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AK 119, Slip Road Westlands, Off Waiyaki Way
Cell: +254 734 676 678
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Email: info@almondprint.com
sales@almondprint.com
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THE HYPOCRISY OF HISTORY:
The Unknown Marvels of the Pre-Historic African to Which There is no Legal Recourse

Author: *Mwende Stardust*[*]

There is that great proverb
that until the lions have their own historians, the history of the hunter will always glorify the hunter.[1]

Abstract

African History has been told in foreign tongues, which have only justified colonialism as an act of charity to the primitive, daft African who has, they say, been incapable of democracy, self-determination and invention.[2] That, of course, is not true by any angle of reality, and yet, the African has been settled at the bottom of the world's food chain. Why? Because simply, history has been misreported by the hypocritical imperialist mind that could never fathom the grandeur of the African mind, and as a result, every African innovation in the prehistoric times has been credited to Arabs, Greeks and Europeans who were only 'Johnny-come-lately's' to the fullness of the African origins of language, art, medicine, stone-masonry and science.

This paper explores the Golden Age of Africa in the prehistory, and attempts a celebration at them. Legal questions will arise, and yet, the law in this instance becomes a weak thing on which we cannot lean. In the end, we might have to let the losses be where they are.

[*] **Mwende Stardust** is a Legal Tech Attorney at Lex Centre LLP

[1] Chinua Achebe, 'The Art of Fiction' (1994) The Paris Review <www.parisreview.com> 08 August 2023.

[2] Cheikh A Diop *Civilization or Barbarism. An Authentic Anthropology* (Lawrence Hill Books 1991) 84.

History was authored by colonial minds who dealt with the African by obliterating and completely erasing culture, fact, and the realities that were happening in the pre-historic times. All evidence that the Black African could ever have created the things that were found in her environment like sophisticated monuments, art, science, medicine and language. And when I say 'Black African', I speak with inclusivity, considering the breadth of similarities and differences with the chord of shared black linkages with the black inhabitants who have always lived here in Africa.

The Black African was already undertaking complicated medical procedures long before European apothecary found its footing.[3] Africans in Egypt had specializations, surgery and extremely skilled doctors for every organ of the body. Further, the chemistry of mummification is a science and that modern humans have been unable to decipher, despite all the technological advancements.

And yet, such African innovations have been credited to other races, and this raises the legal question: Is there a remedy for global deception? Is it misrepresentation with malice aforethought? Is it an innocent foible of history unattributable to anyone in particular? Or is it just a moral question to which there is no remedy?

We might have to sit at the Court of public opinion and decide, much as an injustice has been done, it is too pervasive, too vague and too painful. We might, sitting as judge and jury, have to pick up our satchels and shingles and decide to begin again. Build it all again, erect new monuments and this time, ensure that they bear our names and our indelible ingenuity.

2.The History

2.1 Where It all Begins

A friend of mine once asked me: 'Mwende riddle me this: While the rest of the world was creating aircraft and machines and technology, how come the only great thing we find in Africa are 'stick- men drawn or rocks?'

I was reeled, 'What? What do you mean?' I said and he replied 'Yes, what great invention are you proud of as an African?' I was incensed, Oh I was miffed! I thought for a bit. I came up short. Mt. Kilimanjaro, perhaps? Maybe? He…he, I couldn't think of anything I could brag about and say that it originated in Africa. Were we, really, sleeping through history? That set me off into research, wanting to know whether history begun with the Scramble and Partition of Africa, and whether there was much more to the Black African than what Euro-Centric history books would want us to believe. What sort of life was the African living

[3] Egypto-medicine practiced by black Africans has baffled scholars due to its expansive logical interpretation as well as herbal and 'magico-spiritual' depth. Recordings of ancient medicine reveal complicated medical procedures conducted by African medical practitioners well over 5,000 years ago. Ivan V. Sertima *Blacks in Science* (Transaction Publishers 1984) 127.

before colonialism? Might there be something we missed? And as it turned out, there's plenty of unrecorded creation which are the intellectual property of the Black African dating back to the pre-historic times.

2.2 Cradle of Humanity

To get us started, I will take you on a tour to a dusty, dry-as-bone village called Nariokotome in the Turkana Basin under the African sun. The earliest species of humans *Homo Erectus* who later evolved into *Homo Sapiens* lived here, over 200,000 years ago. Before then, earlier species of hominids (not fully human but truly aspiring to be,) were found in the Turkana Basin and in Koobi Fora in the Omo Basin.[4] It is a big deal when humanity originated from your bones. Africans are the originators of the Human Form and its DNA.

The most famous of these early hominids is the Turkana Boy/Girl which is the most complete discovery of a species ever found anywhere in the world. And that species, scientifically known as *Homo ergaster,* discovered in 1984, is estimated to be over 4.2 million years old.[5] You wonder why nobody told you this in your history class, that the world owes Kenya its existence, for right here in our doorstep is where humanity emerged.

To put it in perspective, the African genetics is the origin of all the races that exist on earth today. And yet, even with science and paleontology on our side, Euro-Centric history still insists on calling the Black African 'primitive'. Imagine if the Cradle of Humanity was anywhere else in the world.

My take is that with all the facts at hand, history and science have glossed over the significance of this fact and insisted on disempowering the African and consistently calling him to prove their worth, their contribution to the world's civilization. We are not talking about the Monalisa or the Eiffel Tower here, ladies and gentlemen, we are talking about the first known place where life begun! In other words, if you, the African didn't exist, then Humanity would never exist. That's how important African existence is.

The world has, in its skewed narrative, led the African to believe that the African is the least developed of the species, yet this is the species that set humanity in motion. My take is that that Western Narrative that obliterates Africa's importance as the origin of the human species has been most destructive and in an ideal world, Africa would be entitled to a remedy for accreditation of the source of the source of the human species, particularly, poor accreditation of human genetics.

[4] Unhabitat.org cradle_of_mankind_2021

[5] https://education.nationalgeographic.org/resource/discoveries-lake-turkana/

This speaks to a superior DNA capable of creating the various species of humanity that currently exist. This is not just about Africa, the place. It is majorly about ***Africans***, the people! The carriers of the DNA which has been capable of creating and populating the world with humans. Sit with that for a moment.

2.3 Journey to the Nile

Fast forward through time, from 200,000 years ago when the human species became aware of it's consciousness and its existence. It multiplied over the years and begun spreading across Africa, following the banks of the rich River Nile. Migration happened from Turkana, cutting through the Lake Victoria Region all the way past Uganda and finally, majority of the Black African Population settled in modern day Egypt.[6] What we know as mixed-race Egypt was the Black Person's capital in the prehistoric times. It was the center of trade and agriculture, on account of the Nile and its strategic positioning and access to the gulf trade area.[7] The Blacks thrived in their land, which was fertile and mineral rich.

2.4 Agrarian Revolution and Technology enabled Tools

The most important revolution in human history has been the move from hunting and gathering for livelihood, and entry into agriculture. Excavations have revealed that up to 18,000 years, while the Europe was still living its Ice Age, Africans lived as settled farmer, cultivating dates, barley and wheat.[8] That settled lifestyle had profound implications on the art and architecture that arose in Egypt, the black person's capital.

The crux of Africans' domestication of crops, animals and deliberate triggering of the Agrarian revolution marked the next level of human life. The African has never been a follower of fads, and in the prehistoric times, the Africa was at the center of human evolution.

The black person was a masterful farmer and trader and the early technology demonstrated in metal farming tools in the form of hoes, ploughs and irrigation pulleys which she created. The inhabitants who farmed along the Nile used advanced canoe systems which saved on irrigation time as well as served as waterways during the annual flooding of the Nile.[9] While the African is inventing these agricultural implements which are evidence of not only a settled lifestyle but a thriving black-smith industry, most of the world is still nomadic, and trapped in the ice age.

2.5 African Civilization and Architecture

Let me take you back. Imagine a black face, dark like the beginning of a new day. A Negro face if you will. Round, kinky hair and dark, dark like the beginning of the world. Put a body on it, average height, sometimes tall, firm and stocky, feet solidly planted on the ground. Maybe

[6] Cheikh A., Diop *The African Origin of Civilization: Myth and Reality* (1974 Lawrence Hill Books)
[7] ibid
[8] Ivan V. Sertima *Blacks in Science* (Transaction Publishers 1984) 31
[9] ibid

you have a picture of a man or a woman. Now, I want you to imagine Egypt and Tunisia, the northern most part of Africa. I want you to imagine that African in your mind, your great, great ancestor, cultivating a vast countryside of dates by the river Tigris. The land is fertile and the plants are lustfully green. Imagine her writing her rich story with a fish bone and ink. Imagine him carving his prosperous and powerful black pharaoh on solid rock. Most importantly, imagine our black, brilliant genius race, building the pyramids in Giza.[10]

The largest stone ever moved in the world's recorded history was moved in Egypt and was used to build the great pyramid at Gaza. It's square base initially measured 755 ft on the Ease, West, South and North sides and the base covered 13.1 acres.[11] the sharpness of the designs, perfectly aligned to the four cardinal points, reveals knowledge of physics, astronomy and mathematics. The same artistic and architectural grandeur of the colossal stone monuments found in Egypt has been found in Sudan and Zimbabwe, serving to provide evidence to the same genius of the African mind across the north and south of its spheres. It also reveals a highly organized society that enjoyed peace, Innovation and prosperity.

A civilization means an organized way of existence; where trade, industry, governance and a people's autonomy are established among a people and predictively requires self-rule, self-determination and self-actualization[12]. That was the Negro's way of life which the Arabs and Europeans admired and quickly copied in their own clusters.

In the modern times, the Dogon people in Mali have always asserted their astronomical knowledge of the existence of the star Sirius from times immemorable. Sirius A, the brightest star in the Northern Hemisphere and its dwarf star-sister Sirius B were only understood in 1930,[13] proving the veracity of the Dogon's knowledge of the existence of both stars.

2.6 The Akan, Mande, Hieroglyphics Writing Systems

Other than governance and a prosperous economy, the Black African had more to offer. Who do you think created the art of writing and shared it with the world? Yes, you guessed it, the African. I am sure you have heard of the hieroglyphics, which was a pictorial form of poetry and storytelling. This was the very first system of writing which was eventually copied and advanced by the Europeans and Arabs after the conquest of Africa[14] as I will discuss below.

Hieroglyphics traces it roots to the Africans in 3200 B.C. and incorporates a fully developed writing system which included the alphabet.[15] Pope, M said this in reference to Egyptian Hieroglyphics: "The simple consonantal voices are already present in full force in Egyptian writing, and it seems to have already possessed phonetic signs."[16]

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[10] ibid.

[11] Megalithic Masonry was a skill used in ancient Egypt and South America used to soften stone and make it malleable to work with. See 8 above, 67

[12] Cheikh Anta Diop, *The African Origin of Civilization: Myth and Reality,* (Lawrence Hill Books 1974)

[13] See 8 above, 27

[14] ibid

[15] Pope Maurice, '*The Story of Decipherment*', (E.A.T Publishers 1964) 102

[16] ibid

Even though the hieroglyphics is the most well-known method of writing in medieval times, African had several linguistic inventions up their sleeve. These include the Mande Script which was used in Niger, West Africa by merchants to keep their records.[17] Another unknown writing system is the Akan Script, invented and created by the Akan people located in the West African coast of Ivory Coast and Ghana.[18]

The Akan body of knowledge was encrypted in metal pieces which also served as body jewelry. It further encapsulated their values for the symbolism articulated things that live on air, land and sea, as well as the formless. The script was written in patterns which varied in arrangement and complexity.[19]

2.6 Astrology and the Sciences

The first scientific method of calculating time was documented in the Egyptian calendar which had 365 days, 12 months and 30 days with 5 festival days. Otto Neugebauer has termed this calendar as the 'only intelligent calendar in the history of humanity'.[20] Little is documented of the scientific inventions of African in the Southern Sahara, including the invention of the Steam Engine. Africans in the medieval times has already set up universities including the University of Timbuktu and Jenne in the Empire of Mali in the 13th Century A.D.[21] Recent research has shown that in the modern-day Tanzania, ancient Africans were blasting in furnaces and making steel only 1500 years ago, which metal was far more superior that anything at the time ever made in Europe.[22]

Ancient Africans were great scientists, way before Plato and Aristotle.[23] In fact, the two scientists studied in the great land of Chem (Kem/ Kemet), for that was the name of modern-day Egypt, modern-day majestic Negro (Black African).

In a highly censored Book, "Destruction of African Civilizations"[24] by Chancellor William, a black historian who has traversed the continent in search of information and has unearthed monumental truth, the author unearths a great time in the history of the black African where we were a shining monument for the world.

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[17] Winters Clyde, *'The Influence of the Ancient Mande Writing on American Writing Systems'* (Bull. de l'IFAN 1977) 941

[18] Jean Gabus, '*Ans d'Ethnologie a Neuchatel*' (P. Attinger 1967) 175

[19] Ibid

[20] Otto Neugebauer, *The Exact Science of Antiquity* (New York: Harper 1962) 67.

[21] Rene Taton *'History of Science: Ancient and Medieval Science*' (Basic Books 1957) 39

[22] P. Schmidt, D. Avery, '*Complex Iron Smelting and Prehistoric Culture in Medieval Tanzania*', (Science 1978) Reprinted in the Journal of African Civilizations 1, No. 1, April 1979

[23] ibid

[24] Chancellor William, *The Destruction of Black Civilization: Great Issues of a Race from 4500 B.C. to 2000 A.D'* (Third World Press 1987) 243.

Africa is where the African has always lived. No brainer, right? Except modern history continues to brainwash the African to believe that their ancestors slept through time before colonialism. The hypocrisy of History ignores all these grand achievements and begins it's telling upon the arrival of the colonial take over. As we have established, the African is thriving, building monuments, pyramids and tombs.

"What exactly happened to this great race, because honestly, we don't feel all that genius in the world arena?" You ask.

Here is what happened. The Negro lost her culture and her history.[25] Her spirit was splintered a thousand times through war, religion, enslavement and most times, hunger and thirst. But let me take you to the beginning.

3. Trade and Intermarriage

It all begun as trade, fun and games, until the Arabs, astounded at the success of the Kingdom of Kemet (as Egypt was originally named), decided to stay and settle in the Northern part of Africa. Intermarriages were rife, where industrious Bantu women adopted Arab names, and in a short while, there was the rise of light-skinned children who then adopted the Arab religion, Islam and they will call themselves Kemites, and later, Egyptians. Then the Greeks came and they too, settled. And so did the British and the rest of the Europeans.[26] The Arabs brought Islam and the Europeans brought Christianity and Africans, being deeply spiritual embraced both religions.

Egypt was now a cosmopolitan city which was world famous for its architecture, art, language and governance of the kings and Pharaohs. The visitors so admired the Black African ways, that they took it upon themselves to learn and integrate, as well as to export their culture and learnings.

Again, unbeknownst to the Bantu, the Greeks went as far as and white-washing the great African mythology.[27]

As time passed, the once all black kingdom was now speckled with lighter shades which become lighter and lighter as the years go by especially in the North. For the African, a guest was a brother, so the African shared all his wisdom, art, astrology, writing, and even with time, white leaders become accepted. [28]

[25] n25
[26] ibid
[27] ibid
[28] ibid

The brother (the Arab, the Greek, the Asian and the European) realizing the over trusting nature of the African slowly but systematically, edged out the Bantu of the fertile lands of Egypt and was pushed to the dry, rocky hinterlands and they were kept moving inwards all the way to East and South Africa through armed invasions.[29] The mixed white race which had been growing over centuries and now occupied positions of power took over Kemet and claimed all the glory and genius of the Bantu Negro, a race Osiris.

4. Armed Aggression

The Negro being edged out of the world's greatest civilization, Kemet, begun a dark era of suffering. From the land of milk and honey, the land of Gold and diamonds, land was violently captured and the strong men and women were taken captive as slaves, and those who survived were forced to flee for your lives. The Black Kingdom fell, and the conquerors wrote of the African:

> The African is a coward. He showed his back to his attackers, the African refused to fight.[30]

The African fell on the sword of her own goodness, her trust, her hospitality, her kindness. From the glory of Kemet into the unknown, kicked out of his homeland, the African crossed over jungles, hoping for survival. The once thriving Bantu was turned into a hunter/gatherer looking for water and food. It was a season of plunder where captured Africans were enslaved in their own continent and soon thereafter, cross-continental slave trade begun, which was fully fledged colonialism and takeover of entire African regions and people in the new imperialism that took place between 1833 to 1914[31] and beyond.

5. The Legal Question Arising: Is there a Remedy?

Bringing the focus closer home, the horrors of colonialism in Kenya have been demonstrated only at a miniscule level, and notably on the Mau Mau case[32] in which a settlement of £19.9M was reached. This case covered the period between 1952 to 1963, which covered actual crimes of murder, cruelty and violence. However, this is only a drop in the ocean, since the period in reference in this article run for centuries. Is there a legal remedy then? And more importantly, who bears the duty of the accurate reporting of history?

6. The Challenge of Proof

Historians have contested each other as to the accurate state of history, noting that none of them were alive at the time. History is based on paleontology, archeology and other types of research, and while some accounts of history have upheld matters as I have recounted, the

[29] n25
[30] ibid.
[31] Rodney, Walter '*How Europe Underdeveloped Africa*', (2012 Pambazuka Press) 182
[32] *Mutua* v *Foreign and Commonwealth Office:* "The Mau Mau Litigation – Justice at Last" (OxHRH Blog, 3 November 2015) <http://ohrh.ox.ac.uk/the-mau-mau-litigation-justice-at-law

same have been fiercely refuted. And you would understand why, because the status quo is and has been beneficial to certain peoples. If we are to rely on African research and African historians, then there is general agreement that history was indeed erased and/or mis-reported, and therefore veracity of proof would likely be achieved in that regard.

7. Choice of Defendant

There is research to prove burning down, destruction and vandalism of the museums in Alexandria which held precious history as to hos the Africans of the North and South rose to be the global civilization from whom the world drew its evolution and progress. Cultural objects which bore evidence of the origins of mathematics and writings, for instance the Akan gold weights[33] have not only been stolen and placed in foreign museums, but have as well been culturally appropriated beyond African borders.

The challenge arises as to who the defendant might be. African history in the prehistoric times features Greeks, Arabs, Romans, the English, the French, Persians and Portuguese, and all these, as is obvious are generalized categories. History has passed, and it has been over 3,000 years since the takeover of African Lands and effacement of their history begun. It has been carried on for so long a time that it is difficult to put a finger on who the perpetrators were.

8. Applicable Laws

While national and international might not anticipate or be applicable to the wrongs done in the prehistoric time, there is always the grasp towards the Law of Equity, which embodies the concept of reduced technicalities and legalese, and shooting right into the heart of the matter. The applicable concepts of Equity are as follows:

9. The Law of Equity

9.1 Equity does not suffer a wrong without a remedy[34]

While the courts of equity do not seek to punish, they embody the concept of restitution. This enables the innocent party to recover their loss and possibly be returned to the position they were in before the injury. Equity will at all times endeavor to avail a remedy where a wrong has been done. While it may be easy to establish the wrongs of history, as indicated above, the choice of defendant will make it impossible for the Law of Equity to apply itself.

9.2 Delay defeats Equity[35]

A person who suffers a wrong must be proactive and avoid laches in the search for Equitable remedies. While this is a continuing wrong, it is rather subtle in its nature, to an extent that

[33] Niangoran Bauah '*The Ancient Akan Script: A Review of the Sankofa*', (M.I.T. Cambridge 1978) 154
[34] Hackney, Jeffrey *Understanding Equity and Trusts* (1987 Fontana) 29
[35] Edmund Henry Turner Snell and Robert Edgar Megarry, Principles of Equity (25th edn, Sweet & Maxwell 1960) 24.

most Africans are not aware of how history has robbed them of their grandeur. There has been a 3,000-year delay as it is, and the question begs, is it still worth it?

9.3 Would Law and Justice be a sufficient remedy for Historical Trauma?

Our solutions to African problems do not lie in the prehistory, and if we have lived an age of genius in the past, we can live it again! If we figured out how to write, how to predict the weather, how to build a civilization and we taught it to the world 6,000 years ago, we can do it again. In the prehistory, our ancestors used hand and palm compasses to navigate the dangerous monsoons of the Swahili seas. If they did it then, what could ever stop us? Law and justice are not 'cure-all'. There exists, after all, the valiant human spirit that triumphs against all odds.

Conclusion

History has been unfair in its erasure and obliteration of African inventions, failing to give credit where it has been due, or intentionally withholding such information. Where honest reporting and documentation ought to have happened, there has been brain-washing instead and it has become a normal concept to refer to the Black African as 'primitive'. Art and recorded history have been deliberately burned down or stolen, spanning back to the days of the gleaming Alexandria.

The African has been fed a history that tells him that he is wanting, there is something unsatisfactory about her. The unfortunate fact of the matter is that there are no legal remedies for erased and mis-reported histories, especially in this age of the imperialist mindset has become all-pervasive. Yet, Africans must remember that in veins run the blood of a majestic people whose inventions set global civilizations in motion.

Before electricity was invented, our ancestors invented *human genetics and the varied races,* and then *fire*, and after that, the *first steam engine* and much more. We are the unstoppable 'Negro' race, a world upon ourselves.

APPRAISAL OF THE ROLE OF ADR PROCESSES IN ENHANCING ACCESS TO CIVIL JUSTICE IN KENYA; Court Annexed Mediation

By Victor Chianda*

Abstract

Alternative Dispute Resolution is a Constitutional imperative under Article 159 (2) of the CoK 2010 which explicitly recognises ADR and requires the Judiciary to adopt it as a principle and a practice. This paradigm shift has been recognised as crucial for effective administration of justice and resolution of a large percentage of disputes that arise in Kenyan society. The many challenges that have bedevilled the formal court system including high costs of litigation, complexity of rules and backlog have frustrated access to justice for the large majority.

Research on the unresolved justiciable issues of the majority poor has demonstrated a link between a lack of access to justice and their continued disenfranchisement within society. The paper attempts to analyse what constitutes access, why it has not historically been conducive to participation by non-legal actors or those without economic wherewithal. It analyses how ADR and in particular Court Annexed Mediation is being applied to foster, speedier and more efficient dispute resolution in Kenya and address some of the shortcomings of the formal court system that has locked out many. The programme of Court Annexed Mediation that has been rolled out by the judiciary in major court stations is expected to revolutionise uptake and use of ADR in court. The paper provides a discussion on its impact, strengths, opportunities and challenges and offers some recommendations on how it can be enhanced for greater effectiveness.
Key words; Alternative dispute resolution, Court Annexed Mediation, Access to justice. Court Annexed Mediation (CAM)

The Role of ADR Processes in Enhancing Access to Civil Justice in Kenya: Court Annexed Mediation.

* LLB (UoN), LLM (UNISA), MCIArb, CPM (Certified Professional Mediator) PhD, Candidate, UoN. The author is an Advocate of the High Court of Kenya. P.O. Box 1850-80200. Malindi. Kenya Tel 0721757809, chiandacompanyadvocates@gmail.com

1.0 Introduction

Disputes unlike wine do not improve by ageing. Delay in settlement or disposal of conflicting claims is a primary enemy of justice and peace in the community
Prof Paul Irdonijie (Nigeria).

Alternative Dispute Resolution can be defined simply as the methods of dispute resolution apart from litigation which can be used to resolve disputes with or without involvement of third parties[1]. They are voluntary processes which are enforceable by agreement of the parties and the methods vary from negotiation at one end of the spectrum to arbitration at the other end and myriad combinations in between.

They include, but are not limited to the following methods, listed from least to most formal;

- Negotiation
- Mediation
- Conciliation
- Early conference
- Expert determination
- Dispute review advisor
- Court annexed ADR
- Adjudication court annexed arbitration
- Arbitration
- Litigation

As one moves from the more informal methods towards the more formal, there is a notable increase in involvement of a third party in the resolution, the processes become more legalistic, take longer, become more expensive and chances of irreversible damage to the relationship between the parties increases. Due to challenges associated with litigation, it becomes vital to adopt and recognize alternatives to resolving disputes. [2]To deal with these bottlenecks in the formal court system, the application of ADR to dispute resolution is steadily being embraced and there is a rapidly growing body of ADR theory in Kenya.

Some pundits have faulted the expression ADR proffering that it implies these mechanisms are second best to litigation. [3]This is because by definition the process is said to be an alternative presupposing the existence of the main method of resolving a dispute. A different school of thought insists that ADR is a stand-alone enterprise whose functionality is not alternative to other dispute resolution mechanisms and whose existence predates litigation. [4]Indeed ADR is not a completely novel idea in the world and Kenya is a signatory to several international

[1] Bryan A Garner, *Black's Law Dictionary (11th edn, Thompson West 2019).*
[2] Ewa Wojkowska 'How Informal Justice Systems Can Contribute, Oslo;UNDP, Oslo Governance Center' (2016) 21
[3] P Fenn, *'Introduction to Civil and Commercial Mediation' Chartered Institute of Arbitrators Workbook on Mediation (2002) 50-52*
[4] Henry Brown and Arthur Marriot, *ADR Principles and Practices*(Sweeth & Maxwell 1993) 12

instruments promoting access to justice. [5]As provided for in the Constitution, ratified treaties and conventions form part of the Law of Kenya.[6]

Alternative Dispute Resolution has been said by some to be a restatement of customary jurisprudence which has been used for centuries elsewhere and is as old as civilisation; a case in point is the Greek legal structure which is over 3000 years old and civil disputes were resolved through mediation and arbitration[7].

ADR increases the degree of customer satisfaction, acceptance and legitimacy of outcomes by minimising the degree to which competing claims are framed in terms of winning and losing by shifting focus from procedures towards outcomes. Fair procedures enhance accessibility to effective remedies. The participatory nature legitimizes the process leading to greater acceptance, and adherence to outcomes. Presently, there has not been enough empirical research assessing its effectiveness and guiding its further application. However, as ADR gains momentum, its obvious advantages over conventional conflict resolution processes are becoming apparent and it is increasingly being touted as a panacea for the ills of litigation.

Existing literature is largely positive about the merits of ADR methods. Claims that ADR is a faster, less expensive route to more stable settlements are common and the indigenous Kenyan experience & jurisprudence on these methods is developing. The Constitution[8] envisions a multi-faceted, pluralistic judicial system that recognizes the existence of alternative dispute resolution and alternative justice systems alongside the formal justice system, able to resolve disputes at various levels.[9] The Constitution further provides that judicial authority is derived from the people, vests in and shall be exercised by the courts and tribunals established by or under the Constitution.[10]

History has shown that no method of dispute resolution can be efficient, equitable, and administratively practicable without the effort of all parties involved. All actors must work together to develop an effective conflict resolution framework and post the 2010 Constitution, attention of stakeholders in the justice sector has deliberately been shifted toward ADR methods alongside litigation.[11]

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[5] The Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Convention on Elimination of All Forms of Violence Against Women (CEDAW), International Covenant on Economic, Social and Cultural Rights (ICESCR) , the African Charter on Human and Peoples Rights (Banjul Charter), Protocol to the African Charter on Human and People's Rights (Banjul Charter), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol) and the Convention on the Rights of the Child.

[6] Constitution of Kenya 2010, art 5-6.

[7] Surridge and Beecheno 'Arbitration/ADR versus Litigation'(4th September 2006)

[8] Constitution (n6) art 159(2).

[9] ibid arts 112,159(2) and 189(4).

[10] ibid 159(2).

[11] Judiciary Mediation Manual 2018, The Judiciary Transformation Framework (JTF) 2012

1.1 A Brief History of ADR in Kenya.

Mediation, negotiation and arbitration have been used in Kenya since the pre-colonial era. During this period, dispute resolution among Kenyan communities was basically traditionally initiated and controlled.[12] Communities had their own systems of justice and indigenous techniques for settling conflicts which were not codified. African societies mainly relied upon restorative approaches through use of mediation and arbitration to keep the peace and maintain adherence to customary law and order. Traditional African culture relied upon methods that promoted co-operation and harmonious social relations hence the common saying 'it takes a village to raise a child'.

With arrival of the English and colonialism, methods of dispute resolution which the new rulers considered primitive, and inconsistent with a modern economy were discarded and a dual system developed. The colonial state courts applied English law whereas the Native Courts applied customary law to indigenous communities; focused on Family law, Land tenure and Succession. English Law was dominant; and became the lens through which all other systems were viewed, a case in point being the limitation of customary law through the 'repugnancy clause'[13]. The result was that dispute resolution mechanisms that had previously existed were deliberately muted by the colonial administration.

In Kenya like in most former African colonies the legal system is pluralistic. Sources of law include the Constitution, statutes, received laws, religious laws and customary laws.[14] The laws hitherto applied by communities pre-colonialism were all upon imposition of British legal systems relegated to application only in personal matters. Litigation become the dominant method of dispute resolution notwithstanding the existence of alternative methods.

The independence Constitution in 1963 recognised ADR as part of the country's legal system though alternative justice systems occupied the lower rungs in the legal ladder preceded by; the Constitution, English statutes of general application and Common Law until the revival of ADR through Article 159 (2) of the CoK 2010. African customary law and jurisprudence did not distinguish between criminal and civil disputes and conflicts of whatever nature were solved using similar mechanisms. Among the Kikuyu disputes were handled by a traditional council of elders or "Kiama" that settled disputes quicker, less acrimoniously, was flexible and addressed the interest of all parties.[15] Indigenous systems relying on elders played a fundamental role in dispute resolution and conflict management and made decisions based on traditional foundations and cultural practices[16].

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[12] Mohamed Adan and Rut Pkalya;, 'Conflict Management in Kenya; Towards Policy and Strategy Formulation' (2006) 8-10.; Ruto Pkalya, Mohamed Adan and Isabella Masinde, 'Indigenous Democracy; Traditional Conflict Resolution Mechanisms, the case of Pokot, Turkana, Samburu and Marakwet communities' (2004).

[13] The Judicature Act, s 3(2)

[14] M Ndulo, 'African Customary Law, Customs and Women's Rights' (2011) *Cornell Law* Publication 87

[15] Jomo Kenyatta *Facing Mount Kenya the Tribal Life of the Kikuyu* (1965) 95-124

[16] Judiciary Manual (n11)

With colonisation the previously existing informal structures were replaced or pushed to the periphery by adoption of Common Law. Customary institutions received only perfunctory recognition and only to the extent not regarded 'repugnant to justice and morality'[17]. Limited application was allowed in land cases and provision for assessors in murder trials and in marriage rites. The ensuing challenges in the post-colonial era have necessitated re-evaluation of Traditional Dispute Resolution Mechanisms and ADR and their recognition as legitimate solutions to dispute resolution in modern day Kenya. They historically had been viewed with scepticism and considered impractical alternatives in dispute resolution. The enactment of the new constitution deliberately sought to restore and promote use of not just alternative dispute resolution but also Traditional Methods of Dispute Resolution which hitherto did not have a comprehensive legislative backing.[18]

As things stand, there are multiple avenues of access to justice and majority of disputes are not resolved by formal courts[19] and there is an ongoing effort to institutionalise ADR through preparation of adequate legal and policy guidelines.

1.2 Efficacy of ADR in contemporary dispute resolution

The transformative 2010 Constitution not only imposes an obligation on the judiciary to promote ADR but introduces far reaching changes meant to institute social change and reform by addressing inequalities that have existed and which the state is meant to remedy. It endeavours to remove barriers to social equality and introduce a system that favours social justice. There is real doubt as to the capacity of the court system to address all the justice needs of our society. Courts are faced with numerous cases that ought to be resolved at other venues.[20]

The private sector and Judiciary have begun actively using the ADR methods of Mediation and Arbitration as practical alternatives to litigation which empowers parties by transferring disputes from the hands of the judges to litigants. ADR covers a range of choices which require parties to change their adversarial mind set inherited from the English colonial legal system, to principled negotiation as contrasted with the positional negotiation that is standard practice in courts. This paper discusses whether the emerging ADR methods and in particular CAM offers opportunities to resolve disputes more effectively than litigation.

Disagreement and Conflicts are an inevitable part of human social interaction and methods for their resolution have evolved over time. Before the introduction of British law into Kenya, the country applied principles of our customary law and traditional courts of elders, a system

[17] ibid.

[18] Kariuki Muigua, 'Court Annexed ADR in the Kenyan Context (...)' <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Annexed-ADR.pdf> accessed on 5 July 2022.

[19] Governance, Justice , Law & Order Sector (GJLOS) (2007) Report; see also ; Justice Needs and Satisfaction in Kenya Report (2017)

[20] Catherine Price, 'Alternative Dispute Resolution in Africa; Is ADR the Bridge between Traditional & Modern Dispute Resolution?' (2018) 18 *Disp Resol L.J* 393 https://digitalcommons.pepperdine.edu/drlj/vol18/iss3/2> accessed 20 October 2016.

of practical, home-grown remedies which focused on preserving communal relationships while at the same time resolving societal conflicts. The new constitution[21] mandates that we need to rediscover the old principles and dispute resolution practises and apply them in the present. This article attempts to evaluate ADR applicability in the Kenyan context and the impact on access to justice for the general populace with a particular focus on Court Annexed Mediation. There is a clear need for an in-depth quantitative and qualitative evaluation of Court Annexed Mediation and its impact on case backlog in the court system and access to justice.

In canvassing for the use of ADR as a tool for case management, two notable authors posit that "the primary case rests on the broad principle that resolution of disputes by consensus and compromise contributes to the wellbeing of society as a whole.[22] They argue that it was a maxim of Roman law that *'interest republicae ut sit finis litium'* that the interest of the state is that there be an end to litigation. Their view is that courts as a matter of public policy should encourage and enforce settlement.

Among the strengths of ADR is that its informal and flexible nature allows changes to be made in the legal system without having to wait for reform. The backlog of cases and inevitable delays experienced in litigation have made ADR an imperative in Kenya. The ongoing adoption of ADR and in particular Court Annexed Mediation is anticipated to assist the commercial & legal sectors by reducing delays, litigation costs, unlocking resources tied up in litigation and increasing access to justice. A paradigm shift is overdue, requiring parties to move away from the adversarial stance and adopt a less combative attitude to dispute resolution.

An encouraging development is that progressively, parties are beginning to see the benefits of involvement in some form of ADR. A large portion of commercial agreements presently include arbitration clauses resulting in the legally enforceable requirement to participate in a form of ADR. The question is whether ADR can actually deliver timely and cost friendly justice especially in a developing country where the majority of litigants lack adequate financial means. The hybrid model (an integration of both ADR and litigation for example in the ongoing Court Annexed Mediation programme) currently being implemented is predicated on the need, to ensure the marginalised are able to access reliable, simple and cost-effective conflict resolution mechanisms. ADR is seen as capable of expanding enjoyment of human rights, as a mechanism for re-engagement with and re-legitimising the state, reclaiming ossified customary norms and as a project to resituate the traditional as rational, by preserving and promoting cultures and preventing them from becoming 'stale'.[23]

[21] Constitution (n6) art 159(3).
[22] HJ Brown and AL Marriot, *'ADR Principles and Practice'*, (2nd edn, Sweet and Maxwell 1999).
[23] Alternative Justice Systems Framework Policy' published by the Judiciary; August 2020.

1.3 Access to Justice and Administration of Justice

Access to justice is the means by which persons resort to the avenue available for resolution of a dispute[24]. 'An efficient justice system is where justice is equally accessible to all and leads to results that are individually and socially just'[25] or to put it differently, the existence of a civil justice system able to resolve disputes in just, timely, effective and affordable manner.

This 'Access' issue is hotly contested among legal pundits and its meaning and objectives to the general populace remain controversial. The question is whether the goal is to increase people's access to the court process or enhance participation in the legal process generally. Kenya has experienced a dichotomy between the theory and reality of litigation mainly because poor and indigent litigants have been severely handicapped and their plight offers a glimpse at some of the larger systemic failings of the litigation process. Adversarial litigation processes together with its underlying assumptions such as ability to engage legal representation have traditionally hindered access to the majority of the population in. It presupposes equality in access to legal services by all citizens; free of discrimination and irrespective of their economic status, age, gender or other such distinctions. The reality is different. It's an open secret that real access for poor or indigent persons is a mirage and transformative change is required.[26] Economic barriers have undermined participation in the legal and political processes and institutions particularly by societies' poor and vulnerable not just though ability to afford legal assistance but also court fees which can be an impediment. Reform of the existing litigation framework is expected to broaden access for the majority. Cappelletti argues there are three main obstacles to access to justice; economic, procedural and organisational.[27] Key barriers to access include delays and backlogs, cost, complex procedural rules, adversarial nature that commonly destroys or undermines future relationships while at the same time failure to deal with the underlying causes of disputes as well as technical documentation requiring legal expertise to draft. Most Kenyans living in frontier regions are very far from institutions of justice.[28] On this point it is useful to note that a positive side effect of the Covid-19 restrictions on social distancing is ushering in of virtual court hearings which have become mainstreamed in the popular psyche and improved access to justice for those previously impeded solely by physical distance. It is now practical for a litigant who is overseas to follow up prosecution of a civil claim to its logical conclusion unlike in the past when the numerous adjournments would have rendered a similar claim an effort in utility. This however requires access to the internet and computer facilities which is gaining traction in Kenya.

[24] Constitution (n6) - arts 10, 48,50,159 & 174

[25] Cappalletti. & Garth, B. (1977). 'Access to Justice, The Newest Wave in the Worldwide Movement to Make Rights Effective'. *Buff Law Review,* 27, 11.

[26] Alternative Justice Systems Policy Framework 2020' Judiciary of Kenya

[27] M Cappalletti 'Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-To-Justice Movement' (1999) *The Modern Law Review,* 56(3), 282-285.

[28] BJ Mwimali' Human Rights Perspective of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya.' *(2015) 2(2) Law Society of Kenya Journal,* 1-11.

Unfettered access to justice is an ideal that inevitably benefits the entire society and its trickle down effects on the economy and good governance are evident in legally advanced jurisdictions. This has long been a pillar of the key development agendas. The concerns of the majority poor have not been a priority in the adversarial model in light of the fact that the litigation process was generally working for the lawyers and judges who designed and use it. There has been considerable progress in this regard with the establishment of the Small Claims courts. The experience of these 'downtrodden' is key in understanding the barriers to real access. This paper contributes to the conversation about the theory and practice of access to justice in a way that shifts the discourse about what increased access to justice should be and how it might be pursued in the context of ADR and particularly through CAM. The hope is to challenge the existing litigation framework particularly in terms of its failure to meet the reality for the general populace. In his classic essay written in 1976, Abram Chayes explained how a paradigm shift was taking place in civil litigation.[29] He chartered a move from the traditional private law model that was grounded in ideas of 19th century legal liberalism to a public law model of litigation that envisioned more flexible procedures and a broader role for the adjudicator. His analysis offered a new approach to thinking about the legal process. A similar approach needs to be taken locally by exploring the experiences and perceptions of litigants, as they grapple within the existing system of litigation *vis a vis* CAM, the growing backlog crisis and resulting need to re-evaluate the existing adversarial model. In the same way that Abram Chayes in 1976 charted a paradigm shift that was taking place in civil litigation, contemporary research suggests that another paradigm shift is taking place today that behoves a broader conceptualization of access to justice.

Different classes view access differently, for the middle classes, access can be viewed as improving through legal representation their chances of achieving a positive outcome in their legal matters as opposed to how indigent litigants perceive it. Among actors in civil society it is viewed as enhanced citizen's participation and their ability to engage meaningfully with legal institutions and processes.

Price posits that access to justice in Africa cannot be realised without strengthening alternative dispute resolution mechanisms.[30] Liberal thinking about access emphasises the role that the masses; the *hoi polloi* should play in the creation and operation of law. That dogma and procedure should not sacrifice participation by the general populace. The elephant in the room; the current case backlog has concretized the need to explore this question in a more immediate fashion.

[29] Abram Chayes, The Role of the Judge in Public Law Litigation' (1976) 89:7 *Harvard Law Review* 1281 <..>

[30] Catherine Price, 'Alternative Dispute Resolution in Africa: Is ADR the Bridge between Traditional and Modern Dispute Resolution?' *(2018) 18 Pepperdine Dispute Resolution Law Journal* 395-396 <https://digitalcommons.pepperdine.edu/drlj/vol18/iss3/2> accessed 19 October 2022.

Access to justice is a contested concept among policy makers and scholars. This continuing lack of agreement over the concept of access could be traced to an "evolution in thinking about what access to justice in a liberal democracy entails"[31]. The Constitution in Article 159 provides that "in exercising judicial authority, the courts and tribunals shall be guided by the following principles (c) 'alternative forms of dispute resolution shall be protected and promoted.' As a basic human right, access to justice involves moving beyond dry letter law to a wider examination of factors and conditions. It can be divided into two broad categories; Procedural access; meaning the right to a fair hearing before an independent and impartial tribunal; and substantive access which entails persons approaching the seat of justice obtaining fair and just remedies. To paraphrase Chayes "the traditional conception of access to justice and the assumptions on which it is based provide an increasingly unhelpful, indeed misleading framework for assessing either the workability or legitimacy of civil litigation as a realisation of access to justice."[32] In the late eighteen and nineteen hundreds access to justice was viewed essentially as "a right of access to judicial protection" which contemplated the formal rights an individual may have to assert or defend a claim.[33]

Statistical data in Kenya indicates that at least 2 million people will experience at least one legal problem within a 3 year period. Underlying this statistic is the fact that many individuals do not identify or characterise their problem as justiciable or seek assistance in addressing the problem even if they are able to identify the issue as legal in nature.[34]

1.4 Challenges in regard to Administration of Justice vis a vis ADR.

The Kenyan judiciary has committed itself in principle and recently in action through Court Annexed Mediation whose pilot phase was introduced at the Family and Commercial divisions of the High Court, to supporting ADR.[35] It's expected that embracing of ADR will have a transformative impact on the justice system. Doubts still persist exist however. Some litigants due to lack of proper knowledge view ADR with suspicion and ignorance about the efficacy of the processes or enforceability of the judgements; feeling a government appointed judicial officer is the more reliable option. The challenge is through civic education to create awareness. The ADR systems are still novel to many. It's useful to remember that the Constitution[36] categorically provides that parties' getting their day in court is an inalienable right and presumptively ADR processes and methods play second fiddle, remaining an alternative. A delicate balance is to be enforced for example in court sponsored ADR schemes such as the recently rolled out Court Annexed Mediation where a Mediation Registrar makes an assessment of cases fit for referral. The process sieves cases suitable for mediation and penalties are imposed upon parties who wilfully refuse to attempt reaching a resolution.

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[31] Roderick A McDonald, Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, W A Bogart & Frederick H Zemans (Access to Justice for a New Century-The Way Forward (Toronto Canada, The Law Society of Canada).

[32] Chayes (n29)

[33] Mauro Cappalletti and Bryant Garth eds *'A World Survey',* Vol 1.(Milan, Italy; Tipographia MORI & C 1978) 6

[34] William LF Felstiner, Richard L Abel and Austin Sarat, ' The Emergence and Transformation of Disputes Naming, Blaming, Claiming' (1980-1981) 15: 3-4 *Law and Soc'y R ev*

[35] Task force on Alternative Justice Systems to develop a National Policy on Access to Justice appointed by the then Chief Justice…. on 4th March 2016.

[36] Constitution(n6) art 50.

The Judiciary has engaged in recruitment of mediators in the recent past and support of mediation is expected from players in the justice sector with a vested interest in the success and efficiency of the judiciary. This is expected to breathe fresh air to the historically conservative legal sector, known to cling to outdated practises like wearing of wigs and gowns and referral to parties with 'lofty' titles which are intimidating and confusing to the man on the street, creating barriers to access. The expected reforms are expected to contribute to clearance of case backlogs and make redundant the adage that "justice delayed is justice denied"

Judiciary's growing reliance on ADR which has proved to offer some effective remedies is expected to bring down barriers to access.

Lowering the cost of access will be a transformative step and further the concept of open access to justice by lowering or reducing the price of entry through minimal court fees, virtual hearings, and reduced focus on legal protocols. It is said the persons who suffer the cruellest injustice are least able to afford the cost of litigation leading to disenfranchisement. The majority do not have the means or proclivity to access formal methods of dispute resolution; principally the courts and would rather take a contentious matter before the chief, a religious leader or a panel of elders for resolution. To date, litigation has not been mainstreamed in the popular psyche and is deemed as combat by other means, therefore dragging a family member or business associate to court carries with it very negative connotations and usually spells a death knell for an ongoing personal or professional relationship. This is because the adversarial nature precludes a win-win solution and the underlying causes of disputes are never addressed; in stark contrast to mediation.

The modern renaissance of ADR originated in the midst of criticism of vexatious adversarial litigation, loss of faith in adjudication and declining confidence in the professionalism of lawyers. Charles Dickens, the famous English author devoted a whole novel to the tale of an interminable law suit 'Jarndice and Jarndice' which grinds through the court process so slowly that by the time the suit is concluded there is nothing left of the inheritance the disputants were arguing about!

Frustration with adversarial legal remedies indeed dates back centuries as indicated by the often quoted line from Shakespeare's Henry VI where Dick the butcher offers Jack Cade the following memorable suggestion: "The first thing we do, let's kill all the lawyers"[37].

It is important to understand that while one of the goals of ADR is to reduce the congested court system, the main purpose is to broaden the range of mechanisms and processes used to assist in dispute resolution.[38] It has become increasingly clear and widely accepted that traditional adversarial channels are incapable of resolving many types of problems effectively. The lengthy

[37] William Shakespeare, *Henry VI,* Act IV Scene 2
[38] Pretorius Dispute Resolution 2; Maclons Mandatory Court Based Mediation 11.'

delays and cost associated with litigation and tribunal hearings has become legendary. They have proved to be costly to access, overly officious thereby grinding down the quality of procedures, unduly formal and in many cases inaccessible to members of the public.[39] This disillusionment with the status quo among virtually all types of disputants has greatly contributed to the increased appreciation of ADR processes. The CoK at Art 159[40] has recognised the need for less adversarial and more cooperative methods to be employed by the courts and has led the campaign by edict for their adoption. Although ADR is used by majority of Kenyans, and plays a complementary role to the formal justice system, some of the challenges include; lack of recognition; even though the constitution has raised its status to a judicial principle; it's yet to be fully recognised as a complementary arm in the administration of justice, the perception of exclusion of women, youth and marginalised persons and inability to handle certain disputes in a fair manner due to gender injustice, lack of a defined jurisdiction, perceived lack of adequate enforcement mechanisms, some traditions challenge general standards of human rights, lack of documentation of the process and its decisions, lack of knowledge and incorporation of human rights framework, lack of capacity and training for CAM practitioners, familiarity with disputants which can lead to bias or corruption by decision makers,

Others include; perceived lack of accountability; being unregulated it's seen to lack procedural fairness, undermining constitutional roles such as the office of the Director of Public Prosecutions. Some of its outcomes it is feared may not be consistent with constitutional and human rights standards. Going forward, measures should be put in place to mitigate these challenges.

Recently the role of ADR in the expeditious resolution of disputes has been recognised and the gamut of legislation that has been passed hitherto makes specific reference to the use of ADR mechanisms. The scope of application of ADR has also been extensively widened by the Constitution,[41] allowing for settling intergovernmental disputes by ADR mechanisms including negotiation, mediation and arbitration. Accessibility and expeditious determination of cases is a central determinant in administration of justice increasing the utility of ADR which can be conducted in local language and culture, involves community inclusion and participation, focuses on restorative justice, and creative remedies.

1.5 The Backlog Crisis Facing the Judiciary

Arguably the most common complaint regarding the judicial system today is delay in handling cases, which is said to rank even higher than corruption. It's clear the current system does not deliver swift justice. The average 2 year back log in civil cases and one year in criminal cases has a negative impact not just on public perceptions but also upon economic growth. The State of the Judiciary & Administration of Justice Annual Report 2018-2019 provides that the timeline

[39] International Commission of Jurists (Kenya Chapter) *Strengthening Judicial Reforms : Performance Indicator (Report)* (2003)
[40] Constitution (n6) art 159(2) (c).
[41] Constitution(n6) art 189(4).

from filing to judgement should be 12 months. The report further notes the backlog stood at 337,403 with the highest backlogs at the Magistrates Court and High court at 437,388 & 39,427 cases. These delays have been contributed to in part by low budgetary allocations due to austerity measures by government, lack of adequate infrastructure and trained personnel as well as rigid and complex rules with their origins in adversarial dispute resolution[42]. Litigation continues to be a prohibitive business cost. ADR is increasingly gaining acceptance not just in cost and time savings; but in affording practical and mutually beneficial solutions to problems. As backlog continues to increase its clear that traditional methods of dispute resolution, principally litigation may not be the panacea and there is need for more aggressive co-option of ADR to help deal with some of these challenges, among other interventions. These interventions have included hearing cases on first in first out basis, embracing plea bargaining, active case management, service weeks, bar-bench meetings and court-user committee meetings.

1.6 Introduction to Mediation in Kenya

Mediation is an informal process in which a neutral third party assists the conflicting parties to reach a voluntarily negotiated resolution of their dispute.[43] Mediation allows for the management of conflict with a more holistic approach which involves not just hearing the parties but allowing them to reach a decision. Agreement arising out of the mediation process is thereafter enforced as a court judgement and if the dispute remains unsolved it is referred back to court.[44] Mediation is not an entirely new concept. Kenya's history is based on multiple avenues of access to justice and only a small fraction of disputes are resolved by formal courts. CAM is one of the first major steps to institutionalise ADR and legal and policy guidelines have been developed to govern it. Court Annexed Mediation is a component of access to justice and is meant to give effect to Article 159(2) (c) which mandates the judiciary as a state organ to promote and give effect to ADR. United Nations Sustainable Development Goal 16 obliges signatories to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

Among the pros of Mediation are that it promotes access to justice, by emphasising restoration & preservation of relationships between litigants which may become strained or destroyed by the adversarial nature of litigation; win-win solutions are possible, Mediation is effective where the parties wish to maintain ongoing positive relationships in business or professionally. It facilitates expeditious and cost effective resolution of disputes by enabling parties at an early stage to determine whether commencement of litigation is in their best interests or not and allows litigants the option of litigation should mediation reach impasse. In other words the outcome is not definitive and where mediation does not succeed, parties can resort to litigation. The issues will thereby have been narrowed, saving court time and expense. It dispenses with rules of procedure and evidence reducing reliance upon lawyers and providing parties with creative

[42] Author The state of the Judiciary & Administration of Justice Report (2018-2019) 14.

[43] The US Equal Opportunity Commission, 'Facts about Mediation' <eeoc.gov/contacteeoc>. accessed 27 October 2022)

[44] Kathy Gonzales, 'What is Court-Annexed Mediation?' <http://www.janusconflictmanagement.com/2011//10q> accessed 10 July 2022.

solutions beyond judgements and decrees which are sometimes beyond the scope and powers of judicial officers. These can be customised, practicable options such as contract alterations or even in some cases, apologies. Mediation is further, not bound by rules of evidence or limited to what is legally relevant. Parties are able to minimise legal costs. It further, facilitates value maximising settlements and is known to reach quicker settlement than litigation.

Mediation is suitable where there is unequal financial power between the parties; because the stronger party may not be able to dictate the outcome of the mediation as easily as litigation, by for example prolonging the process unnecessarily and holding the other side to ransom. The informality of the process recognises the parties' underlying issues, making sure the outcome of the dispute is focused on interests. Parties are usually more relaxed, willing to negotiate, and compromise. Self-determination means the mediating parties are expected to make their own informed decisions on settlement options. Failure of Mediation is not an end in itself because even where parties must resort to litigation, the issues will have been identified, and isolated, and commonly the stance of the parties will have softened and become more conciliatory. It promotes communication between the parties, positively affecting pre-trial proceedings and lawyers who participate in the process are more co-operative in court, accustomed to defending their clients' interests and not positions.[45] High compliance for mediated solutions is attributed to open communication between parties.[46]

Mediation might not be suitable for intense and complex disputes between hostile parties; lacking the coercive control needed to guide the parties into constructive decision making.[47] Or for example where urgent intervention is needed to right an injustice. Mediation is also not appropriate in disputes where there is a clear legal principle governing a dispute.[48] Or where a party feels they have a clear-cut case and want to create a binding precedent with the outcome. It similarly does not fill the gap in disputes where legal precedents and community standards are absent. The same applies where there is a clear legal question at hand, where there are hidden motives or the parties are not in a healthy emotional or psychological state.

1.6.1 The Court Annexed Mediation Programme from Pilot scheme to Present.

Numerous litigants have been directed by the court to pursue dispute resolution outside the court process and the ensuing agreement enforced as a court judgement since the rollout of the CAM programme. This formal form of mediation directly administered by the court was introduced as a pilot project in 2016 and proceeds officially upon the completion of the Mediation Pilot Project[49], the programme was rolled out in other court stations in the country including[50] Kisumu, Nyeri, Kakamega, Eldoret, Nakuru, Mombasa, Kisii, Garissa, Machakos

[45] Wall James and Anne Lynn, Mediation, a Current Review' (1993)1 *The Journal of Conflict Resolution* 160-194 <..>
[46] Lawrence A Nugent J. Scarfone C 'The E ffectiveness of Using Mediation in Selected Civil Law Disputes; a Meta-Analysis (Canada Department of Justice 2007).
[47] Boulle and Rycroft. Mediation 73
[48] ibid 74
[49] Government of Kenya, Kenya Gazzete (1890, 24 March 2016) 24.3.16 vide Gazette Notice No 1890
[50] Gazette Notice 6869 of 2017

and Embu. CAM has also been expanded to other court divisions including Environmental and Land Court and Children's Court.[51] Per the judiciary's records, in the financial year 2019-2020 a total of 4,315 matters were referred to mediation with a monetary value of over Ksh 7 Billion and an average settlement duration of 90 days was recorded.[52]

The present status of the law is that a court may of its own motion or at the request of the parties adopt and implement any other appropriate means of dispute resolution including mediation for the attainment of the overriding objective envisaged under sections 1A and 1B of the Civil Procedure Act[53]. Where in exercise of its powers under the 2010 rules, the court adopts an alternative dispute resolution method, it may make such orders and give such directions as may be necessary to facilitate such means of dispute resolution.[54] Court Mandated Mediation marks a milestone in civil justice administration in Kenya. The procedure is now a precondition to litigation and parties in a litigation process can either be mandated by a court or strongly advised to make use of mediation before utilising the adjudicatory process. Therefore court based mediation can be seen either as an optional or mandatory process. It works by screening and referral of suitable cases. The process is meant to be concluded within 60 days from the date of referral which may be extended by 10 days. This extension is given by the deputy registrar, kadhi or magistrate, taking into account the number of parties, complexity of the matter, or with written consent of the parties. A court may at any stage of court proceedings make an order requiring parties to participate in additional mediation. The mediators' roles are to facilitate resolution of the dispute, prepare notices as stipulated under the Practise Directions, prepare rules of engagement, a certificate of non-compliance where necessary and at the conclusion of the process prepare a report and or a settlement agreement. Each division of the High Court is expected to have a mediation judge tasked to handle interlocutory applications arising during an ongoing mediation as well as a deputy registrar, magistrate or Kadhi designated to handle mediation matters.[55] The role of this judicial officer shall be to screen all matters, place interlocutory applications before the mediation judge, ensure timelines are met, maintain the mediation register, ensure compliance with the practice directions and substitute a mediator who opts out.

The parties' to a mediation are expected to file a case summary, attend sessions, participate in good faith, observe the rules of engagement and sign a mediation agreement in the event of settlement. Matters filed after commencement of the Mediation Rules undergo the usual case registration and filing process. A mediation reference file is opened which contains all documents filed during the course of the mediation. A mediator is to be appointed within 7 days of completion of screening and the parties are to file a case summary within 7 days of receipt of notification and thereafter the process of mediation is set in motion. A Sanction Notice may be issued to a party who fails to comply with the preliminary directions.

[51] Judiciary Republic of Kenya, 'Judiciary Case Monitoring Report' (2019)
[52] The Judiciary 'Finance & Administration Subcommittee Report Financial Year 2019/2020' (2020)
[53] Cap 21, Laws of Kenya, Order 46 rule 20(1).
[54] Ibid Rule 20(2).
[55] Judiciary Manual (n11) p 3

During the Mediation sessions, the mediator; issues guidelines for the process, prepares the Rules of Engagement, and conducts the mediation. The mediator prepares a report within 10 days of the conclusion of the mediation and a Settlement Agreement in the event the process has been concluded successfully. Parties do not pay the mediator's fees under this process.

The mediator is without adjudicative power; does not act as a judge; and cannot decide on behalf of the parties, or force them to reach an agreement. He or she merely guides the process and the parties are responsible for reaching an outcome. To the naysayers; Court mandated mediation is therefore not an oxymoron because the parties have autonomy in arriving at decisions themselves, otherwise the process would not be mediation.[56] The parties are guided towards mediation but cannot be forced to voluntarily agree to a result.

1.7 The Legal Framework

There are several (other) laws governing the use of ADR mechanisms in the judiciary beginning with the Constitution which is the supreme law and guides all organs of state. Below is a brief look at some of these laws;

1.7.1 The Civil Procedure Act & Rules Application in CAM

The Civil Procedure Act was amended in 2012 to inter-alia, give effect to CAM and enable referral of cases to mediation. Numerous provisions have been introduced under the Civil Procedure Act governing use of ADR in conflict management. Section 1A (1)[57] provides that the overriding objective of the act is to facilitate the just and expeditious handling of matters. The judiciary is enjoined to exercise its powers and interpretation of the Civil Procedure Act to give effect to the overriding objective. This provision can also serve as the basis for the court to employ rules of procedure that provide for use of ADR mechanisms to ensure they serve the ends of the overriding objective.

Establishment of the Mediation Accreditation Committee (MAC) is provided for with duties to propose rules for certification of mediators, maintain a register of qualified mediators, enforce a code of ethics and set up training programmes for mediators.[58] Cases may be referred to mediation if a party requests, where it is deemed appropriate or if required by law[59] and a resulting settlement agreement is unappealable and enforced as a judgement of the court. This Committee[60], is an independent body established under the Civil Procedure Act and its affairs are administered by the Mediation Registrar.

[56] Vettori,] Stella, 'Mandatory Mediation; An Obstacle to Access Justice?' (2015) (15(2) *African Human Rights Law Journal* 355-377

[57] Civil Procedure Act (n53)

[58] ibid s59A

[59] Civil Procedure Act (n53) s 59B.

[60] ???

Mediation Rules are now codified in the CPA and the necessary practice notes and directions have been issued, to facilitate Court Annexed Mediation in Kenya. The Mediation Pilot Project Rules were gazetted on 9.10.2015[61] providing the framework for CAM, subsequently amended to apply to all Civil actions filed in the High Court, Environment court, Employment and Labour Relations court, Subordinate courts and Tribunals throughout the country.[62] The statutory basis for use of mediation in respect of court proceedings is order 46 of the Civil Procedure Rules, which regulates arbitration under order of the court and other ADR. The legal framework is intended to regulate the practice of mediators to protect parties from professional misconduct, negligence or conflict of interest.

1.7.2 The Judiciary Mediation Manual and other Laws affecting CAM

The Judiciary Mediation Manual serves as a guideline for the implementation of CAM by setting out standards, best practises and expectations for all persons involved in the process. It provides standardized procedures for processing of files referred to the CAM process, defines the role of all actors and ensures accountability. The second edition of the Manual (2018) was revised to facilitate rollout of CAM across the country.

Mediators are appointed by the Deputy Registrar.[63] In the previous guidelines, parties stated their preference from 3 recommended mediators. However, this process was eliminated because it contributed to delay in adherence to mediation timelines. A noted demerit is that the voluntariness of mediation is undermined and there's some loss of autonomy by parties. Mediation ends when parties execute a settlement agreement, where the mediator determines that further conciliation is not feasible or when the parties submit notice in writing of their intention to discontinue the mediation process.

The proposed Alternative Dispute Resolution Bill 2019 proposed by the Senate, upon passage is expected to become the overarching statute on ADR in Kenya. The Bill proposes filing of an Alternative Dispute Resolution Certificate at the time of instituting judicial proceedings or entering appearance stating that an advocate has advised a party to consider ADR. The court may take this into account later when making orders as to Costs or Case management. The Bill further provides that referral of a dispute to ADR shall serve as stay of the proceedings.[64]

The Mediation Bill 2020 pending before the National Assembly makes provision for settlement of all civil disputes by mediation. It also seeks to consolidate all provisions on CAM by amending the Civil Procedure Act to replace the Mediation Accreditation Committee with the Mediation Committee to take up regulation duties

[61] Vide Gazette Notice 1890
[62] Gazette Notice No 7263
[63] The Judiciary Mediation Manual, Rule 4
[64] Section 34(1) ADR Bill.

There is in addition a draft Alternative Dispute Resolution Policy 2019 under development which seeks to provide a national framework for dealing with all forms of ADR both in criminal and civil disputes. Among its proposals is creation of a National ADR Council to implement the policy and strengthen the sector.

The United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) was enacted by the General Assembly of the UN and applies to international settlements resulting from mediation.[65]

The UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002) "UNCITRAL Model Mediation Law" which serves as the skeleton framework for states to adopt while enacting legislation on mediation.

1.7.3 Justification for Court Annexed Mediation.

Several years after the rollout of the Judiciary sponsored CAM scheme, an investigative evaluation of the systems and role of CAM in dispute resolution in Kenya is necessary. It should include recommendations on how the capacity of actors and various institutions can be enhanced to effectively deal with conflict and disputes within the legal framework. There is need to take a close look at the policy and legal framework of CAM, evaluate the level of customer satisfaction, recommend appropriate policy and legislative reform strategies in order to establish how the current frameworks are suited to deliver equal access to justice by delivering timely, effective remedies. A comparative study that draws from established practice in settled jurisdictions and international best practice should be made and used to guide appropriate reform measures. CAM is relatively novel in Kenya and as yet there is a thin existing body of academic work to draw conclusions from, being uncharted territory; as an emerging area of law in Kenya. It has nonetheless clearly had a positive impact in enhancing access to justice for the general populace. Further research is necessary to advance the state of knowledge through a critical qualitative and quantitative analysis.

1.7.4 Status, Opportunities and Challenges of CAM

There is need to review the challenges and opportunities of CAM and its potential to address some of the issues bedevilling the judicial system. Policies and laws need to be developed to deal with challenges in the effective application of CAM including funding, lack of trained personnel, lack of infrastructure, feared loss of autonomy since 'court mandated' interferes with the basic voluntariness of mediation, there is also need for training litigants on what mediation entails. Lack of reimbursement provision for legal fees implies extra costs to the litigants and

[65] United Nations Convention on International Settlement Agreements Resulting from Mediation art 3.

there is no provision of taxation of costs even where a mediated agreement is reached. Mediation also risks being a court process because after negotiation and even settlement, parties have to return to court for enforcement. Operationalization will require public awareness campaigns. Widespread adoption of ADR will lower the cost of accessing justice. Training of advocates and judicial officers on mediation should be mandatory.

The writer posits that CAM is an important tool for enhancing access to justice and as such, its application in the judicial system, by creating proper legal, policy and institutional frameworks, may be a panacea to some of the most pressing problems bedevilling the sector. CAM has the potential to open up access to justice and improve the welfare of the people. Optimal cooperation from actors in the justice sector shall be necessary coupled with political good will both in the justice and commercial sectors.

In the conservative legal community, orientation to ADR processes requires time, exposure and re-education. There have been fears among advocates that ADR represents 'Another Drop in Revenue' or 'Another Disastrous Result' and is a threat to their income as gatekeepers of the litigation process. Presently, the signals are that mediation has a net positive effect and the 'bargaining in good faith' form of thinking needs to be explored. This supports the thesis posited that procedural attributes of mediation enhance the legitimacy of the justice system.[66]

The adversarial model compels counsel as an advocate to pursue maximum compensation and in spite of evident social costs, advocates get locked in a proactive stance. Unable to make a paradigm shift, lawyers attend mediation proceedings only to defend their legal positions without exploring avenues for settlement and finding solutions. Again, the traditional Law School curriculum focuses on combative and adversarial approach to disputes, at the expense of more holistic and contextualised understanding of grievances. Early exposure to ADR; mediation and negotiation leads to creative thinking and produces more effective lawyers by imparting collaborative skills necessary to obtain concessions and forge settlements. There is a need to reform legal education to de-emphasise litigation and to prepare future lawyers to learn how to negotiate settlements and more advocacy to persuade litigants to amicably resolve their disputes. This will facilitate courts to clear their dockets and allow a better dispensation of justice. It is a practical alternative to a trial which is a win-lose proposition. Some judicial officers do not realise that mediation was introduced to help them unclog their dockets not to undermine their power to adjudicate. That instead it is meant to encourage engagement in law making and law administering institutions by the wider populace. Hopefully the end result should be "the returning of official law to ordinary people"[67]

[66] Mc Ewen and Maiman (n 15) 11-49.s
[67] Macdonald (n 20) 43.

As regards comparative examples and societies that have previously dealt with these challenges, Nigeria is a good example of an African common law jurisdiction applying ADR strategies. Every year the CJ sets a settlement week during which specific courts facilitate settlement of listed cases through ADR.[68] CAM in Nigeria is practised as part of a multi-door courthouse framework with ADR centres complimenting courts.[69]

Down south in South Africa, the principle of mandatory court based mediation is regulated by a draft set of mediation rules approved by the South African Rules Board on 19.11.11. The draft rules regulate court based mediation in both the High Court and lower courts of South Africa.[70]

1.8 Conclusion

The paper has looked at the existing body of knowledge with regard to CAM, as well as practices and challenges facing its implementation which ought to be considered for improvement. From the results of the CAM project the value of mediation is self-evident in dispute resolution and particularly allowing parties opportunities to develop home grown solutions and create win-win situations. It has already proven to be efficient and effective in responding to the needs of the people in resolving disputes and records higher levels of satisfaction among parties. The benefits have been felt in the commercial sphere through the country's improved ranking in ease of doing business[71] and improved judicial timelines.

In further pursuit of analysing CAMs impact on dispute resolution, there is a need for recommending, legal and regulatory policy formulations and comparison to jurisdictions that have managed to effectively adopt and incorporate it to further streamline its local application. Thus far, a critical analysis reveals that CAM is enroute to enabling facilitation of the constitutional vision of expanded freedom, inclusive, equitable and balanced access and outcome of justice for all in Kenya. The future of CAM/ADR in Kenya is bright and promises to bring about a society where disputes are disposed more expeditiously at lower cost so that the ultimate goal of justice not only being done but seen to be done is achieved.

[68] PM News '300 Backlog of Cases in Lagos to be Cleared'(November 16 2011)

[69] Ezeanya Ann Ugonna, 'The Legal Framework of Multi-door Courthouse in Nigeria and Juxtaposing the Rules of Professional Conduct and High Court Rules Provisions with Respect to ADR

[70] Maclons 'Mandatory Court Based Mediation' 120

[71] Trading Economics, 'Ease of Doing Business in Kenya' <https://tradingeconomics.com/kenya/ease-of-doing-business> accessed 19 October 2022.

EXPLORING THE ALIGNMENT OF THE KENYAN CHILDREN ACT, 2022 WITH THE CONSTITUTIONAL PARAMOUNTCY PRINCIPLE, AND THE THREE OPTIONAL PROTOCOLS TO UNCRC

*Alice Wambui Macharia**

Abstract

This study explores how the 2022 Children Act aligns its objectives with the paramountcy principle under the Kenyan Constitution, 2010, and the UNCRC's Three Optional Protocols. The paper provides a background to the study at the national level, followed by brief literature on initial conceptualization of the child internationally. It then examines the Constitutional provisions domesticating UNCRC among other international Conventions, then a background of the UNCRC with particular emphasis on the UNCRC's Three Additional Protocols. The paper then delves into exploring the adequacy of the Act in protecting the Kenyan child. In terms of the scope, this paper limits itself to exploring the Constitutional provisions specifically focusing on the child. It is argued that despite making the elaborate provisions, without a purposeful undertaking and commitment to practically apply the same, the protection remains only in theory.

Key words: Child, Children Act 2022, Constitution, Optional Protocols, Protection, Rights, UNCRC

Background to the study at the national level

According to UNICEF, Kenya is home to over 24 million children currently.[1] As a nation, Kenya is emerging from a place where a child was mostly viewed as a source of wealth for the family, with girls being valued for the anticipated dowry payment upon being married off, and the boys for their herding agility but most importantly, as the ones entrusted with perpetuating the family lineage. Men were allowed to marry as many wives as they were able to take care of in an attempt to sire many children. Indeed, the man with the largest family and livestock was often considered the most wealthy and influential among his peers.[3] Arguably, this initial conceptualization of children as economic enablers for the community as opposed to equal holders of rights goes a long way in explaining why most of the children's rights and interests are routinely neglected in the wider scope of things in the justice system.

* Dr. Alice Wambui Macharia PhD King's College London, (UK), LLM UoN, Post Grad Dip, (KSL), LLB Moi University. is an advocate of the High Court of Kenya, and a Magistrate deployed at the Kenya Judiciary Academy, and an accredited Mediator. **Email:** amacharia19@gmail.com, **Phone Number:** 0716217431

[1] UNICEF data available at https://data.unicef.org/how-many/how-many-children-under-18-are-there-in-kenya/ accessed 12.07.2023

[2] This information was passed down to me by my late maternal grandmother, Felister Nyambura Gichuhi (Wagoni) as she was fondly referred to by close friends and family members.

[3] Mrs. Felister Nyambura Gichuhi, my grandmother was a mother of 5, and the last of my grandfather, Gichuhi wa Gicharu's three wives. See also Alice W Macharia *Rights of the Child, Mothers and Sentencing: the Case of Kenya* (Routledge publishers 2021), 67 available at <https://www.routledge.com/Rights-of-the-Child-Mothers-and-Sentencing-The-Case-of-Kenya/Macharia/p/book/9780367698027> accessed 7.10.2023

The discussion in this paper, therefore, speaks to the progress made in pursuit of the child's rights. Before the advent of colonialism in Kenya, disciplining children was entrenched as a community responsibility. However, with the coming into force of the English Statutes of General Application on 12th August 1897, this setup was upset with the role being assumed by the colonial government under the Juvenile Administration of justice as per the English Common Law, which focused more on institutionalizing the children who got into contact, or in conflict with the criminal justice agencies. However, formal child protection system has been developing from early1960`s with issues relating to children being initially addressed by various repealed Acts such as Guardianship of Infants Act (Cap. 144), Children and Young Person's Act (Cap. 141) and The Adoption Act (Cap.143).

It is important to point out that whereas the current Constitutional dispensation came into force in 2010, the 2001 Act No. 8 was the foundational law that attempted to resolve all matters relating to children. However, despite having the Children Act in place, violence against children had been escalating at an alarming rate.[4] By 2005 major gaps had been identified in the 2001 Act, necessitating calls for review of the Act. One of the major mandates of the 2022 Act, therefore, was to curtail this retrogressive trend, and to provide for penalties against violation of the child's entitlement to life, development, survival as well as wellbeing[5] as enshrined under United Nationas Convention on the Rights of the Child (UNCRC).[6] Another challenge was that the 2001 statute had not only combined public and private law provisions, but also consolidated and repealed the earlier mentioned three pieces of legislation. Moreover, issues of children still featured in other Acts mandating the criminal justice institutions such as the Courts, Police, Public Prosecutor, Children Services, Probation and Aftercare Services, Corrective institutions such as the Borstals and Youth Correctional Training Centre (YCTC) which handle young offenders under Prisons, as well as Charitable Children Institutions. These set of laws had several shortfalls, and on 10th December 2015, the then Chief Justice, the Hon. Dr. Willy Mutunga gazetted a task force under the Kenya Law Reform Commission to look into the emerging challenges relating to children matters.[7] The Taskforce recommended a new set of laws drawing from the existing statutes touching on Children, and incorporating the (UNCRC) as well as the (ACRWC).[8] The arduous work culminated in the 2022 Children Act, which was assented to on 6 July 2022.

Examining the Constitutional provisions domesticating UNCRC among other international Conventions and general rules of international law

The 2010 Constitution introduced two houses of Parliament in Kenya comprised of the National Assembly and the Senate. Article 2 underscores the supremacy of the Constitution

[4] World Vision International Homepage, https://www.wvi.org/stories/kenya/reasons-support-kenya-children-bill accessed 20.10.2023.
[5] ibid.
[6] UNCRC art 6
[7] Status Report on Children in the Justice System in Kenya, Volume 2, NCAJ, 2019.
[8] African Charter on Rights and Welfare of the Child

which not only binds the state organs under both governance levels but also all Kenyans [9] Clause 4 of Article 2 voids all laws inconsistent with the Constitution even as it invalidates omissions or acts that contravene supremacy of the 2010 Constitution. Article 2(5) elevates international law's general rules to apply as law in Kenya,[10] while Article 2(6) hoists any Convention or treaty ratified by Kenya to the same.[11] Article 2(5) and 2(6) therefore mandates the state to adhere to international Instruments that Kenya is party to, including the UNCRC. As pertains to the 2022 Children Act, Section 3 (b) echoes these provisions *mutatis mutandis*.[12]

Initial conceptualization of the child at international level

The regional conceptualization of a child in most African countries is more or less similar to the Kenyan one as explored above but internationally, Philippe Aries 16 Century work is credited as the earliest writeup on Children. He observes that before then, children's rights were not known in European and North American countries, with artists depicting the child as 'a man on a smaller scale.'[13] He opines that before the seventeenth century, painters were unable to conceptualize children as independent rights holders with distinctive mannerisms, and wearing their own clothes. However, Aries observes that this does not translate to neglect or scorn for children, but that in medieval societies, children were not distinguished from adults except as miniature men.[14]

Montaigne, on the other hand is said to have been uncomfortable with adults' love for the child's 'frolicking, games and infantile nonsense'[15] Progressively, however, by 19 century humanity had come to appreciate childhood around which most families are centering for perpetuity.'[16] As pertains to Europe, Rousseau is credited with drawing attention to child in the eighteenth-century. Despite the extensive groundwork undertaken globally, it was not until the coming into force of the UNCRC in 1990 that the world paid attention to the voice of the child.

Background to the UNCRC

In recognition of the vulnerable and fragile nature of children who - in the formative years introvertedly - depend on adults for their survival, growth and development, the preamble to the Convention underscores the need for care and legal safeguards for the mentally and physically developing child way before birth and thereafter.[17] Indeed, the genesis of the UNCRC is deeply rooted in the great suffering that children underwent during the First World War in 20th Century during which millions of children were killed, while many others were maimed. In

[9] Constitution of Kenya, 2010 art 2(1)
[10] ibid, art 2(5)
[11] ibid, art 2(6)
[12] Children Act 2022, s3(a)
[13] Philippe Aries, *Centuries of Childhood* (1996) 31; See also Chris. J, Childhood (1996) 63 - give more details
[14] Aries (n13), p 5
[15] Ibid 3.
[16] Ibid
[17] n6 Preamble

1923 - touched by the plight of these children - Eglantyne Jebb, a British teacher and founder of Save the Children Organization helped draft the initial Declaration on the Rights of the Child aimed at compelling governments to protect the rights of children. Despite this effort, Second World War broke out and children in their millions were gassed before the war finally ended in 1945. In the words of Jebb it is not that the world is ungenerous but rather very busy and unimaginative.[18] Fourteen years later, the Second Declaration protecting the child's rights was adopted by the General Assembly. However, working on UNCRC took the next 30 years to be conclude in 1989. The Assembly adopted the Convention the same year upon ratification by required member States, coming into force on 2 September 1990. Globally, UNCRC is ratified by all states with the exception of USA.[19]

The Convention promises all children fulfillment of their human rights, protection and respect.[20] The Convention comprises of 54 Articles, with the first 42 Provisions detailing the standards to be upheld by all State Parties. while the remaining Articles focus on guiding state parties on how to implement the Convention effectively. The Convention is also home to three additional protocols with the First one restricting child involvement in armed conflict, while the Second one outlaws child prostitution, pornography, and sale of children, with the Third delving into protection of the child's communication rights. The Protocols seek to reinforce and expound on the three substantive areas of the Convention.

Brief analysis of the Three Optional Protocols to UNCRC, and how the 2022 Act has incorporated the Protocols

First Optional protocol

It was adopted by UNCRC on 25th May 2000, coming into force on12th July 2002. The Protocol focuses on restricting and protecting children under 18 from taking part in hostilities, and bans recruiting them into armed forces compulsorily. The Protocol was adopted by UNCRC on 25 May 2000, and entered into force on 12 July 2002.[21]

Section 19 [22] is solely dedicated to protecting the Kenyan child from any involvement in armed conflict, with sub-section (1) categorically stating that no one can shall recruit, expose or subject children external or internal to hostilities, social strife, or recruitment them into armed conflict. Section 9(2) provides that in case there is an armed conflict, the State shall implement mechanisms that respect, care, protect child's rights, while sub-section 3 mandates

[18] Clare Mulley, Eglantyne Jebb, a British teacher, founded Save the Children, wrote first declaration on children rights

[19] United States of America, only member state which is yet to ratify the Convention, which would give the Treaty global status.

[20] Children's Rights in Wales. UNCRC Rights of the Children, available at www.children'srights.wales accessed 04.07.2023; See also https://www.unicef.org.uk/what-we-do/un-convention-child-rights/ accessed 10.07.2023.

[21] First Optional Protocol entered into force on 12 July 2002. It calls on governments to do everything feasible to ensure that members of their armed forces who are under 18 years do not take part in hostilities. The protocol states that the age of direct participation should be raised to 18, and bans compulsory recruitment of children under 18. It provides that children under 18 should not take part in hostilities. It was adopted by UNCRC on 25th May 2000 and entered into force on 12th July 2002.

[22] n12

the State to endeavor to facilitate re-establishment of social life normalcy for any child who could have fallen victim to not only social strife or armed conflict but also natural disaster. Section 9 (4) reiterates nobody shall subject the child as aforestated, and that in the unfortunate circumstance of an occurrence of that nature, the State shall ensure maintenance of the legally provided child's wellbeing, protection and respect[23]'

Section 2 of the Act, interprets child labour as hazardous, or otherwise exploitative work done by a child, thereby placing the child's holistic well-being at risk, while Article 53(1) (a) prohibits subjecting a child to hazardous or exploitative labour, which may arguably include involvement of children in any form of harm such as exposure to armed conflict.

ii) Second Optional protocol

The Protocol is anchored on Articles dealing with protection rights such as Articles 20, 21,22 and 34. It provides against child pornography, prostitution, and sale of children.[24] The Protocol, which was adopted by the Assembly in 2000, entered into force on 18 January 2000. The first Article obliges State Parties to protect children who have fallen victims, to pass laws with punitive penalties that reflect the serious nature of the crime.

In the case of Kenya, whereas Article 53 specifically delves into the child's rights such as the Bill of rights which applies to all children.[25] However, there is need to give due regard to the developmental stage of the particular child. As pertains to the interpretive Section of the Children's Act, child abuse is defined to include an act or omission affecting the child's social and emotional functioning and development, including exposing a child to age inappropriate content, photos or information that traumatizes them. Inducing or persuading a child to engage in sexual simulation or conduct even by use of their image on online platform, or aiding a person to do so is also classified as child abuse, including acts aimed at promoting and normalizing sexual activity among, or with children, such as dissemination of obscene information or material. Grooming is defined as…

> […] establishing a relationship of trust or emotional connection with a child, either personally or through electronic means, with the aim to manipulate the child or adult care giver and which relationship may facilitate sextual contact or other child abuse that promotes, induces or normalizes sextual activity among or with children.

Section 22 [26] provides against subjecting a child to abuse of psychological nature with Section 3 (a) expounding on soliciting or meeting a child for sextual activities, while 3(b) provides against

[23] n12 s9(4)

[24] The Second Optional Protocol was adopted by the United General Assembly in 2000, entering into force on 18th January 2000. Article 1 of the of the protocol requires state parties to protect the rights and interests of the children who are victims. It obliges state parties to pass laws against these practices with penalties commensurate to the seriousness of the crime.

[25] n9 arts 14 and 15

[26] n12

transmission of obscene materials, in ways that, 3(c) exposes the child to online exploitation, abuse, harassment Arguably, whereas Kenya as country is progressively coming up with laws and policies aimed at ensuring greater child protection, rising cases of child prostitution, trafficking, and online sexual exploitation, there is dire need for practical application of the law on the ground such that the negative mindset, attitude and retrogressive practices stalling the Kenyan child's holistic growth and development into an emotionally well-balanced, confident, and responsible adults can be altered. The recent introduction of Sexual Offences Register for convicted offenders will go a long way in deterring the community's approach to sexual abuse.[27]

iii) Third Optional Protocol

The Third Optional Protocol[28] is anchored under art 12 of UNCRC, which provides for the right to self-expression.[29] It provides an avenue of communication in seeking justice from the UN Committee in case a state fails to address the violation of rights. Under the Article, a child who is able to form their own opinion is granted a chance to freely voice their views and feelings so that the same can be taken into consideration by the adults making decisions on their behalf.[30] To this end, the child can communicate to the Committee directly as an individual, or get together with other children to air their collective concern. A person who is concerned about systematic or grave abuse of a children's rights can inform the Committee, but Children can also send a representative, or even an appropriate organization to convey their issues.[31] However, the aggrieved children must first exhaust all possibilities of having their grievances addressed by the respective national mechanisms. It is only after the State fails to offer domestic remedies that the children can complain to the Committee.

In the case of Kenya, Article 33 provides for freedom of expression, with Article 33(3) calling for respect for reputation [32] and rights of others while exercising one's freedom of expression. Pursuant to the communication rights provided under Article 50 of the Kenyan Constitution, Section 222(1) of the 2022 Act [33] underscores the need to be afforded the chance to communicate through a representative or directly in proceedings that affect them, while Section 222(4) obliges the State to formulate mechanisms aimed at facilitating children in

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[27] Kenya launches Sextual Offenders Electronic Register avails an easily accessible crucial database of all offenders convicted of sextual offences available at https://sauce.co.ke/2023/06/kenya-launches-sexual-offenders-electronic- accessed 20.07.2023

[28] Optional Protocol 3 to the UNCRC by Together, a Scottish Alliance for children Rights accessed 20.10.2023; See also United Nations Treaty Collection data base report titled 'A Communications Procedure; third optional protocol to the UNCRC' available at www.ohchr.org>OHCRHR>English>professional interest Accessed on 23.10.2023.

[29] The third optional protocol is on communication rights. It provides that after exhausting all domestic remedies to seek justice and failing to have their grievances addressed, children can make complaints about violation of their rights by their state to the UN Committee on the Rights of the Child.

[30] n28 art 6 provides that state parties recognise that every child has the inherent right to life, and that they shall ensure to the maximum extent possible, the survival and development of the child.

[31] Report titled 'Optional Protocol 3 to the UNCRC' by Together, a Scottish Alliance for children Rights accessed 25.05.2023; See also United Nations Treaty Collection data base report titled 'A Communications Procedure; third optional protocol to the UNCRC' available at www.ohchr.org>OHCRHR>English>professional interest Accessed on 23.06,2023.

[32] n9

[33] n12

conflict with the law to effective communication during the process. Section 95(2) mandates the court to consider the child's wishes and feelings whenever making an order about the child. Arguably, the child's voice is still not fully acknowledged, with their issues mostly being decided by adults with little, if any, consideration of the child's wishes and feelings. Arundhati Roy who states that no one is really voiceless but that there is a deliberate effort to silence them, or a preference not to hear them.[34]

Examining the adequacy of the new Act in upholding child's rights and interests

Section 3[35] underscores specific Constitutional Articles it seeks to align and give effect to among them articles 27, 47, 48, 49, 50, 51 and 53.

Article 27 provide for equality of all in terms of protection, benefits provided under the law, enjoyment of rights, fundamental freedoms, and non-discrimination due to one's age, birth or health status among other grounds. Comparatively, Section 9(1) of the 2022 Act makes similar provisions, but goes a step further to provide the penalty for non-compliance with the statute. Under Section 9(2), the Act provides against contravention of the law, which may be viewed alongside the provisions of Article 47 enshrines lawful, efficient, and expeditious administrative action that is procedurally fair and reasonable, giving written reasons the process might action their rights or fundamental freedom or rights. Article 25 provides for fundamental freedom and rights that may not be limited.[36]

These provisions should be viewed in the light of emerging jurisprudence on the unconstitutional nature of the mandatory death penalty in light of *Muruatetu.*[37] Section 6 of the Act provides for every child's right to survival, life, wellbeing, development and protection while Section 6(2) prohibits passing of a death sentence against a child. However, more Kenyan adults are being condemned to death in cases found to be deserving of capital punishment, but with no clear indication of the way forward in terms of execution which has not happened since 1986. Arguably, there is need for more research to understand Kenya's 'abolitionist de facto'[38] status as pertains to death penalty. For the last 35 years, Kenya has not executed those sentenced to death, but still maintains the death penalty in the statutes, making her one of the 22 African countries that legally retain the death penalty. Globally, 120 countries have abolished the death penalty, among them 25 African countries.

The other Article underscored in the 2022 Children Act is Article 48 providing for access to justice for all, with affordable fee if any in order to ensure that the same does not hinder access.[39]

[34] Roy Arundhati, Quotable Quotes available at https://www.goodreads.com accessed 17.07.2023.
[35] n11
[36] Constitution (n9) art 25(a).
[37] *Muruatetu v Republic* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) available at http://kenyalaw.org/caselaw/cases/view/215422/.
[38] Carolyne Hoyle and Lucrezia Rizzelli, Living with a Death Sentence in Kenya: Prisoners' Experiences of Crime, Punishment and Death Row, The death Penalty Project, 2022.
[39] Constitution (n9) art 47(1)

Article 49 requires informing arrested persons promptly of the reasons why they are being taken to custody and the right to remain silent to avert self-implicating, to be represented, right to be availed in court in reasonable time, and to be granted bond or bail before being charged.[40] Article 49(2) goes on to provide against incarcerating anyone whose punishment is only a fine, or is below six months.[41] Article 50 expounds on fair public hearing of disputes, with the accused person being informed of the particulars of the charge, heard expeditiously under presumption of innocence until otherwise proven, granted ample time and facilities to mount their defense, and presumed innocent unless otherwise proven, among other rights. Article 51 explores the rights of imprisoned persons and of those held in custody.[42]

The remaining Article mapped out as an objective of the 2022 Act is Article 53 of the Constitutional. The Article is considered in the Act as the bedrock upon which the new Act is intended to give effect to. Indeed, the 2022 Act is defined as a parliamentary Act purposed to give effect to the 2010 Constitutional provisions under Article 53 delving into child's rights. Besides providing for services for Children at National Council level, the Clause also provides for diverse ways of regulating children's administration services such as the mandatory responsibility of parents over their children, alternative modes of caring for children such as placement, adoption, foster care and guardianship.[43]

Further exploration of Article 53 of 2010 Constitution

The Article provides for a child's right to a nationality, name and nationality, health care, basic nutrition, shelter, compulsory free basic education, nutrition, health care, protection from violence, inhuman punishment or treatment, exploitative or hazardous labour, abuse, neglect, cultural practices that are harmful to the child.[44] The Act also mandates both parents to take equal responsibility in providing for the child.[45], whether they are married or not. It prohibits detaining of a child unless there is no other way of dealing with the situation, in which case the child and the adults are held separately, and for the shortest time possible. Clause 2 of the Article speaks to the paramountcy of a child's best interests whenever an issue concerning them. This critical provision that places a Kenyan child's rights way beyond the protection offered in most jurisdictions globally will be explored further hereunder.

The Kenyan Child's Paramountcy Principle

Inadvertently, every child's ability to survive upon birth and initial formative years is dependent on the support offered by the adults around them, hence, there is need to take into account their interests when making decisions that may have ripple effects on the child, now and in the future. Whereas the Convention gives no meaning or explanation of what best interests means, Unlike the UNCRC which does not attempt interpreting the best interest principle. However,

[40] ibid art 49(1)
[41] ibid art 49(2)
[42] ibid art 51(1)
[43] ibid art 53
[44] ibid Article 53(d)
[45] ibid Article 53(d) (e)

attempting to demystify the principle, the Kenyan Section 2 of the 2022 Act explains that the phrase primes child's right to development, survival, protection, and participation over and above every other consideration, and include rights envisaged under Article 53, and the Section 8, 2022 Act's mandating everyone exercising administrative and quasi-judicial institutional powers to treat the child's interests as the paramount. and first consideration in as far as this is aimed at conserving, according, safeguarding, and promoting the necessary correction and guidance, and in the interest of the public.'

There is a robust debate on the meaning of the Principle as presented under Article 3 of the UNCRC.[46] Emily Logan opines that the lack of specificity seeks to give room for balancing various considerations in a procedural structured framework.[47] Section 8 of the 2021 Act provides that 'shall treat the interests of the child as the first and paramount consideration in as far as this is aimed at safeguarding, conserving and promoting the child's rights, and to accord the child the 'necessary correction and guidance, and in the interest of the public.'

Comparatively, Section 4(1), 2001 Children Act underscored the right to life for every Kenyan child, and mandates the family and government to ensure proper development and survival of a child. The primacy principle expounded in the above provision echoes Section 8 (1) (a) of the 2022 Act, and Article 3 of the UNCRC *mutatis mutandis* which forms the overarching mandate of UNCRC. The principle was aptly applied in the South African case of *S v M* where the mother to three boys faced four years imprisonment after being convicted of fraud, leaving the dependent boys on their own.[48] On appeal, Sachs J observed that:

> Every child has his own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The sins and the traumas of the fathers and mothers should not be visited on their children.[49]

In his 1925 seminal article, Robert Mnookin underscores the complexity of determining what is best for the child, and compares it to life's value and purpose.[50] He observes that situations considered to make a human being happy at a particular age may affect them adversely at a later stage in life.[51] He wonders:

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[46] UNCRC(n6) art 3 provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration

[47] Emily Logan, Ombudsman for Children, Ireland, & Chairperson of the European Network of Ombudsmen for Children (ENOC) Stockholm, 2008 Janusz Korczak Lecture, the child's best interest - a generally applicable principle, 9 September (2008) available at <https://rm.coe.int/16806da904> accessed on 30.06.2023. The lecture was given in the framework of the Conference "Building a Europe for and with Children, toward a strategy for 2009-2011" organised jointly by the Council of Europe and the Swedish Chairmanship of the Council of Europe in Stockholm.

[48] *S V M* (2007). (CCT 35/06) [2007] ZACC 18; (2008) (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007) –saflii. Available at <www.saflii.org> databases accessed on 21.07.2023; See also <https://www.crim.org> accessed 28.06.2023.

[49] n48.

[50] Van Bueren G, *The International Law of the Rights of the Child* (The Hague Martinus Nijhoff Publishers 1995) page 45.

[51] Robert Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, Law and Contemporary Problems 226-293 1975 available at <https://scholarship.law.duke.edu/lcp/vol39/iss3/8/> accessed on 10.07.2023.

> Should the judge ask himself what decision will make the child happier in the next year? Or at thirty? Or at seventy? Should the judge decide by thinking about what decision the child as an adult looking back would have wanted made? In this case the preference problem is formidable, for how is the judge to compare happiness at one age with happiness at another age?[52]

Since we were all children at one time, my view, based on over 30 years' experience in the justice system, coupled with extensive research in this field is that the most accurate outcome would be realized if a decision maker - equipped with the individual circumstances obtaining for the particular child in issue - considers the law thereto, and takes time to hypothetically step into the shoes of the child in issue, and project their personal growth and future development based on the decision they are about to make over the child's life, unexpected occurrences and life chances notwithstanding. The test would therefore be if they were the child, what they would have wanted to happen to them retrospectively in order to propel them to the position of authority they currently occupy, that gives them authority to decide on behalf of the needy child. Supporting this view is the Australian High Court decision in *Minister for Immigration and Ethnic Affairs v Teo.*[53] Mason CJ and Deane J firmly stated *that* 'a decision-maker with an eye to the principles enshrined in the Convention would be looking for the best interests of children as a primary consideration, asking whether the force of any other consideration outweighed it.'

Some of the quick wins in the Children Act, 2022

Arguably, the most outstanding element of the new Act is demystifying the principle of the child's best interests. Whereas UNCRC gives no meaning or explanation of what the phrase means as observed earlier, Section 2 of the Act interprets the phrase as principle that primes children's right to protection, survival, development and participation over and above any other consideration whatsoever.

In a very progressive move, Section 11(1) of the Act comprehensively provides for parental care. This may be achieved thought inclusion of alternative care services provided for under Section 12 on the right to social security with Section 12(3) and 11(4). These may include short time measures such as care in emergencies, and temporary shelter.[54] Where the required support is more prolonged, measures such as guardianship,[55] and Kafaalah care for children are encouraged.[56] Where the children are a bit older, supported independent living may come

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[52] Robert Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of indeterminacy, *Law and Contemporary Problems*, 1975, 39, 3, 226-293, 75.

[53] Mason CJ and Deane j in an Australian High Court decision in Minister for Immigration and Ethnic Affairs v Teoh, https://www.crin.org/en/library/legal-database/minister-state-immigration-and-ethnic-affairs-v-teoh accessed on 20.07.2023.

[54] n11 s12(f)

[55] ibid s 12(b)

[56] ibid s 12(e), See also The National Framework for the Implementation of Kafaalah Care for Children in Kenya, 2022, vii available at <https://demo.childrenscouncil.go.ke/sites/default/files/resources/Kafaalah%20Framework%20(1).pdf>accessed 22.07.2023

in handy,[57] and where one of the siblings is responsible enough, supported child-headed household[58] may be considered although this calls for closer supervision on the children, and aftercare. Long term remedies include guardianship,[59] foster care,[60] adoption[61] having in mind the provisions of the Act but where possible, the most desirable option is arguably kinship[62] so as to ensure that the child is not torn away from their cultures and religious believe.

The rights of the intersex child are recognized and enunciated under Section 21 which states that these children, who are categorized under the special needs in terms of social protection and services shall be provided with education, appropriate medical care, training and appropriate medical care.[63] In a world that is quickly evolving, the Act has endeavored to provide for emerging challenges **such as** the now rampant online child sexual abuse which is spreading really fast across the country by giving if detailed focus under Section 144(u), while child trafficking in prohibited by Section 144(o) and Section 2(g). Radicalization is comprehensively addressed under Section 135(i). Section 20 guarantees physically challenged children special care, education, appropriate training as well as free medical treatment and states that they should be treated with dignity in line with another enabling statute.[64]

Under Section 193(1), the Act provides for Kinship adoption which Kenyan should embrace holistically as it grants the opportunity to adopt a child only to a relative within the child's lineage. The Act therefore underscores family-based alternatives for a child who requires protection and care as opposed to institutionalizing such a home where their rights might be trampled upon.

In another positive move, Section 221(1) has raised the age of criminal liability from 8 to 12 years in appreciation of the different developmental changes that a child goes through. A child under 14 years is presumed incapable of differentiating right from wrong unless otherwise proven. As pertains to sexual offence committed by a child, emerging jurisprudence appears to deviate to Romeo and Juliet scenario, especially where the difference in age is about 3 years. In the matter of ***P O O (A Minor)*** [65] **,,** a charge of defilement was preferred against a 16 years boy. During the hearing, the complainant testified that the accused, who was from her church, was not only known to her but that they used to talk with each other for hours. On the material day, the accused invited her to his house and while there, they removed their clothes and had sex but she conceived. Her parents initiated his arrest. Upon conviction, the accused appealed to the High Court citing his age. Upholding this view, the court held that both were minors with raging hormones, although both lacked the capacity to consent, they mutually agreed to experiment on sex. Omondi, J held:

[57] n11 s12(h)
[58] ibid s 12(i)
[59] ibid s 12(b)
[60] ibid s 12(c)
[61] ibid s 12(d)
[62] ibid s 12(a)
[63] ibid s 144(z)
[64] Persons Living with Disability Act
[65] P O O (A Minor) v Director of Public Prosecutions [2017] eKLR

> Does a boy under 18 years have the legal capacity to consent to sex." Haven't both children defiled themselves" Shouldn't both then be charged or better still shouldn't the Children's Officer be involved and preferably a file for a child in need of care and protection ought to be opened for both of them. I think these are children who need guidance and counselling rather than criminal penal sanctions. " I really think in this kind of situation should be re-examination in the criminal justice system.

Quashing the proceedings in the Magistrate's court, both the accused and victim were declared as children who needed protection and care. The petitioner was awarded damages for violation of his rights.[66]

The gaps in the Act

Right to life

Arguably, there is room for improvement on the level of protection provided for the unborn child. Arguing on child's right to survival from a pro-life standpoint, Article 26(1) of the 2010 Constitution provides that everyone is entitlement to life, while Article 26(2) categorically states immediately after conception, that life is to be recognized as a person. Adding checks and balances to these provisions, as earlier mentioned Article 26(4) stipulates that unless a qualified healthcare determines that emergency treatment is needed, or that the mother's life is threatened, abortion is not allowed, with the exception of a written law permitting the same. Further section 211 of the Penal Code prohibits the passing of a death penalty on a pregnant, and that a life imprisonment sentence shall be meted out instead.[67] Section 212 seeks to expound on measures to be taken where a woman alleges that she is pregnant, with the judge being mandated to determine the truth of the allegation before passing the death sentence.

Despite these extensive provisions, the Act falls short of specifically aligning itself with Article 26(2) of the Constitution which directly acknowledges, and protects the existence of the unborn child. Whereas the interpretive Section of the Act [68] defines age chronologically from conception, and goes on to state that where the age is not apparent a medical officer's determination will suffice,[69] this Section appears to contradict itself by going on to define a child as someone yet to attained 18 years. Since age is normally calculated from one year after birth, the unborn child is arguably eclipsed by this definition. Additionally, Section 11(1) underscore parental protection and care as a right for all children which, going by the above definition, appears to be focusing on a child who is already born, thereby leaving out the unborn child. In a Canadian 2016 case, *Fangyun Li* case, judge Michael Shore ruled that the appeal court erred in holding that in the absence of a live birth, no consideration would be given to the child's interests as a pregnancy was miscarried. This was in reference to the accused

[66] ibid
[67] Criminal Procedure Code (Laws of Kenya) s211
[68] n12
[69] n11 s2

person's wife's five months pregnancy[70]. Upholding the appeal, the Judge held that both the unborn and born children were equally entitled protection with no distinction. Supporting this view, Jose Mujica, the former president of Uruguay observes that:

> Today we know, from scientific findings, that the underlying problem begins in the mother's womb, and we would have to begin by talking about the rights of women giving birth, in function of the phenomenon they are engendering, because we know that what is lost in the 2 or 3 first years of life is practically unrecoverable later on…If today we understand the importance of feeding, we also know the importance of affection in the first stage of life. This matter can't be fixed with material goods. In the best of cases, the State can provide food, shelter, medicines – but it can't give love, it can't give affection. This is up to the family.[71]

There is need, therefore, for the Act to clearly underscore, recognize, and protect unborn child's rights, as per 2010 constitution, Clause 26.

Children dependent on caregivers behind prison bars

By the early 2020, there were over 600 children accompanying their mothers into Kenyan prison while many others were left behind. However, the Act is silent on the plight of the children dependent on caregivers in conflict with the criminal justice system, thereby subjecting them to arbitrary and vicarious punishment for crimes they did not commit.[72] In a country where women offending is rising rapidly due to the increasing economic challenges, the Act ought to have provided for protection of these dependent children in order to cushion them from additional harm.[73] For comparative purposes at the regional level, the 2022 Act would have benefitted from Article 30 of the African Charter on the Rights and Welfare of the Child (ACRWC), the only provision that underscores the unique place of African mothers who - unlike their counterparts in the developed world - bear several children. The Article mandates States Parties to treat convicted pregnant mothers and those accompanied by dependent children in a special way, and give non-custodial sentences first consideration, promote and come up with other measures geared towards averting confinement, and as much as possible, see to it that a no child accompanies their mother in prison. State Parties are urged to view penitentiary system as a social rehabilitation and reformative measure aimed at integrating the mother back to the family.

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[70] In a 2016 immigration case in Canada, judge Michael Shore of the Federal court has ruled that the unborn child has rights to be protected by the court with great attention <https://www.lifesitenews.com/news/judge-slaps-down-immigration-boards-claim-that-unborn-children-have-no-best> accessed 20.10.2023.

[71] Jose Mujica, 2010-2015 President of Uruguay commenting on the progress made by the UNCRC Convention on its 25 Anniversary, 2015 at < https://www.unicef.org> accessed 30.10.2023.

[72] Alice W Macharia *Rights of the Child, Mothers and Sentencing: the Case of Kenya* (Routledge publishers 2021) 3available at<https://www.routledge.com/Rights-of-the-Child-Mothers-and-Sentencing-The-Case-of-Kenya/Macharia/p/book/9780367698027> accessed 20.10.2023

[73] ibid

Similarly, provision under the 2022 Act would have gone a long in availing accountability and provision for the children accompanying incarcerated mothers, and also the large numbers left suffering within communities, many of whom end up on the streets where they are exposed to all forms of dangers.[74]

Nelson Mandela reiterates that '…no one truly knows a nation until one has been inside its jail. A nation should not be judged by how it treats its highest citizens but its lowest ones.'[75]

Play Therapy

As earlier mentioned, the challenges facing caregivers are rising by the day, and the pressure brought about by the global Corona virus pandemic made the situation worse, with cases of child abuse increasing at alarming levels. The 2022 Children Act, however, failed to address the emerging need for play therapy that would otherwise enable children to freely express their innermost feelings and fears through play therapy. In a country where violence against children including child sextual abuse are rampant, there is need to come up with progressive ways of addressing the inner turmoil that accompanies such abusive experiences which could curtail a wholistic growth and development of the affected child. Indisputably, play therapy would offer the much-needed avenue to unclothe and vent out the traumatic experience in order to thrive beyond the hidden hurt.

Conclusion

This paper set out to explore how the Kenyan Children Act, 2022 has aligned itself with the Constitutional Paramountcy Principle, and with the three Optional Protocols to the UNCRC which partially forms part of the laws of Kenya. The paper has established that the Act has comprehensively endeavored to incorporate the three Protocols into its provisions. As pertains to the paramountcy principle, the paper has established that the same has been largely met with Section 8 mandating every person performing administrative and judicial institutional powers to consider the Child's best interests as paramount. Nevertheless, as pointed out earlier in the section identifying the gaps, the protection accorded to the incarcerated caregivers could have been extended to those dependent on them for their survival and wellbeing in an attempt to cushion their children, the sick and the elderly who might be depending on them solely from the negative ripple effects of the imprisonment.

More gains are provided for by introduction of the novel preventive approaches under diversion, and the all-encompassing family conferencing. Arguably, with purposeful individual, and public awareness, these measures could also be applied at a personal level through self-discipline which is the most effective, in the family including the extended family, the immediate elders, in schools, and at the wider community level before raising a matter with the relevant agencies.

[74] *Nelson Rolihlahla Mandela, The Nelson Mandela Rules, UNODC*

Whereas the criminal justice system comprises of various stakeholders such as the police, probation department, children services, Prison, the state law and the Judiciary, it cannot be gainsaid that none of the actors can make the required impact without working in tandem with the other partners. There is need, therefore, for a streamlined and standardized approach by all the stakeholders whereby each player upholds their responsibilities, and cascades the aspects requiring further support to the relevant agency in pursuit of a strategic and synchronized approach. To this end, the State could provide for additional resources to ensure effective implementation of the children welfare fund.

Nevertheless, the Act has clearly met its objectives, save for the identified gaps which can be cured through an amendment. The research has also established that considering where the country is coming from in terms of conceptualization of the child, a lot of progress has been made, although with focus and goodwill, the State, which constitutionally raised the Kenyan bar of child protection to the paramount enclave, can do much more in ringfencing and actualizing a Kenyan child's rights and interests holistically, both born and unborn.

CIRCUMVENTING THE SOVEREIGN WILL:
The Watering Down of Article 45 of the Constitution of Kenya 2010 through the Marriage Act 2014

By Alphonce Odhiambo Oduor

Abstract

The voting exercise in a referendum, particularly where the people overwhelmingly vote in favor of a constitutional bill, is neither a suggestion nor an expression of an ongoing discussion. It is the conclusion of the discussion and an expression of a decision. Where the sovereign have expressed their will on an issue, Parliament cannot choose to ignore it or prefer a different version of such a decision. Parliament does not get to give effect to the provisions of the Constitution as they ought to be but as they are. As an institution, Parliament must move at the pace of the sovereign people. To do this, where legislation is enacted with respect to a constitutional provision, Parliament must abide by three criteria; the provisions of the legislation must be consistent with the provisions of the Constitution; the legislation must be enacted in compliance with the constitutional provision in question; and, the provisions of the legislation must be effective in addressing the issue that the framers of the Constitution intended to address. This paper argues that by enacting the Marriage Act, 2014 as opposed to a Family Law Act, Parliament circumvented the will of the people of Kenya and replaced it with its own.

Key Words: Family, constitutional legislation, sovereign will

1. Introduction

On 4th August, 2010, out of the 12 million registered voters, approximately 8.9 million Kenyans turned out to vote in the referendum on the then proposed Constitution. Out of the 8.9 million voters, 6.8 million of them, constituting 68.55%, voted in favor of the proposed Constitution. On 27th August 2010, under the presidency of the late President Mwai Kibaki, the Constitution of Kenya (Constitution of Kenya 2010) was promulgated.[1] Soon thereafter, many judges and constitutional scholars published commentaries on the anticipated effects of new Constitution showering it with praises.

In the matter of the *Speaker of the Senate*[2] the Supreme Court held that unlike the conventional liberal Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of the Constitution of Kenya 2010 is to institute social change and reform through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy.

[1] Committee of Experts on Constitutional Review, 'Final Report of the Committee of Experts on Constitutional Review' 11th October, 2010, 13.

[2] *Speaker of the Senate v Hon. Attorney-General* [2013] eKLR.

In another matter,[3] Odunga J. held that the Kenyan case is a kin to that described by the German Constitutional Court to the effect that the existing state and social conditions can and must be improved. He also accepted the argument that the Constitution is a living thing which adapts and develops to fulfill the needs of living people whom it both governs and serves.[4] That, like clothes, the provisions of the Constitution must be made to fit people by adapting to the changing social conditions.[5]

On 16th October, 2014, Dr. Willy Mutunga delivered a lecture at the University of Fort Hare.[6] In that lecture, the former Chief Justice described the process through which the Constitution of Kenya, 2010 was brought into being as 'a story of ordinary citizens striving and succeeding to reject and overthrow the existing social order and to define a new social order for themselves'.[7] He argued that the Constitution is a radical document that looks to a future that is very different from the past in its values and principles.[8] He also argued that, through the Constitution, the people of Kenya deliberately chose the route of transformation to end their deprivation and to regain their sovereignty.[9]

The Former Chief Justice Dr. Willy Mutunga, argued that the Constitution of Kenya, 2010 is an activist Constitution.[10] He also argued that the Constitution's political view is not entirely liberal but has radical ingredients of social democracy and socialism as the ingredient of its purpose.

The transformative effect and potential of the Constitution of Kenya, 2010 has gained academic analysis and commentary from legal scholars such as Professor PLO Lumumba, Professor L. Franceschi.[11] Dr. John Mutakha Kangu *inter alia*.[12] There is no doubt that a consensus has long been built that the Constitution of Kenya, 2010 is a document aimed at transforming Kenyan society for the better.

One of the areas that the drafters of the Constitution of Kenya, 2010 targeted for transformation is the legal regime governing family life and family - related disputes. Progressive and modern societies have moved away from the biased, narrow and traditional view of family through the lenses of marriage. This is the direction that the people of Kenya resoundingly chose to take in 2010.

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[3] *Pharmaceutical Society of Kenya v National Assembly* [2017] eKLR

[4] ibid.

[5] ibid.

[6] Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions' (2015)(1) Speculum Juris.

[7] ibid.

[8] ibid.

[9] ibid.

[10] Willy Mutunga, 'Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?' (2021)8(2) The Transnational Human Rights Review.

[11] PLO Lumumba and L. Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary,* (Strathmore University Press, 2014).

[12] John Mutakha Kangu, 'Constitutional Law of Kenya on Devolution' (2016) 2(1) Strathmore Law Journal.

The Constitution gives the family unit prominence in the society.[13] While it recognizes marriage and the right to marry,[14] it clearly provides that the family is the natural and fundamental unit of the society and the necessary basis of social order.[15] It also guarantees the family unit the enjoyment of the recognition and protection of the State.[16] Although it provides for both marriage and systems of personal and family law as separate rights,[17] the title of the section which provides for both marriage and family is tellingly titled "family" as opposed to "marriage".[18]

The Parliament was required to enact a statute governing family within five years from 27th August, 2010 when the Constitution was promulgated. In the Fifth schedule of the Constitution of Kenya 2010, the drafters of the Constitution did not mince their words nor did they make a mistake. Under Article 45 of the Constitution of Kenya 2010, the word "Family" is expressly used and also in its Fifth schedule. This demonstrates that the drafters of the Constitution of Kenya 2010, were alive to the fact that family is a general and an all-encompassing concept as compared to marriage which is rather narrow, specific and exclusionary.

2. Definition of the Term 'Family'

The Constitution required Parliament to enact a law which would recognize both the marital[19] and non-marital families.[20] Having left the details of family life to be determined by Parliament through the said legislation, the drafters of the Constitution did not deem it necessary to define the term 'family'. While Parliament enacted the Marriage Act, 2014 which defines and governs marriage, it failed to recognize and define family.[21] However, there is no shortage of definitions for the word 'family'.

In *Fitzpatrick,*[22] the court held that the expression 'family' is not a term of art, that is, it is not a technical term with a specific meaning. It is a word of ordinary usage with a flexible meaning.[23] The term is to be defined on a case to case basis[24] since it has several and different meanings.[25] For instance, in some contexts family means children particularly when couples use the expression, "start a family?" to imply the appropriate or convenient time to have children.[26] Family may also mean parents and children with reference to a nuclear family.[27] It

[13] The Constitution of Kenya, 2010 art 45(1).
[14] ibid art 45(2).
[15] ibid art 45(1).
[16] ibid.
[17] ibid.
[18] ibid.
[19] ibid art 45(4)(a).
[20] ibid art 45(4)(b).
[21] The Marriage Act, 2014.
[22] *Fitzpatrick v Sterling Housing Association Ltd.* (HL(E) [2001] 1 AC.
[23] ibid.
[24] ibid.
[25] n22.
[26] ibid.
[27] ibid.

may also mean all persons connected by birth, marriage or adoption with reference to a family tree.[28] Similarly, it may be used to refer to persons who occupy a dwelling house that is a family home.[29] The court concluded that a man and woman living together in a stable and permanent sexual relationship qualify to be considered a family.[30]

In the matter of *Fox,*[31] James LJ held that the word "family" does not carry a fixed meaning. He observed that, with the passage of time, the definition of family has expanded from the traditional one created by blood relationships and those created by the marriage ceremony.[32] Family includes both *de facto and de jure* relationships.[33] In Braschi.,[34] the New York Court of Appeals held that the question whether one qualifies to be a member of another's family should find its foundations in the reality of family life. A more realistic view of family includes two adult lifetime partners whose relationship is long - term and characterized by an emotional and financial commitment and interdependence.[35]

The *Black's Law Dictionary* provides three different definitions of the word "family".[36] First, family is a group of persons connected by blood, by affinity or by law, especially within two or three generations.[37] A family can also be a group of people consisting of parents and their children.[38] Finally, a family can be a group of persons who live together and have a shared commitment to a domestic relationship.[39]

In 2001, the United Nations High Commissioner for Refugees observed that there was a lack of definition for the word "family" in international law.[40] However, the Commissioner pointed out that the question of the existence or non-existence of a family is essentially a question of fact, which must be determined on a case-by-case basis, requiring a flexible approach which takes account of cultural variations, economic and emotional dependency factors.[41] As such, the position adopted by the House of Lords in *Fitzpatrick*[42] and in *Fox*[43] holds in Kenya. That is, the word "family" does not carry a fixed meaning and should therefore be defined on a case by case basis.

[28] ibid.
[29] ibid.
[30] Ibid.
[31] *Dyson Holdings Ltd v Fox* 1976 QB 503.
[32] ibid.
[33] ibid.
[34] *Braschi v Stahl Associates Company Ltd.* (1989) 544 NYS 2d 784.
[35] ibid.
[36] Bryan A Garner (ed.) *Black's Law Dictionary* (8 edn) Thomson West, 2004), 1802.
[37] ibid.
[38] ibid.
[39] ibid.
[40] Frances Nicholson, "The 'Essential Right' to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification", para 8 < https://www.unhcr.org/media/no-36-essential-right-family-unity-refugees-and-others-need-international-protection-context> accessed 19th September, 2023.
[41] ibid.
[42] 1 n22
[43] n31.

What is clear from this definition of "family" is that family transcends marriage. Family as an institution is neither defined nor controlled by marital formalities. Unlike marriage, family is neither defined by certification nor celebrations. When Kenyans provided for the requirement to enact legislation regulating family, they intended to have legislation which transcended the institution of marriage. What was hoped for was a statute which would provide recognition and protection for marital and non- marital families. Kenyans also hoped that the statute would guarantee and define the rights and responsibilities of parties in all family unions regardless of their marital status.

3. Non - Marital Family Arrangements

3.1. Definition of "non-marital family"

Non-marital family or relationship has been defined in various ways by different legal commentators. First, Antognini defines "non-marital relationships" as relationships in which individuals continue to live together with those who they were once married to but are now divorced from.[44] On his part, Kaiponanea argues that a non-marital relationship can be determined based on the intentions of the parties.[45] The relationship must demonstrate the presence of intimacy, commitment and a sense of permanency.

A non-marital family may also be defined as a couple which has made a broad commitment to live as a married couple by sharing a common household, pooling resources and sustaining the said arrangement for an extended period of time.[46] It is a stable marriage-like relationship where both parties cohabit with the knowledge that a lawful marriage between them does not exist. Finally, a non-marital relationship can also be defined as a relationship which has been edging towards de facto marriage; one which a court of competent jurisdiction could justifiably declare as having attained marital status.[47]

3.2. Types of non-marital family settings

Examples of non-marital family settings include adult interdependent partnerships. This type of family structure is found in Alberta courtesy of the State's Adult Interdependent Relationships Act.[48] The Act defines an "adult interdependent relationship" as a relationship between two persons who are adult interdependent partners of each other.[49] It also defines a "relationship of interdependence" as a relationship outside marriage in which any two persons share one another's lives; are emotionally committed to one another; and, function as an economic and domestic unit.[50]

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[44] Albertina Antognini, 'The Law of Non-marriage' (2017) (1) *Boston College Law Review*.
[45] Kaiponanea T Matsumura, 'Consent to Intimate Regulation' (2018)96(4) *North Carolina Law Review.*
[46] *Connell v Francisco* 898, P.2d, 831, 834 (Wash, 1995).
[47] Lawrence W. Waggoner, 'Marriage is in the Decline and Cohabitation is on the Rise: At What Point, If Ever, Should Unmarried Partners Acquire Marital Rights?' (2016) 50(2) *Family Law Quarterly.*
[48] Adult Interdependent Relationships Act, 2002.
[49] ibid s. 1(1)(c).
[50] ibid s. 1(1)(f).

The second type of non-marital family setting is a civil union. In the State of Malta, the Civil Unions Act[51] provides that all persons who have fulfilled the requirements for contracting a marriage may choose to register their partnership as a civil union. A registered civil union automatically has the same effect and corresponding consequences as a civil marriage.[52] The Civil Unions Act explicitly guarantees partners in civil unions the same rights and obligations enjoyed by spouses in marriages.[53]

Domestic partnership is also a type of non-marital family setting. This type of family is found in Bermuda Under its Domestic Partnership Act 2018. The Act provides that two people may enter into a domestic partnership if-- they are both under the age of eighteen; they are not within the prohibited degrees of domestic partnerships; and, neither is currently married, in a domestic partnership or overseas relationship.[54] Titles such as "wife" and "husband" in marriage become "domestic partner" in domestic partnerships.[55]

The fourth type of non-marital family setting is cohabitation. The Black's Law Dictionary defines "cohabitation" as the fact or state of living together especially as partners in life usually with the suggestion of sexual relations.[56] Cohabitation is also defined under the Marriage Act as an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.[57] However, there has been a tendency to rush towards presumption of marriage whenever cohabitation is mentioned in a suit. However, this trend has been rejected even by the courts.

In the case of *KO v JO,*[58] Mrima J. held that the mere fact that people live together and have children does not automatically mean that marriage must be presumed. He further held that marriage must be distinguished from sexual relationship that results into siring of children since the presumption of marriage transcends such boundaries. In the case of *Kangara,*[59] the Supreme Court held that presumption of marriage should be used sparingly and only in cases where there is cogent evidence to buttress it. The court also held that a presumption of marriage must never be made where the intention to marry does not exist. Thus, cohabitation exists as an autonomous form of non-marital family arrangement.

4. Legislative Freedom of Parliament

The role of Parliament is to deliberate on and resolve issues of concern to the people.[60] The resolution of those concerns comes in the form of legislation. The process of legislation starts with ideas. Wherever those ideas originate from determines the limits of legislative freedom

[51] The Civil Unions Act, 2014, s. 3(1).
[52] ibid s. 4(1).
[53] ibid s. 9.
[54] Domestic Partnership Act 2018, s. 3(1).
[55] ibid s. 41(2).
[56] Garner (n 36) 784.
[57] Marriage Act (n21), s. 2.
[58] *KO v J.O* [2018] eKLR.
[59] *Kangara v Mayaka* [2023] eKLR at 65 & 66.
[60] Constitution (n13), art 95(2).

to which Parliament is entitled as an institution. Although Parliament is the legislative arm of government, its legislative authority is neither absolute nor limitless. The two sources of ideas for legislation are; extra-constitutional and constitutional.

4.1. Extra-Constitutional Legislation

Extra-constitutional legislation is the process through which Parliament enacts legislation which it has not been directed by express constitutional provisions to do. This involves the proposition of bills by individual Members of Parliament;[61] committees of Parliament;[62] government agencies with the approval of the Cabinet;[63] or, petitions from members of the public.[64] The phrase "extra-constitutional" must not be confused with the word "unconstitutional". While extra-constitutional simply means outside the Constitution,[65] "unconstitutional" means the nature of provisions being contrary to the provisions of the Constitution.[66] The freedom that Parliament enjoys in extra-constitutional legislation is evident in the history of Parliament as an institution.

Parliament originated from two separate institutions; the Kings Court and the County Courts.[67] The Kings Court began as a gathering of wise men summoned by Saxon Kings in their small divided kingdoms.[68] The gatherings were brought together in the unification of the kingdoms of England after 825 AD.[69] The gathering was an aristocratic assembly which brought unity to the land and offered advice to the King.[70] It was attended by earls, thanes, bishops and abbots.[71] After the Norman Conquest, the gatherings of wise men became the Kings Court.[72]

On the other hand, the County Courts, also known as the Shire Moot, met at least twice a year in each county.[73] The courts were attended by bishops, lords of estates and groups of representatives from every village.[74] Each group consisted of the Shire reeve, the parish priest and four representative men.[75] The shire court was a large representative body which consisted of between 200 and 300 people for each sitting which would be held in open air.[76]

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[61] ibid art 109(5).
[62] ibid.
[63] ibid.
[64] ibid art 119.
[65] Garner (n36) 1759.
[66] ibid p. 4738.
[67] The History of Parliament and the Evolution of Parliamentary Procedure (A verbatim transcript of two lectures given by Maurice Bond, OBE, FSA, Clerk of the Records, delivered in the Grand Committee Room, Westminster Hall, before Members of the House of Commons) House of Lords Records Office 1966 < https://www.parliament.uk/globalassets/documents/parliamentary-archives/evolution.pdf> accessed 19th September 2023.
[68] ibid.
[69] ibid.
[70] ibid.
[71] ibid.
[72] ibid.
[73] ibid.
[74] n67
[75] ibid.
[76] ibid.

In 1264, the representatives of the counties, known as Knights of the Shire, were summoned to discuss the affairs of the kingdom.[77] A similar meeting was organized in 1265 and was attended by the bishops, barons and representatives of many cities and boroughs of England.[78] In 1327, the local communities of the Shires and the boroughs became regular attendees of the Royal court and were called the les communes meaning the communities.[79] The Kings Court, which was attended by the representatives of the communities, came to be called *Parliamentum* which means a place for discussion.[80]

By the 15th Century, Parliament had become the representative of the people.[81] By 1422, there could neither be legislation nor taxation without the authority and consent of the House of Commons.[82] The Legislative Council, with respect to Kenya, was established through the East African Order-In-Council of 1906.[83] It held its first siting on 16th August, 1907.[84] It was anchored on the Westminster Parliamentary Model.[85] The Legislative Council was designed to match the House of Commons[86] and was established to safeguard the interests of the white settlers.[87] It also formulated laws for local application and later served as the Legislative Council for the East African Protectorate.[88]

The Legislative Council of Kenya was the equivalent of today's Parliament. Being one of the colonial legislatures, the Legislative Council had to ensure that their Bills were not repugnant to any English statutes.[89] The Colonial Laws Validity Act provided that a colonial statute could be deemed void if it contravened the provisions of any imperial statute extending in express terms to the colony concerned.[90] In *Powell* the Privy Council held that local parliaments, such as the Legislative Council, were supreme and had the same powers as the Imperial Parliament within the respective colonies but still had to ensure that the laws they passed were consistent with imperial laws.[91]

After independence, the Legislative Council was abolished and the institution of Parliament introduced consisting of the President and the National Assembly.[92] The 1963 Constitution provided that the legislative power of the republic was vested in Parliament.[93] Just like the

[77] ibid.
[78] ibid.
[79] ibid.
[80] ibid.
[81] ibid.
[82] ibid.
[83] East African Order-In-Council of 1906.
[84] The Clerk of the National Assembly, 'History of Parliament of Kenya' Factsheet no. 19, 2nd Edition (Prepared by the National Assembly Taskforce on Factsheet , Speaker's Rulings and Guidelines) August, 2022 < http://www.parliament.go.ke/sites/default/files/2022-08/FS19%20History%20of%20the%20Parliament%20of%20Kenya.pdf> accessed 19 September 2023.
[85] ibid.
[86] ibid.
[87] ibid.
[88] ibid.
[89] Herbert A. Smith, 'Judicial Control of Legislation in the British Empire' Yale Law Journal.
[90] The Colonial Laws Validity Act, 1865, ss. 28 &29.
[91] *Powell v Appolo Candle Co*. (1885, P. C.) L I. o A. C. 282.
[92] Constitution of Kenya, 1963, s. 30.
[93] ibid.

Legislative Council, the independence Parliament had limitations to its legislative power. The repealed Constitution provided that if any other law was inconsistent with its provisions, the law in question would be void to the extent of its inconsistency.[94]

The promulgation of the Constitution of Kenya, 2010 did not take away the legislative freedom of Parliament. Parliament retained the power to enact any laws governing any sector of the economy or issue.[95] Similarly, public participation is a requirement for Parliament to become aware of what experts and the general public have to say on a particular issue but does not have to go with the views expressed.[96] In the *British American Tobacco* case, the Supreme Court held that public participation must be real and not illusory; must be both qualitative and quantitative; purposive and meaningful; and, must be accompanied by reasonable notice and reasonable opportunity.[97] Parliament must provide an opportunity for a balanced influence from the general public.

However, the constitutional requirement for public participation does not compel Parliament to accept every opinion expressed on an issue whether by experts or members of the public. The final decision on a Bill is reserved for members of Parliament to make. What this means is that post-2010 Parliament has the autonomy[98] to enact any legislation on its own motion subject to the procedural requirement of public participation and substantive test of consistency with the Constitution.[99] The measure and standard required of Parliament is one of consistency with the Constitution.

4.2. Constitutional legislation

With respect to this paper, "constitutional legislation" means the legislation which Parliament is called to enact through express constitutional provisions. The express provisions are brought into existence through a referendum thus are express instructions from the sovereign people of Kenya. When Parliament is called upon to enact legislation through express constitutional provisions, the standard for consideration is not merely one of consistency with the Constitution as is in the case of extra-constitutional legislation. Rather, the standard is three fold; consistency, compliance and effectiveness.

For instance, when Parliament enacted the Fair Administrative Action Act, it was not doing so at its pleasure. It was complying with and giving effect to express constitutional provision.[100] The Constitution required Parliament to enact legislation to give effect to the right to administrative

[94] ibid s. 3.
[95] Constitution (n13, arts 95(1) & 95(2).
[96] ibid art 10(2)(a).
[97] *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party),* [2019] eKLR.
[98] Constitution (n13), art 94(5).
[99] ibid art 2(4).
[100] ibid art 47(3).

action that is expeditious, efficient, lawful, reasonable and procedural.[101] It further required Parliament to ensure that the said legislation provided for review of administrative action by a court or an independent and impartial tribunal or body.[102] Finally, the resultant legislation had to have the effect of promoting efficient administration.[103]

When Parliament finally enacted the Fair Administrative Action Act,[104] it ensured that the statute was consistent with the rest of the provisions of the Constitution; was compliant with the requirements of the constitutional provision that called for its enactment; and, was effective in ensuring the enjoyment of the right to fair administrative action. It provided that this was an Act of Parliament to give effect to Article 47 of the Constitution and for connected purposes.

When enacting legislation to give effect to express constitutional provisions, Parliament does not have a free hand. It does not do so at its pleasure. Its legislative freedom is seriously limited.[105] Similarly, it does not enjoy unlimited time as each statute has its timeline for enactment.[106] While Parliament has the freedom to include more provisions in the statute it enacts in compliance with the Constitution, it does not have the freedom to provide for less than the Constitution requires. It must provide for all the issues the Constitution has identified to be provided for through a given legislation.

For instance, Parliament could not fail to provide for an individual's right to be given written reasons for every administrative action that is likely to adversely affect one's rights and fundamental freedoms.[107] It could also not fail to provide for the right to procedural fairness in administrative action.[108] Furthermore, it could not fail to provide for a procedure for review of administrative decisions.[109] Parliament has the legislative freedom to add to but not to subtract from the intentions of the drafters of the Constitution which, having been endorsed through a referendum, became the instructions of the people to Parliament.

The limits imposed on Parliament with respect to constitutional legislation have a basis. A referendum is a direct exercise of sovereign authority. The Constitution resulting from a referendum is a direct expression of the sovereign will. Were Parliament allowed to reconsider the decisions made by the people in direct exercise of their ultimate decision making power, Parliament would assume the position of a higher authority. It would reverse the roles making the decisions of the people merely interim subject to approval or disapproval by Parliament. In effect, Parliament would rank above both the Constitution and the People.

[101] ibid art 47(1).
[102] ibid art 47(3)(a).
[103] ibid art 47(3)(b).
[104] The Fair Administrative Actions Act, 2015.
[105] Constitution (n13), art 261(3).
[106] ibid art 261(1) & Fifth Schedule.
[107] ibid s. 6.
[108] ibid ss. 2(b) & 2(c).
[109] ibid s. 9.

This must be avoided by ensuring that the actions of Parliament are, at all times, both consistent and compliant with the dictates of the Constitution. After all, Kenyans were perfectly satisfied with the Constitution as it is and wanted it to be given effect to as it is. The Supreme Court captured this beautifully in the case of *Attorney General v David Ndii* as follows;

> In passing the 2010 Constitution, it showed that the people trusted the Constitution and the constitutional order they had shaped. They had faith that they had created sturdy and independent institutions with sufficient checks and balances. They also trusted that the design of the Constitution reflected their sovereign power in all aspects of their Constitution. They felt certain that in moving forward, decisions were not being made in far off places, but rather institutionalized at the grassroot level, accessible to all. They also made certain to put in place safety measures that ensured their continued involvement. It is for these reasons that the Constitution is described as exhaustive and self-executing with inbuilt safeguards.[110]

There are certain facts that one cannot help but notice. First, the Marriage Act and the Matrimonial Property Act were enacted within five years of the promulgation of the Constitution; the window that the Constitution had earmarked for Parliament to enact legislation regulating the family unit. Secondly, both the Marriage Act 2014 and the Matrimonial Property Act 2013 make mention of article 45 of the Constitution hence Parliament was aware of the entirety of the provision while enacting the Statutes. Third, both the Marriage Act 2014 and the Matrimonial Property Act 2013 are centered on marriage. While the Marriage Act deals with the creation and dissolution of marriage, the Matrimonial Property Act deals with the consequences of the creation and dissolution of marriage.

In enacting any legislation related to family, after the promulgation of the Constitution of Kenya, 2010, Parliament was duty bound to ensure that its actions: were consistent with the provisions of the Constitution; were compliant with Article 45 in its entirety; and, were effective in achieving the intentions of the drafters of the Constitution in designing Article 45 as they did. Consistency, compliance and effectiveness were the bare minimum requirement of Parliament in enacting legislation that is expressly provided for in the 5th schedule of the Constitution.

5. The Sovereign Expectation

5.1. Introduction

Prior to the enactment of the Marriage Act 2014, Parliament had an opportunity to seek legal opinion from the Office of the Attorney General as to the scope of the statute they were required to enact.[111] It also had the opportunity to seek an advisory opinion from the Supreme Court on such matter of the magnitude that affects the very core of the Kenyan society; the

[110] *The Attorney General v Ndii* (SC Petition No. 12 of 2021) [2022] eKLR para 767.
[111] Constitution (n13), art 156(4)(a) & the Office of the Attorney - General Act, 2012, ss. 5(1)(b) & 5(2).

family.[112] The intended legislation was not one that Parliament was to enact on its own motion. This was a statute flowing from a direct decision of the people through a referendum for Parliament to undertake within a specified period of time. Furthermore, Parliament had a duty to interpret the Constitution on its own and understand what the people wanted to achieve through the provision in question.

Interpretation of the Constitution entails an inquiry into the intention of the drafters to discern the meaning of its provisions. The Constitution itself provides that it must be interpreted in a manner that promotes its purposes, values and principles;[113] advances human rights and fundamental freedoms in the Bill of Rights;[114] and, permits the development of the law.[115]

The Court of Appeal in *Independent Electoral & Boundaries Commission v Kiai*[116] and the Supreme Court in *Munya*[117] prescribed a purposive approach to constitutional interpretation. Parliament must first understand the mischief that a given constitutional provision seeks to remedy to ensure that the proposed legislation is granted the capacity to remedy such a mischief. A purposive interpretation brings into focus the historical context of a given provision. With respect to family- related rights, being part of the Bill of Rights, the Constitution requires that a court, tribunal or any authority must promote the spirit, purport and objects of the Bill of Rights while interpreting it.[118]

5.1.1. The Text of the Constitution

In the preamble of the Constitution, the people of Kenya committed to nurture and protect the well-being of the individual and the family without distinction based on marital status.[119] They also recognized the aspirations of all Kenyans for a government based on essential values of human rights, equality, freedom and the rule of law.[120] Having recognized legal rights and freedoms, the people of Kenya adopted and enacted the provisions of the Constitution in exercise of their sovereign and inalienable right to determine for themselves the scope of family life they wanted to permit in Kenya.[121]

The Constitution provides that the family unit should enjoy the recognition and protection of the State.[122] It is the duty of Parliament to represent the will of the people.[123] Consequently, it is the duty of Parliament to enact legislation that gives recognition and protection to people

[112] Ibid art 163(6) & the Supreme Court Act, 2011, ss. 13(1)(b) & 6.
[113] Constitution (n13), art 259(1)(a).
[114] ibid art 259(1)(b).
[115] ibid art 259(1)(c).
[116] *Independent Electoral & Boundaries Commission v Kiai* [2017] eKLR.
[117] *Munya v Kithinji* [2014] eKLR.
[118] Constitution (n13), art 20(4)(b).
[119] ibid, the preamble.
[120] ibid.
[121] ibid.
[122] ibid art 45(1).
[123] ibid art 94(2).

in all types of families whether marital or non-marital. The will of the people of Kenya was to protect everyone in all types of family unions. It also provides that State organs, including Parliament, must perform their functions in accordance with the Constitution.[124] The phrase 'in accordance with the Constitution' simply infers the sovereign expectation as captured in the text and context of the Constitution. The text of the Constitution provides as follows:[125]

Family

45(4) Parliament shall enact legislation that recognizes—

(a) marriages concluded under any tradition, or system of religious, personal or family law; and
(b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that such marriages or systems of law are consistent with the Constitution.

Consequential legislation

261. Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

Effective Date

263. The Constitution shall come into force on its promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the Kenya Gazette of the final result of the referendum ratifying this Constitution, whichever is the earlier

With reference to family, the Fifth Schedule of the Constitution provides that legislation governing family was to be enacted within five years of the promulgation of the Constitution of Kenya 2010.[126]

The use of the words "OR" and "AND" in separating marital families from non-marital families is of importance in this case. When the Constitution uses the sentences '[…] marriages concluded under any tradition or system of religious, personal or family law'[127]…AND 'any system of personal and family law under any tradition'[128]'[…] to the extent that such marriages OR systems of law are consistent with the Constitution',[129] it demonstrates the recognition of two types of families; marital and non-marital families. The use of the word "family" in the Constitution was not meant to infer marriage; the two terms are not synonymous.

[124] ibid art 1(3)(a).
[125] ibid art 45(4).
[126] Constitution [n13], art 261(1) & the Fifth Schedule.
[127] ibid art 45(4)(a).
[128] ibid art 45(4)(b).
[129] ibid art 45(4).

5.1.2. The Context of Article 45 of the Constitution

The history of Article 45 must be understood from the fact that neither the Constitution of Kenya, 1969 nor statute provided for non-marital unions. The prevailing situation was that a union would fall under one of the following categories; a marriage or a potential case for presumption of marriage or nothing at all. If a couple was neither married nor could their circumstances qualify them to be presumed married, they were simply viewed as strangers with neither a legal relationship to each other nor rights to each other's property as far as the law was concerned. The main reason for presumption of marriage was to confer upon one party certain rights which he or she would not have enjoyed had the marriage not been presumed.

In the case of *Njoki*[130] Madan J.A observed, in his dissenting opinion, that presumption of marriage is a concept borne of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage.[131] The Court further pointed out that if the woman is left stranded either by being cast away by the "husband" or because he dies, the law, subject to the requisite proof, bestows the status of "wife" upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased "husband".[132]

The observations of Madan J.A, were endorsed by the majority decision of the Court of Appeal in *MWG v EWK*.[133] Courts have had to presume marriages in in order to allow certain family members to enjoy certain rights. This has been the only way that the courts have found themselves left with to avoid occasioning an injustice to parties who have invested their time and resources in building families with other individuals but stood the risk of being deprived of the fruits of their efforts.

Yawe v Public Trustee is also a good example of the cases that capture the context upon which article 45 was based.[134] Paul Mukumbi Yawe was employed by the East African Airways Corporation as a pilot. Although he was a Ugandan by birth, he was a resident of Nairobi.[135] On 2nd May, 1972, he was killed in a motor vehicle accident in Uganda.[136] Having died intestate, Letters of Administration to his estate were made to the Public Trustee of Kenya on 4th July, 1972.[137] A report of the death of Paul Mukumbi Yawe was made to the Public Trustee by Hottensiah Wanjiku claiming to be his widow and that she had four children by him.[138]

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130 *Njoki v Mutheru* [1985] eKLR.
131 ibid.
132 ibid.
133 *MWG v EWK* [2010] eKLR.
134 *Yawe v Public Trustee* [1976] eKLR.
135 n134.
136 ibid.
137 ibid.
138 ibid.

The trial court established that the alleged marriage had not met the threshold that was required of a Kikuyu customary marriage.[139] The Court held that even though Hottensiah Wanjiku's marriage to the deceased was not valid under Kikuyu custom or at all, her children were the deceased's children hence entitled to inherit.[140] Furthermore, the deceased's mother and siblings were also entitled to inherit.[141] However, Hottensiah Wanjiku was not entitled to any rights to the deceased estate.[142] The High Court, after re-evaluating the evidence on appeal, held that the circumstances of the case were such that a marriage could be presumed.[143] On the basis of presumption of marriage, Hottensiah Wanjiku was entitled to her share of the inheritance as the widow together with the other beneficiaries.[144]

In Re Estate of *ibunja Kamau,* the petitioner, Milka Githikia Kamau, describing herself as the widow of the deceased and petitioned for letters of administration on 12th February, 1999. [145] The letters of administration were granted on 13th May, 1999.[146] On 7th December, 1999, she petitioned the court for confirmation of the grant. Faith Wangechi Kamau filed an affidavit of protest of the grant being confirmed on the basis that she had also been married to the deceased.[147] She claimed that they had been married under Kikuyu customary law.[148]

It was established that the requirements of a valid kikuyu customary marriage had not been met.[149] They were therefore not married.[150] However, the deceased lived with Faith Wangechi Kamau from 1993 until his death.[151] The deceased personal effects such as clothes and motor vehicle were retrieved from her house when the deceased passed away.[152] There was also evidence that she was the one who took the deceased to hospital when he was taken ill.[153] Furthermore, the funeral committee included her as the widow of the deceased and she was accorded the full treatment of a widow.[154] She held herself out as the wife of the deceased.[155] Her relationship with the deceased was open and notorious to both the deceased's parents and his friends.[156]

Justice Martha Koome held that a marriage could be presumed hence she was entitled to a share of the deceased estate.[157] She also held that denying her a share of the deceased estate

[139] ibid.
[140] ibid.
[141] ibid.
[142] ibid.
[143] ibid.
[144] ibid.
[145] *In Re Estate of Kamau* [2008] eKLR.
[146] ibid.
[147] ibid.
[148] ibid.
[149] ibid.
[150] ibid.
[151] ibid.
[152] ibid.
[153] ibid.
[154] n145.
[155] ibid.
[156] ibid.
[157] ibid.

would have been tantamount to denial of her fundamental rights as regards fair treatment and equality before the law.[158] Justice Koome expressed her displeasure with the inordinate time that family law in Kenya was taking to review and make provisions for non-marital relationships.[159] The court pointed out that cases such as this one were only too common and were becoming an everyday affair since the 1970s.[160]

The judge admitted that the courts were struggling to deal with such cases. She recommended that it was necessary to revise marriage laws so as to make provisions for the thousands of women who found themselves trapped in such relationships which were not recognized as customary or statute. As of 2008, the court held that it was high time that Parliament made provisions for these kinds of relationship to bring about some order in the society. One would do well to remember that around 2008-2010 was the period when the proposals for the 2010 Constitution were being finalized.[161]

In *Githatu v Kiarie*[162] the appellant claimed to have married the deceased in 1968 under Kikuyu customary law. She produced the birth certificates of their children showing herself as the mother and the deceased as the father as evidence of marriage.[163] She also produced photographs of herself and the deceased family members taken at various family occasions.[164] However, the court held that the main component of a Kikuyu marriage, payment of dowry, had not taken place.[165] They were therefore not married under Kikuyu customary law.[166]

Based on the circumstances of the case such as cohabitation for 15 years and having attained and sustained the reputation of a husband and wife, the court upheld the findings of the trial court that a marriage could be presumed in this case.[167] The court also held that the petitioner could be regarded as a widow of the deceased.[168] This declaration meant that she would be entitled to the rights of a widow under the Law of Succession Act.[169]

In 2023, in *Kangara,* the Supreme Court called on Parliament to wake up and recognize that it is becoming increasingly common for consenting adults to live together for long durations without the desire or intention to be married.[170] The Court also pointed out that there exists relationships where couples cohabit with no intention whatsoever of contracting a marriage. While some may find this amoral or incredible, it is a reality of the contemporary times.[171] In

[158] ibid.
[159] ibid.
[160] ibid.
[161] (n1) 13.
[162] *Githatu v Kiarie* [2010] eKLR.
[163] ibid.
[164] ibid.
[165] ibid.
[166] ibid.
[167] ibid.
[168] ibid.
[169] ibid.
[170] *Kangara* (n59)KLR [65]- [66].
[171] ibid.

addition, in the ever-changing society, a man and a woman can choose to cohabit with the express intention that their cohabitation does not constitute a marriage.[172]

Having updated Parliament on the realities of the changing world, the Supreme Court went further and recommended to the National Assembly and the Senate to move with speed and enact legislation which is similar to the Adult Interdependent Relationship Act in Alberta, Canada, which has proved effective in the recognition and definition of rights and obligations of cohabitees in long -term relationships.[173]

All these cases dating from 1980s all the way to 2023 contextualize the necessity of enacting legislation that provides for both marital and non-marital families. When the drafters of the Constitution decided to focus on "family" as opposed to "marriage", they intended to protect the rights of individuals in different types of family settings. The drafters intended to have a provision that admits and recognizes that the society was indeed changing and required a change in the legal approach to measure up to the needs of the individual and society in the contemporary world. Thus, the context of Article 45 was that the people wanted to address the exposure to risks that people were subjected to for choosing unions other than marital unions.

5.2. Significance of sovereignty on the question of family

In light of the foregoing discussion, it is incumbent to question the legal value and weight of the results of a referendum to answer the following questions. What is the weight of the vote in a referendum? What happens when a conservative Parliament feels that the people are too progressive or egalitarian for their own good? What happens when members of Parliament feel that the people proposed too many radical changes to the law through the referendum? Can Parliament demand moderation? Can the Parliament water down certain provisions of the Constitution? Can the Parliament choose to ignore the existence of certain parts of the Constitution in the "interest of the public"? Does voting in a referendum indicate the beginning or the end of debate? Are constitutional provisions a list of suggestions or commands to Parliament?

Simeon E. Baldwin argues that every government is organized selfishness.[174] It is constituted for the good of its constituents. It is the embodiment of a scheme devised by the people to form a union; insure their domestic tranquility; provide for their own welfare; and, to secure their own liberty. A Constitution is the medium through which sovereign citizens strike a balance between the selfishness of individuals to establish a union that is agreeable to everyone in it. In *Munn,*[175] Chief Justice Waite argued that the very essence of government is to pursue public good.

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[172] ibid at para 68.
[173] ibid at para 69.
[174] Simeon E Baldwin, 'The People of the United States' (1899) VIII(4) *Yale Law Journal* 166
[175] *Ira Y. Munn and George L. Scott v the People of Illinois*, 94 US, 116-119 cited in 'Price and Sovereignty' (2021) 135(2) *Harvard Law Review,*755, 765.

In the matter of *Chisholm,*[176] the Supreme Court of the United States held that sovereignty rests with the people rather than governments. They also held that the States are not Kings neither is the legislature the successor of the Crown. This was a case that arose when the United States of America liberated itself from the control of the monarchs of the United Kingdom. A controversy arose as to whether, in the transition, popular sovereignty rested with the individuals or the States. The Court held that sovereignty belongs to the people. Even when the sovereign people form government, the said government does not become sovereign unless sovereignty is donated to it. In forming government, the dignity of the citizens who the court christened the "original sovereign", remains unimpaired individually and collectively.

Finally, Alain De Benoist argues that the question of sovereignty arose at the end of the middle ages when people thought beyond the issue of the best form of government to establish.[177] People sought to redefine the relationship between the government and the people in a political community. Sovereignty is therefore the prerogative of authority. It originates from the people and government derives its function from the inalienable right of the people to govern themselves. There is no authority above the sovereignty that emanates from the people. In the formation of government, the sovereign authority is not transferred to the government rather it is merely delegated. The people never cease to possess the sovereign power intrinsically and substantially. The government becomes a trustee rather than the proprietor of sovereignty.[178]

In the Kenyan case, the Constitution prominently provides in the very first provision that all sovereign power belongs to the people.[179] It also provides that the people may exercise their sovereign power either directly or through their democratically elected representatives.[180] Sovereign power is delegated to, among others, Parliament.[181] It also provides that the legislative authority of the Republic is derived from the people.[182] Furthermore, Parliament may only exercise the delegated sovereignty in accordance with the Constitution.[183]

The significance of sovereign authority is that when the sovereign have decreed something to be done in a particular way, it has to be done exactly as the sovereign have decided. The assignment for Parliament has not changed since 4th August, 2010 when the referendum was held. The focus of the sovereign decree is the enactment of a legislation that remedies the mischief that existed in families before 2010. Nothing less than a legislation that either comes as a single statute or a series of statutes should suffice.

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[176] *Chisholm v Georgia* 2 US (2 Dall.) 419 [1793] cited by Randy E. Barnett, 'The People or the State: *Chisholm v Georgia and Popular Sovereignty*' (2007) (93) *Virginia Law Review,* 1729.

[177] Alain De Benoist, 'What is Sovereignty?' A translation by Julia Kostova from "Qu'est-ce que la souverainete?' in *Elements*, No. 96 (November, 1999), 24-35 < https://www2.congreso.gob.pe/sicr/cendocbib/con2_uibd.nsf/A20317BBCECF9E1E0525770A00586F60/$FILE/what.pdf> accessed on 26th June, 2023.

[178] ibid p. 113.

[179] Constitution (n13), art 1(1).

[180] ibid art 1(2).

[181] ibid art 1(3)(a).

[182] ibid art 94(1).

[183] ibid art 1(3).

6. The Purview of the Marriage Act, 2014

6.1. Limitations of the Marriage Act, 2014

The people of Kenya having provided clear instructions for Parliament to enact a legislation that regulates family unions within five years of the promulgation of the Constitution, Parliament chose to enact the Marriage Act, 2014.[184] The Act provides that its objectives are to amend and consolidate the various laws relating to marriage and divorce and for connected purposes.[185] True to its objectives, the Marriage Act, 2014 consolidated all the marriage - related statutes that had existed prior to the promulgation of the Constitution of Kenya, 2010.[186] The Act regulates five types of marriages: Christian marriages;[187] Civil Marriage;[188] Customary marriages;[189] Hindu marriages;[190] and, Marriage under Islamic Law.[191] This gave the statute a narrow focus; marriage.

The narrow purview of a Marriage Act was perfectly covered in.[192] In this case, S.E.O. Bosire J. held that the provisions of the Marriage Act Cap 150 Laws of Kenya strictly applied to marriage.[193] It could not be applied to burial because it did not provide for it.[194] The same is the case with the Marriage Act 2014 which cannot be applied to non-marital unions since it does not address anything other than marriage.

Nothing about the Marriage Act, 2014 embodies the profound effect that Article 45 of the Constitution was designed to achieve with respect to non- marital families. Nothing shows a legal system that has adapted and developed to fulfill the needs of the living people in non-marital families.[195] Nothing shows a story of ordinary citizens striving and succeeding to overthrow the existing social order to define a new social order for themselves with respect to the family unit.[196] The Marriage Act 2014 fails to reflect social change and reform through values such as social justice, equality, human rights and freedom for non-marital families as intended by the Constitution of Kenya 2010.[197] Kenya has always had a Marriage Act since 1902. Parliament simply ignored Article 45 of the Constitution of Kenya 2010 hence the status quo remains unchanged.

184 The Marriage Act, 2014.
185 ibid.
186 ibid.
187 ibid part III, ss. 17-23.
188 ibid part IV, ss. 24-42.
189 ibid part V, ss. 43-45.
190 ibid part VI, ss. 46 & 47.
191 ibid part VII, ss. 48 & 49.
192 *Otieno v Ougo* (1987) eKLR.
193 ibid.
194 ibid.
195 *Pharmaceutical Society of Kenya* (n3) .
196 Mutunga (n6).
197 *Speaker of the Senate* (n2).

Suffice it to note, the Parliament has a history of second -guessing and side-stepping the sovereign will often attempting to claim sovereign authority over the people. In *Ndii,* the Supreme Court agreed with the observations in the *Njoya case198* to the effect that the history of Kenya is awash with attempts to dilute the role of the people in favour of those in authority.[199] Professor Kivutha Kibwana argued that in 1999, the government colluded with the opposition to undermine and oppose a people - driven process of constitutional review.[200] The opposition and government mounted a campaign to try and ensure that constitutional reform was a preserve and responsibility of Parliament.[201] They resorted to the strategy of using a parliamentary select committee headed by the then leader of opposition.[202]

The Constitution of Kenya Review Commission (CKRC), having full knowledge of these attempts, observed in their final report that the tendency to treat Parliament as supreme must be discarded.[203] It also defined sovereignty as the supreme political authority; the supreme will; the paramount control of the Constitution and frame of governance. It is the source of all political power from which specific political powers are derived.[204] The Commission also concluded that it is important to define who the final authority in a country is. They further concluded that it is equally important to define the relationship between the authority and the key institutions of State. The Constitution should respond to people's voice and the people's needs as perceived by the people themselves.[205]

The Supreme Court, while addressing presidential powers, made a comment which is also applicable to Members of Parliament.[206] It stated that the President's oath of office includes the protection of the sovereignty of ordinary citizens based on the social contract theory.[207] The President exercises authority in a manner the people have chosen under the Constitution.[208] It should not, at the same time, be open for the President to choose what the sovereign should have in her Constitution.[209] It is also not open to Members of Parliament to pick and choose what the people will have in legislation. Parliament's legislative authority must be as the people of Kenya chose it to be.

By taking the selective approach to legislation, Parliament directly challenged the will of the Kenyan people. While the sovereign citizens extended legal protections to all families, Parliament chose to limit such protection to marital families thus challenging the collective intelligence of the 8,887,652 voters who took part in the referendum held on 4th August, 2010.

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198 *Njoya v Honourable Attorney General* [2004] eKLR.

199 Ndii (n110).

200 Kivutha Kibwana, 'Constitutional Development in Kenya in 1999' < http://erepository.uonbi.ac.ke/handle/11295/88064> accessed 19 September 2023.

201 ibid.

202 ibid.

203 The Final Report of the Constitution of Kenya Review Commission Final Report (Approved for Issue at the 95th Plenary Meeting of the Constitution of Kenya Review Commission Held on 10th February, 2005).

204 ibid p. 79 section 7.4.1.

205 ibid.

206 *Ndii* (n110) par 474.

207 ibid.

208 ibid.

209 ibid.

6.2. The Legal Effects of Lack of Recognition for Non-Marital Families on Individual Rights

The Constitution of Kenya 2010 mandated Parliament to enact legislation whose main focus was legal recognition of families.[210] All families formed by marriage or any system of family law have a constitutional right to legal recognition. Unfortunately, it is only families established by marriage that currently enjoy legal recognition courtesy of the Marriage Act 2014.[211] Legal recognition determines rights and responsibilities of each party to each other and to each other's property. Therefore, the failure to enact a legislation recognizing non-marital families denies couples in non-marital families the enjoyment of rights which married couples are entitled to. First, the lack of legal recognition for non-marital families affects the parties' property rights. It is trite law that any property acquired by parties to a marriage constitutes matrimonial property.[212] The same is subject to distribution between the parties at the dissolution of their marriage according to each party's contribution.[213] On the other hand, property acquired during the pendency of non-marital families does not become matrimonial property. To acquire property rights in non-marital families, one has to pursue a longer and more tedious path of the doctrine of common intention constructive trust.[214] A party to a non-marital family has to shoulder the heavy burden of demonstrating the nature of the substantive right; proof of the existence of that right; and, finally deal with the quantification of that right.

Secondly, the lack of legal recognition for non-marital families affects rights in criminal proceedings. No person can be compelled to disclose any communication made to him or her during marriage, by the other spouse.[215] A person's wife or husband cannot be compelled to testify for the prosecution against their spouse.[216] However, individuals are allowed to testify in defense of their spouses.[217] The Evidence Act defines the terms "husband" and "wife" to mean, respectively, the husband and wife of a marriage.[218] The law does not extend such privilege to communications between parties in non - marital families.

Third, the lack of recognition for non-marital family settings affects taxation. In the transfer of property from one spouse to the other, the payment of Capital Gains Tax is dependent on the parties' marital relationship.[219] Similarly, the transfer of property between former spouses as part of a divorce or separation settlement attracts an exemption from the payment of Capital Gains Tax.[220] Furthermore, transfer of assets to a company where spouses or a spouse and children hold 100% shareholding attracts a tax exemption.[221] This is a tax exemption which is

[210] Constitution (n13) art 45(4).
[211] Marriage Act (n21) ss 3 & 6.
[212] The Matrimonial Property Act, 2013 s. 2.
[213] ibid ss. 7 & 9.
[214] *Kangara* (n59) par88.
[215] The Evidence Act, Cap 80 s. 130(1).
[216] ibid s. 127(2).
[217] ibid.
[218] ibid s. 127(4).
[219] The Income Tax Act, Cap 470.
[220] ibid Eight Schedule 6(2)(h)(ii).
[221] ibid Eight Schedule 6(2)(h)(v).

only available on the relationships between spouses. Hence, marriage confers a privilege in the form of tax exemption in the transfer of property. On the other hand, there are no such tax exemptions between couples in non-marital family arrangements.

Fourth, marital status directly affects financial dependence between parties to intimate family relationships. The Marriage Act 2014 provides that a court may order a person to pay maintenance to a spouse.[222] The Act defines the word "spouse" as a husband or a wife.[223] The substance of the Marriage Act is that marriage automatically confers upon a spouse the right to be maintained by the other spouse. This right is not extended to partners in non-marital family arrangements.

Finally, restricting legal recognition to marital relationships denies parties to non-marital relationships rights under the Law of Succession Act.[224] Under this Act, those who are qualified to inherit from the estate of the deceased are called dependents.[225] Dependents include the wife or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.[226] Where the deceased was a woman, dependents include her husband.[227] Therefore, it is clear that marriage confers upon a spouse benefits over the deceased spouse's estate.

7. Conclusions

Although the Marriage Act, 2014 is sufficient in the formation, regulation and dissolution of marriage, it falls short of the expectations of Article 45 of the Constitution of Kenya 2010. Article 45(4) required Parliament to enact legislation recognizing both families established by marriage and non-marital families established under any system of family law, tradition or religious practice.

By failing to enact legislation which accords legal recognition to non-marital family unions, the Parliament created an inequality with respect to how marital and non-marital families affect individuals' property rights; rights under the Law of Succession Act; rights to financial support of an intimate partner; individual rights in criminal proceedings; and, exceptions in taxation. It is essential that Parliament enacts legislation which specifically confers legal recognition to non-marital families; defines rights and responsibilities of parties to such unions; and, extends the same benefits that are currently extended to married couples. This would ensure that all family units enjoy equality, recognition and protection by the State as is provided by the Constitution of Kenya, 2010.

[222] The Marriage Act, 2014 section 77(1)(a).
[223] ibid s. 2.
[224] The Law of Succession Act Cap. 160.
[225] ibid s. 26.
[226] ibid s. 29(a).
[227] ibid s. 29(c).

CONUNDRUM OF ETHICS IN ADVOCATE-CLIENT RELATIONS IN KENYA

Aming'a Stephen Philip Mang'erere*

1. Introduction

In Kenya, advocates are pivotal in professional capacities in all state organs. In the administration of justice, advocates are judicial officers, investigators, prosecutors, or counsel of parties to legal proceedings. Advocates also serve as in house counsel in agencies and as private practitioners. Professionally, the advocate's role is triune namely; being the client's legal advisor, defender and representative.[1] Albeit Kenya has multiple regulatory structures for the legal profession and protection of clients; review of case law, regulators' statutory reports, government task force reports, mass media reports, and empirical survey reports; points to a steadily growing ethical conundrum in the profession. The problem manifests itself in rising cases of client complaints and regulators' sanctions against advocates for professional misconduct; prosecution of some advocates for theft of clients' money; and investigation of some advocates for alleged crimes in connection with retainers. For example, ACC reports for the years ended 31st December 2019, 31st December 2020, 31st December 2021, and 31st December 2022, and the two quarters ended 30th June 2023; indicate that total pending client complaints against advocates stood at 4385,[2] 3885,[3] 4007,[4] 4026,[5] and 3774,[6] respectively. The reports reveal that most complaints were on withholding of client funds, failure to render professional services, and failure to account.[7] Media reports quoting ACC Secretary, also disclosed that for the period July 1, 2022, to March 31, 2023, the ACC facilitated retrieval of more than six (6) million shillings in clients' money which had been[illegally]retained by advocates.[8] The reports also stated that for an unspecified period, the ACC had facilitated refund of more than twenty three million (23) shillings to Kenyans [clients] from their advocates who had illegally withheld the money.[9]

* LLB (UoN, Kenya), LLM (UWE, Bristol, UK), Dip-Law (KSL), PhD (Law), University of Dar es Salaam. Advocate, Commissioner of Oaths & Notary Public, Lecturer at Law and Acting Dean, JKUAT School of Law Phone: 0722529179 | Emails: saminga03@yahoo.co.uk/ saminga@jkuat.ac.ke

1 United Nations Principles on the Role of Lawyers (Adopted 7 September 1990), principle 13.

2 Advocates Complaints Commission, 116 *Quarterly Report*, Published as Gazette Notice No. 1389 dated 24th January 2020; *The Kenya Gazette* Vol. CXXII-No.34, Nairobi;21st February 2020.

3 ibid, 120 Quarterly Report, Published as Gazette Notice No.56 dated 6th January 2021; *The Kenya Gazette* Vol. CXXIII-No.2, Nairobi; 8th January 2021.

4 22, 124 *Quarterly Report*, Published as Gazette Notice No. 164 dated 4th January 2022; Kenya Gazette Vol. CXXIV-No. 6, Nairobi;14th January 2022.

5 n2, 128 *Quarterly Report*, Published as Gazette Notice No. 231, dated 4th January, 2023; *The Kenya Gazette* Vol. CXXV-No.7, Nairobi, 14th January 2023.

6 Advocates Complaints Commission, 130 Quarterly Report, Published as Gazette Notice No. 9278, dated 4th July 2023; *The Kenya Gazette* Vol. CXXV-No.163, Nairobi, 14th July 2023.

7 Ibid. See also *fn*(2)(3)(4)(5).

8 Robert Ojwang' and Chris Mahandara.;State Rolls Out Sensitization Campaign On Legal Complaints Resolution, KNA1 April 19, 2023 Counties, Editor's Pick, Kisumu, Legal0. Accessed at https://www.kenyanews.go.ke/state-rolls-out-sensitization-campaign-on-legal-complaints-resolution/ on 10 October 2023.

9 Ibid.

The report even revealed that 'in 2023 alone, 3 rogue advocates have been suspended and 5 struck off the roll over gross professional misconduct.'[10] Such breaches are symptomatic of a deeply rooted and contagion ethical conundrum in the legal profession. The conundrum has serious ramifications on clients and the public and grave reputational damage to the profession. Therefore, as a matter of public concern and interest, there is urgent need for culture change among advocates and drastic regulatory transformation to combat the cancerous conundrum for the benefit of all stakeholders.

This article dissects some of the causes and manifestations of the ethical conundrum, identifies some ramifications on stakeholders and makes a case for positive cultural change among advocates; consumer empowerment through education and transformation in regulation of the legal profession. Part 1 states the problem under investigation. Part 2 focuses on the meaning of an advocate, nature of advocate's work; formation of advocate-client relationship and the rights and duties of parties thereto. Part 3 renders an overview of the nature, sources and significance of professional ethics for advocates and performance of advocates in upholding them. Part 4 chronicles some causes and manifestations of the ethical conundrum and its ramifications on stakeholders. Part 5 offers some evidence-based suggestions on regulatory reforms and other measures to address the conundrum. Part 6 highlights key issues, findings and conclusions.

2. Who is an advocate under the Laws of Kenya?

In Kenya, an advocate is a person whose name has been duly entered on the Roll of advocates and/or on the Roll of advocates holding the rank of Senior Counsel.[11] Upon admission, every advocate acquires membership of the Law Society of Kenya (LSK).[12] Kenya has more than twenty thousand advocates.[13] In addition to admission, to practice law, an advocate must hold a current annual practicing certificate.[14] Every advocate to whom the Registrar (CRJ) issues annual practicing certificate (PC) acquires ordinary membership of the LSK and the Advocates Benevolent Association (ABA) and is subject to the laws and rules governing LSK and ABA.[15] In this article, advocate also includes persons obliged to take out annual practicing certificate who are nevertheless engaged in private practice without the PC; a foreign advocate admitted by the Attorney General to practice as such, for any specified suit or matter;[16] and any advocate who is in house counsel.[17]

2.1 Regulation of Advocates in Kenya.

In Kenya, the legal profession is co-regulated by itself through the LSK and the government. Regulation takes the form of laws, annual practice certificates, investigatory and disciplinary

[10] Ibid.
[11] The Advocates Act, Chapter 16, Laws of Kenya, Section 2.
[12] The Law Society of Kenya Act, 2014, No. 21 of 2014, section 7(1)(a).
[13] See https://lsk.or.ke/membership/. Accessed 10th October 2023.
[14] The Advocates Act (n11),s 9.
[15] ibid, s 23(1).
[16] ibid, s 11
[17] ibid, s 32A.

powers, investigatory and prosecution powers among others, exercised by regulators and some government agencies. The normative foundations of the co-regulation include The Constitution of Kenya 2010 (The Constitution); The Advocates Act;[18] The Law Society of Kenya Act;[19] and other laws including the LSK Code of Standards of Professional Practice and Ethical Conduct (2017).20 Legally, advocates are bound by multiple legal and ethical requirements and standards of professional practice and conduct with attendant duties and responsibilities. Professional standards, duties and responsibilities are designed to safeguard and promote the profession's reputation and independence; safeguard clients' rights and interests, and protect public interest.[21]

In Kenya, the public policy purposes of regulating the legal profession and practice of law are revealed in the objects and functions of the LSK.[22] Thus, due execution of the objects and functions is apt to benefit all stakeholders including the government, public, legal profession and other professionals engaged in legislation, government, and administration of justice. Thus, under the LSK Act, the LSK is mandated to protect and promote private and public interests in advisory, facilitative and representative capacities.

The main agencies that regulate advocates include Law Society of Kenya (LSK),[23] the Advocates Complaints Commission (ACC),[24] the Advocates Disciplinary Tribunal (ADT),[25] the Attorney General (AG),[26] the Chief Justice (CJ),[27] the [Chief] Registrar of the Judiciary (CRJ),[28] and the Courts of Law.[29] Others are Office of Director of Public Prosecutions (ODPP),[30] and the Ethics and Anti-Corruption Commission (EAAC).[31]

Regulatory instruments used include admission into the profession (CJ), admission of foreign advocates to conduct a particular matter (AG), continuing legal education (LSK), annual practicing certificate (LSK and CRJ), issue, suspension or revocation of annual practicing certificate (CRJ, Courts and CJ), determination of complaints against advocates (ACC), disciplinary proceedings and sanctions (ACC, ADT and Courts), and prosecution (ODPP, AG and Courts). Each regulator uses one or more of the instruments.

[18] No.18 of 2014, Chapter 16, Laws of Kenya.
[19] No.21 of 2014, Chapter 18, Laws of Kenya.
[20] *The Kenya Gazette* Notice No 5212 of 2017, dated 11th March 2023.
[21] See UN Principles on the Role of Lawyers 1990; LSK Code of Standards of Professional Practice and Ethical Act (2017); Law Society of Kenya Act (n12), ss 4; 5 and 6.
[22] Law Society of Kenya Act (n12), s 4.
[23] A body corporate established under section 3(1) of The Law Society of Kenya Act (n12).
[24] Established by section 53, of The Advocates Act (n11).
[25] ibid, s57
[26] ibid ss 11 and 80.
[27] ibid ss 11(e); Section 14.
[28] ibid ss16 and 18, The [Chief] Registrar of the Judiciary is the custodian of the Roll of Advocates and the Roll of Senior Counsel. He or she issues annual practicing certificates to eligible advocates pursuant to sections 21, 22 and 25 of The Advocates Act Chapter 16, Laws of Kenya.
[29] Advocates Act (n11), s 55. Under this section every advocate is an Officer of the Court and Subject to the jurisdiction of the Court.
[30] The Office of Director of Public Prosecutions Act No. 2 of 2013 pursuant to Article 157 of The Constitution of Kenya 2010.
[31] The Ethics and Anti-Corruption Commission Act No. 22 of 2011, Laws of Kenya. s3

2.2 The Nature of the Lawyer's Professional Work

Lawyers are specialized professionals who place the interests of their clients above their own, and strive to obtain respect for the rule of law.[32] To enable regulators and lawyers effectively manage the high risks associated with the practice of law and help lawyers balance competing interests in their relations with clients, fellow lawyers, their profession, the courts and the public; in many states, including Kenya, as a matter of public interest, the legal services industry is heavily regulated.[33]

2.3 Who is a Client?

Under section 2 of the Advocates Act, a "client" includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs. Though not included in the above definition, a purposive interpretation of the section and use of the *ejusdem generis* rule leads to the conclusion that a client includes any recipient or beneficiary of *pro bono* legal services and legal aid under the *pro bono* scheme of the LSK, other organization and the National Legal Aid Service.[34]

2.3.1 Nature and Creation of Advocate-Client Relationship in Kenya

Though diverse opinions abound on the nature of the advocate-client relationship; an advocate-client relationship is primarily professional. However, depending on the subject matter, a retainer may have other dimensions and aspects including being a contractual, representative, principal-agent or supplier-consumer relationship. As a contractual relationship, it should satisfy all the essential elements of a valid contract including contractual capacity, offer, acceptance, intention to create legal relations, consideration, legality, and form. As a contract, claims under a retainer are subject to the law of limitations of actions.[35] Thus, in *Njuguna & Associates v Chege Gichuru t/a Exodus Transporter,* it was held, inter alia, that," since it is plain that an advocate-client relationship is contractual, any claim for payment of fees by an advocate for services offered by the Advocate must be brought within six years of the completion of the work.[36]

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[32] International Bar Association, 'International Principles on Conduct for the Legal Profession' (2011),1.

[33] See Aspen Publishing, The Regulation of Lawyers, Accessed on 10th October 2023 at <https://www.aspenpublishing.com/File%20Library/Student%20Resources/Law%20School/Authors%20L-P/Lerman%20-%20Ethical%20Problems%20in%20the%20Practice%20of%20Law%204e%20Concise/Chapter1.pdf.>

[34] Under The Legal Aid Act No. 6.of 2016.

[35] Limitation of Actions Act Chapter 22, laws of Kenya.

[36] *Njuguna & Associates v Chege Gichuru t/a Exodus Transporter* [2017] eKLR, High Court of Kenya at Kiambu Misc. Civil Application No. 36 Of 2016. The same verdict was reached in *Abincha & Co. Advocates v Trident Insurance Co. Ltd [2012] eKLR,* where bills of costs filed more than six years after completion of the work under the retainer and lawful termination of the retainer, were held, statute-barred under section 4(1) of the Limitation of Actions Act.

An advocate-client relationship may arise through express agreement, unilateral appointment, orally or in writing by a client; implication from course of dealings; through *pro bono* services by an advocate,[37] State assignment of an advocate to a deserving accused or litigant,[38] or assignment of advocate under the National Legal Aid Service.[39]

In law, though an advocate-client agreement need not be in writing for it to be valid;[40] where an oral retainer is disputed by the alleged client, the advocate has the burden of proving on a balance of probabilities, of the existence of the retainer. Thus in *Nyachoti and Company Advocates v Giriama Ranching Company Limited,*[41] where existence of a retainer was disputed, the advocate adduced evidence leading the Court to hold, inter alia, that,.'[…] a retainer existed between the law firm and the Applicant Company through its Directors'.[42] Consequently, the court permitted taxation of the Bill of costs for legal services the advocate rendered to the company till transfer of the case from Nairobi to Mombasa High Court. [43]

In appropriate cases, the relationship may be implied from the course of dealings between an advocate and the alleged client or by client ratification of services or benefits accruing from the services. Thus in *Akiba Bank Limited,*[44] it was held, *inter alia*, that; '[…] the participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client/ the conduct of the Client/Advocate "relationship".'[45]

On form, in *Karanja,*[46] it was held that '[…] where a suit is instituted for and on behalf of a company, there should be a company resolution to that effect.' Whatever the mode of creation, it '"*is trite law that a client-advocate relationship arises when a client retains an Advocate to offer legal services specifically or generally*'.[47] Legally, "retainer" is synonymous with instructions, employment, or engagement of an advocate in terms of section 51(2) of the Advocates Act.[48]

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[37] Especially in public interest litigation or *pro bono* services to indigents in civil and criminal proceedings.

[38] Pursuant to Article 50(2) (h), Constitution of Kenya 2010 and The National Legal Aid Act No. 6 of 2016, sections 35 and 36.

[39] Under section 2 of the Legal Aid Act No. 6 of 2016.

[40] *Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd* (2007) eKLR(HC).

[41] [2021]eKLR,

[42] Ibid

[43] Ibid.

[44] *Ochieng Onyango and Kibet & Ohaga Advocates - vs - Akiba Bank Limited* Misc Application No. 330 of 2005, High Court of Kenya at Nairobi.

[45] See also Ritesh Nandlal Pamnani & Another V Dhanwanti Hitendra Hirani & 2 Others[2012] eKLR(HC).

[46] *Karanja v Maina* Nairobi Milimani Law Courts Environment and Land Division ELC No.1411 Of 2014; [2015] eKLR.

[47] *Per Mabeya J,* in Oriental Commercial Bank Limited V. Central Bank of Kenya [2013]eKLR(HC).

[48] *Owino Okeyo & Company Advocates v. Pelican Engineering & Construction Company Limited,* High Court of Kenya at Nairobi (Milimani Commercial Courts),Misc Civil Appli 48 of 2002; [2007] eKLR. See also *Hezekiah O Obunya –vs- Kuguru Food Complex Ltd –vs- Nairobi* HMCA No. 400 of 2001.

2.3.3 Rights and Duties of Parties to an Advocate-Client Relationship

The rights and duties of parties to a retainer are derived from the law, terms of a retainer and/or court determination in case of a client-advocate dispute on retainer or fees. Under the Constitution, the relationship is subject to principles and values of governance[49] and the bill of rights.[50] It is also subject to other laws on consumer protection,[51] contract, evidence, trusts, and crime. In Kenya, Advocates are key in facilitating access to justice. Thus in *Dry Associates Limited v. Capital Markets Authority.*[52] access to justice was defined to include '[…] affordability of legal services.'[53] Justice is a public good.

2.4 Rights of a Client as Against an Advocate

In a retainer, the rights of a client may stem from the law, terms of the retainer, implication from the course of dealings, client ratification of actions/services or adoption of benefits accruing from services of an advocate or upon determination of a court. Following is a discussion of some of the rights and their enforcement under the laws of Kenya.

2.4.1 Under the Constitution of Kenya 2010.

Under the Constitution, as consumers of legal services; clients are entitled to goods and services of reasonable quality;[54] to the information necessary for them to gain full benefit from the goods and services;[55] to the protection of their health, safety and economic interests;[56] and to compensation for loss or injury arising from defects in goods or services.[57] The rights apply to goods and services offered by public entities and private persons.[58] No sector is exempt from Article 46. Parliament gave effect to Article 46 through The Consumer Protection Act No. 46 of 2012.

Under Article 31 of the Constitution, subject to some legal exceptions; a client has a right of privacy for privileged communications between the client and advocate under a retainer. Other rights are equality and freedom from discrimination as envisaged in Article 27(5) of the Constitution. In that regard, a client has a right not to be discriminated by an advocate

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[49] Under Article 10 of the Constitution of Kenya 2010. Under section 4 of the LSK Act, one of the objects and functions of the LSK is to uphold the national values and principles of governance.

[50] Constitution of Kenya 2010; Article 46 acknowledges the rights of consumers of goods and services.

[51] Examples include, The Consumer Protection Act No. 46 of 2012,Laws of Kenya. This Act gave effect to Article 46 of The Constitution of Kenya 2010. Others are, Competition Act No. 12 of 2010 [Revised 2016], Laws of Kenya; The Advocates (Marketing and Advertising) Rules, 2014.

[52] *Dry Associates Limited v Capital Markets Authority* The High Court Of Kenya At Nairobi Constitutional and Human Rights Division Petition No. 328 of 2011

[53] Ibid, para 110.

[54] Constitution (n50) art46(1) (a).

[55] ibid, art 46(1) (b).

[56] ibid, art 46(1) (c)

[57] Constitution (n50) art 46 (1) (d).

[58] ibid art 46(3)

especially in legal fees, quality of services and other matters under the retainer on any of the prohibited grounds including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. In a retainer, an advocate should uphold fairness and equality and be guided by the law on fees, quality of services and other attendant issues.

Under Article 11(2) (c) and Article 40(1) and (5) of the Constitution, a client has a right to protection of their intellectual property rights and other property including money, title documents, and confidential data entrusted to an advocate under the retainer. Therefore, cases of theft or misappropriation of trust property; illegal withholding of funds, and failure to account are breaches of a client's right to property. On this, ACC reports reveal that money and property issues bear most client complaints against advocates. For example, in the quarter ended 31st December, 2021, of 37 complaints classified by the ACC, 23 concerned withholding of funds; 11 failure to render professional services, and 3 on issuing dishonoured cheques.[59] For the quarter ended March, 2022, of the 64 complaints classified, 33 were on withholding of funds, 13 failure to render professional services, and 8 failure to account.[60] In the quarter ended 30th June 2022, of the 51 complaints classified, 28 were on withholding of funds, 10 on failure to render professional services, and 9 on failure to account.[61] In the quarter ended 30th September, 2022, of the 58 complaints received and classified, 26 were on withholding of funds, 18 on failure to render professional services, and 7 on failure to account.[62] For the period ended 31st December, 2022, of the 44 complaints classified by the ACC, 22 were on withholding of funds, 10 failure to render professional services, and 6 failure to account.[63] In the quarter ended 31st March, 2023, out of the 48 complaints received and classified, 20 were on withholding of funds, 13failure to render professional services, and 12 failure to account.[64] For the next quarter ended 30th June, 2023, of the 50 complaints received and classified, 17 were on withholding funds; 15 failure to render professional services, and 15 on failure to account.[65]

[59] Advocates Complaints Commission, 124th *Quarterly Report*; Dated 4th January, 2022, Published as Gazette Notice 164; *The Kenya Gazette* Vol. CXXIV-No. 6, 14th January 2022.

[60] Advocates Complaints Commission, 125th *Quarterly Report*, Dated 4th April, 2022, Published as Gazette Notice 3982; *The Kenya Gazette*, Vol. CXXIV —No. 61, 8th April 2022.

[61] Advocates Complaints Commission, 126th *Quarterly Report*, Dated 4th July, 2022, Published as Gazette Notice 9409; The Kenya Gazette, Vol. CXXIV —No. 151, 5th August 2022.

[62] Advocates Complaints Commission, 127th *Quarterly Report*, Dated 4th October, 2022, Published as Gazette Notice 12598; The Kenya Gazette, Vol. CXXIV —No. 21, 14th October 2022.

[63] Advocates Complaints Commission, 128th *Quarterly Report*, Dated 4th January, 2023; Published as Gazette Notice No.231; The Kenya Gazette, Vol. CXXV —No. 7, 13th January, 2023.

[64] Advocates Complaints Commission, 129th *Quarterly Report*, Dated 4th April, 2023, Published as Gazette Notice 5193; The Kenya Gazette, Vol. CXXV —No.92, 20th April 2023.

[65] Advocates Complaints Commission, 130th *Quarterly Report*, Dated 4th July,2023, Published as Gazette Notice 9278; The Kenya Gazette, Vol. CXXV —No. 61, 14th July, 2023.

2.4.2 Statutory Rights and Protections of a Client.

Under legislation, rights of a client include confidentiality under sections 134 and 137 of the Evidence Act[66] and section 18 of the Proceeds of Crime and Anti-Money Laundering Act.[67] The privilege belongs to the client and not the advocate. Thus, in *Sum;*[68] it was held that, 'an advocate cannot […] be compelled to breach the said requirement either by court or any other person.'[69] Since it belongs to the client, an advocate cannot rely on the privilege to shield himself from investigation by regulators or state agencies for alleged breaches of client's rights or alleged criminal conduct in connection with a retainer.[70] The right subsists post-the retainer.[71]

Under the Consumer Protection Act (CPA), as persons to whom goods and services are marketed by suppliers in the ordinary course of the suppliers' business or as users of goods or recipients or beneficiaries of particular services, irrespective of who contracted or paid for the goods or services; clients are consumers.[72] It follows that an advocate-client agreement is a consumer agreement. Applicable CPA rights include right to commence or participate in class proceedings arising out of a consumer agreement;[73] to protection against unfair practices including false, misleading or deceptive representation;[74] and protection against renegotiation of the terms of the agreement such as price.[75]

2.4.4 Duties of a Client to Advocate

Whereas the statute law does not articulate the duties of a client to an advocate; from terms of a retainer, nature of the relationship and case law; a client owes the duty to give clear and complete instructions for a retainer as envisaged under the LSK Code;[76] and duty to pay legal fees earned and other costs incurred by the Advocate under a retainer.[77] Thus in *Hayanga & Co. Advocates - vs - Rayal Garden Developers Limited,*[78] it was held that:- '[…] if an advocate was instructed to prepare an agreement of sale, he would have earned his full instruction fees as soon as the said agreement of sale was ready.' This duty covers client's liability to pay accrued fees on premature withdrawal of instructions as in *Zakhem Construction (Kenya);*[79] where it was held, inter alia, that, '[…] though the client has the right to choice of representation, it is only fair for them to pay for services already rendered by taxing the Bill of Costs before securing another advocate of their own choice.'

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66 Chapter 80, Laws of Kenya.

67 No 9 of 2009, Laws of Kenya. This right has very few constitutional and statutory exceptions.

68 *Manani Lilan & Mwetich Co. Advocates v Sum* High Court of Kenya at Eldoret, Miscellaneous Civil Application No. 63 of 2019, [2022]eKLR

69 *See n.(67)*, section 18(4).

70 *Prof Tom Ojienda t/a Tom Ojienda and Associates v Ethics and Anti-Corruption Commission*, Petition No. 122 of 2015[2016] eKLR

71 The Evidence Act Chapter 80, Laws of Kenya, section 134(2).

72 No.46 of 2012, section 2.

73 Ibid, section 4(1).

74 Ibid, section 12.

75 Ibid, section 14.

76 See LSK Code of Standards of Professional Practice and Ethical Conduct (2017), Part IV, Guidance Rules 65 and 66.

77 Ibid.

78 Miscellaneous Application No. 305 of 2004, High Court of Kenya at Nairobi

79 *Mereka & Company Advocates v Zakhem Construction (Kenya*) [2014] eKLR; In The High Court Of Kenya At Nairobi,Misc. Civil Application No. 336 Of 2012

2.4.5 Rights of an Advocate against the Client

In an advocate-client relationship, an advocate has some rights including right to clear and complete instructions. For clarity and material evidence, instructions should be in writing and where given orally, be confirmed by a letter or agreement defining the nature and scope of the retainer, expected deliverables, fees payable or basis for charging fees and when the same falls due.[80]

An advocate is entitled to fair and reasonable fees for professional services rendered.[81] Subject to the statute of limitations, the right may be enforced through taxation of the Bill of costs after termination of the retainer as held in *Mercy Nduta Mwangi T/A Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited.*[82] There is also the right to professional independence including right to exercise independent judgment; hence no identification with client's cause or acting under undue influence in executing the retainer's purpose.[83] Others are right to lawfully terminate the relationship at any time;[84] and right to indemnity for professional undertaking given in favour of another advocate to further a client's transaction.[85]

An advocate has a right of lien upon a client's documents, money or chattels in the advocate's possession under a retainer, for unsettled fees and other obligations due from a client. This right is possessory and available in case an advocate is in lawful and actual possession of the client's property.[86] On the nature and scope of a lien, in *Booth Extrusions (Formerly Booths Manufacturing Africa Limited v.Dumbeyia Nelson Muturi Harun T/A Nelson Harun & Company Advocates,*[87] Onguto J, held, *inter alia,* that, '[…] the lien is general and not restricted to costs owing in respect to the property which the client is claiming possession. It is simply a retaining lien premised upon the advocate having actual physical possession of the property the subject of the lien.' Thus, no advocate has power or right to appropriate or dispose of the money or other property, the subject of the lien, without express authority of the client or a court order to that effect. Since a lien is security for fees and costs lawfully due from the client to the advocate, the lien must be reasonable, and proportionate to the advocate's claim. Thus, in *Ex -parte: Interactive Gaming and Lotteries Limited,*[88] Odunga J, held, that '[…] an advocate is not entitled to exercise a right to a lien in respect of the whole property when his costs can only be recovered from part only of the property. In other words, the lien ought to be commensurate to the claim for fees and no more.'

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[80] LSK Code of Standards of Professional Practice and Ethical Conduct [2107], Part IV, Regulations 65 and 66.
[81] LSK Code of Standards of Professional Practice and Ethical Conduct[2017], Part II, Overriding Principle 9.
[82] [2016] eKLR
[83] LSK Code of Standards of Professional Practice and Ethical Conduct [2017], Part II, Overriding Principle 1.
[84] In exercise of the freedom of contract and in case a conflict of interest situation arises or the client fails to pay fees.
[85] Applies mostly in conveyancing transactions.
[86] *Dhanji v Machani* Dar-Es-Salaam HCMCC No. 34 of 1969.
[87] *Booth Extrusions (Formerly Booths Manufacturing Africa Limited v Harun T/A Nelson Harun & Company Advocates* [2014] eKLR. High Court Of Kenya At Nairobi, Milimani Law Courts, Environmental & Land Division Elc No. 93 of 2013 (O.S) *par* 18.
[88] *Republic v Lucas M. Maitha Chairman, Betting Control and Licensing Board Ex p: Interactive Gaming and Lotteries Limited* The High Court Of Kenya At Nairobi Miscellaneous Civil Application No. 370 Of 2010

Some rights accrue from judicial determinations in taxation of a bill of costs as in *New Kenya Cooperative Creameries Limited,*[89] where the Court of Appeal upheld the High Court's decision, inter alia, that, '[…] there existed an advocate-client relationship between the parties till 30th April 2007, when it was terminated by notice of the Respondent; and that the Applicant was [only] entitled to charge fees and incidental costs incurred for client's instructions given and carried out by the Advocate till 30th April 2007.'[90]

2.4.6 Duties of an Advocate to the Client

Broadly, by source and character, the duties of an advocate to a client fall into four namely; constitutional duties, contractual duties, duties of care, skill and diligence; and fiduciary duties. The duties include duty to advise and educate their clients on their legal rights and obligations[91] and duty to use lawful means, to protect the legitimate interests of their clients.[92] Pursuant to Article 31 of the Constitution, Sections 134 and 137 of the Evidence Act, and section 18 of The Proceeds of Crime and Anti-Money-Laundering Act, an advocate must uphold confidentiality for all privileged information exchanged under a retainer. This duty is sacrosanct and tied to the client's right of confidentiality of privileged communication. Thus, in *Kings Woolen Ltd (formerly known as Manchester Suiting Division Ltd),*[93] the Court of Appeal held that; 'Once the retainer is established then the general principle is that an advocate should not accept instructions to act for two or more clients where there is a conflict of interest between those clients.'

Under the LSK Code of Standards of Professional Practice and Ethical Conduct; the duties can be summarized as professional independence, honesty and integrity, fidelity to the law; good faith, confidentiality for privileged communications; honour, respect and trust with respect to professional undertakings, client's money and other client property; and accountability to the client through regular reports on the retainer.[94] Others are duties of care, skill and diligence; duty of fairness and reasonableness in legal fees and costs for professional services, and duty of good standing in and outside the profession.[95] The LSK Code, describes honesty and integrity as the "the hallmark of the legal professional."[96] On honesty and integrity, the sustainability growth of a profession lies.

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[89] *Muriu Mungai* & *Company Advocates* v. *New Kenya Cooperative Creameries Limited*, [2019] eKLR. Court of Appeal at Nairobi, Civil Appeal 286 of 2010 .

[90] Ibid.

[91] Principle 12 UN Principles on the Role of Lawyers.

[92] *Ibid.* The appropriate means include litigation, arbitration and other alternative dispute resolution mechanisms.

[93] *Kings Woolen Ltd (formerly known as Manchester Suiting Division Ltd) v M/s Kaplan & Stratton Advocates* Civil Appeal No. 99 of 1993, [1993] KLR 273 (CA).

[94] See LSK Code of Standards of Professional Practice and Ethical Code of Conduct (2017); Part II, Overriding Values and Principles of Professional Practice and Ethical Conduct, Principles 1-7 and Principle 14, UN Principles on The Role of Lawyers.

[95] ibid, LSK Code, Overriding Values and Principles 8-11.

[96] LSK Code of Standards of Professional Practice and Ethical Conduct, Part II, Regulation 21, overriding Principle 2.

Other duties are duty to render professional services according to the retainer. Failing to render services, or rendering less than agreed/expected in quantity or quality, may pass for unsatisfactory conduct or professional misconduct under section 60 of the Advocates Act and Part I (C), Regulations 10, 11 and 12 of the Code. Thus, reports that advocates contracted by Nairobi City County Government made inflated, fictitious and fraudulent claims of legal fees against the Government are breaches of duties of fairness and honesty.[97]

The same is also evident from media reports, quoting the ACC Secretary, that between 1st July 2022 and 31st March 2023, the ACC facilitated retrieval of over shillings 6 (six) million of clients' money which had been retained by advocates.[98] Illegal retention of client funds is unethical conduct.

In civil proceedings, every party and advocate acting for either party is duty-bound to assist the Court to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The parties and/or their advocates must participate in Court processes and comply with the directions and orders of the Court.[99] This professional duty partly gives effect to Articles 48 and 159(2) of Constitution.

Other duties include the duty to decline to take instructions or withdraw from acting for a client where the advocate is likely to participate as a witness or due to risks of conflict of interest. Thus, in *Mutuma;*[100] on the application of the prosecution Counsel and based on prior interactions between the complainants and the defence counsel's law firm, the Judge disqualified the law firm from acting for the accused persons in the murder trial as there was real risk of prejudice to a fair trial.

3. Meaning, Sources and Significance of Professional Ethics in Advocate-Client Relationship.

Ethics are both normative and practical, hence can be manifested in compliance or breach. Thus

> Ethics are principles and values, which together with rules of conduct and laws, regulate a profession, such as the legal profession. They act as an important guide to ensure right and proper conduct in the daily practise of the law.[101]

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[97] Government of the City County of Nairobi, Report of the Task Force for the Audit and Examination of the Delivery of Legal Services to the Nairobi City County Government (2017) t Para 2.4 9 June 2021 at https//www.cofek.org 9 June 2021.

[98] KNA1 April 19, 2023 Counties, Editor's Pick, Kisumu, Legal, By Robert Ojwang' and Chris Mahandara, State Rolls Out Public Sensitization Campaign On Legal Complaints Resolution. Accessed 13th October 2023 at <https://www.kenyanews.go.ke/state-rolls-out-sensitization-campaign-on-legal-complaints-resolution/ >

[99] Civil Procedure Act (Chapter 21 Laws of Kenya), section 1A (1) and (3).

[100] *Republic v Mutuma* Criminal case No. 5 of 2016 [2016] eKLR (High Court of Kenya at Nakuru).

[101] Horizon Institute, 'Ethics for Lawyers' Horizon Institute, 'Ethics for Lawyers' 1 <https://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> accessed 15 September 2023.

Historically, lawyers have been treated with suspicion and sometimes with contempt. Thus, in the 18th century England, some satirists claimed that at the Inns of Court, "youth are bound to spend five years to learn the art of confounding truth, supporting falsehood, and torturing justice."[102] The claims persist even today as in the *Devil's Dictionary,* where a lawyer is described as "one skilled in circumvention of the law."[103] Therefore, to counter the onslaught, safeguard the authority and reputation of the law, and promote civilized and credible resolution of disputes; lawyers should strictly uphold professional ethics. As Mcfarlane argues, 'if lawyers disregard ethics, the law will fall into disrepute and people will resort to alternative means of resolving conflict.[104] He also contends that since lawyers belong to a profession, ethical responsibility and duty are inherent in the legal profession.'[105] Thus, in legal education, training and practice, ethics should be core since, since 'without ethics, true professionalism and good lawyering escape us.'[106] The goals of teaching professional ethics in professional courses include "raising one's moral consciousness, values clarification, the analysis of moral arguments, and providing solutions to moral problems and teaching the solutions as moral lessons.[107]

Despite its great significance in legal practice and services, under the Legal Education Act No 27 of 2012, professional ethics is not among the sixteen core subjects taught in Law degree courses at University Law Schools in Kenya.[108] However, in the Advocates Training Programme (ATP) offered at the Kenya School of Law, Professional Ethics is a compulsory unit.[109] So, a good lawyer must of necessity satisfy a moral fitness test when joining the bar and for life.

As in Kenya, codes govern law students, lawyers and legal practice in other jurisdictions. For example, in South Africa, section 36 (1) (a) of the Legal Practice Act (LPA) requires the South African Legal Practice Council to develop a code of conduct that applies to all legal practitioners and all candidate legal practitioners (Emphasis supplied).[110] It is instructive that under the LPA, candidate legal practitioners, equivalents of students undertaking ATP in Kenya, are bound by the same laws and code of conduct as licensed legal practitioners. This may be worth adopting in Kenya.

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[102] Gale, *London: A Satire, Containing Prosaical Strictures on Prisons, Inns of Court, Courts of Justice* (3rd edn, 1782) quoted in Penelope Jane Corfieldv, *Eighteenth Century Lawyers and the Advent of the Professional Ethos* (2003) 7.

[103] Ambrose Bierce.; *The Devil's Dictionary*, GlobalGrey 2018. Accessed file:///C:/Users/Rose/Downloads/devils-dictionary.pdf. See also Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients, 20 Notre Dame J.L. Ethics & Pub. Pol'y 2*09 (2006). Available at http://scholarship.law.nd.edu/ndjlepp/vol20/iss1/8

[104] MacFarlane Peter, 'The Importance of Ethics and the Application of Ethical Principles to the Legal Profession' (2009) 13 (1) *Journal of Pacific South Law*.

[105] Ibid

[106] Elliston Fredrick A, 'Ethics, Professionalism and the Practice of Law' (1985) 16 *Loyola University Chicago Law Journal* 529.

[107] 'The Teaching of Ethics in Higher Education: Reports from the Hastings Center' (1980) 5(32) *Science, Technology, & Human Values* 29.

[108] Legal Education Act No. 27 of 2012; Second Schedule Part II:- CORE COURSES AT DEGREE LEVEL

[109] Legal Education Act No. 27 of 2012, Second Schedule Part III: CORE COURSES AT POST GRADUATE (PROFESSIONAL) DIPLOMA LEVEL In the KSL ATP postgraduate Diploma course, the course is ATP 105.

[110] Under Chapter 4 of The Legal Practice Act No. 28 of 2014 (As amended by Legal Practice Amendment Act, No. 16 of 2017 and updated to *Government Gazette* 41389 of 18 January 2018).

Under the LSK Code of Standards of Professional Practice and Ethical Conduct. (2017),[111] all advocates should uphold its provisions or face disciplinary proceedings for professional misconduct. The latter means "…conduct in breach of the rules, standards and ethics of the profession."[112] The Code;

> Defines the minimum standards designed to assist the regulatory bodies and the legal practitioner alike in determining whether, in a particular case, the conduct in question falls within or outside of the remit of professional misconduct. It sets minimum benchmarks for professional conduct, the breach of which amounts to misconduct and might attract punishment.[113]

Under the Constitution of Kenya 2010, all state organs, state officers, public officers, and all persons are bound to apply the national values and principles of governance whenever they interpret and apply the said Constitution; enact, apply or interpret any law; or make or implement public policy decisions.[114] Some of the values and principles are ethical and include human dignity, equity, social justice, inclusiveness, equality, human rights, and non-discrimination;[115] good governance, integrity, transparency and accountability.[116] Others are the Bill of Rights,[117] described as "an integral part of Kenya's democratic state and …the framework for social, economic and cultural policies.[118]

Others are principles and values of public service in Article 232 of the Constitution which apply to all state organs and state corporations.[119] Thus, advocates employed by those organs and corporations must uphold the values and principles of public service including high standards of professional ethics;[120] efficient, effective and economic use of resources;[121] responsive, prompt, effective, impartial and equitable provision of services;[122] accountability for administrative acts;[123] and transparency and provision to the public, timely and accurate information.[124] Article 232 has been given effect by Parliament under the Public Service (Values and Principles) Act[125] Advocates in public service are also subject to other ethical standards under the Public Officer Ethics Act.[126]

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[111] LSK Code of Standards of Professional Practice and Ethical Conduct (2017), Part B, Regulation 9
[112] Ibid, Part C, Regulation 11.
[113] *Ibid*, Regulation 15.
[114] Constitution (n50) art10 (1).
[115] ibid art10 (2) (b).
[116] ibid art 10(2) (c).
[117] ibid Chapter 4.
[118] Ibid art 19(1).
[119] ibid art 232(2).
[120] ibid art 232(1) (a).
[121] ibid art 232(1) (b).
[122] ibid art 232(1) (c)
[123] ibid art 232(1) (e).
[124] Constitution (n50) art 232 (1)(f).
[125] No. 1A of 2015.
[126] No. 4 of 2003 Revised Edition 2016 [2012].

Other constitutional principles and values are derived from Chapter six of the Constitution. They apply to all state officers. Thus, any advocate who is a state officer, is bound to uphold Chapter six standards namely; public trust;[127] personal integrity, competence and suitability;[128] objectivity and impartiality in decision-making;[129] selfless service;[130] accountability to the public for decisions and actions;[131] and discipline and commitment in service to the people.[132] Chapter six has been given effect by Parliament as The Leadership and Integrity Act.[133] Other values and principles are in Article 201 and 227 of the Constitution as principles of public finance. They include openness and accountability;[134] prudent and responsible use of public money;[135] responsible financial management, and clear fiscal reporting.[136] Those in Article 227(1), oblige state organs and public entities, to use systems of procurement that are fair, equitable, transparent, competitive, and cost-effective. The provisions of Chapter 12 have been given effect in various Acts of Parliament including the Public Finance Management Act,[137] and the Public Procurement and Disposal of Assets Act.[138]

4. Some Causes and Manifestations of the Ethical Conundrum in Legal Practice in Kenya.

This section is a brief evaluation of the causes and manifestations of the ethical crisis in legal practice in Kenya. It is based on review of select case law, task force reports, Advocates Complaints Commission Reports, media reports and a recent field survey undertaken by the author in Kenya.

4.1 Causes and manifestations of the Ethical Crisis in Advocate-Client Relations in Kenya

The following are some causes and manifestations of the growing ethical conundrum:

a) Greed. Some advocates have been accused of colluding with vendors to impose their services on purchasers and offer them fake title deeds. This interferes with a client's right to independent counsel.[139]

[127] Constitution (n50) art 73(1).
[128] ibid art 73(2)(a).
[129] Ibid art 73(2)(b).
[130] Ibid art 73(2) (c).
[131] ibid art73(2) (d).
[132] ibid art 73(2) (e).
[133] No. 19 of 2012.
[134] Constitution (n50) art 201 (a).
[135] ibid art 201(d).
[136] ibid art 201(e).
[137] No. 18 of 2012.
[138] No. 33 of 2015.
[139] Business Daily, Editorial: LSK must crack whip on errant lawyers, posted on October 27, 2015 at 19.25. Accessed at http://www.businessdailyafrica.com/opinion-and-Analysis/LSK-Must-Crack-the-Whip-On-errant-lawyers/5395548-2932506-xs5ba5z/index.html.

b) Dwindling employment opportunities for advocates. A 2016 Tracer Study by Kenyatta University School of Law (KUSOL), found that majority of the respondents (44.7%) all of whom are Law graduates of KUSOL, were on internship or pupilage; 5.3% were holding over; while 14.7%, 19.7%, 9.2% and 7.9% were employed on contract; permanent; self-employed, and part-time basis respectively.[140] That means most of the graduates were not in gainful employment, thus exacerbating the risk of unethical conduct.

c) Unauthorized practice of law under alternative business structures (ABS) by audit firms, banks, insurance companies and other persons. This facilitates unethical conduct by promoters including advocates who are either shareholders or employees in ABS. Promoters argue that due to the "complex nature of contemporary businesses and markets, enterprises need not just legal advisors, but business savvy legal advisors.'[141]

d) Regulatory leniency for professional misconduct and crime against client's interests as in K*inyanjui*[142] where, the Chief Magistrate's Court convicted the accused advocate on 18 counts of theft by agent contrary to section 283(c) of the Penal Code and sentenced him to pay a paltry fine of KES 50,000/= on each count or KES 800,000/= for the 18 counts and in default imprisonment for 12 months. On appeal by the convict,[143] the High Court found the sentence imposed by the lower Court 'manifestly inadequate and inappropriate' and 'substituted it with one commensurate with the gravity of the offence.[144] According to the High Court, 'For the trial court to sentence the appellant to pay a fine of Kshs 800,000/= after convicting him of stealing Kshs 52, 170, 300/= "smacks of rewarding the appellant for the theft committed.'[145]

e) Unhealthy competition for dwindling business opportunities in major urban centres partly because 'most youthful advocates are unwilling to set up law offices in rural or small urban areas and most legal practitioners prefer the city centre.'[146]

f) Widespread client and public ignorance about their consumer rights, duties of advocates and channels for enforcement. The ignorance predisposes clients to exploitation by unethical advocates and quacks. To address this problem, in the 2022/2023, financial year; the ACC, in partnership with the International Development Law Organization (IDLO), rolled out a public legal awareness campaign on mechanisms for efficient

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[140] Kenyatta University, School of Law, Tracer Study of Law Graduates, The Report, February 2016, Table 5.2. Accessedhttps://irlibrary.ku.ac.ke/bitstream/handle/123456789/20603/KUSOL%20Tracer%20Report.%20Final.pdf?sequence=1&isAllowed=y

[141] American Lawyer Media (ALM) Intelligence (2017), Elephants in the Room. Part 1: The Big Four's Expansion in the Legal Services Market. Accessed 14 June 2021at <https://www.alm.com/intelligence/NEWVERSION-Elephants-in-the-Room-Th-Legal-Services Market.Final.9.15.17.pdf> .

[142] *Republic v Kinyanjui* Criminal Case No 2247 of 1996, Chief Magistrate's Court at Nairobi.

[143] *Kinyanjui v Republic*, Criminal Appeal No. 544 of 1999, High Court of Kenya at Nairobi, [2004]eKLR

[144] ibid.

[145] ibid, at p14.

[146] Republic of Kenya, Report of the Taskforce on Legal Sector Reforms, (2017),Chapter 4, p84, Par 117(b)

resolution of complaints against advocates. As at April 2023, the legal clinics and camps had covered 8 counties.[147]

g) Lack of effective and publicly accessible system(s) for advocate identification. This is a regulatory failure. Consequently, quacks prey on unsuspecting consumers. ACC argues that the huge LSK membership exceeding 19000 advocates makes it a daunting task for members of the public to identify genuine advocates.[148] ACC also reported that "many clients had been conned by people masquerading as advocates who eventually fail to discharge their mandate causing distress and even financial loss to the victims,"[149] Even the LSK leadership has issued a public notice on the rise in cases of people masquerading as advocates.

h) Regulatory overlaps due to lack of shared regulatory objectives for legal services. There are over ten regulators with some like ACC and ADT, having overlapping mandates, powers and functions. This complex system breeds inefficiency and consumer confusion especially in dispute resolution processes. Shared regulatory objectives "define the basis, purpose, parameters and scope of lawyer regulation.'[150]

i) Lack of a standard statutory form of contract for advocate-client relations. This omission is not mitigated by the LSK Code advisory for advocates to "always encourage clients to issue written instructions."[151] This omission may lead to client claims of exploitation in fees as in *Kenya Pipeline Company Limited;*.[152] where the Court held, inter alia, that 'whereas, there was no doubt as to the existence of the retainer; there was no valid agreement between the parties as to fees payable to advocate for the work done under the retainer.'[153]

j) Impatience, insatiable greed and lack of appreciation of the value of ethical lawyering; hence misappropriation of client accounts and fraudulent billing.[154]

k) Breach of trust and resultant injury to client interests and reputational damage to advocates accused and convicted of professional misconduct. Quarterly reports of the ACC reveal the ethical conundrum in diverse forms including failure to account;

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147 Supra (*n.98)*

148 Ibid

149 Ibid.

150 Laurel S. Terry.; Steve. L. Mark.; & Tahlia Gordon (2012).; "Adopting Regulatory Objectives for the Legal Profession", **Fordham Law Review**,Vol.80, at p.2685. Accessed 15 June 2021 at <https://ir.lawnet.fordham.edu.vol80/iss6/14>

151 LSK Code, op cit, Part IV, Regulations 62, 65 and 66.

152 *Adipo & Company Advocates v Kenya Pipeline Company Limited Miscellaneous Application 686 of 2008*, [2009] eKLR (High Court of Kenya at Nairobi).

153 *Ibid,* at p.6.

154 Githua Cynthia Njeri, *Implications of Unethical Business Pricing and Accounting Practices in the Legal Profession in Kenya: A Case of Members of the Law Society of Kenya (2019)***,** Chapter 2, pp 11-13 and Chapter 5, p 62, Para 5.4.2. A Research Project Report Submitted to the School of Business in Partial Fulfillment of the Requirement for the Degree of Masters in Global Business Management (GMBA) of UNITED STATES INTERNATIONAL UNIVERSITY-AFRICA.

failure to render professional services, withholding client's funds; failure to carry out client's instructions; conflict of interest; withholding documents; and failure to update clients.[155]

l) Theft of client's property as in Kinyanjui, where the Court of Appeal of Kenya dismissed the appellant's 2nd appeal against a Judgment of the High Court and held that the appellant was convicted on sound evidence which proved beyond reasonable doubt the charges upon which he was convicted; and that the prison sentences imposed and served already were lawful and duly confirmed them.

4.3 Empirical Evidence of the Ethical Conundrum in Kenya's Legal Profession

In Kenya, notwithstanding heavy regulation of the legal profession, government task force reports, ACC Quarterly Reports and empirical field surveys reveal a serious ethical conundrum in legal practice. A 2017 report of the Task Force on Legal Sector Reforms revealed that in legal practice; there was:

> Deterioration in the quality, professional capacity and competence of legal practitioners; decline in the standard of decorum and propriety of practitioners in public and private practice spaces; increase in reported cases of professional misconduct and unprofessional conduct of legal practitioners; decline in public confidence, illustriousness and prestige of the legal profession; erosion of traditional sense of common standards and values of the legal profession; increased levels of unhealthy competition driven by profit dynamics; and decline in public service and *pro-bono* work.[158]

The above findings confirm the existence of a monumental ethical crisis which is posing existential threats to the profession. As noted in *Bolton v Law Society,* 'a profession's most valuable asset is its collective reputation and the confidence, which that inspires.'[159]

A 2017-2018 field survey in Kenya by the author, found sufficient evidence of the existence and growing crisis of ethics in the advocate-client relationship.[160] The survey used structured questionnaires administered on 120 respondents from 10 counties or 20% of the counties. The respondents included regulators, advocates, consumers, teachers of law and other stakeholders.

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[155] 112 *Quarterly Report* of the Advocates Complaints Commission, dated 9th January 2019; published as Gazette Notice: *The Kenya Gazette* Vol CXXI-No.9;18th January 2019

[156] Kinyanjui (n143)

[157] *ibid,* at p10. Judgment was delivered by the three Judge bench (Omollo, O'kubasu & Otieno JJA, on 15th Day of January 2010.

[158] Republic of Kenya, *Report of the Taskforce on Legal Sector Reforms, (2017), Chapter 1, P.11,* at Para 3(b)

[159] [1994] 2 AII ER 486, 492-3**(CA).**

[160] Aming'a Stephen P.M; Quest for Harmonization of Legal and Institutional Frameworks For Protecting Consumers of Legal Services in Kenya, A Thesis Submitted in Fulfillment of the Requirements for the Degree of Doctor of Philosophy (Law) of the University of Dar es Salaam, University of Dar es Salaam, November 2019.

The survey was part of a study for award of the degree of Doctor of Philosophy in Law. From the survey, the ethical crisis manifests itself in myriad ways. Some of the manifestations and possible factors for the same are summarized below:

Unethical conduct.

> Misinformation of/lack of information to the client; failure to provide legal services despite receiving payment; withholding of clients' money/property; misappropriation of clients funds/property; failure to account for clients' money; negligence in delivery of service; failure to follow client's instructions and conspiracy with third parties to defeat clients' interests.[161]

Plausible explanations.

From the findings of the study, the deterioration in the ethical and moral fabric of members of the legal profession may be attributable to the following individual and collective factors:

a) Erosion of culture of integrity and honesty in the legal profession.

b) Low consumer knowledge of the legal mechanisms for their protection.[162]

c) Lack of consumer legal services needs assessments by regulators.[163] Such surveys help ascertain the extent to which the profession meets those needs.

d) Lack of legal services consumer protection needs survey or regulatory impact assessment by regulators.[164] Such surveys help establish and address regulatory gaps and determine the degree of responsiveness and efficacy of the regulation.

e) Inappropriate regulatory approach for the legal profession. The dominant approach is rule-based and complaints-driven.[165] Its main weakness is the false assumption that minimum compliance with the rules results in attainment of regulatory objectives.

4.4 Ramifications of Unethical Conduct on Advocates and the Public.

Unethical conduct by an advocate alone or in collusion, has serious implications on the advocate, client, the legal profession and the public. It can result in one or more of the following:

a) client complaints against their advocates and disciplinary proceedings for professional misconduct. Conviction may attract sanctions including warning, reprimand, fines, order to pay compensation, suspension from legal practice or being struck off the roll of advocates.[166]

[161] Ibid ,*Chapter 5*, p.239, Para 5.3.10.
[162] *Ibid*, pp 255-256, para 5.3.27
[163] Ibid, p 265, para 5.3.36
[164] Ibid, pp266-267, para 5.3.37
[165] *Ibid*, pp 270-271, para 5.4.3
[166] The Advocates Act (Cap 16), section 60 and various provisions of the LSK Code of Ethics and Conduct (2017)

b) Prosecution of suspected advocates for breach of trust under section 80 of The Advocates Act, or theft by agent under section 283(c) of the Penal Code.[167] If convicted and sentenced, on top of criminal sanctions; the convict will be struck off the roll of advocates for professional misconduct, thus suffering in money, liberty, reputation and loss of career.[168]

c) Damage to individual and corporate reputation. If a client is overcharged and realizes it, "there is a gap created and mistrust of the advocates and the legal profession as a whole…"[169]

d) 'Self-lawyering' by some consumers and exploitation of others by quacks.

e) Proprietary and other damage to client interests e.g. trust money or other property.

5. Suggestions to Address the Ethical Conundrum in Advocate-Client Relations in Kenya and the Legal Profession in General.

To address the conundrum, the following measures are recommended:

a) Mainstream legal ethics in curricula for academic, vocational and continuing legal Education for lawyers and advocates. Currently, Ethics is not compulsory in LLB courses.

b) Following robust stakeholder consultations; parliament can enact a new law on Legal Services to consolidate, harmonize and strengthen regulatory frameworks for legal services. On this, Kenya can borrow from United Kingdom and South Africa.

c) The proposed law can entrench risk-based and outcome-focused regulatory approach.[170] Risk-based approach entails provision of a broad framework for objective risk identification, assessment, ranking and the targeting of regulatory resources and efforts relative to level of risk posed by the regulatee to the regulator's objectives.[171]

(d) Statutory restructuring, rationalization and harmonization of the regulation of the legal profession by reducing the number of regulators, and integration of regulatory powers, functions, and processes. This will eliminate regulatory ambivalence, duplication, confusion, inefficiency and capture.[172]

[167] Chapter 63, Laws of Kenya.

[168] *Kinyanjui* (n143)

[169] Njeri(*n.154*) at p.15.

[170] Decker C.; Goals-Based and Rules-Based Approaches To Regulation, BEIS Research Paper Number 8 (2018), *Department for Business, Energy & Industrial Strategy*, University of Oxford, Accessed 1 August 2018 at <www.gov.uk/beis

[171] Black J.; "*Risk-Based Regulation", Presentation to OECD*, (2008), at p.4. Accessed 1 August 2018 at http://www.oecd.org/gov/regulatory-policy/44800375.pdf

[172] Currently, there are more than ten advocate-centric and dominated regulators with no consumer representation. Some have irreconcilable powers and functions e.g. investigatory, prosecutorial and adjudicatory powers of the Advocates Complaints Commission. There are even overlaps in powers, functions and responsibilities between agencies especially the Advocates Complaints Commission and the Advocates Disciplinary Tribunal. This is a cumbersome, complex and expensive system that exacerbates consumer vulnerability. The direct regulators are the LSK Council, the Advocates Complaints Commission, the Advocates Disciplinary Tribunal/Regional Disciplinary Committees, Committee for Senior Counsel, The Attorney General, The Solicitor General, the Directorate of Public Prosecutions, The Chief Justice, Judges of Superior Courts and, The Chief Registrar of the Judiciary. In addition, there are indirect ones including Parliament, Commission on Administrative Justice, Ethics and Anti-Corruption Commission and the Directorate of Criminal Investigations.

(e) Statutory adoption and regulation of ABS. The current consumer market is heterogeneous and demands multidisciplinary and transferable skills. The unregulated ABS in the name of integrated business solutions are posing serious existential threats to the legal professional services market.[173]

(f) Develop and implement sustainable curricula for legal education and training anchored in sound lifelong education philosophy, with shared objectives, diversity in content and delivered through systematic integration of theory and practice. The curricula should seek to achieve UN SDG 4 on inclusive and equitable quality education and lifelong opportunities for all. In particular, the system should seek attainment of target 4.4 on acquisition of relevant skills for decent work; and target 4.7 on education for sustainable development and citizenship. In a bid to combat the ethical conundrum, core law and essential non-law knowledge and skills from other disciplines including economics, psychology, risk management, sociology, anthropology, strategic planning, accounting, project management, data analytics, technology transfer and sign language should be included.

6. Conclusion

This paper sought to examine causes, manifestations and ramifications of the growing ethical conundrum in advocate-client relations in Kenya and raise the need to address it. Review of relevant literature and case law revealed that the legal profession is an essential public service which is heavily regulated mainly due to the credence nature of most legal services, enormous information asymmetry between advocates and clients, consumer vulnerability and heterogeneity and significance of legal services in lives and relations.[174] The main finding is that despite heavy regulation, there is sustained and cancerous growth in professional misconduct among advocates and evidence of resultant substantial harm to consumer and public interests mainly due to inappropriate and ineffective rule-based and complaints-driven regulation. This regulation lacks efficacious systems for inculcating and sustaining a culture of professional integrity among advocates, anticipating and preventing risks of misconduct and empowering advocates, consumers and regulators to prevent the same. The regulation is punitive rather than rehabilitative of errant advocates and fails to adequately and promptly compensate aggrieved clients. The dispute resolution systems are complex and slow.

[173] American Lawyer Media (ALM) Intelligence (2017), Elephants in the Room. Part 1: The Big Four's Expansion in the Legal Services Market. Accessed 14 June 2021 at <https://www.alm.com/intelligence/NEWVERSION-Elephants-in-the-Room-Th-Legal-Services- Market.Final.9.15.17.pdf >. In this report arising from a 2016 survey by ALM, it was found that PWC had 2500 lawyers in its legal services arm and ranked the 6th largest legal services provider globally. In Kenya, some global and national audit and accountancy firms provide legal services as part of integrated business solutions. They include PWC Kenya; KPMG Kenya; Ernst &Young and Deloitte (The Big Four); Mazars and Rodl & Partner. Information on Mazars accessed at https:/www.mazars.co.ke/Home/Our Expertise while on Rodl & Partner information is available at <https://www.roedl.com/about-us/locations/kenya >

[174] Hook, A; *Sectoral Study on the Impact of Domestic Regulation of Trade in Legal Services* (2006), OECD-WORLD BANK, Sixth Services Experts Meeting, at *para*109. Accessed at 14 June 2021 at <http://www.oecd-org-site-tadstri>

The main conclusion is that in Kenya, the sustained monumental spike in professional misconduct among advocates and in client-advocate disputes are mainly attributable to phenomenal erosion of ethical standards and professional culture among advocates; lenient sanctions on errant advocates; antiquated compliance-oriented regulation of a dynamic profession in a dynamic and complex global business space, and regulatory capture. As many consumers suffer, the conundrum continues to seriously undermine public confidence in the legal profession and render it globally uncompetitive.

To create and sustain a truly transformative, inclusive, responsive, transparent, accountable and globally competitive legal profession in Kenya; there is need for positive attitudinal and culture change among advocates, strict adhere to the standards and ethics of lawyering, and revolutionary reforms in regulation of the profession in line with global best practices; national values and principles of governance, values and principles of public service, the Bill of Rights, and objects and functions of the LSK. Kenya should adopt risk-based regulation in lieu of the rule-based compliance and complaint-dependent and driven one. The latter is obsolete in current dynamic global markets.

History shows that legal knowledge without client trust disempowers advocates and hurts consumer interests. However, with solid client trust, lawyers could find plentiful work in litigation and constitutionalized governmental administrations.[175] Now is the time for beneficial ethical revolution and regulatory transformation and disruption in the legal profession in Kenya for benefit of all

[175] Penelope Jane Corfield (2003), Eighteenth Century Lawyers and the Advent of the Professional Ethos, at. P.27. This Corfield's essay was published in P. Chassaigne and J-P Genet (eds), *Droit et société en France et Grande Bretagne: Law and Society in France and England* (Sorbonne Publications, Paris, 2003), pp. 103-26.

DRAFTING EFFECTIVE BILATERAL LOAN AGREEMENTS

*By Mathews Okoth**

Abstract

Clauses in bilateral loan facility agreements are not idle provisions. Appreciating both the content of the clauses and their rationale is thus a hallmark of elegant drafting. Crucially, the lender and the borrower should negotiate key terms for lending upon which lawyers draft detailed bilateral loan agreements. Clarity on purpose of the loan allows the lender to assess credit risk in the deal and lays a basis for the lender to impress a Quistclose trust on funds that the lender is able to trace if the borrower applies borrowed funds to a different purpose. Representations, warranties and covenants induce the lender to enter into the loan agreement, and fundamentally, should be accurate when the borrower makes them. The purpose of the loan clause as well as the clause on representation, warranties and covenants tie into the interest rate, which numerically represents the overall credit risk of the borrower. Indeed, breach of representations, warranties or covenants under the loan agreement constitutes an event of default, entitling the lender to accelerate the loan, refuse to disburse funds that the borrower is yet to draw down or convert the bilateral term loan to an on-demand loan. However, the borrower is and ought not to be helpless in a bilateral term loan. If the lender wrongfully refuses to lend to the borrower who has satisfied all the terms of the loan agreement, the borrower would be entitled to sue the lender for breach of contract, generally seeking damages, and in limited circumstances, may also seek a remedy of specific performance. This article analyses drafting strategies to consider when drafting bilateral loan agreements to optimally protect interests of the lender and the borrower under the agreement.

* Mathews Okoth, LL.D (Candidate), holds Master of Laws Degree in Corporate Law from University College London, Bachelor of Laws (Hons) Degree from Moi University, Post Graduate Diploma in Law from Kenya School of Law, and is the author of the pioneer book title, *Law of Corporate Finance in Kenya* (AML Publishers, 2023, ISBN 9789914491890). He is a Lecturer of Law and Chairman of Commercial Law Department at South Eastern Kenya University (SEKU) School of Law, an adjunct Lecturer of Law at Mount Kenya University School of Law, an Advocate of the High Court of Kenya of over twelve years standing, and the Managing Partner at Agnes & Mathews Law LLP Advocates. The author may be reached at maoklaw@outlook.com

1.1 Introduction

In this paper, I discuss the content and structure of a bilateral loan facility agreement. That is, a facility agreement between one lender and one borrower. A well drafted bi-lateral loan agreement typically and ideally contains clauses on definition and interpretation provisions of material terms used in the contract, describes the facility and sets out its purpose. The agreement further sets out the financial and operative provisions of the agreement and includes provisions on mechanics and procedures for utilization of the facilities and repayment of the principal and interest designed, to protect the lender's financial position. If the facility is guaranteed, the guarantee maybe contained within the loan agreement itself, making the guarantor a party to the loan agreement, or it may be contained in a separate agreement. The agreement should cover representations and warranties that the borrower gives the lender to induce the lender to enter into the facility, as well as covenants and undertakings where the borrower agrees to do or refrain from certain acts in respect to itself, or its affairs during the life of the loan. The agreement should set out enforcement provisions, covering events of default and circumstances where the lender can accelerate the loan.

The agreement would stipulate boiler plate provisions. Boiler plate provisions deal with matters such as giving of notices, and effect of the provisions on the agreement if it turns out to be unenforceable. The provisions are called 'boiler plate' as they cover fairly standard matters common to other agreements.[1] The boiler plate provisions include governing law and dispute resolution clause which enable the parties to specify the law that will be used to interpret the loan agreement in the event of a dispute between the parties.[2] The clause does not indicate how the disputes is to be resolved, but it specifies the governing law. In the event that governing law is not specified, the court or tribunal seized with jurisdiction would typically be empowered to determine the applicable law. Dispute resolution provision specifies whether resolution is by way of arbitration or through court. If through court, the clause would specify which court should hear the dispute. Usually, the clause would state that the selected court has exclusive or non-exclusive jurisdiction to determine the dispute. Exclusive jurisdiction means that only the specified court has jurisdiction to hear and determine any arising dispute under the agreement. Non-exclusive jurisdiction means that parties are not prevented from litigating any arising dispute in another court if they deem it appropriate to do so.

Save for the boiler plate provisions which are fairly standard, the article conceptualises clauses of the loan agreement to give meaning to them, discuss, and rationalise drafting strategies that aim to protect the lender and the borrower under the agreement, and the consequences of breach of particular clauses of the agreement.

[1] Mark Weidemaier, 'Disputing Boilerplate' (2009-2010) 82 *Temple Law Review* 1, 2.
[2] Stephen Choi and others, 'The Black Hole Problem in Commercial Boilerplate' (2017) 67 *Duke Law Journal* 1, 5.

1.2 Key terms of bi-lateral term loans

1.2.1 Recitals provisions

Loan facility agreement typically starts by describing parties, followed by recitals setting out background information and confirming that parties have agreed to enter into the agreement and that the lender agrees to provide the facility to the borrower, subject to terms and conditions set out in the agreement. Recitals set the stage and background to the agreement and parties' obligations are not to be included in the recital provision.

1.2.2 Definitions Clause

Definitions clause contains those expressions used frequently in the remainder of agreement. This avoids the necessity of setting out the full meaning of the expression each time it is used in the agreement. The meanings ascribed to expressions should be non-technical and ensure the meaning is properly understood. The definition should not ascribe an obligation of parties; just describe the terms.

1.2.3 Words and Phrases Clause

These are words and phrases used more generally and are given a meaning specific to the agreement to avoid uncertainties and confusion. Either adopt a meaning adopted in legislation, for instance, defining a person to include a legal person, administrative bodies and unincorporated entities. Lender may be defined to include lender's successors and assigns. Interpretation clauses should state that headings and indexes are for reference only and are not to be taken into account in determining any of the meanings in the agreement. This is important if mistakenly a heading that is irrelevant to the body of clause is used, thereby in interpreting the agreement, the actual body of the clause is the one to be considered, not the heading.

1.2.4 Purpose of the loan

The clause on purpose of the loan describes the facility and the purpose for which it is provided. The description includes the amount and currency of the facility. The purpose of the loan may be described in general terms such as provision of working capital or for the general purposes of the borrower or may be described to be specific to a particular project. Where the parties agree that the funds are for a particular purpose, the lender acquires the various rights and it is important to consider the rationale for the lender's interest in the purpose for which the borrower applies the loan. Generally, a loan agreement gives rise to a relationship of debtor and creditor only. The money advanced becomes the property of the borrower and no trust arises in respect of the advanced funds in favour of the lender. The lender's general remedy therefore lies in a suit for recovery of the debt on grounds of breach of contract, or in an action for misrepresentation if the lender was induced to enter into the contract by false statement of the borrower's intention as to the use of the funds. This was articulated in the case of

Edgington[3] where directors were found liable for making a fraudulent misrepresentation by obtaining a loan on the premise that it would be used to improve company buildings and to expand the business, when their real intention was to pay off pre-existing debt. The Court held that a statement of present intention that influences entering into a contract can count as an actionable misrepresentation.

Whereas generally there is no specific trust that is sought to be established under the loan agreement, if there is a specific focused purpose to which the funds are to be applied, and the loan is not applied to that purpose, and the advanced funds can be traced, a concept of q*uistclose* trust may, in limited circumstances, enable the lender to trace the money from third party who has received the money in breach of the very specific purpose clause but only if the money can be traced.[4] The lender's concern with the purpose for which the funds are applied is part of the due diligence by the lender. The lender assesses the credit risk of the borrower's ability to repay the loan by reference to, among other considerations, the purpose to which the borrower intends to apply the loan. The lender may also want to ensure that the purpose to which the funds are being applied is a legal purpose in the lender's jurisdiction.

1.2.5 Financial and Operative provisions

Financial and operative provisions typically include clauses on mechanics and procedures for utilisation of funds; repayment of funds; cancellation and termination of lending obligation; charging and payment of interest and fees; and loan repayment terms. Banks make their profit from the difference between the cost of funding and the margin it charges to lend the funds, assuming that the interest it charges for lending is higher than the cost of funds.[5] Banks will for instance, in theory, borrow at the benchmark rate set by the Central Bank of Kenya, the *Inter-Bank rate*, or simply called *Central Bank Rate*. The Central Bank Rate does not reflect the entire interest that a bank charges when it lends to a corporate borrower. The bank needs to be compensated for the credit risk in the deal when it lends. That compensation for the credit risk comes in the form of the *Margin* component of the interest rate which is fixed on day one of the loan agreement.[6] In the event that the Central Bank Rate is not available, or does not accurately reflect actual cost of funding to the bank, the facility agreement should provide for alternative benchmark lending rate. The alternative interest rate may be determined by reference to interest charged by pre-identified reference banks.

If the alternative benchmark lending rate also turns out to not to understate the actual interest rate that the bank pays to borrow funds in inter-bank lending market, then loan facility agreement would typically provide for a market *disruption clause* which kicks in to require the lender and borrower to renegotiate alternative interest rate. To effectuate the market disruption clause, the facility agreement should include a provision obligating the lender and the borrower

[3] *Edgington v Fitzmaurice* [1885] 29 Ch D 459.
[4] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.
[5] *AGEM Limited v Chartehouse Bank Limited,* Milimani HCCOMC No. 241 of 2005 [2019] eKLR.
[6] *Agrinco Limited v Standard Chartered Estate Management Limited,* Nairobi CA No. 240 of 2005 [2014] eKLR.

to enter into negotiation with a view to adjust the interest rate. Market disruption therefore enables the lender to go back to the negotiating table and negotiate interest rate with the borrower, otherwise the loan would be unprofitable to the lender.

If acting for the borrower, it is prudent, *firstly*, that the loan agreement restricts the power of the lender to trigger market disruption unless the increase in the lender's costs of funding exceed the Central Bank Rate by a particular set percentage. This may help mitigate the significant impact that triggering the market disruption clause may have on the borrower, not just in the form of higher interest rate, but also negative cash flow effects. *Secondly*, include a requirement that the lender needs to take reasonable steps to mitigate the extent of any increase in the costs of funding caused by market disruption. This imposes a duty on the lender to mitigate negative impacts of the costs of funding. *Thirdly,* let the agreement provide that the particular loan is not treated differently from the other loans where the lender is funded. Banks and other lenders fund their loans in different ways. If the Central Bank Rate does not reflect the actual cost of funding, that is, if their cost of funding the loan is higher, it is important to understand the source from which the bank is funding the loan so that the borrower does not suffer disproportionate costs. Market disruption clause affects only the Central Bank Rate component of the interest rate, not the Margin component, which remains fixed for the entire term of the loan.

1.2.6 Utilisation request

Mere signing of the contract does not lead to funds being advanced to the borrower. In large corporate borrowing, there are a number of formalities, also known as conditions precedent, that the borrower must fulfil before it receives the loan.[7] For instance, in the case of *Gimalu Estates Ltd* [8], one of the conditions precedents in the loan agreement to disbursement of funds was 'completion of the agreement referred to in the loan agreement, and the provision of securities to secure the repayment of the loans.'[9] In *LTI Kisii Safari Inns Ltd v Deutsche Investitions-Und Entwicklungsgesellschaft (Deg)*[10], disbursement of funds was conditional on the Appellant obtaining necessary regulatory approvals to the development subject of financing and acquisition of shortfall in financing from third parties. Typical condition precedent in large corporate borrowing is the requirement of the borrower to deliver a *compliant utilisation request* to the lender. Once delivered, a utilisation request is irrevocable. This is because the moment the bank receives a complaint utilisation request, it would be expected to go to the inter-bank market to obtain the matched funding. The facility contract may permit the borrower to draw down the full amount or part of the loan. The loan amount may be significant so it may be unreasonable to expect that the borrower draws down the whole amount once. However, the loan agreement would typically specify a minimum amount that the borrower can draw down for administrative reasons for disbursements.

[7] *Mackay v Dick* (1880-81) LR 6 App Cas 251.
[8] *Gimalu Estates Ltd v International Finance Corporation,* Milimani HCCOMC No. 606 of 2003 [2006] eKLR
[9] ibid.
[10] [2011]eKLR

The facility agreement should set out the conditions that must be met before utilisation request is deemed compliant and clearly stipulate that the borrower cannot deliver utilisation request unless the lender has received all information and evidence required under conditions precedent.[11] For instance, at the time of draw down, there must be no default and no default must arise as a result of the draw down, and the various representations required from the borrower must be true. Failing to comply with the conditions of draw down relieves the lender of the obligation to lend under the specific drawdown request and does not prevent the borrower from issuing a fresh drawdown request. The agreement should stipulate that utilisation requests can only be submitted once conditions precedents have been met, misrepresentation and warranties must be true, no event of default must have occurred and no default must arise as a result of the draw down. The conditions precedent are the conditions that when satisfied, lending is triggered. The conditions have nothing to do with the effectiveness of the loan.

If circumstances arise that the lender did not foresee at the time of the contract, that makes it impossible for the lender to perform its obligations under the loan agreement, it may explore a number of options. The lender may argue that the contract is frustrated. Frustration arises if circumstances arise, such as a change in law, that makes it *unlawful* for the lender to lend. However, a lender cannot claim frustration simply because it has become more expensive to lend. In the case of *Gimalu Estates Ltd*[12], the Court held that 'the mere fact that a contract has been rendered more onerous does not of itself give rise to frustration.'[13] For instance, banking regulations may be tightened, obliging banks to hold more capital and to meet this requirement, the lender may be tempted to elect to discontinue lending on a misguided premise of frustration. Such a claim cannot hold for the reason that the bank still would have discretion to acquire more capital, or can elect not to lend to other borrowers.[14] Without default of either party of a contractual obligation, a circumstance must have arisen that renders performance of that obligation radically different from that which the party undertook to perform.[15] There must be unforeseen circumstances that make it illegal, thus impossible to continue to lend for a claim for frustration to be properly invoked. Frustration is thus quite far-fetched and may apply in very limited circumstances.

Secondly, the lender may claim a material clause effect. Material adverse clause effect may be defined to mean 'any event or series events, whether or not related, which in the opinion of the lender may have adverse effect on the borrower.'[16] "Material" refers to an occurrence that has or is likely to have a substantial and long-term effect on the borrower. "Adverse" may be defined to mean that assets of the borrower and or its financial position are deteriorated thereby

[11] Andrew McKnight, 'Commitments to Lend in Troubled Times' (2009) 3(2) *Law and Financial Markets Review* 148, 149.
[12] *Gimalu Estates Ltd* (n8)
[13] ibid
[14] *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] Lloyd's Rep 1.
[15] ibid
[16] Franck Julien and Jean-Marc Lamontagne-Defriez, 'Material Adverse Change and Syndicated Bank Financing: Part 1' (2004) 19(5) *Journal of International Banking Law and Regulation* 172, 172.

impacting its ability to repay the loan. Material adverse clause has to be specific as it may, of itself, trigger a breach of financial covenant in the loan agreement and thereby consequently trigger an event of default.

In principle, loan facility agreements stipulate Material Adverse Change clause in the agreements to complement covenants, representation and warranties. It is a sweeping up provision that captures things not covered by a detailed covenants whose breach would trigger events of default.[17] A good lawyer for the borrower should capture events beyond the contemplation of the parties in the covenants to avoid giving an unmitigated room for invoking Material Adverse Change clause. The Material Adverse Change clause sits side by side with a detailed event of default clauses and courts may be reluctant to permit a lender to exclusively rely on Material Adverse Change clause to avoid its obligation to lend. A vaguely worded Material Adverse Change clause is difficult for the lender to rely on to trigger an event of default. A lender, for reputational reasons, may also not want to weasel out of its lending obligation based on a broadly worded Material Adverse Change clause. It is though prudent, if acting for the borrower, to specifically describe what amounts to "materiality" and "adverse effect" to reduce the discretionary power of the lender to trigger a Material Adverse Change clause. In the matter of *Grupo Hotelero Urvasco SA*[18], 'materiality' was circumscribed to mean the borrower's '(in)ability to perform its obligations to pay interest and repay principal under the loan agreement,' thereby obligating the lender to meet the materiality threshold before it can competently invoke a claim that there has been a material adverse change in the borrower.[19]

In practice, Material Adverse Change clause is typically used in combination with an allegation that another covenant is breached, though not always. In the case of *BNP Paribus*[20] the Court heard that in 2003, there was a revocation of the license for exploration of Russian oil reserves. This led to downgrade of the borrower's credit rating, borrower's tax liability of USD 3.3 billion, and freezing of the borrower's assets leading the lender to trigger an event of default on the ground that there was a material adverse change of the borrower. *Yukos Oil Company*, the borrower, contested that an event of default had occurred. The Court held that the lender's declaration of an event of default on the premise that there had been a material adverse change in the borrower was not unreasonable in the circumstances for the reason that 'its (borrower's) assets had been frozen by order of a court on the 15th April, and on the 29th June, it had suffered judgement in the sum of $3.3Bn for tax due in 2000, with the prospect of imminent proceedings to enforce tax claims in similar amounts for subsequent years, which prospect had caused Yukos to issue a press release speaking of a resulting threat of insolvency.'[21] This was therefore a classic case of material adverse change.

[17] *BNP Paribas SA v Yukos Oil Company* [2005] EWHC 1321 Ch [17]-[19].
[18] [2013] EWHC 1039
[19] *Grupo Hotelero Urvasco SA v Carey Value Added SL* [2013] EWHC 1039 (Comm) [346]-[351], [353]-[357], [358]-[363].
[20] n 17
[21] Ibid

1.2.7 Avoiding the obligation to lend

The requirement that the borrower must satisfy conditions precedent to be able to draw down funds under the loan facility agreement is subjective, as it is only the lender, not the Court that makes the determination that the conditions precedents have been satisfied.[22] However, a lender cannot be unreasonable in determining whether or not conditions precedents have been satisfied. Caselaw suggest that a lender cannot act capriciously, dishonestly, for improper purpose or unreasonably when determining whether the borrower has satisfied condition precedent to lending, as held in the case of *Paragon Finance Plc v Nash & Staunton*.23 In this case, whereas the lender had the power to vary interest rate, the Court held that the lender could not use the discretion dishonestly, for an improper purpose, capriciously or unreasonably. A discretion of a decision maker is implicitly limited 'by concepts of honesty, good faith, genuineness, absence of arbitrariness, perversity and irrationality, and subject to principles analogous to *Wednesbury* unreasonableness.'[24] The burden to prove that the refusal by the lender to lend is 'capricious, perverse, irrational or arbitrary' vests with the borrower.[25]

If a lender wrongfully refuses to lend, the borrower may lodge a claim for breach of contract and seek damages that would restore the borrower to the position it would have been had the contract been performed. Generally, the borrower would only be entitled to nominal and not substantial damages, as there is an assumption that the borrower can obtain replacement funds in the market,[26] unless the loan agreement restricts the borrower from entering into alternative credit facilities.[27] If the borrower is permitted and able to obtain alternative funds, the borrower may raise claims for special damages arising from additional expenses in obtaining alternative funds and increased interest rates charged in the alternative financing.[28] However, if the borrower is not permitted or is unable to obtain alternative finance, the borrower may raise a number of claims. These include loss of profit; loss of future business that might have been expected to flow had the funds been advanced; and loss creditworthiness and business reputation. The borrower can also claim damages from a third party with whom the borrower had entered into an agreement in reliance of the lender's obligation to lend.[29] If the money is being applied for a purpose that is known to the lender, for instance to consummate an acquisition, damages beyond nominal damages will be claimed by the borrower. In order to succeed in its claim, the borrower must show *causation* and *proximity***.** The loss must have been caused by the breach and not too remote as was held in the case of *Hadley*.[30] That is, the loss must have arisen naturally from the breach or must have reasonably been foreseen as likely to arise from circumstances that the lender was aware of at the time of the contract.

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[22] Philip Rawlings, 'Avoiding the Obligation to Lend' (2012) 2 *Journal of Business Law Review* 89, 98.
[23] [2001] EWCA Civ 1466.
[24] *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116.
[25] *Deutsche Bank (Suisse) SA v Khan and others* [2013] All ER (D) 195.
[26] *Blue Sky One v Mahan Air* [2010] EWHC 631 (Comm) [145].
[27] Rawlings (n 22) 100
[28] *Essentially Different Ltd v Bank of Scotland* [2011] EWHC 475 (Comm).
[29] (n 22)101.
[30] *Hadley v Baxendale* [1854] 9 Ex 34.

A borrower may also lodge a claim for specific performance against the lender in the event that the lender wrongfully refuses to lend. An order for specific performance is, though, is a discretionary remedy and granted in very rare circumstances. The general position of Kenyan law is that the remedy for breach of contract is damages and the Court will not exercise its discretion if damages are an appropriate remedy. In *Caltex Oil (Kenya) Limited*,[31] the Court held that 'the jurisdiction to order specific performance was based on the existence of a valid and enforceable contract and on the basis that it is an equitable relief. Such relief was more often than not granted where the party seeking it could not obtain sufficient remedy by an award of damages, the focus being whether or not specific performance would do more perfect and complete justice than an award of damages.' Circumstances under which the Court may exercise discretion are to grant a remedy for specific performance rare. For instance, in instances where the borrower needs the money quickly to finance an acquisition that was within the contemplation of parties at the time of signing the loan agreement, and if the money is not advanced, the borrower may lose the contract, the prayer for specific performance remedy may be granted. However, in majority situations, claims against banks for breach of contracts will be seeking damages.[32]

1.2.7.1 Borrower's duty to Mitigate

The borrower must mitigate the loss it suffers from a breach of a contract to lend 'by taking such reasonable measures to minimise his loss arising from the breach.'[33] In *South Nyanza Sugar Company Ltd*,[34] the Court held that 'the fundamental basis is thus compensation flowing from the breach; but this principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars any part of the damage, which is due to his neglect to take such steps.' Justice F. Gikonyo justified the duty of a plaintiff to mitigate loss as a necessary policy consideration, to prevent unscrupulous plaintiffs from temporising their loss for as long as possible in order to derive maximum benefits, and to prevent stealth and veiled greed by a plaintiff.[35] Losses caused by the borrower's failure to take reasonable measures to reduce or eliminate the losses suffered from the breach of the contract, are not recoverable, because this constitutes a fresh cause of the loss, thus breaks a chain of causation because the lender, in signing the loan facility agreement, does not accept liability for the risk of the loss occurring as a result of the borrower's inaction. The concepts of *foreseeability* and *break in chain of causation* thus justify the borrower's duty to mitigate its loss. For instance, a borrower has to show that it went out to the market to seek replacement finance and failed.[36]

[31] *Caltex Oil (Kenya) Limited v Rono Limited,* Nairobi CA No. 97 of 2008 [2016] eKLR.
[32] *The South African Territories Limited v Wallington* [1989] AC 309.
[33] *Githaiga v CFC Stanbic Bank Limited,* Milimani HCCA No. 92 of 2017 [2019] eKLR [9] (Gikonyo, J.)
[34] *South Nyanza Sugar Company Ltd v Midney,* Kisii CA No. 60 of 2017 [2018] eKLR [12] (Majanja, J.)
[35] n 33.
[36] *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631.

Circumstances may, though, prevent a borrower from mitigating the loss for instance due to the general lack of funds in the market making it impossible to replace the loan.[37]

1.2.8 Conditions Precedent

Compliance with conditions precedents triggers the lender's obligation to lend.[38] In practice, a lender may permit a borrower to borrow if a particular condition is not supplied on terms that the unfulfilled condition precedent becomes a *condition subsequent.* Conditions subsequent are continuing obligation after draw down which the borrower has to meet after draw down.

Loan facility agreement should obligate the lender to notify the borrower that conditions precedent have been satisfied. The borrower therefore needs to follow up with the lender to confirm that conditions precedent has been satisfied. The agreement may also set the timeline within which the lender must notify the borrower that the condition precedents have been satisfied. This is important to enable the borrower to deliver a utilisation request.

The documents that the borrower need to deliver to the lender as condition precedent would typically include:

(a) a copy of the constitution document of the borrower;

(b) a copy of the board resolution of the borrower approving the finance documents and authorising specified persons to execute the financial documents, sign utilisation requests and issue any notice required;

(c) a specimen signature of each person authorized by the resolution to sign. This enables the lender to compare the signature in the documents to that of the specimen signature for similarity.

(d) Certified board statement confirming that the documents supplied are correct as at the date of the agreement; and

(e) Evidence of perfection of security, if applicable, including insurance over the security.

The documents that the borrower has to deliver to the lender as condition precedent are aimed to satisfy the lender of the power, capacity, authority of the borrower to enter into the particular contract. This is important to create a binding contact with the borrower in the jurisdiction of the borrower.

[37] n 28
[38] McKnight (n 11) 149.

1.2.9 Representations and Warranties

Representation is a statement of fact made prior to the making of the contract by one party to another party to induce that other party to enter into the contract.[39] If the representation is incorporated into a contract thereby becoming part of the contract, the representation transforms into a warranty.[40] A warranty is therefore a statement of fact that has already become part of the contract.[41] Representations and warranties are part of due diligence exercise to enable the lender to appropriately price the loan. They reflect the condition of the borrower as at the date of signing of the agreement and intended to remain true during the term of the loan. Breach of a representation or warranty may lead to actionable representation and consequential damages assessed on a tortious basis; the damages should restore the victim to the position it would have been, had the misrepresentation not been made in the first place. It is a defence to the borrower to plead that it reasonably believed in the truth of the facts, made when a claim of misrepresentation is made. A successful plea of misrepresentation may lead to rescission of the contract.[42]

In the context of a loan agreement, the lender's concern would be, and a well drafted loan agreement should reserve the right of the lender to refuse to disburse or make further disbursements to the borrower if there is a misrepresentation or accelerate the loan, that is demand immediate repayment of the drawn funds. The clause should entitle the lender to trigger an event of default if any statement or representation by the borrower is or proves to have been incorrect or misleading in any material respect when made. It should be that immaterial misrepresentation did not induce the lender to lend or that the borrower believed in the correctness or otherwise of the statement or representation when made for there to be an event of default.

The loan agreement should further provide for repeating representations and warranties. That is, the borrower should not only be obligated to make the statements as at the date of signing of the agreement, but also require the borrower to repeat the statement at various periods during the term of the loan. If acting for the borrower, it is prudent to consider whether the representations can be repeated at a future date or whether they should only be made as at the date of signing of the agreement. Typically, repeating representations are subject to negotiation by parties.

Representations and warranties can be divided into two broad categories. Firstly, representations relating to legal issues pertaining to the borrower, such as representations on the existence, status, powers and authority of the borrower to contract. If the borrower is not properly constituted, a lender may not be able to bring an action against a non-entity.

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[39] Edwin Peel, *The Law of Contract* (14th edn, Sweet & Maxwell 2015)3 80- 81
[40] Ibid, [6-018].
[41] *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] EWHC 1909 (Comm).
[42] Andrew Burrows, *A Restatement of the English Law of Contract* (1st edn, Oxford University Press 2016) 189-190.

The second category of representations and warranties pertain to commercial and factual matters about the borrower. For instance, absence of litigation against the borrower that may materially negatively impact the borrower's business and assets if it may have to pay a large claim. Representations on the absence of litigation should be wide enough to capture even perceived vexatious and unfounded proceedings. If acting for the borrower, ensure that the representation is qualified by a particular quantum threshold, the so called, *materiality threshold*, and to refer only to claims that may have a significant impact on the borrower's business as to render the borrower unable to effectively discharge its obligations under the loan[43].

1.2.10 Covenants

Covenants contain the obligations undertaken by the borrower in favour of the lender relating to the promises as to what the borrower will do and promises as to what the borrower will not do. The intention behind covenants, from the lender's perspective is to, firstly, require that the economic, legal and commercial status of affairs concerning the borrower is preserved during the term of the loan. Secondly, the covenants help to get a flow of information from the borrower during the term of the loan to enable it ascertain that indeed the borrower's economic, legal and commercial state of affairs are preserved. Further, in the event of breach of a covenant, the lender's objective is not necessarily to pursue remedies it is entitled to under general law; the lender would prefer to trigger an event of default, accelerate the loan and demand immediate repayment of the loan in the event of default or refuse to make further advances in the event of default. Typical covenants in loan facility agreement can be divided into *Information Covenants* and *Financial Covenants.*

1.2.10.1 Information Covenants

These are covenants that obligate the borrower to supply certain information to the lender during the term of the loan. The information is meant to enable the lender to monitor the performance of the borrower and any changes in the risk involved in the loan and if necessary, to intervene and trigger the event of default clause. It is not in the interest of the lender to be swamped with insignificant information or burden the borrower with unnecessary information. From the borrower's perspective, the borrower may want to specify the information that will be provided to prevent an ill-intentioned lender from bombarding the borrower with a barrage of requests for information, aimed at making the borrower to trip thereby occasioning an event of default. The lender should not have an open-ended discretion on the information that they may request, thus the borrower should endeavour to limit information that the lender may seek from it. The loan agreement should reserve the borrower's right to inquire from the lender the relevance of the information to monitoring the borrower's credit quality.

[43] Mark Adelson, 'Representations and Warranties in Mortgaged-Backed Securities' (2017) 23(1) *Journal of Structured Finance* 98, 100.

Information covenants include, firstly, the obligation of the borrower to furnish account information during the life of the facility and the manner in which the accounts information should be prepared and presented. Secondly, an information covenant clause should obligate the borrower to notify the lender of an event of default or the likelihood of such an event occurring. Thirdly, an information covenant clause should obligate the borrower to furnish the lender with information that the lender needs to meet its regulatory requirements, including relevant information necessary for risk weighting for capital adequacy purposes, know your customer (KYC) requirements and money laundering requirements[44].

1.2.10.2 Financial Covenants

Financial covenants aim to ensure that the financial condition of the borrower does not worsen. So, where a borrower has a difficulty in meeting financial covenants, or breaches them, that should serve as a warning to the lender. Examples of some of the financial covenants include, firstly, clauses in the loan facility agreement providing for minimum tangible consolidated net worth of the borrower. A borrower's minimum tangible consolidated net worth is arrived at by taking the company's total tangible assets and subtracting the value of the borrower's liabilities and intangible assets (non-physical assets such as patent, trademark). The loan agreement should provide for growth in the borrower's tangible consolidated net worth. Secondly, financial covenants clause should provide for the ratio of total consolidated borrowing to net worth, also called gearing/leverage ratio. This measures the borrowing liability of the borrower as compared to the borrower's tangible net worth. Its objective is to ensure that the level of debt is kept down, and to monitor to what extent the borrower may be expanding its business with debt. The loan agreement should define financial indebtedness to not only include debt but also other commercial transactions that have a similar effect, including potential liabilities under guarantees, deferred purchases and derivative transactions. The lender also needs to be aware of the creditors that it will be competing with against the value of the assets that will be available to settle the claims. The lender needs to know the assets that will be available to apply for the loan repayment against outstanding borrowings of the company.

Thirdly, financial covenants clause should provide for the borrower's debt service coverage ratio. Debt service coverage ratio measures the cash available for debt servicing and divides it with interest, principal and any lease payments. That is, Net Operating Income/(Principal Repayment + Interest payments + Lease payments). The benchmark measures the company's ability to produce enough cash to cover its debt payments. The higher the ratio, the easier it is to repay the loan. Typically, the least ratio is 1.2, though some banks accept a lower ratio which may turn out to be a risky practice. A ratio of less than 1 means that the borrower is not generating enough cash and has to resort to other sources to meet its loan payment obligations. A borrower may have assets but is not generating enough cash to pay for the loan. If a borrower does not make a small amount of interest, it may trigger an event of default. Debt service

[44] Robert Lloyd, 'Financial Covenants in Commercial Loan Documentation: Uses and Limitations' (1990-1991) 58 *Tennessee Law Review* 335, 342.

coverage ratio aims to ascertain that the borrower is generating sufficient cash to repay the loan. At times, a lender may agree to reduce the specified debt service ratio *on terms that the borrower blocks a certain specified amount of money in a bank to be applied to debt servicing*. Moreover, the financial covenants clause should provide for the borrower's current assets to current liabilities ratio, which measures liquid assets, that is assets that can rapidly be turned into cash, against liabilities in the short term; and the borrower's security cover ratio.

Further the loan facility agreement should restrict the scope of the borrower's activities during the term of the loan including the borrower's undertaking to operate its business as it previously operated it before the loan agreement, and not to vary the nature of the business. This is because the lender extends the loan to the borrower based on the strength of the borrower's business as at the time of the agreement. If the borrower varies that business to a different type of activity that may make the borrower's business considerably risky, the variation may expose the lender to a risk that it did not accept to take up. The Agreement should require the borrower to seek the consent of the lender before changing its business. Further, the facility agreement should restrict the borrower from disposing its assets. Where the borrower legitimately wishes to dispose of its capital assets, for instance to improve its machinery, such a disposal may be exempted. Moreover, the borrower should covenant under the loan agreement not to merge its business; comply with all laws pertaining to the loan transaction; restrict or prohibit dividend payments, profit sharing, derivative transactions and management arrangements, when the loan repayment obligation is outstanding, except with the lender's consent.

1.2.11 Negative Pledge

Negative pledge is a covenant in the loan facility agreement that seeks to maintain the quality of the credit which the lender is making throughout the life of the loan. The covenants prevent corporate borrowers from taking certain causes of action that may adversely impact on the quality of credit, credit analysis or likelihood of non-repayment of the loan to maintain the creditworthiness of the loan made available. Negative pledge constrains the borrower's management from taking certain key management decisions and can be characterised into two brackets. Primarily, a negative pledge covenant aims to maintain the priority position of the lender to that of security holders of debtor's assets.[45] It restricts the power of the borrower to create new security or increase the amount that its existing security secures.[46] It aims to allow the lender to remain unsecured until the happening of the contingency, but at the happening of the contingency, gives the lender a security interest that ranks in priority to the security right created in favour of the subsequent lender.[47] The restriction is justified. The lender would not want to be subordinated to subsequent lenders as the borrower's assets may be depleted before its turn to be paid. Creating fixed charge to other lenders reduces the borrower's available estate

[45] Roy Goode and Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (6th edn, Sweet & Maxwell 2017) [1-78].

[46] Ellis Ferran and Look Chan Ho, *Principles of Corporate Finance Law* (2nd edn, Oxford University Press 2014) 288.

[47] Julie K Maxton, 'Negative Pledges and Equitable Principles' (1993) Sep *Journal of Business Law* 458, 458.

to unsecured creditors at insolvency.[48] If a secured lender's existing security turns out to be deficient, the lender may want to turn to the borrower's other assets to fully recover its return. Moreover, the requirement for lender's consent before creating security directs the mind of the borrower's management to the interest of the lender.[49]

The covenant exists both as a contract and as a quasi-security. As a contract, negative pledge covenant gives the lender contractual rights and obligation over the borrower's assets, though with remedies that remotely sprawl into realm of torts. As a quasi-security, negative pledge covenant is, at inception of the loan agreement, a contractual device. However, if a particular contingency occurs, the covenant transforms into a security negative pledge, giving the lender rights, that it can exercise against the corporate borrower's assets to discharge the loan, in addition to the borrower's personal promise to pay.[50] Nevertheless, the negative pledge clause should be couched in a way that enables the corporate borrower to continue to trade[51] to avoid automatic breach the covenant on day one.

1.2.12 Events of Default

Events of default clause in a term loan agreement typically provides that if one of the events stated in the loan facility agreement occurs, the lender will acquire three essential remedies.[52] Firstly, the lender acquires the right to suspend disbursement of any undisbursed funds. This remedy enables the lender to prevent any further drawdowns if there are any drawdowns that are outstanding. More than that, not only is the lender able to prevent further drawdowns, but also the borrower's ability to make any drawdowns is cancelled. Secondly, the lender acquires the right to accelerate the loan and demand immediate repayment of the entire outstanding amount of the loan. For instance, in *Law Debenture Trust Corp.*[53] case, 'events of default' clause entitled the lender to bring forward the date of the loan repayment from 15 December 2005 to 18 January 2005. Thirdly, the lender may place the loan on demand, thereby transforming a term loan into an on-demand loan. Putting the loan on demand is quite an effective remedy to the lender as it converts a term loan essentially to an overdraft facility. On demand loan is a loan where the lender can demand repayment at any time. The loan may continue for a number of years after it has been placed the loan on demand, but the lender can at any stage and without having to wait for any further event of default, unilaterally decide to demand early repayment of the loan, essentially converting the term loan into an overdraft facility.

[48] Andrew McKnight 'Restrictions on Dealing With Assets in Financing Documents: Their Role, Meaning and Effect' [2002] 17 *Journal of International Banking Law* 194.

[49] T. Hobbs, 'The Negative Pledge: a Brief Guide' [1993] 8 *Journal of International Banking Law* 269, 270.

[50] *Bristol Airport Plc v Powdrill* [1990] 2 WLR 1362.

[51] Rafal Zakrzweski, 'Loan Facilities' in Sarah Paterson and Rafal Zakrzewski (eds), *McKnight, Paterson and Zakrzewski on the Law of International Finance* (2nd edn, Oxford University Press 2017) 184-185 [3.18.11.2].

[52] McKnight (n11) 151.

[53] *Law Debenture Trust Corp. v Electrim SA* [2010) EWCA 1142 (32)

Incidences that would typically give a lender the right to trigger an event of default relate to the non-payment of the amounts falling due under the agreement, perhaps with a grace period in which the non-payment can be rectified, particularly if non-payment has arisen due to technical difficulties in the mechanics of transmission of the payment. Other breaches to stipulate in the loan agreement as capable of triggering events of default include breach of representation and warranties; breach of covenants; cross-default; insolvency of the borrower; loss of security rights by the borrower if the loan is secured and the security falls away; and material adverse change in the borrower's circumstances.[54] It is important that the loan agreement specifically spells out events of default, because a lender does not have an inherent right to demand early repayment of a term loan. The lender would only demand early repayment of a term loan if the agreement gives the lender that right. Unless there is a provision in the loan agreement that provides otherwise, there is no right on the part of the lender to demand early repayment of the loan. If a lender triggers an event of default in circumstances where the lender is not so entitled, the declaration of default is invalid and all events that flow from it are a nullity.[55]

If representing the borrower in negotiating the term loan, the borrower may want to negotiate around the potential harshness of the events of default clause. Depending on the type of potential default, for instance, when it comes to non-payment, the borrower may want to negotiate a short grace period before the lender may serve a default notice to enable the borrower to rectify any technical difficulty with the transfer of funds. Similarly, the borrower may seek a grace period to rectify a breach of the covenant. Grace period may be appropriate for some covenants but unsuitable for others. It would, for instance, be inappropriate to grant a grace period where the borrower breaches a negative pledge clause or disposal covenant.

With respect to representations and warranties, because they are historic occurrences, that is, backward looking, obviously, grace period is not applicable, and alternatively, the borrower may negotiate a materiality qualifier. The borrower may want the agreement to stipulate that an event of default in respect of representations and warranties would only arise where there is a material breach. The agreement ought to describe what constitutes a material breach or who determines materiality. Alternatively, the agreement may stipulate financial thresholds to determine materiality, though, representation as to legal validity of the borrower, incorporation of the borrower, authority of the borrower to enter into the loan transaction cannot be qualified by financial materiality threshold. However, representation as to litigation disputes facing the borrower can be qualified by financial threshold.

If the lender does not want to waive its right to trigger an event of default, the lender is typically required to, at the minimum, send to the borrower a reservation of right letter. The reservation of rights letter notifies the borrower that the lender is aware of the breach of the loan agreement, much as the lender may not be triggering an event of default at that particular

[54] n17

[55] n17; *Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261.

time. The letter reserves the right of the lender to trigger an event of default at some point in the future. In *Tele2 International Card Company SA v Post Office Ltd*[56], the Court held that for a party to be held to have abandoned its right to exercise a right on account of breach of the agreement, there must be clear and unequivocal communication. Inaction is deemed a clear and unequivocal communication by conduct of the lender to affirm the agreement and abandon its right to terminate the agreement for breach. Further, the lender must have the knowledge that the breach has occurred, because in the absence of the knowledge, it would be untenable to claim that the lender waived the right to exercise the right.[57] The affirmation of the agreement occurs when the lender *continues* to perform the contract. For instance, if the lender advances a further drawing after an event of default has occurred, then that is clearly continuing performance of the agreement, thus, an affirmation of the agreement.

1.2.13 Cross Default

Cross default clause would typically provide that if a borrower defaults in relation to any other agreement referencing indebtedness of the borrower, that breach of the other agreement constitutes a default in the present agreement between the lender and the borrower as well. The rationale for cross default clause is that if another creditor has not been paid, the creditor may take action against the borrower and recover its debts, either by formal proceedings, or by exercising pressure. Thus, the lender in the present loan agreement would want to be in the same position as the creditor in the other agreement to make recoveries. Otherwise, the other creditor could get paid, leaving little or nothing available for the lender when it does get the right to pursue its remedies under the present agreement against the borrower.

If acting for the lender, the loan agreement should envisage every circumstance that would entitle a third-party creditor to enforce against the borrower as a trigger on the cross-default clause, thereby entitling the lender in the present agreement to trigger an event of default, regardless of whether the third-party creditor actually enforces the breach or not. The lender would not want to wait on the side-lines when an independent event of default between the borrower and third-party creditors is triggered. Great attention needs to be paid to the definition of indebtedness in the loan facility agreement. The lender, for obvious reasons, may want the broadest definition of indebtedness. The definition should not only pick up indebtedness from borrowed money, but also for deferred purchase prices of goods and services, guarantees, interest rates.

If acting for the borrower, the operation of cross-default clause, in conjunction with other clauses in the loan agreement, may sink the borrower into insolvency if all the financial creditors of the borrower pursue the borrower at the same time, if the borrower fails to pay only one of its financial creditors. In a way, cross default clause may be argued as allowing the borrower's creditors to take advantage of the most onerous terms in one creditor's agreement

[56] [2009] EWCA 6118
[57] ibid

that may have no bearing at all in the present facility agreement. The borrower therefore needs to focus on limiting the breadth of the clause. The borrower can achieve this by focusing on a *de minimis* threshold of the clause. In other words, only if the borrower defaults in a financing agreement between the borrower and a third-party creditor above a specified amount, then and only then will the cross-default clause be triggered. The rationale for that limitation is that if the amount that allow other lenders to trigger a cross-default clause is immaterial in the context of the borrower's overall financial position, it poses no threat to the lender.

Further, include a provision in the loan agreement that disentitles the lender of the right to trigger a cross-default clause if the borrower is contesting, in good faith, its indebtedness to the third-party creditors. In practice, though, a lender may not accede to a blanket stipulation in the loan agreement, that the lender's right to trigger cross default will be held in abeyance for as long as the creditor is in good faith contesting its indebtedness to other creditors. A more practical clause would give a grace period within which the in good faith contest of the borrower's indebtedness to third party creditors must be concluded, at the expiry of which the lender will be entitled to trigger cross-default clause.[58] Alternatively, if the period of the contest is undefined, the withholding of the lender's right to trigger an event of default on account of breach of cross-default clause may be conditional on the borrower providing a reserve of funds to satisfy its obligations to the third-party creditors against whom the borrower is contesting its indebtedness. This is because, the mere fact that a borrower is contesting its indebtedness in good faith does not mean that ultimately, the borrower will be exonerated from its debt obligation to the third parties.

1.2.14 Standstill agreements and reservation of rights letters

Triggering an event of default ordinarily entitles the lender to accelerate the loan, put the loan on demand and or cancel the facility if there are any outstanding drawdowns. However, there are potential limitations which might impact on the exercise by the lender of its rights under loan facility agreement. It is legal, superficially attractive, all well and good to draft a loan agreement as to give the lender wide ranging rights, including the right of the lender to trigger an event of default immediately the loan facility agreement is breached. At a practical level, triggering an event of default is not a zero-sum game; triggering an event of default may lead to the borrower breaching cross-default clause in respect of other loan facilities with other creditors, and consequential insolvency proceedings being commenced against the borrower. The last thing that a lender would want is to force a lender into insolvency. Insolvency proceedings may be inevitable if directors of the borrower, who know that the borrower is technically insolvent, commence insolvency proceedings to prevent the technically insolvent borrower from continuing to trade as a going concern, lest they suffer personal liability for wrongful trading. [59]

[58] n53

[59] Insolvency Act No. 18 of 2015, s 506.

Conversely, there are consequences if a party enjoys the benefits of certain rights which it can exercise, fails to exercise those rights. When an event of default occurs, it is without question that the lender has to do something. The lender cannot sit on its hands and just make up its mind in future about its rights under the loan facility. At the very least, a lender would be expected to send a communication to the borrower that it is waiving the exercise of its rights under the loan facility agreement, if it does not want to exercise those rights at the moment, a reservation of rights letter, lest it run the risk of being unable to exercise that right at some future time.[60] Where directors continue incurring liabilities in circumstances when the borrower is technically insolvent, and the directors do not have reasonable grounds to believe that the company will be able to pay its creditors, including, critically, new creditors whose indebtedness is being incurred during the twilight zone, the directors can be held liable for wrongful trading.[61]

A reservation of rights letter does not waive the right of the lender to exercise its rights under the loan facility agreement; the letter reserves the right of the lender to exercise its rights under the loan facility agreement, and it typically supplemented with a *standstill agreement*. Standstill agreements take time to negotiate. Therefore, sending out reservation of rights letter gives the parties the much-needed time to negotiate terms of the standstill agreement without the lender suffering risks of any claims of waiver of its rights under the loan facility agreement.

Standstill agreement is an agreement is a contract between the borrower and the lender, as well as, in the case of a syndicated loan, the agent in the syndicated loan and security trustee, that gives comfort to the borrower that the borrower can continue operating as a going concern while negotiations on how the borrower can rectify default continue to take place. Its purpose is to give the borrower a breathing space during which the lender is able to consider the options that they have available, including, continuing with the loan on precisely the same terms or triggering an event of default with all the consequences that follow after that, potentially, insolvency of the borrower. The parties may also, during the period of the standstill, agree to restructure the agreement itself or even restructure the management of the borrower in order that the borrower may go through the difficult period and hopefully thrive in the future or just in time to satisfy its debt obligations to its creditors. The lender would therefore typically need time to assess the most prudent option to take when the borrower gets into financial difficulty and it is that time that a standstill agreement affords the lender.

Therefore, it is not always that in all cases, an event of default automatically leads to acceleration of the loan and exercise of rights by the lender under the loan facility. In some cases, the lender immediately exercises its rights under the facility. However, in many cases, the best option for the lender to get its money back would be to adjust the facility and work with the borrower, subject to limitations, to see if there is a way the borrower's position can be improved, to then maximize the prospects of the lender being paid.

[60] n 55

[61] *Re Continental Assurance* [2007] 2 BCLC 287, 293 [h]-[i] (Park J).

1.3 Conclusion

The easiest way to draft bilateral loan agreement is by relying on a template agreement. This article dissuades lawyers from relying on template bilateral loan agreements, line, hook and sinker. Circumstances of borrowers differ. What lenders look out for in a lending agreement also differ. Some lenders may enter into a lending agreement with the primary aim to trip the borrower into default to maximise their return from the lending agreement. It is therefore crucial that lawyers apply their mind to each clause of the bilateral loan agreement, right from the recitals provision all through to boiler plate clauses The article has conceptualised each of the clauses in a typical bilateral loan agreement, crucially analysing the risks that either party under the agreement may suffer if the clauses are inelegantly drafted, the clauses misrepresent the particular circumstances of the parties, or if parties, particularly the lender, is unreasonable in its refusal to perform the bilateral loan agreement.

HOW CLIMATE LITIGATION CONTRIBUTES TO THE EMISSION GAP

*Charity Cheruto Kipkorir**

Abstract.

The World Metrological Organization (WMO), in its most recent research, has indicated that one of the coming five years will be the hottest in human history. The prediction by WMO, echoes the sentiments of the United Nations Environmental Programme (UNEP). UNEP has indicated that current scientific evidence shows the goals set by the Paris Agreement, aimed at reducing atmospheric temperatures, may not be met. Global warming is part of our common parlance. It is understood as the rise in atmospheric temperatures, precipitated by the impacts of releasing fossil fuel (carbon dioxide), to the atmosphere from human activities. Although there has been concerted global awareness and effort to reduce the emission of greenhouse gases, and to curb the plethora of extreme weather events and resultant calamities; these efforts are seemingly inadequate. Through the decisions they make, courts have a niche to cause the implementation of policies that cause multi-sectoral transformation, across all systems, to deliberately turn the tide. This paper seeks to show the climate crisis the world is in, and the importance of climate litigation in that context. It then outlines how the inadequacies and/or translation of climate science in evidence, and judicial dogma contributes to the emission gap and suggests solutions.

Key words: Climate science, Climate litigation, Evidence, Greenhouse gases, Courts, Emission gap, Climate Change.

* The author is an Advocate of the High Court of Kenya. She currently serves as a magistrate with the Judiciary in Kenya. She has an LL.M in Commercial law from the University of Melbourne. The original version of this paper, was presented by the author for her mentioned Master's degree. She can be reached through Cherukipkorir@gmail.com

Introduction

The United Nations Environmental Program (UNEP) has in the last decade consistently prepared reports showing the emission gap. Emission gap, with regard to climate change has been defined as the difference between 'where we are likely to be and where we need to be'.[1] This is in the context of the target set by the parties to the Paris Agreement of holding the increasing global average temperature, to well below 2°C above pre-industrial levels, and pursuing efforts to limit the temperature increase to 1.5°C.[2] UNEP has done this through the analysis of the scientific studies done on the current and estimated future greenhouse gas (GHG) emissions and compared with 'the emission levels permissible for the world to progress on a least-cost pathway to achieve the goals of the Paris Agreement.'[3] The 2019 Emission Gap report was categorical that the actions taken globally to reduce the rise in atmospheric temperatures, has been insufficient. It was grimly observed then that the situation 'is almost exactly at the level of emissions projected for 2020 under the business-as-usual, or no-policy, scenarios used in the emissions gap reports'.[4] In 2022, the emission report declared that the world is in a climate emergency.[5] To understand the context of the urgency in the emission report, and the possible predicted catastrophe, there is need to understand the history behind it.

I. The Basics of Climate Change and Climate Science.

A global mechanism to find a solution to climate change, culminated in the ratification of the United Nations Framework Convention on Climate Change (UNFCCC). The Convention came into force on 21 March 1994. UNFCCC's Preamble states that its signatories are concerned with the increase in atmospheric concentration of GHG's caused by human activities. This resulted in global warming and 'adversely affect natural ecosystems and human kind.'[6] The Convention, in Article 2, sets out the main objective as 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'

Article 7, of the Convention, established a Conference of the Parties that meets once a year. The parties to the Convention in those meetings make decisions that promote the operation of the Convention. The first conference of the parties adopted the Kyoto Protocol, a treaty to give effect to the UNFCCC; it was ratified on 16 February 2005.[7] The 21st Conference

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[1] UNEP *Emissions Gap Report 2019. Executive Summary* (United Nations Environment Programme, Nairobi 2019) at <https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf?sequence=1&isAllowed=y> accessed on 20/4/2023. p IV

[2] Paris Agreement, Article 2 available at <https://unfccc.int/sites/default/files/english_paris_agreement.pdf>

[3] ibid

[4] Christensen J and Olhoff A (2019) '*Lessons from a Decade of Emissions Gap Assessments* (United Nations Environment Programme, Nairobi) <https://wedocs.unep.org/bitstream/handle/20.500.11822/30022/EGR10.pdf> accessed on 20/3/2023 p 3

[5] UNEP '*Emissions Gap Report 2022. Executive Summary*' (United Nations Environment Program, Nairobi, 2022) <https://www.unep.org/resources/emissions-gap-report-2022> p XV accessed on 20/3/2023

[6] UN *United Nations Treaty Framework Convention on Climate Change*, 12 June 1992, 1771 UNTS. Available at https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf accessed on 20/3/2023

[7] Kyoto Protocol at <https://unfccc.int/resource/docs/convkp/kpeng.pdf>

of the parties took place in December 2015 in Paris. 194 countries committed to strengthen the global response to the threat of climate change, through implementation of the Paris Agreement. Under Article 2 of the Paris Agreement, the parties adopted a target of holding the increase in the global average temperature to as outlined hereinabove.

To this end, the Paris Agreement, under Article 4(2) requires each signatory to prepare a 'nationally determined contribution (NDC) that it intends to achieve.' NDC's simply explained are the ambition targets set by countries as climate change adaptation and mitigation strategies. The targets are to be implemented within their borders. It is binding for parties to 'prepare, communicate and maintain' their commitment to reduce emissions of GHG's'.[8] The NDC's are to be filed with the United Nations. The assessment of the emission gap, in the UNEP reports referenced factored in the efforts made through the NDC's submitted at the time.

Article 4(1) of the Paris Agreement confirms the parties' aim 'to reach global peaking of greenhouse gas emissions as soon as possible and to undertake rapid reductions thereafter in accordance with the best available science....' The "best available science" envisaged in Article 4(1) of the Paris Agreement has been prepared, analyzed and submitted by the Intergovernmental Panel on Climate Change (IPCC). It is a body established by the United Nations and World Metrological Organization, (WMO). Their role is to mainly do research on climate change science.

IPCC, has reiterated with high level of certainty, that anthropogenic greenhouse gas emissions are extremely likely to have been the dominant cause of the observed warming since the mid-20th century. The IPCC, in its Fourth and Fifth Assessment Reports, issued in 2007 and 2013 respectively, established that GHG concentrations in the atmosphere must be stabilized at 0 parts per million in order to achieve the 2°C target. The 2022 Emission gap report specifies that nations have been guilty of procrastination. The NDC's filed show a gap in their commitments and efforts to implement them. This has resulted in a projection by the IPCC, that warming will likely exceed 1.5°C and it will be harder after 2030 to limit warming below the 2°C target. [9] WMO in a report released in May 2023, confirmed this.[10]

These are the climate changes that the world suffers at only 1.1ºC above pre-industrial temperatures.[11] Warming of the ocean and the atmosphere, diminished amount of snow and ice and rise in sea levels.[12] Warming has brought about heat waves, frequency and intensity

[8] n 2, Article 4.2,

[9] IPCC (2022b) Climate Change 2022: *Mitigation of Climate Change. Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Geneva. <https://www.ipcc.ch/ report/ar6/wg3/> accessed on 23/5/2023

[10] World Metrological Organization *Global Annual to Decadal Climate Update,* (Geneva, May 2023) <https://library.wmo.int/doc_num.php?explnum_id=11629> p 2

[11] United Nations Environment Program *Adaptation Gap Report 2022 Forward*, (Nairobi 2022) at <https://www.unep.org/resources/adaptation-gap-report> p XI

[12] H-O Pörtner, et al (eds.) *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate*, *Summary for Policymakers, pp* 6-10 at <https://www.ipcc.ch/srocc/chapter/summary-for-policymakers/> accessed on 1/5/2023.

of droughts, heavy rainfall, and wild fires.[13] This has led to shift in the range, abundance of animal and plant species and even caused extinction.[14] The observed climate changes are unprecedented. They are likely to get worse and have a widespread domino effect, that cascade across inter connected jurisdictions and population groups.[15] These calamities have hindered the provision of public goods, such as peace, security and economic stability. [16]

The World Trade Organization (WTO) indicates that trade and climate change are deeply intertwined.[17] Climate change has and can cause supply shortages, disruption of transport which severely affect international trade.[18] Without significant reduction in the GHG's, the trade body observed there is likely to be change in endowments in natural resources, alterations in efficacy in which land, capital and other production factors can be deployed to produce goods and services.[19] Of importance, it is also established that third world countries, (such as Kenya) are the most likely to suffer the dire effects of climate change. Agriculture and tourism, (bedrocks of Kenya's economy), are particularly vulnerable to climate change.[20] Sea level rise and extreme weather events could permanently damage tourism infrastructure.[21] Food security is also at threat as countries South of the Sahara experience high agricultural yield shocks than other regions.[22] This is because they are vulnerable economically to cushion themselves.[23]

IPCC in its report *Global Warming of 1.5ºC* indicated that; 'rapid and far reaching transitions in energy, land, urban and infrastructure (including transport and buildings), and industrial systems,' [24]are urgently required to limit the rise in atmospheric temperatures. The key ways in which this has (and/or will) be achieved is through shift in technology and behavior across board. Policies that ensure energy efficiency, fuel switching measures, phasing out coal plants, decarbonizing aviation and shipping, investment in clean and efficient energy are emphasized.[25] There is need to also support research and innovation for clean energy and fossil fuel phase out.[26] Importantly there is emphasis that there is no need to invest, finance or insure new

[13] PR Shukla, et al, (eds.) 'Summary for Policymakers, in Climate Change and Land, an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems' pp 14-17 at < https://www.ipcc.ch/srccl/> accessed on, 1/5/2023.

[14] *WMO statement on the state of the Global Climate in 2019* World Meteorological Organization, at <https://library.wmo.int/doc_num.php?explnum_id=10211#:~:text=The%20global%20mean%20temperature%20for,also%20the%20warmest%20on%20record.pp10-14>. pp 10-14 accessed on 5/5/2023

[15] n11, p 5

[16] The World Trade Report 2022: *Climate Change and International Trade*, available at <https://www.wto.org/english/res_e/booksp_e/wtr22_e/wtr22_e.pdf> accessed on 4/5/2023

[17] ibid, p 11

[18] ibid, p 10.

[19] ibid

[20] ibid

[21] ibid

[22] n14 pp 33- 34

[23] ibid.

[24] Intergovernmental Panel on Climate Change (IPCC), *Special Report: Global Warming of 1.5 ºC, Summary for Policy Makers (2018)* < https://www.ipcc.ch/site/assets/uploads/2018/11/SR1.5_SPM_Low_Res.pdf> pp 15-16.

[25] Kelly Levin and Chantal Davis, *'What Does "Net-Zero Emissions" Mean? 6 Common Questions, Answered'* World Resources Institute September 17, 2019 at <https://thecityfix.com/blog/net-zero-emissions-mean-6-common-questions-answered-kelly-levin-chantal-davis/#:~:text=We%20will%20achieve%20net%2Dzero,close%20to%20zero%20as%20possible>. Accessed on 7/5/2023

fossil fuel infrastructure.[27] In addition to this, specific dates need to be set for zero emission vehicles and investment in zero emission transport infrastructure.[28] Other quick win measures include; efficacy in food production, reducing food loss and waste, changing of dietary options, halting deforestation, restoring degraded lands and increase use of public transport.[29] Existing technologies and practices are available options in emission reduction in the areas identified above.[30] It is also emphasized generally, that the transition necessary to limit warming as intimated in the Paris Agreement, should be approached in a just manner in line with the United Nations Sustainable Development Goals (SDG's).[31]

Prof Chris Hilson opined that 'many people want serious action taken, (on climate change) but at the same time do not want to give up their carboniferous luxuries, let alone adopt a life of climate austerity'.[32] This could explain why despite the laudable scientific progress, pledges to commit to them and efforts to reduce the emission gap, a lot more needs to change. Competing geo-political needs, conflicting economic priorities and energy strategies are some of the challenges in the mitigation and adaptation policies.[33] As it is, there is little hope that globally, any meaningful action will be taken or compromises will be made in good time to avert the looming threat.[34] This state of affairs has served as an encouragement, if not an urgent need 'to explore potentially promising avenues to stem the tide.'[35]

This is where climate litigation comes in.

II. Climate Change Litigation

Over the same period, subject of the emission gap, there has been increase in climate change litigation culminating in landmark decisions.[36] Climate litigation has been defined by the Sabin Center as 'any piece of federal, state, tribal, or local administrative or judicial litigation in which the tribunal decisions directly and expressly raises an issue of, factor, law regarding the substance or policy of climate change and impacts.'[37] Climate litigation has become widespread due to increase in awareness of the salience of climate change, especially its destructive

[26] n5 p XXIV.
[27] ibid
[28] ibid
[29] n 25
[30] *Trade and Climate Change*, WTO-UNEP Report (2009) available at: <http://www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf >. pp 90–110
[31] United Nations Transforming our world, the 2030 Agenda for Sustainable Development available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf > accessed on 1/5/2023. See also Emission Gap report (n 5) p XXII
[32] Hilson Chris; 'Climate Populism,Courts, and Science' (2019) *Journal of Environmental Law*, , pp 31, 396
[33] n16, p 9.
[34] *Commentary on the Oslo Principles on Global Climate Change Obligations, 2015,* Available at <https://globaljustice.yale.edu/sites/default/files/files/Oslo%20Principles%20Commentary.pdf> p3
[35] ibid.
[36] *Massachusetts v EPA* 127 S Ct 1438 (2007); *State of the Netherlands v Urgenda*, Supreme Court (20 December 2019), (ECLI:NL:HR:2019:2006; Case number 19/00135)
[37] Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113:4 *AJIL* p 688. Sabin Center at Colombia University, keeps a dedicated data base on Climate change litigation.

effects by the populace. This has been aggravated by the instrumental failure by majority of governments, both domestically and internationally, in effectively tackling climate change.[38] In addition, the lack of an effective and efficient enforcement mechanism under Article 15(2) of the Paris Agreement exacerbated the need for an alternative compliance mechanism. That article promotes a non-adversarial and non-punitive system in policing implementation of the NDC's. The difficulty in applying other international law dispute mechanism in climate change has made domestic litigation a lucrative option.[39]

As at July 2020, at least 1,550 climate change cases had been filed in 39 countries.[40] The country with the highest number of claims filed is the United States with approximately 1,200. Australia is a far second with 97 cases, followed by the United Kingdom and the European Union with 58 and 55 cases filed respectively.[41] Litigation has been used to pursue various legal claims in jurisdictions which are permissive and have robust legislation specific to climate change. It has been instrumental also in areas where the law is still developing and where climate change law and regulation is not taken with the seriousness it deserves.[42]

The issues for determination by the courts take various forms. UNEP, in its May 2017 report surmised them as; holding governments to their legislative and policy commitments, linking the impacts of resource extraction to climate change and resilience, establishing that particular emissions are the proximate cause of particular adverse climate change impacts, establishing liability for failures (or efforts) to adapt to climate change and applying the public trust doctrine to climate change.[43] Lately, the following have also been included in the claims filed; corporate liability and a call to an end to corporate greenwashing on the subject of energy transition, as well as those seeking to keep fossil fuels on the ground.[44]

The outcomes of litigation have been varied; successful cases have been lauded for making climate change 'tangible and routine' and for contributing to 'cosmopolitan justice'.[45] The unsuccessful ones have underscored areas in climate litigation in need of reform. They have also provided a stage for the advancement of legal arguments and jurisprudence on climate change. Litigation has emerged as a mechanism to debate, implement, amplify or challenge climate legislation.[46] It is a benchmark against which litigants measure the (in) actions of their governments and private entities (both tend to be defendant's in such cases) in the enforcement

[38] Elizabeth Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to *Massachusetts v EPA*' (2013) 35 Law Pol, p 242.

[39] n 37, p 695

[40] UNEP *Global Climate Litigation Report 2020 Status Review*, https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review p 9.

[41] ibid

[42] *The Carbon Boomerang*: *Litigation Risk as a Driver and Consequence of the Energy Transition* https://2degrees-investing.org/resource/the-carbon-boomerang-litigation-risk-as-a-driver-and-consequence-of-the-energy-transition/.

[43] UNEP *The Status of Climate Change Litigation–A Global Review* p.14 at <https://wedocs.unep.org/handle/20.500.11822/20767>

[44] n40, p 4

[45] Burgers Laura 'Should Judges make climate change law?' *Transnational Environmental Law*, 9:1 (2020), p 57.

[46] Hilson CJ 'Climate Change Litigation: An Explanatory Approach (or Bringing Grievance Back in)' In F Fracchia & M. Occhiena (eds), *Climate Change* (2010) pp 421–436.

of their country's international emission reduction targets.[47] An unintended result of litigation has been to bring forth awareness to climate change. Jacqueline Peel and Jolene Lin termed it the indirect effects of litigation.[48] They explain, this form of litigation also raises '… public awareness, mobilizing public sentiment, keeping the climate issue on the political agenda, creating leverage to supplement other strategies….'[49] This pragmatic and holistic outlook considers any outcome, a stepping stone.[50]

Climate change litigation is not without critics. It has been wearily observed that the litigation is inconsistent with the doctrine of separation of powers and representative democracy. The judges who endorse a law-making role have been subject to political criticisms of undemocratic "judicial activism".[51] In some instances judges have refrained from making controversial decisions in climate change litigation, on the basis that they are best left to the political sphere.[52] Justice Hurwitz in *Juliana* [53] whilst delivering the majority judgment in the US Ninth Circuit Court stated that; the plaintiffs' case must be made to the political branches or to the electorate at large. He added that even if the legislature and the executive have abdicated their role, that does not allow the courts to step into their shoes.[54]

The condemnation increasingly fails as it is obvious from the emission gap that the attempts made thus far, collectively by the other arms of governments globally, has yet to bear substantive fruit. In as much as it was not the intended primary arm of government, to steer the action needed, the role the judiciary has played is envisaged in the Paris Agreement. The preamble to the Paris Agreement, acknowledges the role the courts should play in climate change. Judiciary, is part of the 'all levels of government' who should 'in accordance with respective national legislations of Parties', assist 'in addressing climate change.'[55] Lord Carnwath JSC explained the role of the judiciary as one that holds their governments commitments under the Paris Agreement within the constraints of their individual legal systems, by ensuring that they are given a practical and enforceable effect.[56]

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[47] Setzer J & Vanhala LC 'Climate change litigation: A Review of Research on Courts and Litigants in Climate Governance' Wiley Interdisciplinary Reviews-Climate Change 10(3) (2019), p 8.

[48] n 37 p 696.

[49] ibid.

[50] Bouwer Kim 'The Unsexy Future of Climate Change Litigation' (2018) 30 *Journal of Environmental Law*, pp 490-491.

[51] Patapan H 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2001) 37 *Australian Journal of Political Science* p 241.

[52] Nicole Rogers 'If You Obey All of the Rules You Miss All the Fun: Climate Change Litigation, Climate Change Activism and Lawfulness' (2015)13 *NZJPIL* 179, p182

[53] *Juliana v United States,* US Court of Appeals for the Ninth Circuit, No. 18-36082, D.C. No. 6:15-cv-01517AA at <http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2023/20230601_docket-615-cv-01517_opinion-and-order.pdf> accessed on 23/5/2023.

[54] ibid

[55] n 2

[56] n 37 p 699.

III. Challenges Faced in Climate Litigation

In climate change litigation, the success or otherwise of the case will be determined by proof of the following issues.[57] To prove climate change and extreme event attributions, plaintiffs must link a specific change or event to anthropogenic climate change, e.g., sea level rise.[58] The plaintiff in applicable cases, must also link a specific loss to that change or event e.g. the cost of adaptation measures i.e., impact attribution.[59]For the plaintiff's to prove source attribution, they must link the defendant's conduct e.g., release of greenhouse gas emissions, to anthropogenic climate change and identify the defendant's relative contribution to the harm incurred by the plaintiff.[60] In considering the question of liability against either governments or private entities, plaintiffs will rely on climate science. Judges need not be scientists to understand the evidence adduced. What is required of them is to interpret the science of detection and attribution as applied to global climate system.[61] This has been defined broadly as 'the scientific tools that policy-makers and lawyers can use to show the existence, causes, and effects of climate change.'[62]

Courts have established that they are the flexible and deliberative forum for discussions on climate change science, policy and regulation. This also includes 'a sound scientific basis for collective action to address the climate crisis through mitigation and adaptation measures.'[63] For instance the Supreme Court of the United States in *Massachusetts v EPA*[64], the Environmental Protection Agency (EPA), in its argument indicated that, the reduction of emission sought by the claimants will not make much difference in mitigating global climate change as there are countries, China and India, were specified who are also large-scale emitters but are not regulated. The court indicated that reduction of emissions cannot be considered a tentative step. It quoted the emission of the US transport sector at the time capped at 1.7 billion metric tons; composing of 6% of worldwide emissions in support of its finding. The idea, the court stated, is to reduce the pace of global emissions; it did not matter what other countries were doing.

This was also the finding in *State of the Netherlands v Urgenda*,[65] the court stated that climate change is a global problem and therefore requires global accountability. It was observed, that compels all countries to implement the reduction measures to the fullest extent possible in spite of the amount of emissions each country had. The court stated that it has been established that any anthropogenic greenhouse gas emission, no matter how minor, contributes to an

[57] Burger M, Wentz J.\, & Horton R 'The Law and Science of Climate Change Attribution' (2020) *45*(1) *Columbia Journal of Environmental Law*. <https://doi.org/10.7916/cjel.v45i1.4730> pp 69-77.
[58] ibid
[59] ibid
[60] ibid
[61] Allen, MR 'The scientific Basis for Climate Change Liability' in, Lord R., Goldberg S., Rajamani L and Brunnée, J (eds) *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2011). p1.
[62] n 57 pp 140-141.
[63] n 57, p 219
[64] *Massachusetts (*n 36), p 21
[65] *Urgenda* (n36)

increase of CO2 levels in the atmosphere and therefore hazardous to climate change.[66]

Courts have gone further to include downstream effects of GHG emissions in this global responsibility as in the finding of the court in *Gloucester Resources limited vs. Minister of planning*.[67] The court made a finding that included scope 3 GHG emissions. These are emissions caused by the end use of the coking coal, the end product of the mining, subject of the case before court. It is used in steel mills and electricity power stations. Hon. Justice Brian Preston SC indicated that those emissions are relevant and should be factored in. He specifically stated that mining of such resource should be based on the principle of ecologically sustainable development. Meaning the use of the natural resource should be sustainable in the long term and of importance reduce environmental harm. He reiterated that climate change is a global problem and tackling it cannot be detached from specific local actions.

Despite the positive outcomes of litigation through sophisticated strategies of litigants, and improvements in the field of climate science;[68] courts have shown they are yet to fully reach their potential in the merits of these types of cases.[69] What climate litigation has exposed is the need for climate education on the intersection of science and the law to assist the admissibility burden plaintiffs have faced.[70] Some of the observed challenges are specified below. The analysis includes how judicial dogma has also hindered the breakthrough needed in addressing losses and damages from climate change in courts.

i. Lack of a Legal Definition of Climate Science

The first challenge climate science has faced is a lack of a *legal* definition; this includes what it is and its scope. It is to be noted that at the writing of this paper, the International Court of Justice, (ICJ) the principal judicial organ of the United Nations, is yet to make a definitive finding on the nexus between climate change, and the emission of anthropogenic GHG's. The importance of this, in scientific evidence generally, must be looked at in the context of how evidence is presented in court. 'It will always be possible for both sides in a case to persuade experts (and possibly even the same expert) to subscribe to statements that sound as if they support their cause'.[71] The court then makes a finding and 'evidence that is indefinite, vague, or improbable will generally be given less weight than evidence that is direct and unrefuted.'[72] What is missing at present is consensus on a factual, acknowledged understanding by courts of what climate science is.

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[66] Ibid

[67] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [487]-[694].

[68] Friederike E L Otto, Petra Minnerop, Emmanuel Raju, Luke J Harrington, Rupert F Stuart-Smith, Emily Boyd, Rachel James, Richard Jones & Kristian C. Lauta . 'Causality and the fate of climate litigation: The role of the social superstructure narrative,' *Global Policy, (*2022) 13(5) *London School of Economics and Political Science* , pp 736-750, <https://onlinelibrary.wiley.com/doi/10.1111/1758-5899.13113#pane-pcw-references> accessed on 14/7/2023

[69] n 40, p 31.

[70] n 68

[71] Allen M, Pall P, Stone D, Stott PA, Frame, DJ, Min S-K, Nozawa T,and Yukimoto S 'Scientific 'Challenges in the Attribution of Harm to Human Influence on Climate'. (2007).155 *University of Pennsylvania Law Review*. 1353-1400

[72] n 57, p 170

The first ambit to resolve this would be first to evaluate if climate science is easily understood by a non-scientific audience.[73] Can a lay person read, digest it and fully comprehend its content without need for further explanation? At present the reports include terminologies and concepts, which is the basis of evidentiary analysis and cannot be said to be produced specific for litigation.[74] A good example of how this challenge has played out in court is when Judge William Alsup held a 'climate science tutorial.' Both sides briefed him on climate science.[75] The possible reason why such a request could have been made was due to a lack of expertise of the scientific concepts the judge needed to understand to enable him decide. It is an innovative way to ensure comprehension. However, litigation of climate issues is global; sometimes other priorities like time, resources and even availability of those experts may not be an option, yet a decision has to be made.

The norm should be; such a request is unnecessary. Climate science should be produced and circulated in a language a court anywhere can understand. A good example of this is how weather forecast is produced for the masses. It has been observed that 'if the legal community demands it, the meteorological "raw material" for any assessment of harm could be provided by a straightforward extension of routine weather forecasting services, generated by the same neutral government agencies that currently provide forecasts'.[76] This would allow scientific experts to 'then play a relatively non contentious, mundane, and technical role in … cases in which the attribution of harm to human influence on climate is an issue'.[77]

Thus, it is prudent to have stakeholder engagements through which the gaps in translation of the content, the subject of scientific evidence are outlined. This feedback could spotlight areas in need of further research and/or customization, even prior to the science being subject of evidence in court. This will in turn give rise to an "industry standard" science for litigation.[78] How this industry standard will be arrived at, is a legal concept that only the legal fraternity, and scholars, scientists and practitioners working on climate litigation, can work on. They understand the unique context of the legalities at play.[79] This will in turn ensure climate science as evidence is as impactful as possible.

Considering the status of the ICJ, a finding which covers the foregoing among others will be ground breaking. Phillipe Sands rightfully observed that a clear statement by the ICJ as to what is or is not required by the law, or as to what the scientific evidence does or does not require—may itself contribute to change in attitudes and behavior.[80] He went ahead and stated that it is one thing for the IPCC to give the conclusion it has as a matter of scientific opinion and

[73] n 57, p 223
[74] n 47, p 10
[75] *City of Oakland v BP PLC,* 325 F. Supp. at 1022 (N.D. Cal. 2018).
[76] n 71 p 1355.
[77] n 71 p 1395.
[78] ibid.
[79] ibid.
[80] Phillipe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28 *Journal of Environmental Law*, p 26.

another for the ICJ, or other international courts to give a judicial determination of this fact.[81] Such a finding would be a great authority in proceedings in international courts and tribunals as well as in domestic litigation.

ii. Contextualization of GHG's Emissions to Plaintiff's Losses.

As outlined above, climate change adds to the intensity and likelihood of natural hazards to which plaintiffs are exposed.[82] What climate science has suffered in evidence is how to contextualize the GHG's emissions in time, for liability to attach to defendants by linking them to specific climate change impacts. Although the science that confirms these connections is robust,[83] currently, there is no comprehensive inventory of the impacts of climate change.[84] This is in addition to the limited information about historical and current emissions from specific individual sources.[85] 'This lack of globally agreed metrics on climate impacts makes it harder for individuals to judge pieces of evidence independent of where the burden of proof lies'[86]. This has affected legal determinations about how to apportion responsibility and has led to dismissal of cases.

The challenge of proving the foregoing at trial can be seen in the case of *Native Village of Kivalina v Exxon Mobil (Kivalina)*[87] The district court found that Kivalina lacked standing as they failed to show that the defendant's actions caused the injuries complained of. This is in spite of Kivalina leading evidence to show that jointly the defendants were responsible for 1.2 billion tons of GHG's annually. They also outlined the effects of the emissions on the village such as the melting of the permafrost and rising sea level. The court indicated that the undifferentiated nature of GHG's from various global sources made it hard to pin point the defendant's actions directly. The court specifically stated 'it is not plausible to state which emissions—emitted by whom and at what time in the last several centuries and at what place in the world— "caused" Plaintiffs' alleged global warming related injuries.'[88] This was also the opinion of the court in *Washington Environmental Council v Bellon*[89], the U.S. Court of Appeals for the Ninth Circuit made it clear that climate scientists need to articulate the specific cause and effect with respect to local context, which the plaintiff based its claim. The court stated that greenhouse gases, once emitted from a specific source, quickly mix and disperse in the global atmosphere and have a long atmospheric lifetime. The court observed that scientific capability in assessing, detecting, or measuring the relationship between a certain GHG emission source and localized climate impacts in a given region is wanting.[90]

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[81] ibid, p 29.

[82] Stone DA, Rosier SM & Frame DJ 'The Question of Life, the Universe and Event Attribution' (2021) 11 *Nat Clim Change*. pp 276–278

[83] n 40, p 31

[84] IPCC REPORT *2019 Refinement to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories* at <https://www.ipcc.ch/report/2019-refinement-to-the-2006-ipcc-guidelines-for-national-greenhouse-gas-inventories/> accessed on 1/5/2023

[85] n 57, p 212

[86] n 68

[87] *Native Village of Kivalina v Exxon Mobil Corp*., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. CV 08 1138).

[88] ibid

[89] *Wash Envtl Council v Bellon*, 732 F.3d 1131, 1135 (9th Cir. 2013), 741 F.3d 1075 (9th Cir. 2014).

[90] ibid,

To resolve the foregoing challenge; first, there is need to redefine climate, with particular reference to climate change. This is because the relationship between weather and climate is central to the issue of liability. Climate has been defined by WMO as the 'average weather and the statistics of its variability over a period of thirty years.'[91] This definition is inadequate as there is evidence that GHG's and anthropogenic aerosols (which have a much shorter life span in the definition of climate) have caused significant climate changes in a much shorter period.[92] It is compounded by the fact that the current evidence on the carbon cycle shows that reduction in emissions, will only cause atmospheric temperature to rise more slowly.[93]This gives credence to the finding of the courts above. However, Myers Allen observed that if the carbon concentrations were to be reduced to zero, 'even then, it would be centuries to millennia before the climate would return to anything close to its pre-industrial state.'[94] Myers indicates that when discussing timescales, 'it is worth noting that the climate responds to the levels of GHGs present in the atmosphere relative to pre-industrial levels, not to rates of change in these levels'. This complicates the link between emissions and impact for the most important GHG, carbon dioxide.[95]

It follows that litigation will benefit from a definition of climate that has a combination of models and observations which cannot be precisely defined and directly observed. The definition in a nutshell should include 'circumstances where an impact may have been caused by climate change but was not foreseeable, and circumstances where an impact is a foreseeable consequence of climate change but cannot be causally linked to climate change.'[96] This means that judges should be ready to accept causal inferences when translating global or regional impacts to specific injuries.[97] This requires plaintiffs and defendants to address the court when litigating these issues in a persuasive way.[98]

The other option is 'to request compensation for a proportion of damages that corresponds with the proportion of global greenhouse gas emissions emitted by the defendant.'[99] An example of this is the case of *Lliuya v RWE AG.*[100] As much as the district court dismissed the case initially, the appellate court reversed the decision and gave direction that the case be determined on merit to establish if the plaintiff's home is threatened by flooding or mudslide as a result of the melting glaciers. The court on the re-hearing should have an opportunity to review scientific opinions on the RWE's carbon dioxide emissions, and 'the contribution of those emissions to climate change, the resulting impact on the glacier, and RWE's contributory share of responsibility for causing that impact.'[101]

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91 n 61, p 9
92 ibid
93 ibid
94 ibid, p10
95 Ibid, p 9
96 n 57, p 203
97 n 57, p 236
98 n 40, p 44
99 n 57, pp 211-212
100 *Lliuya v RWE AG, VG Essen* 15.12.2016 (2 O 285/15) (Germany). Available at http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/ accessed on 17/5/2023.
101 n 57, p 212

In conclusion, litigants in climate change litigation, to be able to establish liability, will benefit from attribution and impact scientific research that focuses on all scales from the global to those that can be particularized to individual defendants. It follows that it will be helpful for scientists to generate additional findings for slow-onset impacts of climate change as well as extreme events and quantify the actual impacts on communities and individuals.

iii. The Awfulness of Lawfulness

The third challenge is what has been referred to by Nicole Rogers as the 'awfulness of lawfulness.'[102] The concept has been explained as the belief that litigation must 'operate within the constraints of the official discourse of law'.[103] Rogers went on to explain that lawfulness restricts opportunities for practical and systemic change through climate change litigation.[104] Precedents, established legal principles and the principle that legislation trumps judge made law, are examples of concepts though legal, prevent judges from making new law in response to shifting values and changing social norms. A good example of this concept is the decision in *the Juliana case*.[105] In that case the underlying climate science on attribution was emphatically outlined in evidence through expert reports. This led to the court making a finding that there was a plausible cause of action based on well-established scientific evidence. However, the court concluded that it could not provide the redress plaintiffs were seeking. The reason for this finding was it would implicate policy choices reserved for the legislature and executive. The case was dismissed as it violated the separation of powers doctrine and not for want of proof of the climate change question at issue.

Another way this 'awfulness of lawfulness' has been experienced is through precedent, the concept of *stare decisis*, especially in common law jurisdictions. This is a legal doctrine that binds courts to follow legal precedents set by superior courts. By its nature is hierarchical. In the context of climate change, such a doctrine can be based on legal concepts and understanding which may not be transformative enough and work with the needs of climate change litigation. A number of climate law cases have failed, for failure to meet legalities such as causation, justiciability, standing and the doctrine of separation of powers.[106] Precedent is a key feature in such cases. This is not to say that the decisions in itself are wrong, far from it. Sometimes judicial officers default back to what they know. Sometimes the constrain is the law itself, which negates the little wriggle room for innovation to be a game changer on the part of the judicial officers. It caters to the legal concepts shaped by conventional interpretation of the law, 'rather than an approach which permits an innovative adaptation of the legal system to the ominous realities of climate change.'[107] This reduces the opportunities for systemic change in climate governance through litigation. There is hope though. Across the 20th century, there

[102] n 52 p 180
[103] n 52, p 181
[104] ibid
[105] n 53
[106] The cases cited herein are good examples for this, such as the Kivalina case, Juliana case, Washington vs. Bellon among others.
[107] n 52, p 181.

are varied examples of issues that required of the public and by extension the court to change perceptions of a given issue. Transformative decisions were made on issues such as women's and children's rights, the harmful effects of cigarettes, asbestos, drugs or chemicals, which were subject to product liability litigation. Such cases provide useful analogies to judicial dogma in the context of climate change.[108]

The concept that legislation trumps judge-made law is a form of lawfulness that is a source of frustration in litigation. This is apparent in cases where decisions made by pragmatic judges, who made use of climate science evidence only for it to be negated by subsequent legislative action. For instance, the Queensland government, amended the relevant legislation within four days, to ensure that a mine went ahead after the Court of Appeal set aside a decision to approve extension to the Newlands coal mine.[109] In another scenario, the New South Wales planning assessment commission, amended the existing planning regulation to approve expansion of the Rio Tinto's Mount Thorley Warkworth open-cut coalmine, after a judgment delivered by Justice Preston.[110] He held that the expansion of the mine should be denied. The reason for that opinion was that the economic benefits of the expansion of the mine did not outweigh the impact on the community. The court opined that the growth 'would exacerbate the loss of sense of place, and materially and adversely change the sense of community, of the residents of Bulga and the surrounding countryside.'[111]The decision was upheld on appeal. This was simply a moot exercise. The legislature found a way to side step that pragmatic finding. Just as legislative initiatives could replace the need for judicial action, retrogressive reactions to judicial decisions by the legislature are clearly a shot in the arm to climate action. This confirms Prof Hilson's opinion on the reason for general inertia in this sphere.

This awfulness does not spare the UNFCCC. Though arguably a better word for would be the catch twenty-two of lawfulness. UNFCCC allows for common and differentiated obligations. That means an acknowledgement of the different capabilities of individual countries in addressing climate change, which essentially ensures *equitable* responsibility. This is provided for in the UNFCCC under Article 3.1. Article 15 of the Paris Agreement also includes the principle by recognizing that parties will 'pay particular attention to the respective national capabilities and circumstances.' The UN sustainable development goals inclusion as a requirement in the reduction of atmospheric temperatures reaffirms this. It is recognized for example that least developed countries, will have other priorities that outrank climate change; especially the eradication of poverty.

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[108] Minnerop P & Otto FEL '*Climate Change and Causation – Joining Law and Climate Science on the Basis of Formal Logic*'. (2020) *Buffalo Journal of Environmental Law*, p 27.

[109] Chris McGrath 'The Xstrata case: Pyrrhic Victory or Harbinger?' in Tim Bonyhady and Peter Christoff (eds) *Climate Law in Australia* (The Federation Press, Sydney, 2007) 214 at 227, see also *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* [2007] QCA 338.

[110] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* [2013] NSWLEC 48. [18]; New South Wales Planning Assessment Commission *Warkworth Continuation Project Review Report* (4 March 2015)

[111] ibid

In *Save Lamu* [112] the environmental tribunal in Kenya, invalidated the license granted to Amu power company Ltd, to construct Lamu Coal power station. The tribunal found that the constitutionally required public participation was not properly done. The finding specified that the decision did not mean that approval of coal mine projects will always be rejected in Kenya. The tribunal stated 'as long as coal power plant projects meet the required standards of the law and abide by conditions imposed to mitigate potential impacts then they remain a viable and an acceptable mode of power generation'.[113] The tribunal indicated that the Kenyan parliament whilst enacting the Energy Act 2019, opined that coal would be one of the possible sources of energy in Kenya. The finding also cites the United Nations Sustainable Development Goals as part of its consideration. This, juxtaposed with the opinion of Professor Steffen, an expert witness in the *Gloucester Resources Limited v. Minister of planning,*[114] who explained, whilst applying the carbon budget concept, that it leads to the inevitable conclusion that 'most of the world's existing fossil fuel reserves – coal, oil and gas – be left in the ground, unburned.' He added that it is 'an obvious conclusion that no new fossil fuel developments can therefore be allowed'.[115] This is also a recommendation of the 2022 Emission report.[116]

Kenya cannot be said not to have robust laws and regulations that champion climate change. The country ratified the UNFCCC in 1994, ratified the Kyoto Protocol in February 2005 and the Paris Agreement in 2016.[117] Kenya being a non-annex I country, is not legally bound to reduce its greenhouse gas emissions under the Kyoto Protocol. However, Kenya in an effort to address climate change enacted a Climate Change Act in 2016.[118] Part of the objective of the Act is 'development, management, implementation and regulation of mechanisms to enhance climate change resilience…'[119] This gives effect to the Article 2 of the Kenyan Constitution which domesticated the UNFCCC, Kyoto protocol and the Paris Agreement.[120] It is a very well intentioned and cognizant of the urgency- of- climate- change- type- of legislation. Kenya in an effort to address climate change has banned the use of disposable plastic paper bags[121] and the use of single use plastic bottles in any of the National and Marine Parks.[122] In addition,

[112] *Save Lamu v National Environmental Management Authority (NEMA)* [2019] eKLR available at <http://kenyalaw.org/caselaw/cases/view/176697/> Accessed on 14/7/2023

[113] Ibid, para 17.

[114] n 57

[115] n 67, para 437.

[116] n 5, p XXIV

[117] See <https://unfccc.int/node/61092>

[118] The Act is available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2011%20of%202016> accessed on 23/5/2023

[119] ibid, section 3

[120] Constitution of Kenya, 2010 available at <http://kenyalaw.org/kl/index.php?id=398> accessed on 13/7/2023

[121] Gazette notice number 2356 of 2017, available at <http://kenyalaw.org/kenya_gazette/gazette/notice/181293> accessed on 14/7/2023

[122] On 5th June 2019 the then Cabinet Secretary for Tourism and Wildlife, Hon. Najib Balala, through Gazette Notice No.4858, issued the directive.

other options also exist for countries like Kenya to address climate change especially through REDD+ initiatives[123] and the green fund[124].

The common but differentiated concept though well thought out is an obvious challenge in the need for atmospheric temperature reduction. There is no easy answer to this ambit of the challenge. What is clear is; there is need for a global effort to reduce GHG's and the urgency cannot be gainsaid. As the dilemma rages, on how to balance development and climate change, the unfortunate thing is, the latter keeps accelerating at least at present, at an irreversible pace. Kenya unfortunately as outlined above, may bare some of the worst brunt of the effects. What is apparent is even in climate litigation, its relevance would sometimes fall on the wayside in the hierarchy of needs of a country.

Conclusion

The impact of even temporarily breaching the 1.5°C goal, should help focus minds. Alongside the accelerated efforts by businesses and governments to align their operations with the goals set in the Paris Agreement; Judiciaries around the world can also use climate litigation as an avenue to contribute to the reduction of the emission gap. Judicial orders can be the genesis of new climate goals and reforms in regulations on energy, industry, transportation, buildings, environment and natural resources. The decisions can compel governments and private entities to commit to pursue more ambitious mitigation and adaptation policies. They can also as a result develop ecologically sustainable development strategies, to avoid litigation risk. To achieve this; it is prudent for the judiciary, and lawyers generally to have innovative ways, and to explicitly acknowledge the legitimacy of an alternative normative order, to address the challenges observed. If any of these actions have the effect of reducing global temperatures, it would be a gleam in an otherwise predicted gloom.

[123] See the targets set by Kenya on reducing emissions from forest degradation, sustainable management of forests and enhancement of forest carbon stocks, as filed with the United Nations available at <https://unfccc.int/sites/default/files/resource/tar2020_KEN.pdf> See generally, Margaret A Young, 'REDD and Interacting Legal Regimes' in Christina Voigt (ed) *Research Handbook on REDD-Plus and International Law* (Edward Elgar, 2016) pp 89-125.

[124] Green Climate Fund (GCF) is a creation of the Paris Agreement. It is the world's largest climate fund, mandated to support developing countries raise and realize their Nationally Determined Contributions (NDC). Details available at <https://www.greenclimate.fund/home> accessed on 14/7/2023.

THE CONSTITUTIONAL PRINCIPLE OF EQUITY IN PUBLIC PROCUREMENT:
A Remedy to the Partly Performed Contracts

*Maina Nyabuti**

Abstract

Most statutes in Kenya render illegal contracts unenforceable. While this is uncontestable, problems arise when one party had discharged its contractual obligation yet the court pronounced the contract illegal. Even though the courts may want to invoke doctrines of equity borrowed from the English courts to mitigate losses incurred, a challenge arises as with the Judicature Act that spells out Kenya's sources of law hierarchically puts written laws above doctrines of equity. The Act locks out equity doctrines from being applied where written laws exist. Furthermore, most other written statutes fail to consider and provide remedies to situations where illegal contracts had been partly performed. Against this background, the article problematizes such partly performed illegal contracts from statutory standpoints, and recommends a resolution through the 'constitutional principle of equity'. The Constitution of Kenya (2010) has now entrenched equity as principle, value and interpretative tool. This is what birthed the 'constitutional principle of equity' which is distinguishable from the antiquities of equity doctrines and maxims. The article focuses on contracts in public procurement since the disputes and litigation arising from such contracts attracts public interest. It advances the argument that the constitutional principle of equity, complemented with the doctrines of equity and part performance of contracts, can be invoked to fashion remedies mitigating losses arising from partly performed but illegal public procurement contracts. The article, purely relying on deskwork research, relies heavily from the Constitution of Kenya, local and foreign court decisions, statutes, regulations and published articles, books and reports. It concludes that while illegalities must be avoided in public procurement contracts, the courts cannot send away a party who had already performed the contract partly empty handed. The constitutional principle of equity can be used to mitigate losses in public procurement contracts.

Keywords: Contracts, Constitution, Equity, Procurement, Mitigation

* ***Maina Nyabuti is an advocate of High Court of Kenya. He is currently a prosecution counsel in the Office of Director of Public Prosecutions.***

1. Introduction

Based on its pluralistic legal system, Kenya applies laws from different sources.[1] Against this backdrop, the courts often apply equity, where necessary, through the maxims and doctrines developed by the English courts prior to 2010. However, these equity doctrines and maxims occupy a lower cadre in the hierarchy of Kenya's laws. The Judicature Act had designed them to come after written laws.[2] It basically meant that where written laws existed, equity maxims would not apply. Contract formation is regulated largely by written laws, which limit application of Judicature Act's doctrines of equity. The problem often arises where the courts have declared contracts illegal yet either party had discharged its contractual obligations partly. Perhaps, the contracts could have been be illegal *ab initio* or in the course of performance. In a strict sense, therefore, the written law that often rendered illegal contracts unenforceable would leave the contractors with no remedy to mitigate the loss or damages occasioned while performing the contract partly. This article, thus, sets out to inquire whether this position that locks out partly-performed contracts from mitigating loses through equity is tenable in the advent of what it refers to as a 'constitutional principle of equity' in post 2010. It narrows its focus on public procurement contracts.

To put the discussion into perspective, the *Okoiti* decision[3] provides a better glimpse. In this case, the Appellant had appealed against the High Court decision which found that procurement for the Standard Gauge Railway (SGR) project, which had been partly performed to be legal. In overturning the trial court decision, the Court of Appeal held that –

> We set aside that part of the judgment of the High Court holding that the procurement of the SGR was exempt from the provisions of the Public Procurement and Disposal Act, 2005 by reason of Section 6(1) thereof. We substitute therefore an order declaring that Kenya Railways Corporation, as the procuring entity, failed to comply with, and violated provisions of Article 227 (1) of the Constitution and Sections 6 (1) and 29, of the Public Procurement and Disposal Act, 2005 in the procurement of the SGR project. The appeals succeed to that extent only.

The question that flows from the above and similar decisions is whether, for instance, the Kenya Railways Corporation is obligated to pay China Road and Bridge Corporation for part performance of the contract? There exists a school of thought holds that – (a) illegal contract are unenforceable;[4] (b) the procuring public entity is not obliged to pay any shilling to the contractor; and (c) there should be no recourse for damages from an illegal contract. This study takes a different view that contractors in such contracts have remedies based on the constitutional principle of equity and the doctrine of part performance.

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[1] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) 1 *Strathmore LJ* 22

[2] Judicature Act 1967, s 3

[3] *Okoiti* v *Attorney General* [2020] eKLR

[4] Robert Shaw, 'Court ruling opens a Pandora's box of flawed SGR procurement' *The Daily Nation* (24 June 2020)

In the post 2010 constitutional era, even if the contract turns out to be illegal, the contractors in public procurement contracts can invoke constitutional principle of equity to mitigate damages for having partly discharged contract obligations. Even though there could be a thin line between the constitutional principle of equity and the doctrines of equity, the same are symbiotic. For instance, while the court applying the constitutional principle of equity it can rely on the equity maxims.

2. Legal Framework of Equity Principles

The Constitution[5] entrenches equity as one of the tools for interpretation and application of its provisions. Article 10 provides for the national values and principles of governance that bind all State organs, State officers, public officers and all persons in their duties which includes, making or implementing public policy decisions. Under Article 10(2)(b), it enlists equity as one of these principles and values. It states that:

> The national values and principles of governance include—
> 'Human dignity, **equity**, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized […].

The Constitution also incorporates the equity in the Bill of Rights. It decrees for a constitutional rights interpretation that promotes, among other values, equity.[6]

Finally, Article 227(1) of the Constitution deals with public procurement of goods and services and provides as follows -

> When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, **equitable**, transparent, competitive and cost-effective.

There are other several provisions in the constitution which entrench equity. This study only highlights those which are relevant in public procurement that is the focus of this Article. The entrenchment of equity in the Constitution gives birth to what this study refers to as the 'constitutional principle of equity.' Therefore, as a constitutional principle, public entities are required to apply the equity in execution of their duties, which includes public procurement. Before the promulgation of the constitution, equity applied through antiquity doctrines that trace their origins from maxims developed by courts of England in dispensing justice. Section 3(1)(b) of the Judicature Act paved in the doctrines of equity to Kenya laws. It provides that –

> (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with–

[5] The Constitution of Kenya, 2010
[6] Article 20(4)(a)

> (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, **the doctrines of equity** and But the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

Apparently, both in the pre and post 2010 Constitution era, equity forms an integral part of Kenya's laws. Before the promulgation of the Constitution it applied through doctrines of equity while after the enactment of the new constitution, it has evolved to be a constitutional principle. Whereas courts have not clarified whether there is a distinction between the principle of equity as envisaged in the constitution and the doctrines of equity as applied in the context of section 3(a)(b) of the Judicature Act, this study insists that the same are complementary and interrelated. For the purposes of this discussion, this paper merely makes a phrasal distinction for reference purposes, that is, the 'constitutional principle of equity' and the 'doctrines of equity.'

3. Public Procurement in Kenya

In simplified terms, public procurement involves the purchasing of goods, works and services to meet an identified need by a public entity.[7]

The Public Procurement system in Kenya has progressively evolved over time.[8] Initially, public procurement was not regulated. However, during post-independence period; Treasury Circular, the Exchequer and Audit (Public Procurement) Regulations[9] were enacted to govern public procurement. After about four decades, the National Assembly enacted the Public Procurement and Assets Disposal Act of 2005 and its attendant Regulations[10]. The statute and regulations were later repealed by Public Procurement and Assets Disposal Act of 2015 (herein PPAD, 2015) and the attendant Regulations.[11]

Public procurement is also governed by other statutes. These include the Anti-Corruption and Economic Crimes Act,[12] the Bribery Act,[13] the Public Audit Act,[14] the Public Finance Management Act[15] and the Law of Contract Act.[16]

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7 Lewa Peter, 'Citizens Guide to Public Procurement: Public Procurement Procedures for Constituency Development Funds' (2010) CGD

8 Public Procurement Oversight Authority, *Assessment of the Procurement System in Kenya.* (2007) *PPOA*, Nairobi

9 The Exchequer and Audit (Public Procurement) Regulations, 2001 dated 30th March, and amendments 2002 (Legal Notice No. 51)

10 2006

11 Public Procurement and Asset Disposal Regulations, 2020

12 Chapter 16, Laws of Kenya

13 No. 47 of 2016, Laws of Kenya

14 No. 34 of 2015, Laws of Kenya

15 No. 18 of 2012, Laws of Kenya

16 Cap 23, Laws of Kenya

Essentially, the procurement process involves three stages. These are; the Pre-tendering, the Tendering and the Post Award phases.[17] During the Pre – tendering phase, the public entity decides the goods or services to be bought. Tendering stage involves the contracting process while post award phase entails administering the contract to ensure it is performed effectively. Public procurement is only complete upon this entire cycle.[18]

Experts observe that managing procurement contracts ensures that contractual parties discharge their obligations and provide the value for money.[19] It also protects the rights of the parties and ensures required performance when circumstances change.[20] The focus of this study is the third stage, the post award phase, which relates to contract management. In other words, the study narrows its focus on discharge of contractual obligations by the procuring entity and the contractor. It is at this stage, where most procurement contracts go nasty when the courts declare that the contract was illegal. The study proposes that the constitutional principle of equity and doctrines of equity can be relied on to mitigate the losses arising from partly performed procurement of illegal contracts.

As discussed earlier, Article 227 of the Constitution entrenches the principles in public procurement, which include equity. The courts have emphasized the need to ensure there is equity during public procurement. Before spotlighting some of these decisions, it is crucial to observe that the constitutional principle of equity should not be limited to a single aspect of procurement but must be applied to all contractual procurement disputes.

In *ex p Kenyatta National Hospital,*[21] the court stressed the need to investigate whether the principles in Article 227 of the Constitution have been adhered to in public procurement. It is observable that the court was referring to the constitutional principle of equity.

In *ex p Applicant CMC Motors Group Limited*[22] the court held -

> These constitutional requirements in Article 227(1) of the Constitution must inspire all aspects of the process including termination. A policy, a tender process, or a decision terminating a tender process, which clashes with the requirements in Article 227, would be unconstitutional, and therefore legally invalid. It is for this reason that the Constitution obliges organs of state to ensure that a procurement process is fair, **equitable**, transparent, competitive and cost-effective. Where the procurement process including a termination of a tender process is shown not to be so, courts have the power to intervene.

[17] Jackeline Kagume and Noah Wamalwa, 'Public Procurement in Kenya: Analysis of the Auditor General's Reports' (2018) Institute of Economic Affairs

[18] Sue Arrowsmith and others (Ed), Public procurement regulation: an introduction (2011) University of Nottingham

[19] Interagency Procurement Working Group, *UN Procurement Practitioner's Handbook; Common Procurement Certification Scheme for the United Nations* (2006)

[20] Ibid.

[21] *Republic v The Public Procurement Administrative Review Board ex p Kenyatta National Hospital* [2016] eKLR

[22] *Republic* v *Public Procurement Administrative Review Board ex p Applicant CMC Motors Group Limited* [2020] eKLR

[…]

> To achieve the constitutional imperative in relation to procurement, Parliament enacted the Public Procurement and Asset Disposal Act, the Regulations made thereunder and the Public Finance Management Act.

It is apparent that the emerging jurisprudence suggests that the constitutional principle of equity is an integral cog in the public procurement contracts. Actually, the court of appeal in *Kitilit v Kibet*[23] made an unequivocal elucidation that equity is a constitutional principle that is above the written law.

4. Equity, Part Performance Doctrine and Public Procurement Contracts

Part-Performance doctrine is an equitable principle that allows a court to recognize and enforce a contract which has been performed despite its legal deficiencies.[24] By applying the part performance doctrine, a party can establish the existence of a contract despite the lack of any written evidence.[25] For instance, a party relying on this doctrine can claim enforcement of a procurement contract with a public entity even though the other party has not signed it.

4.1. The Doctrines of Equity and Part Performance: Decisions and Law Reforms in England.

It is not contested that Kenya borrows its legal system heavily from English laws. Therefore, this section traces the doctrine of equity and part performance from court decisions and laws of England.

In the landmark case of *Maddison* v *Alderson*,[26] the House of Lords expressed illuminating remarks regarding application of doctrine of equity in part performed contracts. It held -

> In a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow**.** The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded.
>
> (…) All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged.

[23] [2018] eKLR

[24] Shefali Tejas, 'The Doctrine of Part Performance' Legal Service India (E- Journal) at https://www.legalserviceindia.com/legal/article-1695-the-doctrine-of-part-performance.html

[25] Ibid

[26] HL (1883) 8 App Cas 467

From the House of Lords' reasoning above, it is clear that the court desired to prevent one party from going loss after partly performing his contractual obligation in a situation where both parties intended to create a binding contract. In effect, the court prevented a party from escaping to restitute the other party on the performed part on a mere technicality like lack of a signature. Such a situation could otherwise amount to fraud or unjust enrichment.

Lord Justice Warrington[27] was more flexible, unlike the House of Lords in *Maddison*[28] when he held that **'**[…] the acts of part performance must be such as not only to be preferable to a contract such as that alleged, but to be referable to no other title.

Lord Justice Kingswood [29] stated that it was not his understanding that part performance must not necessarily be referable to the agreement. Actually, the judge adopted the wording used by Anson J that the acts of part performance relied on 'must of themselves suggest the existence of a contract such as it is desired to prove.'

It appears that part performance doctrine controversy was inadequately settled by the English courts. It explains why the issue of enforcing part performances in illegal contracts (for instance, one that is required to be in writing but has been partly performed without existence of contract in writing) found its way to the Law Commission (England and Wales).[30] The commission provisionally proposed that when exercising its discretion to afford relief in such illegal contracts (partly performed), a court should consider:

(i) the seriousness of the illegality involved;

(ii) The knowledge and intention of the party seeking to enforce the contract, seeking to recover benefits conferred under it, or seeking the recognition of legal or equitable rights under it;

(iii) Whether denying the claim would deter the illegality;

(iv) Whether denying the claim would further the purpose of the rule which renders the contract illegal; and

(v) Whether denying relief would be proportionate to the illegality involved.

It can be concluded that the courts of England and the Law Reform Commission have not only identified the issues arising from partly performed contracts but also proposed or applied the doctrines of equity and discretion to mitigate the losses incurred in partly performed contracts which are illegal.

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[27] *Chaproniere v Lambert* (1917) 2 Ch 356

[28] n25

[29] *Estate Co v Anderson* (1962) 2 QB 169

[30] The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed.

3.2. The Doctrines of Equity and Part Performance: Construing the same from the prism of Constitutional Principle of Equity.

This article embraces three-prong legal arguments to make a case for complement the constitutional principle of equity with the doctrines of equity and part performance. First, the Constitution permits the courts to develop the constitutional principle of equity when applying it.[31] Secondly, there is a considerable consensus that the Constitution establishes a constitutional theory of interpretation.[32] Thirdly, the Supreme Court Act and Regulations sanction for development of indigenous jurisprudence. Thus, while taking into account the social, economic, cultural and political phenomenon to develop indigenous jurisprudence, the courts can also borrow the antiquity maxims of equity and part performance doctrine which the courts of England developed in contractual contexts. There is absolutely nothing wrong in choosing progressive aspects from the inherited laws as we decolonize our laws. The incorporation of doctrines of equity and part performance to the constitutional principle of equity will ensure that parties in procurement contracts mitigate losses arising from part performance. In any case, the doctrines of equity and common law are part of our laws and hence the constitutional interpretation exercise cannot turn a blind eye to them. That is why the article argues that both the constitutional principle and doctrines of equity complement each other.

Indeed, the doctrines of equity and part performance have already been applied in Kenya, and courts have infused the constitutional principle of equity to give remedies where ordinarily the law would have barred parties because of legal deficiencies. Of course, there have not been many cases litigated particularly to contracts which are by statute, required to be in writing. However, some decisions have dealt with illegal contracts; situations where equity conflicts with statutory requirements; and situations where rights accrue from an illegality due to equity. This section takes a survey of these decisions.

In the case of *Cherono v Kimitei*[33] the court had an occasion to refer to English decisions. The judges were grappling with the requirement that land contracts must be in writing, and yet one party had just alleged to have performed the contract partly without the existence of written agreement.

The first decision the judges cited and concurred with was that of *Elias*[34] when dealing with similar provisions in the English Statute of Frauds 1677, where Lord Searman had held;

> In seeking a sufficient memorandum, it is not necessary to shoulder the further burden of searching for a written contract. Evidence in writing is what the statute requires. For, as *Steadman v Steadman [1976] AC 536* emphasized an

[31] Constitution of Kenya2010, art 159(1) (c)

[32] Willy Mutunga 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions' [2015] 1 SPECJU 6

[33] [1995] eKLR

[34] *Elias v George Sahely & Co (Barbados) Ltd* (1983)1 AC 655

> oral contract for the sale of land is not void but only in the absence of evidence in writing or part performance, unenforceable. If therefore, a document signed by the party to be charged refers to a transaction of sale, parol evidence is admissible both to explain the reference and to identify any document relating to it. Once identified the document may be placed alongside the signed document. If the two contain all the terms of a concluded contract, the statute is satisfied.

The court then proceeded to revisit Maddison[35] while dealing with the doctrine of part performance relating to interest in land. Gicheru and Kwach, JJ (as they were then) appreciated its import in the instant matter, and produced a long excerpt from Earl of Selborne LC where he pointed out that;

> In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase – money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from res gestae subsequent to and

[35] n25 475-476

> arising out of the contract. So long as the connection of those res gestae with the alleged contract does not depend upon mere parol testimony but is reasonably to be inferred from the res gestae themselves, justice seems to require some such limitations of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of the material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement.

The learned judges went on to explain the use of the words *res gestae* as used in the decision. They clarified that the phrase is in preference to 'acts of part performance of the alleged contract.' The judges speculated that that is why Lord Simon in *Steadman* emphasized that "what gave rise to the equity was, not the contract itself, but what was done ancillary" to it since:

> Once it was considered incumbent to do equity without undermining the statute, it was reasonable to look for attendant circumstances which inherently rendered it probable that there had been an antecedent contract the obligations of which it would be inequitable to allow a party to escape.

Even though the court did not enforce the subject contract and dismissed the appeal, it is clear that judges appreciated the *Maddison*[36] and *Steadman*[37] landmark decisions. However, one may argue that the decisions are applicable in procurement contracts in Kenya in so far as circumstances allow. Besides, these decisions were concerned with doctrines of equity which are applicable on a case to case basis.

Away from the doctrines of equity and fast forward, the court of appeal in *Kitilit* had the opportunity to deal with the application of a constitutional principle of equity where the contract was performed and parties sought for specific performance. The Appellant and Respondent had entered into a valid land agreement. However, transfer was not done. Later, the Respondent refused to transfer the land to the Appellant. He argued that the Appellant did not comply with the statutory requirements to obtain the Land Control Board Consent. While appreciating the Respondent's argument, the court held that the principle of equity has now been elevated to higher pecking order, as a constitutional value. It held –

> Thus, since the current Constitution has by virtue of **Article 10(2) (b)** elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.

[36] n25.
[37] Ibid.

The appellate enforced the contract even though the contract had statutory deficiencies. The decision may have variant interpretations. However, to the extent that the decision has not been overturned, it spells the law as it is currently. Equity is a constitutional principle. Secondly, the constitutional principle of equity occupies a higher rank in the pecking order with the written laws. As to whether the constitutional principle of equity is equivalent to the doctrines of equity is a different ball game. This study avoids delving into the debate but maintains that the same are interrelated and complementary. The constitutional principle of equity cannot exist in a vacuum. It, among other scales of justice, relies on the doctrines of equity.

A further survey of the court's jurisprudence points out that courts have innovatively endeavored to grant reliefs on grounds of constitutional principle of equity or devise new tools to protect and enforce constitutional rights and principles. Needless to state, as pointed earlier, the constitutional principle of equity is one of the tools in interpreting the constitutional rights pursuant to Article 20(4) (a) of the Constitution. The following decisions buttress this point.

In *Minister of Health* v *Treatment Action Campaign*,[38] the Constitutional Court of South Africa made the following remarks -

> [...] appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal.

The High Court of Kenya [39] has borrowed the reasoning and taken the same path of fashioning an equitable remedy where the invalid contract was partly performed. It held –

> It follows that no valid contract can be signed arising from such an illegality. This being the clear position of the law, then this is a proper case for this court to fashion appropriate reliefs. Indeed, this Court is empowered by Article 23(3) of the Constitution to grant appropriate reliefs.

The latest is the *Mitu-Bell Welfare Society*[40] decision by the Supreme Court of Kenya. Even though it was made within human rights parlor, the Supreme Court arguably endorsed the idea of structural interdicts as forms of relief under the Constitution. The Petitioners (appellants) had no legal titles in the suit property but nevertheless claimed the housing rights under Article

[38] (2002) 5 SA 721 (CC).
[39] ex p Applicant CMC Motors Group Limited n21)
[40] *Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA)* (2021) eKLR

43 of the Constitution. The five – Judge Bench held as –

> We are, however, in agreement with the submissions of the appellant and Amicus Curiae, to the effect that Article 23 (3) of the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right. As this Court has already made an authoritative pronouncement on this matter, we shall say no more.

The Supreme Court proceeded to make a more relevant pronouncement in respect to a legal right accruing from an illegality (illegal occupation of public land). While recognizing that the constitutional right to housing accruing from illegal occupiers of public property, the court posed this question–

> This scenario has inevitably led to the emergence of the so called "informal settlements", an expression that describes a habitation by the "landless". In their struggle to survive, many Kenyans do occupy empty spaces and erect shelters thereupon, from within which, they eke their daily living. Some of these settlements sprout upon private land, while others grow on public land. It is these "settlers" together with their families who face the permanent threat of eviction either by the private owners or State agencies. The private owners will raise 'the sword of title', while the State agencies will raise 'the shield of public interest'. So where does this leave the right to housing guaranteed by Article 43 of the Constitution?

The right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. This right derives from the principle of **equitable access** to land under Article 60 (1) (a) of the Constitution.

The discussion under this section has resolved the question on the applicability of the constitutional principle of equity to illegal or invalid contracts. Of course, this study is not unmindful that the constitutional principle of equity operates beyond public procurement. It permeates to all other facets of legal relationships. But in the realm of public procurement, it is clear that the courts are obliged to provide remedies for contractors who performed their duty, even though the contract is invalid.

3.3. Breaking the Jinx of section 135 of PPAD: A case for Equity and Part Performance through the Prism of Constitutional Principle of Equity.

Section 135 of PPAD, 2015 is arguably the basis of public procurement disputes in the procurement tribunals and courts. Non-compliance of the provision results in illegal contracts which could be partly performed. Without any imputation that the impugned section is the only root cause of illegality in procurement contracts, the study singles the provision as a suitable area of study.

Section 135 of PPAD basically deals with formation of a public procurement contract. Sub-sections 135(3) and (4) state that;

> (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification **provided that a contract shall be signed within the tender validity period.**
>
> (4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity **until the written contract is signed by the parties.**

It seamlessly flows from the provisions that for a procurement contract to be valid, it must be signed within the tender validity period. Secondly, it must be a written contract signed by the parties. In other words, the two parties must sign a written contract within the tender validity period.

The question that arises is; what happens to a party that signed the contract and proceeded to discharge its obligation partly – but the other party failed to sign within the tender validity period? As pointed out in the introductory part, public entities party to public procurement contracts often find themselves in this situation. One may argue that these entities fail to sign in time due to bureaucracies or at times high voltage corruption and favoritism which results in authorizing a contractor to continue discharging the contractual duty while overlooking the strict legal requirements and procedures. Without condoning these vices and legal improprieties, the focuses the scenario outcome: part performance in illegal contract.

How can the scenario outcome resulting from non- compliance with section 135 of PPAD, 2015 be addressed? First, it must be appreciated that the provision does not set the days for the tender validity period. The drafters must have foreseen a need to provide contractual freedom by according the parties the powers and discretion to set their own validity time. Secondly, section 88 of the PPAD, 2015 further infuses flexibility by allowing extension of tender validity period. Perhaps the drafters were privy to the fact that every procurement contract is peculiar, and the process of formation may be delayed by unforeseeable circumstances and practicalities. Finally, remedies can be fashioned through the application of the Constitutional principle of equity.

Therefore, where one party has signed the contract and performed part of its obligation, and due to peculiar contract formation process, the other party runs out of the time to sign the contract- the party which discharged part performance on the unsigned contract can be accorded some reliefs.

This position has been enunciated in *M/S Ikuyu Enterprises Ltd* v *M/S Feba Radio*[41] where the defendant claimed that the subject contract was not binding upon them since they had not signed it. In relying on the Halsbury's Laws of England,[42] the plaintiff had argued that the unconditional acceptance of a tender gave rise to a valid contract. At the end, the court held that there was a valid contract. The court stated that;

> In this case it is clear that these conditions were applicable. There was an offer by tender which was accepted as to the price in absolute and unqualified terms. Then there was absolute acceptance of amendments to the contract and by the conduct of giving the site to the plaintiff by the defendant 'immediately'. The issue of the incorporating the 1999 Agreement has been discussed above and the court has come to the conclusion that the terms of standard form published by the Architectural Society of Kenya and the Joint Building Council were incorporated and binding upon the parties. The conditions referred in the above decision are similar to those enshrined under section 135(6) of the Act, with effect that, the contract is valid even in the absence of signing by the other party which is a mere formality.

In a comparative perspective, the court in *Lease America Org, Inc* v *Rowe International Corp*[43]also held that there was a valid written contract between the two parties even though Rowe never signed it. The court reasoned that although both parties did not sign the contract, it was clear from the record that both parties manifested an acceptance to the agreement.

4. Conclusion

Whilst the study does not advocate parties' laxity in ensuring public procurement contracts comply with the statutes, it takes cognizance that several of such scenarios have and continue to arise. Some are attributable to human error and other factors. The constitutional principle of equity can be innovatively be used to fashion reliefs to a party who partly performed its obligation. In applying the principle, courts can rely on the maxims of equity and doctrine of part performance. This is notwithstanding, whether the contract is illegal or not. A party cannot seek justice by doing injustice.

[41] [2009] eKLR
[42] (4th eds) 385 [315]
[43] (2016) USDC Massachusetts

THE LIMITS OF EXPANDING ACCESS TO JUSTICE THROUGH TRADITIONAL DISPUTE RESOLUTION MECHANISMS IN KENYA

*by Linda Khaemba**

Abstract

This article discusses the use of Traditional Dispute Resolution Mechanisms (TDRMs) to provide conflict resolution mechanisms in line with the Constitution of Kenya. In exercising their judicial authority, courts are mandated to foster the use of Alternative Dispute Resolution (ADR) Mechanisms including TDRMs. The article examines the role of the formal justice system and its relationship between TDRMs. It traces the development of the formal justice system and TDRMs and highlights the differences in standards, processes and outcomes. In analysing the potential for cross pollination and cross contamination of values between both systems, it examines the likelihood of different systems morphing into systems with similar challenges and outputs. The article also analyses the main considerations that should inform the limits on formal recognition and use of TDRMs as an avenue for accessing justice, and makes proposals for consideration when embracing TDRMs.

Keywords: Traditional Dispute Resolution Mechanisms, Alternative Dispute resolution, Kenya

* LLB (Moi), LL.M (Pitt), Lecturer (Moi University School of Law)

1. Introduction

The formal justice (public dispute resolution) and informal justice systems have co-existed for ages. The systems are not mutually exclusive since opting for court does not prevent parties from arriving at a settlement. Article 48 of the Constitution of Kenya[1] mandates the State to provide access to justice for all persons and to ensure that any fee charged does not bar access. The Constitution has greatly reinforced rights related to dispute resolution and broadened the array of dispute resolution mechanisms at the disposal of parties in conflict. Article 159 of the Constitution[2] vests judicial authority in courts and tribunals established under the Constitution. The guiding principles direct them to promote alternative forms of dispute resolution including Traditional Dispute Resolution Mechanisms (TDRMs), to protect and promote the purpose and principles of the Constitution and to deliver justice to all irrespective of status. The challenge posed in adopting TDRMs revolves around questions relating to compliance with basic constitutional standards, particularly those concerning the procedural and substantive rights of vulnerable subjects.

Most justifications for the use of Alternative Dispute Resolution (ADR) make two related observations as their point of departure. First, they highlight challenges likely to be experienced in accessing tax payer funded public dispute resolution mechanisms. Proposals for the use of TDRMs and other forms of ADR are largely premised on surmounting the obstacles likely to be encountered by persons in their attempt to access justice. An overwhelming combination of factors serve as impediments to access to justice. These include poverty, ignorance or unfamiliarity with complex court rules and procedures, limited geographical reach of the court, case backlog, the risk of unsatisfactory outcomes, the display of State power, symbols and authority (e.g. policemen) which evoke fear and intimidation, reinforcing the notion powerlessness and loss of autonomy of the State's coercive and intrusive reach into individual affairs and expenses associated with professionals.[3] They also highlight the expense associated with litigation as well as the fact that it is an emotionally draining and lengthy affair. The relationship between the victor and the vanquished is usually worse at the end of the process. All these systemic flaws justify the development and use of other justice systems. The "promise of ADR" was to provide alternatives which cured these shortcomings.

Second, not all disputes are resolved through courts. In fact, the majority of the disputes arising in society are resolved through various forms of ADR including TDRMs. This challenges the view of ADR as "the alternative" and requires introspection regarding where the focus of resources, policy and design should be. Kenyans through the Constitution elected to encourage the use of TDRMs in order to broaden access to justice. This paper will assess the viability of using traditional dispute resolution mechanisms to achieve the goal of ensuring access to justice and examine policy coherence with a view to determining whether practical steps are being taken to align TDRMs with the Constitution.

[1] Constitution of Kenya 2010.
[2] Ibid art 159(2)(c) and 159(2)(e).
[3] HJA Lugulu, 'Equal Access to Justice: The Case of Legal Aid in Kenya'(2008) 2 *MULJ* l. 3

The first part of this paper will examine the concepts of Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR). Part two examines the potential for transfer of values between the formal justice system and TDRMs and the effect this is likely to have on TDRMs. Part three examines the legal framework for implementing ADR in general and TDR in particular in the country. Part four examines the historical context of the relationship between formal and informal institutions of dispute resolution in the country , compares them and examines the intersection between the judiciary and TDRMs. Part five discusses the considerations that should be made when encouraging the use of TDRMs.

2. Traditional Dispute Resolution as a form of Alternative Dispute Resolution

a. Policy, Perspective and Values

In many communities, ADR rather than litigation is the first port of call in resolving disputes, with the judiciary playing a marginal role.[4] As a matter of perspective, for members of these communities, litigation rather than ADR is the alternative. The term ADR has been used to refer to all dispute resolution mechanisms other than litigation. One view is that this creates a distinction between public and private dispute resolution processes, implying that these processes arise in distinct domains such that parties must therefore opt for one over the other. In reality, many disputes are multi-faceted and cannot be wholly resolved using a single approach or process. Many disputes which are filed in court are concluded through settlement. In other cases, courts refer aspects of a dispute to TDRMs for resolution. However, the allocation of resources through the National Budget which places a focus on funding the formal justice system reinforces the public/private distinction in dispute resolution since taxpayer funds are channeled to the formal justice system while the costs of alternative justice systems such as TDRMs are largely borne by private persons.

The judiciary describes TDRMs as complementary to the court and which together with other ADR mechanisms have "become a useful avenue of responding to backlog of Court cases."[5] However, policies informing the use and place of TDRMs should not be predicated solely on challenges and shortcomings of the formal justice system. TDRMs are more than a docket clearing device; they are an affirmation of indigenous solutions to indigenous problems which western legal cultures may not have prioritised. They are also a celebration of the cultural diversity of the nation through enriching its brand of legal pluralism.

Another view conceptualises all dispute mechanisms as existing on a continuum along which the level of coercion, formality and focus on rights increases as one progresses along the continuum. TDRMs which arise from communities as opposed to the State and are managed by community leaders rather than state actors can be contrasted with processes such as arbitration which are highly formalised, rely on professionals and connected to the court system through law which

[4] T Chopra, 'Building Informal Justice in Northern Kenya' (World Bank and Legal Resources Foundation Trust, 2008) 11.

[5] Judiciary of Kenya, ' Alternative Justice Systems Framework Policy' (2020) <https://www.unodc.org/documents/easternafrica/Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf> accessed 4 October 2023.

expressly defines areas of court intervention.[6] TDRMs also encompass a broad variety of dispute processes which Muigua[7] identifies as negotiation, mediation, problem solving workshops and the use of councils of elders. The level of coercion, focus on rights and use of power options is greater in court than in TDRMs which are likely to place greater emphasis on interests and approaches which build consensus.

The country's colonial history and the forces of modernisation have had an impact on the development and relationship of the formal and TDRMs. The judiciary retains supervisory jurisdiction over all methods of dispute resolution. The manner and extent to which TDRMs should relate to the formal court system should be managed so that access to justice is not accompanied by regression in areas where rights of vulnerable persons have advanced. Questions which require consideration include those regarding oversight and legal aid. These methods hold the promise of expanding access to justice. They also play a significant role in preserving the culture of various communities and promoting social cohesion.

b. Value Transfer

The cross-fertilisation of values and cultures can have both positive and negative outcomes for TDRMs and their users arising from cross-contamination and cross pollination. Whereas the hierarchical court structure is a function of constitutional design, TDRMs are developed based on community values, challenges and customs. The use of TDRMs must be designed with the judiciary taking the lead as the body vested with judicial authority. However, this must be done with a measure of caution. DiMaggio and Powell examined the tendency of organisations in a field to increasingly become similar over time.[8] They observed that when different organisations operating in the same area are organised into a field by competition, the State or professionals, they are influenced to become increasingly alike.[9] They described this push towards homogenization as "institutional isomorphism" and attributed it to three main forces; societal expectations and coercion from other organisations they interact with such as the government; mimetic forces which encourage organisations to " model themselves on other organisations" in conditions of uncertainty such as ambiguous goals; and professionalisation which exerts normative pressure to conform by adopting and norms considered proper for a field.[10]

Traditional Dispute Resolution Mechanisms (TDRMs) are an alternative to the formal justice system. They are rooted in specific communities[11] and are referred to as informal justice systems

[6] Arbitration Act 1995 s 10.

[7] K Muigua, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010' <http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf> accessed 3 October 2023

[8] P DiMaggio and WW Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 American Sociological Review 2

[9] Ibid 148.

[10] Ibid.

[11] Kenya Human Rights Commission *et al*, 'Transitional Justice in Kenya: A Toolkit for Training and Engagement' (2010).

to underscore the fact that they are separate and distinct from the State.[12] Roder observes that unlike State sponsored dispute resolution mechanisms which get life from the Constitution and other forms of law, TDRMs are sponsored by their communities.[13] Traditionally, TDRMs were cheap, accessible and devoid of the numerous challenges experienced by the court system. This is unlikely to remain the case as they gain formal recognition and begin to interact more closely with the judiciary. For example, Joireman and Henrysson examined women's property rights and dispute resolution in Kisii and found that customary processes also attracted monetary costs that made them inaccessible to many. They observed that "[r]ent-seeking, the use of public office to extract personal payments, at all levels of both the formal and informal adjudication processes makes the settling of land disputes prohibitively expensive."[14] They established that women had secondary rights (to use) and were rendered vulnerable if they were widowed, childless or deemed to have poor character.[15] They found that money had replaced the traditional token of a meal and that vices like corruption and obstacles like process costs had become the norm.[16] Whatever costs are introduced in such processes are absorbed by the disputants because state resourcing for recognised bodies is minimal or non-existent. Kanyinga notes that the "[l]lack of funds to support the elders' role has led to community members being required to financially support some of these roles' resulting in faster disposition of cases where parties pay and the risk of wealthier parties corrupting the elders.[17] In other cases, elders have made demands for payment from the State for rendering their services, using the formal recognition of the role they play in dispute resolution to justify their demands.[18] Members of Parliament have also in the past suggested that they should be remunerated for the role they play which includes resolving disputes and the executive has since made a proposal for remuneration of village elders.[19] This approach invites questions regarding regulation and accountability, and is likely to be accompanied by a higher threshold of scrutiny similar to that of other public servants whose services are funded by the taxpayer.

[12] TJ Roder, ' Informal Justice Systems: Challenges and Perspectives'(Max Planck Institute for Comparative Public Law and International Law) 58 <http://worldjusticeproject.org/sites/default/files/informal_justice_systems_roder.pdf> accessed 31/5/2023

[13] Ibid 61

[14] SF Joireman and E Henrysson, 'On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya' (2009) Political Science Faculty Publications 71 <http://scholarship.richmond.edu/polisci-faculty-publications/71> accessed 3 October 2023

[15] Ibid.

[16] ibid.

[17] K Kanyinga, 'Kenya: Democracy and Political Participation' (Open Society Foundations, 2014) 223–32, 228.<http://www.jstor.org/stable/resrep42937.26 > accessed 11 July 2023.

[18] The Star, 'Kenya: Village Elders Demand Pay' AllAfrica (Nairobi, 29 April 2015) <https://allafrica.com/stories/201504290773.html> accessed 8 July 2023; Parliament of Kenya, " Government will Recognise and Remunerate Village Elders once Law is Amended, CS Prof. Kindiki" <http://www.parliament.go.ke/node/20448> accessed 10 October 2023.

[19] R Otieno 'Ballooning payroll: MPs propose perks for village elders' *The Standard* (Nairobi) <https://www.standardmedia.co.ke/article/2001318549/ballooning-payroll-mps-propose-perks-for-village-elders> accessed 8 July 2023.

Kanyinga observes that "colonialism and the money economy" have had an impact on the manner in which community leaders acquire their "seniority and respectability."[20] He states that "notables" (wealthy persons, senior government officials, senior academics etc.) who become traditional leaders in some communities rely on African customs only when it suits them and are open to external influence.[21] Some are propped up by politicians to achieve political objectives.[22] The former Chief Justice Willy Mutunga once observed that every time he met with a council of elders, a second group of elders (from the same community) would contact him claiming that they were the legitimate elders, and that the ones he had met were frauds.[23] The modern-day Council of Elders takes on such roles as endorsement of candidates for political processes[24] which sometimes has a divisive effect on their communities. Ironically, some members of bodies that are supposed to promote TDRMs, in keeping with the rest of society, present their conflicts (usually leadership wrangles[25]) to courts for resolution. One would assume that a body that has existed since pre colonial times, and which the courts encourage to help others resolve disputes, has internal dispute resolution mechanisms.

Kanyinga also highlights positive aspects of interaction between TDRMs and formal State actors. He cites the example of the approach taken by the Kenya National Human Rights Commission (KNHRC) to collaborate with the *Njuri Ncheke* and the Luo council of elders as engagements which have "modern and progressive ideas on good governance and human rights."[26] Areas of cross-fertilization, particularly those which encourage TDRMs to evolve their practices should be identified and nurtured. Article 11 of the Constitution reiterates the importance of culture "as the foundation of the nation and as the *cumulative civilisation* of the Kenyan people and nation(emphasis mine). This suggests a broader outlook on the question of culture to accommodate developments occasioned by the interaction of different legal, religious, national, cultural and other systems. The ethnic and religious diversity which is celebrated in the preamble affirms the idea that our cumulative civilisation is the result of contributions from different sources and confirmed by legal plurality in many areas.

Drawing from Dimaggio and Powell's ideas, the relationship between formal adjudication and TDRMs if not well managed can result in more of the same. Marry them too closely to the court system and they cease to be viewed and treated as alternatives. Divorce them entirely and the court loses its authority to supervise, support and help them align to constitutional and natural justice standards. One method of managing the overlaps in areas of operation is to perhaps encourage TDRMs to play a greater role in prevention since they operate within their communities.

[20] Kanyinga (n 17) 225.
[21] Ibid 225- 226.
[22] Ibid 225.
[23] W Mutunga, Remarks made at the Induction Retreat for Cohesion and Integration Goodwill Ambassadors (Nairobi, August 29, 2010)
[24] Ibid.
[25] *R v Registrar of Societies ex parte Njuri Ncheke Supreme Council of Ameru Elders* [2015] eKLR; *Mukenion v Mwok* [2022] eKLR.
[26] Kanyinga (n 17) 226.

3. Access to Justice: The Legal Framework for Traditional Dispute Resolution

Several international legal instruments underscore the importance of ensuring access to justice. The constitution incorporates international law as part of Kenyan law so that rights contained there can be claimed by Citizens.[27]Article 11 of the Universal Declaration on Human Rights (UDHR) guarantees the right to "a fair and public hearing before an independent and impartial tribunal." For violations of fundamental rights, Article 8 guarantees the right to effective legal remedies before competent national tribunals.[28] Article 2(3) of the International Convention on Civil and Political Rights (ICCPR) is broader, requiring each State party to ensure that people who are seeking remedies for violations of their rights have recourse to "competent judicial, administrative or legislative authorities" or to "any other competent authority provided for by the legal system of the State." The remedy, therefore, can be obtained from any other entity sanctioned by law. The State, therefore, has the primary responsibility to ensure that it has established mechanisms for citizens to resolve matters and obtain remedies. The Kenyan Constitution requires courts and tribunals to promote the use of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[29] The preamble describes the people as "one indivisible sovereign nation" but affirms their "ethnic, cultural and religious diversity." Article 11 and 44 lay the basis for promoting culture and guaranteeing rights related to language and culture. The Constitution therefore lays a firm basis for celebrating, promoting and harnessing culture in all areas of life. However, Article 2(4) subordinates all law, including customary law to the constitution. Customary systems of dispute resolution should therefore be used where appropriate. The methods should be consistent with the Constitution and the Bill of Rights and should not produce outcomes which can be challenged because of falling short of constitutional values and standards. Article 48 of the Constitution requires the state to ensure that there is access to justice for all persons which calls for the exploitation of both formal and informal dispute resolution mechanisms.

Article 67 requires the National Land Commission to "encourage the application of traditional dispute resolution mechanisms in land conflicts.[30] This function is also spelt out in S.5(1)(f) of the National Land Commission Act.[31] The Environment and Land Court Act allows courts to adopt and implement "any other appropriate means of alternative dispute resolution including conciliation, mediation, and traditional dispute resolution mechanisms."[32] The Community Land Act requires a community claiming an interest in land to be registered and to elect members of a community land management committee from a community assembly composed of all adult members of the community.[33] The functions of the committee are broadly spelt

[27] n1 Art 2(5) and 2(6).
[28] UDHR.
[29] n1 Art159(2)(c).
[30] n1Art 67(2)(f)
[31] Act No.5 of 2012.
[32] Environment and Land Court Act, Act No. 19 of 2011 s 20.
[33] Community Land Act, Act No.27 of 2016 s 7 and s 15.

out and not limited to land issues. It for instance has "responsibility over the running of the day to day functions of the community" and to "prescribe rules and regulations, to be ratified by the community assembly, to govern the operations of the community".[34] The Committee is mandated to manage and administer the community land on behalf of the community. In *Robert Bonaya & another v Samuel Hamena Mtetemo*[35], the court stated that the Council of elders was one such committee envisaged under section 15 of the Act. It noted that the elders were elected by the community in accordance with their traditions and customs, but did not go as far as confirming that the requirements of the Act for putting in place a community land management committee had been met.[36] The Act requires all adults to participate in such an election. The repealed Land Disputes Tribunals Act defined elders as "persons in the community or communities to which the parties by whom the issue is raised and who are recognised by custom in the community or communities as being, by virtue of age, experience or otherwise competent to resolve issues between the parties.[37] They were appointed by the Minister to hear civil disputes regarding division of land, boundaries, claims to occupy or work land and trespass.[38]

S.3(2) of the Judicature Act[39] requires courts to be "guided" by customary law in certain cases which makes its application somewhat discretionary. The recognition of customary law serves as an important basis for its growth. It is also important since a community's values and customs are applied in resolving disputes. It is these rules which provide the substantive rules that are applied in resolving disputes. S.60(1) of the Evidence Act[40] requires courts to take judicial notice of "all laws, rules and principles, written or unwritten, having the force of law." However, although the Act provides that no proof is required for facts that the court must take judicial notice of, in *Kimani v Gikanga,*[41] the court stated that the difficulty posed concerned the manner in which these customary laws were to be established as facts before the courts. The court cited section 13 and 51 of the Evidence Act[42] in support of the view that a party wishing to rely on customary law to support his case bore the onus of proof to establish that law. To underscore this requirement, the court stated:

> As a matter of necessity, the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and

[34] Community Land Act, s 15(4)(a) and s 15(4)(e).
[35] [2021] eKLR.
[36] Community Land Act, s7(6) requires the Committee to submit the name, register of members, minutes of the meeting and the rules and regulations of the committee to the Registrar for registration.
[37] Land Disputes Tribunals Act, Act No. 18 of 1990 (repealed), s 2.
[38] Land Disputes Tribunals Act, Act No. 18 of 1990 (repealed), s 3 and s 5.
[39] Cap 8, Laws of Kenya.
[40] Cap 80 Laws of Kenya.
[41] [1965] EA 735.
[42] n40.

> would include a judicial decision but in view, especially, of the present apparent lack in Kenya of authoritative textbooks on the subject, or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove that customary law as he would prove the relevant facts of his case.

The Magistrate's Courts Act[43] lists customary law matters which can be entertained by Magistrates Courts. These include claims for land held under customary tenure, matters affecting status (particularly that of women, widows and children) and intestate succession *inter alia*. In the context of litigation, courts may refer suits to "any other method of dispute resolution" through the parties or the courts initiative.[44]

The Kenyan Constitution, therefore, presents an important opportunity to rediscover and reinforce positive aspects of culture particularly those pertaining to dispute resolution. This is in keeping with changing perceptions on TDRMs that call for "strengthening and reforming existing traditional institutions and linking them to state institutions rather than trying to marginalise them."[45] The main difference between courts and TDRMs is that the former are entrenched in the Constitution with its offices and officers created, the mechanism for their appointment and removal spelt out and jurisdiction dealt with.[46]

4. Formal Justice and African Traditional Dispute Resolution

4.1 History

The colonial era presented a conflict between colonialists who sought to superimpose their law on native inhabitants.[47] The effect of what Philips describes as "culture contact" was enormous.[48] Foreign law was introduced and implemented such that it in many instances supplanted or suppressed existing indigenous systems and law. Joireman observed that "[e]ffective colonization in Africa demanded a legal system to both maintain control of a country and resolve disputes within it" and therefore "the colonial metropoles established their own systems of law and dispute resolution, disregarding pre-existing mechanisms of conflict resolution as primitive or appropriate for "natives" only".[49] However, this approach was not always used because of the expense associated with funding administration. The system of indirect rule was perfected because of insufficiency of resources to take full charge of all affairs in the colonies.

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[43] Cap 10, Laws of Kenya.

[44] Civil Procedure Act, Cap 21 s 59C.

[45] Roder (n12) 59.

[46] *See* Constitution of Kenyan, Chapter 10 which establishes the judiciary and the court system.

[47] See E Cotran, 'The Development and Reform of the Law in Kenya' (1983) 27:1 J.A.L , 42 (stating "[i]t is common knowledge that when the colonial powers colonized Africa they brought their law with them.').

[48] A Phillips, *Report on Native Tribunals in the Colony and the Protectorate of Kenya* (Government Printer, Nairobi, 1945).

[49] SF Joireman 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) Journal of Modern African Studies ; Phillips (n48);

In Kenya, customary law and traditional structures such as the chief council of elders were used by the colonial administration to make inroads in managing native affairs.[50] Structures that had previously served the interests of the people were "captured" and repurposed to meet the objectives of the State. Patrick Glenn observes that the council of elders was supplanted and sometimes replaced by chiefs. He however noted that because they had no armies, chiefs were only able to function through consultation and generating consensus.[51] Kanyinga notes that in some cases, the chief was drawn from the council of elders.[52] Linking traditional structures to the State had adverse effects. Bruce Berman observed that chiefs who were "almost wholly creations of the colonial state" were conflicted between their role as agents of the State and demands of the indigenous population.[53] The position of the chief typified the conflict presented between serving as an agent of the State while trying to preserve the social fabric and cultural values. The corrupting force of Western values was felt since "[t]he rewards of the politics of collaboration were unmistakably material."[54]

Initially, local law was implemented alongside British law.[55] For a time, African Courts were required to "administer and enforce African customary law."[56] A parallel system of courts known as Native Tribunals was established to administer justice to "natives".[57] The role of enforcing rights and ensuring justice for the native was not wholly the preserve of the courts; the executive arm justified its involvement in dispute resolution through the appellate process. Appeals from the tribunal lay to a Native Court of Appeal and then to a District Commissioner and then to the Provincial Commissioner. Cotran observed that this was done to allow the local established system of justice to continue its operations using structures established under customary law, but to subject them to supervision and control "not by judicial officers, but by administrative officers who were supposed to understand the "natives" better[58] because they interacted more closely with them on a day to day basis. Local law and practices were therefore entertained not out of a sense of respect for the indigenous structures, but because they presented an effective means of asserting state control over the local population. Customary law was allowed to remain "fluid and situational" to facilitate greater control over natives.[59]

The separation of power and authority was therefore relaxed and the distinction between the role played by the bench in administering justice and that of the executive of law enforcement was fuzzy with respect to African affairs. It is not strange therefore that the culture of executive

[50] BL Shadle 'Changing Traditions to Meet Current Altering Conditions': Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60 *The Journal of African History*, (1999) 40(3) 411, 413.
[51] PH Glenn, *Legal Traditions of the World* (Oxford, OUP 2000) 60.
[52] Kanyinga (n17).
[53] B Berman, *Control & Crisis in Colonial Kenya: The Dialectic of Domination* (East African Education Publishers 1990) 209.
[54] Ibid 60.
[55] Cotran (n47) 42.
[56] African Courts Act (repealed) s 18(a).
[57] Cotran (n47) 42.
[58] Ibid 43.
[59] Shadle (n50), 413.

involvement and interference in judicial affairs plagued the nation. Brett notes that "[f]rom the earliest days of British rule in Kenya, members of the administration and the judiciary battled over who would control the dispensation of justice to Africans."[60]

The Magistrates' Courts Act[61] abolished the African Courts and created a new court hierarchy. The duality in the court system changed with the enactment of the Judicature Act.[62] Courts were now "guided" by African customary law in civil cases in which one or more of the parties is subject to it, or affected by it, so far as it is applicable and not repugnant to justice or morality, or inconsistent with any written law."[63] This was a significant change from "requiring" them to administer and enforce African Customary Law. Similar legislation in other countries "required" courts to apply the law in certain instances.[64] Customary law was relegated to the bottom of the hierarchy of laws. [65]

Ghai & McAuslan described the reforms which were achieved through the Judicature Act and the Magistrate's Courts Act as "rather antipathetic to Kenyan law with a non-English common law origin." They stated that the "approach to law with an English origin" was "much more sympathetic".[66] Customary law was viewed as inferior and few efforts were made to customize English law to suit local circumstances. Phillips similarly observed that "[t]he foundations of native law are being undermined at all points" and explained that "the social system on which it is based is being profoundly disturbed and altered."[67] Kariuki Muigua observes that the introduction of adversarialism through the court system "greatly eroded the traditional conflict resolution mechanisms."[68] Several positive aspects of Customary Law with their collective, participatory dispute resolution devices were therefore relegated to the echelons of the past or downgraded to merely informal practices with limited application in resolving issues.

Other forces also had the effect of degrading cultural practices. Rural-urban migration has the effect of disconnecting people from their communities and culture. The introduction of Christianity and other religions had the effect of altering their adherent's belief systems and cultural practices they subscribed to. The tension between christianity (the dominant religion) and African culture eventually resulted in the establishment of independent churches where aspects of African culture could be retained. Custom and customary law are embedded in a people's culture. Wahab *et al* describes culture as "that complex whole which includes

[60] Ibid 411, 417.
[61] n43.
[62] n39.
[63] s3(2) Judicature Act, Cap 8 Laws of Kenya.
[64] s9 Judicature and Application of Laws Ordinance of Tanganyika, 1961; s15 Magistrates' Courts Act, Cap 36 Laws of Uganda providing that : "Subject to the Constitution and the Provisions of this Act, A Magistrate's Court *shall administer* the customary law prevailing in the area of its jurisdiction."
[65] Judiciary of Kenya, *Alternative Justice Systems Framework Policy* (2020) <https://www.unodc.org/documents/easternafrica/Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf>.
[66] YP Ghai & JPWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (1970) 376.
[67] Phillips (n48).
[68] Muigua (n8).

knowledge, belief, arts, morals, customs, laws and other capabilities which are learned, shared by men as members of society, and transmitted from one generation to another."[69] They state that "[a]ny laxity, lassitude, and levity exhibited by its custodians would result in rapid erosion and disappearance of the uniqueness of the people and their culture".[70] They observe that the ease of global travel and improved communication has contributed to the cultural supermarket phenomenon, allowing people to "choose from a wide range of different identities."[71] Joireman and Henrysson observe that "customary law and public law co-exist and sometimes conflict."[72] Customary law and customary law practices usually lose out to western values and systems.

4.2 Comparison

The African tradition was largely oral. Such traditions do not lend themselves to complex institutions[73] and therefore faced "less danger of pecuniary and institutional corruption, offering fewer positions of prestige and authority."[74] It was a more pure system devoid of many of the challenges faced by the court system. Disputes were resolved with reference to the entire community.[75] Like most aspects of a communities' life, dispute resolution was a community as opposed to individual affair. Maintaining peace in the group or between the group and its neighbours was a key goal of the social structures.[76] Restoring relationships and preserving social harmony was an important objective, resulting in an emphasis on restorative justice. Various devices were used to maintain social harmony and to restore it where it was disrupted.[77] Elisabetta Grande observes that "[u]ltimately, the legal process is designed to re-establish social peace in order to prevent feuds."[78] In contrast, litigation is largely an individual affair and a zero-sum game premised on retribution which disrupts relationships.

Patrick Glenn observes that "[t]he most common feature appears to be a council of elders, individual people who, by their assimilation of traditions over a longer period of time, often speak with greater authority."[79] For instance, among the Nandi of Kenya, membership to the council was obtained through "seniority and personality."[80] Elders were the most authoritative points of reference in most communities.[81] In many communities, parties who were unable to resolve their issues, turned to the council of elders for a decision.[82]

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[69] EO Wahab and SO Odunsi and OE Ajiboye 'Causes and Consequences of Rapid Erosion of Cultural Values in a Traditional African Society' (2012) Journal of Anthropology at <https://doi.org/10.1155/2012/327061> accessed 6 October 2023.
[70] Ibid.
[71] Ibid.
[72] Joireman (n15) 71.
[73] PH Glenn *Legal Traditions of the World* (Oxford, OUP 2000) 60
[74] Ibid.
[75] E Grande 'Alternative Dispute Resolution, Africa and the Structure of Power: The Horn in Context' *Journal of African Law* [1999] 43.
[76] Ibid 64.
[77] GS Snell, *Nandi Customary Law* (KLB 1954).
[78] Grande (n75) 64.
[79] Glenn (n73).
[80] Snell (n77).
[81] Grande (n75) 64.
[82] Snell (n77)) 10.

Most comparisons of litigation and TDRMs focus on the process differences and values of each process. Litigation is described with reference to its: adversarial nature which worsens relationships; expensive process costs; reliance on the advocate's and judge's skill; outcome which produces winner and a loser. TDRMs in contrast are described as communal processes which place no reliance on professionals other than elders and other respected community members, and which are focused on preserving relationships. The emphasis is on restorative justice over retributive, distributive and other forms of justice stressed by the formal dispute resolution mechanisms.[83] The process served to ensure that the disputants resolved the matter through what were acceptable channels so as not to disrupt social harmony at minimal cost to the participants.

In criminal law matters, punishment for most offences is only meted out after one's guilt has been established. This concept (of guilt) was alien to many African cultures - establishing the *actus reus* was sufficient. Compensation was usually prescribed once the wrongdoing was ascertained.[84] Most TDRMs showed little distinction between criminal and civil law matters. In fact, in many communities, there was no separation of criminal matters from civil ones.[85] The adversarial method used in common law countries is the tool used to uncover the truth. The disputants are provided with the forum to articulate their cases with a view to persuading a neutral arbiter that their version of the case is the most credible. Justice is deemed to be achieved if the process is fair and the outcome responds to the issues substantively. In some TDRMs, there are processes which have the same goals but would involve a violation of the participants rights. The trial by ordeal was a feature in some communities. For instance, among the Kipsigis, a truth ordeal or a poison ordeal could be administered in "cases of persistent criminal activities, witchcraft, sorcery and highly disruptive antisocial behaviour...".[86] The relationship between successfully completing an ordeal and the establishing the "truth" in that matter is tenuous.

The process outcome of many TDRMs may not be effective, acceptable or legal today. For instance, ostracism was reserved for serious offences in many communities. Today, the fact that many people do not live and work in their rural homes would render such a penalty almost meaningless. Other penalties involved punishing people who were not parties to the original dispute. For instance, an offender's clan might be asked to pay a fine on behalf of the offender. There was also the belief in supernatural sanctions as demonstrated by oathing practices and the use of curses.[87] Many of these outcomes would today flout various provisions in written law.[88] Other process requirements can be challenged on the basis that they amount to cruel and degrading treatment.

[83] S Kinyanjui 'Restorative Justice in Traditional Pre-Colonial "Criminal Justice Systems" in Kenya' (2010) 10 *Tribal Law Journal* 1, 2-3.
[84] Ibid 5.
[85] M Saltman, *The Kipsigis: A Case Study in Changing Customary Law* (1977) 42.
[86] Ibid 41.
[87] Ibid 43.
[88] Constitution (n1) art 44.

4.3 The Judiciary and TDRMs

What informs the use of either the formal justice system or TDRMs? In some cases, use of TDRMs is by default rather than by design. The impediments to access to justice are systemic faults that may push individuals to choose the lesser of two evils. The failure by the State to ensure access to "formal" justice means that "[c]ustomary justice systems are the lived reality of most people in developing countries, especially in rural areas."[89] Several scholars have documented the challenges experienced by persons attempting to access justice through the court system in Kenya. These include: the process (costs, complexity, case backlog, corruption); required professionals (counsel, expert witnesses, trained personnel); accessibility of courts; internal challenges (inadequate personnel, planning, management, independence, image) and other factors such as distrust and fear of the State and state institutions serve as impediments to access to justice. These inform the recourse to alternative systemes. Kenya ranks poorly in the rule of law index which uses metrics such as absence of corruption, open government, fundamental rights, regulatory enforcement, criminal justice and civil justice in determining a country's score.[90] It is therefore not strange that people would turn to other means of resolving disputes.

Much as it makes sense for the judiciary to embrace other justice systems in order to unclog its system of delivering justice, it must exercise caution because it is the body vested with judicial authority. In his article "Against Settlement" Owen Fiss warns against the dangers of reducing the judicial function to dispute resolution.[91] His views regarding the dangers of settlement can be analogously applied to other forms of dispute resolution where the court's involvement is tangential. He views settlement as "the civil analogue of plea bargaining" and argues that encouraging settlement should be viewed as a "highly problematic technique for streamlining dockets" with the result that cases may be dispensed with without justice being done.[92] He points out that power imbalances sometimes force people to settle because they lack resources to analyse their legal position, engage in a lengthy court process or to finance litigation.[93] A judicial determination is superior in that it lays the basis for the court's subsequent interventions in cases like family law matters and avails to parties compliance mechanisms like contempt of court[94] and other mechanisms for enforcing decrees including arrest and attachment. Judgements also serve functions which transcend the parties dispute. They present an opportunity to set standards of behaviour and make authoritative interpretations of the law.[95] TDRMs which use mediation or other forms of impartial third parties are likely to exacerbate power imbalances between the parties and reinforce the traditional social orders

[89] International Development Law Organization, *Towards Customary Legal Empowerment* (Inception Paper 2010)

[90] World Justice Project, *Rule of Law Index | Kenya Insights* <https://worldjusticeproject.org/rule-of-law-index/country/Kenya> accessed 9 July 2023. In 2022, Kenya was ranked no.104 from 120 countries surveyed)

[91] O Fiss, 'Against Settlement' (1993) Yale LJ 1073.

[92] Ibid (n90) 1075.

[93] Ibid 1076.

[94] Ibid 1083.

[95] G Lebovits, 'Judgement Writing in Kenya and in the Common-Law World' (2009)

which shortchange vulnerable members of society. As part of its social transformation agenda, the judiciary must play a role in strengthening TDRMs through exercising firmer oversight in the beginning to support them to update or evolve their processes to meet basic due process standards.

5. Considerations for Traditional Dispute Resolution Mechanisms

5.1 Application of Customary Law

Before one can encourage the use of TDR mechanisms, it should be ascertained that they still exist and have not been subsumed by modern structures.[96] The question of available options is pertinent. Are they used because people prefer them, or simply because they have no viable option in their circumstances? In some areas like North Eastern province, TDRMs thrived perhaps because of the absence of State investment in infrastructure and administrative capacity. In some cases, communities which adopt pastoralism as a way of life make it challenging for state organs such as the judiciary to devolve justice. TDRMs are more prevalent in rural areas than urban areas suggesting a relationship between the court's geographical footprint and the existence of local solutions. Culture and customary law develop in a specific context to address problems which may have been unknown in other communities and legal cultures.

TDRMs are preferable if the parties opting for their use are aware of their rights and have chosen to exercise their use as an option. One of the motivations for their use in many rural areas is the fact that the disputants will often opt for reconciliation or restorative justice measures to ensure that they can continue to live harmoniously in the community. In other cases, parties' use of TDRMs is based on their inability to access the formal justice system and ignorance of their rights, or the desire to preserve relationships.

Some customary practices and laws have fallen out of use to reflect change and advancement in different areas of society. Dispute resolution rules are designed to deal with disputes arising from the day-to-day life of the community. They work well in communities which are relatively homogenous where members have shared values and customs. Customary law differs from community to community. The rules applicable to the substance of the dispute will largely depend on the community of the disputants. Rural-urban migration, intermarriage, religion, devolution and other forces have contributed to the creation of a more diverse society in which advocating for the use of TDRMs in some instances may result in cultural hegemony. The tension between respecting diverse cultural rules and promoting national unity through encouraging individuals and their communities to embrace shared national values must be carefully managed.

[96] Snell (n76) 123.

The judiciary will however play a key role in giving customary law norms a chance to survive into the next century by upholding their use and giving them room to evolve to match constitutional standards and values. The Court of Appeal in *Mwangi v Gachangi* [97] acknowledged that customary law does not stand still. The court stated:

> Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot, therefore, be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete.

5.2 Validity Tests

All dispute resolution methods have to meet certain basic standards. These relate to the process, the outcome and the norm used to resolve the matter. Many aspects of TDRMs would fail these tests if applied in their pure form. Article 159(3) of the Constitution provides that they should not: contravene the Bill of Rights; be repugnant to justice and morality; result in outcomes that are repugnant to justice and morality; or be inconsistent with the constitution or any written law.

a) Constitutionality and Consistence with Written Law

Customary laws which govern various communities are subordinate to the constitution and other written laws. Article 2(4) of the Constitution makes it clear that the Constitution supersedes customary law and other forms of law. Article 159(3) of the Constitution requires TDRMs to be used in a way that is consistent with the Constitution and written law.[98] The Judicature Act also limits the application of customary law where it conflicts with written law.[99] They must therefore mirror the rights and values relating to justice which are spelt out in the constitution, and conform with the rights contained therein.[100]

Several considerations should be made when encouraging parties to use TDRMs. First, are the due process standards set in the Constitution likely to be met? Should parties expect similar due process standards to those set by the Constitution? Are they entitled to them? Article 27 of the Constitution guarantees everyone "equal protection and equal benefit of the law." It also prohibits discrimination on the basis of age and gender and affirms women's right to participate in all spheres of life, including the cultural sphere. In addition, the many treaties which form part of Kenyan law[101] advocate for equality.[102] Most communities are patriarchal

[97] Civil Appeal No. 281(A) of 2003.
[98] *R v Abdulahi Noor Mohamed* [2016] eKLR.
[99] (n39) s 3(2).
[100] *Ojenge v Mashru* [2017] eKLR.
[101] Constitution (n1) art 2(5) and 2(6).
[102] For instance, Article 2 of The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) requires States to take all appropriate measures to eliminate discrimination against women; Convention on the Rights of the Child, art 2(1).

in nature resulting in many social structures, including Councils of Elders which resolve disputes being composed of men. The ability of such structures to produce fair outcomes for women and other vulnerable members of society is doubtful[103] and impeaches the fairness of processes before such bodies. Benson Muthama *et al* found that culture was a great hindrance to "gender equality in resolving conflicts using ADR mechanisms in Kapsakwony."[104] They noted that men dominated societal affairs and decision making, women "could not speak before elderly men" and married women channeled their view through their husbands. The prevailing view was that tradition would not change overnight and women would "remain under men's authority, whether they like it or not." They suggested that persons engaging in ADR should seek legal advice first to prevent the negative effects of power imbalances created by culture and tradition. Justice Ngugi argues that all justice systems are infected by patriarchy and as such Alternative Justice Systems (AJS) should not be isolated for criticism relating to gender justice.[105] Instead, gender bias should be rooted out in both. However, unlike courts which operate as a hierarchical system with self correcting and standardisation and support tools, TDRMs operate in isolation on the basis of a specific community's culture and customs. The diversity of the bench, education and training programmes conducted at the Judiciary Training Institute, Policies and Procedures developed to address specific vulnerable classes, the doctrine of precedence and the appellate process all play a role in addressing concerns regarding vulnerable classes of litigants. It is unfair to expect TDRMs to rid themselves of systemic bias without similar resources or programmes.

In addition, conflicts between customary law and statutory law will be resolved in favour of written law. For instance, in *JMK & GMI v DMK*[106] the High Court considered the status of a marriage contracted under Kamba customary law after the couple subsequently contracted a marriage under the now repealed African Christian Marriage and Divorce Act.[107] It held that the statutory marriage took precedence over the customary one. The 2010 Constitution mandated Parliament to enact a law to recognise " marriages concluded under any tradition, or system of religious, personal or family law."[108] The Marriage Act which was passed to fulfil this edict cured the problem since it now requires all marriages to be registered and provides that all marriages have the same legal status.[109] The unintended consequence is that customary marriages which are less likely to be registered than other forms of marriage will again be downgraded and adversely affect the status of families created through them.

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[103] S Oswago 'The place of Maslaha in the Kenyan Justice system – EACHRights' *EACHRights* at <https://eachrights.or.ke/the-place-of-maslaha-in-the-kenyan-justice-system/> accessed 9 July 2023.

[104] B Muthama and others, 'Gender Dynamics Determining Men and Women's involvement in Community Conflicts through Alternative Dispute Resolution (ADR) Mechanisms in Kapsokwony, Kenya' (2020) Research on Humanities and Social Sciences.

[105] International Commission of Jurists,' Customary and Informal Justice and Alternative Dispute Resolution in the East, Southern and Horn of Africa (2020) <https://www.icj.org/wp-content/uploads/2020/06/Universal-GvaForum-Kenya-Publications-Reports-Seminar-or-conference-reports-2020-ENG.pdf> accessed 10 July 2023.

[106] Civil Appeal No. 7 of 2013 (HCt Garissa).

[107] Cap 151.

[108] Constitution (n1) art45(4).

[109] Act No.4 of 2014, s 3.

Further, in matters of personal law, discriminatory treatment is to some extent tolerated in order to accommodate cultural and religious diversity. In public law matters like criminal law however, different aspects of societal order such as prevention, deterrence and retribution are taken into consideration when determining matters. TDRMs which resolve criminal law offences produce a discriminatory outcome since offenders from such communities may be treated less leniently or more harshly than those processed through the formal justice system.[110] Some goals of the criminal justice system may also be undermined.

Lastly, methods used may infringe on a person's freedom of conscience. In fact, the main challenges to the application of the TDRMs are made on the basis of Article 22 of the Constitution which allows every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. In *Mutuma v Kanuno*[111] the applicant argued that the procedures adopted by the *njuri ncheke*, including oathing, were repugnant to justice and morality and went against his Christian values. In another case, the court upheld a plaintiff's property rights after his land was sold without his consent ostensibly to raise money to compensate the family of a man he had killed.[112]

b) The Repugnancy Clause

Article 159 (3) provides that TDRMs shall not be used in a way that is repugnant to justice and morality. The repugnancy clause is also reiterated in the Judicature Act which requires courts to be "guided by" African customary law provided it is not repugnant to justice and morality.[113] During the colonial era, courts applied the British standard of justice and morality which reflected their background. In *Gwao bin Kilimo v Kisunda bin Ifuti,*[114] the court stated that the only standard of justice and morality which a British Court in Africa can apply is its own British standard. Buluma notes that the repugnancy clause "restricts the application of customary law in Kenya to the narrowest of senses."[115]

Indigenous customs were often considered to be primitive and retrogressive. At some point, customary marriages were described as "wife-purchase" and therefore not "marriage" as generally understood among civilized peoples.[116] A similar challenge still exists. In cases where issues arising from TDRMs and customary law are presented in courts, there is a likelihood that the judge, advocates and other professionals in the formal justice system will come from different ethnic and religious backgrounds and therefore have challenges appreciating or understanding

[110] Oswago (n103).
[111] Civil Suit No132 of 2011(HCt Meru).
[112] *Naibei v Cheptabut* [2016] eKLR.
[113] Cap 8 (n39) s3(2).
[114] [1938] 1 TLR (Rev) 403.
[115] B Bwire, 'Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan Example' (2019) *Societies 9*, 17 <https://doi.org/10.3390/soc9010017> accessed 4 October 2023.
[116] *Rex v Amkeyo* (1917) EALR 14; *Abdulrahmen Bin Mohamed v Regina* [1963] EA 188 (in both cases, wives who were married under customary law were allowed to testify against their husbands as prosecution witnesses

customs arising from other communities. They may therefore resort to the "British standard", or replace it with another standard which reflects their personal or professional background. In the absence of a juror or assessor system, some courts resort to sending the matter to TDRM officials and waiting for a report in order to resolve the matter. This robs the court of the opportunity to help assist in the development of standards which reflect constitutional values.

Because it involves a value judgement, a repugnancy clause is an easy route for one to use in extricating themselves from a TDRM. In the *Mutuma* case, the applicant's objections to being subjected to the *njuri ncheke* (a TDRM) were summarised thus:

> *Njuri Ncheke* applies uncouth, barbaric, repugnant, apprehensive, intimidating, risky, health periling and unchristian practices, norms and customs like black magic, curses, Kithiri oath, Nthenge oath and Muuma, an oath of receiving and swallowing saliva and a chewn piece of meat from the mouth of an elderly Njuri adherent who sniffs traditional tobacco, some of which is put in the inner side of the lower lip, which virtues the applicant has stated is unwilling to undergo. The applicant deponed that the practices are dehumanizing, emotionally stressing, traumatizing, stigmatizing and demeaning.

The court agreed that subjecting him to the *Njuri Ncheke* would result in an infringement of his constitutional rights. In *Ojenge v Mashru*[117] case, an employer enlisted the help of a witch doctor to determine which of his employees had stolen a computer. The court stated that the use of witchcraft to resolve a workplace dispute was a violation of the employee's constitutional and statutory rights and repugnant to justice and morality.

5.3 Substantial Justice

The Constitution requires substantial justice to be dispensed without procedural technicalities.[118] S.3(2) of the Judicature Act also requires courts to determine matters according to "substantial justice without undue regard to technicalities of procedure and without undue delay". In *Ombajo v Okumu,*[119] the court stated that the wording of the section "gives flexibility to the administration of justice, as courts are thus empowered to weigh all the circumstances of a case before coming to a decision, without whittling down the place of customary law in the administration of justice in Kenya." Because of the oral nature of the African customs, strict formal rules were dispensed with so that the application of the law was flexible.[120] Proceedings are conducted in the local language and matters are usually dispensed with expediently. They are accessible since they are rooted within a community. This means that it is more responsive to needs as they arise. In fact, customary law easily passes the test of legitimacy because "it springs from the people it purports to govern."[121]

[117] [2017] eKLR.
[118] Constitution (n1) art 159(2)(d).
[119] Civil Appeal No 209 of 96(1) (CA Nairobi).
[120] TW Bennet and T Vermeulen 'Codification of Customary Law' *JAL* (1980) 213.
[121] Ibid 214.

5.4 Subjects

Following the limitation on who customary law can apply to, TDRMs can only be applied to disputes from members of a community and those who are affected by its rules.[122]Article 44 of the Constitution also implies that the subjects of customary law must agree to its application. It prevents a person from compelling another person from performing, observing or undergoing any cultural practice or rite. Challenges regarding the use of the traditional processes have arisen on the basis that they conflict with one's freedom of conscience, religion, belief and opinion. Article 32(4) of the Constitution provides that no one can be compelled to "act, or engage in any act, that is contrary to the person's belief or religion." In other cases, parties who voluntarily participate in the TDRM but subsequently refuse to be bound by the outcome lengthen the path to justice because courts cannot force them to abide by the outcome.[123]

5.5 Subject Matter

TDRMs have proved useful in the resolution of some disputes relating to land. The boundary dispute in *Cheboi v Suter*[124] related to unadjudicated ancestral land held communally in accordance with customary law. With the consent of the parties who belonged to different clans, Munyao J referred the matter to the *Osis* (elders from the community who resolve disputes) for determination and marking of the boundaries. The plaintiffs objected to the decision made by the Osis and refused to be bound by it, forcing the court to hear the matter. While acknowledging that there was no law to guide the court on how to approach the matter, Munyao J stated that TDRMs had "great utility" since the matter concerned ancestral land which was held under customary law. The court found no issue with the determination made by the elders and adopted their wisdom in making its determination.

However, not all types of disputes lend themselves to resolution through TDR. Many disputes in African Traditional Society resulted from conflicts over resources. Laws and rules for resolving disputes are often developed against the backdrop of conflicts or problems which are most likely to recur. Such rules did not anticipate modern developments such as intellectual property to address situations where indigenous knowledge and culture is appropriated and commercialised without compensating the community. The expertise required for solving these and other present day problems is lacking from customary law rules.

Secondly, the State has the sole authority to deal with criminal law matters. In fact, s.3(2) of the Judicature Act provides that African customary law only applies to civil law matters. However, in *R v Mohamed Abdow Mohamed,*[125] the Director of Public Prosecutions (DPP) made an application to withdraw a murder charge against the accused. The reason given was that the accused person had settled the matter with the family of the deceased by making compensation

[122] Cap 8 (n39), s 3(2).
[123] *Kiragu v Mugambi* [2017] eKLR, [2020] eKLR.
[124] [2014] eKLR.
[125] Criminal Case No 86 of 2011 (HCt Nairobi).

in cattle, goats and ornaments as provided for under Islamic law and customs. Article 159 of the Constitution was cited as granting the court the authority to allow the application since it sanctioned the use of TDRMs to resolve matters. It was also argued that the prosecution was finding it hard to secure the participation of its witnesses in the process because it went contrary to their tradition to proceed with the matter after receiving compensation from the accused. The court allowed the application. The ruling was not however clear on which of the arguments necessitated the outcome; the inability of the prosecution to proceed with the case or the fact that the case had been dispensed with through ADR. It is therefore possible to argue that the court took an expansive interpretation of A.159 and allowed the use of TDRMs and other informal justice mechanisms to be used to dispense with the dispute. In this case, the outcome of the process facilitated reconciliation and restorative justice between persons affected by the dispute. It however trampled on many established criminal law principles and created the potential for applying different brands of justice based on the TDRMs available in different communities.

In later cases, courts have defined the limits of the application of alternative justice systems. In a similar case, *R v Abdulahi Noor Mohamed,*[126] the court criticised the approach taken in *R v Mohamed Abdow Mohamed,* arguing that the settlement, in that case, should have been reduced to a plea bargain. It pointed to the absence of policy guidelines to give direction on how to incorporate alternative justice systems in criminal law cases and highlighted the fact that the Criminal Procedure Code excludes felonies like murder from being concluded through reconciliation.[127] Courts have upheld the DPPs prosecutorial discretion and disallowed applications made by parties to terminate proceedings after they "resolve" a matter using TDRM.[128] In some cases, courts still allow TDRMs to influence outcomes such as sentencing.[129] Murder cases have been terminated upon payment of compensation under customary law.[130]Others have sanctioned the use of customary oaths to determine land rights.[131]

Human rights matters where cultural rules subordinate women and children may not be suitable for TDRMs. Many matters relating to personal law such as marriage, divorce and succession have been legislated on. The rules reflect a departure from the patriarchal positions espoused in many societies' laws with respect to rights and obligations. This variance is a conflict which is resolved in favour of the Constitution and other written law. *Rono v Rono*[132] is an example of a succession dispute where cultural values were pitted against principles of equality and non-discrimination. The distribution of the deceased's estate had favoured the sons who were allocated 30 acres each at the expense of daughters who were given smaller shares of 5 acres. The justification was that daughters would get married and move away and also that under Keiyo customary law, daughters had no right to inheritance from their father's estate.

[126] [2016] eKLR.
[127] Criminal Procedure Code, Cap 75, s176.
[128] *Republic v Nyamu* [2021] eKLR.
[129] *R v Longonyek* [2021] eKLR (Samburu customary law).
[130] *R v Kiteme* [2017] eKLR (Kamba customary law).
[131] *Runji v Ciara* [2017] eKLR.
[132] (2005) AHRLR 107 (KeCA 2005.)

The appellate court stated that Kenya had ratified a number of International and Regional legal instruments which required it to eliminate discrimination against women. In *Kananu v Baituba*[133] an objector laid claim to an estate on the basis of a finding by the *Njuri Ncheke.* The court was unable to establish a relationship between the objector and the deceased and reiterated the position that *Njuri Ncheke* or elders cannot distribute a deceased person's estate.

5.6 Codification and the Oral Nature of the Tradition

TDRMs draw on culture and customary law when resolving disputes. The fact that most African traditions were oral in nature was viewed as a problem by people outside the communities in question. It was considered an opaque veil which did not lend itself to scrutiny to establish the values espoused. Bennet and Vermeulen noted that:

> If no written records of the law can be kept, the community governed by the system of law in question is compelled to hand down its knowledge by word of mouth, from generation to generation. Memory is faulty and, if we accept that the written word suffers from ambiguity and lack of precision, how much more are these defects to be magnified by the spoken word, especially when distorted by lapse of time. That clarity and precision which are so sought after in western jurisprudence are lacking in customary law.[134]

To solve this problem "attempts with varying degrees of success were made to codify customary law." These attempts led to the flawed perception that customary law was "frozen" in time thus stifling its growth.[135] In addition, the attempt to reconcile conflicting rules or to alter outdated rules sometimes produced a code which did not accurately reflect the customary practices of a community leading to problems with the legitimacy and acceptability of such codes.[136] This approach was avoided in Kenya so as to retain its fluidity to respond to changing circumstances, and ultimately, to keep native affairs within the control of the executive as opposed to the judiciary. Codification was viewed as an undesirable limitation on the exercise of colonial administrative power. The restatement approach was used. Eugene Cotran's work in this field is commendable. Several scholars also conducted research on the customs of some communities. Bennet and Vermeulen observed that these restatements were of more value to administrators of justice than to members of the community who were schooled in their culture from a young age.[137] This method suffered from the same challenges faced by the codification approach. Unlike other sources of law, customary law is subjected to proof in court. Once a custom was proved, it could be recognised and applied in subsequent cases based on the doctrine of precedents. This also served to "crystallize" it and freeze its development to meet emerging changes.

[133] [2006] EKLR.
[134] Bennet & Vermeulen(n119).
[135] Shadle (n50).
[136] Bennet & Vermeulen (n119).
[137] Ibid.

5.7 Transparency & Accountability

The fact that the proceedings in most TDRMs are not recorded means that the values of predictability and certainty may be compromised. The absence of the record means that there is no point of reference to guide disputants and the decision-makers in future disputes. Flexibility to respond to arising situations was accorded more weight by TDRMs than "the rigid and consistent application of a doctrine of precedent."[138] The recording of court proceedings and the outcome of the process provides an extra layer of oversight since they are open for scrutiny and debate. In the absence of this, it becomes hard to hold the decision-makers to account and to reflect on whether what they are doing meets constitutional and other legal standards.

6.0 Conclusion & Recommendations

The Kenyan Constitution presents an opportunity for expanding access to justice through the use of TDRMs. Although these methods have been in use, the process of formal recognition imposes an additional layer of oversight on their application to prevent systemic abuses. Some of the challenges faced by TDRMs arise from standards set in the Constitution and other written laws as well as the manner in which they have been treated by the State since the colonial era. To harness the complementary role that can be played by TDRMs.

Should TDRMs be integrated with the formal justice system? The formal recognition of customary law has ensured the survival of some customary law norms. The requirements imposed on the application of customary law norms by way of validity tests and the proof requirements have however undermined the flexibility enjoyed by many customary systems to adapt to changes presented by society. It is also noteworthy that the recognition was with respect to the application of customary law in disputes resolved through the State's courts. It did not extend to the recognition of traditional systems used for resolving these disputes. Arguments have been made in favour of formal recognition of such systems by the State since it "can transform the position and legitimacy of traditional leaders."[139] Where such systems function, pressure on the judiciary is eased off. They should however not be linked to the State system as this "may cause leaders to lose their independence and risk them being identified with state failure." [140] The reverse is also true - discriminatory standards applied in TDRM systems which are linked to the court system can bring the judiciary into disrepute. Their autonomy from the State should therefore be preserved.

The rules regarding the recognition and enforcement of customary law norms should be re-examined with a view to encouraging their growth and evolution to incorporate present-day values and ideals such as equity, non-discrimination, fairness and inclusiveness. There is merit in injecting accountability and transparency into such mechanisms through oversight by the

[138] Ibid.
[139] J Ubink, 'Towards Customary Legal Empowerment: Inception Paper' (International Development Law Organisation, 2010) 11.
[140] Ibid 10.

courts and proactive measures such as formal training in human rights for persons involved in TDRMs. The challenge however is that some of these mechanisms are secretive in nature and almost impervious to external influence.[141] There is also the real danger that if these methods are formally linked to the State, the transference of negative values and the shortcomings on the public dispute resolution systems will take place. The institution of the chief and the corrupting effect that linkage with the State had is a good example of this.

The dearth of scholarship in TDRMs should be remedied by prioritising research into customary law systems in specific communities. Research should be conducted to establish which of these processes are still in use and where possible, efforts made to understand and document their internal working and sample outcomes examined. It is preferable to maintain the dichotomy between public dispute resolution mechanisms which the State has control over, and private dispute resolution mechanisms which individuals may opt to use. Interventions by the State should be restricted to exercising oversight so as to correct rights abuses and in providing paralegal education and training on human rights issues and other relevant laws so that their work is informed by the standards set by the people in their constitution. They must be designed and encouraged to ensure that customary law and processes "evolve" to meet societal needs. The State should also clarify the extent of authority TDRMs have.

Suggestions for reintroducing assessors to allow elders to assist judicial officers to understand the cultural context and rules in which some problems arise should be taken seriously. Alternatively, cases remitted to elders or other forms of TDRMs should be done so with clear instructions regarding basic procedural and substantive rights which may apply in particular cases. The Judiciary Training Institute could partner with other institutions to ensure that community leaders get trained on basic constitutional rights so that they serve as change agents in influencing the manner in which TDRMS evolve in their communities.

And finally, even as this opportunity for expanding access to justice is exploited, the State should never abdicate its role of providing access to justice by taking formal State institutions closer to the people. The absence of State institutions in some parts of the country has often rendered TDRMs "poor man's justice" since people will have no recourse to courts. Proper management practices should ensure that resources are optimally allocated to the core business of the institution, and that the pressure for officers to clear their dockets is balanced to ensure that alternatives where used are appropriate.

[141] Bennet and Vermeullen (note 119).

TIME FOR THE REVISION OF THE LEGAL PROFESSIONAL CODE OF CONDUCT IN KENYA?:- A Study of the Role of Legal Academia and Professional Ethics at the Law School

*Elizabeth Muli**

Abstract

The first exposure that the law student receives on what it entails to be a lawyer, their functions, and how they discharge their duties, is the legal academic. It is the legal academic who designs the curriculum, instructs, examines and ultimately determines if one has qualified to receive the Bachelor of Laws degree, the first basic requirement of the legal profession. Despite the key role played by the legal academic in teaching and modelling legal ethics and professionalism, the Code of Ethics and Professional Conduct of the Law Society of Kenya which is the primary tool of regulation of the legal profession, does not provide guidance to the legal academic as a legal professional. This paper explores legal academia's role in promoting professionalism within a law school context and seeks to propose a new approach for the enhancement of professional conduct in law schools and consequently in the legal profession.

Keywords: legal education; legal ethics; legal profession; legal training; legal academic

* LLB(University of Nairobi), LLM(University of Bristol), MSL(Stanford Law School), JSD(Stanford Law School), Advocate of the High Court of Kenya & Senior Lecturer, University of Nairobi, Faculty of Law. Contact Information: elizabeth.muli@uonbi.ac.ke

1. Introduction

How does the professionalism of legal academics impact student learning of legal ethics in the law school and consequently, the ethical conduct and standards of the legal profession? This is an important question because the first exposure that the law student receives on the requirements of a lawyer and execution of their duties is from the legal academic.[1] Most legal professionals including judges, legal practitioners in private and public sectors and academics, if asked, would likely share anecdotes about one or more stellar law teacher who inspired them during their undergraduate degree and to whom they attribute their success, knowledge and skill in their professional career, if not wholly, but certainly to a significant degree.[2] No doubt, that there would be a number of responses that would regale with descriptions of those legal academics that were infamous for their amorous tendencies, punitive marking, teaching while under the influence of alcohol or drugs, absenteeism and authoritarian model of instruction.[3] The kind of professionals that students become are shaped by the legal education they receive and their overall educational experience. It is in law school that the law student gains the knowledge, skills and attitudes that are necessary to qualify to graduate with the Bachelor of Laws Degree (LLB) which degree is the key that opens the entry into the legal profession.[4] Therefore, the importance of the professionalism of the legal academic who has the primary responsibility in the delivery of quality legal education cannot be gainsaid.

Legal education in Kenya has two pre-qualification stages. The first, is the university law school[5] where the student acquires the LLB degree and the second is at the Kenya School of Law where upon graduation from the university, the law student undertakes the post university Advocate Training Programme.[6] The objectives of the legal education offered at the two tiers may vary in order to align with the niche of a particular university but a common aim is to train future

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1 It is claimed that law professors play a vital role in moulding the members of the profession. See Donna Fossum, 'Law Professors: A Profile of the Teaching Branch of the Legal Profession' (1980) 5(3) *American Bar Foundation Research Journal* 501.

2 For example, Professor Deborah Rhode states that: "Even as a law student, it was evident to me how much I wanted to emulate her scholarly temperament." Swethaa S Ballakrishnen 'Managing Sudden Death, Grief, and Loss in Close Community: Not Your Usual Law Review Essay' (2021) *74 Stanford Law Review Online* 20; Patricia Kameri-Mbote and Collins Odote (eds), *The Gallant Professor: Essays in Honour of HWO Okoth-Ogendo* (School of Law–University of Nairobi 2017) where the late Professor Okoth Ogendo is described as the "Guru" by students. Professor Githu Muigai EGH, SC Law Professor and former Attorney General of Kenya described the late Prof. Okoth Ogendo as "a teacher who left such a deep intellectual inspiration on every serious student" and attributes his entry into legal academic career partly to the late Professor Okoth Ogendo. A search on Hein online on law student tributes to law professors brings up several articles and essays written by former students sharing about the influence that their law professors had on them during their law degree programme.

3 See Lisa G Lerman, 'First Do No Harm: Law Professor Misconduct Toward Law Students' (2006) 56(1) *Journal of Legal Education* 86, describing professional transgressions of law professors including disrespectful and abusive conduct to students, humiliation of students, modelling of negative professional values, neglect of teaching amongst others; Amia Srinivasan, 'Sex as a pedagogical failure' (2020) 129(4) *Yale Law Journal* 1100, describing consensual professor-student sex as evidence of a pedagogical failure.

4 Advocates Act, 1989, s 13(1) (a) & (b) .

5 The term 'School' and 'Faculty' shall be used interchangeably in this paper to refer to the law school context because different universities use the either term.

6 Kenya School of Law Act, 2014, ss 4(1) and 4(2)(a). The Kenya School of Law is the public legal education provider responsible for training persons to be advocates.

ethical legal professionals.[7] The oldest public university law faculty at the University of Nairobi describes its main task as 'to train lawyers for the practice of Law in its multifaceted aspects… provides intending lawyers with the knowledge of the law required in professional practice'.[8] The University of Embu School of Law which is the newest public university school of law in Kenya describes the goal of its LLB degree as 'to equip learners with relevant skills and knowledge that meet the individual and professional needs in legal education and related areas to be able to provide legal services in the Country and globally in order to stir and stimulate growth.'[9]

The commitment to the aspirational goal of quality legal education that transforms law students to ethical legal professionals is not confined to law schools in public universities. Strathmore Law School which is a private university law school has described its vision as "to be a centre renowned for excellence in legal education and research, guided by a commitment to pursue justice, to cultivate lawyers of professional competence and moral conviction, and to be the region's hub for change agents."[10] In the only institution where legal education is offered in the second tier post university, the Kenya School of Law describes its mission as "to offer quality practical training in law and other related disciplines for the professional development of lawyers".[11]

The conceptualization of legal education as the foundation based on which the law student transforms into an professional and ethical lawyer is not unique to Kenya but has gained acceptance regionally and internationally.[12] The United Nations Basic Principles on the Role of Lawyers require legal education institutions to ensure that lawyers get the right education and training and learn about the ideals and ethical responsibilities of a lawyer.[13] The University of Cape Town Faculty of Law, the oldest law school in South Africa describes its aim as '…to train the next generation of skilled legal professionals who will ensure the maintenance and strengthening of an open, free and democratic South Africa..'[14] Similarly, in Uganda, Ghana

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7 The Commission for University Education (CUE) requires Universities to indicate the niche that the University is expected to fill when it applies to be established. See the CUE Guidelines for preparing a proposal for establishment of a new university in Kenya – 2015 para. 1.4.

8 University of Nairobi, 'About Us' (University of Nairobi Faculty of Law) <https://law.uonbi.ac.ke/> accessed 15 September 2023.

9 Embu University, 'Programmes' (Embu University) <https://law.embuni.ac.ke/?page_id=52 > accessed 15 September 2023.

10 Strathmore Law School, 'About Us' (Strathmore Law School) <https://law.strathmore.edu/about-us/> accessed 15 September 2023.

11 Kenya School of Law, 'Vision' (Kenya School of Law) <https://www.ksl.ac.ke/mission-vision-and-mandate/ > accessed 15 September 2023.

12 Jackton B Ojwang and DR Salter, 'The Legal Profession in Kenya', (1990) 34(1) *Journal of African Law* 9, stating that in operational terms, the legal profession and legal education are one continuum; Jonathan Campbell, 'The Role of Law Faculties and Law Academics: Academic Education or Qualification for Practice' (2014) 25(1) *Stellenbosch Law Review*, argues that the university law faculty is responsible for providing the necessary foundational preparation for legal practice); Jerome Organ, 'Legal Education and the Legal Profession: Convergence or Divergence' (2012) 38(3) *Ohio Northern University Law Review* 1, making the point that legal education is not only a prerequisite for entering the legal profession; it also serves a variety of functions in preparing graduates for the legal services market. See Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, 'Basic Principles on the Role of Lawyers' (1990), para 9.

13 ibid

14 University of Capetown, 'Choose Law' (UCT Faculty of Law) <https://law.uct.ac.za/> accessed 15 September 2023.

and Nigeria the common goal of producing graduates who enter the profession prepared to offer legal services with professionalism and integrity is evident.[15]

It is therefore in the law school that the law student will start to form their professional identity.[16] They acquire the knowledge, skills, and values necessary to assume the role of a legal professional in society. Those responsible for training law students are thus critical players in the evolution of the legal profession. Scholars have explored the relevance of legal education, the necessity for reforms, and the issues facing legal education in terms of the professionalism. Despite the fact that the legal profession has in recent years come under public censure for the unethical conduct of its members,[17] the measures to address the unethical lawyering have largely included the development of a Code of Standards of Professional Practice and Ethical Conduct[18] to regulate the legal profession and calls for reforms in legal education.[19] Scholarly literature on the teaching of legal ethics abounds but it has focussed on interventions such as pedagogy,[20] whether to teach the legal ethics pervasively[21] or as a standalone course,[22] or through

[15] See the mission of Makerere University School of Law, 'Vision and Mission' < https://law.mak.ac.ug/mission-statement> accessed 15 September 2023; The University of Ghana School of Law describes itself as 'the School of Law of the University of Ghana is the premier centre for legal education in Ghana and continues to lead the way in preparing students for the legal profession, University of Ghana, 'School of Law' <https://law.ug.edu.gh> accessed 15 September 2023; University of Nigeria, 'Faculty of Law' (University of Nigeria Enugu Campus) <https://law.unn.edu.ng/about/history/-> accessed 15 September 2023.

[16] Eli Wald and Russell Pearce, 'Making Good Lawyers' (2012) 9 *University of St. Thomas Law Journal*, 403 contend that law schools have been involved in the development of students' professional identities both implicitly and actively.

[17] Bowry Pravin 'Legal Profession at crossroads' *(The Standard* 18 November 2015) <https://www.standardmedia.co.ke/pravin-bowry/article/2000182842/legal-profession-at-crossroads> accessed 15 September 2023, highlighting "The recent allegations in high legal quarters of advocates being conduits of corruption in courts and other registries and offices are also disturbing."; Paul Mwangi, *The Black Bar: Corruption and Political Intrigue Within Kenya's L egal Fraternity* (Oakland Media Services 2001), 96, describing the decline of the professional and ethical standards of black Kenyan lawyers; Patrick Lumumba, 'The Legal Profession and Crisis of Ethics' in Y P Ghai and J Cottrell (eds), *The Legal Profession and the New Constitutional Order in Kenya* (Strathmore University Press 2014), describing that 'What plagues the legal profession is a disease that masquerades as 'professional misconduct.'; Editorial, 'Let CJ weed out corrupt officials to boost justice' *Nation Newspaper* (Nairobi 27 January 2022) <https://nation.africa/kenya/blogs-opinion/editorials/let-cj-weed-out-corrupt-officials-to-boost-justice-3695546> accessed 15 September 2023 reporting that 'a branch of the Law Society of Kenya (LSK) has appealed to Chief Justice Martha Koome to act on the rampant graft in the Judiciary on 27 January 2022.

[18] Law Society of Kenya, 'Code of Standards of Professional Practice and Ethical Conduct' (Law Society of Kenya 2016) (COSOPPEC).

[19] See Report of The Taskforce on Legal Sector Reforms, on 25 February 2019, 10 calling on "the profession to design appropriate policy, regulatory, enforceable, and deterrence mechanisms that will strengthen self-regulation, promote the development of professional standards, and restore public trust" ; Kenya School of Law and KIPPRA, Final Report on Factors Influencing Student's Performance in the Kenyan Bar Examination and Proposed Interventions (September 2019) 7, Recommending greater innovation in legal training and improvement of quality of legal education; Task Force on the Development of a Policy and Legal Framework for Legal Education in Kenya, 'Report of the Ministerial Taskforce on the Development of a Policy and Legal Framework for Legal education in Kenya' (2005); Report of the Taskforce on the Status and Management of the Kenya School of Law (1994).

[20] Jan Jacobowitz and Scott Rogers, 'Mindful Ethics-A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility' (2014) 4 Mary's Journal on Legal Malpractice & Ethics 198, discussing the teaching of Mindful Ethics as an innovative approach to teaching legal ethics with the goal of better preparing law students to deal with the reality of practice; Muna Ndolo, 'Legal education in Zambia: Pedagogical I ssues' (1985) 35 (3) *Journal of Legal Education* 445.

[21] Alison Kehner and Mary Ann-Robinson, 'Mission: Impossible, Mission: Accomplished or Mission: Underway: A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools' (2012) 38 University of Dayton Law Review; Jerome Shestack, 'Pervasive Professionalism Must Be Part of Legal Education' (1998) 84 *American Bar Association Journal* 6.

[22] Michael Robertson and Helen Kruuse, 'Legal ethics education in South Africa: possibilities, challenges and opportunities' (2016) 32(2) South African Journal on Human Rights 344, 344, recommending that teaching of legal ethics should focus on learning outcomes or standards, on what students should be expected to learn.

clinical legal education,[23] to teach it in law schools[24] or in the Advocate Training Programme or as part of the Continuing Professional Development of the Bar Association.[25] Despite the fact that law schools aim to prepare students who will one day be ethical lawyers and it is the legal academic who designs the syllabus, teaches, examines and prepares the student to graduate, there is limited study on how their professionalism as academics and legal professionals can impact the quality of legal education and consequently the legal ethics of the legal profession.[26]

If legal education is the bedrock of forming the professional identity of a lawyer, then the role of the legal academic within the law school context is vital to the achievement of the objectives of the law schools to produce prepared graduates who are fit to enter the profession. Other factors that may impact the quality of legal education include adequacy of education resources and qualification of the academics amongst others. This paper, however, explores how the professionalism of academics may impact the professionalism of the legal profession because of the dual identity of the academics as both members of the legal profession and members of academia. The argument made is that the professionalism of legal academics who are legal professionals impacts the quality of legal education and consequently the legal ethics of the legal profession. The objective of this paper is also to contribute to the literature in the legal ethics field by evaluating the student perception of the ethics of legal academics in the law school context as an initial step and how this may inform suggestions on fostering professionalism in legal academia. Both the legal profession and the Universities have an interest in the quality of legal education and in the professionalism of their graduates. This study shall provide insights that may inform possible reforms focusing on the professionalism of the legal academic.

Section one of the paper provides a background of the Code of Ethics for Advocates in Kenya and how it regulates the legal profession including legal academics. The objective is to assess the extent to which the Code applies to legal academia and establish whether it adequately guides legal academia on the ethical dilemmas they face within the law school context. Section two analyses the impact of dual professionalism of legal academia as both legal professionals and as academic staff with regard to their ethical and professional conduct. In section three, the results of a student perception survey are analysed with the objective of establishing the level of professionalism of legal academics from the perspective of law students. The findings provide a basis for the claim that the professionalism of legal academics may impact the quality of legal education and the teaching of legal ethics in the law school and consequently, the

[23] C Anna, 'What does legal ethics teaching gain, if anything, from including a clinical component' (2015) 22 (1) International Journal of Clinical Legal Education 47; James Moliterno, 'On the future of integration between skills and ethics teaching: Clinical legal education in the Year 2010' (1996) 46(1) *Journal of Legal Education* 67.

[24] Russell Pearce, 'Legal Ethics Must Be the Heart of the Law School Curriculum Symposium: Recommitting to Teaching Legal Ethics- Shaping Our Teaching in a Changing World' (2002) 26 *Journal of the Legal Profession* 159, arguing that 'If the commitment of the legal profession and of legal academia to producing ethical lawyers is genuine, legal ethics must be the most important subject in the curriculum.'

[25] Muna Ndolo, 'Legal Education in Africa in The Era of Globalization and Structural Adjustment' (2001) 20 (3) *Penn State International Law Review* 487.

[26] William Twining , 'LETR: The Role of Academics in Legal Education and Training: 10 Theses' (2014) 48 Law Teacher 96, noting that legal professionals should be lawyers, scholars, educators and administrators ; Douglas Lang, 'The Role of Law Professors: A Critical Force in Shaping Integrity and Professionalism' (2001) 42(1) *South Texas Law Review* 509.

ethical conduct and standards of the legal profession. Section four proposes a new approach to enhancing the professionalism of legal academics within the law school context namely the reconceptualization of the university as an organizational client to the legal academic in which the student, as an integral part of the organization is deserving of quality legal services that include client care, quality teaching and role modelling. These interventions can be included in context specific practice guidelines that target legal academics as legal professionals. The Law Society of Kenya (LSK) can develop context specific ethical guidelines and develop continuing professional development programs customized for legal professionals in academia. Faculty should model professionalism for students, and ethics should be incorporated into all subjects taught in the bachelor of laws curriculum. Finally, legal academics and law students should be made aware of the dual professional status of legal academics and apply both the code of ethics for advocates and the code of ethics for university staff in the law school context.

2. Background To The Regulatory Framework And The Code Of Ethics For Legal Professionals

The crisis facing the legal profession in Kenya with regard to the falling standards of ethics and professionalism is not a recent development but one which has been topical for the last fifty years. Pheroze Nowrojee SC [27] for example described the legal profession in the 1970s and 1980s as consisting of 'corrupt prosecutors, corrupt defence lawyers, corrupt police investigators and corrupt magistrates and judges fixing cases and operating deals for their private gain, all the while still performing their sycophantic and equally corrupt public services to the executive in return for impunity and a blind eye for their profitable private manipulations of the judicial process.'[28]

The former Chief Justice Dr. Willy Mutunga during his tenure noted that 'lawyers who were amongst the most vocal champions of a new constitutional order now appear to take only timid steps to bring their practice into conformity with the high standards of conduct required by the Constitution.'[29] The media has not shielded away from exposing the soft underbelly of the unethical conduct of members of the Bar by highlighting cases of alleged bribery, mistreatment of clients and poor advocacy.[30] This has led to a loss of public trust and brought disrepute to the legal profession.[31]

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[27] Pheroze Nowrojee, Senior Counsel, is an Advocate of the High Courts of Kenya (1967).

[28] Pheroze Nowrojee, 'The Legal Profession 1963-2013: ALL This Can Happen Again – Soon' in Yash Ghaii, Jill Cottrell (eds) *The Legal Profession And The New Constitutional Order In Kenya*, (Strathmore University Press 2014) 37.

[29] Willie Mutunga, 'A New Bench-Bar Relationship: The Vision Of The 2010 Constitution Of Kenya' in Yash Ghaii, Jill Cottrell (eds) *The Legal Profession And The New Constitutional Order In Kenya* (Strathmore University Press 2014) 62.

[30] Muthoni Kamau, 'More Kenyan lawyers accused of misconduct' *Standard* (Nairobi, 2016) <https://www.standardmedia.co.ke/counties/article/2000196071/more-kenyan-lawyers-accused-of-misconduct#:~:text=The%20number%20of%20lawyers%20who,compared%20to%20158%20in%202014.> accessed 15 September 2023; Cece Siago, 'Three rogue lawyers struck off advocates' roll, 5 suspended' *Daily Nation* (Nairobi, April 18 2018) <**https://nation.africa/kenya/news/three-rogue-lawyers-struck-off-advocates-roll-5-suspended-38158?view=htmlamp>** accessed 15 September 2023, describing the misconduct of lawyers that included withholding of clients' money, failure to provide professional services and failure to keep clients informed.

[31] Pravin (n17); Ambreena Manji, 'The G rabbed S tate: Lawyers, P olitics and P ublic L and in Kenya' (2012) 50 (3) *The Journal of Modern African Studies*, on the role of the legal profession in the illegal and irregular misallocation of public land. The Afrobarometer survey conducted in November 2021 revealed that an overwhelming majority of Kenyans see corruption in the judiciary. See Afro Barometer, 'Overwhelming majority of Kenyans see corruption in the judiciary' <https://afrobarometer.org/sites/default/files/press-release/Kenya/news_release-overwhelming_majority_ojamaf_kenyans_see_corruption_in_the_judiciary-afrobarometer-bh-25nov21_.pdf> accessed 15 September 2023.

To protect the public from the vagaries of unethical lawyering, the state enacted statutes aimed at the regulation of the profession and the establishment of certain mechanisms relating to conduct of Lawyers including the Digest of Professional Conduct and Etiquette, the Advocates Complaints Commission,[32] the Disciplinary Tribunal[33] and the COSOPPEC.[34] The state and the public have a vested interest in the integrity and professionalism of the legal profession because it is lawyers who in their various roles promote, advocate and facilitate the respect for the rule of law and the pursuit of social justice.[35] The history of the legal profession in Kenya is replete with instances in which members of the legal profession fought to defend the Constitution often times at great risk to their careers in the Bar and the Bench.[36] The achievement of constitutionalism and social justice would be difficult if not impossible if the legal profession lacks integrity and professionalism, thus the need for a legal ethics framework.

The current legislation in Kenya that governs the legal profession comprises of the Constitution and statutory provisions, various statutory instruments, and guidelines issued by the Law Society of Kenya, (LSK) which serves as the regulatory body.[37] It is the responsibility of the Law Society of Kenya (LSK) to oversee the legal profession. Some of the statutory functions and objectives of the society include the following;

(1) ensure that all persons who practise law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide;[38]

(2) set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya; [39]and

(3) determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya;[40]

The regulatory role of the LSK over the standards of professional competence, professional conduct and learning within the profession illustrates the centrality of legal ethics and legal education in the development of the legal profession that plays its role in the provision of quality legal services to clients and to society.[41] In fulfilment of its mandate, the LSK developed

[32] The Advocates Complaints Commission is established under Part X of the Advocates Act .

[33] The Disciplinary Tribunal is established under Part XI of the Advocates Act.

[34] COSOPPEC(n18).

[35] This conceptualization of the role of the legal profession is not recent. See Luban, Fuller and Rhodes.

[36] Nowrojee (n28).

[37] The statutes include the Advocates Act , and the Law Society of Kenya Act, 1962 .

[38] The Law Society of Kenya Act s 4(c).

[39] ibid s 4(e).

[40] ibid s 4(f).

[41] See the Report of The Taskforce On Legal Sector Reforms, 25th February 2019 at p 8, and the earlier Report of the Ministerial Taskforce on the Development of a Policy and Legal Framework for Legal Education in Kenya, August 2005 (also known as the Muigai Report, 2005) at para 3 both noting that one of the key challenges of the Kenya legal profession is need for "legal education and training respond to rising demands for competent and professional training which is in touch with market trends and international best practices." For scholarly discourse on the link between legal education and the legal profession see also Deborah Rhode, 'Legal Ethics in Legal Education' (2009) 16 Clinical Law Review 43, claiming that legal ethics instruction in legal education can play a critical role in developing capacities for reflective judgement on professional conduct and regulation issues; HT Edwards 'The role of legal education in shaping the profession' (1998) 38(3) Journal of Legal Education; Bryant Garth 'Crises, crisis rhetoric, and competition in legal education: a sociological perspective on the (latest) crisis of the legal profession and legal education' (2013) 24 Stanford Law & Pol icy Review

the Code of Standards of Professional Practice and Ethical Conduct (COSOPPEC). In its original form, the COSOPPEC was known as the Digest of Professional Conduct and Etiquette.[42] The Digest specifically acknowledged that it "was not an exhaustive treatise" and required to be updated to take into account current regulatory concerns and trends in the practice of law.[43] Because of this, not only was the regulatory framework incomplete, but it also contained elements that were out of date due to the fact that the individual components had not been reviewed and updated. Many of its rules lacked clarity, a characteristic that discourages compliance and makes enforcement difficult. Furthermore, not all aspects of the practice of law were contemplated by the Digest.[44]

The LSK recognized the need to develop a comprehensive COSOPPEC that builds on the Digest of Professional Conduct and Etiquette to set standards for the legal profession, serve as the authoritative guide for legal practitioners, regulators, and the public in determining what is expected of a member of the legal profession and in adjudicating professional misconduct.[45] The legal profession is often self-regulated or government regulated or a combination of both.[46] Whether self-regulated or State regulated, the rationale for the regulation is that since lawyers have a monopoly in the provision of legal services, there is need for regulation to balance the self-interest of the profession with the public interest in receiving quality legal services.[47] The revised COSOPPEC is the primary instrument for self-regulation among LSK members, which articulates principles, sets standards, and provides guidance on how to apply those standards.[48] The objective of COSOPPEC is therefore to guide on the ethical conduct expected of legal professionals as they undertake their responsibilities to their clients, institutions they work for and the public.

Regulating the professional and ethical conduct of lawyers by the state or a bar association is necessary first, because they offer a specialized service that contributes to the welfare of society.[49] To safeguard the end users of the legal services from unethical legal practice, it becomes necessary to regulate the professional and ensure that the services are offered in a professional and ethical manner. A second justification for the establishment of Codes of Ethics

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[42] COSOPPEC (n 18); Law Society of Kenya, Digest of Professional Conduct and Etiquette (Law Society of Kenya as at 1st January, INTRO 2000)

[43] Code of Standards of Professional Practice and Ethical Conduct s 2.

[44] ibid.

[45] LSK Strategic Plan for 2012-2016.

[46] On discussion on benefits of self-regulation, see Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15 Oxford Journal of Legal Studies 97; Frank Stephen and Love J, 'Regulation of the Legal Profession' *Encyclopaedia of Law and Economics* (Cheltenham, Edward Elgar, Nr. 5860, 2017).

[47] Noel Semple, Russell Pearce and Renee Knake, 'A Taxonomy of Lawyer Regulation: How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England and Wales, and North America' (2013) 16(2) *Legal Ethics* 265, describing public interest theory of regulation as the purpose of regulation is to protect clients, third parties and interests other than those of legal services providers and that Self-regulation is required to protect both clients and society as a whole.

[48] Role of The LSK in regulating the profession was recognized in *R v George Maina Kariuki* where the court determined that the primary aim of the Society of Kenya is to regulate its members' activities and conduct.

[49] Noel Semple, 'Legal Services Regulation at the Crossroads' (Cheltenham, Edward Elgar Publishing, 2015) 19, observes that legal services regulators in various developed common law countries provide public interest as an explanation of why legal services need to be regulated.

is that it promotes the values and principles that define what the legal profession stands for and compliance by lawyers ensures that the reputation of the profession is retained which in turn builds public trust in the profession.[50]

There are contesting views to the two justifications on the motivations underlying the development of Code of Ethics.[51] In Kenya, however, the growing dissatisfaction with the professionalism and ethical conduct of the legal profession justifies the use of the COSOPPEC as a tool amongst other enforcement mechanisms for the promotion of professionalism, to protect clients, safeguard the reputation of the profession and protect the public interest. The Law Society Act explicitly states that an objective of the LSK is to 'protect and promote the interests of consumers of legal services and the public interest generally.' The reference to consumers of legal services aligns the Society's objectives with the Constitution of Kenya 2010 in which the right of consumers to goods and services of reasonable quality is enshrined.[52] For lawyers, this means that their clients and the citizenry have a right to quality legal services. It can be argued, therefore, that one way in which the LSK can promote the enjoyment of rights of the consumer of legal services is through setting the rules and guidelines on what constitutes professional competence, professionalism and ethical conduct which if complied with in totality would result in quality legal services.

The COSOPPEC provides for its own interpretative framework in the form of overriding values and principles that ought to guide a lawyer on what constitutes professional conduct and professional misconduct, the latter which attracts sanction for breach of the rules and standards.[53] For purposes of this research, the overriding principle that is relied upon is professionalism as the focus of the paper is to assess the impact of the professionalism of legal academics on the quality of legal education which in turn has an impact on the ethics of the legal profession. A more holistic endeavour would have applied the entire ten overriding principles as frames of analysis but because the crux of the argument is based on the role played by a particular legal professional (the legal academic) working in a specific context (the law school), it suffices to use one that is applicable in the law school context. There are two justifications for the use of the principle of professionalism as set out in COSOPPEC. First, the legal academic who is employed in a public university is a public officer and is required to observe the ethical and professional requirements of that body if they are a member of a professional body and to discharge any professional responsibilities in a professional manner.[54] Second, the legal academic who has been admitted as an advocate is a member of the legal profession and is subject to the COSOPPEC including with the principle of professionalism.

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50 COSOPPEC para 18.

51 On the pursuit of self-interest and protectionism by professions in contrast to the pursuit of public interest see Magali Larson, 'The Rise of Professionalism: A Sociological Analysis' in Stanley Aronowitz and Michael Roberts, *Class (The Anthology)* (Wiley-Blackwell 2017).

52 Constitution of Kenya, 2010 art 46(1)(a).

53 COSOPPEC para 24–25.

54 General Code Of Conduct And Ethics, Appendix Paragraph 4(2) of the Code of Conduct and Ethics for Public Officers, Public Officer Ethics Act, Chapter 183 of the Laws of Kenya, s 9, Part III

In the following section, the scope of application of COSOPPEC shall be examined to demonstrate its applicability to the legal academic as a legal professional and highlight the challenges that arise with regard to their role as a legal academic.

2.1. Scope of Application of COSOPPEC

Jurisdictions all over the world have enacted applicable statutes and codes of professional conduct and ethics to control the conduct of members of the legal profession. These standards of conduct outline what is considered ethical and unethical conduct in the practice of law. A code of ethics establishes norms of behaviour and principles to be followed by members of a profession with relation to their moral and professional obligations to one another, their clients, and society in general.[55] It is the observance of these values and principles that underpin Ethics Code which depict what constitutes professionalism of a lawyer.

In Kenya, the Advocates Act and the Law Society of Kenya Act provide the regulatory framework for the code of conduct and ethics. The COSOPPEC further sets standards that serve as a guide for legal practitioners, regulators, and the general public in setting the standards expected of members of the legal profession and adjudicating professional misconduct.[56] Both the statutes and the Code provide for the scope of application in relation to the "who" it obligates to comply and the "what" is required of an Advocate in terms of the parameters of what constitutes professional and ethical conduct. The two aspects of the scope of application require some analysis because their conceptualization impacts the extent to which the Code achieves its objective with respect to advocates generally and academics specifically.

2.2.The "Who" under the Code of Ethics.

The "who" under the Code relates to defining "who" it obligates to comply with its rules and "who" is the beneficiary of the services of an ethical legal professional.[57] In the first instance, the Code expressly promulgates that it applies to all the members of the LSK.[58] Section 7 of the Law Society of Kenya Act designates the categories of members of the Society as consisting of:

(1) Any person who has been admitted as an advocate and whose name has been entered into Roll of Advocates kept under section 16 of the Advocates Act (Cap 16);

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[55] Richard Tur 'Legal ethics"(Taylor and Francis, 2001):, Describing Code of ethics as a set of rules, principles, and standards that are often embodied in writing and applied and enforced by appropriate bar associations as a guide to lawyers' professional conduct; L Ray Patterson, 'The Function of a Code of Legal Ethics', (1981) 35(1) University of *Miami Law Review* 695 <https://repository.law.miami.edu/umlr/vol35/iss4/5> accessed 15 September 2023; Egle Dagilyte and Peter Coe 'Professionalism in higher education: important not only for lawyers' (2014) 48(1) *The Law Teacher* 33, arguing that the earlier students are exposed to professional ideals, attitudes, and skills, the higher the quality of service provided to the public by these future lawyers.

[56] COSOPPEC para 6, at p 3-4.

[57] Consideration of the beneficiary of legal services is important because the COSOPPEC asserts that it serves as an authoritative guide not just to the legal practitioner but also to the public who include the clients; COSOPPEC (n 18) para 6.

[58] ibid para 11 at p6.

(2) Any person admitted to membership under section 8 of the Act; and

(3) Any person elected as an honorary member of the Society under section 9 of the Act.

A person is a member of the LSK by virtue of having their name entered on the Roll of advocates.[59] Membership of the LSK is not dependent on holding a practicing certificate. An advocate who does not hold a practicing certificate but whose name is on the Roll of Advocates is still a member of the Society. The COSOPPEC which applies to all members of the LSK, accordingly applies to advocates who are legal practitioners by virtue of holding a practicing certificate and advocates who are non-legal practitioners.[60] The COSOPPEC in Kenya therefore has universal application over the membership of the legal profession.[61] Consequently, legal academics who have been admitted to the Roll of Advocates are therefore members of the LSK and subject to the COSOPPEC.

The other aspect of the scope of the COSOPPEC and who it applies to is the identity of the client. The client is the primary beneficiary of legal services that are provided in a professional and ethical manner.[62] A disproportionate amount of emphasis is placed on duties that an advocate owes to a client within the context of an advocate-client relationship, even though it is acknowledged that advocates have obligations to their profession, the courts and to the general public. The advocate-client relationship is further delineated as that which takes place in a traditional legal practice environment as opposed to that which takes place in non-practice related contexts. The popular conception of the client as someone who seeks the services of an advocate in order to compete in an adversarial gladiatorial contest ignores the diversity of clients and the wide range of reasons for why they may seek legal assistance.

Clients seek legal counsel to aid them in resolving their difficulties, and the way in which advocates respond to their clients' requirements, exercise their judgement and decision-making, and take action is at the heart of ethical regulation and is the essence of the profession. The question of who the client is and what the client wants is at the heart of client-centered lawyering, and it defines the scope of practice within which legal ethics can be applied . The failure of the COSOPPEC to take into account the variety of clients is another illustration of the universal application of the Code. To the extent that the LSK relies on the COSOPPEC to inform members, clients and society at large of what to expect from a legal professional,[63] the universalization of the 'thin' conceptualization of who a client is and the nature of the client-

[59] Advocates Act (n 4) s 2

[60] Because of the distinction between the two cadres of advocate, the Code goes further to expressly state that it is intended to apply to all members of the LSK whether they engage in legal practice or they do not practice; COSOPPEC (n 18), para 11.

[61] ibid para 9 at p 4.

[62] Stephen Pepper, 'Three Dichotomies in Lawyers' Ethics (with Particular Attention to the Corporation as Client)' (2015) 28(4) *Georgetown Journal of Legal Ethics* 1069, 1073, propounding that professional ethics are often understood to safeguard the consumer (client) from the powerful professional.

[63] ibid para 6 p 3, stating "the revised code would set standards for the legal profession and be the authoritative guide to legal practitioners, regulators and the public in determining what is expected of a member of the legal profession and judging professional misconduct.

advocate relationship creates a lacuna in the effective regulation of those advocates who deal with diverse clients in non-practice contexts.

Universality has its positive and negative aspects that can either strengthen or weaken the implementation of a law, rule or regulation.[64] In the case of compliance with the Code of ethics, the universal application of the code ensures that there is uniformity and equality in its application without any form of disparate or discriminatory treatment of any members. Those who support the universality of professional codes of conduct do so on the basis that there are certain values and principles that define the profession and the provision of the basic standards of conduct and ethics guaranteeing that the consumers of legal services get a uniform product; that the services are provided by qualified and competent professionals and; on the basis of equality of the consumers.[65]

The universality ideology underpinning professional ethics, has faced criticism.[66] Opponents have argued that uniform codes do not provide adequate guidance on the ethical dilemmas that face lawyers in their different practice areas.[67] Context matters. The traditional uniform code has been censured for being a "one size fit all" code that does not take into account the context and particularities of modern legal practice.[68] The refusal to shift from a conceptualization of legal practice as a small single man or woman firm largely focussed on adversarial litigation for example to accommodate diverse realities of legal practice including large law firms, cross border legal practice and in-house lawyering renders the Ethics Code outdated and not 'fit' for purpose.[69] As a result, the standard uniform ethic code presents a dilemma for lawyers when ethical concerns that occur in specialized areas of practice are not sufficiently, clearly, or at all addressed by any of the professional conduct standards.[70] Leslie Levin and Lynn Mather in their empirical study of lawyers in practice demonstrated that the economic, social, and organizational characteristics of practice environments have an impact on the lawyer decision-making on ethical dilemmas.[71] The one size fits all rules of the universal code lack the clarity necessary to offer meaningful guidance to lawyers working in diverse practice realities.[72]

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[64] David Wilkins, 'Beyond "Bleached Out" Professionalism: Defining Professional Responsibility for Real Professionals' in Deborah Rhode (ed) *Ethics in Practice: Lawyer's Roles, Responsibilities and Regulations* (Oxford University Press, 2000) 207.

[65] ibid, describing 'bleached out' professionalism whose ideology is that the group identity of the legal profession should subsume that of the identity of the individual lawyer.

[66] Nancy Rapoport, 'Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics Scholarly Works' (1998) Scholarly Works 135, arguing that a state uniform Code of Ethics does not provide adequate guidance to bankruptcy lawyers. See also Stanley Sporkin, 'The Need for Separate Codes of Professional Conduct for the Various Specialties', (1993) 7(1) *Georgetown Journal of Legal Ethics* 150, urging the establishment of separate ethics codes for corporate and securities practice)

[67] ibid at p 49.

[68] Eli Wald, 'Resizing the Rules of Professional Conduct' (2014) 27(1) *Georgetown Journal of Legal Ethics* 227.

[69] ibid

[70] Ted Schneyer, 'From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers' (1994) 35(1) *South Texas Law Review* 650 (observing that ethics rules are too general and vague to guide banking lawyers).

[71] Leslie Levin & Lynn Mather (eds), 'Epilogue', in *Lawyers In Practice: Ethical Decision Making In Context* (University of Chicago Press 2012) 369.

[72] Sporkin (n65) 149.

Certain issues that the code regulates may be difficult to interpret within a different context. There is certainly some difference for example between civil or criminal litigation and teaching which generalized rules fail in guiding conduct by the non-distinction of contexts. [73]There may be issues where the rules provide for an issue but because it is not contextual, do not achieve optimal compliance.

The arguments that oppose the application of universal or generalized codes without due regard to the context of legal professionals are pertinent when analysing the scope of the Code over legal academics with regard to two aspects: who the client is and the ethical dilemmas that they face. Under the Advocate's Act,[74] the definition of a client "includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs." This definition 'fits' the profile of those who seek legal services either as individuals, corporations or employers.

In academia, the definition applies to the University that employs the legal professional as an academic.[75] The constituent structure of the university as an institutional client includes the senate, council, administrative and academic staff and the student body. In the role of a legal professional, the academic owes professional responsibility to the university administration, their academic colleagues and to the student. The range of duties that the legal academic is required to undertake include teaching, research, advising, administrative duties and mentorship. This list is not exhaustive and may vary across different universities but it is reflective of the roles required to be played by legal academics. If these then are the key functionalities of the legal academic, then the conclusion can be reached that at least in part, the student is a primary beneficiary of the services provided by the legal academic and is therefore entitled to client care by virtue of being part of the University that employs the legal professional.

The depiction of a student as a legal services consumer is not a novel idea in the higher education sector. Viewing education as a professional service, the beneficiary of those services is the customer, the consumer and in the case of professional services the client.

Having established that the COSOPPEC applies to the legal academic who is a legal professional, unfortunately the universal application of the Code fails to provide adequate guidance to those legal professionals such as legal academics who work in non-traditional practice contexts such as law schools. In the next section, the dual professionalism of legal academics will be assessed

[73] For example, the COSOPPEC provides for the fiduciary duty of an advocate to safeguard the client's funds or property. This principle can be applied in civil matters but cannot apply in the context of the legal academic and the law student. COSOPPEC 11.

[74] Advocates Act (n4) s 2.

[75] Job advertisements for law lecturer jobs require the applicant to either be a registered member of a relevant professional body or furnish professional certificates with their applications. See for example advertisement for law lecturers by Mount Kenya University requiring registration with a relevant professional body posted on February 16, 2021, *the Lawyer*: <https://www.thelawyer.co.ke/jobs/legal-jobs-lecturers-of-law-mku-parklands-law-campus> accessed 15 September 2023.

including the challenges this status presents to the professionalism of legal academics. The aim of the analysis shall be to identify the gaps in regulation of the ethical and professional conduct of legal academics within the law school context where legal education is offered.

3. Dual Professionalism Of Legal Academics

There are approximately 17 000 active members of the LSK.[76] 285 of these legal professionals have declared that they are Academics. Data from the Commission for University Education (CUE) which is the regulator of universities reveals that there were 256 legal academics employed in public and private universities in 2019.[77] It has been established that the professional conduct and ethics of legal academics who are legal professionals are regulated by the LSK through the COSOPPEC. Further, by virtue of being academics, this cadre of legal professionals is subject to other Codes of Ethics.

Legal academics employed at public universities, for example, are public officers and are governed by the Public Officers Ethics Act, 2003, which establishes a code of conduct and ethics for public officers in general with a code of conduct and ethics for faculty at public institutions specifically.[78] In a similar fashion to the COSOPPEC, both the Public Officers Ethics Act (POE) and the Code of Conduct and Ethics require public officers to demonstrate professionalism. Under the POE Act, professionalism requires an officer to carry out his or her duties in a manner that maintains public confidence in the integrity of the office; to treat the public and fellow public officers with courtesy and respect; to the extent appropriate to the office, to seek to improve the performance standards and level of professionalism in his or her organization; and, if a member of a professional body, to adhere to the professional and ethical requirements of that body.[79]

By dint of law therefore, the legal academic is subject to dual professional rules of ethics as an academic and as a legal professional. The ethical conduct of legal academics is governed by academic and professional codes of conduct, though these documents frequently fail to explicitly address the range of dilemmas confronting them in their roles as faculty and administrators. An examination of the Code of Ethics for Staff of Public Universities (COESOPU) illustrates the discordance arising from the application of the two separate Codes of Ethics.[80]

In the preamble to the COESOPU, the objective of the general rules of conduct and ethics is to regulate the employees of the public universities so as "to maintain the integrity, dignity,

[76] The LSK has over 20000 members but only those that hold a current practis ing certificate are granted Active status: Law Society of Kenya,'Membership' <https://lsk.or.ke/membership/> accessed 15 September 2023, The number of active members and categories of practice were provided by the LSK Secretariat on 21 September, 2021.

[77] Data provided to the author by Prof. Mwenda Ntarangwi, Secretary to the Commission for University Education upon request made on Wednesday December 8, 2021.

[78] , Public Officers Ethics Act, 2003 updated in 2009 & 2016, and Subsidiary Legislation LN170/2003 Code of Ethics for Public Universities.

[79] Public Officers Ethics Act s 9.

[80] ibid

and nobility of university education."[81] Whilst this is a noble goal and legal education of law students forms part of university education, it would be stretch to extend the scope to include the maintenance of 'the integrity, dignity and nobility' of the legal profession. The regulation of the staff of public universities then is ring-fenced and does not extend to the regulation of staff as legal professionals in their ethical obligations to clients, their profession and the public at large.

The distinct boundary between the regulation of the legal academic as an academic and as a legal professional has led to the oxymoron of the delinking of legal education from the legal profession. In what has been described as "law schools and law firms moving in opposite directions"[82] the law schools focus on teaching abstract theory rather than training students to become ethical lawyers who will in future provide legal services in an ethical manner. When the legal academic enters the classroom, the only hat they wear is that of a Don, casting off their legal professional identity, mien and values outside the door. The obligations of client care as espoused in COSOPPEC mean naught in the classroom. Rather the focus is on teaching, setting and marking exams, supervising research.[83] This is hardly surprising when the COESOPU explicitly regulates the conduct of academics with respect to these roles of the academic.

The performance appraisal criteria in some universities similarly prioritize the quantitative aspects of teaching, research, supervision, community service and administrative duties. The more courses you teach, the higher the number of students supervised, papers published, conferences attended and administrative roles undertaken are what determine if you have performed well. Qualitative indicators such as timeliness in class attendance and marking, timely communication on queries, quality of teaching, civility and respect towards students, mentorship and role modelling are not measured. Yet it is these qualitative aspects of the role of academics that most mirror the obligations relating to client care for the legal professional. The legal academic who is a legal professional finds he or herself in a conundrum of having obligations as an academic to teach and research that are unrelated to the professional responsibility to demonstrate competence, diligence and client care as a legal professional.

The challenge that dual professionalism and dual regulation presents with regard to the legal academic is twofold. First, the legal professional who is an academic remains unregulated as a legal professional in the law school context. Secondly, the COESOPU, while recognizing that some members of staff like lawyers may be members of professional bodies, leaves the regulation of their conduct in that role to the professional code of ethics. COESOPU does not provide any guidance on how academic staff who are professionals should conduct themselves beyond the reference to compliance with COSOPPEC in the case of lawyers. As we have seen, the COSOPPEC is a universal instrument of regulation of the profession as a whole and is therefore inadequate in guiding the legal academic on ethical dilemmas arising within the law school context.

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[81] Code of Ethics for Public Universities(n78) 167.

[82] Harry Edwards, 'The Growing Disjunction between Legal Education and the Legal Profession' (1992) 91 *Michigan Law Review* 34.

[83] Code of Conduct and Ethics For Public Universities(COESOPU), Public Officers Ethics Act, 2003, Part II, s 6.

The following part will examine students' perceptions of legal academics' professionalism, as they are the major consumers of this cadre of legal professionals' services within the law school setting. The purpose is to gain a helicopter view of those components of academic professionalism and ethics that may have an effect on the quality of legal education, which in turn has an effect on the quality of graduates entering the legal profession.

4. Student Perception Of The Professionalism Of Legal Academics

The right to education encompasses the right to quality education.[84] Therefore there must be standards to be met by those institutions and their staff which set out to impart knowledge to students. The standards generally relate to the curriculum itself, the requisite infrastructure and the academic staff who are entrusted with teaching the law students.[85] Due to the fact that law students are the recipients of legal education at the university law school, they are an excellent place to begin developing an understanding of the professionalism of legal academics. Thus, the study sought to ascertain students' impressions of their instructors' ethical standards. The premise is that legal academics' ethical behaviour is critical to ensuring the quality of legal education and, consequently, to the formation of an ethical legal profession.

4.1. Method

The survey was conducted at a large public university law school and administered to undergraduate students across the four-year cohorts of the Bachelor of Laws (LLB) degree programme.[86] Participation was open to all students. The survey tool received 241 completed replies. The responses of the students did not differ considerably by academic year, and the objective was not to determine differences by age, sex, ethnic origin, or race, but rather by completion of the degree program required for entry into the legal profession. Additional research is necessary to determine the effect of group qualities on student perception. The study had limitations in that it evaluated students at a single public university's law school, and thus the findings may not be indicative of students at other public and private colleges. Nevertheless, to the extent that the Faculty has the largest number of legal academics on staff in Kenya whom are regulated both under the COSOPPEC and COCEPU as well as the largest number of students who enrol in the Advocate Training programme after graduation, the findings shall suffice for purposes of providing a helicopter view of law students' perceptions on the professionalism of legal academics.

The competency and diligence of legal academics, as well as their behavior toward their students, were studied as specific areas of professional and ethical conduct. When evaluating

[84] SDG 4 for example provides for quality education which aims to "ensure inclusive and equitable quality education and promote lifelong learning opportunities for all." UNGA 'Resolution adopted by the UNGA on 25 September 2015 Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1<https://sdgs.un.org/2030agenda> accessed 15 September 2023.

[85] Commission for University Education, 'Standards and Guidelines for University Academic Programmes' (Commission for UniversityEducation)<https://www.cue.or.ke/index.php?option=com_phocadownload&view=category&id=16:standards-and-guidelines&Itemid=494> accessed 15 September 2023.

[86] Survey was administered to the law students at the University of Nairobi Faculty of Law on 26 October 2021.

the professional competence of legal lecturers, qualitative rather than quantitative criteria were used to assess the quality and style of instruction, the academic's preparation for lectures, the timely communication of exam results, and the respect for academic freedom by allowing for differing points of view. In terms of ethical behavior, the students responded to questions pertaining to the treatment of students with respect and civility, the occurrence of sexual relationships between students and lecturers, the keeping of class time, the occurrence of exam leakage by lecturers, and the accessibility of students for consultation with faculty. Also included in the survey was the issue of whether or not students consider their lecturers to be role models and mentors. Despite the fact that these parameters are by no means exhaustive, they do provide a viable sample of components of professionalism and ethical conduct that are required of advocates under the SOPAEC and which can be used to determine the extent to which compliance exists within the context of a legal education institution.

4.2.Results

a. Respect and Civility

Approximately 50% of the students state that lecturers treated them with respect and civility. 23% were ambivalent neither agreeing or disagreeing while 25% responded that they disagree that they are treated with respect and civility. Both the Code of Ethics for Advocates[87] and the Code for Public University Staff require the legal academic to treat their client and public respectively with courtesy and respect.[88] Student stress, compromised learning, strained interpersonal ties, and a toxic learning environment are all consequences of academic incivility.[89] With an admission by 25% of the respondents that they are not treated with respect and civility, this is a significant breach of both Codes of Conduct and Ethics and necessitating interventions to address the cases of non-compliance and develop a culture of civility in the law school environment.

b. Quality of Teaching

The students were asked to provide their assessment of the quality of teaching provided to them. A majority of the students stated that they receive neither high nor low quality (39.51%). The positive responses (those stating high quality education) account for approximately 33%, while the negative responses (those stating low quality education) account for approximately 26%. Further the students were asked to rate the preparedness of academics for their lectures on a scale between 1 and 100. The results were an average number of 59. Therefore, the students believe that legal academics are mostly prepared for their lectures. The students were then asked if lecturers furthered any ideology in their teaching. The majority stated that it occurs sometimes (36.36%), then rarely (27.27%) or never (26.03%). On the issue of authoritarian

[87] COSOPPEC para 57 26.

[88] The Code Of Conduct And Ethics For Public Universities Part III Section 9(b) of the General Code of Conduct and Ethics 172.

[89] Cynthia Clark, Danh Nguyen and Celestina Barbosa-Leiker, 'Student Perceptions of Stress, C oping, Relationships, and Academic Civility: a Longitudinal Study' (2014) 39(4) *Nurse Educator* 170.

and repressive teaching, most students stated that they did not experience authoritarian and repressive teaching (50.41%). 81.89% of students responded that they are allowed to hold and voice diverse opinions different from that of their lecturer.

c. Timeliness, Availability and Accessibility of lecturers

The students were then asked if lecturers were available and accessible to students for consultation and supervision. A majority of the students chose to remain neutral (31.69%). However, it can be said that more students are of the opinion that lecturers are not available and accessible for these tasks (≈44%) while a lower number state that they are available and accessible (≈22%). The other question asked was whether classes start late or on time. A majority of the students stated that the classes start on time (60.08%) while 34.57% state that classes start late. The students were then asked whether lecturers send timely communication on classes and queries on exam marks. Most students disagreed (≈45%), stating that lecturers do not send timely communication, while a smaller number stated that lecturers did in fact send timely communication (≈32%).

d. Sexual Relationships between Legal Academics and Students

The survey then asked if the students are aware of any sexual relationships between students and faculty. A large majority stated in the negative (95.44%), that they are not aware.

e. Role Models and Mentorship

The students were asked whether they view lecturers as role models in the legal profession and 66.26% confirmed that they do. On mentorship, 77.87% of students stated that they have not been mentored by a legal academic.

f. Ethics

95.06% of the students were unaware of instances of exam leakage by legal academics. In response to whether they have been taught legal ethics as a part of any course at their school, the majority of students stated that they had not been taught legal ethics (66.80%).

4.3. Analysis

From the findings gathered, it is possible to analyze the connection between the responses given and the objectives of the survey. In analyzing the responses given, they were placed into two categories: professional standards and ethical standards. Professional standards would include respect and civility, teaching quality, timeliness of classes and communication, availability and accessibility, open-mindedness, and having open discussion. Ethical standards would account for sexual relationships, being role models, mentorship, exam leakage and ethics courses.

The University of Nairobi Service Charter considers students as clients.[90] By extension this would mean that in their capacity as a faculty of the university, law lecturers are to treat students as clients of theirs as well. Taking this into consideration, it can be implied that legal academics

as legal professionals and members of the LSK, are to apply the Code of Standards by treating students as their clients. This will be the premise informing the analysis of the data collected. The professional standards specified in this survey are provided in the LSK Standards of Professional Practice and Ethical Conduct (SOPPEC).91 As part of client care, it is considered to be professional misconduct if a legal professional including legal academics who is a member of the LSK to treat a client or student with disrespect and incivility.[92] The provision of quality teaching and instruction,[93] demonstration of timeliness in classes and in communication to students,[94] being available and accessible to student-clients[95] are manifestations of the compliance with the SOPPEC in the unique context of the law school environment. Failing to adhere to these standards would amount to professional misconduct.[96]

Some issues that were canvassed in the survey because they are a key role of an academic such as respect for academic freedom and diversity of opinion did not 'fit' within the ambit of the COSOPPEC unless one relies on the stipulation of the Code that it is not exhaustive in its enumeration of what constitutes professional and ethical conduct.[97] The respect for diversity of opinion could then be deemed to be a component of the treatment of clients with respect and civility and a part of what constitutes client care.[98] What is clear is that the universal character of the Code and standards and their pre-occupation with traditional legal practice creates ambiguity at best and no guidance at worst to those legal professionals working in the academic environment. Even with the consideration of the Code of Ethics for University Staff in view of the dual professionalism of legal academics, there remains a gap in the regulation of the professionalism of the legal academic as a legal professional as the Code steers clear of that which it leaves to the professional codes of ethics.

Due to the great number of students that the lecturer has to pay attention to, especially in public law faculties, it may be impossible to assure every student proper treatment. So, it is only to be expected that there may be a percentage of students that do not receive proper treatment. It is worrying however that the percentage of these students almost always exceeds a quarter of the sample size. It is even more worrying that there are areas where most students are not receiving treatment as per the professional standards required for law lecturers. Law lecturers failed to be available and accessible to their student-clients and to provide timely communication to the majority of their students.

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[90] University of Nairobi, 'University of Nairobi Customer Service Delivery Charter' (University of Nairobi, 2018) 7 <https://uonbi.ac.ke/sites/default/files/UoN%20Revised%20Customer%20Service%20Delivery%20Charter%202018.pdf > accessed 15 September 2023 .

[91] COSOPPEC .

[92] ibid at 27 SOPPEC 3 para 58(b).

[93] ibid at 23 SOPPEC 3 para 45.

[94] ibid at 25 SOPPEC 3 para 53.

[95] ibid at 26 COSOPPEC 3 para 53, 58(b).

[96] ibid at 26-27 COSOPPEC para 58(a)((b) and (e).

[97] ibid at 6-7 paragraph 12 and 17 (stating that "the Code however does no more than set minimum benchmarks for professional practice and ethical conduct… It is not the last word on the conduct expected of a member of the Society.")

[98] ibid SOPPEC 3 para 57 and 58.

Of equal importance is that in the areas where a majority of the students would state that the lecturers adhered to their professional responsibilities, there is a significant number of students that disagree. In some areas more than a third of the students receive improper treatment. Almost 50% of the sample size have encountered authoritarian and repressive teaching. This reflects poorly on law lecturers as legal practitioners and members of the LSK.

The ethical standards are not directly provided by the Code of Standards provided by the LSK. However, there are numerous implications to having sexual relations with students, failing to be role models and mentoring students as well as facilitating exam leakage.

Related to this and more worrying is that almost 80% of the sample students have not been mentored by lecturers. A study done in Canada found that mentorship is vital to a student's academic and future professional life.[99] It found that most survey participants found it significantly challenging to find mentors without some personal connection.[100] It also found that despite a significant number of law students being women, they struggle most to find mentors. The university involved in the study already had a program in place despite these challenges. If the barriers given by the students in this study would be the same as those Kenyan law students could voice, it is no surprise that they are unable to access mentors, especially with no programme in place to assist.

Exam malpractice manifested in exam leakage is another issue facing universities in Kenya in general.[101] It is admirable that only 3% of the sample students reported awareness of exam leakage by a lecturer. It may be unclear whether this leakage may have been accidental or purposeful. However, the greater number of responses stating no exam leakage would show that lecturers mostly do not engage in exam malpractices. This would mean that despite the small presence of possible exam malpractice, students would not likely rely on lecturers to leak exams.

The final aspect to consider is if the students have been taught legal ethics as a part of a course in the school. The majority have not. This is an important data point as it establishes the foundation on which the students based their previous responses. Did they understand the ethical responsibilities of a lawyer as they answered the survey questions? From this particular survey question, it can be inferred that the students used the conventional understanding of ethics. Legal ethics itself is significantly different from conventional ethical concepts, and is itself in need of development.[102] Students need to learn more about legal ethics in order to prevent ethical violations from occurring once they enter the profession.

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[99] Suzanne Bouclin, 'Marginalized Law Students and Mentorship' (2017) 48(2) Ottawa Law Review 357.

[100] ibid 379.

[101] Stephen Akaranga and Jude Ongong, The Phenomenon of Examination Malpractice an Example of Nairobi and Kenyatta Universities (University of Nairobi, 2013).

[102] Alexander Guerrero, 'Lawyers, Context, and Legitimacy: A New Theory of Legal Ethics' (2012) 25 *Georgetown Journal of Legal Ethics* 107.

Despite students viewing their lecturers as role models of the legal profession, there are indications that there is unprofessional and unethical conduct that would if the legal academic was subject to the COSOPPEC, they would be subject to disciplinary proceedings or entitle the student to make a complaint to the Advocates Commission.[103]

The student perceptions indicate that the quality of legal education is affected by the professionalism of the legal academic with regard to the qualitative elements of teaching, assessing and marking exams. On matters relating to role modelling and the teaching of ethics, there is a need to address these. In the next part, possible interventions shall be recommended.

5. Recommendations

5.1. The Legal Professionalism of Legal academics.

The student perception survey revealed that while law students do view their lecturers as role models of legal professionals, they have observed instances of unethical and unprofessional conduct with respect to the qualitative aspects of undertaking their responsibilities. While the survey may not be sufficiently representative, the results are nonetheless of interest. They reveal the need to explore ways of improving the professionalism of legal academics in view of the crucial role played by legal academics in legal education.

A possible cause of the unethical conduct is the lack of acceptance by law academics of their dual identities as both legal professionals and law academics within the law school context. A second possible cause is the lack of guidance offered by the current regulatory framework on the duty of care owed by legal professionals working in academia as espoused in the universalist COSOPPEC. There is limited scholarship on student perception on the professionalism of legal academics and legal education generally in Kenya. The gap between professionalism of legal academics and quality legal education needs to be closed, if the outcome of an ethical legal profession is to be achieved. In this part, some possible interventions are considered that may promote professionalism and ethical conduct in law schools.

5.2.Guidelines on the Ethics and conduct of Legal Academics.

It is a truism that the legal profession has never been more diversified both in terms of specializations of practice but also with regard to the personal identity of lawyers. In the first instance, legal academics must embrace the conceptualization of themselves as lawyers even when they are in the law school context teaching and undertaking research. The recognition by LSK of law teaching as a specialized area of practice would contribute to the self-understanding of the legal academic as a legal professional who is bound by the professional rules of conduct and ethics.

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[103] Law Society of Kenya Act (n 36) s 53(4). The Advocates Complaints Commission is under a duty to. Receive and investigate a complaint from any person regarding the conduct of an advocate.

An obvious start would be the development of guidelines on the conduct and ethics that are specific to law academics. The question is which body would issue the guidelines? There is no association of law schools in Kenya similar to the American Association of Law Schools (AALS) that developed guidelines on conduct and ethics specific to legal academics.[104] In America, the AALS saw the need for a code of standards for law professors and came up with guidelines in its "Statement of Good Practices."[105] The statement provides a set of guidelines that law professors are expected to adhere to. It recognizes that law professors are both lawyers and professors and that they have added responsibilities to their students due to the dignity and image of the legal profession. The Legal Education Board of Philippines provides a specialized code of ethics for law professors as well. It recognises the multidisciplinary role of a law lecturer in training future lawyers.[106] In South Africa, there is the South African Law Deans Association (SALDA) which could potentially issue such contextual guidelines.[107] Perhaps such an association can be formed in Kenya but until then, the only regulatory mechanism remains the LSK. It is in the interests of the LSK to provide specific guidelines that inform the compliance with the principles and values of the COSOPPEC within the academic context.[108]

In view of the crucial role played by legal education in the development of an ethical legal professional and the role of the legal academic in the delivery of that legal education, the LSK should therefore prioritize the de-universalization of the COSOPPEC. It can do this, first, by recognizing law teaching as a 'community of practice' distinct from litigation, in-house lawyering or public service legal practice. In the law school context, the client, the norms, culture, social and economic factors vary from those in other contexts and have an impact on how the law academic understands and interprets the professional rules of conduct. Second, by developing guidelines for legal academics who are its members similar to those that have been developed with regard to the enhancement of Practice For Young Lawyers[109] and the guidelines on the application of the proceeds of crime and anti-money laundering Act,[110] would provide context relevant guidance to its members on their professional and ethical responsibilities to law

[104] The AALS was formed with the objective of upholding and advancing excellence in legal education by promoting the core values of excellence in teaching and scholarship, academic freedom, and diversity while seeking to improve the legal profession and foster justice. See Association of American Law Schols, 'About AALS' <https://www.aals.org/> accessed 15 September 2023.

[105] *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities* (American Association of Law Schools, 1989) <https://www.aals.org/members/other-member-services/aals-statements/ethics > accessed 8 October 2021 .

[106] *Ethical Standards for Law Professors* (Legal Education Board of Philippines, 2013) ss 1–4.

[107] The SALDA makes statements on issues relating to legal education in South Africa. See for example the SALDA statement on LLB Accreditation issued in November 2017 <http://www.law.uct.ac.za/sites/default/files/image_tool/images/99/news/SALDA%20CommunicationNov17.pdf> ; South Africa Law Deans' Association (SALDA) statement on continuing gender-based violence of September 3, 2021 <https://www.up.ac.za/faculty-of-law/news/post_3013758-south-africa-law-deans-association-salda-statement-on-continuing-gender-based-violence> accessed 15 September 2023.

[108] J Campbell, 'The Role of Law Faculties and Law Academics: Academic Education or Qualification for Practice' (2014) 25(1) *Stellenbosch Law Review* 20, observing that that the legal profession has a vested interest in legal education as it serves as the 'gateway to practice and graduate preparedness.'

[109] LSK Nairobi Branch Guidelines for the Enhancement of Practice for Young Lawyers: <https://www.nairobilaw.or.ke/download/lsk-nairobi-branch-guidelines-for-the-enhancement-of-practice-for-young-lawyers/> accessed 15 September 2023.

[110] The Law Society of Kenya, 'Anti-Money Laundering Guidance For Legal Practitioners' <https://lsk.or.ke/Downloads/LSK%20AML-CFT%20Guidelines%20-%20Draft%20MWB%20FINAL%20Rev%20Clean.pdf> accessed 15 September 2023.

students and the legal profession generally. The uncertainty that the generalized rules impress upon lawyers, purporting to provide autonomy, leaves lawyers at risk of violating the same rules due to an ethical dilemma not properly provided for in the code.[111] Context matters.[112] The role of a lawyer should not only be viewed in the context of client representation in traditional legal practice.[113]

The guidelines can provide for the ethical conduct of the legal academic with regard to mentoring, role modelling, teaching, timeliness, civility and respect, professional competence and decorum. The development and application of the guidelines including training on the same would create a culture where the law academic aligns their conduct with their dual professional identities.

5.3.Continuing Professional Development for Legal Academics.

Secondly, the LSK can introduce Continuing Professional Development (CPD) ethics courses that address the ethical dilemmas faced by legal academics in the law school environment. CPD is widely recognized as a key vehicle through which professional bodies can support their members to gain the knowledge and skills necessary to promote professional competence and experience that responds to the dynamic changes occurring in society. Through the CPD courses, the legal academic can begin to develop an understanding of their role in imbuing ethics in law students through their own professional conduct and ethics.

5.4.Evaluation of Qualitative Aspects of Teaching in Academic Staff Appraisals.

At the law school level, there's need for academic staff appraisals to go beyond the quantitative measure of academic duties and responsibilities in teaching and research and include appraisals on compliance with ethical rules and guidelines. Because they are viewed by law students as role models, legal academics should receive training on mentorship and programmes put in place that ensure that the mentorship is effective and meaningful to both the law student and legal academic.

Qualitative appraisals of academic staff could take the approach of qualitative research. Gerald Hess identifies four main types of qualitative research relevant to legal education: Phenomenology, ethnography, case study and grounded theory.[114] These factors, when applied to a qualitative exploit of a lecturer's performance, give adequate and appropriate context to their academic duties, improve their compliance with ethical rules and guidelines and more importantly, contribute greatly to a university's delivery of service. A well-formed appraisal

[111] Bruce Green, 'Reflections on the Ethics of Legal Academics: Law Schools as MDPs; or, Should Law Professors Practice What They Teach Symposium: Ethics of Law Professors' (2001) 25 *South Texas Law Review* 15.
[112] Rapoport (n 65) 52; Alice Woolley, 'Context, Meaning and Morality in the Life of the Lawyer' (2014) 17(1) *Legal Ethics* 1; Guerrero (n 99).
[113] Wilkins (n 63) 470.
[114] Gerald Hess, 'Qualitative Research on Legal Education: Studying Outstanding Law Teachers' (2013) 51(4) *Alberta Law Review* 925.

system further improves the motivation of the academic staff, when compensation is balanced by identifiable quality service.[115]

This paper has avoided focusing on the teaching of ethics courses because the objective was to explore the impact of the professionalism of legal academics. Nonetheless, beyond the classroom, where the legal academic can teach ethics either pervasively or in a specific ethics course, it is proposed that legal aid clinics would provide an avenue for legal academics who are practitioners to work with, model and teach legal ethics to law students. More law schools should offer clinical legal education in their LLB Curriculum. Multiple scholars state that clinical education is the best approach to teaching legal ethics as it presents real life problems with real clients.[116] However, clinical education cannot exist on its own, and should be utilized in conjunction with other methods of ethics instruction and experiential learning.[117]

Legal academics who are legal professionals teach as well as offer their services in legal practice. From a university standpoint, having legal academics who have experience in practice, is an ideal combination that ensures that students get the benefit of learning from legal scholars whose teaching is infused with the requisites of legal practice. Ideally the student who has gone through the hybrid legal education is likely to graduate ready to join the profession. The converse of this ideal, is where the students suffer learning from legal academics who prioritize their legal practice over legal education. To that extent, they are inaccessible due to their students because of constraints in time as they juggle what are basically two 'jobs.'

It is my argument that the LSK provides guidelines for a broader range of legal careers and legal practice. The most apparent field that has long been disregarded is the position of a law lecturer. The guiding mechanism of a possible specialized code of ethics for law lecturers in Kenyan law schools, would obviously be the prevailing Code of Conduct provided by the LSK. The overriding principles would form a firm basis on which to begin the formulation process.[118] From these principles, the ethical code would be applied to the unique situations and contexts of legal education. This is in line with the duty of the LSK to ensure professional standards are maintained in legal education.[119]

A good place to start is in legal academia. Since it has been shown that students learn ethics through, among other ways, mentorship,[120] it is important to provide a standard to which legal

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[115] Kulno Turk, 'Performance Appraisal and the Compensation of Academic Staff in the University of Tartu' (2008) 3(1) *Baltic Journal of Management* 40.

[116] Deborah Rhode, 'Teaching Legal Ethics' (2007) 51 1052; Richard Wilson, 'Training for Justice: The Global Reach of Clinical Legal Education' (2004) 22(3) *Penn State International Law Review* 421, 424.

[117] Deborah Rhode, 'Ethics by the Pervasive Method' (1992) 42(1) Journal of Legal Education 31; Susan Burns, 'Teaching Legal Ethics' (1993) 4(1) *Legal Education Review* 141; Michael Robertson, 'Providing Ethics Learning Opportunities throughout the Legal Curriculum' (2009) 12(1) *Legal Ethics* 59, 73.

[118] Fred Zacharias, 'Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics' (1993) 69 *Notre Dame Law Review* 223, 225.

[119] Law Society of Kenya Act s 4(e) and (f).

[120] Margaret Castles, 'Challenges to the Academy: Reflections on the Teaching of Legal Ethics in Australia' (2001) 12(2) *Legal Education Review* 1.

academics are to hold themselves. Law lecturers make the same professional judgments in their work as academics as they do as practicing lawyers.[121] Similar, though non-congruent ethical dilemmas face them that exist in an entirely different context, carrying with them different meaning to both lecturer and student.[122] As legal education progresses toward more practical teaching, the need for a standard of ethics grows.

All things considered, there are barriers to actualizing these specific codes of ethics. As noted by scholars, codes of conduct differ from legislation in the discretion they give to lawyers.[123] Creating specific codes to apply to different contexts, risks robbing lawyers of this autonomy. Together with this is the view that ethical codes of conduct only minimally direct the conduct of a lawyer[124] and that it would be impossible to begin applying them to every possible context.[125] Lastly, the greater the variety of ethical codes applicable to overlapping disciplines, the greater the risk of the codes themselves overlapping and making it more difficult for lawyers to make necessary choices.[126]

6. Conclusion

Law professors are in the midst of a serious crisis of identity as the academic discipline of law undergoes a radical shift.[127] Legal academics are in a constant battle to find a way to balance their academic and lawyer identities. Their dual professionalism roles of legal academics as we have reviewed in part II of the paper and the regulation of the Codes of Conduct and Ethics of the LSK on one hand and that of Public Universities on the other provide inadequate guidance to legal academics as professionals in the law school context. Failure to address these gaps in regulation and the ensuing identity crisis for the legal academic poses a risk of an unwanted outcome of low quality of legal education. While there are very apparent barriers to creating specialized codes for the less popularized disciplines of legal practice, it is clear that there is still significance in doing so. Especially in academia, it not only improves the quality of education, it may also improves the relationship between legal academic and student. This it does by carrying the benefits of the generalized code of ethics and applying it to the specific context of university education.

[121] Robert Kuehn and Peter 'Joy, Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility' (2009) 59 *Journal of Legal Education* 97.

[122] Woolley (n 109).

[123] Nancy Moore, 'The Complexities of Lawyer Ethics Code Drafting: The Contributions of Professor Fred Zacharias' (2011) 48(1) *San Diego Law Review* 335, 340,343; Zacharias (n 111) 238; Green (n108) 547.

[124] Moore (n 116) 345; Fred Zacharias, 'The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation' (2002) 44 *Arizona Law Review* 858.

[125] Green (n 108) 548.

[126] Rapoport (n 66) 50.

[127] Stephen Feldman, 'The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)' (2004) 5(1) *Journal of Legal Education* 471.

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