8 of the Land Control Act, Cap 302 of the Laws of Kenya

[325] Civil Suit No. 76 of 2012, [2014] eKLR http://kenyalaw.org/caselaw/cases/view/94674/ <Accessed 21 September 2017>.

[326] *Ibid* para 14.

[327] *Kahia v Nganga* (2004) 1 EA 75.

[328] [1980] KLR 513-516.

[329] Environmental Land Case 693 of 2012 [2013] eKLR http://kenyalaw.org/caselaw/cases/view/87849<accessed on 21 September 2017).

[330] *Ibid.*

In the case of Jacob Michuki Minjire v Agricultural Finance Corporation,[331] the court held that 'if the consent of the Land Control Board is not obtained, the parties are restored to status quo ante while in between, there is merely a de facto agreement which has no legal effect, but if the consent is obtained, the transaction binds the parties which proceeds to completion'.[332] It is prudent that parties involved in land transactions secure the services of lawyers to advise them on the implications of Section 6 of the LCA. This will avoid disputes that arise by failure to seek the consent of the LCA making the said agreement unenforceable to the detriment of a purchaser who may have paid the full purchase price. The Courts have further held that no specific performance of a contract can be ordered by the Court where by law such a contract has been declared null and void.[333] In the case of Kariuki v Kariuki the Court was categorical that:

> When a transaction is clearly stated by the express terms of an Act of Parliament to be void for all purposes for want of the necessary consent, a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void. That is what the Act provides, and the statute must be enforced if its terms are invoked.[334]

If a controlled transaction is voided and unenforceable subject to Section 6 of the LCA, the question that follows then is what is the appropriate remedy? In case a controlled transaction has been voided by virtue of section 6(1) of the LCA, the Courts have been categorical that the only remedy that the statute provides is a refund of the consideration which is recoverable as a debt and not damages.[335] Section 7 of the LCA provides that, 'if any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22.'

[331] (1982) LLR 619.

[332] *Omuse Onyapu v Lawrence Opuko Kaala* Civil Appeal No.21 of 1992.

[333] Ibid.

[334] [1983] KLR 225, at 227.

[335] *Emily Jepkemboi Kogo v Patrick Korir*, Eldoret HCCC No. 195 of 2007; *Githu v Katibi* (1990) KLR 634; *Simiyu v Watambala* (1985) KLR 852.

In the case of Kariuki v Kariuki,[336] it was held that 'no general or special damages are recoverable in respect of a transaction that is void for all purposes for want of consent'. The Court went further to state that the only remedy available to such a party is the money or consideration paid subject to Section 7 of the LCA. Even where a party has made developments on the property, the courts will be hesitant to grant damages. In the case of Cheboo v Gimnyogei,[337] the court held that compensation for improvements on a land whose transaction is voided for lack of LCB consent is not recoverable.

However, the recoverable debt is subject to Section 22 of the LCA which makes it an offence to pay or receive any money, or enter into or remain in possession of any land voided as a result of section 6(1) of the Land Control Act. Parties in a controlled transaction must ensure that they apply for the LCB consent, failure to which such transactions shall be rendered null and void in accordance with the law and the only remedy shall be the consideration paid recoverable as a debt as stipulated under Section 6 and 7 of the LCA.

3. Can the Equitable Doctrine of Constructive Trust Legalize a Controlled Land Transaction Voided by Operation of Transaction of the Land Control Act?

It is not in doubt that, Section 6 of the LCA informed by policy considerations during the colonial period was meant to enhance land use and management of agricultural land by Africans. More than five decades later, and amidst the promulgation of the Constitution which has been celebrated as the most liberative and transformative, the question that follows then is what happens when an agreement is voided by operation of law. Is the recovery for consideration paid as a debt sufficient remedy? If not, what is the best remedy for an innocent purchaser of value who has invested in the said land? Should the courts be invited to impose the doctrine of constructive trust as it would be unconscionable for the vendor to unjustly enrich himself to the detriment of the purchaser?

[336] [1983] KLR 225, at 227.

[337] Civil Appeal No 40 of 1978.

Whilst most court decisions have been categorical that the law prohibits and criminalizes any action in contravention of Section 6 of the LCA, and that the only remedy is a refund of the purchase price recoverable as a debt, aggrieved parties have in a number of cases raised the argument that equitable doctrine of constructive trust can indeed legalize such occupation.

According to D Ong, a constructive trust is:

> …judicially imposed on the owner of property, with respect to either a part or the whole of that property, to the extent that it would be unconscionable, notwithstanding the absence of any relevant or express or resulting trust of that property, for that owner to enjoy that property beneficially in relation to the person or persons for whose benefit the trust is imposed.[338]

A constructive trust can either be express or implied.[339] A constructive trust can arise in fiduciary relationships, as a direct consequence of unlawful transaction or from the rule that no person should benefit from his own crime.[340] The concept of remedial constructive trust grants the courts the discretion to deliver justice tailored on the facts of the case where the rules are strict.[341] However, Webb provides that this is a myth.[342] He posits that where the court's discretion making conflicts with rules, it leads to less justice.[343] Invoking constructive trust as a remedy where a transaction has been voided by the operation of law has remained a subject of litigation leading to conflicting decisions.[344] In Yaxley v Gotts & Another,[345] it was held that an oral agreement

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[338] D Ong, *Trusts Law in Australia* (4th edn, Federation Press 2012) 501.

[339] George P Costigan, 'The Classification of Trusts as Express, Resulting and Constructive' (1914) 27 *Harvard Law Journal* 437.

[340] AJ Oakley, *Constructive Trusts* (Sweet & Maxwell 1996) 92; David M Wright, *The Remedial Constructive Trust* (Butterworths 1998).

[341] Charlie Webb, 'The Myth of Remedial Constructive Trust' (2016) 69 *Current Legal Problems* 353.

[342] *Ibid.*

[343] *Ibid.*

[344] Henry H Ingersoll, 'Confusion of Law and Equity' (1911) 21 *The Yale Law Journal* 58.

[345] [2000] Ch 162.

for the sale of property creates an interest in the property even though void and unenforceable as a contract, but the oral agreement would still be enforceable on the basis of a constructive trust or proprietary estoppel. In the case of Steadman v Steadman,[346] it was held that if one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not be allowed to turn around and assert that the agreement is unenforceable.

Kenyan courts have in a number of decisions been called upon to adjudicate on whether the doctrine of constructive trust can be invoked to make a controlled transaction enforceable in the absence of the LCB consent as required by law. In some decisions, the court has affirmed that although the provision of Section 6 of the LCA is harsh, it is imperative in nature and has no room for 'the application of any doctrine of equity to soften its harshness'.[347]

In Hirani Ngaithe Githire v Wanjiku Munge,[348] the Appellant and Respondent entered in an agreement for the sale of agricultural land situated in Kabete area. The Respondent paid the purchase price and took full possession of the land, despite the fact that they did not seek the consent of the LCB as required under Section 6 of the LCA. The Appellant then refused to effect a legal transfer and the Respondent filed a suit before the trial magistrate for specific performance. The trial court held that the 'lack of consent from Land Control Board was not fatal to the agreement and equity and substantial justice supported specific performance'. On appeal, the Court in overturning the trial magistrate's decision was categorical that:

> The position is simple and clear. Section 6 of the Land Control Act is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The Courts cannot do that; for it is not for us to legislate but to interpret what Parliament has legislated…Section 6 prohibits any dealing with agricultural Land in a land control area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.

[346] [1976] AC 536.

[347] *Karuri v Gitura* [1981] KLR 247; *Kariuki v Kariuki* [1983] KLR 225.

[348] *Ibid.*

Although it is true that one of the principles for equity is that equity follows the law, [349]equity, by its very nature, can only follow a law that is just and not an unjust law. Consider this scenario: someone sells his land to a buyer who pays the full consideration and takes possession of the land. The buyer goes ahead to put up a magnificent home on the land after taking possession knowing very well that the seller will obtain the consent of the LCB to transfer the land to him as required under Section 6 of the LCA. The seller does not obtain the consent of the Board but instead sues the buyer claiming that the Sale Agreement is void for want of the consent of the Board. To aggravate the situation, the buyer is arrested for being on the land without the consent of the LCB contrary to the law.

This provision of the law is likely to allow people to con others out of their money and investment. In order to remedy the situation, there is need for full compensation to the aggrieved party.

The question of whether the equitable doctrine of constructive trust or proprietary estoppel can be invoked to defeat the provision of Section of the LCA has come into play recently in the Court of Appeal in the decisions of Macharia case,[350] Kitilit case[351] and Tukai case.[352] These decisions are peculiar because they were made after the promulgation of the Constitution. In the three suits, the Court was called upon to determine whether the equitable doctrine of constructive trust could be invoked and render a controlled transaction enforceable despite contravening section 6(1) and 6(2) of the LCA.

In the Macharia Case, the Respondent in subdividing his piece of land LR N0. 6324/10 did not obtain the LCB consent as required because he preferred obtaining the consent after he had sold his 240 plots of land. After selling the plots to the Appellants, the Respondent refused to transfer the titles arguing that the Appellant had failed to pay the survey fees as per the Sale Agreement. The trial Court found that the suit land, being an agricultural land, required

[349] Wesley Newcomb Hohfeld, 'The Relations between Equity and Law' (1913) 11 (8) *Michigan Law Review* 536.

[350] Supra n.7.

[351] Supra n.9.

[352] Supra n.8.

the consent of LCB to be obtained in respect of the numerous sub-divisions and the sale transactions and that the failure of such consent made the said agreements void and unenforceable against the Respondent.

The aggrieved parties on appeal asked the Court of Appeal to interpret the LCA in light of the 2010 Constitution as their case was based on constructive trust to ensure the Appellants received substantive justice. The Respondent argued that, the Appellants had failed to prove constructive trust and where the law is clear as in this case, the doctrine of constructive trust is not applicable. However, the Court of Appeal held in favour of the Appellants and held that, the Respondents had created an implied or constructive trust in favour of those persons who had paid the purchase price.[353] The Court went further and explained that:

> The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice.[354]

The Court of Appeal further elaborated that:

> A constructive trust is based on "common intention" which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case… constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.355

Other than the equitable doctrine of constructive trust, the Court of Appeal in the Macharia case also observed that all the decisions of the Court which had held that controlled transactions are void for want of the consent of the Board were made prior to the promulgation of the Constitution and may not hold.

[353] *Macharia case* para 19.

[354] *Ibid* at para 25.

[355] *Ibid* at para 20.

The Court stated as follows:

> Article 159(2) (d) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing; and equity detects unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.356

The Court in the Macharia case also found that section 30(g) of the Registered Land Act (repealed) was meant for situations that were similar to those before it.[357] According to the Court, the Appellants, being in possession of the suit properties, came within the protection of section 30(g) of the Registered Land Act. The Court faulted the trial court for failing to give due consideration to the fact that the Appellants were in possession and occupation of the suit property.

In a number of decisions that followed the Macharia Case decision, the courts construed that indeed the doctrine of constructive trust can be invoked to legalize a contract voided by operation of law in order to dispense justice. On 8th October, 2014, the Court of Appeal sitting in Nyeri in the case of Peter Mbiri Michuki v Samuel Mugo Michuki[358] pursued the position that once the vendor enters into a sale agreement with the purchaser and receives the purchase price, he becomes a trustee holding the property in favour of the purchaser, notwithstanding the lack of the consent of the LCB. Although the Court of Appeal sitting in Kisumu in the case of Sammy Likuyi Adiema Vs Charles Shamwati Shisikani (Sammy Likuyi case),[359] was of the view that the provision of section 6(1) the LCA requiring the consent of the LCB was not a mere technicality, the Court went on to follow the decision in the Macharia

[356] Ibid para 26.

[357] *Ibid* para 17.

[358] *Civil Appeal No. 22 of 2013, [2014] eKLRhttp://kenyalaw.org/caselaw/cases/view/102173/<accessed 22 September 2017>.*

[359] Civil Appeal 3 of 2014, [2014] e KLRhttp://kenyalaw.org/caselaw/cases/view/104716/<accessed 24 September 2017>.

case and stated that even if the respondent had not invoked the Limitation of Actions Act,[360] he would have succeeded on the basis of constructive trust. The court went ahead and held that the Respondent, having been put in possession of the land, raised equity in his favour and the Appellant held the land on a constructive trust in his favour.

In a conflicting decision months later, the Court of Appeal in Tukai case sitting in Nairobi declined to follow the reasoning in the Macharia case. In the Tukai case,[361] the trial court (Emukule J) following the decision in Macharia Case, held that the cut and dry provisions of Section 6 of the LCA were harsh and would wreck inequality and injustice. In this situation, the Court should apply the principle of equity and natural justice to tamper with Section 6 of the LCA. Aggrieved by the trial Court's decision, the appellants argued before the Court of Appeal that the trial court had erred by disregarding the mandatory provisions of Section 6 of the LCA and ignoring binding precedent without any cogent reason.

It was further argued that the judge 'could not purport to rely on the doctrines of equity to void a clear statutory provision like section 6 of the LCA'. The Respondents, on the hand, invited the appeal court to consider that 'by accepting payment after the completion date…the Appellant had disregarded the sale agreement and due to their occupation of the suit property, the Respondents had acquired equitable rights over the same'.[362] The Respondents, relying on the decision in Macharia case, further argued that the provision of Section 6 of LCA is a mere technicality and by dint of Article 159(2) of the Constitution, cannot deter the Court from administering justice.

The Court started off by stating that the decision of the High Court (Emukule J) and the Macharia case had departed from the previous consistent decisions of the Court of Appeal and the High Court. The Court examined at length the rationale of the land control legislation and stated that the Act was informed by noble and deliberate public policy considerations. After quoting several consistent decisions of the Court of Appeal and the High Court that had hitherto given full effect to the provisions of section 6 and 22 of the Land

[360] Government of Kenya, Limitations of Actions Act Chapter 22 of the Laws of Kenya (Government of Kenya Printers 2010).

[361] Supra n.8.

[362] *Ibid* at 5.

Control Act, the Court held as follows:

> That was the weight of precedent and authority that was before the trial Judge when he determined the suit before him. In our opinion, the learned Judge did not give any serious reasons for departing from such consistent decisions, many of which were directly binding on him. All that we see is the taking of refuge in unclearly articulated notions of inequality, injustice, equity and natural justice. To begin with, it is difficult to comprehend the legal basis of the view that the Court has the power to ignore clear and express provisions of a statute under the guise of equity.

The Court went further to observe that under the hierarchy of norms, the doctrines of equity are subject to the Constitution and the Statutes, and that the doctrines of equity cannot override the provisions of the statute. The Court disagreed with its decision in the Macharia case on five grounds being:

a) There is no room for the courts to import doctrines of equity into the LCA. Consequently, according to the court, the invocation of equitable doctrines of constructive trust and proprietory estoppel to override the provisions of the Land Control Act has no legal foundation;

b) In holding that there was an implied or constructive trust which did not require the consent of the Board, the Court in Macharia Case not only ignored its previous decisions on the point, but also ignored the express terms of Section 6(2) of the LCA;

c) For actual possession of land to amount to an overriding interest within the meaning of section 30(g) of the repealed Registered Land Act, the occupation must be legal in the first place. According to the Court, occupation of land contrary to the provisions of Section 22 of the Act cannot be said to be legal. It was the view of the Court that courts cannot enforce an illegal contract or one which is against public policy; and

d) The provisions of the LCA cannot be equated to procedural technicalities that can be over looked by virtue of Article 159(2) (d) of the Constitution and the overriding objective under the Appellate Jurisdiction Act.

The Court of Appeal decisions in Macharia case and Tukai case, only exacerbates the situation on the conflict between the provision of Section 6 of the LCA and the application of the doctrine of constructive trust. This paper seeks to address this conflict. The hierarchy of norms under the Judicature Act is very clear, that doctrines of equity are subject to the Constitution and Statutes. However, the Constitution is supreme law which binds every person and state organs. Any law that is inconsistent with the Constitution is void to the extent of its inconsistency.[363]

[363] Constitution 2010, art 2.

Is Section 6 of the LCA inconsistent with the Constitution? The answer is NO. Article 40 of the Constitution protects the rights of individuals to own property either as individuals or in association of others. However, Article 40(6) of the Constitution stipulates that the 'rights under this Article do not extend to any property that has been unlawfully acquired'. The reading of the above section is very clear and the court in the case of Evelyn College of Design Ltd v Director of Children's Department & another,[364] held as follows:

> Article 40 which protects the right to property must be read to exclude property found to have been unlawfully acquired under Article 40(6). This requirement is an extension of the fact that the Constitution protects higher values which are to be found in preamble to the Constitution and Article 10. Values such as human rights and social justice cannot countenance a situation where the Constitution is used to rubberstamp what is in effect unlawful.

Where land is acquired unlawfully in contravention of statutory law, such rights are not protected under the Constitution. Whereas every person has a right to access justice, it is evident that where property is unlawfully acquired or voided by operation of law, then doctrines of justice and equity cannot be imported to oust clear provisions of law. Section 22 of the LCA creates an offence which is punishable where a person pays money or takes possession of land in furtherance of a transaction voided by the law. Courts exist not only to interpret the law but also to apply it accordingly.

The above conflicting decisions by the Court of Appeal in the Macharia Case and Tukai case brings alive the discussion on the place of justice when equity and law conflict. Article 159(2)(d) of the Constitution requires the Court while observing the rule of law, not to unreasonably be restricted by procedural technicalities and to be guided by the values and principles of the Constitution.. However Section 6 of the LCA is a matter of substantive law and procedure. The maxim, 'Aequitas sequitur legem' meaning that equity follows the law, is an indication that equity cannot replace the law but supplements it. The Judicature Act also provides for hierarchy of laws in Kenya and the doctrines of equity are subject to statutory law.[365]

[364] Petition No. 228 of 2013 [2013] eKLRhttp://kenyalaw.org/caselaw/cases/view/90931/<accessed 23 September 2017).

[365] Section 3(1) of the Judicature Act, Cap. 8 Laws of Kenya.

Notwithstanding the well-known hierarchy of laws in Kenya, the Court of Appeal in the Kitilit case[366] was of the view that by Article 10(2) (b) of the Constitution, equity is one of the national values which binds the courts in interpreting any law, and that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act.[367] The import of the decision of the Kitilit case is that under the current constitutional dispensation, it is the statutory law that follows equity and not the other way round. Although this decision may be justifiable in situations where sellers of land take advantage of the provisions of Section 6 of the Land Control Act to deprive buyers of their properties, it opens up a Pandora's box in relation to other equitable principles which may be employed by litigants to oust the clear provisions of the law, thus creating confusion and uncertainty in the country's legal system.

4. Adverse Possession or Full Compensation?

In the new constitutional dispensation, Section of 6 of the LCA is harsh and if mechanisms are not devised to cure the situation, this Section will be used to procure injustice where a purchaser in good faith is deprived ownership of land yet he has paid the full purchase price. While the requirement of the LCB consent was informed by policy considerations, it should not be used as a tool to deprive a purchaser in good faith the title to the land. Where a controlled transaction has become void due to lack of consent, the aggrieved party can succeed in a claim under Section 6 of the LCA if they plead adverse possession and not in any other situation. However, the aggrieved party must prove adverse possession in accordance with the law.

Adverse possession is the process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is inconsistent with the right of the owner.[368] However, in order to succeed under the doctrine of adverse possession, all the conditions in accordance with the law must be met.

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[366] Supra n.9.

[367] Ibid, para 25.

[368] Stephen Jourdan and Oliver Radley, *Adverse Possession,* (2nd edn Bloomsburry 2011) 92.

Under the Limitation of Actions Act, it is possible for title to land to be acquired by adverse possession under certain conditions after the expiry of 12years.[369]In the case where the land owner has been out of possession and a stranger has been in possession, for a period of 12 years, thus barring the owner's rights to re-enter or to recover possession, the owner's right, if it is unregistered land under any of the land registration statutes, is extinguished. However, if it is a registered title, it is not extinguished but the registered proprietor holds it in trust for the person who by virtue of the statute has acquired the title, and the stranger acquires the title by moving to the ELC.[370]

Where a person claims to have become entitled by adverse possession to land which has been registered, he is allowed by virtue of the provisions of section 38 of the Limitation of Actions Act to apply to the High Court (ELC) for an order that he be registered as the proprietor. The fact that one has adverse possession of land does not give him title, but prevents the owner from asserting his title, and forms a basis for applying to have the title issued to him by the Court. What the doctrine recognizes (and also section 37 of the LAA) is that the registered owner holds the title to the land as "the legal owner" but for the occupier as the cestui que trust whose legal ownership ripens only upon registration after a court order.371 For one to succeed in a claim for adverse possession, he must prove the following elements:

a) He must have made physical entry and be in actual possession of the land for the statutory period;

b) The entry and occupation must be with or maintained under some claim or colour of right or title;

c) The occupation must be non-permissive;

d) The occupation must evince unmistakable animus possidendi,[372] that is occupation with the clear intention of excluding the owner and all other persons and;

[369] *Gideon Mwangi vs. Joseph Gachenje Gituto*, Civil Appeal No. 4 of 2015(2015) eKLR.

[370] Limitations of Actions Act, s 37.

[371] *Bridges v Mees* [1957] Ch. 475.

[372] Animus possidendi means an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title. See Robert Megarry and William Wade (eds), *The Law of Real Property* (Sweet & Maxwell, 6th edn 2012).

e) The acts of the adverse possessor must be inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it.

The justification of the doctrine of adverse possession is to prevent wastage of land by forcing the owner to monitor his property or suffer the consequences of losing it through adverse possession. Section 6 of the LCA was enacted to ensure that agricultural land was put into use for economic development and to ensure that no land lies idle. Therefore, in the absence of the consent of the LCB, one can only succeed in a claim under Section 6 of the LCA if they can plead adverse possession and not in any other situation.

When it comes to adverse possession in regard to a land transaction voided by Section 6 of the LCA, the question that arise is: when does time start running for the purposes of adverse possession. On one hand, the courts have held that time will start to run at the time when the transaction becomes void as a result of not applying for the LCB consent. In this case, time will start to run at the lapse of six months when the parties fail to apply for the consent of LCB in accordance with Section 8 of the LCA. In the case of Samuel Miki Waweru v Jane Njeri Richu, the Court held that adverse possession starts running 'where the sale agreement being subject to the Land Control Act became void under section 6(1) (c), for lack of consent'[373]

In other instances, the Courts have held that for the purposes of adverse possession, time starts to run when the claimant is put into possession. In Mbugua Njuguna v Elijah Mburu Wanyoike & Another,[374] the court held that, 'where the transaction for sale of land terminates by reason of failure to acquire the consent of the Land Control Board, then for purposes of adverse possessory rights, time starts running on the day the claimant is put in possession of the land'. In the case of Public Trustees v Wanduru,[375] it was stated that 'adverse possession should be calculated from the date of payment of the purchase price to the full span of 12 years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession'.

Where a purchaser has paid up the purchase price, and is in possession of the

[373] Civil Appeal No. 122 of 2001 (unreported).

[374] Civil Appeal No. 27 of 2002.

[375] (1984) KLR 314.

land, time should start running for the purpose of computing if twelve years have lapsed either from the date that the purchase price was paid or when the sale agreement became void notwithstanding the absence of the consent of the board. It cannot be said that since the occupation is illegal for lack of the consent of the LCB, the claimant cannot succeed under the doctrine of adverse possession. All a claimant has to show to succeed in a claim of adverse possession is that he has dispossessed the owner of the land for a period of 12 years, and he has all along shown that intention (animus possidendi). The other reason why such a claimant should succeed is because pursuant to the provisions of Section 37 of the Limitation of Actions Act, a title holder only holds a title for his land after the expiry of twelve years from the date when the last payment was made in trust for the person in possession, notwithstanding that the claimant's stay on the land is "unlawful" in the first place. The Land Control Act has no application where the claim to the title of agricultural land is by operation of law such as by adverse possession.[376] It is upon the vendor to evict the claimant before the expiry of 12 years.

5. Conclusion

The decision in Tukai Case faulted the Macharia case decision on the ground that for actual possession of land to amount to an overriding interest within the meaning of section 30(g) of the RLA, the occupation must be lawful in the first place. Can an occupation be said to be unlawful in a situation where the vendor enters into an agreement to sale his land, receives the full purchase price and then puts the purchaser in possession? Section 22 of the Land Control Act seems to suggest so. If the law prohibits, and indeed criminalizes such occupation, can the equitable doctrines of proprietary estoppel and constructive trust legalize such occupation? I don't think so. One can only succeed in a claim under the above scenario if he pleads adverse possession, and not in any other situation.

Unless one proves the elements of adverse possession, the equitable doctrines of proprietary estoppel and constructive trust cannot legitimize an offence. The law expressly prohibits possessing agricultural land without the consent of the LCB, the circumstances of such ownership or possession notwithstanding. The Act has given the purchaser who buys land and fails to obtain the consent of the LCB within six months a recourse. They may file a suit for recovery of the purchase price or file a suit for extension of time within which to obtain the consent of the Board. The other alternative is for legislative amendment of

[376] *Public Trustee v Wanduru* (1984) KLR 314.

Section 7 to provide for full compensation to a purchaser who fails to obtain the consent of the LCB and not just recovery of the consideration as a debt. This however must take into consideration the provisions of Section 22 of the LCA, if the intended policy considerations are to be enhanced.

6. Recommendations

Based on the above analysis and conclusions, this paper recommends that: The laws of Kenya should provide that where a land transaction is voided as a result of lack of the LCB consent, a claimant can only succeed if he/she pleads adverse possession and not in any other situation. In the case of Gideon Mwangi v Joseph Gachenje Gituto,[377] the Court held that notwithstanding the consent of the Board, the respondent was entitled to the suit property having been put in possession of the land by the Appellant and having stayed on the land for more than 12 years. Time should start running for the purpose of computation if twelve years have lapsed either from the date that the purchase price was paid or when the sale agreement became void, notwithstanding the absence of the consent of the LCB.

Secondly, where adverse possession cannot be pleaded, there is need to amend Section 7 of the LCA to provide for full compensation in the form of damages to the aggrieved party. This amendment will provide certainty on the available remedies. Currently, Section 7 of the LCA only allows the aggrieved party to recover the money or consideration that was paid for the land as a debt and not damages, even in a scenario where one has carried out development on the land. The amendment will deter unscrupulous sellers from unjust enrichment emanating from their own illegal acts. Further, it will provide compensation to purchasers who may not hold title to the land yet they had paid the full purchase price. Such an amendment must take into consideration Section 22 of the LCA which criminalizes any action in furtherance of an avoided transaction in order to protect the policy considerations that informed the enactment of the LCA.

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[377] Civil Appeal No. 4 of 2015, [2015] eKLR http://kenyalaw.org/caselaw/cases/view/112043/<accessed 15 September 2017).

INTERNATIONAL CRIMES AND THE INTERNATIONAL CRIMINAL COURT

AMBOLE MAGAL[378*]

ABSTRACT

This paper evaluates the impact of the codification of international crimes stricto sensu by the Rome Statute on the corpus of international criminal law. The formulation of each of these crimes under the Rome Statute is evaluated against their formulations under the international customary rules as well as in other treaties. The paper also scrutinises the principles of legality and complementarity, the element of state cooperation, and the role of the Security Council under the Rome Statute with a view of appraising the efficiency and effectiveness of the ICC. It concludes that the Statute has had a significant impact on international criminal law. However, its limitations lie in its dependence on the assistance and cooperation of State Parties in the discharge of its remits, and that the referral and deferral of cases by the UN Security Council provides an opportunity to politicize the Court's functions.

1. INTRODUCTION

The Constitution of Kenya, 2010 makes international law a part of the laws of Kenya through Article 2(5). Article 2(6) expressly provides that any treaty or convention ratified by Kenya forms part of the laws of the country. One such treaty, with far reaching implication on our country, is the Rome Statute of International Court, 1998(hereinafter referred to as the Rome Statute).It was ratified on the 11th day of August 1999 meaning therefore that it forms part of our laws. It is therefore imperative that we all seek to understand the contours of international criminal law in general and more specifically as moulded by the Rome Statute.

[378*] The author is an Advocate of the High Court of Kenya. He holds a Master of Laws (with Distinction) degree in *Crime and Litigation* from London South Bank University (LSBU), UK. (*philipmagal@gmail.com*).

International Criminal Law (ICL) is a relatively new branch of public international law which has come into being by gradual accretion.[379] As a matter of fact, ICL is still an underdeveloped branch of international law.[380] This is partly because the development of the substantive international criminal law is a slow and complex process. Under ICL, it is relatively harder to define the constituent elements of a crime. This is attributable to the process of international criminalization.[381] The corpus of rules of international criminal proceedings of general application is still evolving. The procedural rules adopted so far only apply to the specific tribunals for which they were adopted. As a result, international criminal law is not yet a coherent system and the international courts are forced to rely heavily on customary rules, and unwritten general principles.

The international criminalization process is twofold. The first limp involves the classification of a conduct or an offence under the domestic law as an international crime punishable as such. This, in turn, happens in either one of two ways. One, it may take place under international customary law, by way of practice of nations, whereby nations treat a given conduct as an international crime invariably leading to its classification as such. Alternatively, it may be done by way of a treaty whereby nations enter into agreements in which a given conduct is classified as an international crime and is accordingly prohibited.[382] A given conduct can be an international crime under the customary international rules as well as under treaty law. An international crime may also be codified as such under more than one treaty. Under customary international law, the core international crimes (international crimes stricto sensu) are: war crimes, genocide, crimes against humanity and crimes of aggression. These crimes have been codified as such by multiple instruments, most recently by the Rome Statute. Significantly, their elements, i.e. their actus reus and the mens rea, are applicable uniformly universally.[383]

The second limp of the international criminalization process is the enforcement of the international criminal law. Enforcement ordinarily takes

[379] I Bentekas, *International Criminal Law* (4thedn, Hart Publishing 2010) 8.

[380] *Ibid*, p 6.

[381] *Ibid*

[382] *Ibid* p 8.

[383] *Ibid.*

place within the state with the territorial jurisdiction over the crime or the suspect. Prior to 1998, there was no permanent international enforcement mechanism. The trend then was the establishment of temporary tribunals to address serious violations of international customary norms. Examples of such tribunals include the Nuremberg Tribunal, the International Criminal Tribunal of the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

Most recently, the Rome Statute, a multilateral treaty, codified war crimes, genocide, crimes against humanity and crimes of aggression. It also established a permanent international court i.e. the International Criminal Court (ICC) to enforce its provisions. This is a very significant development in the field of international criminal law. This paper examines this development. First, the impact of the codification of war crimes, crimes against humanity, and the crime of aggression on the corpus of international criminal law will be evaluated. The formulation of each of these three crimes under the Rome Statute will be analyzed and critically evaluated as against the formulation under the international customary and different treaty laws. The crime of genocide is deliberately excluded from the discussion for the reason that in comparison to the other three crimes codified under the Rome Statute, it was relatively more developed and its ambit more extensively evaluated even before the adaptation of the Rome Statute by the State Parties, and therefore, unlike the case with the other crimes, the Statute has contributed very little to its development. Secondly, the essay will critically appraise the efficacy of the ICC. For this purpose the principle of legality and complementarity, the element of State cooperation, and the role of the Security Council as provided for under the Statute will be scrutinised in order that their impact on the efficiency and effectiveness of the ICC in the discharge of its remit may be determined.

2. THE ROME STATUTE

The Rome Statute was adopted by the United Nations Diplomatic Conference of Plenipotentiaries in July 1998. Under Article 1, it establishes the International Criminal Court as a permanent court. ICC's jurisdiction and remit is governed by the Rome Statute [384] which also endows it with an international legal personality. It may discharge its functions and exercise its powers within the jurisdiction of any of its member States, and by means of an ad hoc agreement

[384] International Criminal Court Statute, 1998, Art 1.

with a non-party State, in that State's territory.[385] The Rome Statute entered into force on the 1st of July, 2002.[386]As of 1st July, 2012, one hundred and twenty two countries were parties to it.[387]

2.1 Substantive Crimes under the Rome Statute, and their Contribution to the Corpus of International Criminal Law

In exercise of its jurisdiction, the ICC is bound by the Rome Statute as its primary source of law. In interpretation of the provisions on substantive crimes and for guidance on applicable procedures it relies on the Elements of Crime and the Rules of Procedure respectively. Should these be inadequate, it can have recourse to other relevant treaties, principles, and rules of international law. If necessary and in appropriate cases, it can also have recourse to principles of law derived from national laws within the different legal systems of the world.[388]

Only the most serious international crimes are subject to the jurisdiction of the Court. Article 5 of the Rome Statute limits its jurisdiction to:

f) The crime of genocide,

g) Crimes against humanity,

h) War crimes and,

i) The crime of aggression.

2.2 Crimes against Humanity

Crimes against humanity was first introduced by Article 6(c) of the Charter of Nuremberg Tribunal in 1945[389] which defined it thus:

> Crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds in execution

[385] *Ibid*, Art 4.

[386] *Ibid*, Art 126(1).

[387] ICC, 'How many countries are parties to the ICC Statute',<http://icc-cpi.int/>accessed 15 January 2016.

[388] *Ibid*, Art 21.

[389] I Bantekas, *International Criminal Law* (4th edn Hart Publishing2010) 185.

> of or in connection with any other crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic laws of the country where perpetrated.

Up to that point in time, international criminal law had not criminalised large scale atrocities committed by individuals against their own population. The scope of the crime was limited by this original definition to crimes connected to war crimes or wars of aggression.[390] The conducts that could give rise to a charge of crime against humanity were also restricted to the enumerated list within the above definition.[391] Overtime, international customary rules did away with the need for a connection to war crimes or wars of aggression.[392] The list of conducts constituting crimes against humanity has since also increased. Crime against humanity was however never incorporated into any multilateral treaty until 1998 when it was enshrined in the Rome Statute. In between this time, reliance was placed on the Nuremberg jurisprudence and the International Military Tribunal Charter but these were at variance with the developing customary law.[393] The Rome Statute, although slightly differently, captures the state of customary law as it presently is.

Before the Rome Statute's formulation, crimes against humanity had been differently defined under the International Criminal Tribunal of the former

Yugoslavia(ICTY)[394] and International Criminal Tribunal for Rwanda(ICTR)[395] that were set up by United Nations Security Council resolutions under Chapter VII of the UN Charter. The ICTY and ICTR jurisprudence rapidly evolved its definition but they had their short comings. Contrary to customary norms, the definition of crimes against humanity under Article 5 of the ICTY Statute required a nexus between conducts constituting

[390] *Ibid.*

[391] *Ibid.*

[392] *Ibid.*

[393] *Ibid* p.187.

[394] ICTY St, Art 5.

[395] ICTR St, Art 3.

the crime and an armed conflict.[396]This element limited the scope of the offence. Under Article 3 of the ICTR Statute, discrimination on grounds of ethnicity, nationality, race or religion was added as a requisite element of the crime.[397]

The ICTY, ICTR as well as the Rome Statute incorporate exhaustive lists of the specific offences that underlie crimes against humanity. This list has been greatly expanded from the initial enumeration under the Nuremberg jurisprudence.[398]As per the ICTY and ICTR Statutes these crimes include: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution and other inhumane acts.[399] The Rome Statute incorporates all these plus two more offences: the crime of apartheid[400], and enforced disappearances[401]. Moreover, the Rome Statute also includes a category of offences labelled 'other inhumane acts'.

This is an open ended provision meant to incorporate other crimes that are of a character similar to crimes against humanity in the sense that they cause great suffering, serious mental or physical injury that may not have been contemplated by the draughtsman.[402] It is arguable that, if extended by analogy, this category may bring crimes such as terrorism and corruption under the definition of crimes against humanity.

It is however submitted that this category does not meet the strict requirements of the principle of specificity which is explored in greater details later on in this paper. Under the Rome Statute, connection to armed conflicts, war crimes or crimes of aggression are not elements of the crime against humanity, neither is discrimination on any ground. Article 3 of the ICTR restricted the concept of an attack under crimes against humanity to attacks that were systematic

[396] See note 11 above, p.190.

[397] *Ibid.*

[398] *Ibid*,p.192.

[399] See note 13 &14 above.

[400] *Rome Statute of International Criminal Court*, Article 7(1)(j).

[401] *Ibid*, Art. 7 (1)(i).

[402] *Ibid*, Art. 7(1)k.

or widespread in nature, meaning therefore that the overall attack (not the underlying offence) had to be widespread or systematic. This is in line with international customary law. This meant that a single offence would be regarded as a crime against humanity if it took place within the context of widespread or systematic attack against a civilian population.[403] The position is however different under the Rome Statute which sets a higher threshold standard which only admits the most serious offences. Article 7(1)as read together with Article 7(2) implies that for a charge of crimes against humanity to be substantiated it must be proved that the underlying criminal act committed against a civilian population was widespread or systematic, and was itself committed under the umbrella of widespread or systematic attack. What this means is that the commission of a single act constituting one of the underlying offences under a widespread or systematic attack would not be admissible at the ICC.[404]

2.3 War Crimes

The Rome Statute covers four categories of war crimes. They include:

a) Grave Breaches under the four 1949 Geneva Conventions (GC I-IV).405 The Rome Statute reproduces the definitions contained in the GC I-IV which provides detailed lists of prohibited acts that qualify as grave breaches if committed in the context of international armed conflict against persons or property protected under them. These acts also constitute grave violations of international humanitarian laws and include wilful killing, torture, inhuman treatment, hostage taking, destruction or appropriation of property.406

b) Other violations of laws and customs applicable in international armed conflict.407This category largely reproduces rules from:

i) The 1907 Hague Convention which covered the Laws and Customs of War on Land.

[403]*ICTY Prosecutor v Kuranac and Others*, Trial Judgement, para 431.

[404]See note 11 above, p 201.

[405]See note 22 above, Art 8(2)(a).

[406]K Dormann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiation of the Elements of Crime' in A von Bogdandy and R Wolfrum (eds)*Max Planck Year Book of United Nations Law (2004)*Vol 7:341-407.

[407]See note 22 above, Art 8(2)(b).

ii) The 1977 Protocol I, Additional to the Geneva Conventions of 12th August, 1977, which relates to the Protection of Victims of International Armed Conflicts.

iii) The 1899 Hague Declaration (IV, 3) which dealt with Expanding Bullets, and

iv) The 1925 Geneva Gas Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or other Gases, and the Bacteriological Methods of Warfare, Geneva 17 June 1925.[408]

c) Serious violations of Article 3 common to the Geneva Conventions which applies to non-international armed conflicts.[409]This prohibits acts such as violence to life and person which in turn include murder, mutilations, cruel treatment and torture.

d) The last category includes crimes derived from the 1907 Hague Regulations and Additional Protocol II to the Geneva Conventions which relates to the protection of Victims of Non-International Armed Conflicts (AP II), Geneva 8 June 1977. In general, this category covers serious violations of the laws and customs applicable to armed conflict of non-international kind.[410]

Though extensive, these four categories do not cover all the grave violations of international humanitarian laws. The Rome Statute only incorporated those violations that had risen to the status of norms of customary international law, and entailed individual criminal responsibility. For example, due to the sparse ratification of Additional Protocol I to the Geneva Conventions, serious violations contained in it were excluded for want of international customary law stature. Other war crimes excluded from the Rome Statute for this reason include: unjustifiable delays in the repatriation of prisoners of war or civilians, and launching of an indiscriminate attack affecting the civilian population or civilian object (such an attack should be distinguished from an attack targeting the civilians population as such, which is covered by the Statute), among others.[411]

[408] See note 28 above, pg 342.

[409] See note 22 above, Art 8(2)(c).
[410] See note 28 above, p 342.

[411] See note 28 above, p345.

The Rome Statute's prohibition on the use of specific weapons is also limited to those prohibited under international humanitarian laws. It prohibits: poison or poisoned weapons,[412]asphyxiating, poisonous or other gases and all analogous liquids, materials or devices,[413] and bullets which expand or flatten easily in the human body[414].As a result, the use of most modern weaponry is not covered. The use of nuclear weapons, biological weapons, blinding laser weapons, and anti-personnel mines were excluded from the Statute as a result of an unresolved dispute as to whether the use of nuclear weapons should be covered under the Rome Statute. This dispute involved a choice between abandoning the use of all major weapons including nuclear weapons or none at all; the delegates disagreed and settled on the latter option.[415] It should however be noted that the use of any weapon(prohibited or not) constitutes a war crime, if attacks are intentionally directed towards a civilian or a civilian populations; [416] use of such weapons in an attack on a town, village, dwellings or buildings which are neither defended nor meant for military objectives would constitute a war crime.[417]

A major contribution of the Rome Statute is the recognition, inclusion and prohibition of war crimes committed during non-international armed conflicts. Until 1995, customary international law did not recognize violations of the laws and customs of war in internal conflicts as international crimes. Common Article 3 and Additional Protocol II to the GC made provisions for the minimum international humanitarian rules applicable to internal conflicts but left their enforcement to domestic jurisdictions.[418]This shift is partly attributable to the ICTY and ICTR jurisprudence. Most significantly, the Tadic Appeal Chamber [419] asserted that violations of Common Article 3 of the GC I-IV

[412]S ee note 22 above, Article 8(c)x.

[413] *Ibid*, Art 8(c)xi.

[414] *Ibid*, Art 8(c)xii.

[415] See note 28 above
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[416] See note 34 above, Art 8(2)(e)(i) and (b)(i).

[417] *Ibid*, Art 8(2)(b)(v).

[418] I Bantekas, *International Criminal Law* (4th edn Hart Publishing 2010) 185.

[419] *ICTY Prosecutor vTadic*, Appeal Decision on Jurisdiction(02 Oct.1995).

is an international crime, and questioned the wisdom behind the distinction between international and internal warfare, governed by different rules.[420] The ICTR expressly extended the definition of war crimes to cover violations in a non-international armed conflict.[421] Under this category, the Rome Statute prohibits a large number of conducts most of which are also prohibited as war crimes if committed under international armed conflict. However, almost half of the conducts prohibited as war crimes under the international armed conflict were omitted from the category, supposedly because: (1) they are not applicable to internal armed conflicts, and (2), because some delegates were of the view that some rules did not qualify as international customary rules. One of the negative effects of these omissions was the exclusion of the rules prohibiting the use of specific weapons in internal conflicts. These weapons include: poison or poisonous weapons, asphyxiating, poisonous or other gases and all analogous liquids, material and devices and certain types of bullets. This is the case despite the fact that the use of these weapons is expressly prohibited under international armed conflict.[422] However, the Rome Statute was amended in July of 2010 and these prohibitions included as war crimes committed in the context of internal armed conflict.[423]This amendment will however only enter into force and be applicable to State Parties that ratify it, one year after such ratification.[424]The Rome Statute's provisions on war crime should neither have distinguished between internal and international armed conflict nor applied different rules to them. These, it is submitted, is bound to lead to confusion and instances of injustice. One corpus of law should have been applicable to both.

2.4 Crime of Aggression:

Crimes against peace was first formulated under Article 6(a) of the Nuremberg Charter.[425] This Article also gave rise to individual criminal responsibility for the crime. It constituted of the following:

[420] *ICTY Prosecutor vTadic*.

[421] ICTR Article 3.

[422] ICC Statute Art 8(2)(b)xvii-xix.

[423] *Ibid*, Art 8(2) (d) xiii-xv.

[424] *Ibid*, Art 121(5).

[425] See note 40 above p.203,see also The London Charter for the Nuremberg IMT,5UNTS 251.

> Planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

It then receded into the realm of international customary law and almost disappeared from public international law. Its incorporation in the Rome Statute however saved it from oblivion.[426]

In 1998, Article 5(1)(d) of the Rome Statute made the crime of aggression one of the crimes subject to the jurisdiction of the ICC. However, the Court's jurisdiction over it was made dormant after the State Parties failed to agree on its definition. Article 5(2) of the Rome Statute provided that this was to remain the case until such a time that a definition and the conditions for the exercise of the Court's jurisdiction would be agreed upon, and the Statute amended accordingly.

On the 12th June2010, the first ICC Review Conference adopted a definition for the crime of aggression and the conditions under which the ICC is to exercise its jurisdiction, and the Rome Statute was accordingly amended to reflect this agreement. Article 8bis(1) defines crime of aggression as:

> The planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitute a manifest violation of the Charter of the United Nations.[427]

In turn, Article 8bis (2) defines an act of aggression as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another state, or in any manner inconsistent with the Charter of the United Nations', and provides a list of acts that constitute it. This is the first ever formulation of this crime under a multilateral treaty.

The Court's jurisdiction over the crime may be triggered by a referral by the Security Council[428] or a State Party. The Prosecutor may also initiate an

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[426] *I bid.*

[427] See note 44 above, Article 8*bis.*

[428] *Ibid*, Art.13(b) and 15ter.

investigation proprio motu.[429] Under Article 15bis(2)and 15ter(2),the Court will only have jurisdiction over crimes of aggression committed one year after these amendments have been ratified by 30 State Parties.
The inclusion of the crime of aggression in the Rome Statute has raised its profile and recognitions as an international crime. Considering the number of State Parties to the Rome state, it's only a matter of time before it reasserts itself as a norm of customary international law.

3. Aspects of the Rome Statute that Greatly Impact the ICC'S Discharge of its Mandate

3.1 Principle of Legality

Though discussed under this section, the principle of legality is also a key feature of the substantive crimes considered above. In general terms, it refers to the form as well as the content of the definition ascribed to a crime. The specificity with which the subject crimes of the ICC have been defined is one of the most significant contributions by the Rome Statute in the field of international criminalization. In particular, this is the first time that the definitions of crimes against humanity and aggression have been formulated under a multilateral statute. This is one of the main reasons why it was considered appropriate for discussion in this paper.

This principle provides that 'an individual may be considered criminally responsible only for a conduct which was unambiguously criminal at the time of its commission and must be sentenced in accordance with the law.'[430]

Article 22 of the Rome Statute reads as follows:

> (1) A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
>
> (2) The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

[429] *Ibid*, Art.13(c).

[430] S Lamb,' *Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law' in A Cassese and P Gaeta and JD Jones (eds)*The Rome Statute of International Criminal Court: A Commentary* (OUP 2002).

> (3) This Article shall not affect the characterization of any conduct as criminal under international law independently of this Statute'.

This Article encapsulates all the elements of the principle of legality i.e. specificity, strict construction of rules, prohibition on retrospective application of rules and extension of definitions of crimes by analogy, and construction of ambiguities in favour of the accused.[431] The principle of legality is a fundamental principle of criminal law designed to protect individuals from the arbitrary use of the penal power of the State by guaranteeing them access to proper and prior knowledge of what is prohibited.[432] It has only recently been recognized as a customary norm of international criminal law, that is, after its express inclusion and compliance in various multinational treaties. In keeping with this custom, the Rome Statute provides detailed definitions of the crimes under its jurisdiction. These include details of the actus reus and the mens rea of the main offences as well as the underlying offences. It also details modes of liability and criminal participation, and defences and excuses from criminal liability. This is in contrast with international customary law whose content can be quite indeterminate.[433]

The definitions of crimes in the Rome Statute offer predictability and certainty of the law which is necessary for the protection of the rights of the accused.[434] They also offer proper guidance to the Court.[435]

The specificity of the Statute serves as a clear definition of the jurisdiction of the Court as well as of the obligations imposed on State Parties.[436] This provides State Parties with a clear understanding of their obligations.[437] It should shield the Court from criticism levelled against the Nuremberg trials of violating the principle of legality.

[431] *Ibid*, p. 734.

[432] *Ibid*, p. 736.

[433] *Ibid*, p. 740.

[434] *Ibid*, p. 744.

[435] *Ibid*, p. 750.

[436] *Ibid*, p. 733.

[437] *Ibid.*

This should enable the ICC to discharge its remits unencumbered by such legal challenges which have been prevalent thus far.[438]

As stated earlier, the express inclusion of the principle of legality, and the definition of substantive crimes in line with it has been one of the marked contributions of the Rome Statute to international criminalization.[439]However, the prohibition on analogy as provided for under Article 22(2) might result in some problems. Extension of definition of crimes by analogy takes varied forms, yet it is neither properly defined nor delineated by Article 22. Analogy is a valid tool by which courts interpret statutes and fill gaps left by draughts men. An example of the Court's use of analogy would be the interpretation of Article 7(1) (k)that includes the term '…other crimes…' as a part of the definition of acts capable of giving rise to crimes against humanity. A strict prohibition on analogy would vitiate it.

3.2 The Principle of Complementarity

The rules of procedure under this principle are lengthy, complex and prone to abuse by those bent to defeat the ends of justice. Depending on how the Statute's provisions and the Rules pertaining to it are applied by the Court, it might pose a real threat to the international criminal justice system as envisaged under it. The Rome Statute's preamble, at paragraph 6, states that it is the duty of every State to exercise it criminal jurisdiction over those responsible for international crime. Paragraph 10 provides that the ICC shall be complimentary to national criminal jurisdiction. This position is reiterated in Article 1 of the Statute. Under Article 17(1), the national court has primary jurisdiction over cases that:

> i) It is either investigating or prosecuting, and has jurisdiction over,[440]or
>
> ii) It has investigated and has jurisdiction over but has decided not to prosecute the person concerned,[441]or

[438] *Ibid*, p.748.

[439] *Ibid*, p.749.

[440] ICC Statute, Art 17(1)a.

[441] *Ibid*, Art 17(1)b.

iii) The person concerned has already been tried for the conduct which is the subject of the complaint[442] or

iv) Where the case is not of sufficient gravity to justify further action by the court.[443]

On its part, the ICC has jurisdiction over cases which the national jurisdiction is genuinely unable or unwilling to prosecute. Thus the ICC can only admit and exercise jurisdiction over a crime where it is established to its satisfaction that a national jurisdiction is either unwilling or unable to exercise its jurisdiction. To establish a State's unwillingness to prosecute, the ICC will consider whether:

a) The proceedings under the national court were undertaken for the purpose of shielding the person concerned from the jurisdiction of the ICC, or[444]

b) There have been unjustified delays in the proceedings, which in the given circumstance is inconsistent with the intention to bring the perpetrator to justice,[445] or

c) The proceedings were not being conducted independently or impartially, with the intent to obstruct justice.[446]

Article 17(3) also makes provisions for the criteria for establishing a national judicial system's inability to prosecute cases under its primary jurisdiction. It will be considered unable if it has totally or substantially collapsed and as such, cannot obtain the accused, the necessary evidence or otherwise carry out its mandate.

These two sets of criteria establish a very high threshold for admissibility of cases to the ICC. The ability of the Prosecutor to investigate and substantiate a claim of a State's unwillingness to exercise its jurisdiction is questionable, especially, in cases of State-sponsored crimes in which the highest government officials are implicated. On the flip side of the coin, the aim is to ensure that the ICC does not needlessly interfere with national jurisdictions in the investigation and

[442] *Ibid*, Art 17(1)c.

[443] *Ibid*, Art 17(1)d.

[444] *Ibid*, Art 17(2)a.

[445] *Ibid*, Art 17(2)b.

[446] *Ibid*, Art 17 (2)c.

prosecution of cases. This is in line with the principle of complementarity.[447] The principle is sound in the sense that being the location of the crime, evidence and the perpetrator, the territorial State is best suited to handle these cases. State authorities are in a good position to prosecute all manner of international offences including minor ones that might not meet the threshold for admission to an international tribunal. This fosters the rule of law within the national jurisdiction.

Article 15(1) provides that the Prosecutor may initiate investigations proprio motu. However, in line with the principle of complementarity, the Prosecutor ought to first determine whether there is a reasonable basis to proceed with an investigation. Among the factors to be considered in making that decision is the question whether the conditions set under Article 17 as explained above have been met.[448] Should the Prosecutor conclude that there are reasonable grounds to proceed with investigations, he or she is then supposed to seek the authorization of the Pre-Trial Chamber to do so. The Pre-Trial Chamber is to consider, among other things, the requirements of Article 17 have been met before granting the Prosecutor's request.[449]

Under Article 18(1), if the Prosecutor has determined that there is a reasonable basis to commence an investigation, he or she is required to notify the State that would normally exercise jurisdiction over the crimes concerned. In order to get a deferral of the cases to the national judicial system, the notified State is to initiate its own investigations within a month.[450]Should the cases be deferred to the State for investigation, the Prosecutor can still review them every 6 months or whenever there is a significant change of circumstances.[451] The Prosecutor can also request for periodical information from the State on the progress of the investigation or prosecution.[452] Exceptionally, the Prosecutor may also seek the

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[447] JT Holmes, 'Complementarity: National Courts versus the ICC', in A Cassese, P Gaeta and JR Jones(eds)*The Rome Statute of International Criminal Court: A Commentary* (OUP 2000).

[448] Rome Statute, Art 53.

[449] *Ibid.*

[450] *Ibid*, Art 18(2).

[451] *Ibid*, Art 18(2).

[452] *Ibid*, Art 18(5).

Pre-Trial Chambers authorisation to investigate such cases.[453]
Under Article 19, after the Prosecutor has reached a decision that there is a reasonable basis to proceed with an investigation and has been granted authorisation to do so by the Pre-Trail Chamber, the State concerned or the accused may challenge the admissibility of the case to the ICC.[454]At this stage, the victims of the crimes can also make representations on the admissibility of the case.[455]A challenge against the jurisdiction of the Court or the admissibility of cases can only be made once, and should be done before the commencement of the trial. The Court may however grant leave for the challenge to be made more than once and/or after the commencement of the trial.[456]

Under Article 19(6), decisions on the admissibility of cases or the jurisdiction of the Court may be appealed against at the Appeals Chamber. Again, this entails a very lengthy process with real potential for delays. Different States as well as the accused(s) may challenge the Court's jurisdiction at different times, and then appeal the decisions thereof. The victims' representations may also occasion delays. The procedural steps for determining the admissibility of a case, and/or the jurisdiction of the court are complex. The Prosecutor has to establish facts that support the contention that a State is unwilling to discharge its duty. The delays occasioned by all these may prove fatal to the prosecution's case if witnesses are not protected, evidence is lost (or destroyed) and/or the accused disappears. Therein also lies a real possibility of abuse of process. An accused may be duly prosecuted and sentenced within the national judicial system, and then pardoned or paroled without serving his or her sentence or after a very short period in prison. Such a suspect would then challenge the admissibility of his or her case at the ICC on the principle of ne bis in idem, thus ridiculing the whole justice system, as the Rome Statute has no provisions relating to such a circumstance.

3.3 State Parties' Cooperation

Lately, there has been reluctance by some State Parties to cooperate with the Court's request for assistance. An example is the execution of the warrant of arrest issued by Pre-Trial Chamber I against President Al Bashir of Sudan,

[453]*I bid*, Art 18(6)

[454]*I bid*, Art 19(2).

[455] *Ibid*, Art 19(3).

[456] *Ibid*, Art 19(4).

which has never been effected despite his visit to several State Parties.[457]The success of the ICC depends to a large extend on the assistance and cooperation it receives from State Parties, the Security Council, non-party States as well as other intergovernmental bodies. The ICC has no enforcement mechanism of its own; it neither has a territory nor a police force.

State Parties have a general obligation to cooperate fully with the Court. Article 86 of the Rome Statute provides, "States shall, in accordance with the provisions of this Statute, cooperate fully with the court in its investigation and prosecution of crimes within the jurisdiction of the Court."

The legal basis of the State Parties' obligation to cooperate with the Court is treaty law. The duty to cooperate extends to all obligations under the Statute, and is owed to all the constituent organs of the ICC, not just the Court.[458] It also implies due diligence and prompt action in good faith. At the request of the ICC, States Parties are obliged to offer assistance with arrest and surrender of suspects, investigations and collection of evidence, provision of privileges and immunities to ICC officials, witness protection, enforcement of ICC orders for fines and forfeitures, and prosecution of individuals who have committed offences against the Court's administration of justice.[459] Under Article 88 of the Statute, Party States are also under an obligation to make necessary amendments to their domestic laws to facilitate cooperation with the Court.

Should a State Party fail to comply with the Court's request for cooperation, under Article 87(7) of the Rome Statute, the Court can make a finding of non-compliance and refer the matter to the Assembly of State Parties (ASP) or to the Security Council if the matter was referred to it by the Council. However, the Statute does not specify the cause of action open to the Assembly of State Parties after non-compliance has been reported to it.[460]There are no specified countermeasures that the Assembly of State Parties can utilise to enforce compliance. This is a major drawback on the Court's effectiveness.

[457] J Isanga ,'The International Criminal Court Ten years Later: Appraisal and Prospects'(2013)21 *Cardozo Journal of Int'l and Comp Law* 235.

[458] A Ciampi, 'The Obligation to Co-operate', in A Cassese and P Gaeta and JR Jones(eds)*The Rome Statute of the International Criminal Court :A Commentary* (OUP 2002).

[459] *Ibid.*

[460] *Ibid*, p. 1613.

Countermeasures should have been expressly included in the Statute. However, this should not be taken to mean that there are none available to the ASP.[461]

A non-party State is generally under no obligation to cooperate with the ICC. However, it can enter into an agreement with the ICC, in which it accepts the Court's jurisdiction over a specific crime as provided for under Article 12(3) of the Statute. In such a case, it would be under an obligation to cooperate fully with the Court with reference to the terms of that agreement.[462] The Court may also elect to seek the assistance of non-party States by entering into ad hoc arrangements and/or other forms of international agreements with them.[463] A non-party State can also unilaterally offer to assist. Lastly, a non-party State would be under an obligation to cooperate with the Court where a situation has been referred to the ICC by the Security Council in exercise of its mandate under Chapter VII of the UN Charter. Article 25 and 49 of the UN Charter directs all UN member States to execute the decisions of the Security Council and assist in the enforcement of its measures.

Should a third party State which has entered into an agreement with the ICC fail to assist as agreed, the Court can make a finding to that effect and inform the Assembly of State Parties of its findings. Where the matter was referred to it by the Security Council, a finding of non-compliance with a request for cooperation can be reported back to the Security Council.[464] In all cases of non-compliance referred to the Security Council, the Court is free to take any measure within its power to enforce compliance including imposition of sanctions.[465] This would also be the case even if the matter was not referred to the Court by the Security Council, if non-compliance by a State poses a threat to international peace and security.[466]

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[461] *Ibid* p. 1616.

[462] *Ibid.*

[463] Rome Statute, Art 87(5).

[464] *Ibid*, Art. 87 (5).
[465] See note 80 above, p. 1613.

[466] *Ibid*, p. 1614.

The ICC can also seek assistance from international organisations.[467] Under Article 15(2) of the Statute, the Prosecutor can seek information from any source in the course of his or her investigations. These international organisations may assist in different ways including in investigations and arrests. Some do collect information that might be useful in an investigation. For example, under the Negotiated Relationship Agreement, the UN is under an obligation to cooperate with, and assist the ICC.[468] The ICC has also entered into such an agreement with the EU (ICC-EU Agreement on Cooperation and Assistance).[469]Such agreements do greatly enhance the Courts capabilities. It is submitted that the ICC should consider entering into more of such agreements with bodies such NATO, whose assistance may prove valuable especially in the investigation of offences, and enforcement of warrants of arrest.

3.4 Security Council's Power of Referral and Deferral

Under Article 13(b) of the Rome Statute, the Security Council can refer a situation to the ICC. This is in exercise of its powers under Chapter VII of the UN Charter. This power offers opportunities for the expansion of the ICC's jurisdiction to cover crimes committed in countries that are not party to the Rome Statute and their nationals.[470]Examples of its use include, the Security Council's referral of the situation in Darfur, Sudan in March 2003 and of the situation in Libya in February 2011.[471]However, this power does also pose a threat to the rule of law and the legitimacy of the Court. It has the effect of granting one of the Permanent Five members' states of the Security Council (P-5) veto powers over the ICC's jurisdiction over situations in non-member party states.[472]It means that such situations risk being subject to the caprice of any one of these five States. The legitimacy of the ICC, to a large extend, depends on the proper exercise of this broad discretion by the Security Council. Any member State of the P-5 can veto Security Council resolutions and as such, each one

[467] See note 85 above, Art.87 (6).

[468] *Ibid*,p.1

[469] *Ibid*, p.355.

[470] L Arbour, 'The Relationship Between the ICC and the UN Security Council (2014) *Global Governance* 20:195-201.

[471] *Ibid*, p.196.

[472] *Ibid.*

ofthem can veto resolutions aimed at referring situations that would bring it or its affiliate States under the ICC's jurisdiction. To make matters worse, 3 members of the P-5 are not parties to the Rome Statute.[473]Furthermore, being a political body, the Security Council can resolve to refer situations for purely political reasons. For unclear reasons, it referred the situations in Sudan and Libya but has turned a blind eye to credible allegations of human rights and international humanitarian laws violations in Syria, Palestine and Sri Lanka.[474]

Under Article 16 of the Statute, the Security Council is also conferred with powers to defer investigations or prosecution at the ICC, for a renewable period of 12 months.This provision exposes the Court to further political machinations and poses great danger to the international criminal justice regime as envisaged by the Rome Statute.[475]As appertains to this power, a disconcerting trend has already emerged. The Security Council via Resolution 1970 exempted nationals of all non-party States to the Rome Statute except Libyans from the ICC's jurisdiction.[476]Vide Resolution 1422, adopted by the Security Council in July 2002 and renewed as Resolution 1487 in 2003, a pre-emptive deferral of any investigation or prosecution of UN peacekeepers from non-party States was effected.[477]Such actions vitiate the principle of equality and fairness which lie at the heart of any legitimate criminal justice system.

4. Conclusion

The adoption of the Rome Statute by the United Nation Diplomatic Conference of Plenipotentiaries in July 1998 is one of the most significant developments in International Criminal Law in the recent times. Its contribution to the substantive international criminal law includes its extensive and elaborate formulations of the four international crimes that fall under the ICC's jurisdiction, i.e. the crime of genocide, crimes against humanity, war crimes and the crime of aggression. These formulations incorporate important principles of international criminal law such as nullum crimen and nulla poena. For the first time, crimes against humanity, and crimes of aggression are provided for in a multi-lateral statute.

[473]*I bid*, p. 198.

[474] *Ibid.*

[475]*I bid*, p.199.

[476] *Ibid*,pg.200

[477] *Ibid*

This should raise their stature as customary norms of public international law. However, whilst most attributes of the Rome Statute are an accurate reflection of the current state of the customary international law, some are retrogressive. For example, in its definition of war crimes, the Statute arbitrarily distinguishes between international and internal armed conflict. This, in turn, leads to the absurd exclusion of the use of some weapons that cause unnecessary suffering, and/or that are inherently indiscriminate in the criminalisation of war crimes offences connected to internal armed conflict.

The other significant contribution of the Rome Statute is the establishment of a permanent International Criminal Court with detailed procedural rules to govern its adjudication process. The principle of complementarity has been properly catered for under the Statute. It should however serve to promote the rule of law within the territorial State Parties in cases involving international crimes by limiting the role of the ICC to instances where the State Party involved is either unwilling or unable to act. The rules of procedure are additionally very lengthy and prone to abuse.

A lack of an enforcement mechanism by the Court should also be a major concern with regard to its efficaciousness. The Court is largely dependent on the assistance and cooperation of State Parties in the discharge of its remit. Despite this, the Rome Statute is silent on counter-measures that can be employed to enforce cooperation by State Parties.

Referral and deferral of the cases by the UN Security Council under Chapter VII of the UN Charter provides an opportunity for the extension of the Court's jurisdiction to cover international crimes committed by nationals of non-state parties within their jurisdictions. The Court should however be wary of corrosion of its independence and legitimacy by the political nature of the Security Council decisions.

Relationship Between State and Religion in Kenya: Epiphany of Orwellian Doublethink

'I believe in Christ as I believe the sun has risen; not only because I see it, but because by it I see everything else' C.S. Lewis.

'If there was no God, there would be no Atheists' G.K. Chesterton.

'God did not create man in his own image, evidently it was the other way round. Man creates God in his own inverted image' Christopher Hitchens.[µ]

Ruth Lutta* **and Joseph Lutta****

Abstract

Freedom of Religion is the hallmark of any liberal democracy. This is because it offers wide latitude for diversity of conscience and beliefs thereby averting the risk of transforming into a tyrannical theocracy. Similar strands of thought apply to the Kenya as budding constitutional democracy. The Constitution of 2010 included a comprehensive Bill of Rights that transformed the place of religious freedom in the country. In addition, it restructured the role of the judiciary in the enforcement and interpretation of this right. Nonetheless, nine years later the jurisprudence on this subject is beset with inconsistent outcomes and nebulous legal principles in the decisions of the superior courts of record. This legal conundrum forms the epicenter of this paper. Broadly speaking, the paper seeks to demystify the relationship between State and religion in Kenya by expounding on the specific provisions of the Bill of Rights. It also addresses the position of freedom of religion within the public school system which remains a perennial source of conflict and proposes test of 'reasonable secularism' on delineating the boundaries between State and religion in Kenya's constitutional framework.

General Background on State and Religion in Kenya

1. Introduction

The legendary English author and satirist George Orwell (born Eric Blair) is revered for his literal masterpiece Nineteen-Eighty-Four.[478] The plot of this ingenious dystopian novel is Oceania a surreal state bedeviled by perpetual wars, ubiquitous surveillance, political propaganda and abject poverty.[479] Furthermore, the people are manipulated by four major slogans, 'WAR IS PEACE,''FREEDOM IS SLAVERY,' 'IGNORANCE IS STRENGTH' and 'BIG BROTHER IS WATCHING YOU.' Orwell paints the picture of a credulous and subjugated people manipulated by a cult of personality, thought crimes, double think, newspeak, and thought police. The main character of the novel is Winston Smith, a heretic member of the ruling organisation known as the Outer Party. Smith is employed by the Ministry of Truth (in reality the Ministry of Propaganda). He is a master propagandist who manipulates the people in order to protect the deified image of the autocratic and mysterious ruler known as Big Brother. Despite his diligence and allegiance to the establishment, Smith desires a more liberal thinking society.[480]

Consequently, the establishment issues a declaration that '2+2=5.'[481] As expected the people accept this self-evident deception with near insane euphoria.[482] Mathematically speaking, 2+2=4, but due to the longevity of

[478] * Advocate of the High Court of Kenya.
**Advocate of the High Court of Kenya.
We are profoundly grateful to Dr. Wamuti Ndegwa, University of Nairobi for his insightful comments when discussing the issues that culminated into this paper. Similarly, we are indebted to Professor B. Sihanya and the peer reviewers of the *LSK Journal* entire for their helpful comments on the earlier draft of this paper. Any mistakes remain ours. ∞British novelist, literary critic, Christian apologist and theologian. β British novelist, philosopher and lay theologian revered for his classic masterpiece *The Everlasting Man*. μBritish-American journalist, author and 'militant atheist' known for his best selling anti-religion text, *God is not great: Why religion poisons everything.* George Orwell, *Nineteen-Eighty-Four* (Secker and Warburg 1949).

[479] Michael Yeo, *Propaganda and Surveillance in George Orwell's Nineteen Eighty – Four: Two sides of the same coin* (2005) 3 (2) Global Media Journal, 50.

[480] Ibid at 89.

[481] Ibid at 102.

[482] Michael Head, 'Orwell's Nineteen Eighty-Four 20 Years On, "The war on terrorism", "doublethink" and"-big brother" (2005), 30 (5) Atlanta Law Journal, 209.

misinformation and brainwash the people concur that 2+2=5 or even 3 while others seem to hold both responses. Smith then wonders:

> For, after all, how do we know that two and two makes four? Or that the force of gravity works? Or that the past is unchangeable? If both the past and the external world exist in the mind, and if the mind itself is controllable- what then?"[483]

Finally, he concludes that genuine freedom exists when people can declare 2+2=4 without either offending or cajoling the establishment.[484]

Similar to this Orwellian doublethink is the relationship between state and religion in Kenya. By and large, Kenya is usually described as a 'religious state' despite being a secular constitutional democracy defined by religious diversity.[485] This concurrent affirmation of secularism and religiosity is an Orwellian doublethink since the two notions are diametrically opposed in nature. This paper warps together this Orwellian doublethink within the context of the relationship between state and religion in Kenya.[486] It seeks to map out the terrain of state and religion in Kenya under a novel test known as 'reasonable secularism.' It argues this legal principle will strikes a practical balance between these two competing interests by upholding the secular foundation of the republic while protecting the religious liberty of the people.

1.1 Legal significance of correlation between state and religion

Broadly speaking, it is important to monitor the degree of interaction between state and religion. When the state loses its secular identity, then it may gravitate towards subtle theocracy that prefers one religion to another. For example the perennial conflict in Northern Ireland pits English Protestants unionists

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[483] Ibid at 102.

[484] Ibid at 103.

[485] Ibid Article 8.

[486] Judith Fisher, Winter, 'Why George Orwell's ideas about language still matter for lawyers' (2007) 68 (1), Montana Law Review, 17. See also Robert C. Lind Jnr, 'Justice Rehnquist: First amendment speech in the labour context' Fall (1980), 8 Hastings Constitutional Law Quarterly, 96 he quotes Chief Justice Rehnquist quoting *Nineteen-Eighty-Four* in his dissenting opinion in *United Steelworkers v Weber* 443 US 193, 219 (1979).

against the minority republicans who are ethnically Irish Catholic.[487] However, despite Britain being a secular constitutional monarchy, Anglicanism is the most dominant religion. Subsequently, the British government insidiously favours the protestant unionists over the Irish Catholics who are victimised because of their religious persuasion.

By the same token, it is also important to examine on the permutation of state and religion within geopolitical context. This legal dilemma is portrayed by the controversy of the prolific British author Sir Ahmed Salman Rushdie and his contentious novel The Satanic Verses.[488] This controversial book was abhorred by Muslims as blasphemous and insulting to their religion. This revulsion hit a peak when Supreme leader of Iran Ayatollah Ruhollah Khomeini issued a religious proclamation (fatwa) condemning Rushdie to death for offending Islam, desecrating the Quran and slandering Prophet Mohamed.[489] The Muslim communities in Great Britain demanded the government should follow the actions of other Middle Eastern countries and ban the book. This call was supported by some countries such as Pakistan, Iran and Saudi Arabia which threatened to sever diplomatic ties with Britain should they refused to proscribe the book.

Consequently, Margaret Thatcher's government grappled with a serious political dilemma. First, was it possible to permit the book without appearing to marginalise the Muslim community in Britain or jeopardizing the foreign relations with Islamic countries?[490] Secondly, if the state banned the book, would it lose its neutral identity and appear to prefer one faith over others? There were several books which satirised other major religions such as Christianity, Judaism and Hinduism yet they were never proscribed for being offensive or blasphemous. For the case of Sir Rushdie, his previous two novels Midnight's Children and Shame had elicited controversy for caricaturing then Indian Prime Minister Indira Gandhi and Pakistani strongman Zia Ul Haq

[487] Timothy White, 'Catholicism and Nationalism in Ireland: From Fusion in the 19th Century to Separation in the 20th Century' (2007), 4 (1), Westminster Paper in Communication and Culture, 48.

[488] Jordan Manalastas, 'Religion and Relativity in Iran' (1) Cornell International Law Journal Online, 153.

[489] Neil Shevlin, 'Velayat-e Faqih, in the Constitution of Iran: The implementation of theocracy' Fall (1998) 1 (2) Journal of Constitutional Law, 359.

[490] Robert Spencer, 'Salman Rushdie and the 'war on terror'" (2010) 46 (3) *Journal of Post Colonial Writing*, 253.

respectively. Ultimately, the British government declined to ban the book since it would have connoted preference of Islam to other faiths. This legal intricacy illustrates the nexus between foreign policy and the relationship between state and religion.

Finally, it is prudent to delineate the parameters between state and religion for purposes of developing the jurisprudence surrounding this subject matter. This position is enunciated in the American Constitution which under the first amendment provides for the religious clause which states, "Congress shall make no law respecting an establishment of a religion, or prohibiting free exercise thereof." [491]Furthermore, this religious clause is divided into 'establishment clause' and 'free exercise clause.'[492] The establishment clause prohibits the legislature from establishing national religion while the free exercise clause obligates the state to protect religious freedom.

Conversely, the "free exercise clause" remains litigious and divisive because it obligates the state to project religious freedom.[493] Generally speaking, there are two major philosophies of the establishment clause i.e. Washington-Lincoln and Jefferson-Madison.[494] The former encompasses the ideal of Presidents George Washington and Abraham Lincoln. The two leaders approved the public endorsement of religion mainly protestant Christianity through public prayers and levying of taxes for purposes for promoting religious causes. This position is couched in the epic and immortal phrase delivered by President Lincoln during the Gettysburg address which partly states,[495]

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[491] Ibid.

[492] Vincent Philip Munoz, 'The original meaning of the fee exercise clause: The evidence from the first congress' 31 (3), Harvard Journal of Law and Public Policy, 1081.

[493] Noah Feldman, 'The intellectual origins of the establishment clause' May (2002), New York Law Review, 348.

[494] Kent Grenwaaltz, 'Secularism, religion and liberal democracy in the United States' [2009] 30 (6) Cardozo Law Review, 2388.

[495] Abraham Lincoln, 'The Gettysburg Address' 19th November 1863 *available at* <http://www.learntheaddress.org/static/media/uploads/docs/gettysburg-address.pdf> last accessed on the 16th of March 2015.

'That this nation under God, shall have a new birth of freedom-and that the government of the people, by the people, for the people, shall not perish from the earth.' [496]

This viewpoint forms the social foundation of the religious conservative movement in America. Conversely, the Jefferson- Madison school of thought advocates for strict separation between religion and the state.[497] It is brain child of former Presidents and Federalists Thomas Jefferson and James Madison.[498] This school of thought is ideologically slanted towards the liberals and progressives who believe in limited interaction between state and religion. This American example signifies the importance of nurturing the jurisprudence on the relationship between the state and religion in Kenya.

1.2 Dilemma of Defining Religion

According to Platvoet and Molendijk defining religion is a problematic and laborious exercise.'[499] This is because it is a complex and hybrid concept that pools together spiritual, metaphysical and cultural aspects.[500] Furthermore, there are instances when some religious practices are virtually indistinguishable from ethnic and cultural norms.[501] Examples include Hinduism and Indians; Jews and Judaism; and Sikhs and Sikhism. This point is poignantly addressed by Albie Sachs a former Judge of the South African Constitutional Court.[502]

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[496] Ibid paragraph 3.

[497] David E. Steinberg, 'Thomas Jefferson establishment clause federalism' (2006) 40 (2), Hastings Constitutional Law Quarterly, 300.

[498] David Reiss, 'Jefferson and Madison as icons of Judicial History: A study of religion clause jurisprudence' [2002], 61 (1) Maryland Law Review, 95.

[499] Arie Molendijk, 'In Defence of Pragmatism' in J. G. Platvoet and A.L. Molendijk (Eds), *The pragmatism of defining religion* (1999) 3-19 at 4. See also Emmanuel Kwabena Quansah, 'Law, religion and human rights in Botswana' (2008) 8 (2), African Human Rights Law Journal, 418-505 at 419.

[500] Jeremy Gunn, 'The complexity of religion and the definition of "Religion" in International law' (2003) 16 Harvard Human Rights Journal, 193.

[501] Johann Van Der Vyver & M Christian Green, Law, 'Religion and Human Rights in Africa' (2008), 8 Africa Journal of Human Rights, 340.

[502] *Minister of Home Affairs and another v Fourie and others* [2005] ZACC 19; See also Justice Albie Sachs, *Law and Religion in Africa, Conference Keynote 1* available at <https://www.youtube.com/watch?v=OmeQIXX-7iU> last accessed on the 6th of March 2015. See also *Christian Education South Africa v Minister of Education* 2006 1 SA 524.

He states, 'religion is not just a question of belief and doctrine. It is part of the people's temper and culture. And for many believers a significant part of their way of life.' By juxtaposing religion with culture Justice Sachs' observation is more definitive for appreciating the non-spiritual aspects of religion. This notion also applies to people who do not necessarily engage in organised religion but identify with the specific rituals and rites due to either their cultural upbringing or ethnic background. For example African traditional religions are usually belittled compared to the mainstream religion. As Amoa and Bennett rightly note;

> The fact that indigenous African belief systems are constantly treated as incidents of African culture obviously says something about the way in which traditional religions are perceived by outsiders. In the case of Africa, the first outsiders were missionaries of Christianity and Islam, soon to be followed by European colonial powers. Although the conflation of religion and culture tends to devalue the former, the habit persists and, ironically, is shared by Advocates of indigenous religions and human rights.[503]

Thirdly, some emerging religions are incoherent with conventional religious practices for lack of a divine being. These are mostly 'new age movements' like Church of Scientology, Church of Satan and Universal Life Church which espouse belief systems alien to mainstream practices. As Davis argues these groups are 'high demand' religions with a charismatic leader and enthusiastic followers who operate in isolation while flowing against the established social norms.[504] Therefore, it is impractical to cluster them together with mainstream religions.

Nonetheless, it is important to adopt a comprehensive definition that expounds on the essential features of church-state relationship.[505] Black's Law Dictionary defines religion as a, 'System of faith and worship usually involving belief in a supreme being and usually containing a moral and ethical code especially such as recognised and particular church, sect or domination.'[506] This

[503] Jewel Amoah and Tom Bennett, 'The freedoms of religion and culture under the South African Constitution: Do traditional religion African religions enjoy equal religious treatment' (2008) 8 (2) African Human Rights Law Journal, 337-357 at 338.

[504] Dena Davis, 'Joining a "Cult"; Religious Choice or Psychological Aberration' (1996-1997) 145 (11) Journal on Law and Health 145-172 at 147.

[505] Tarisai Mutangi, 'Religion, law and human rights in Zimbabwe' (2008), 8, African Human Rights Law Journal, 528.

[506] Bryan Garner (Ed) Black's law dictionary, 8th Edition at 317.

definition enshrines the customary assumptions of religion as an organised code of faith and belief in a divine being.

1.3 Legal Theories on the Relationship between Church and State

The premise of this paper is founded on two major schools of thought absolute secularism and religious neutrality. Absolute secularism argues for the total separation of state and religion.[507] On the other hand, religious neutrality permits the state to engage in religious activities on condition that all religions are accorded equal treatment.[508] This distinction is well articulated by Van Der Vyver and Green who note:

> while secular state seeks to uphold a wall of separation between the church and the state and to compel political authorities (at least in their official capacity) and state sponsored institution to distance themselves from religious practice, a religiously neutral state does not preclude itself from participation in, and or sponsoring of religion but seeks to uphold the equal treatment of all religions.[509]

Despite this distinction it is tenable to argue absolute secularism is coherent with the central tenets of constitutional neutrality.[510] However, it is implausible to implement this practice in Kenya due to the longevity of religion in public spheres.[511] Furthermore, absolute secularism is fraught with the risk of religious persecution as means of purging religion from public spheres. For example, the Marxist regimes in the Soviet Union (Lenin and Stalin), China (Mao Zedong) and Cambodia (Pol Pot) and Mozambique (Samora Machel) adopted an extreme and vindictive version of secularism in order to expunge religion from society.[512]

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[507] Patrick Parkinson, 'Accommodating religious belief in a secular age: The issue conscientious age objection in the workplace' (2001) 34 (1) University of New South Wales Law Journal, 282.

[508] Joyce Marie Mushaben, 'Women between a rock and hard place: State Neutrality v EU anti discrimination mandates in the German Headscarf' (2013) 14 (9) German Law Journal, 1787.

[509] Van Der Vyver and Green note 24 at 345.

[510] Brayan Awe, 'Religion in the EU: Using Modified Public Reason to define European Human Rights' (2009), 10 (11), German Law Journal, 1444.

[511] John Lonsdale, 'Religion and Politics in Kenya' Lecture, OCMS, (2004), 31 viii, John Lonsdale, Trinity College, Cambridge.

[512] Paul Froese, 'Forces secularization in Soviet Russia: Why an atheistic monopoly failed' (2004), 43 (1) Journal of Scientific Study of religions, 35-50 at 40; Katheryn Klein, 'Bringing the Khmer Rouge to Justice: The Challenges facing the Joint Tribunal in Cambodia' (Spring 2006) 4 (3) Northwestern Journal of International Human Rights, 549-566 at 550 she notes the Khmer Rouge decimated 1.7 million people

These catastrophic policies are offshoots of Marxist-Leninist theology that equates religion to opium.[513] Consequent to this pernicious ideology millions of religious people mostly Christians perished in state sponsored detention and labour camps called Gulags.[514] In the Former Soviet Union alone approximately 12 million Christians were martyred by the Bolsheviks in their quixotic quest of establishing a communist utopia free from the three enemies of the proletariat; capitalism, private property and religion.[515] This horrific experience is well documented by the late Russian Christian apologist and Noble laureate Aleksandr Solzhenitsyn in his chilling novel, Gulag Archipelago. He was condemned to the icy hard labour camps in Siberia for being a vocal critique of communism.[516]

This mass carnage is emblematic of the danger of adopting absolute secularism as a barometer for the interface between state and religion.[517] On the other hand, there is inherent risk that religious neutrality may result in fusion of state and religion. It is anchored on a blurred boundary that doesn't define the nature and degree of interaction between the two notions. Therefore, there is legitimate concern the state may prefer the religion associated with the regime while marginalising those considered as 'anti-establishment.' In line with this

some of whom perished because of their faith; Larry Carter Becker, 'The crisis of secular liberalism and the constitutional state in comparative perspective ; Religion, Rule of Law, Democratic Organization of Religion Privileging states' (2015) 48 Cornell International Law Journal, 52-104 at 53; Eric Kolodner, 'Religious rights in China; A comparison of International Human Rights Law and Chinese Domestic Legislation [1994] Pacific Basin Law Journal, 407- 430 at 418; Alex Vines and Ken Wilson, 'Churches and the peace process in Mozambique' in Paul Gilford (Ed) *The Christian Churches and the Democratisation of Africa* (EJ Brill :New York 1995) 130-145 at 132. In Mozambique President Samora Machel persecuted the Catholic Church for being 'handmaidens' to the Portuguese colonial regime.

[513] Michael Mendel, Marxism and the Rule of Law [1986] 35 University of New Brunswick Law Journal, 7-34 at 9. See also Bruno Bauer, *On the Jewish Question*, (1844).

[514]Keith Suiter, 'September 11 and Terrorism International Law Implications' [2001] Australian International Law Journal, 9.

[515]Augusto Zimmerman, 'Marxism, Communism and Law; How Marxism Led to the Lawlessness and Genocide in the Former Soviet Union' *The Western Australia Jurist*, 1-60 at 4; See Religious Persecution in the Soviet Union, United States Government, 1986.

[516]Aleksandr Solzhenitsyn, *The Gulag Archipelago, 1988-1956 An Experiment in Literary Investigation*, (Translated from Russian to English by Thomas P. Whitney, Harper and Row Publishers; New York).

[517] John S. Ehrett, 'Notes from Underground: The intersection of Russian Orthodoxy, Religious Liberty, Liberty Rights and State Authority' (2015) 6 (1), Creighton International and Comparative Law Journal, 24-74 at 42-44.

opinion Quashigah notes, 'Apart from outright proclamation of a state religion, there can also be more subtle subjection of sections of a population to the obedience of laws and policies that are inherently the tenets of one religion.'[518] Despite this apparent shortcoming, it remains an important school of thought on this subject.

2. Constitutional Underpinnings on State and Religion in Kenya

The Constitution is enshrined with spectrum of provisions on state and religion. Firstly, Article 8 prohibits the establishment of state religion in Kenya.[519] This pivotal clause affirms Kenya as a secular constitutional democracy and not a theocracy. Furthermore, it maintains religious liberty and harmony by separating state and religion which enables the people to enjoy religious freedom without interference. In Nyakamba Gekara v Attorney General the High Court rightly observed the principal objective of Article 8 of the Constitution is to prohibit the state from preferring one religion over another. [520]

Secondly, Article 19 (1) as read together with Article 20 (1) is fundamental when interpreting the freedom of religion in Kenya.[521] First, it bestows upon the state the positive obligation to ensure the people enjoy religious freedom. Similarly, it prescribes the negative obligation that forbids it from unnecessary interference with the freedom of religion.[522] Moreover, Article 23 (3) stipulates a spectrum of remedies should the government contravenes the bill of rights.[523] Most importantly, Article 32 provides for the freedom of conscience, religion and belief.[524] This clause is read together with Article 27 which provides for equal protection before the law and prohibits discrimination based on religious grounds.

[518] Kofi Quashigah, 'Religion and the Republican state in Africa: The need for a distanced relationship' (2014) 14, African Journal of Human Rights, 79.

[519] Ibid.

[520] Petition Number 82 of 2012.

[521] Ibid.

[522] *Nyakamba Gekara v Attorney General and others* Constitutional Petition Number 2 of 2012, Lenaola J, 1st November 2013 at 8.

[523] Ibid.

[524] Ibid.

However, Article 32 should be read together with Article 24 which is the principle clawback provision on fundamental rights and freedoms.[525]Among the factors to be considered include the nature of the right or fundamental right; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights fundamental freedoms by any individual does not prejudice the rights and fundamental freedom of others; and the relation between the limitation and its purpose and whether there are less restrictive means of achieving the purpose.

This overarching provision defines the constitutional parameters for interfering with the bill of rights within an open and democratic society. The legal significance of this clause was amplified in Robert Alai v The Attorney General & others where Justice Chacha Mwita observed that the limitation of any right should be reasonable and justified in any democratic society.[526] He further noted Article 24 was purposefully couched in mandatory terms and the limitation should be the exception and not the rule. In terms of religious freedom this position was enunciated in Republic v The Head Teacher Kenya High School & Others where Justice Githua observed Article 32 of the Constitution is subject to reasonable limitations under Article 24.[527]

Noteworthy, Article 25 has profound impact on the relationship between state and religion. By omitting religious freedom as an absolute right, it knocks down the Chinese wall between state and religion thereby permitting legitimate interference of religious freedom.[528] Finally, by the tenor of schedule four of the Constitution, the national government is vested with the mandate to determine the relationship between state and religion. This clause intends to protect religious minorities from being persecuted and marginalised by the county governments.

However it would prudent to discuss the impact of the preamble of the Constitution on this subject matter. More specifically, its' closing phrase

[525] Ibid.

[526] Petition Number 174 of 2016.

[527] Judicial Review Number 318 of 2010.

[528] Ibid.

states "God bless Kenya."[529] This quote seems innocuous considering Kenya's protracted cultural history of religious proclamation in public. This culture is reflected in the religious sentiments in the national anthem and commencement of public ceremonies with prayers, sermons and hymns.[530] In ABH v Attorney General & others where Justice Anyara Emukule (as he then was) stated:-

> The opening sentence to the preamble to our Constitution acknowledges of 'almighty God', and ends with the supplication "God bless Kenya. The first stanza of our national anthem invokes the name of God of all creations. The oath of office of all state officers … and with the words 'So help me God. The same procedure applies to oaths by members of Parliament (MP's and Senator), Judges and holders of independent offices. So the Republic of Kenya is a state rooted in the belief of God or Supreme Being - whatever individuals perceive HIM to be."[531]

From another perspective, one may argue this clause bears profound impact on the Kenya's constitutional foundation as secular liberal democracy. In essence, it erroneously identifies the people as a monolithic bloc of monotheists. Nonetheless, a theological analysis of this phrase complicates the nature of the Divinity in question. Logically, which God is this phrase addressing? An alternative attempt to interpret this clause as Pantheistic creates more absurdity than uniformity since these Supreme Beings are fundamentally different in nature.[532] Therefore, it is fallacious to assume all of them are simultaneously embodied under this umbrella term.[533] If anything, this legal quest would be an abnormal exercise of attempting to use human laws as lens to read the mind of God.

Similarly, this clause implies Kenya is a monotheistic state to the exclusion of other religions.[534] First, it excludes polytheists' who believe in more than

[529] Ibid.

[530] Adam Epstein, 'Religion and sports in undergraduate classroom: A surefire way to spark student interest, Spring (2001) XXI Southern Law Journal, 137.

[531] Petition Number 41 of 2015.

[532] Bruce Ledewitz, 'Could government speech endorsing a higher law resolve the establishment clause crisis?' 41 St Mary's Law Journal, 44.

[533] Arthur A. Leff, 'Unspeakable ethics, Unnatural law' [1979] 6 Duke Law Journal, 1229-1249 at 1230.

[534] *Reverend Jesse Kamau & others v Attorney General & others* Miscellaneous Application Number 890 of 2004, Nyamu, Wendoh and Emukule JJ). This decision proscribed the inclusion of the Kadhi's Court in the Constitution as being unconstitutional. Nonetheless, this was a flawed pronouncement since the judiciary

one Supreme Being. Furthermore, it remotely isolates atheists and agnostics because of their lack of belief in God. This is because it promulgates a Supreme Being as the superego of all the legal norms, therefore, any contrary opinion or belief becomes the id. Subsequently, does the constitutional acknowledgement of God infringe on the rights of nonbelievers? Or does the Constitution proselytise Monotheism? This concern raises serious constitutional issues since the preamble is an important tool for interpreting the Constitution.[535] Therefore, it is fair to surmise it may denote the Constitution as a religious text rather than legal document.

Conversely, some legal scholars define this customary affirmation of God in public as 'mere ceremonial deism.'[536] This term was coined by Yale legal scholar Eugene Rostow as an exception from the establishment clause of the first amendment to the Constitution. The declaration of God in the Constitution is plain acknowledgment for historical and heritage purposes rather than religious affirmation.[537] Nonetheless, this argument is saddled with potential shortcomings.[538] If the state proclaims God for formality purposes then it amounts to public blasphemy. One of the spiritual canons of Monotheism is 'thou shalt not use God's name in vain.' Therefore, if the words ''God bless Kenya'' are stipulated in the Constitution for ceremonial purposes, are we being blasphemous with God's name?[539] Does this exercise infringe on the religious freedom of monotheists? If not, then is the state using the Constitution a tool for proselytising Monotheism among the people?

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cannot amend the constitution. This is the power that is vested with the people or the legislature. Therefore, the judgement signified the epiphany of the Countermajoritarian difficulty in the Kenyan judiciary.

[535] Milton Handler et al, 'A reconsideration of the relevance and materiality of the preamble in Constitutional Interpretation' (1990) 12 Cardozo Law Review, 121.

[536] Richard F. Suhrheinrich and Melinda Bush, 'Essay: The Ohio Motto Survives the Establishment Clause' (2003), 64 Ohio State Journal, 586. He defines it as 'civic piety'. See also *Marsh v Chambers* 463 US 783 (1983).

[537] *Ex Parte Speaker of Western Cape Provincial Legislature 1997* 4 SA 795 (CC).

[538] Rachel R, Meyers, 'Pledge Protection: The need for Official Supreme Court recognition of Civil Religion' (2006) 3 (3) University of St Thomas Law Journal, 670.

[539] Van Der Vyver and Green *op cite* note 9 at 349 where they describe ceremonial deism as 'blasphemy of the worst kind and does not do the Christian religion any good'.

One way or another, the US Supreme Court ended up grappling with this issue in the cases of Van Orden v Perry[540] and McCreary County v ACLU of Kentucky[541] informally known as "The ten commandments cases." The gravamen of these matters entailed the display of Ten Commandments in public institutions.[542] In the Van Orden case, the issue was whether the display of a six foot monolithic Ten Commandments tablets outside the State Capital in Austin, Texas violated the establishment clause. The plaintiff argued the tablets symbolised Texas as a Judeo-Christian theocratic state. In a 5-4 decision the court ruled the display did not violate the establishment clause since the monument was donated by private organisation and not the government. The swing vote was delivered by Justice Breyer who articulated courts should always examine the basis behind the symbol before determination. It is important to inquire the historical reason behind the display, the source of funding, composition of the makers of the symbol and who permitted the action. In this case, the monument was donated by eagle scouts after approval by the state legislature.

In the McCreary case, the facts were similar only that the symbols were outside county court building. Apart from the tablets, there was Magna Carta, Declaration of Independence, Bill of Rights, lyrics of the Star spangled banner, May flower compact, National motto and Picture of lady justice. Similarly, the issue was whether the display infringed on the establishment clause. In 5-4 majority the court held that displaying the Ten Commandments was unconstitutional since it endorsed the Judeo-Christian faith to the exclusion of other religions.

Furthermore, unlike the Van Orden case, the tablets were financed by the exchequer. However, in an emotive dissenting opinion, Justice Scalia concurred with the majority that the Constitution prohibited the establishment of state religion. Nonetheless, its' original understanding permitted the public acknowledgement of God through the display of symbols like the Ten Commandments.[543] Pursuant to the majority opinion of the court the tablets

[540] 505 US 677 (2005).

[541] 545 US 844 (2005).

[542] Greg Abot, 'Upholding the unbroken tradition: Constitutional Acknowledgement of the Ten Commandments in Public Square' (2005) 14 (1) William & Mary Bill of Rights Journal, 55.

[543] Ibid at 10.

were removed from the courthouse. Following this decision, the Supreme Court was assailed for judicial inconsistency since the two matter touch on similar issues yet they resulted I totally different outcomes.[544]

2.1 Religion in Public Schools

This is one of the most litigious and emotive aspect on the interface between state and religion in Kenya. When discussing this matter the point of origin is section 4(i) of the Basic Education Act, 2013 states that one of the value systems of the public schools in Kenya is to promote religious diversity, cohesion and tolerance. Furthermore, section 59(k) obligates the Board of Management to promote the spirit of cohesion, integration and tolerance within the school community. This means schools are supposed to respect the religious beliefs of their students so long as they are consistent with the school culture and rules. This legal issue was echoed in Mohamed Fugila & Another v Attorney General & others where the Court of Appeal reiterated the obligation of schools to respect the religious preference of the student body.[545] However, the court went a step further to clarify the religious demands should supplement and not substitute the preexisting school rules and culture. Furthermore, the religious preference accorded to any group should not be undertaken at the detriment of the other students.

In the same vein, the court held that in proving religious discrimination the burden of proof lies upon the party to demonstrate the injury suffered if the school gave religious preference to a specific group. Using the Republic v Kenya High School & Others decision as a frame of reference, this decision signified a paradigmatic shift in the jurisprudence on this subject. More specifically, the court adopted a liberal understanding of Article 24 in prohibiting schools from unnecessarily interfere with the religious freedom of the student body so long as it did not conflict with the school program and regulations.

However, the petitioner appealed to the Supreme Court seeking to set aside the orders of the appellate court.[546] The gravamen of their appeal rested on the fact that the interested party never filed a formal cross-petition pursuant to rule

[544] Edith Brown Clement, *Public displays of affection…for God: Religious monuments after Mcreary and Van Orden*, 32 (1) Harvard Journal of Law and Public Policy, 233.

[545] Civil Appeal Number 22 of 2016.

[546] Methodist Church in Kenya v. Mohamed Fugicha & Others Petition Number 16 of 2016.

10 (2) of the Mutunga Rules.[547] A cursory glance of the pleadings confirmed the interested party filed a comprehensive replying affidavit which in paragraph 34 stated "I am swearing this affidavit in opposition to the herein…I am also cross –petitioning that Muslim students be allowed to wear a limited form of Hijab…" The petitioner argued by admitting the replying affidavit as a cross petition the superior courts violated their right to be heard under Article 24 and 50 of the Constitution since it raised novel issues that were never canvassed in the original petition. [548]

In a majority decision of 5-1 the Court held that the interested party flouted the Mutunga rules by failing to file a comprehensive cross petition as outlined in rule 15 (3).[549] They further concurred the Court of Appeal lacked jurisdiction to hear the response which raises new issues that digressed from the substance of the petition.[550] Moreover, it would be unfair to presume the petitioner consented to that position despite the fact that they argued extensive oral submission in response to the interested party's case. In any event, oral submissions do not amount to a formal response.

The court then concluded since there was no cross petition on record, then it negated the entire case for the interested party. Consequently, the appeal was allowed and the orders of the Court of Appeal set aside in its entirety. However, in their orbiter dictum the Judges reiterated the importance of parties exhausting all the appropriate measures before filing the suit in the before the Court.[551]

In stark contrast, Justice J.B. Ojwang' delivered the only the only dissenting opinion.[552] He argued failure to file a formal cross petition could easily be cured by Article 22 (3) (b) of the Constitution which allows courts to entertain proceedings on the "basis of their informal documentation."[553] In addressing the

[547] Ibid paragraph 20.

[548] Ibid paragraph 21.

[549] Ibid paragraph 56.

[550] Ibid paragraph 53. See the Supreme Court decision of *Francis Karoki Muruatetu & Another vs. Republic & 5 Others* Supreme Court Consolidated Petition Number 15 & 16 of 2015.

[551] Ibid paragraph 59.

[552] Ibid paragraph 80.

[553] Ibid paragraph 86.

merits of the case, he noted section 27 (d) of the Basic Education Act obligates schools to ensure religious diversity in conformity with the ordinary rules and regulations.[554] This means despite the school being sponsored by the Methodist Church the management had the duty to protect the religious freedom of the Muslims students to wear the Hijab.

By and large, the court was justified in setting aside the orders of the Court of Appeal on legitimate grounds of procedural technicalities. Seemingly, the Judges adopted a cautious and elusive approach in addressing the substance of the petition which would have had a tremendous impact on the position of religion in public school. As the highest judicial organ the court had the cardinal duty to comment on the merits of the case and offer practical legal guidelines on this emotive subject matter. By leaving this perilous legal lacuna wide open the court missed out on the perfect opportunity to address this perennial social conflict.

The second issue pertains to the criteria of clustering of public secondary schools in Kenya. In hindsight, some of these institutions were established by religious organisations during the colonial era.[555] However, they have been transformed into national schools which admit students of all faiths but retained significant elements of their religious heritage. In hindsight, the Ominde Commission on Education recognised the role of religious organisations in the promoting education in Kenya.[556] This taskforce identified the role of mutual cooperation between civic and religious bodies in promoting education in Kenya.[557] This position has since been codified into section 27 (d) of the Basic Education Act which mandates sponsors to support spiritual development while giving credence to other beliefs. This pivotal clause affirms the importance of promoting religious diversity in the public school system.

However this cooperation between state and religious institution demonstrates the cognitive dissonance on the identity of these schools. For example is it constitutional for students to be compelled to participate in religious activities

[554] Ibid paragraph 94.

[555] Theuri M.M., 'The relationship between Christianity, Education, Culture and Religion in Kenya since political independence in 1963' (2013) 3 (16) Research in Humanity and Social Sciences, 54.

[556] Republic of Kenya (1964) Kenya Education Commission Report, Government Printers, Nairobi.

[557]Paragraph 63 and 64.

or can they be exempted? This legal quandary emanated in the ABH v Attorney General & others case (supra). The petitioner's daughter was a Muslim student who alongside 37 others was suspended from school for refusing to attend Catholic mass which was part of the school routine. She argued this exercise violated her infringed on her religious freedoms as espoused in Article 32 of the Constitution.

In an emphatic rejoinder the school argued it had taken reasonable steps to protect the religious rights of Muslim students. This included designation of prayer rooms, offering special diet during Ramadhan and fully paid school trip to Voi town to celebrate Idd Ul Fitr. The court further observed despite being a public national school the respondent was generously sponsored by the Catholic Archdioceses of Mombasa hence the attending mass formed a significant part of the school culture. In any event, there was no discrimination against the students since the school had put in place special arrangements to cater for their religious demands.

In addition, the court acknowledged with role of sponsors in supporting the schools. By and large, section 27 of the Basic Education Act recognises the important role of sponsors in supporting basic education institutions in Kenya. However, in terms of enhancing spiritual growth and development section 27 (d) stipulates the sponsors shall safeguard the denomination and religious adherence of others.[558] However, the court noted allegations of religious discrimination should not form the basis of ousting the moral and tradition of the school sponsor. The judge reasoned supported this reasoning by insisting sponsors should not be coerced to surrender their objectives for a purpose acquiescing to the specific demands of every student. This was a telling observation that struck a perfect balance between obligation of sponsors and safeguarding freedom of religion in public schools.

In determining this matter it would be prudent to distinguish this decision from that of Seventh Day Adventist School v Minister of Education School.[559] The petitioner argued Alliance High School Saturday routine that required all students to attend class and perform cleaning chores discriminated against

[558] Ibid.

[559] Petition Number 431 of 2012

Adventist students. The trial court observed the routine applied to all students hence it would not be considered as inherently discriminatory under Articles 19, 22 and 32 of the Constitution. In overturning the decision the Court of Appeal held that the school routine amounted to discrimination since it interfered with the religious rites and practices of the students. As part of the orders the court directed the Ministry of Education to promulgate the appropriate guidelines on dispute resolution mechanism within a year. This decision confirmed the positive obligation upon the state to protect the freedom of conscience and religion under the precepts of Article 19 as read together with Article 32 of the Constitution. In this case the school had the obligation to put in place special but reasonable arrangements to cater for the demands of the Adventist students.

In foreign jurisdictions, this legal conundrum has been expounded upon by the US Supreme Court through spectrum of authorities. In Lemon v Kurtzman[560] commonly known as the "Lemon Test" the court held reimbursement of funds to private schools for religious teachings infringed the establishment clause.[561] Warren Burger, CJ crafted the Lemon test on the religious freedoms. This principle is premised on three pillars of determining whether a law violates the establishment. First, the statute must not result in "excessive government entanglement" with religious affairs (entanglement prong). Second, the statute must not advance or inhibit religious practice (effect prong). Finally, the statute must have a secular legislative purpose (purpose prong). Indeed, the Lemon test remains one of the most important judicial principles on establishment clause.[562] Thereafter in Lee v Weisman[563] the Supreme Court crafted 'The coercion test.' The subject matter in this suit pertained to the constitutionality of non-denominational prayer in public schools. The court ruled the establishment clause prohibited prayers in public schools.[564] This is because communal prayers

[560] 403 US 602 (1971).

[561] Conor Reilly, 'Preliminary Injunctions Excessive entanglement and prior restraints: Should courts treat potential pre trial religious infringement the same as potential pretrial speech infringement' [2012] 3 (1), Akron Journal of Constitutional Law and Policy, 3.

[562] Josh Blackman, 'The lemon comes as a lemon: The lemon test and pursuit of a State's secular purpose' (2006) 20 (3) Civil Rights Law Journal, 351-415 at 356.

[563] 505 US 577 (1992).

[564] Steven Goldberg, 'Beyond coercion: Justice Kennedy aversion to animus' (2006) 8 (4) Journal of Constitutional Law, 802.

were equivalent to establishing a religion.[565] This principle built up on the first limb of the 'lemon test' that prohibits the combination of state and religion.

This issue resurfaced in Elk Grove Unified District School v Newdow.[566] This case was filed by Michael Newdow as next of friend of his daughter who attended a public elementary school.[567] He argued being an atheist the daily recital of the national pledge which includes the phrase "one nation under God" (hereinafter the phrase) violated the establishment clause.[568] On the other hand, the mother raised a preliminary objection to the application on the grounds that the plaintiff lacked the legal custody of the child hence the capacity to lodge the suit. She further argued their daughter was raised as an Evangelical Christian and the phrase could not infringe on her rights. Therefore, the court grappled whether the plaintiff had the locus standi to file the suit. In addition, they considered whether the phrase "One nation under God" violated the establishment clause? In majority decision the court held plaintiff lacked the locus standi to institute the proceedings since the legal custody vested with the mother. Consequently, the suit was struck out because of this procedural technicality.[569]

Nonetheless, the dissenters argued the procedural technicality did not prohibit the court from determining the underlying constitutional issues.[570] William Rehnquist CJ stated the phrase did not endorse religion rather it 'merely acknowledgement America's religious tradition' as forecasted by the founding fathers. Conversely, Justice Thomas argued declaring the phrase as unconstitutional would prevent the religious students from being prayerful. He further averred the establishment clause prohibited the Federal government from indoctrinating individual states with religion.

[565] Ibid at 588.

[566] 542 US 1 (2004).

[567] Arsineh Arakel, *The pledge of allegiance, 'Under God' is under scrutiny,* Fall (2003), 1 Irvine Law Forum Journal, 37.

[568] Under section 52720 California Code of Education, all elementary schools are required to recite the loyalty pledge and sing national anthem.

[569] Rachel Prouser, '*Elk Grove Unified District School v Newdow*' (2005) 13 (1) Journal of Gender, Social Policy & law, 246.

[570] Gloria Chan, 'Reconceptualising fatherhood: the stakes in Newdow' [2005] 28 Harvard Journal of Law & Gender, 471.

3. Recommendations and Conclusion on State and Religion in Kenya

3.1 Introduction

This segment marks the penultimate part of this manuscript. First, it proposes for Kenya to adopt the 'reasonable secularism' instead of either 'absolute secularism' or 'religious neutrality.' This legal test is essential in eliminating the doublethink encircling church-state relationship in Kenya. Thereafter, it will entail some concluding remarks from the authors.

3.1.1 Inculcating Reasonable Secularism as the Legal Test

The basic import of Article 8 of the Constitution confirms Kenya's underpinning as a secular democracy with profound respect for religion within civil spheres. Therefore, it is would be grossly erroneous to use this clause as basis of eliminating religion from public spheres since it forms part of our culture and heritage. In line with the Nyambara Gekara decision it is fair to argue this clause does not advocate for the elimination of religion but the deterrence of religious preference.[571]

Therefore, this paper argues for Kenya to adopt 'reasonable secularism' as the legal test for relationship between state and religion in Kenya. This principle stands on three pillars:

a) The state should observe secular principles of the Constitution;

b) The state should uphold the religious heritage within the parameters of diversity and voluntary participation.

c) If there is a conflict between secularism and religious heritage then the former suffices.

3.1.2 The State Should Observe Secular Principles of the Constitution

The state is obligated to observe the secular principles prescribed by the constitution. This opinion is substantiated by the decision of Republic v Kenya High School and another[572] which affirmed Article 8 of the constitution

[571] Op cit.

[572] Op cit.

recognised Kenya as secular state.[573] Subsequently, the state is prohibited from actively engaging in religious activities either expressly or impliedly except for heritage purposes.

3.1.3 The State Should Uphold the Religious Heritage within the Parameters of Diversity and Voluntary Participation

Secondly, if the state should uphold the religious heritage of this country, then it should be practiced on the basis of accommodative and voluntary as means of avoiding religious preference. In essence, Article 32 (4) of the Constitution stipulates that a person shall not be compelled to act or engage in any act that is contrary to his belief and religion. This provision is inextricable connected to Article 24 of the Constitution which limits religious rights within an open and democratic society. Therefore, it is fundamental to align practices within these legal parameters. This principle was affirmed in Seventh Day Adventist (East Africa) v Minister of Education & others where the Court of Appeal observed equality does not imply uniformity but an acknowledgement of accepted religious differences. [574]

3.1.4 If there is a Conflict between Secularism and Religious Heritage then the Former Suffices

Thirdly, if there is a conflict between the secularism and religious heritage or practice, then the secular aspect should suffice. The original understanding of Article 8 of the Constitution prohibits the state religion. Furthermore, Article 25 of the constitution exempts religious freedom as an absolute right. Therefore, the state has the inherent right to interfere with religion based on legal and justifiable grounds which includes maintaining constitutional secularism. One of the canons of interpreting the constitution is to expound on the underlying right in question.[575] This means if there is a conflict among rights, then they should be syncronised in a harmonious manner. This harmonious objective should be skewed in favour of reasonable secularism since it offers wide latitude for the protection and exercise of religious freedom.

[573] Ibid pg 13 at paragraph 2

[574] Civil Appeal Number 172 of 2014.

[575] *David Tenyefuza v Attorney General of Uganda* Constitutional Petition Number 1 of 1996 decided on the 24th April 1997.

4. Conclusion

The adjudication of religion and state remains a complex and incoherent legal matter in Kenya. Therefore, it demands through philosophical brainstorming from the bar, bench, academia, theologians and public. In the penultimate phase of Nineteen-Eighty-Four, the establishment turns against Winston and condemns him to Room 101 (torture chamber). After being incarcerated, Winston is tortured by O'Brien his former superior at the Outer Party. During the course of his interrogation, Winston asks, 'Does big brother exists?' O'Brien responds:

> That, Winston, you will never know. If we choose to set you free when we have finished with you, and if you live to be ninety years old, still you will never learn whether the answer to that question is yes or no. As long as you live it will be an unsolved riddle.[576]

Similar reasoning extends to the jurisprudence of state and religion in Kenya. For years the country languished under an imperial presidency protected by a façade of a constitution.[577] This political maladministration engendered the doublethink of secularism and religiosity. In addition, state bureaucrats continue to use and abuse religion as a ruse to secure and retain public power.[578] However, the promulgation of the new Constitution lifted the lid on this legal conundrum. This optimism is deeply anchored on the spectrum of stipulations on the relationship between state and religion. In summary, this constitutional transformation lays the platform for developing better ideas among all and sundry in upholding the identity of Kenya as a secular state while protecting freedom its' religion and heritage.

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[576] Ibid at 27.

[577] Ben Sihanya, 'Reconstructing the Kenyan Constitution and State, 1963-2010: Lesson from German and American Constitutionalism' [2001] 6 (1) Law Society of Kenya Journal, 10.

[578] Susan Kilonzo, 'Silent religiosity in a sniveling nation: The role of religious institution in promoting Post-conflict reconciliation in Kenya' (2009) 17 (1&2) Africa Media Law Review, 100.

Constitutional Approach to Devolved Governance as a Building Block of the Right to Health in Kenya

Faith Simiyu[579*] and Christine Namalwa Simiyu[580§]

Abstract

Gross health inequalities exist around the world for which no country is exempt. In most cases, centralization as a form of governance has partly been considered as the underlying cause of the gross inequalities. Hence, it has been suggested that the health inequalities have by extension posed challenges to the progressive realization of the right to health. This paper seeks to provide a critical analysis of Kenya's constitutional approach to devolved governance as a building block of the right to health. In doing so, it discusses the nature and scope of Kenya's legal obligation in respect to the right to health and its correlation to the decentralized governance in Kenya.

1. Introduction

The right to health has been embraced as a common concern of both developing and developed countries. Indeed, most States have ratified one or more international as well as regional legal instruments on the right to health.[581] Collectively, the legal instruments impose obligations for the progressive realization of the right to health.[582] Most states have also domesticated the

[579*] Commonwealth PhD Scholar at Cardiff University School of law and Politics; Lecturer, Private Law Department at Jomo Kenyatta University of Agriculture and Technology School of Law; Advocate of the High Court of Kenya and co-founder and Partner in the firm of Simiyu, Opondo, Kiranga and Company Advocates (SOKLaw Advocates). Faithsimiyu@gmail.com(preferred) or SimiyuF@cardiff.ac.uk.

[580] Graduate of the University of Natal South Africa. Over 20 years working and teaching experience as a nursing practitioner and lecturer. simiyuchristine428@gmail.com.

[581] G. Backman, et al. Health Systems and the Right to Health: An Assessment of 194 Countries. (2009). Lancet, pg. 372.

[582] Such instruments echo the right to health as found in Article 25.1 of the Universal Declaration on Human and Peoples Rights (UNDHR); Article 11 European Social Charter; Article 24 of the Convention on the Rights of the Child of 1989, Article 16 of the African Charter on Human and Peoples' Rights of 1981 and Goal 3.8 of Agenda 2030 for Sustainable Development etc.

right to health, either through the framework of their national constitutions; or through constitutionally recognized policy principles.[583] In so doing, the legal instruments urge States to take other measures that inter alia include the implementation of health programs developed by the World Health Organization (WHO).[584]

The World health Organization (WHO) Framework for Action on Strengthening Health Systems is one of the key policy programs that has been fronted in the quest to promote the right to health.[585] Under the WHO Framework for Action, six building blocks of a health system are proposed. The six building blocks are not only 'building blocks' of a health system, they are also building blocks for the right to health.[586] These are: (i) health workforce, (ii) health financing, (iii) medical products, vaccines & technology, (iv) leadership and governance, (v) information research and (vi) service delivery.[587] Leadership and governance is the most complex and critical building block[588] and is therefore the focus of this paper.

Leadership and governance scrutinises the role of governments viz other public or private actors; especially in the context of gross health inequalities.[589] Despite the importance of governance as a building block of the right to health, it has partly been blamed for the failure of health systems.[590] In particular, centralized governance of health systems has been criticized for gross inequalities around

[583] Neier A, *Social and Economic Rights: A Critique* (2006) 13 Human Rights Brief 1.

[584] Committee on Economic, Social and Cultural Rights, *General Comment 14:* The *Right to the Highest Attainable Standard of Physical and Mental Health.* UN Doc. No. E/C.12/2000/4 (2000), para 1.

[585] World Health Organization, 'Everybody's Business: Strengthening Health systems to Improve health Outcomes: WHO's Framework for Action' (World Health Organization, Geneva: Switzerland 2007).

[586] Hunt P & Backman G, *Health systems and the Right to the Highest Attainable Standard of Health.* (10) 1 (2013) Health and Human Rights Journal.

[587] WHO n 5.

[588] Ibid.

[589] Ibid.

[590] Uneke CJ et al, 'Enhancing Leadership and Governance Competencies to Strengthen Health Systems in Nigeria: Assessment of Organizational Human Resources Development' 7 (3) (2012) Health Policy 73-84.

the world; especially in Africa.[591] The inequalities are evidenced from differences in the differences in the availability of health facilities within a geographical area;[592] the differences in health and disease status amongst people,[593] the uneven distribution of health resources,[594] differences in access to health services where more often than not such services are scare in rural areas where indigenous communities reside,[595] and so on. As such, it is arguable that the right to health maybe constrained by amongst other things– a failure in centralization as a form of governance.[596] Hence, States have been urged to adopt appropriate policies, strategies and approaches for the governance of their health systems.[597]Such approaches arguably include decentralized governance;[598]which can take the form of devolution.[599]

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[591] Hutchinson, P & LaFond A, *Monitoring and Evaluation of Decentralization Reforms in Developing Country Health Sectors*. (2004). Bethesda, MD: The Partners for Health Reform plus Project, Abt Associates Inc. See also Olowu, D, *Decentralisation Policies and Practises under Structural Adjustment and Democratization in Africa*. (2001) Democracy, Governance and Human Rights programme Paper Number 4. United nations Research Institute for Social Development.

[592] Gov.UK, (2018) *Health Profile for England, Chapter 5 Research and Analysis: Inequalities in Health*. Public Health England <https://www.gov.uk/government/publications/health-profile-for-england-2018/chapter-5-inequalities-in-health> accessed 23 January 2018.

[593] Nyanjom Othieno et al, 'Inequality in Kenya's Health Sector' in *Readings on Inequality in Kenya: Sectoral Dynamics an Perspectives* (Society for International Development. Nairobi: Kenya 2006).

[594] Daniel D Reidpath and Pascale Allotey, 'Measuring Global Health Inequity' (6) 16 (2007) International Journal for Equity in Healthand drive much of the current thinking about global health. Health inequity, however, is usually measured using health inequality as a proxy \u2013 implicitly conflating equity and equality. Unfortunately measures of global health inequality do not take account of the health inequity associated with the additional, and unfair, encumbrances that poor health status confers on economically deprived populations. Method: Using global health data from the World Health Organization's 14 mortality sub-regions, a measure of global health inequality (based on a decomposition of the Pietra Ratio.

[595] United Nations General Assembly, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mission to Kenya: Implementation of General Assembly Resolution 60/251. (2007) Human Rights Council. A/HRC/4/32/Add.326.

[596] Uneke n 10. See also Bulle, A, *Drivers Influencing Delivery of Decentralized Health Services in Kenya: A Case of Wajir County* (66) 2 (2015) *Strategic Journal of Business and Change Management* 571-614.

[597] World Health Organization, Monitoring the Building Blocks of Health Systems: A handbook of Indicators and their Measurement Strategies. (2010). Geneva: Switzerland at 86.

[598] Ibid.

[599] World Health Organization. *Health System Decentralization; Concept, Issues and Country Experience*. (1990). World Health Organization. Geneva: Switzerland.

On this premise, it is suggested that decentralization through devolution; may help promote health equity.[600]

Decentralization and/or devolved governance inter alia calls for the transfer of powers and responsibilities in decision making for various matters such as health; from the national government to local governments at the sub-national levels.[601]Decentralization is often classified by the types of responsibilities that have been devolved as well as the level of autonomy granted thereof.[602]Hence, it is asserted that since devolved governance enhances community participation in health decision-making through the transfer of power in health decision making,[603]it inevitably means that communities may develop strategies to combat health inequalities that are peculiar to their own needs. It is no wonder then that many countries have adopted decentralization through devolution; [604] as part of the approaches combating inter alia health inequalities.[605]Kenya is no exemption.

In Kenya, the goal of devolution in health is partly to enhance equity in resource allocation so as to improve health service delivery.[606] Thus, in an effort

[600] World Bank, *World Development Report: The State in a Changing* World (New York: Oxford University Press 1997).

[601] WHO n 19.

[602] Hutchinson & LaFond n 11.

[603] Devas N & Grant U, *Local Government Decision-Making-Citizen Participation and Local* Accountability: *Some Evidence from Kenya and Uganda* (Public Administration & Development, ProQuest Publications 2003) 307. See also World Bank, *World Development Report: The State in a Changing World*. (New York: Oxford University Press 1997).

[604] World Health Organization. (2008) *Regions for health network in Europe: Decentralized health systems in transition*: <http://www.euro.who.int/__data/assets/pdf_file/0012/134400/E91415.pdf> accessed 23 January 2019. See also Rico A & León S, *Health Care Devolution in Europe: Trends and prospects* (2005) Health Organization Research Norway: University of Oslo. Working paper 2005: 1.

[605] World Health Organization. Health System Decentralization; Concept, Issues and Country Experience. World Health Organization, Geneva. See also Bevan, G et al, *The four health systems of the United Kingdom: How Do They Compare?* (The Health Foundation and Nuffield Trust 2014).

[606] Netherlands Enterprise Agency, *Kenyan Healthcare Sector: Opportunities for the Dutch Lifesciences and Health Sector*, Study commissioned by the Embassy of the Kingdom of the Netherlands in Nairobi (2016): <https://www.rvo.nl/sites/default/files/2016/10/2016_Kenyan_Healthcare_Sector_Report_Compleet.pdf> Accessed 24 January 2018.

to reduce health inequalities, the Government of Kenya (GoK) has enacted various policies, legislative and constitutional frameworks on decentralized governance through devolution. Amongst the key enactments include the second National Health Sector Strategic Plan (NHSSP II) and its successor, the Kenya Health Sector Strategic and Investment Plan (KHSSP) as well as the Constitution of Kenya. NHSSP II aimed to provide a guiding framework for the reduction of health inequalities.[607] Under the NHSSP II, the GoK recognized the need for fundamental changes in the existing governance structures, through decentralization; as a key component of lasting solutions to health inequalities.[608]A change of governance was also echoed in the KHSSP which emphasized health inequalities may be reduced by the decentralization of health through devolution.[609] It is therefore not surprising that in 2010, devolution was introduced as a fundamental change in governance in the Constitution of Kenya (CoK).

Devolution, as envisioned under the CoK, held the promise of a probable solution to health inequalities.[610] In fact, the Supreme Court of Kenya in Speaker of the Senate & another v Attorney General & 4 others [611] reiterated the fact that devolved governance would help remedy amongst other things, Kenya's problem of centralized governance that contributed to health inequalities.[612] It follows, to bolster the implementation of devolved governance, the Constitution of Kenya (CoK) introduces a two-tiered system comprising of a national and county government. [613] The two-tiered system of devolved governance involves the transfer of power and responsibility in decision-making from the national

[607] Republic of Kenya, *Reversing the Trends: The Second National Health Sector Strategic Plan of Kenya (NHSSP II 2005-2010).*Ministry of Health at 3.

[608] Ibid at 3.

[609] Republic of Kenya, Kenya Health Sector Strategic and Investment Plan (KHSSP) July 2013-July 2017: The Second Mid-term Plan for Health. Ministry of Medical Services and Ministry of Public Health & Sanitation.pg.1

[610] *Speaker of the Senate & Another v Attorney-General & 4 Others* [2013] eklr' 1 para 166-190.

[611] Ibid.

[612] Ibid.

[613] Kempe R.H, Devolved Government and Local Governance in Kenya Implementing Decentralization Underpinned by the 2010 Constitution (2014) African and Asian Studies. Koninklijke Brill NV: Leiden. pg. 338-358.

government to the county governments at the sub-national level. As such, in the context of health, the national government has been allocated the roleof managing national referral health facilities and health policies; whilst the county government has been allocated the role of managing county health facilities including pharmacies, ambulance services and the promotion of primary health care.[614] Both levels of governments are to be guided by the principles of distinctiveness and inter-dependence.[615] In so doing, it is expected that constitutional framework for devolved governance may promote the right to health guaranteed under Article 43 of the CoK and by extension, rid Kenya'shealth inequalities.

In retrospect, implementing Kenya's framework for devolved governance is seemingly problematic. A problem that also suggests a failure in devolved governance as a building block of the right to health in Kenya. Specifically, the implementation of devolved healthcare has largely been precipitated by conflict and confusion between the national and county government. [616] As a consequence, problems are rife in the other building blocks of the right to health in matters that inter alia relate to the legal conditions for health care service delivery[617], health financing, planning and auditing.[618] Further, due to the conflict and confusion between the national and county governments, the provision of health services has been constrained by amongst other things human resources, finances and medical product supplies.[619] Similarly, acute shortage of health care facilities, essential medicines and equipment continue

[614] Fourth Schedule, Constitution of Kenya, 2010.

[615] Art 6(2) and Article 189(2), Constitution of Kenya (CoK), 2010.

[616] Institute of Economic Affairs. (2013). *Budget Guide: The Onset of Devolved Government and the Hurdle ahead*: <https://www.google.com/search?client=safari&rls=en&q=Institute+of+Economic+Affairs.+Budget+Guide:+The+Onset+of+Devolved+Government+and+the+Hurdle+ahead.&ie=UTF-8&oe=UTF-8> Accessed 23 January 2013.

[617] Franceschi L, 'Health Law Remains Underdeveloped in Kenya' *Daily Nation* (2016) <http://www.nation.co.ke/oped/blogs/dot9/franceschi/2274464-3440938-aie75l/index.html> Accessed on 23 January 2018.

[618] Kahumbi, E, *National Government to take over the health sector from counties* (Citizen Digital 2015) <http://citizentv.co.ke/news/national-govt-may-take-over-the-health-sector-from-counties-99217/> accessed 23 January 2019.

[619] Wasuna, B & Mutaj E, 'Counties get May 6 Ultimatum for health Equipment Contract' Business Daily (2015) <http://www.businessdailyafrica.com/Counties-ultimatum-for-health-equipment-contract/-/539546/2657214/-/gwjcok/-/index.html> accessed 23 January 2018.

resulting in few, if any, patients accessing health care services.[620] To make matters worse, many health care providers have opted for a go-slow or no attendance in hospitals partly due to the conflict between the national and county governments in the provision of health.[621]

Given the foregoing, it seems devolved governance as a building block of the right to health in Kenya needs revisiting. Accordingly, this paper seeks to provide a critical analysis of Kenya's constitutional approach to devolved governance as a building block of the right to health. In doing so, the paper envisions clarifying the roles of the national and county governments viz other actors involved in the devolved governance of health. The paper is onwards divided into five sections.

Section two, which follows next, briefly discusses the nature and scope of the right to health and its correlation to governance as building blocks of a health system. The section does not delve into details on the normative content of the right to health. Instead, section two focuses on the key defining elements of the right to health that relate to governance as its building block. Following this, section three expounds on governance as a building block of the right to health with focus given on decentralized governance through devolution. In so doing, the section notes how the key defining elements of the right to health not only correlate to decentralized governance but make decentralization have similar characteristics as devolution; which similarities inform how devolution is a building block of the right to health. On this premise, section four elaborates on the constitutional approach to devolved governance as a building block of the right to health in Kenya.

In so doing, section four focuses on the legal and institutional framework for devolved governance under the CoK as well as the principles of distinctiveness and inter-dependence that guide the implementation of the same in the context of health. Section five is the conclusion.

[620] Otuki, N, 'Uhuru says Medical leasing Equipment Deal will Continue' *Business Daily* (2015) <http://www.businessdailyafrica.com/Uhuru-talks-tough-on-Sh38bn-equipment-plan/-/539546/2736632/-/nlaj90/-/index.html> accessed 23 January 2018.

[621] Burrows O, 'Health Budget still meagre, Doctor's Union says' *Capital News* (2015) <http://www.capitalfm.co.ke/news/2015/06/health-budget-still-meagre-doctors-union-says/> accessed 23 January 2019.

2. Right to Health

2.1 Nature and Scope of the right to health

Literature suggests two starting points to understanding the nature and content of the right to health. The first is the legal starting point that looks at the legal process through which the right to health has been codified and ratified internationally while the second is the non-legal starting point that looks at developments within a plethora international, regional and inter-governmental Organizations that also have lawmaking authority on health. [622] This includes the United Nations and its agencies such as the WHO which is not only an intergovernmental organization (IGO) but is also a specialized agency for global health within the United Nations system.[623]

Outside the UN agencies, specific health-related matters also fall under the mandate of other international and regional IGOs, including the Food and Agriculture Organization of the United Nations (FAO), the World Organization for Animal Health (OIE), the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO).[624] For example, the expansion of trade means the link between health and trade in a number of treaties of the WTO is increasingly becoming evident in areas including access to medicines, food security, nutrition, infectious disease control and biotechnology.[625]

While the legal and non-legal starting points seem to be two divergent views, this paper argues that both converge to make the right to health as one that has become concretized following the ratification of legal instruments by States. States have ratified legal instruments at the international, regional level in Africa and the national level in Kenya's Constitution. The ratification as occurred while being members of the international, regional and national Organizations. Hence, the paper expounds on the nature and scope of the right to health based on the definitions emerging from developments at the international levels under the WHO and the UN; at the regional level in Africa as well at the national level in Kenya.

[622]Murphy T, *Health and Human Rights* (Hart Publishing Ltd: United Kingdom, 2013) 23-30.

[623]OECD/WHO, *International Regulatory Co-operation and International Organizations: The Case of the World Health Organization (WHO)*, (2016). OECD and WHO.

[624]Ibid.

[625]Ibid.

It is therefore arguable that the right to health was first articulated in the 1946 Constitution of the World Health Organization (WHO) known as the 'Magna Carta of Health'.[626] The preamble of the WHO constitution not only defined health as encompassing both the physical, mental and social aspects of a human being but also reinforced the fact that health is a fundamental human right:

> Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity…The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition (emphasis added).[627]

The definition under the WHO Constitution was subsequently reaffirmed in the WHO's 1978 Declaration of Alma-Ata. This was during the international conference on the right to health that took place in the Alma-Ata (now Kazakhstan). The Conference resulted in 134 countries signing the Alma-Ata Declaration. The Alma-Ata Declaration emphasized the fact that health was a 'fundamental human right' that requires government to take responsibility towards the health of its people.[628] Besides the WHO, developments within the UN systems are also said to be the initial conceptions of the right to health. For some, the initial ideas on the right to health begun with the creation of the United Nation (UN) as an international organization for cooperation on inter alia human rights issues including the right to health in 1945. To them, the signing of the UN Charter therefore informed the initial conception of the right to health providing that:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> a. higher standards of living, full employment, and conditions of economic and social progress and development;

[626] Wolff J, *The Human Right to Health* (WW Norton & Company Inc 2012) 5.

[627] Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 1946.

[628] Murphy n 42 at 23-30.

> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (emphasis added)[629]

Beyond the UN Charter, the right to health arose under the UN system through the enactment of the Universal Declaration of Human Rights (UDHR). The UDHR is was an advisory declaration that was adopted by the United Nations General Assembly in 1948.[630] Article 25(1) of the UDHR is therefore considered yet another starting point on the right to health. It provides that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control (emphasis added).

Article 25(1) also recognized the fact that health is part of the right to an adequate standard of living. It also mentioned other aspects that seem to accompany the promotion of health which included food, clothing, housing, medical care, security etc. As we shall see, these aspects were later interpreted as the underlying determinants the right to health. For present purposes it suffices to note that the UDHR was just a declaration. By virtue of it being a declaration, it meant that it was non-binding upon states.[631] Hence, there was general consensus that separate discussions needed to be made in order to create a binding covenant on the right to health.[632] It follows, in 1954, the International Covenant on Economic, Social and Cultural Rights (ICESCR) was subsequently adopted by the UN in 1966 and came into force as a formal

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[629] Article 55, United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <https://www.refworld.org/docid/3ae6b3930.html> accessed 24 January 2019.

[630] Ibid.

[631] Martti Koskenniemi, 'The Preamble to the Universal Declaration of Human Rights' in Guðmundur Alfreðsson & Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Kluwer 1999) 27.

[632] Ibid.

part of international law in 1976.[633] The ICESCR became the primary human rights instrument that elaborated on the right to health under Article 12 providing that:

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
>
> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
>
> (b) The improvement of all aspects of environmental and industrial hygiene;
>
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
>
> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness (emphasis added).[634]

Article 12.1 of the ICESCR seems to define the right to health in the context of 'highest attainable standard of physical and mental health' just like its predecessor the WHO which defined the right to health as encompassing the physical and mental aspects. Notably, the 'right to everyone to enjoy the highest attainable standard of physical and mental health' is also known as the 'right to health'. [635] It follows, legislative efforts at the regional level in Africa have defined the right to health as connoting the right to the highest attainable standard of health. In particular, Article 16(1) of the African Charter on Human and Peoples Rights provides that, 'Every individual shall have the right to enjoy the best attainable state of physical and mental health'.[636]

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[633] Ibid.

[634] Article 12, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at <https://www.refworld.org/docid/3ae6b36c0.html> accessed 24 January 2019.

[635] Op. cit. 1.

[636] Article 16(1), Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ('Banjul Charter')*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at <https://www.refworld.org/docid/3ae6b3630.html> accessed 24 January 2019.

On its own, 'right to everyone to enjoy the highest attainable standard of physical and mental health' seems not to provide much guidance on its definitive elements. As such, between 1981 to 2011, the definition of the right to health under Article 12 of the ICESCR was expanded by the Committee on Economic, Social and Cultural Rights (CESCR) in its various interpretive documents known as General Comments. Of importance is General Comment 14 on the Right to the Highest Attainable Standard of Health adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights (CESCR) on 11th August 2000.

Under General Comment 14(GC 14), the CESCR expounded on the meaning of the 'right to health' or the 'right to everyone to enjoy the highest attainable standard of physical and mental health' found in Article 12.1 and 12.2 of the ICESCR. First, the CESCR interpreted the 'right to health' to mean the right to the highest enjoyment of a variety of facilities, goods, facilities on one hand and conditions necessary for the highest attainable standard of health on the other hand.[637] In subsequent years, the right to health facilities, goods and services came to be simply referred to as the 'right to healthcare'. [638] 'Healthcare' is thus one element of the definition of the right to health and is the focus of this paper.

Secondly, the CESR noted that the right to health is an inclusive right.[639] Inclusive in the sense that it extends to a wide range of factors that enable us lead a healthy life.[640] The wide range of factors have been termed as the 'underlying determinants of health" and include access to safe and portable drinking water, adequate supply of safe food, nutrition and housing, adequate sanitation, participation of the population on health-related decision-making

[637] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 2000, E/C.12/2000/4, para 14(9) Available at: <https://www.refworld.org/docid/4538838d0.html> accessed 24 January 2019.

[638] National Economic and Social Rights Initiative. *What is the Human Right to Health and Healthcare* <https://www.nesri.org/programs/what-is-the-human-right-to-health-and-health-care> accessed 24 January 2018.

[639]Office of the United Nations High Commissioner for Human Rights and World Health Organization. *Right to Health. Factsheet 31.* World Health Organization Press: <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf> Accessed 24 January 2018.

[640] Ibid.

at the community, national and international levels; access to health-related education and information, housing-related etc. [641] The participation of the people in health decision-making is also a key element of the right to health, which as we shall see, is also an important aspect of devolved governance in Kenya. Thus, participation being an underlying determinant of health; is the focus of this paper.

Given the foregoing discussion, it is no wonder then that Kenya has defined the right to health as encompassing healthcare. Under Article 43(1) of the Constitution, the right to health is defined providing that: 'every person has the right: (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care (emphasis added).

Accordingly, this paper takes the view that the nature and scope of the right to health comprises of two key defining elements namely; (i) 'healthcare' as denoted by health facilities, goods and services and (ii) the 'underlying determinants of health' specifically related to the participation of various actors in health decision-making at the community, national and international levels.

This is as illustrated in figure 1 below:

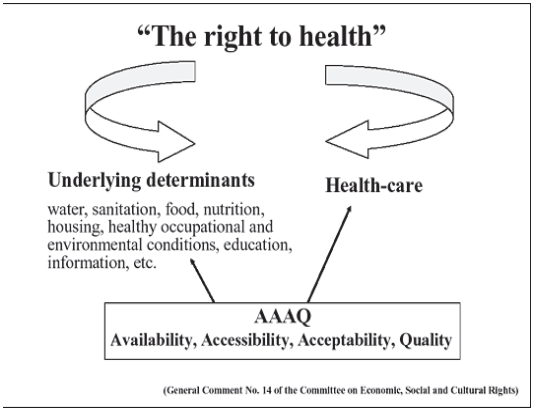

Figure 1

Based on figure 1 above, it is now generally agreed that at the heart of the right to health lies an effective and integrated health system encompassing

[641] Op cit n 57 para 11.

'healthcare' and the 'underlying determinants of health'. [642] Without such a system, the right to health can never be realized.[643]

That said, it is notable that the participation of the people in health-decision making at the international, national and community levels as well as the provision of healthcare correlate to governance as a building block of the right to health. Hence, as the subsequent sections highlight, people's participation in health-decision making at the international, national and community levels is normally realized through public or private actors. In most cases, the actors are drawn from the public sector. For example, politicians in the government may sometimes considered as public actors especially when they are elected to represent the people in health decision-making.[644] Similarly, the public sector may also be represented by the Ministry of Health (MoH) or other government institutions.[645]

It follows, the representation of the people by public actors may take the form of providing of health facilities, goods and services through the MoH, which as already discussed, is an element of the right to health known as 'healthcare'. At the same time, it may also involve the making of health-related decisions, as is the case of politicians in the government. Hence, not only can public actors represent the people-in health-related decision-making but they can also engage in the provision of healthcare services on behalf of the people.

When public actors either provide healthcare services or engage in healthcare decision-making as elected officials, then one can infer that such actions point to the two definitive elements of the right to health- right to healthcare and participation of the people in health decision-making-as already discussed. These actions also underpin decentralized governance as a building block of the right to health, as is next explained.

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[642] Hunt P & Backman G, *Health systems and the right to the highest attainable standard of health.* (2013). Health and human Rights Journal Vol. 10 no.1 <https://www.hhrjournal.org/2013/09/health-systems-and-the-right-to-the-highest-attainable-standard-of-health/> accessed 24 January 2018

[643] Ibid.

[644] C, Bambra et al, 'Towards a politics of health' (20) 2 (2005) Health Promotion International at 187-193.

[645] Republic of Kenya, *Reversing the Trends: The Second National Health Sector Strategic Plan of Kenya (NHSSP II 2005-2010)* Ministry of Health at 3.

3. Decentralized Governance as a Building Block of the Right to Health

The concept 'decentralization' is difficult to pin down.[646] The single, seemingly simple character of decentralization, when probed more deeply reveals the fact that decentralization is often inconsistent and sometimes overtly contradictory term, has various types with each type having different characteristics, policy implications, and conditions for success. [647] The difficulty in the concept is compounded by differences between those writing about decentralization as it applies in the field of public administration generally, in contrast to those seeking to apply decentralization specifically to the health sector. [648] Thus, decentralization has been defined and understood in multiple ways.[649]

That said, for present purposes, the definition that is adopted is a health perspective of decentralization where:

> [Decentralization] is the transfer of formal responsibilities and power to make decisions regarding the management, production, distribution and/or financing of health services, usually from a smaller to a larger number of geographically or organizationally separate actor.[650]

Accordingly, it can be argued that decentralization has three core characteristics. First decentralization involves the transfer of 'power' and 'responsibility'. 'Responsibility' is linked to decision-making and should be understood as having someone who can be held accountable for their decisions in the context of health while 'power' refers to the degree or scope of discretion given for the range of decisions one can take.[651]

[646] S altman et al, *Decentralisation of healthcare: Strategies and Outcomes* (European Observatory on Health Systems and Policies Series, Open University Press: England 2007).

[647]Y uliani E L, *Decentralization, deconcentration and devolution: what do they mean? Compiled by papers presented at the Interlaken Workshop on Decentralization, 27-30 April 2004*. Interlaken: Switzerland. Available at <http://www.cifor.org/publications/pdf_files/interlaken/Compilation.pdf> accessed 24 January 2018.

[648] Saltman et al n 66.

[649] Bhuputra P & Thakur Harshad P, *Decentralization and health system performance – a focused review of dimensions, difficulties, and derivatives in India* (BMC Health Services Research 2016).

[650] Saltman et al n 66.

[651] Ibid.

The scope and level of discretion for the exercise of power and responsibilities is determined by the specific institutional set-up including the legal framework and the norms and routines that develop in the health system.[652] This is because, decentralization is often classified by the types of responsibilities that have been devolved as well as the level of autonomy granted thereof.[653]As the subsequent discussion will highlight, Kenya's constitutional framework provides a legal and institutional set-up for the transfer of power and responsibility in the context of health. The legal and institutional set-up is underpinned by various principles that provide for accountability and scope of discretion health-related decision-making. The principles for example include distinctiveness or autonomy between the different levels of governments.[654]

Second, decentralization is accompanied with the transfer of power and responsibility in decision-making is in relation the provision of health services. The term 'health services' should be understood in a broad sense as products or services so that decisions regarding health services may range from to arranging health care services, management, production to health care distribution and financing.[655] Health services, as already mentioned, are part of healthcare.

Third decentralization is executed by various actors who are involved in the transfer of power and responsibilities in health decision-making. As already intimated, the actors can be drawn from the public sector and may comprise of governments as elected representatives who make health-related decisions on behalf of the people or government institutions such as the MoH that provides healthcare services.

Collectively, the foregoing characteristics crystallize what decentralization is and by extension, inform the research conceptualization of decentralization as a building block of the right to health. Accordingly, the research conceptualization

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[652] Ibid.

[653] Hutchinson, P & LaFond, A. *Monitoring and Evaluation of Decentralization Reforms in Developing Country Health Sectors.* (2004). Bethesda, MD: The Partners for Health Reform plus Project, Abt Associates Inc.

[654] Article 6(2), CoK.

[655]Saltman et al. n 66.

of decentralization is that it involves the transfer of power and responsibility for health-related decision-making from the central to lower levels of government, which transfer can executed by public and/or private actors as representatives of the people; during the provision of healthcare services.

Against this backdrop, it is notable that decentralization may take different forms. The transfer can be within political levels (devolution), within administrative levels (deconcentration), from political to administrative levels (bureaucratization) or to relatively independent institutional levels (delegation/ autonomization within the public sector) and the transfer of responsibility to private actors (privatization).[656] A detailed examination of the different types of decentralization is beyond the scope of this paper which solely focuses on devolution. The next section briefly examines decentralized governance through devolution, as a building block of the right to health. The discussion is lays emphasis on how devolution bears resemblance with research conceptualization of decentralization being; (i) the transfer of power and responsibility from the central to lower levels of government which transfer is; (ii) to be executed by public actors comprising of elected government officials or government institutions such as the MoH; (iii) during health-related decision-making or in provision of healthcare services.

4. Decentralized Governance Through Devolution as a Building Block of the Right to Health

Devolution is a complex undertaking which derives different meanings and models in varying contexts.[657] In fact, it is suggested that there is no uniform model of devolution around the world.[658] Different models of devolution exist, and each country adopts a model peculiar to its need.[659] The models include: fiscal devolution, administrative devolution, political devolution as well as market

[656] World Health Organization. *Health System Decentralization; Concept, Issues and Country Experience*. World Health Organization: Geneva See also World Bank Decentralization Team, *What is decentralization* <http://www.ciesin.org/decentralization/English/General/Different_forms.html> accessed 24 January 2018.

[657] Odero Steve, 'Devolved Government' in PLO Lumumba, M.K. Mbondenyi and S.O. Odero (eds), *The Constitution of Kenya: Contemporary Readings.* (LawAfrica 2011).

[658] Ghai, Y.P & Ghai, J.C, *Kenya's Constitution: An Instrument for Change* (Kenya: Katiba Institute 2011)139.

[659] P.L.O Lumumba, M.K. Monday and S.O. Odero (eds), *The Constitution of Kenya: Contemporary Readings*. (Law Africa 2011).

devolution.[660] A detailed examination of the various devolved model is beyond the scope of this paper. However, it suffices to state that devolution is often defined as the transfer of power or functions from one level of government (usually the central or national government) to a lower levels of government such as the local government.[661] In some instances, devolution has meant a form of decentralization in which the authority for decision-making, functions and powers are transferred from the central government to quasi-autonomous units or levels of the local governments.[662] For example, the United States of America (USA) has a decentralized system of government at the federal, state and county or local levels. Similarly, South Africa has three levels of a decentralized government at the national or central, provincial and local government level comprising of municipalities and districts. Germany has a federal, lander and local government levels.[663] Other examples include the devolution of power to Scotland, Wales and Northern Ireland in the United Kingdom.[664]

The foregoing definitions seem to point to the fact that devolution bears semblance with some elements of the research conceptualization of decentralization being: (i) the transfer of power and responsibility for decision-making and (ii) the presence of actors, largely the government, to execute the said transfer. As the next section highlights, devolution in Kenya involves the transfer of power and responsibility from the national to the county levels, which in the context of this paper; relates to health-related decision making during the provision of healthcare services. In light of this, the next section expounds on devolved governance as a building block of the right to health in Kenya.

[660] Ibid.

[661] Ghai n 78.

[662] Odero n 77.

[663] Simiyu, F, 'Recasting Kenya's devolved framework for Intergovernmental Relations: Lessons from South Africa' in PLO Lumumba, Mbondenyi M. & Kabau T., *Devolution in Kenya: A Commentary* (LawAfrica 2016).

[664]Rico, A. & León, S., *Health Care Devolution in Europe: Trends and Prospect* (2005) Health Organization Research Norway: University of Oslo. Working paper 2005: 1.

5. Devolved Governance as a Building Block on the Right to Health in Kenya

As already noted, devolved governance refers to the transfer of 'power' and 'responsibility' usually from the national or central government; to lower levels of government comprising of local governments. This definition, as further intimated, means that devolution is also marked by three characteristics that bear semblance with the research conceptualization of decentralization as a building block of the right to health. These are: i) the transfer of power and responsibility from the central to lower levels of government which transfer is; (ii) to be executed by public actors comprising of elected government officials or government institutions such as the MoH; (iii) during health-related decision-making or in provision of healthcare services.

As already mentioned, the scope and level of discretion for the exercise of power and responsibility is determined by the specific institutional set-up including the legal framework and the norms and routines that are developed in the health system. As such, the realization of devolution is premised on the legislative framework created to facilitate its design and implementation.[665] Thus, in order to derive the methods, design and processes of devolution in any country one must examine the Constitution, ordinary law or administrative arrangements of the country in question.[666]Therefore, as the next section will highlight, Kenya's constitutional framework provides a legal and institutional set-up for the devolved governance of health. The legal and institutional set-up for devolved governance of health is also underpinned by various norms or principles that provide for scope and level of discretion in the context of devolution.

6. Constitutional Approach to Devolved Governance as a Building Block of the Right to Health in Kenya

This section critically analyses the constitutional approach to devolved governance as a building block of the right to health in Kenya.The analysis will focus on the three characteristics of devolution-(i) the transfer of power and responsibility from the central to lower levels of government which transfer is; (ii) to be executed by public actors comprising of elected government officials or government institutions such as the MoH; (iii) during health-related

[665] Ibid.

[666] Ghai n 78 at139.

decision-making or in provision of healthcare services. In so doing, the section also provides the principles that guide the scope and level of discretion for the exercise of power and responsibility in the legal and institutional framework for devolved governance of health.

As will be evident, other legal frameworks exist to supplement the constitutional approach to devolved governance of health in Kenya. The legal framework includes legislations such as the Transition to Devolved Government Act, the Intergovernmental Relations Act, the Health Act, as well as policies such as: (i) Kenya Vision 2030; (ii) Kenya Health Policy (2014-2030) and (iii) the Kenya Health Sector Referral Implementation Guidelines (KHSRS) and so on. The following section will largely focus on the constitutional framework for devolved governance since it informs the provisions of the said policies and legislation as the supreme law of the land. The provisions in the said polices and legislation will not be entirely ruled out. Instead, they will be used for illustrating constitutional provisions. In doing so, the section begins with a background to devolved governance in Kenya in which the key defining features thereof are highlighted. In the said highlighting, what will become evident is how devolved governance in Kenya has similar characteristics to the research conceptualization of devolution while at the same time provides the insights on how devolution arose under the Constitution of Kenya.

6.1 Legal Framework for the Devolved Governance of health under the Constitution of Kenya

The Constitution of Kenya (CoK) was as a result of a nation-wide referendum in which 67% of Kenyans voted 'yes' to a new Constitution on 4th August 2010.[667] The CoK was then signed into law on 27th August 2010. [668] From August 2010, Kenya operated under a new constitutional dispensation that introduced a new form governance known as 'devolution'. Devolution is thus one of the most significant features of the Constitution of Kenya.[669] In fact, amongst the national values and principles of devolved governance in Kenya is devolution. Article 10 (2) (a) provides one of the national values and principles of governance in Kenya as: 'the national values and principles of governance

[667] *Byl*, S., *Punia*, M., and *Owino*, R. *Devolution of Healthcare Services in Kenya*: Lessons Learnt from Other. Countries. (2013). KPMG.

[668] Ibid.

[669] Republic of Kenya, *Kenya health policy 2014-2030: Towards Attaining the Highest Standards of Health* (Ministry of Health: Kenya 2014).

include… sharing and devolution of power, the rule of law, democracy and participation of the people (emphasis added).

'Sharing and devolution of power' as well as the 'participation of the people' is seemingly echoed in the objects of devolved governance under Article 174 (c) and (h) of the CoK which state that:

The objects of devolution of government are:

> (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
>
> (h) to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya (emphasis added).

Article 10(2), Article 174 (c) and (h) of the CoK, when read together, begin to paint the picture on what devolution entails. Both articles somehow mimic the research's definition of devolution found in the previous sections. This has been through the usage of definitive elements such as 'devolution and sharing of power', 'giving people the power of self-governance', 'decentralization of State organs, their functions and services' and the 'participation of the people in decision-making'.

The previous section has noted that devolution is synonymous to decentralization. Thus, the section defined devolution in the context of health as characterized by:

> (i) the transfer of power and responsibility for health-related decision-making from the central to lower levels of governments which transfer is;
>
> (ii) to be executed by public and private actors largely drawn from the government as representatives of the people;
>
> (iii) during the provision of healthcare services;
>
> (iv) as guided by principles that define the scope and level of discretion for the exercise of power and responsibility thereof.

Given the immediate definition, it can be inferred that the definitive elements of devolution found in Article 10 (2), Article 174 (c) and (d) above render 'devolution and sharing power' to mean the 'transfer and sharing of power' which as we shall see, relates to health. Further, 'decentralization of State organs, their functions and services' from the capital of Kenya implies the 'transfer of responsibility' more so as it pertains to the provision of services; from Nairobi. Again, in the context of this paper, the provision of services relates to health.

Concomitantly, giving people the 'power of self-governance' implies that power belongs to the people, which is an aspect of devolution.[670] In fact, Article 1 of the CoK, which is arguably one of the starting points to understanding the legal framework for devolved governance in Kenya, captures the sovereignty of the people providing that:

All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

> (2) The people may exercise their sovereign power either directly or through their democratically elected representatives.
>
> (4) The sovereign power of the people is exercised at:
>
> (a) The national level; and
>
> (b) The county levels.

The provisions in Article 1(1) above imply that at the end of the day, it is the people who have the ultimate power; which is sovereign or above all other. However, the sovereign power cannot be exercised by the people collectively. Hence, there must be elected representatives per Article 1(2). It follows, the elected representatives conceived under Article 1(2) of the CoK can be found in the national and county levels of governance. Thus, per Chapter 7 and Chapter 11 CoK, the representation of the people through elected representatives can include politicians elected in the national and county government. Therefore, it is deducible that elected representatives at the national and county levels of governance are to discharge their functions and powers on behalf of the people. Thus, it is assumed that giving people the power of self-governance may enhance their participation in decision-making; which in this paper is health related.

[670] Rico & León n 85.

On this premise, it can be deduced that devolution in Kenya may be defined as involving:

a) the transfer and sharing of powers;

b) in order to give people;

c) the power of self-governance so as to enhance their participation in the exercise of state power during the making of decisions that affect them while at the same time; facilitating the transfer of power and responsibility of State organs and their provision of services from the capital of Kenya (Nairobi).

The immediate definition is what make devolved governance a building block of the right to health not just in Kenya but worldwide. Indeed, devolution has been recognized as one that allows communities to take part in making decisions that affect them through elected representatives, which in this case is health-related;[671] while at the same time making sure that power is not centralized.[672] This has also been the case for Kenya.

Prior to the enactment of the then Constitution of Kenya (CoK), Kenya operated under a constitutional dispensation that advanced a centralized form of government.[673]Since independence in 1963, centralization had been at the core of governance with power being concentrated in the central government based in the capital, Nairobi.[674] Sub-national entities at the provisional, district, divisional, locational and sub-locational levels of governance lacked autonomy in decision-making. They were merely an extension of the central government. [675] In the context of health, centralization was also rife under the Ministry of Health (MOH) based in Nairobi.

[671] Devas, N & Grant, U, *Local Government Decision-Making--Citizen Participation and Local* Accountability*: Some Evidence from Kenya and Uganda* (Public Administration & Development ProQuest 2003) 307.

[672] Saltman et al n 66.

[673] Simiyu n 83.

[674] *Byl*, n 87.

[675] Ibid n 93.

Thus, the provision of healthcare services, the procurement of medical supplies and payment of medical personnel remained largely centralized under the MOH.[676]

Centralized governance of health systems was criticized for regional and provincial inequalities in the distribution of health services, in resource allocations, and in the inequitable access to quality health services.[677] Thus, as Articles 10 (2), 174 (c) and (d) of the CoK above highlight, Kenya committed to decentralizing its governing structure through devolution. In the context of health, as discussed below, devolved governance has involved the transfer of power and responsibilities for the delivery of health services, from the national and county level of governance as well as its Organs comprising of health facilities; in order to allow for the participation of the people in managing their own health. [678]
The legal and institutional set-up and/or framework for devolved governance of health in Kenya is next examined.

6.2 Institutional Framework for Devolved Governance of Health under the Constitution of Kenya

Article 186 of the CoK is arguably one of the starting points for understanding the legal set-up for devolved governance of health in Kenya. As already intimated, 'devolution' is first generally characterized by the transfer of power and responsibility for decision-making from the national to local governments. As further intimated, in the context of this paper, the transfer of 'power' and 'responsibility' is in relation to for health-related decision-making or in the provision of healthcare services.

It follows, Article 186(1) specifically provides for the transfer of power and responsibility in the context of devolution. Article 186 (1) states that, '186. (1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county and powers of governments, respectively, are as set out in the Fourth Schedule.'

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[676] Byl, n 87.

[677] Bulle, A, 'Drivers Influencing Delivery of Decentralized Health Services in Kenya: A Case of Wajir County' (66) 2 (2015) The Strategic Journal of Business and Change Management at 571-614.

[678] Ibid.

The Fourth Schedule of the CoK arguably provides the institutional set-up for devolved governance of health. It allocates responsibilities to the national and county governments in the provision of healthcare services or in health-related decision-making. For present purposes, we limit the discussions to the functions that relate to the provision of healthcare services. The responsibilities for health are distributed between the national and county governments as illustrated in figure 2 below:

FOURTH SCHEDULE

Distribution of Functions Between the National Government and the County Governments

PART 1—NATIONAL GOVERNMENT

23. National referral health facilities

28. Health policy.

PART 2—COUNTY GOVERNMENTS

The functions and powers of the county are—

2. County health services, including, in particular—

(a) county health facilities and pharmacies;

(b) ambulance services;

(c) promotion of primary health care;

Figure 2
Source: Constitution of Kenya, 2010

From figure 2 above, it is evident that specific functions and/or responsibilities are assigned to two levels of governments. The allocation of responsibilities for health between the national and the county government crystallizes devolution as a building block of the right to health. On one hand, national government plays the role of leadership in health policy development; management of national referral health facilities; capacity building and technical assistance to counties;

and consumer protection, including the development of norms, standards and guidelines. On the other hand, county governments are responsible for county health services, including county health facilities and pharmacies; ambulance services; promotion of primary healthcare; licensing and control of undertakings that sell food to the public; cemeteries, funeral parlors and crematoria; and refuse removal, refuse dumps, and solid waste disposal. [679]

The preceding functions have further been unbundled under various legislations and policies such the Transition to Devolved Government Act, the Intergovernmental Relations Act, the Health Act, the Kenya Health Sector Strategic and Investment Plan (KHSSP), the Kenya Health Policy (KHP), the Kenya Health Sector Referral Implementation Guidelines (KHSRS) and so on. A detailed examination of the same is beyond the scope of this paper. Of importance in the context of this paper is the Health Act, the Kenya Health Policy (KHP) and the Kenya Health Sector Referral Implementation Guidelines (KHSRS). The Act and policies have been enacted to help the national and county governments realize devolved healthcare through the creation of 'referral health facilities'. Specifically, the Health Act begins by empowering the national government to establish policy guidelines for referral mechanisms.[680] The KHP and the KHSRS are therefore some of the policies that have been enacted to provide more details on how to implement the referral mechanisms. The referral health facilities are to act as organs of the national and county governments, as illustrated in figure 3 belo

[679] Republic of Kenya, *Kenya health policy 2014-2030: Towards Attaining the Highest Standards of Health* (Ministry of Health: Kenya 2014).

[680]Health Act 2017 Section 79.

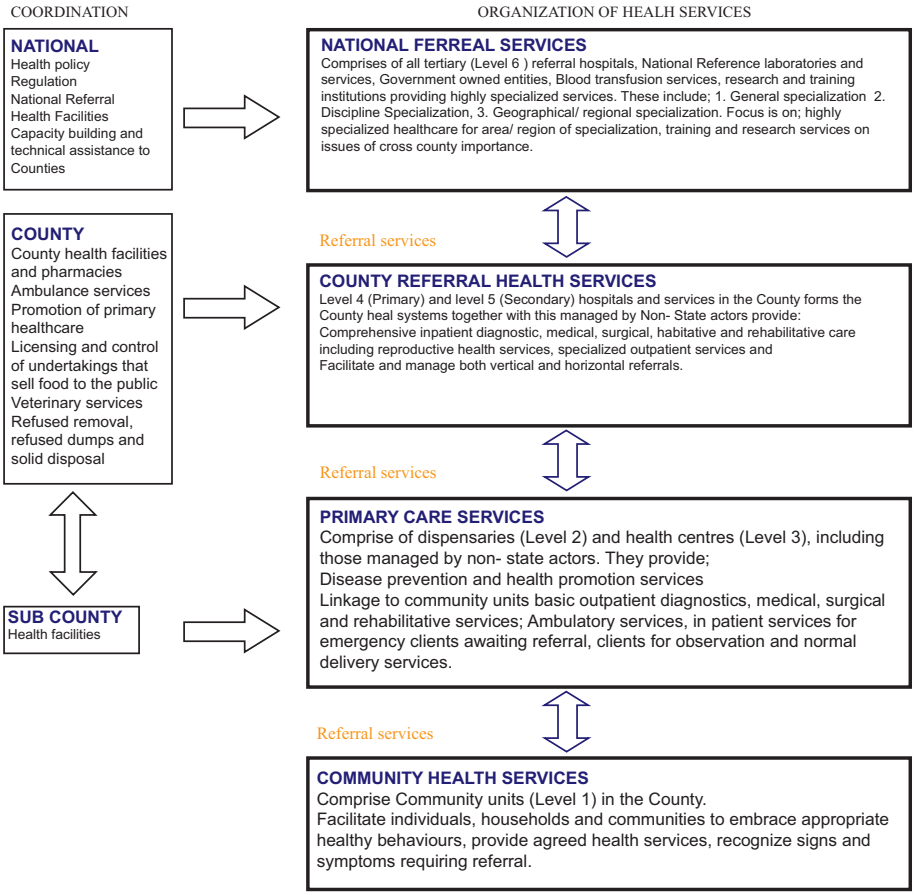

Figure 3
Source: Source: Kenya Health Policy 2014-2030 pg. 42

As figure 3 above illustrates, the referral health facilities are organized in a hierarchical manner. In the said hierarchy, the referral health facilities are further sub-divided into six levels as illustrated in figure 4 below:

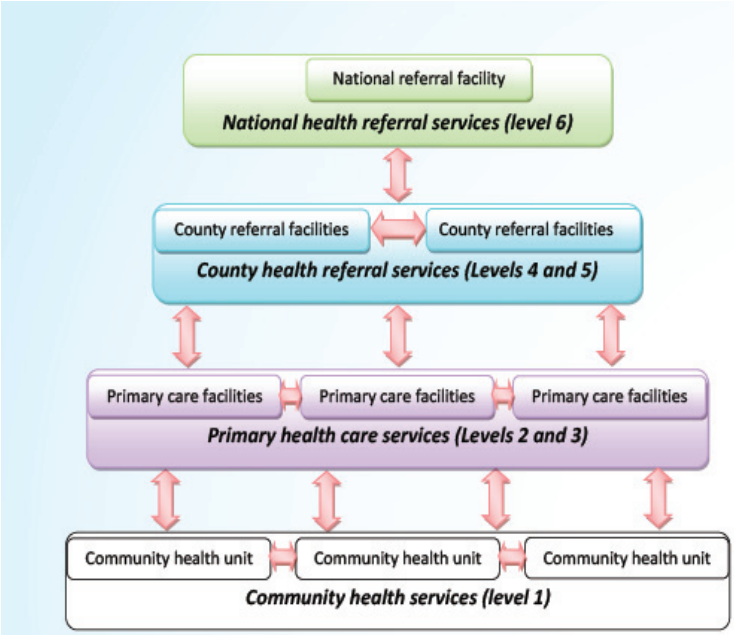

Figure 1: Referral linkages between different levels of care

Figure 4
Source: Kenya Health Sector Referral Implementation Guidelines (KHSRS), page 15

Each referral health facility oversees the provision of a specific category of 5 healthcare services depending on the hierarchy. Thus:

> Level one services comprises community units (CUs) that are the first point of contact with health services by community members. This level allows the community to define its own priorities so as to develop ownership and commitment to health services.
> Levels 2 and Level 3 facilities offer primary (health) care services and form the interface between the community and the higher-level facilities.
> Levels 4 and 5 facilities are secondary hospitals and form the county referral hospital facilities managed by a given county government. They offer a broad spectrum of curative services, and some are health training centers.

> Level 6 is tertiary hospitals and constitute national referral services/ facilities that are managed by the National government. They cater for more complex cases referred from other levels. They provide high-level specialist medical care, reference laboratory support, blood transfusion services, research and specialist training to health workers. [681]

From figure 3 and 4, it would seem other public actors have been brought in to play a role in the provision of devolved healthcare services alongside or on behalf of, the government. These actors are the referral health facilities that operate in a hierarchical manner when providing healthcare services. The hierarchy begins from the national level all the way to the community level. One cannot hesitate but infer that the hierarchical arrangement fulfills one of the objects of devolution being the participation of the people in health-related decision-making and services at the international, national and community levels. Such participation is also an underlying determinant of the right to health and by extension, crystalizes devolved governance as a building block of the right to health in Kenya.

To further cement devolved governance as a building block of the right to health, it is noteworthy that health facilities in Kenya can be private or public. In fact, statistics show that there are officially about 9,696 registered health facilities in Kenya comprising of a network of about 4,616 of health facilities that are owned by the public sector, 3,696 that fall under ownership of the commercial private sector and 1,384 that are owned by FBOs, NGOs or Community Based Organizations (CBOs).[682] This is as illustrated figure 5 below. Thus, as the previous discussion has intimated, devolution scrutinizes the role of the government viz other public and private actors involved in the pursuit of national health goals. The presence of public and privately funded health facilities is thus an aspect that builds on the right to health in Kenya through devolved governance.

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[681] Republic of Kenya. *Kenya Health Sector Referral Implementation Guidelines 2014.* Ministry of Health. page 15

[682] Netherlands Enterprise Agency. (2016). *Kenyan Healthcare Sector: Opportunities for the Dutch Lifesciences and Health Sector.* Study commissioned by the Embassy of the Kingdom of the Netherlands in Nairobi <https://www.rvo.nl/sites/default/files/2016/10/2016_Kenyan_Healthcare_Sector_Report_Compleet.pdf> accessed 24 January 2018.

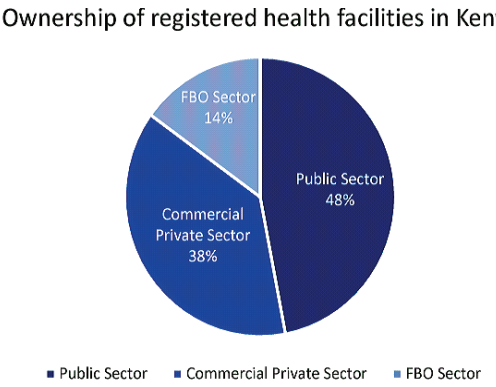

Figure 5 Source[1]

Given these figures 3, 4 and 5, it means that once again, devolved governance as a building block of the right to health is crystallized under the CoK. The crystallization is in form of the institutional set-up that comprises of public and private actors, who arguably also represent the people either in the provision of healthcare services or during the process of health-decision making. The question that therefore arises is what the scope and level of discretion given to the national and county governments during devolution. An answer to this is found in Article 6 and 189 of the CoK.

Article 6 as read together with Article 189 of the CoK; anchor the principles that are to guide the scope and level of discretion for the exercise of power and responsibility in the legal and institutional framework for devolved governance of health. Article 6(2) specifically asserts that the national and county Governments are to conduct their mutual relations on the basis of consultation and cooperation. Thus, in discharging their constitutionally defined roles or functions, both levels of government must observe and be guided by the principles of distinctiveness and interdependence found in Article 189(1). The principles are surmised below:

> 6. (2) The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.

[1] *Ibid*

> 189. (1) Government at either level shall—
>
> (a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;
>
> (2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities (emphasis added).

Collectively, Articles 6 (2) and Article 189 echo the fact that even though the national and county governments, distinct or autonomous institutions, they are interrelated and need to work together; especially when discharging their responsibilities in the health sector. In other words, even though each level of government is separate and distinct, they are interrelated.[683] None can work in isolation. Due to this interrelation, the Article 6(2) further mandates co-operation and consultation between the two levels of Government. Hence, the governments at the national and county levels are 'distinct and interdependent,' and are expected to undertake their relations through 'consultation and cooperation.'[684] It is now wonder then, as figure 2 highlights, both levels of governments have established referral health facilities that work together but remain autonomous in their health-decision-making.

In light of the immediate principles, it can be deduced that devolved governance as a building block of the right to health under the CoK is ultimately defined and characterized by a cooperative yet independent system involving the transfer and sharing of powers from and between the national and county government and its Organs comprising of referral health facilities; which transfer enhances the participation of the people in health decision-making and in the provision of health services; as an underlying determinant of health.

[683] Ipsa.

[684] Simiyu, n 83.

7. Conclusion

The constitutional analysis of devolved governance has highlighted three characteristics and two principles of devolution that by extension, underpin the building block of the right to health. The first characteristic is the fact devolution involves the transfer of power and responsibility from the national to the county governments. Second is the fact that the said transfer is executed by public actors comprising of elected government officials or government institutions such as the referral health facilities. Third, is the fact that the said transfer is executed by the either in the process of health decision-making or in provision of healthcare services.

Beyond that, the paper has noted that the foregoing aspect of devolved healthcare is guided by two principles that define the scope and level of discretion for the exercise of power and responsibility thereof. These are the principles of distinctiveness and inter-dependence. Both principles imply the fact that even though the national and county governments are separate and distinct, they are interrelated. None can work in isolation. Due to this interrelation, the CoK further mandates co-operation and consultation between the two levels of Government.

Collectively, the foregoing characteristics and principles are what have crystalized the constitutional approach to devolved governance in Kenya. Ultimately, the picture that emerges is that devolved governance in Kenya defined and characterized by a cooperative yet independent relationship between the national and county governments. The cooperative form of devolved governance involves the transfer and sharing of powers from (and between) the national and county government as well their Organs that comprise referral health facilities. By extension, this crystallizes devolved governance as a building of the right to health in Kenya.

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