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ASSESSING CIVIL SOCIETY AND PRIVATE SECTOR ACCESS TO THE EAST AFRICAN COMMUNITY: Opportunities, Challenges and Policies

Nellys Koyoo[1*]

Abstract

Concerns persist over the restrictive operating environment for civil society organisations (CSOs) globally and within the East African Community (EAC). The 2024 State of Civil Society report by the World Alliance for Citizen Participation highlights worsening conditions. CSOs face financial constraints, legislative restrictions, and threats to civic leaders, exacerbated by multiple crises.[2] In the EAC region, CSOs encounter barriers ranging from overt threats against civic leaders to restrictive policies and dwindling funding. Resolutions from the third and fourth annual EAC Secretary General's Forum have acknowledged these challenges and called for improved engagement. On this basis, this paper critically examines the operational landscape for CSOs across EAC partner states, identifying trends of shrinking civic space and assessing the extent of accessibility. The findings reveal a persistent decline in civic freedoms, varying by country, with restrictive legislation and financial precarity emerging as key obstacles. Despite these challenges, opportunities exist through policy reforms and regional advocacy efforts that can enhance CSO participation in EAC integration processes.

Keywords: *Civil Society Organizations, East African Community, Community, Partner States, Law of Treaties*

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2 'State of Civil Society Report 2024' (*CIVICUS Global Alliance*12 March 2024) <https://www.civicus.org/index.php/state-of-civil-society-report-2024?utm_source=chatgpt.com> accessed 2 February 2025.

1.0 Introduction

The EAC Council of Ministers, in its 26th Meeting, adopted a consultative Dialogue Framework to oversee the integration of civil societies, the private sector, and interest groups into the Community.[3] The framework safeguards the ongoing discussions at the national and regional levels between the Community, Civil Society Organizations (CSOs), Business Sector Organizations, and other Interest Groups. Forming multi-stakeholder partnerships guarantees that the integration process involves the population of EAC States.[4]

The EAC Treaty emphasises improving cooperation between corporate and professional bodies and creating an enabling environment for CSOs, the private sector, and other interest groups. [5] According to the EAC Treaty, EAC development and regional integration must be participatory and people-centred.[6] Many essential players, including women, young people, the corporate sector, and civil society, must participate. For these stakeholders to succeed, governments must establish an enabling climate.

The EACJ is quite actively involved in interpreting the Community's Treaty. In East African Law Society and 4 Others v The Attorney General of the Republic of Kenya and 3 Others, the EACJ noted that the Community is a market—and people-driven partnership; hence, those outside the Summit must consult with and participate in other Community organs.[7] The EACJ went on to state that the previous community collapsed partly due to the weak involvement of the CSOs and private sector. Therefore, reading the Treaty to permit irregular amendments at the whim of officials without any stakeholder engagement would be a surefire way to return to that state of affairs. The case emphasises the need for active engagement and consultation with other community organs outside of the Summit, thereby reaffirming the Community's framework on inclusion and participation.

3 Tomasz Milej, 'East African Community (EAC) – Inspiring Constitutional Change by Promoting Constitutionalism?' (2023) 20 International Organizations Law Review 160 <https://brill.com/view/journals/iolr/20/2/article-p160_003.xml> accessed 27 May 2024.

4 Mwapachu, J. V. "EAC: Past, present and future." The East African Community (2010).

5 EAC Treaty 2000, Art 127,128 and 129.

6 Petro Protas and Theophil Romward, 'Reflections on ' People Centered Principle ' in the East African Community: The Current Legal Controversy' (2015) 42 The Eastern African Law Review 1 <https://journals.udsm.ac.tz/index.php/ealr/article/view/1705> accessed 2 February 2025.

7 EACJ Ref. No. 3 of 2007.

Enhancing civil society has grown to be crucial to the development of cooperation.[8] It becomes increasingly difficult for development cooperation to pinpoint the goals, opportunities, and dangers of supporting civil society groups as democracy, human rights, and good governance become essential criteria. It is still undervalued how vital civil society is for establishing a framework that is supportive of growth and how diverse its roles are. Promoting civil society organisations is essential if the objectives of development cooperation are to be achieved. These organisations support political participation by communicating the issues of underrepresented groups and dismantling outdated systems. By doing this, they aid in resolving social disputes and keeping an eye on governmental activity.[9]

When the community opens its doors to civic society organisations, benefits are likely to trickle down, benefiting the community in the long run. [10] From improved advocacy to partnerships and collaborations with the CSOs in various sectors, the Community will have a new phase. Indeed, alliances and accessibility will translate into better policies for improving the Community. For professional bodies, including the Law Society of Kenya, that may even mean opening the horizons so that there will be seamless cross-border practice and larger markets for trained advocates within the Community.

While CSOs are crucial in promoting democracy, development, and human rights, their growth and activities present challenges. These challenges are more manifest in underdeveloped nations like the EAC member states.[11] The challenges arise from, among other considerations, the socio-economic disparities among the EAC member states.

8 Ghaus-Pasha, Aisha. "Role of civil society organizations in governance." In Kertas Persidangan 6th Global Forum on Reinventing Government Towards Participatory and Transparent Governance. Seoul, pp. 24-27. 2005.

9 Mary Kaldor, 'Civil Society and Accountability' (2003) 4 Journal of Human Development 5.

10 Morris Odhiambo and Rudy Chitiga, *The Civil Society Guide to Regional Economic Communities in Africa* (African Books Collective 2016) <https://books.google.com/books?hl=en&lr=&id=GQBX-EAAAQBAJ&oi=fnd&pg=PP1&dq=civil+societies+and+the+EAC&ots=21w5EHRVRY&sig=piL-jHnJDH20d79QkNzoYmItunnA> accessed 31 May 2024.

11 Oriwa Allan, 'The Role of Civil Society Organizations in Promoting and Protecting Human Rights in Kenya: A Case of Transparency International' [2017] Uonbi.ac.ke <http://erepository.uonbi.ac.ke/handle/11295/101727> accessed 2 February 2025.

Some of the dangers unique to the EAC include inter alia:

a. Concerns about Foreign Influence and National Sovereignty-many CSOs with an EAC basis depend on international funding, which can result in outside influence over local priorities and policies that occasionally conflict with national interests.[12] Like those in Tanzania and Uganda, regional governments have voiced concerns over foreign-supported CSOs pushing agendas that conflict with the country's development objectives.[13]

b. Issues with Accountability and Transparency It is challenging to monitor CSO operations in EAC member states due to a slack regulatory framework, which may result in financial mismanagement, corruption, and ineffective project execution.[14] CSOs have occasionally been charged with misusing donor funds, diminishing their legitimacy and efficacy.

c. Political Manipulation and Partisan Activities: Some CSOs in the EAC region have been utilised as political instruments, undermining their impartiality by siding with ruling parties or assisting opposition groups.[15] Government crackdowns have resulted in CSO operations being restricted by legislation that restricts NGOs in Rwanda and Uganda.

d. Fragmentation and Duplication of Efforts-when CSOs in EAC partner nations don't coordinate, it results in inefficiency, rivalry for scarce resources, and redundant efforts to solve social issues.16 This fragmentation diminishes the total effect of civil society activities.

e. Tense Relations Between the Government and CSOs—EAC governments frequently see CSOs as adversaries rather than cooperative partners. Restrictive laws have been passed in nations like Burundi and Tanzania to restrict CSOs' activities, especially in elections,

12 Cecilia Lwiindi Nedziwe and Oluwaseun Tella, 'Civil Society Actors and Comparative Region-Building: ECOWAS and the EAC' 105.

13 Rachel Cooper, 'What Is Civil Society, Its Role and Value in 2018?' (2018) <https://assets.publishing.service.gov.uk/media/5c6c2e74e5274a72bc45240e/488_What_is_Civil_Society.pdf> accessed 2 February 2025.

14 Norman Mugarura, 'The Global AML Framework and Its Jurisdictional Limits' (*repository.uel.ac.uk*1 September 2012) <https://repository.uel.ac.uk/item/85y9z> accessed 2 February 2025.

15 Fredrick K Njehu, 'Civil Society Organizations in Trade Negotiations: Case of Eac-Eu Economic Partnership Agreement (Epas)' [2018] Uonbi.ac.ke <http://erepository.uonbi.ac.ke/handle/11295/105814> accessed 2 February 2025.

16 Priscilla Wamucii, 'Civil Society Organizations and the State in East Africa: From the Colonial to the Modern Era' [2013] Nonprofit and civil society studies 109.

human rights, and governance.[17] This animosity impedes meaningful participation and policy influence.

f. Dependency on Donor financing: Many CSOs in the EAC have trouble making ends meet and rely mainly on foreign donors instead of local financing sources. Shifting financing priorities based on external interests restricts their autonomy and long-term efficacy.

g. Regulatory and Legal Restraints-CSOs find it challenging to register, function, and obtain funding due to the restrictive legislation and administrative obstacles imposed by EAC governments.[18] Laws restricting civic space and strengthening state control over CSOs, such as Uganda's NGO Act and Kenya's Public Benefits Organizations Act, have been criticised.

Any outside involvement affects civil society's growth and makeup in nations still in their infancy. The higher the chance that new conflicts will arise when some groups of the population are supported and particular social interests are prioritised, the weaker the society. The same applies to civil societies and integrating regions, as in the case of the EAC. This, however, will depend on the stage of integration.

Advancement of civil society outside the country requires care because not all its endeavours inevitably lead to development. Governments in developing countries often try to control and sway the processes of civil society growth to achieve their goals.[19] Phoney civil society organisations should not influence development collaboration. Thus, a false and narrow-minded civil society may be the feared monster that stands in the way of achieving comprehensive regional integration and is a barrier to it.

17 Godfrey Musila, 'A Freedom House Special Report Freedoms under Threat: The Spread of Anti-NGO Measures in Africa' (2019) <https://freedomhouse.org/sites/default/files/2020-02/05132019_UPDATED_FINAL_Africa_Special_Brief_Freedoms_Under_Threat.pdf> accessed 2 February 2025.

18 Martin Ronceray and Nneka Okechukwu, 'Navigating Africa's Democracy Agendas: A Guide for Civil Society Engagement' (2024) <https://ecdpm.org/application/files/6417/2769/8912/Navigating-Africa-Democracy-Agendas-Guide-Civil-Society-Engagement-ECDPM-Discussion-Paper-377-2024.pdf> accessed 2 February 2025.

19 Michael Edwards, *The Oxford Handbook of Civil Society* (Oxford University Press 2013) <https://books.google.com/books?hl=en&lr=&id=qeASDAAAQBAJ&oi=fnd&pg=PP1&dq=+Governments+in+developing+countries+often+try+to+control+and+sway+the+processes+of+civil+society+growth+to+achieve+their+goals&ots=sUfC3PIN0S&sig=RP2H0oqhmcWN24uw0Db2zuMizZg> accessed 31 May 2024.

2.0 An evaluation of the extent of involvement of CSOs in the EAC

According to the EAC Treaty, community development and regional integration must be participatory and people-centred.[20] Many essential players, including women, young people, the corporate sector, and civil society, must participate. For these stakeholders to succeed, governments must establish an enabling climate. Over the past ten years, the commercial industry, professional associations, women's groups, and civil societies have all been increasingly involved in the integration process. To date, the EAC has benefited from the participation of various organisations in its operations, including the East African Law Society and the East Africa Centre for Trade Policy and Law.[21]

Civic societies serve as the social fibre that keeps a society stable.[22] It is a setting where people mingle, talk, and support one another. It also carries out other crucial tasks, including advocating for individual rights, keeping an eye on the corporate and public sectors, and monitoring alternatives to the status quo. CSOs play a significant role in providing various social services in multiple countries. Similarly, the role of CSOs in championing peace and equilibrium should not be overlooked. [23]They can initiate partnerships and networking that would ensure the preservation of peace. Civil societies must, therefore, be actively involved in the Community for the apparent benefits that they will be bringing to the Community. Procedural and institutional measures must be put in place so that civil society organisations and private sectors not only access the Community but also get actively involved in deliberations and negotiations aimed at enriching the Community.

3.0 Challenges encountered by CSOs Operating in the EAC

In 2014, The EAC Partner States dialogues were organised and managed by the East Africa Civil Society Organizations' Forum (EACSOF) in collaboration with the Finnish NGO Platform (KEPA). The discussions aimed

20 EAC Treaty 2000, Art 7(1)(a).

21 Valérie Vicky Miranda, Nicoletta Pirozzi and Kai Schäfer, 'Towards a Stronger Africa-EU Co-operation on Peace and Security: The Role of African Regional Organizations and Civil Society' (*JSTOR*2012) <http://www.jstor.com/stable/resrep09661> accessed 31 May 2024.

22 Anheier, Helmut K. "What kind of nonprofit sector, what kind of society? Comparative policy reflections." American Behavioral Scientist 52, no. 7 (2009): 1082-1094.

23 Coate, Roger A. "Civil Society as A Force For Peace." International Journal of Peace Studies 9, no. 2 (2004): 57–86. <http://www.jstor.org/stable/41852921. >

to appraise the current working environment for civil society organisations (CSOs) in different countries in the community. This was closely followed by discussions on the findings and national consensus building on enabling factors and the challenges and recommendations on how to avoid them. The report emphasised the facilitating elements that encouraged establishing and expanding a thriving civil society in East Africa. It evaluates the region's top practices from particular nations. It also focuses on elements that have impeded the working environment for Civil Society Organizations (CSOs) and associated regionally bad practices.

National governments have not entirely guaranteed civil society's operational atmosphere; instead, they have enacted restrictive laws restricting civil society groups in the area. [24] Several nations have hastily created new laws or made changes that limit civil society presence and smooth operations, jeopardising CSOs' operational efficacy. CSOs faced various challenges, including faulty laws and tense interactions with certain state officials.[25] The militarisation of the environment by placing active-duty military personnel in charge of ministries overseeing NGOs, along with the accompanying militaristic threats made against civil society, the legislature, the media, and opposition parties, all of whom were grouped as state enemies, was of more significant concern. The state has harassed CSO leaders in more serious situations, posing direct threats to their safety; some organisations have been shut down, and in the worst cases, fatalities have been recorded. The current operational environment of the CSO in the EAC does not adhere to the spirit of the Community's Treaty on creating an enabling environment.[26] To get back on track and per the EAC Treaty, constructive engagements that will promote the protection of citizens' rights through a healthy operating environment for CSOs are needed. [27] This

24 Heinrich, Volkhart F. "Studying civil society across the world: Exploring the thorny issues of conceptualization and measurement." Journal of Civil society 1, no. 3 (2005): 211-228.

25 Helmut K Anheier, Markus Lang and Stefan Toepler, 'Civil Society in Times of Change: Shrinking, Changing and Expanding Spaces and the Need for New Regulatory Approaches' [2019] Economics: The Open-Access, Open-Assessment E-Journal.

26 Lydia V Makaka, 'Regional Integration in Africa - a False Promise? The Case Study of the East African Community' [2018] Uonbi.ac.ke <https://erepository.uonbi.ac.ke/handle/11295/105756> accessed 2 February 2025.

27 Fioramonti, Lorenzo, and Olga Kononykhina. "Measuring the Enabling Environment of Civil Society: A Global Capability Index." Voluntas: International Journal of Voluntary and Nonprofit Organizations 26, no. 2 (2015): 466–87, available at < http://www.jstor.org/stable/43654691.>

calls for a concerted effort, through dialogue, to rethink the motivations and directions of all players.

4.0 The contribution that civil society organisations make to the advancement of human rights, the rule of law, and reasonable governance discourse

CSOs have a range of responsibilities.[28] They are a vital source of information for the public and the government. They monitor government activities and hold the executive branch accountable. They lobby and create alternative rules for the executive branch, the corporate sector, and other institutions.[29] They offer services, especially to the poor and disadvantaged. They struggle to maintain and modify social mores and customs while safeguarding the people's rights.

CSOs may play a big part in society and have various objectives, governing structures, and sizes. Labour unions, village associations, faith-based groups, co-ops, environmental organisations, women's rights organisations, and associations for farmers are a few examples of CSOs. [30] CSOs play a fundamental role in advocacy and checks and balances of a government's excesses. They have played an essential role in democracy and human rights. Actors from civil society who seek to advance fundamental rights must be allowed to exercise such rights without being restricted in their ability to do so by arbitrary or unwarranted means. This makes nations need to properly carry out their promises to protect human rights and create an atmosphere that fosters CSOs.

Furthermore, civil society actors work to monitor and investigate issues, give voice to the voiceless, help vulnerable groups express their rights, and bring

28 Yerkes, Sarah, and Zeineb Ben Yahmed. "The Role of Civil Society." Tunisia' s Political System: From Stagnation to Competition. Carnegie Endowment for International Peace, 2019, available at < http://www.jstor.org/stable/resrep20993.7.>

29 Aisha Ghaus-Pasha, 'ROLE of CIVIL SOCIETY ORGANIZATIONS in PARTICIPATORY and ACCOUNTABLE GOVERNANCE 6 Th Global Forum on Reinventing Government towards Participatory and Transparent Governance Role Of Civil Society Organizations In Governance Role Of Civil Society Organizations In Governance CONTENTS' (2005) <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=4d8d4d0575416628d5862e0f6b61b17e7de6e6d7> accessed 31 May 2024.

30 Blagescu, Monica, and John Young. Partnerships and Accountability: Current thinking and approaches among agencies supporting Civil Society Organisations. Overseas Development Institute, 2005.

peace back to areas that have experienced violence. Together with all other human rights, they aim to advance the right to growth. The Civil Society seeks to improve the awareness of international human rights principles, information, and strategies among civil society actors so they may effectively engage with the UN human rights system. In addition, civic societies support vulnerable people in asserting their rights, conducting research and monitoring, giving voice to the voiceless, and helping communities in conflict recover. All human rights, especially the right to development, are advanced by their labour.

Civic groups driven by non-discrimination, participation, responsibility, and respect for human dignity are responsible for creating long-lasting and sustainable social change. Civil society actors influence public policies by educating and advocating for them to decision-makers in government, business, politics, international organisations, and the general public.[31] CSOs participate in capacity-building activities and develop materials on how civil society actors can engage with other human rights watch groups. They also coordinate advocacy campaigns and other outreach programs with various advocacy groups.

5.0 An analysis of notable Civil Society Organizations having a visible mark in the Community

Civil society organisations have mushroomed in recent years due to their apparent advantages. [32] The CSO's focus areas vary from safeguarding human rights to championing good governance to those concerned with the rule of law. [33] For example, the Association *Burundaise des Consommateurs*-Transparency International Burundi (ABUCO-TI Burundi) aims to support good governance by fighting corruption and upholding, defending, and safeguarding consumer rights. Its 500 members are dispersed throughout Burundi's various regions in a network. Progress Integrated Community Development Organization (PICDO), a CSO operating in Ethiopia, serves the poorest and most vulnerable

31 Abdulai, Abdul-Gafaru, and Ruby Quantson. "The changing role of CSOs in public policy making in Ghana." Ghana Social Science Journal 6, no. 2 (2009): 38-38.

32 Chaplowe, Scott G., and Ruth Bamela Engo-Tjega. "Civil society organizations and evaluation: Lessons from Africa." Evaluation 13, no. 2 (2007): 257-274.

33 Global Center on Cooperative Security. "Enhancing Civil Society Engagement." Global Center on Cooperative Security, 2020,available at < http://www.jstor.org/stable/resrep25187 >

and marginalised people in Ethiopia. However, outstanding CSOs within the Community have been vocal yet fundamental to EAC. These include the law societies of the respective countries, including the Kenyan Bar.

The East African Law Society has been vibrant, especially regarding litigation in the Community. In many instances, it has instituted suits and has been a party to the East African Court of Justice proceedings. For example, in *East African Law Society v. Attorney General of the Republic of Burundi and the Secretary General of the EAC*[34] *The* East African Law Society argued that the disbarment of a Burundian lawyer and the issuing of an order that prohibited the lawyer violated articles 7(1) and (2) of the EAC Treaty. The Law Society prayed for a quashing order and a stay of the Bujumbura Court of Appeal decision. Even though the court determined that because the applicant's claimed remedies were final, this illustrates how willing and committed the law society is to safeguarding its member's fundamental rights and freedoms and ensuring no breach of the Treaty provisions.

Transparency International is yet another notable CSO.[35] The organisation has branches in various East African Countries, including Kenya, Burundi, Rwanda, and Ethiopia. The CSO collaborates with governments, businesses, and civil society to advance the release, verification, and analysis of data from infrastructure projects. [36] This makes it possible for individuals to hold decision-makers responsible by educating and empowering them.

6.0 Specific agenda? An analysis of the pattern stemming from the issues instituted by Civil Society Organizations

Civil societies are non-state organisations with official status that carry out charitable functions. They are established and managed by citizens to reflect the interests and concerns of their members, specific target audiences, or the general public. The leadership decides on the governance structures and actions

34 EACJ First Instance Division, App. No. 3 of 2014.

35 Transparency International. "ABOUT TRANSPARENCY INTERNATIONAL." A TALE OF FOUR FUNDS: Best Practices of Multilateral Trust Funds in Safe-Guarding Climate Finance from Corruption and Waste, Transparency International, 2017, pp. 36–36. JSTOR,available at <http://www.jstor.org/stable/resrep20544.11> (Accessed 14 Apr. 2023).

36 Galtung, Fredrik, and Jeremy Pope. "Against Corruption: Evaluating Transparency International." The self-restraining state: Power and accountability in new democracies (1999): 257.

that CSOs adopt without significant government scrutiny or representation. The CSOs have always shared their agenda in promoting advocacy for human rights and advocacy. It is, therefore, not a new phenomenon to come across a CSO cutting across the three. However, other CSOs focus on a specific area, whether human rights, children's rights, or election support. While some CSO networks may be formal and long-term in character with well-defined partnership papers that include the vision, objectives, strategic interventions, membership, and leadership, others have no formal or strict norms of involvement other than a dedication to the topics under discussion. Others, however, only exist while the issue(s) in question are still being addressed and arise out of necessity. A notable trend that can be deduced from most of the problems CSOs instituted is human rights. They champion human rights while checking Government excess and balances. Protection and promotion of human rights are increasingly on the lookout amidst growing concerns about the violation of human rights in the EAC region.

7.0 Situational analysis on EACJ adjudicating on cases instituted by Civil Societies.

Governments in partner nations are increasingly incorporating civil society organisations in the design and execution of policies.[37] In the wake of this, it has been highlighted that most CSOs have focused on service delivery rather than campaigning, much alone governance and democracy while participating in policy processes.[38] As a result, CSOs are becoming more crucial to overseeing national and municipal elections and controlling spending. The community has opened its doors to civic society organisations through institutional and procedural mechanisms. An analysis of the decisions is hereinbelow.

37 John D Clark, *Globalizing Civic Engagement: Civil Society and Transnational Action* (Routledge 2012) <https://books.google.com books?hl=en&lr=&id=R1quBAAAQBAJ&oi=fnd&pg=PR1&dq=Governments+in+Partner+nations+are+increasingly+incorporating+civil+society+organizations+in+the+design+and+execution+of+policies&ots=J0ay30vLZ_&sig=RKxL1XHV96O6JE69XQ-lRPcPDkU> accessed 31 May 2024.

38 Monica Blagescu and John Young, 'Capacity Development for Policy Advocacy: Current Thinking and Approaches among Agencies Supporting Civil Society Organisations' (2006) <https://cdn.odi.org/media/documents/156.pdf>.

7.01 African Network for Animal Welfare v. The Attorney General of the United Republic of Tanzania [39]

Here, a civil organisation contested the suggested course of action by the Tanzanian government to build a through-pass road through Serengeti National Park because such actions were tantamount to a breach of environmental obligations binding Tanzania stemming from the ratification of the Rio Declaration as well as the United Nations Declaration on Biodiversity. The Applicants contended that such construction would have environmental and ecological effects. The Applicant further claimed that such actions would violate the EAC Treaty, requiring member states to manage and preserve the environment. It was held that such national heritage, including Serengeti and Masai Mara, would suffer irreparable harm if the route was built. The court declared the plan illegal as it violated the Treaty provisions. A permanent injunction was issued prohibiting the government from building the proposed road.

7.02 Avocats San Frontieres v. Mbugua Mureithi Wa Nyambura & 2 Others. [40]

In this case, the applicant is a non-governmental organisation championing human rights and access to justice. The applicant claimed in an affidavit in support of its application that it was interested in the independence, liberties, and fundamental freedoms of attorneys and law societies in the region of East Africa and that this interest led it to want to participate as an amicus. The plaintiff contended that its unique contribution to the case, which would be restricted to legal issues, would offset any hardship to the parties by helping the court understand the Community's Treaty and advancing respect for the rule of law. The court held that the applicant's affidavit adequately stated its interest in the matter, so no further statement of interest was necessary.

39 EACJ Ref. No. 9 of 2010.
40 EACJ First Instance Division, App. No. 2 of 2013.

7.04 Forum pour Renforcement de la Société Civile & 6 Others v Burundian Journalists' Union & A-G of the Burundi.[41]

The petitioners, several domestic and foreign nongovernmental organisations (NGOs), alleged that specific provisions of Burundian legislation violated press and speech freedoms, as well as the EAC Treaty's sound governance principles included in articles 6(d) and 7(2). The question before the court was whether amicus curiae could assist in defining and elucidating the types of media regulations that violate press freedom and offer justifications for why freedom of speech and the press are essential elements of the core values of the East Asia Treaty (see article 6(d) of the Treaty) as well as the Community's operational principles (see article 7(2) of the Treaty).

The court said that should it think doing so would serve the interests of justice, it may ask for amicus curiae support. An amicus "must have a stake in the proceedings, must be pertinent to the proceedings, and present fresh arguments that the court could find helpful," the court declared, citing precedent from the South African Constitutional Court that concluded that "an amicus must call the court's attention to pertinent legal and factual issues that would not otherwise be brought to the court's attention.

The applicant's statement of interest demonstrated their involvement with and familiarity with the topics pertinent to the case, and the court concluded that the petitioners satisfied the amicus curiae test. The court also mentioned how well-known organisations like PEN International, International Press Institute, and PEN Kenya Centre are for their work with press freedom issues. The court further stated that because it is codifying its law, expert testimony would benefit both the case and the court.

41 EACJ First Instance Division, App. No. 2 of 2014.

7.05 UHAI EASHRI & Health Development Initiative Rwanda v. Human Rights Awareness & Promotion Forum & the A-G of the Republic of Uganda[42]

The petitioners submitted a notice of motion requesting the court's permission to participate as amicus curiae in a case challenging the legality of specific provisions of Uganda's 2014 Anti-Homosexuality Act, which has since been repealed. The court stated that in addition to establishing circumstances that prima facie justify an applicant's appearance as amicus curiae, Rule 36 of the court's rules of procedure requires an applicant to demonstrate that it is interested in the outcome of the substantive reference.

The court turned down both requests. The second application was denied permission to intervene because it had not shown a stake in the resolution; the case included a challenge to Ugandan legislation, but the second applicant's stated goal was restricted to working in Rwanda. Similarly, the court denied the first applicant's request for permission to intervene as amicus curiae because it believed that, despite its interest in the case's result, the first applicant's goals were incompatible with the Anti-Homosexuality Act 2014's stated goals.

Thus, the court has been open to adjudicate on institutions made by civil society organisations. Diversified civil society organisations should, therefore, work hand in hand with parallel promotions by NGOs, trade unions, and human rights groups to ensure a pluralist civil society that is not only vibrant but also able to propel the community toward achieving its objectives.

I. Is it merely windy, or is the candle of the existing institutional and procedural mechanisms within the Community too dim?

Economic collaboration is needed in the region, as regional integration and cooperation can have significant political and financial benefits.[43] Regional economic blocs, with each country member of a particular regional organisation, have become the foundation for global trade and commerce. It is impossible to overstate the importance of regional blocs for countries looking

42 EACJ First Instance Division, Apps. No. 20 and 21 of 2014.

43 Pedersen, Thomas. "Cooperative hegemony: power, ideas and institutions in regional integration." Review of International Studies 28, no. 4 (2002): 677-696.

to take advantage of a more globalised world and interact meaningfully with the international community. Most nations have followed a stage-by-stage process that started with economic cooperation and moved toward deeper political integration as the end goal.

The Community has faced procedural challenges in cases of out-of-time references and preliminary objections to its jurisdiction. Similarly, Institutional challenges have threatened the integration journey due to coordination issues with the EAC's intergovernmental structure.[44] Undeveloped infrastructure, the economic dominance of some member states with increased productivity advantage skewed in their favour, delays in regional integration efforts within EAC due to member states' multiple memberships in other trade blocs, and delays in harmonising tax regimes by EAC member states are just a few of the challenges that have been identified. [45]Nonetheless, the advantages of regional integration within the community still outweigh the difficulties encountered.

II. Conclusion

The accessibility of the East African Community (EAC) by civil society organisations (CSOs) remains limited due to legal restrictions, financial constraints, and insufficient engagement mechanisms. While the EAC Treaty emphasises a people-centred integration process, CSOs have faced bureaucratic hurdles and restricted civic space, hindering their participation in policy formulation and regional governance—however, ongoing advocacy, policy reforms, and strengthened partnerships present opportunities for greater inclusion. For the EAC to achieve meaningful integration, it must enhance transparency, streamline CSO engagement frameworks, and ensure a more enabling environment. Strengthening participatory mechanisms will be crucial in realising a genuinely inclusive regional community.

44 Mugomba, Agrippah T. "Regional organizations and African underdevelopment: The collapse of the East African Community." The Journal of Modern African Studies 16, no. 2 (1978): 261-272.

45 Malin Arvidson, Håkan Johansson and Roberto Scaramuzzino, 'Advocacy Compromised: How Financial, Organizational and Institutional Factors Shape Advocacy Strategies of Civil Society Organizations' (2017) 29 VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations 844.

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LEGAL AND REGULATORY FRAMEWORK ON CROSS BORDER CYBER SECURITY THREATS: The Case of East African Community (EAC)

Irene Shimanyula[1*]

Abstract

With the rise of new technologies, the world has seen an increase in cybersecurity threats extending beyond borders. The East African Community (EAC) has been particularly vulnerable to cross-border cyberattacks due to the region's rapid technological advancements. For example, Uganda lost 42 million to cybercrime in 2017, while Rwanda lost six billion francs in 2018. Between April and June 2019, cyber threats amounted to 26 million shillings in Kenya. Cybersecurity is essential for protecting personal privacy and data and ensuring the integrity and confidentiality of systems through which information is transmitted. It also plays a significant role in business profitability, affecting reputational and financial risks that hinder growth. Ensuring robust cybersecurity is increasingly important with the rapid expansion of technologies like e-commerce, online banking, digital communication, and digital payment platforms. For regions like the EAC, where economic growth and social stability are key priorities, cybersecurity must be a focus to foster development. This article examines the legal and regulatory frameworks surrounding cybersecurity, explores notable incidents in the EAC, and analyses the impact of existing laws and regulations. A comparative analysis will also be included with other regions, such as the European Union (EU) and the Southern African Development Community (SADC).

Keywords: *Cybersecurity, East African Community (EAC), Cybercrime, Legal Framework, Digital Economy*

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1.0 Introduction

Cybersecurity is crucial in technology as it safeguards data and information against loss and theft. This includes Sensitive data, personally identifiable information (PII), intellectual property, personal information, data, protected health information, and government and business information systems.[2] It entails security measures to safeguard computers, servers, mobile devices, electronic systems, networks, and data against improper use, malicious attacks and illegal access.[3] Technology has become an integral part of daily life, shaping businesses, education, healthcare, travel, and other essential activities.. Therefore, proper measures must be implemented to safeguard all these activities and the people involved. Technology has brought many benefits, including efficiency, speedy access to information and convenience. Each technological advancement brings new cybersecurity risks.

The East African Community is known to be one of the most economically integrated regions in Africa. Kenya, Uganda, and Tanzania have tried to promote digital economic integration. Countries within this region have been at the forefront of promoting financial inclusion among their citizens.[4] Digital payment systems such as MPESA and government integration platforms such as the e-citizen platform are among the digital platforms developed and implemented within these regions.[5] The EAC adopted an e-commerce Strategy in July 2022. The strategy's main objective is to harmonise laws to enable cross-border e-commerce in the region and strengthen cross-sectoral and public-private collaboration in developing regional approaches to cross-border e-commerce.[6]

A vision, roadmap, and framework exist to create a Digital Single Market (DSM) for East Africa, which would aid the seamless movement of people,

2 Simplilearn. 'What is Cybersecurity and Why It is Important?' (Simplilearn, 2023) https://www.simplilearn.com/tutorials/cyber-security-tutorial/what-is-cyber-security accessed 3 May 2024

3 Simplilearn. 'What is Cybersecurity and Why It is Important?' (Simplilearn, 2023) https://www.simplilearn.com/tutorials/cyber-security-tutorial/what-is-cyber-security accessed 3 May 2024

4 Domingo Ennatu, Arnold Stephanie, & Apiko Philomena, 'Interoperability of Digital Payment Systems: Lessons from the East African Community' (Discussion Paper No. 357, European Centre for Development Policy Management (ECDPM) October 2023).

5 Ibid.

6 Ibid.

goods, and services across the region.[7] Banks within this region have also focused on digital payments, bulk transfers of funds, scheduled payments, and wire transactions, which often involve large amounts of money. An East African Payment System also exists within the digital payment space, though it has had a low uptake since its rollout.[8]

Rapid technological advancements in the EAC have led to a surge in online scams, impacting individuals and businesses alike.. Reports indicate countless people have encountered deceitful schemes while navigating the digital landscape.[9] A report on weak consumer protection regulations within the region has also been reported, which hampers trade. There exists a Continental Africa Union Convention on Cyber Security and Personal Data Protection; Rwanda, a country within the EAC, has ratified the same.[10] The surge in mobile money users in the region and banks embracing fintech has caused a growing demand for national interoperability platforms. This has instilled a sense of urgency, compelling industry leaders to reposition themselves to advocate for cross-border payment interoperability by liberalising their digital markets. Hence, there is a need for cross-border cybersecurity within the EAC region.

In 2023, African countries experienced significant cyberattacks on key systems, including those of the African Union Commission (AUC), the Kenyan government, and Nigerian election infrastructure. This spurred the African Union (AU) to prioritise cybersecurity at its summit in Addis Ababa. Key actions included directing the AUC to expedite a Continental Cybersecurity Strategy and adopting a child online protection policy. However, the Malabo Convention, Africa's main cybersecurity agreement, remains largely unratified, undermining its effectiveness.[11]

7 Ibid.
8 Ibid.
9 Domingo Ennatu, Arnold Stephanie, & Apiko Philomena, 'Interoperability of Digital Payment Systems: Lessons from the East African Community' (Discussion Paper No. 357, European Centre for Development Policy Management (ECDPM) October 2023).
10 Ibid.
11 Nnenna Ifeanyi-Ajufo, 'The AU Took Important Action on Cybersecurity at Its 2024 Summit – But More Is Needed' (Chatham House, 23 February 2024) https://www.chathamhouse.org/2024/02/au-took-important-action-cybersecurity-its-2024-summit-more-needed accessed 4 May 2024.

The concept of borders has undergone considerable transformation over the years. Initially, borders constituted geographical boundaries signifying national sovereignty; now, borders are defined as critical infrastructure that incorporates checks and surveillance and falls under law enforcement jurisdiction. Within globalisation and heightened mobility, well-regulated borders are a priority of nations, with an emphasis on technological advancements to effectively manage mobility. However, there has been a rise in cyber-attacks and threats resulting from the fusion of cyber and physical realms, coupled with heavy reliance on technology, providing malicious actors ample opportunities to target borders. The repercussions of a cyberattack are intense, given the pivotal role of borders within the EAC region.[12]

This article delves deep into the legal and regulatory framework for cybersecurity threats within the EAC region. This article will look at a brief background of the EAC, the Legal framework of Cybersecurity within the EAC, challenges and issues in combating cross-border cybersecurity threats within the EAC, and case studies or real-world examples of cross-border cybersecurity incidents within the EAC will also be provided. The paper will also Propose best practices for enhancing cross-border cybersecurity cooperation within the EAC, provide recommendations for strengthening the legal and regulatory framework on cybersecurity and Suggest measures to improve coordination and collaboration among member states. Common cross-border cybersecurity threats include data breaches, cyber espionage, ransomware attacks, malware, social engineering attacks, and supply chain attacks.

2.0 Background of The East African Community (EAC)

Founded in 1999, the East African Community (EAC) comprises eight member states: Burundi, the Democratic Republic of Congo, Kenya, Rwanda, Somalia, South Sudan, Uganda, and Tanzania.[13] It consists of the Summit, the Council of Ministers, the Co-ordinating Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat. It also has (9) institutions, three of which became operational

12 Chatzis, P., & Stavrou, E. (2022, July 27). Borders and cyber-threats: how safe are we? Retrieved May 4, 2024, from https://www.border-security-report.com/borders-and-cyber-threats-how-safe-are-we/

13 The East Africa Community, 'About EAC' https://www.eac.int/about-eac accessed 4 May 2024.

in July 2015. All have their leadership, and their budgets are drawn from the consolidated annual EAC budget.[14] Over the years, the EAC has recorded several milestones, including the admission of new members, the newest being the Democratic Republic of Congo, the execution of the protocols for the formation of the EAC Common, the Establishment of the EAC Monetary Union, tripartite summits, among many others.[15]

EAC comprises a total population of 302 million citizens from all the eight partner states. It also boasts a combined Gross Domestic Product (GDP) of US$ 312.9 billion and holds strategic and geopolitical importance, promising significant prospects of its renewed and invigorated future. [16] EAC functioning is guided by a treaty signed on the 30th of November 1999 that led to the formation of the community. With Kenya, Uganda and Tanzania being the first and the Republic of Somalia being the last, they acceded to the treaty on the 4th of March 2023.

3.0 Legal And Regulatory Framework on Cybersecurity within the East Africa Community

The initial foundation of the EAC law stems from the Treaty for the Establishment of the East African Community. According to the Treaty, the EAC's primary role is to broaden and enhance the integration process. The treaty in Article 5(2) provides for its objectives, which include establishing and gradual progression towards a Customs Union, a Common Market, a Monetary Union, and ultimately a Political Federation. The decision-making structure within the EAC is through a consensus, with each state having veto powers on the details of the regulations formed under the Treaty.[17] The accord arrived at and approved regulations by states, tying all partner states. Once consensus is reached, states may ratify whatever regulations are approved. States may, however, formulate their domestic policies.

14 Ibid,.
15 Ibid,.
16 Ibid,.
17 United Nations, 'Harmonizing Cyberlaws and Regulations: The Experience of the East African Community' (United Nations, 2012).

Only one specific law on cyber security governs the whole of EAC, save for the African Union Convention on Cyber Security and Personal Data Protection (2014), which very few countries on the African continent and Rwanda within the EAC have ratified.[18] This is deemed an all-encompassing guide on cyber-crime.[19] It is similar to the Cyber Crime Convention, which the Council of Europe currently applies to Europe. Member states, through the African Union Convention on Cyber Security and Personal Data Protection (2014), are mandated to share responsibilities through the implementation of measures on cybersecurity that aim to safeguard data from cybercriminals, prevent third-party misuse of data and also provide for the establishment of national computer emergency response teams. It also advocates for cooperation between business entities and governments.

Another key provision in the convention is dual criminality, allowing cybercriminals to be prosecuted either in the country where the crime occurred or in their home country, thus preventing conflicts of laws. It also provides mutual legal assistance, a significant provision in the convention, as it allows intelligence sharing and collaboration during investigations. The convention also covers matters of data protection in-depth, from the requirement of the establishment of an authority to govern personal data by each state to the rights of data subjects similar to those provided in Kenya's Data Protection Act, 2019. Although Uganda and Kenya are not yet signatories to the Convention, they have been working on establishing the legal and policy frameworks outlined in the Convention. Rwanda is also implementing these measures as a signatory and is one step ahead.

Article 124(5) of the Treaty indicates that cybercrime regulation is an area of cooperation for the EAC member states. As a result of this provision, EAC has developed a robust framework, including the EAC Development Strategy, EAC Framework for Cyber laws (2008), EAC Model of ICT Framework (2015), Science Technology and Innovation Policy (2019), and EAC Vision

18 Nelson Otieno, 'So Near Yet Too Far: Insights on Intrigues of Harmonization of Cybercrime Regulation in EAC' (Africa Legal Studies, 23 April 2021) https://africanlegalstudies.blog/2021/04/23/so-near-yet-too-far-insights-on-intrigues-of-harmonization-of-cybercrime-regulation-in-eac/ accessed 4 May 2024.

19 'What's Been Done to Fight Cybercrime in East Africa' (The Conversation, 2 December 2019) https://theconversation.com/whats-been-done-to-fight-cybercrime-in-east-africa-127240 accessed 30 May 2024.

2050. However, the impact of these regulations is at an absolute minimum.[20] The Draft EAC Legal Framework for Cyber Laws 2008 also exists but remains unimplemented.[21]

The convention lacks a strong enforcement mechanism to ensure mandatory compliance with its provision, so very few states have adopted it. Member states may not prioritise cybersecurity or take necessary actions to address cyber threats effectively without adequate enforcement. It also elicits an aspect of inadequate inclusivity; that is, key stakeholders such as civil societies and technical experts, mainly in the data privacy and cyber security space, and the private sector were not involved in developing the Convention. The Convention's relevance in addressing contemporary cyber security threats may also be limited as it fails to address the cyber security challenges likely posed by the technological advancements that have been made so far—for instance, Artificial Intelligence, Internet of Things devices (IoT) and quantum computing. The Convention also lacks adequate capacity building, hence making it difficult for member states to implement the Convention's provisions adequately. The mechanisms for monitoring its implementation and evaluation mechanisms are also lacking.

Kenya, Uganda, and Tanzania are the only countries with solid cybersecurity laws in the region. With Uganda having the Computer Misuse Act enacted in 2011, Tanzania's Cybercrimes Act was passed in 2015, and Kenya in 2018 developed its Computer Misuse and Cybercrimes Act (2018). These laws provide for cyber offences, due process in investigation procedures, international cooperation, and jurisdiction of courts. With all this in place, however, research indicates that the cybercrime legislation within this region does not inspire confidence in the prospects of convergence of the EAC cybercrime legislation.[22]

20 'What's Been Done to Fight Cybercrime in East Africa' (The Conversation, 2 December 2019) https://theconversation.com/whats-been-done-to-fight-cybercrime-in-east-africa-127240 accessed 30 May 2024.

21 'Robust Data Protection Standards Could Spur Regional Economic Integration' (CIPESA, March 2024) https://cipesa.org/2024/03/robust-data-protection-standards-could-spur-regional-economic-integration/accessed 4 May 2024.

22 United Nations, Harmonizing Cyberlaws and Regulations: The Experience of the East African Community (United Nations, 2012) https://unctad.org/webflyer/harmonizing-cyberlaws-and-regulations-experience-east-african-community accessed 4 May 2024.

Several gaps inform the conclusion. For instance, the number of offences constituting cybercrime in these legislations varies; the Kenyan legislation lists 29 offences, Uganda lists 10, and Tanzania has 13. This variance in quantity, types, and severity of penalties undermines the possibility of aligning cybercrime legislation across the EAC. Rwanda has made significant strides in embracing cyber security by establishing a robust regulatory framework. It has also made efforts to raise awareness of cyber security. In 2015, the National Security and Response Center was established. The centre is tasked with detecting, responding to, and preventing cyber security threats. In 2016, the Network Security Regulations were rolled out by the Regulatory Board of Rwanda. The objectives of these regulations include the protection of people's privacy and empowering the government to control and screen service providers and operators of the Internet. There is also a cybersecurity contingency plan that aids in handling cybersecurity-related crises.[23]

Further, according to Rwanda's regulations on telecommunications network security, service providers must have licenses, ensure the security of their infrastructure, and ensure the integrity and confidentiality of their services. Rwanda also enacted the Information and Communication Technology (ICT) law in 2016, including provisions on computer misuse and cybercrime and criminalising unauthorised data access.

Kenya, just like Rwanda, has also made remarkable progress in its legal and regulatory framework on cybersecurity and data protection. The Computer Misuse and Cybercrimes Act was enacted in 2018. It provides a legal basis for prosecuting individuals engaged in cyber-crime. This legislation also criminalises various cybercrimes, including computer forgery, unauthorised access and data interference. In 2019, Kenya enacted its Data Protection Act, which law governs the processing of personal data and ensures an individual's privacy rights are protected. Kenya also has a National Cyber Security Strategy, which addresses emerging threats and challenges around cyber security. The strategy revolves around six pillars: establishment of government structures, strong legal, regulatory and policy frameworks, protection of critical

23 'What's Been Done to Fight Cybercrime in East Africa' (The Conversation, 2 December 2019) https://theconversation.com/whats-been-done-to-fight-cybercrime-in-east-africa-127240 accessed 4 May 2024.

information infrastructure, skilled workforce, development of more advanced capabilities, crime and incidents minimisation, and fostering cooperation and collaboration.[24] An incident response and coordination centre also exists where essential cyber security infrastructure is aligned, creating room for regional and international partnerships.[25]

Uganda's legal and Regulatory Framework is like that of Kenya and Rwanda. In addition to this, Uganda also has the National Information and Technology Authority, which provides cyber security training and technical support. Kenya and Rwanda are regarded as the top three countries in Africa with a strong framework on cyber security, as per the 2018 Global Cyber Security Index. An East Africa Community ICT policy also has identified gaps in Cybersecurity within this region. The policy establishes adequate policies and legal frameworks for cybersecurity among member states, promotes information sharing/awareness on cybersecurity, establishes regional and international cooperation mechanisms, and cooperates with national institutions dealing with cybersecurity among member states.[26]

3.0 Overview of Cybersecurity Threats

Cybersecurity attacks are believed to occur due to outdated systems and software or a lack of proper safeguards in these systems. It entails putting safeguards in place to prevent attacks on computer systems and networks by hackers, which will impact one's right to privacy due to unlawful disclosure of information and the loss or damage to hardware, software, or data. As technology evolves, so do cyber-attack methods. These attacks can be fatal, resulting in financial losses, disruption of services, national security and reputational risks, and more so for businesses and governments.

The sophistication of cybersecurity has seen it target different sectors, including banking and government, among many others. Inadequate cyber security can have serious consequences, as evidenced by the Equifax breach and WannaCry

24 National Computer and Cyber Crime Coordination Committee, National Cyber-security Strategy 2022-2027 https://nc4.go.ke/national-cybersecurity-strategy-2022-2027/ accessed 30 May 2024
25 Ibid.
26 Ibid.

Ransomware attack.[27] The number of Cyber Attacks has been increasing rapidly. Some of these threats include Ransomware attacks, phishing scams, data breaches, Denial of Service (DoS) and Distributed Denial of Service (DDoS), SQL injection, man-in-the-middle attacks, Zero-day Exploits, advanced persistent threats, and insider threats. According to Cyber Crime Magazine, the financial cost of cybercrime is projected to reach trillions of dollars annually by 2025.[28] Cross-border cyber security threats originate from one country and affect entities in another; a typical example is state-sponsored espionage.

4.0 Joint Collaborative Efforts Within the East Africa Community to Curb Cyber Security Threats

Even with an unclear legal framework on cyber security in this region, member states have tried to mitigate cyber security risks. Some of these include the formation of regional treaties and agreements, such as the EAC framework for cyber laws, whose key objective is to harmonise legal approaches and enable cross-border collaboration. Joint initiatives and projects also exist around cybersecurity. For instance, the EAC cyber security task force, which has aided in sharing resources among member states, has promoted a collaborated training plan and has developed coordinated response strategies. The EAC secretariat also significantly coordinates cyber strategy efforts among member states, including providing a platform where states can hold discourses and ensuring the implementation of cyber security laws amongst member states.

5.0 Challenges and Issues In Combating Cross-Border Cybersecurity Threats Within The EAC

Various challenges are hindering the combating of Cyber-Security threats within the EAC community. Some of these challenges include the following:

(i) Legal Harmonization

As earlier stated, there are varying legal frameworks within the

27 Frist Campus Center, 'Lessons from The WannaCry Ransomware Attack, Equifax Breach, and Other Security Incidents' (23 May 2018) https://informationsecurity.princeton.edu/events/lessons-wanna-cry-ransomware-attack-equifax-breach-and-other-security-incidents accessed 30 May 2024.

28 Cyber Crime Magazine, 'Cybercrime To Cost The World $10.5 Trillion Annually By 2025' (13 November 2020) https://cybersecurityventures.com/hackerpocalypse-cybercrime-report-2016/#:~:text=Cybersecurity%20Ventures%20expects%20global%20cybercrime,%243%20trillion%20USD%20in%202015 accessed 30 May 2024.

cybersecurity space in the EAC region. This, in turn, tends to hinder effective communication among member states and information sharing, hence ultimately failing to address cyber security threats. While some African governments prioritize cybersecurity and infrastructure protection, others do not consider it a key concern.[29]

(ii) Limited Resources

The development of a robust cybersecurity framework requires sufficient resources. On the other hand, developing states are usually at a disadvantage regarding international standards of cyber governance. These states typically lack the capacity, skills and infrastructure to meet international cyber governance effectively. Research also indicates that the African ICT infrastructure is underdeveloped, and this digital disparity exacerbates existing inequalities and social exclusion, highlighting the significant challenge of bridging the gap between the promises of the information age and the stark realities many worldwide face. This, in turn, affects meaningful participation by these states in international cyber governance forums.[30] Aside from lacking proper infrastructure, these countries also lack resources such as reliable electricity, hindering them from leveraging digital technologies' benefits. Being part of the African region, EAC tends to contribute to the challenge of countries being unable to combat cyber security threats effectively. They also lack the skills, capacities, and financial resources to implement effective cyber governance measures.

(iii) Challenges with Cyber Diplomacy

Political considerations heavily influence how African nations engage in diplomatic processes and extend support to other international states. Compromises and reciprocal actions are usually the order of the day regarding diplomatic strategies within the African states. For instance, only a few African member states ratified the Council

29 Nnenna Ifeanyi-Ajufo, 'The AU Took Important Action on Cybersecurity at Its 2024 Summit – But More Is Needed' (Chatham House, 23 February 2024) https://www.chathamhouse.org/2024/02/au-took-important-action-cybersecurity-its-2024-summit-more-needed accessed 31 May 2024.

30 M Castells, The Internet Galaxy: Reflections on the Internet (Oxford University Press, 2021).

of Europe's Budapest Convention. They voted favouring a Russia-backed resolution in December 2018, which mandated the UN Secretary-General to solicit countries' perspectives on cybercrime. Additionally, only 32 out of 54 African countries voted for the December 2019 UN General Assembly Resolution, aiming to establish a new cybercrime treaty.[31]

Africa faces notable challenges in cyber diplomacy and its participation in various diplomatic endeavours related to cyber governance. This is not any different from the EAC as it is within the African region, and a good example is the Continental Africa Union Convention on Cyber Security and Personal Data Protection.

(iv) Jurisdictional Issues

Cross-border cybercrimes entail perpetrators operating in different jurisdictions. Determining jurisdictions and coordinating investigations and prosecutions across borders can be a task. section 31 of Tanzania's Cybercrime Act provides a more extensive and inclusive framework for apprehending cybercriminals outside Tanzania. In contrast, the Kenyan and Ugandan laws place their focus within their jurisdictions and impose significant restrictions on granting extraterritorial jurisdiction to relevant courts.

Other factors include a lack of technical expertise and sufficient cybersecurity awareness among citizens in these states.

(v) Legal and Regulatory Challenges

Among these challenges are diverse legal systems and traditions. Africa, as a whole, boasts a diverse tapestry of legal systems and traditions.[32] Each country has unique approaches to tackling various issues, including data protection and cyber security, which complicates the harmonization of the laws around cyber security

31 United Nations General Assembly, Resolution A/74/401, "Countering the use of information and communications technologies for criminal purposes," 25 November 2019.

32 Mohamed Aly Bouke, Sameer Hamoud Alshatebi, Azizol Abdullah, Korhan Cengiz, and Hayate El Atigh, 'Africa Union Convention on Cyber Security and Data Protection: Challenges and Future Direction' (ResearchGate, July 2023) https://www.researchgate.net accessed May 30 2024

within the continent and the EAC in particular. Each country must reconcile its national laws with the Convention for uniformity.[33]

(vi) Balancing Between National Security and Cyber Security

National security is a key element in every state. A government must defend its nation, citizens, economy, and institutions. It encompasses both military and non-military attacks.[34] Governments have struggled to find a balance between these two elements, as they are both critical to a state's safety. This becomes more problematic during cross-border interactions, including the transfer of data.[35] It is imperative that states within the EAC develop laws and regulations that clearly define the limits of government surveillance, data access, and cyber security and set up oversight mechanisms to ensure these laws are followed.

6.0 Case Studies of Cross Boarder Cyber Attacks Within the East Africa Community

This section tends to give examples of real-life cyber-attacks incidences and an analysis on the responses and mitigation strategies adopted by member states and the EAC. The Sudan hacker group cyber-attacks against Djibouti, Kenya and Uganda Telecommunication companies over politics. This was an attack that was perpetrated by a hacker group called anonymous Sudan. This group is believed to have launched multiple Distributed Denial of Service attacks against organizations and governments from across the world. They claimed responsibility for attacking Kenya on 3rd February 2024 when educational entities' websites were attacked. Djibouti's telecommunication's network was also attacked on 5th February,2024 and on 6th February, Uganda also fell a victim of the attack and the same was deemed fatal. The reason for the attack was that Uganda hosted and legitimized RSF war criminal in a diplomatic manner.[36]

33 Mohamed Aly Bouke, Sameer Hamoud Alshatebi, Azizol Abdullah, Korhan Cengiz, and Hayate El Atigh, 'Africa Union Convention on Cyber Security and Data Protection: Challenges and Future Direction' (ResearchGate, July 2023) https://www.researchgate.net accessed 30 May 2024

34 United States Environmental Protection Agency, 'National Security Defined' https://www.epa.gov/national-security/national-security-defined accessed 30 May 2024.

35 Ibid.

36 L Sengere, "Sudan Hacker Group Cyber-Attacks Djibouti, Kenya and Uganda Telecoms Companies Over Politics" (8 February 2024).

In 2019, Kenya discovered a cyber espionage campaign whose main target were various government institutions and Uganda was believed to be behind the attack. The attack was aimed at stealing sensitive data and cause disruption of services. The two countries, as a response measure initiated diplomatic discussions to address the issue where the importance of cross-border cooperation in cybersecurity was discussed. Experts from both countries were also deployed to undertake investigations and identify the perpetrators. Enhanced information sharing and intelligence cooperation between Kenyan and Ugandan cybersecurity agencies were established to prevent future incidents.

In 2020, there was a Rwanda, Tanzania Cross boarder Ransomware attacks. This attack caused data encryption, and this would only have been decrypted upon payment of hefty sums.[37] Upon investigations, the attack was believed to have originated from within the EAC states. Tanzanian and Rwandan cybersecurity agencies as a response mechanism came together to identify where the attack originated from and the people behind it. To prevent further spread of the attack, Joint efforts were made to disrupt the command-and-control infrastructure used by the attackers. Businesses and individuals were also educated as a way of creating awareness of such attacks and cybersecurity best practices to mitigate future attacks.

In 2018, there were Cyber Attacks on the EAC Infrastructure that targeted critical infrastructure systems, including power grids and transportation networks, across multiple EAC countries. Essential services were disrupted, and this raised concerns about the vulnerability of regional infrastructure to cyber threats. As a response the EAC Secretariat convened an emergency meeting of member states to coordinate a unified response to the cyber-attacks. to enhance preparedness and resilience of critical infrastructure against cyber threats, Joint cybersecurity exercises and simulations were conducted. There were also partnerships with international players and organizations that dealt with cyber security to enhance protection of the EAC infrastructure and mitigate future attacks.[38]

37 African Cybercrime Operations Desk, African Cyberthreats Assessment Reports: Cyberthreat Trends and Outlook (2023).

38 Internet Society, '2018 Cyber Incident & Breach Trends Report' (9 July 2019) https://www.internet-society.org/resources/doc/2019/cyber-incident-breach-trends-report-2018/ accessed 31 May 2024

Kenya also recently experienced a cyber-attack which targeted its digital infrastructure that saw various public and private institutions that led to denial of essential services by Kenyan citizens. [39] Kenya Power and Lighting Company, Kenya Railways Corporation and the National Transport and Safety Authority were among the public entities that were affected. [40] The group that initiated this attack was believed to be the Anonymous Sudan, a group of Sudanese Cyber Warriors who pose threats on anyone who is believed to be an impediment to their country Sudan.[41]

7.0 Best Practices and Recommendations

To have a solid legal framework on cybersecurity within the East Africa Community this paper will not be complete without a proposal and recommendation on some of the best practices for enhancing cross-border cybersecurity cooperation within this region. Some of the recommendations include:

7.01 Establishment of a Cyber Security Coordination Body and a Cyber Security Response Team

From the research, it is clear there exists no defined body to deal with cyber security within the EAC hence this would be a good place to start from. This body or committee should be created whose main task should be overseeing cyber security initiatives across the EAC member states. This body should facilitate information sharing, develop common cyber security standards among the member states and coordinate joint cyber security activities. With this, there will be uniformity on the standards, rules and regulations that will govern these states in the event of such attacks. This will also aid in jurisdictional challenges as enumerated above.

39 J Kitili and D Abiero, 'Kenya's Digital Infrastructure Under Threat? A Look at Anonymous Sudan's Thwarted Cyberattack Attempt and its Implications for Kenya's Digital Systems' (22 August 2023, Strathmore University, Centre of Intellectual Property and Information Technology Law).

40 P Mwai and A Nkonge, 'Kenya Cyber-Attack: Why is eCitizen Down?' (BBC, accessed 31 July 2023) https://www.bbc.com/news/world-africa-66337573 accessed 31 May 2024

41 J Kitili and D Abiero, 'Kenya's Digital Infrastructure Under Threat? A Look at Anonymous Sudan's Thwarted Cyberattack Attempt and its Implications for Kenya's Digital Systems' (22 August 2023, Strathmore University, Centre of Intellectual Property and Information Technology Law).

A Cyber Security Response team should be created with representatives from each EAC member state, which team should coordinate on prevention, detection, analysis, handling and responses to cyber security incidents. This team should have well defined services, clear mandate, its model of governance, a service framework, technologies, and processes for their service provision. The EAC members are currently in different stages of establishing their national National Computer Incident Response Team (CIRT)/ Computer Emergency Response Team (CERT).[42]

7.02 Develop a Regional Cyber Security Strategy

A strategy tends to outline a vision, mission, and goals of an entity and this gives a clear way forward on what the entity is aiming at achieving. With an elaborate strategy on cross boarder cyber security practices, it will be clear among the member states of the EAC on the goals, practices, and action plans in the event of such occurrences they are aiming to achieve.

7.03 Harmonization of Cyber Security Laws

There is a gap in the uniformity of laws governing Cyber Security within the EAC; hence, this should be a key focus to ensure consistency and clarity. This can involve aligning legislation related to data protection, cybercrime, and information security standards. Also, through the harmonization of laws, mandatory cyber security compliance standards should be created for all the organizations operating within the EAC.

Once all the above are met, a standardized awareness mechanism should be developed among citizens to understand cyber security and its threats and how to mitigate the risks when attacks happen. This can be done through conferences, training, and workshops.

8.0 Comparative Analysis with Other Regions

This section will focus on the European Union (EU), Association of Southeastern Nations (ASEAN), the African Union (AU), and the South

42 East African Community Organisations, Regional Strategy for Establishing and Operationalizing of Computer Incident Response Teams (CIRTs/CERTs), Doc No. 25/EACO/S/1/2023 (2023).

African Development Cooperation (SADC) member states and how their progress compares with that of the EAC.

8.01 The Case of The European Union

Like any other region, cybersecurity-related issues within the EU region are increasing daily, and this will only worsen. By 2025, nearly Forty-One billion devices globally will be connected to the IoT.[43] According to a report by the European Council, Countries in Europe occupy 18 of the top 20 places in the global cybersecurity index, and the EU's value in the cybersecurity market is approximately €130 billion with an annual growth rate of 17% a year and over Sixty Thousand cybersecurity companies and over Six Hundred and Sixty Centers cyber security expertise.[44]

The Cyber security strategy was developed by the EU in 2013.[45] This strategy focused on resilience in the EU's infrastructure, immediate reduction of computer-related crimes, policy development, and increased resources. In 2020, EU leaders moved to strengthen the EU's self-defence capacity against cyber-attacks and create a safer place using encryption, compliance with criminal procedures for computer data access, and using this data only in judicial proceedings.[46]

Like the EAC, where a common cybersecurity strategy exists, many member states within the EU region are believed to have their own cybersecurity strategies.[47] The EU has stronger cyber security frameworks, and this is because this region has experienced more serious attacks than the EAC region. The major one was the *Wannacry* attack that hit the region in 2017. It also greatly impacted the EU's cyber security strategy. [48]

43 European Council Council of the European Union, Cybersecurity: how the EU tackles cyber threats https://www.consilium.europa.eu/en/policies/cybersecurity/ accessed 31 May 2024

44 European Economic and Social Committee, 'Cybersecurity: Ensuring awareness and resilience of the private sector across Europe in face of mounting cyber risks' (March 2018).

45 Moise AC, 'The European Union Strategy in the Field of Cybersecurity' (11 December 2023) International Journal of Legal Social Order.

46 Ibid,.

47 Sliwinski K, 'Moving beyond the European Union's weakness as a cyber-security agent' (2014) Hong Kong Baptist University HKBU Institutional Repository https://repository.hkbu.edu.hk/cgi/viewcontent.cgi?article=1007&context=gis_javan%20der%20Meer accessed 30 May 2024.

48 Giantas, D. H. & Liaropoulos, A., 'Cybersecurity in the EU: Threats, frameworks and future perspectives' (Giantas DH and Liaropoulos A, 'Cybersecurity in the EU: Threats, frameworks and

Within the EU, there also exists an Agency that deals with Cyber security, the European Union Agency (ENISA). This agency is specialized in nature, and the objective of its formation was to strengthen cybersecurity across Europe, provide expertise and any cyber-related assistance, including technical support, training, and advisories to the member states and institutions, and facilitate cooperation and information sharing among member states. The agency also improves Europe's information technology infrastructure and network resilience by facilitating cooperation and information sharing among member states.[49]

In addition to ENISA, The European Union (EU) has a well-developed cybersecurity framework, including the European Union Regulation introduced in 2019, the General Data Protection Regulation (GDPR) and the Network and Information Systems (NIS) Directive, Formally known as Directive (EU) 2016/1148, introduced in 2016 as the first EU-wide cybersecurity law. These regulations provide a model for the EAC in terms of harmonizing laws and promoting cross-border cooperation. The NIS Directive, or Network and Information Security Directive (NIS), are also designed to strengthen cybersecurity across the European Union. The directive mandates that member states create national cybersecurity strategies, appoint national authorities, set up Computer Security Incident Response Teams (CSIRTs), and ensure that essential service operators and digital service providers implement proper security measures and report significant incidents. The primary aim of the NIS Directive is to enhance cooperation among member states and improve the security and resilience of critical infrastructure and services against cyber threats.

From the foregoing, it is clear that the EU has made some progress in embracing a strong legal and regulatory framework around its cross-border cyber security. The existence of ENISA, GDPR and NIS clearly indicates a more solid legal and regulatory framework than that of the EAC. A more pronounced cross-border coordination is evidenced by the EU's understanding that cybersecurity is a key aspect of its market, commerce, and economic relations, both within

future perspectives' (September 2019) Working Paper Series no. 1, ResearchGate.

49 ENISA, 'National Cyber Security Strategies' (8 May 2012) https://www.enisa.europa.eu/publications/cyber-security-strategies-paper accessed 30 May 2024.

and outside the EU. This has been actualized through the EU's launch of the Digital Single Market Initiative, which ensures there is free movement of goods, people, services, and capital.[50] Additionally, the EU has established a European cybersecurity certification framework. This framework provides EU-wide certification schemes with standardized rules, technical requirements, standards, and procedures to ensure a high level of cybersecurity across the region.[51]

8.02 The Association of Southeast Asian Nation (Asean)

ASEAN was established in 1857. This is a regional and international organization in Southeast Asia. Its founding declaration in Bangkok outlines its goals: to boost economic growth, advance social progress, and enhance regional cultural development. Additionally, ASEAN aims to foster regional peace and stability by upholding justice and the rule of law in inter-country relationships, adhering to the principles of the United Nations Charter. Interaction among ASEAN member states is based on cooperation; thus, they work together to form agreements. This cooperation spans various fields, including social and cultural development and politics.

The Association of Southeast Asian Nations (ASEAN) has also made significant strides in cybersecurity, however, at a slow and fragmented pace. [52] There has been a rise in cyber threats, and ASEAN member states have acknowledged the significance of cybersecurity, which in turn greatly affects not only the member states' economic stability but also national security and public safety.[53] This recognition has led to the inclusion of cybersecurity in regional security dialogues and frameworks. The ASEAN Cybersecurity Cooperation Strategy outlines a collaborative approach to addressing cyber threats, which the EAC could emulate. ASEAN has made efforts to implement cybersecurity measures, including establishing devices that allow for the sharing of information; joint

50 (Giantas DH and Liaropoulos A, 'Cybersecurity in the EU: Threats, frameworks and future perspectives' (September 2019) Working Paper Series no. 1, ResearchGate.

51 Ibid.

52 Heinl CH, 'Regional Cybersecurity: Moving Toward a Resilient ASEAN Cybersecurity Regime' (July 2014) ResearchGate.

53 Iermata IM and Nanda BJ, 'The Securitization of Cyber Issue in ASEAN' file:///C:/Users/irene.shimanyula/Downloads/THE_SECURITIZATION_OF_CYBER_ISSUE_IN_ASEAN.pdf accessed 30 May 2024

cybersecurity exercises such as the ASEAN CERT Incident Drill (ACID conducted annually by member states; and capacity-building initiatives. The ASEAN Cybersecurity Cooperation Strategy aims to develop a coordinated and resilient regional response to cyber threats.

Although remarkable progress has been made in adopting cybersecurity measures within the ASEAN region, challenges remain, such as varying levels of cybersecurity maturity among member states, resource constraints, and the need for greater harmonization of national cybersecurity policies. Addressing these challenges requires enhanced cooperation and commitment from all member states, which closely relate to those faced by the EAC.

Further, each ASEAN member state has its own policy on Cyber security, and regional harmonization is still pending. A similar strategy exists just like that of EAC, with almost similar goals and objectives; however, that of EAC is still at a budding stage. Some of the cross-border coordination made within this region include the ASEAN-Japan Cybersecurity Capacity Building Centre (AJCCBC), which was established for training and enhancement of cyber security capabilities purposes, and the annual joint cyber exercise, as earlier mentioned. The EAC is still in the process of enhancing its regional coordination and harmonization efforts.

8.03 Southern African Development Community (SADC) Approach

Southern African Development Community (SADC) involves southern African countries. While some of the countries within this region have laws around cyber security enacted, others are still in the process of drafting. These countries in the drafting stage include Namibia, South Africa, Lesotho, and Zimbabwe[54] The main focus within the SADC region has been balancing cyber security and human rights. Even with this, laws on communication, data protection, and electronic transactions that are deemed restrictive are still persistent.

54 MISA-Zimbabwe, 'Cybersecurity and Cybercrime Laws in the SADC Region: Implications on Human Rights' https://data.misa.org/api/files/1634498575242w6kap89lsf8.pdf accessed 30 May 2024.

Similarly, SADC, like the EAC, has a regional framework that guides member states in developing national cyber security laws and policies. Most, if not all, member states have also adopted national CERTs. A Cyber Security Center of Excellence also exists to enhance regional capacity building and coordination.[55] The SADC regional cyber security plan encourages cooperation and information sharing among member states, evidencing cross-border coordination within the SADC region. SADC, like EAC, has implementation gaps despite the existence of a very feeble legal framework. The region is equally experiencing a shortage of resources and varying levels of technological advancements. The SADC region seems to be far behind compared to the EAC region.

9.0 Conclusion and Recommendation

From the foregoing, no proper measures have been put in place to govern cyber security within the EAC. This culminates from factors such as lack of sufficient resources, lack of harmonized laws, jurisdictional challenges and issues concerning diplomacy. Cyber security is crucial as technology keeps advancing on a day-to-day basis, and the systems become more prone to such attacks. It is, therefore, essential to address cross-border cybersecurity threats within these regions to enhance commercial transactions amongst these states for their betterment.

Overall, while the AU Convention on Cybersecurity represents a significant step towards addressing cyber threats in Africa, several areas could be strengthened to enhance its effectiveness and relevance in today's rapidly evolving cyber landscape. With the implementation of the proposed recommendations, future cross-border cybersecurity threats will be mitigated. Therefore, I suggest that more research on this topic be done to firm up policies around cross-border cybersecurity threats within the EAC region and other African regions. From this research, the Cyber security legal framework for the European Union is more comprehensive and the most developed, while the EAC, ASEAN and SADC are still developing regional frameworks with varying levels of national implementation.

55 RENAPRI, 'Strengthening SADC'S Engagement With Regional Centers Of Excellence And Centers Of Specialization' https://www.renapri.org/strengthening-sadcs-engagement-with-regional-centers-of-excellence-and-centers-of-specialization/ accessed 30 May 2024

The EU's cyber security institutions, such as ENISA, are the most robust regarding institutional framework. While EAC, just like ASEAN and SADC, depends on national CERTs regional coordination bodies that are still coming up. As for Cross-Border Coordination, the EU has much stronger mechanisms that enable cross-border cooperation and incident response. The EAC and ASEAN have made quite some progress on their regional and capacity-building strategies and initiatives, respectively; SADC, on the other hand, is still in the inception stages of enhancing regional coordination and capacity. EAC, ASEAN and SADC tend to face more significant challenges related to inequality of resources, varying legal frameworks, and technological advancement of differing levels compared to the EU. Overall, while the EU serves as a model for advanced cross-border cybersecurity cooperation, both ASEAN and SADC are actively working towards improving their regional cybersecurity frameworks amidst unique regional challenges.

In the case of the Africa Union (AU), Cybersecurity is a significant part of the AU's Agenda 2063, yet member states have been criticized for not prioritizing it. Diverse political, social, and cultural contexts across Africa complicate cybersecurity governance. Africa has often been sidelined in global cybersecurity discussions, but this is changing as African countries actively participate in UN negotiations on a global cybercrime treaty, with key roles played by Algeria, Nigeria, and Egypt. A significant development was adopting a Common African Position on the Application of International Law in Cyberspace, affirming AU members' commitment to uphold international law in cybersecurity. This was driven by the AU's Peace and Security Council (PSC), highlighting Africa's dedication to responsible state behaviour in cyberspace.[56]

AU countries must better align their cyber diplomacy strategies. While many see China and Russia as crucial partners in cybersecurity, others favour Western alliances. This divergence risks undermining African collaboration due to US-China competition. The AU can facilitate better cooperation and ensure that African cyber diplomacy with global powers remains balanced and pragmatic. The Malabo Convention, aimed at unifying Africa's approach to cybersecurity,

56 Nnenna Ifeanyi-Ajufo, 'The AU Took Important Action on Cybersecurity at Its 2024 Summit – But More Is Needed' (23 February 2024) https://www.chathamhouse.org/2024/02/au-took-important-action-cybersecurity-its-2024-summit-more-needed accessed 31 May 2024

electronic transactions, and data protection, only came into force in June 2023, with just 15 out of 55 AU countries ratifying it, which limits its impact. Currently, only one additional country, Sao Tome, has ratified it. Major African nations like Egypt, Algeria, Nigeria, South Africa, Kenya, Morocco, and Ethiopia have yet to ratify the convention, which is crucial for a coherent African cybersecurity agenda.[57]

Despite advancements in Africa's digital ecosystem, significant gaps in cybersecurity awareness, knowledge, and capacity remain among AU member states. Ensuring a secure Internet is essential for achieving digital transformation's social and economic benefits. The rise in cybercrime has made cybersecurity a priority for all governments. The African Union Cyber Security Expert Group (AUCSEG) AUCSEG's main objective is to advise the AUC and AU policymakers on addressing cybersecurity concerns in the region by providing guidance and recommending strategies that consider international and regional dynamics.

Emerging technologies, such as quantum computing and blockchain, will likely shape the future of cybersecurity. These technologies have the potential to revolutionize cybersecurity practices but also introduce new challenges that need to be addressed. Potential developments in the EAC Cybersecurity Framework. It is expected to continue developing its cybersecurity framework, focusing on harmonization of laws, capacity building, and regional cooperation. Future developments may include establishing a regional cybersecurity centre and adopting more stringent data protection regulations.

There needs to be a clear cyber governance framework in the EAC and the entire African region. This can be done through a unified approach together with speedy ratification of the Malabo Convention by these countries within the African sphere, as this can assist with the achievement of cyber governance communal norms and standards, and this can only be possible with the provision of all the necessary resources. States within the EAC should also join the Budapest Convention, an international treaty on Cyber Crime that will enable member states to gain international support in many aspects, including resource allocation and technical support. Beyond ratifying these instruments,

57 Ibid

African states should prioritize strategic international and regional partnerships and adopt global best practices to further cyber governance efforts. The EAC should focus on harmonizing cyber security laws across its member states to address legal challenges. This harmonization should include a standard definition of cybercrimes and penalties, making it mandatory for all member states to ratify the applicable laws and streamline the legal processes involved in cross-border coordination and cooperation.

Capacity building would also be a very good initiative towards addressing cross birder cyber security threats within the EAC region. This includes established well-equipped training centres and centres of excellence, training and awareness to all EAC citizens, not just professionals. Of excellence Investing in capacity building is essential for improving cybersecurity in the EAC. This includes training cybersecurity professionals, enhancing technical and promoting cybersecurity awareness among citizens and businesses. Common standards applicable to cyber security professionals within these regions should apply. Advanced cybersecurity technologies, such as artificial intelligence and machine learning, should be on EAC's list of priorities. This will bolster EAC's ability to discover and alleviate cyber threats more effectively. This can be done through enhanced threat detection, automated incidence response, and predictive and behavioural analytics. EAC should also embrace partnerships with advanced technology companies and international partners to aid with technological advancements.

Managing cross-border cybersecurity threats in the EAC requires a comprehensive and coordinated approach. While significant progress has been made in establishing legal and regulatory frameworks, challenges must be addressed through legal reforms, capacity building, technological advancements, and enhanced collaboration. Cybersecurity is a critical issue that impacts national security, economic stability, and public trust. By strengthening its legal and regulatory frameworks and fostering regional cooperation, the EAC can better protect its citizens, businesses, and governments from the growing cyber-attack threat.

HOLDING POLICE SUPERIORS ACCOUNTABLE: A Case for Command Responsibility in Kenya

Festus Mwiti Kinoti[1*]

The sword that reaches it has no effect, nor does the spear or the dart or the javelin.[2]

Abstract

Following the 2007/08 post-election violence, Kenya initiated police reforms to address issues such as extrajudicial killings, torture, and public distrust. A significant part of this reform was establishing accountability mechanisms for police misconduct, particularly regarding unlawful use of force and firearms. Key measures included the creation of the Independent Policing Oversight Authority (IPOA), a civilian body to investigate police crimes, and enacting stringent legal regulations on police conduct. However, accountability efforts have faced significant challenges due to an entrenched culture of concealment among police superiors, often called the "blue code of silence." This culture obstructs investigations and judicial inquiries, as evidenced in the cases of Baby Pendo and Stephany Moraa. Both children were killed due to unlawful police actions, but the courts were unable to identify the responsible officers because of superior-led cover-ups. Consequently, justice for the victims' families remains elusive. This article examines the impact of the "blue code of silence" on achieving accountability, focusing on the role of superior officers in these cover-ups. It argues for adopting the principle of command responsibility as a solution. Borrowed from international criminal law, this principle holds superior officers criminally culpable for deliberate cover-ups of crimes by their subordinates. The article explores how command responsibility can be integrated into Kenya's legal framework to address systemic police misconduct and overcome the barriers to accountability posed by the blue code of silence.

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2 The Holy Bible (Bible Gateway), Book of Job Chapter 41:26 https://www.biblegateway.com/passage/?search=Job%2041%3A26-29&version=NIV

Keywords: *Command Responsibility, Police Accountability, Kenya, Human Rights, Leadership Oversight*

1.0 Introduction

On 14th February 2019 and 15th March 2021, the Magistrate courts rendered rulings on the grisly happenings in Kenya on 12th August 2017 that are emblematic of how the police used force following the announcement of Presidential election results on 11th August 2017 and the ensuing violence. *In the Matter of baby Samantha Pendo (Deceased) t*he Chief Magistrate's court at Kisumu was told how on the night of 12th August 2017, just past midnight, the family of Mr. Joseph Oloo Senge comprising his wife Lenser Achieng, his daughter Moesha Mitchelle Akinyi and six-month-old baby Pendo, were awoken from slumber in their one-room house in Kilo junction, in Kisumu's Nyalenda low-income settlement, by screams and pleas for help from their next-door neighbour who was under attack by intruders.[3] The mother, clutching her baby, Pendo, sat pensively on the edge of the bed while the father crept near the door to listen, but it wasn't long before the night intruders arrived at their door and ordered them to get out of the house. However, as they soon found out, there were no ordinary intruders but law enforcement officers, ostensibly on a mission to quell riots following the announcement of the 11th August 2017 presidential results, but who had now transmuted themselves into lawbreakers.

Their mission was breaking into homes for the sole purpose of meeting out wanton violence on sleeping villagers as punishment for their having participated in riots during the day. Fully aware of what awaited them should they open the door, the father refused, but the house breakers would not be deterred, so they lobbed a tear gas canister into the one-roomed house.[4] Choking and wheezing, the father finally yielded, opened the door, and ran outside into the open arms of gratuitous violence being meted out by police officers in full riot gear, shields, body armour, batons and rifles. As the batons landed heavily on him, his wife, half-naked, also ran out clutching her 6-month-old baby, hoping beyond hope that the attackers would spare her given the baby. Her

3 Inquest no.6 of 2017, Chief Magistrate Court at Kisumu,
4 Ibid.

hope was in vain; despite her pleas, she was not spared, and one of the batons ferociously swung and struck the 6-month-old baby.[5] The blow was fatal, as the post-mortem would later reveal, the baby had a fractured skull, the cause of death being severe head injury secondary to blunt force trauma to the head.[6]

Despite investigations by the Independent Policing Oversight Authority (hereinafter IPOA), none of the witnesses could identify the police officers who assaulted the family, leading to the death of the baby. Of course, being clad in full riot gear, with visors and all, and in the middle of the night, this was not unexpected. Therefore, heavy reliance had to be placed on superior officers to identify the officers deployed at Kilo Junction Area. No help was forthcoming. Some superior officers in charge of the operation disowned any knowledge of operational orders *(election- Mipango)* that showed the officers who were supposed to have been deployed to the Kilo junction Area.[7] On the other hand, the senior officer alleged to have drawn the operation order and claimed it was never activated, as the violence was sudden. He even fantastically contended that the county commander ordered him to instruct officers not to venture out of their houses that night for fear of violence.[8] His evidence showed no officers in the area in question on the night.

The court ultimately found that police officers indeed murdered baby Pendo but were unable to identify the particular officers who caused her death.[9] The court enraged at the needless death and the lack of cooperation from the police superiors, recommended to the Director of Public Prosecutions (hereinafter DPP) that police commanders in charge of operations at the Kilo junction area should be held liable for the death of the baby under command responsibility.[10] However, no legal provision was cited to support that recommendation. As will be seen below, this recommendation was made more out of exasperation than considering the complex reality of legal rules applicable in Kenya on command responsibility.

5 Ibid
6 Ibid at 8-9.
7 Ibid at 9-17.
8 Ibid at 15.
9 Ibid at 24.
10 Ibid at 35-37

The case of baby Pendo was in no way an isolated incident. In *Stephany Moraa Gisemba (Deceased) inquest,* the Magistrate's court at Nairobi was told how on the morning following the night of terror in Kisumu that extinguished baby Pendo's life, in the capital city of Nairobi, Mathare Area 2, also a low-income settlement, at around 9:00 am Stephany Moraa Gisemba a 9-year-old child was playing together with her two friends on the 3rd floor balcony of their apartment overlooking the main road.[11] Two police officers were seen patrolling the area; one was identified as tall and light-skinned, wearing a jungle green uniform and a helmet. The tall, light-skinned officer knelt, took aim at the balcony with his rifle, and then relented, probably the weight of his conscience having borne heavily on him for a moment. The moment of conscience was, however, flitting; the officer knelt again, took aim at the balcony and for no apparent reason, shot Stephany Moraa in the chest, extinguishing her young life, which ebbed as she clung on to one of her neighbours, Moses, pleading for help.[12] The cause of death, as revealed in the post-mortem and corroborated by the eyewitness accounts, was chest injuries due to a single distant high-velocity gunshot.[13]

As expected, none of the witnesses could identify the police officer who shot at a distance. The court again sought assistance from superior officers. The Officer Commanding the Station within whose station's jurisdiction the incident happened and the sub-county police commander in whose jurisdiction the incident took place both maintained that no operation order existed that could help identify police officers who were patrolling the area. [14] The court found their evidence not credible and was not persuaded by that claim. [15] The court found that police officers were culpable for the death. Still, police commanders in charge of the operation in Mathare North Area 2 engaged in a deliberate cover-up under the rubric of the "blue code of silence" by refusing to avail operation orders both to the court and IPOA that would have assisted in identifying police officers who were patrolling the area.

11 Inquest no. 14 of 2017, Chief Magistrate's Court at Nairobi
12 Ibid at 3
13 Ibid at 4.
14 Ibid at 6-8
15 Ibid at 1-2, 9-10.

Unlike in the *baby Pendo case*, the court did not go so far as to recommend the prosecution of commanders under command responsibility for the death of Stephany Moraa, probably cognizant of the lack of legal basis for such a recommendation. Instead, it simply forwarded its findings on police culpability for the DPP's further action.[16] Having not identified the culpable officer, it is also, therefore, unsurprising that no police officer has to date been charged with the murder of Stephany Moraa Gisemba.

There are many commonalities in both cases, not least the unprovoked violence meted out by police officers on children. However, the one golden thread that ties the failure of IPOA and the courts to identify the perpetrators was the role played by superior officers. In both cases, the superiors were accused of deliberately covering up for their subordinates by failing to provide accurate information, including operational orders that could have identified the perpetrators. As the court noted in the Stephany Moraa case, if the police wished to identify the officer who took away the life of Stephany Moraa, it wouldn't take them a day.[17] However, holding superior officers accountable for the conduct of their subordinates in both cases under domestic law has proved a veritable challenge because there is no specific provision providing for command responsibility as a mode of criminal liability for domestic offences. In the case of *Samatha Pendo*, it took fresh investigations focused on international crimes to finally bring charges against superior officers under the International Crimes Act. In *Stephany Moraa's* case, where there is no evidence of the commission of an international crime, justice remains a mirage.

The cases of *Samantha Pendo* and *Stephany Moraa* were not isolated incidents. The court in the *Stephany Moraa* case noted that this was a trend whereby every election time trigger, happy police officers, under the guise of quelling post-election violence, could shoot members of the public at will, under the comfort that they would be protected under the "blue code of silence."[18] Similar concern on the use of the blue code of silence by police officers to cover up for each other has also been raised by the Court of Appeal in the

16 Ibid at 14.
17 Ibid at 13
18 Ibid at 10-11.

cases of *Titus Ngamau Musila v Republic*[19] and *Nahashon Mutua v Republic*.[20] If this trend is to be bucked, the criminal liability of police superiors needs to be re-appraised. This article, therefore, looks at the current legal framework on command responsibility in Kenya as set out in the National Police Service Act (hereinafter NPS Act) and the International Crimes Act, 2008 (hereinafter ICA) and the accountability gaps therein. To close such accountability gaps, the article argues there is a case for an amendment to the NPS Act borrowing from the ICA to include command responsibility as a mode of criminal liability for serious offences.

The first part of the article briefly considers the history of police reforms in Kenya, particularly the introduction of command responsibility as part of police reforms. The second part looks at the current legal framework of command responsibility in the NPS Act, identifying the gaps to ensure proper accountability. The third part considers the concept of command responsibility in international criminal law and in the Rome Statute of the International Criminal Court (ICC), which has been domesticated in Kenya through the International Crimes Act (ICA), 2008, and makes the case for incorporation of command responsibility in the NPS Act as a mode of criminal liability. It argues that this is a short but critical step in addressing the gaps in accountability from what is already provided for in the NPS Act.

2.0 Police Reforms in Kenya

Like other institutions created during the colonial period, the Kenyan police drew its character and modus operandi from colonialism's dictates. Contrary to its then motto, *salus populi,* the police was a force designed to aid the colonial. administration to crush Popular resistance to British colonial rule.[21] For instance, the use of the police in the torture and extra-judicial killings of persons perceived to be Mau Mau and their sympathisers is now well

19 *[2020] eKLR* at page 1 available at http://kenyalaw.org/caselaw/cases/view/193506/ last accessed 26/12/22

20 *[2020] eKLR* at page 10 available at http://kenyalaw.org/caselaw/cases/view/205239/ last accessed 26/12/22

21 David Killingray, 'The Maintenance of Law and Order in British Colonial Africa' (1986) *African Affairs: The Journal of the Royal African Society* 425; WR Foran, *The Kenya Police: 1887–1960* (Robert Hale Ltd, London 1962) 79.

documented in the Pulitzer Prize-winning book by Caroline Elkins, '*Britain's Gulag.*'[22]. The Police were, therefore, perceived as an appendage of British oppression in Kenya.

The relationship between the Kenyan public and the police, however, did not markedly change post-independence. The successive post-independence governments, instead of engaging in the arduous task of nation-building in a state comprised of multi-ethnic, multi-religious societies welded together into a state only through an oppressive colonial project, found it easier to use the police in doing the executive's bidding, in a bid to aggrandise and collate power.[23] The use of the police in extrajudicial killings, torture and other acts of gratuitous violence thus continued even post-independence. Like any other institution operating in opacity, corruption also started gnawing at the heart of the police. Soon, corruption became the hallmark of the police, with the force being consistently ranked as the most corrupt institution in Kenya.[24] The police force was thus in dire need of reforms.

R. Hope notes that globally, demands for police reforms and accountability are made due to a crisis of public confidence in the police.[25] Kenya's 2007-2008 post-election violence was an event that shattered any remnants of public confidence in the police, and the conclusions by the Commission of Inquiry into the Post-Election Violence (hereinafter referred to as the Waki Commission) on police conduct during the violence were damning.[26] The Commission found that the police had not only fantastically failed to protect Kenyans adequately but had themselves been involved in the commission of egregious crimes during that period, including rape, murder and theft.[27] The Commission further found that the policies, systems and procedures meant to respond to

22 Caroline Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (Pimlico, London 2005).

23 Report of the National Taskforce on Police reforms (2009) (Ransley Report) 13-16< http://www.ipoa.go.ke/images/press/Ransley%20Report.pdf > accessed on 18th October 2015>.

24 Transparency International Kenya Bribery Index reports from 2001, 2004,2005,2006,2007,2008 and 2011 available at http://www.tikenya.org/index.php/kenya-bribery-index <accessed on 18th October 2015>.

25 .R Hope, 'In Pursuit of Democratic Policing: An Analytical Review and Assessment of Police Reforms in Kenya' (2015) 1 *International Journal of Police Science and Management* at p. 6.

26 See *Report of the Commission of Inquiry into the Post-Election Violence* (2008) (the Waki report) available at http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf l <accessed on 19th October 2015>, at Pp. 416-27.

27 See *Ibid* at p. 421.

complaints against the police themselves and to deal with other perpetrators of the violence were outdated and did not work, thus further exacerbating the sorry state of the police in Kenya.[28] The post-election violence was hence not only an event in which policing in Kenya failed catastrophically but was also a watershed moment that laid bare the rot that had been eroding any remnants of professionalism and accountability in the police since independence and also brought to the fore the urgent need for wholesale reforms in the police. The inclusion of police reforms as part of the four items in the National Accord and Reconciliation Agreement between parties that ended the post-election violence was no surprise.[29] The subsequent appointment of the National Task Force on Police Reforms (NTFPR or Ransley Taskforce) began a badly needed wholesale police reform process. The report from the task force, commonly known as the Ransley report, provided the blueprint for police reforms in Kenya[30]. These reforms would entail structural and legal reforms and policy shifts to transform what was a force beholden to the executive into a police service beholden to democratic policing ideals.

3.0 Command responsibility as a key pillar of police reforms in Kenya

One of the main issues identified in the Waki Commission was the unlawful use of force and firearms by the police. The Commission found that 405 people were shot and killed by police officers in circumstances where it was highly likely they were unlawfully killed. The repealed Police Act cap 84 and the repealed Administration Police Act cap 85, however, only contained provisions on circumstances when police officers could use firearms but did not have any provisions specifically on accountability for the unlawful use of force and firearms. [31] Therefore, one of the main areas identified for police reforms was introducing a legal architecture for accountability where there was suspected illegal use of force and firearms.[32] One of the key pillars of accountability is independent and impartial investigations into alleged police misconduct.[33]

28 See *Ibid* p. 424
29 See Ransley Report, *supra* note 23 at Pp 1-3.
30 See *Ibid*.
31 See repealed Police Act, cap 84 s. 28 available at http://kenyalaw.org/kl/ last accessed 19/12/22; Repealed Administration Police Act , s. 14 available at http://kenyalaw.org/kl/ last accessed 19/12/22
32 *Supra note* 24 at 417-20
33 *Supra note* 24 at 431-444

Therefore, as part of police reforms, the Authority was established according to the Independent Policing Oversight Authority Act of 2011.[34] IPOA is an independent civilian statutory body established under section 3 of the Independent Policing Oversight Authority Act to provide civilian oversight over the work of the National Police Service. As the Court of Appeal put it, IPOA is the ordinary person's (Wanjiku) watchman over the police.[35] IPOA is mandated to *inter alia* conduct independent investigations into criminal and disciplinary complaints against police officers.[36] Section 25 of the IPOA Act obligates the Authority to investigate any death or serious injury caused by members of the Service while on duty. Additionally, the other body created is the Internal Affairs Unit. This is a semi-autonomous unit within the National Police Service, headed by an Assistant Inspector General who reports directly to the Inspector General (hereinafter IG). The unit is mandated to investigate disciplinary cases against police officers. [37]

Schedule 6 of the NPS Act on the use of force and firearms also requires IPOA to investigate any use of force that leads to death, serious injury and other grave consequences.[38] The schedule also clearly does not preclude the IG from conducting investigations. Therefore, this means that IPOA must investigate the criminal aspects of the conduct while the IG, through the Internal Affairs Unit, may also look at the disciplinary infractions. The law has, therefore, established bodies to conduct thorough, independent and impartial investigations on all aspects of police officers' use of force and firearms.

Apart from the conduct of thorough, independent and impartial investigations, the other key pillar of accountability is command responsibility. This requires states to hold superior officers accountable where they know or should have known that their subordinates are resorting to or have resorted to unlawful use of force and firearms and fail to take all measures in their power to prevent,

34 Independent Policing Oversight Authority Act, 2011 available at http://kenyalaw.org/kl/ last accessed on 12/4/2022

35 Attorney General & 2 others v Independent Policing Oversight Authority & another [2015] eKLR at page 3, available at http://www.ipoa.go.ke/wp-content/uploads/2020/03/Civil_Appeal_324_of_2014.pdf last accessed on 12/4/2022

36 *Supra note* 33 at Section 6

37 The National Police Service Act, 2011, ss 87-88, available at http://kenyalaw.org/kl/ last accessed on 12/4/2022

38 *Ibid* at Schedule 6.

repress or report illegal conduct by their subordinates to relevant persons / agencies with powers to investigate and/or punish prohibited conduct. [39] Command responsibility is essential in ensuring accountability for two reasons. Firstly, it works to prevent unlawful use of force and firearms since the superior officer is best placed to put in place and enforce measures to prevent illegal use of force by their subordinates. Secondly, where there is unlawful use of force, in most instances it would be difficult to have proper investigations if requisite information is withheld from investigative bodies. The person(s) who should be able to avail such information are the superior officer (s). Therefore, by obligating the superior officer to report unlawful use of force and firearms it ensures there is a chance for investigative agencies to conduct investigations that can lead to accountability.

The current NPS Act, 2011, enacted as part of police reforms, therefore, seeks to incorporate this principle in schedule 6-part C, which sets out the specific responsibilities of superiors. Firstly, the Act places a general obligation on superior officers to do everything possible to prevent unlawful use of force or firearms.[40] Secondly, the Act requires that the superior officer report to IPOA and the IG when there is illegal use of force or firearms.[41] Thirdly, even where the use of force or firearms does not result in death or serious injury, the Act requires the subordinate officer to report to their superior for the superior to determine whether the use of force or firearm was lawful or not.[42] Fourthly, where there is death, serious injury or other grave consequences in police custody or due to police action, the superior is obligated to secure the scene, immediately report the same to IPOA, and confirm in writing within 24 hours of the incident.[43] The superior must also secure relevant evidence that may

39 See Article 24, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, (1990) available at https://www.un.org/ruleoflaw/blog/document/-principles-on-the-use-of-force-and-firearms-by-law-enforcement-officials/ last accessed 12/4/2022; Article 19, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions available at https://digitallibrary.un.org/record/75550?ln=en last accessed 19/12/2022; Article 6 International Convention for the Protection of All Persons from Enforced Disappearance available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced last accessed on 9/12/2022;

40 Supra note 36, Schedule 6-part C rule 1

41 Ibid

42 Ibid, Schedule 6-part B rule 4

43 Ibid Schedule 6-part C rule 3; Supra note 33 IPOA Act section 25 (2)

be required for investigations and forward it to IPOA immediately. Lastly, concerning criminal responsibility for the superior, failure by a superior to secure evidence and report to IPOA is a criminal offence.[44]

While the foregoing provisions represent an essential step in accountability, in terms of holding superior officers criminally liable for failure to exercise effective command and control over their subordinates, these provisions fall short as there are gaps that blunt their impact. Firstly, the superior is not made criminally liable for failure to prevent unlawful conduct. Taking the case of baby Pendo as an example, if the superior knew or had reason to know subordinates were about to engage in illegal conduct, *to wit*, deliberately and without colour of a right breaking into homes and assaulting residents, and failed to prevent them when he could do so, this provision would not apply. Secondly, the superior is not criminally liable for failure to repress ongoing criminal conduct. Considering again the case of Baby Pendo, if the superior, in that case, knew or had reason to know his juniors were engaging in the unlawful conduct of breaking into homes and assaulting them and could stop the ongoing unlawful conduct but failed to do so again this provision would not apply to place criminal responsibility on the superior.

The closest the Penal Code (Cap 63) of the Laws of Kenya comes to command responsibility is the offence of neglect of official duty, under section 128 of the Penal code, whereby a public officer may be found criminally culpable of negligence if he fails to perform any duty which he is bound by the law to perform. The offence is not explicitly targeted at superior officers. Still, it could apply where a superior police officer fails to perform their duty to do everything in their power to prevent the subordinates' unlawful use of force and firearms. However, two factors militate against the utility of this provision to close the current accountability gap for police superiors. Firstly, the offence is only a misdemeanour and, therefore, fails to capture the gravity of dereliction of duty by police superiors, leading to cases such as Baby Pendo and Stephany Moraa. Secondly, it does not establish a nexus between the dereliction of duty by the superior and the offence committed by subordinates. As argued in infra part 5.1.4, to be sufficiently deterrent and satisfy the victim's

44 Ibid

right to access to justice, the superior ought to be held culpable not just for a stand-alone offence of dereliction of duty removed from the actual offence committed by a subordinate but to be held criminally culpable for the actual offence committed by the subordinates. Therefore, the current provisions on criminal accountability for superior officers have failed to pierce the armour of the blue code of silence. Some superior officers aware of the criminal conduct of their subordinates do nothing to prevent or repress it. Instead, they provide them with military-grade armour cover, a keen to the skin of the leviathan, leading to cases like Baby Pendo and Stephany Moraa, where the leviathan of wanton unlawful use of force and firearms prowls unrestrained by the current ineffectual legal provisions mauling innocent lives.

4.0 Command responsibility in international law

Historically, the development of command responsibility can be traced to domestic military laws, where a commander could be held criminally culpable for the crimes committed by his forces if he failed to prevent or punish crimes.[45] The elements of command responsibility as a mode of criminal liability have, however, mainly been developed and expounded in international law. Command responsibility was first applied in international law post-World War II as a mechanism to hold criminally liable military commanders for failure to exercise effective command and control of their subordinates who committed egregious violations of laws of war. [46] The first case where the concept was applied to hold a military commander criminally liable was by the United States Military Commission in Manilla in *the trial of General Tomoyuki Yamashita*, who was in command of Japanese forces in the Philippines from 9th October 1944 until his eventual surrender in September 1945. He was found criminally culpable for war crimes committed by Japanese troops in the Philippines. His culpability was premised on his failure to discharge his duty as commander to control his forces, thereby permitting them to commit the

45 Carol T Fox, 'Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offenses' (2004) 55 *Case Western Reserve Law Review* 443, 445–449 https://scholarlycommons.law.case.edu/caselrev/vol55/iss2/7 accessed 7 December 2022. Chantal Meloni, 'The Evolution of Command Responsibility in International Criminal Law' in Morten Bergsmo, Cheah Wui Ling, Song Tianying and Yi Ping (eds), *Historical Origins of International Criminal Law: Volume 3* (Torkel Opsahl Academic E Publisher, 2015) 686–687.

46 See Chantal Meloni Ibid at 688-690; See Carol T. Fox Ibid at 451-453; A. Cassese et al (eds) *International Criminal law, cases and commentary* (OUP) 2011 at 422

atrocities. [47] While the formulation and application of the concept in that case was criticized because it was not shown that Yamashita had knowledge of the commission of offences,[48] the idea developed and was applied by the United States Military Tribunal at Nürnberg in other cases such as *United States v. Karl Brandt and others*[49], *United States v Wilhelm List et al*. (the "*Hostage Case*")[50] and *United States v Wilhelm von Leeb et al*. ("*High Command Case*").[51] The US Military Tribunal in Tokyo also applied it in *U.S.A. v. Soemu Toyoda*.[52] The concept was also applied to civilian superiors, for instance, Nazi industrialists in the United States vs Friedrich *Flick* and others[53] and the *Reochling case*, for war crimes and crimes against humanity.[54]

The concept, having crystallised in international law, was incorporated in the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[55] The tribunals vide case law further refined and elaborated concept elements, including its application to non-military superiors.[56] Command responsibility as a mode of

47 Ibid International Criminal Law at 422-425

48 For a detailed discussion see Ibid *International Criminal law* at 425-431

49 *Vol. II, Trials of War Criminals (TWC)* before the Nürnberg Military Tribunals under Control Council Law No. 10, (U.S. Govt. Printing Office: Washington 1950) 186, p. 212 (relating to the criminal responsibility of the accused Schroeder)

50 *Vol. XI, TWC*, para 214 http://www.worldcourts.com/imt/eng/decisions/1948.02.19_United_States_v_List2.htm last accessed 17/10/2022

51 *Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No 10* available at http://werle.rewi.huberlin.de/High%20Command%20Case.pdf at p.39 last accessed 17/10/2022

52 Available at https://www.worldcat.org/title/record-of-proceedings-in-the-trial-of-usa-v-soemu-toyoda/oclc/223681940. last accessed 7/12/22

53 *Vol. VI, TWC*, 1187 available at http://werle.rewi.hu-berlin.de/Flick-Case%20Judgment.pdf last accessed 7/12/22

54 *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others, Indictment and Judgement of the General Tribunal of the Military Government of the French Zone of Occupation in Germany,* Vol. XIV, TWC, Appendix B, 1061.

55 Article 7 (3) Statute of the ICTY available at https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf last accessed on 8/12/2022; Article 6 (3) Statute of the ICTR available at https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-criminal-tribunal-prosecution-persons last accessed on 12/8/2022. ICTY was established by the UN to deal with international crimes that took place during the conflict in the Balkans in the 1990s and the ICTR was established to investigate and prosecute those involved in the 1994 Genocide in Rwanda .

56 Refer to *Prosecutor v. Delalić, Mucić et al*. IT-96-21- T, 16 November 1998, (*Celebic case*) the Trial Chamber of the ICTY paras 366-357,363 available at (http://www.legal-tools.org/doc/d09556/) last accessed 12/8/2022 ; Prosecutor v. Delalić, Mucić et al. IT-96-21-A, ICTY Appeals chamber judgement (20 February 2021) para 195 avilable at https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf last accessed on 14/12/22 ; ICTR Kayishema and Ruzindana, Trial Chamber Judgement, para. 213; *Prosecutor v. Aleksovski, Case No. IT-95-14/1-T,* Trial Judgment of the ICTY, 25 June

criminal culpability for international crimes such as crimes against humanity, war crimes, genocide and aggression is now considered part of customary international law.[57] Recently, the European Court of Human Rights, in the case of *Milanković v. Croatia*, upheld the conviction of police superior by Croatian domestic courts under the doctrine of command responsibility for war crimes committed by police forces under his command against the Serbian population and a prisoner of war between 1991-1992. The court reiterated that command responsibility was part of customary international law at the time of the commission of the crimes.[58]

According to Article 2(5) of the Constitution of Kenya, customary international law forms part of the laws of Kenya; command responsibility as part of customary international law is therefore applicable in Kenya.[59] The concept has also been incorporated in the Rome statute, to which Kenya is a state party and has domesticated through the ICA.[60] Pursuant to section 7 of that Act, Article 28 of the Rome statute applies in prosecuting international crimes in Kenya.

Command responsibility has been applied in international criminal law as a mode of criminal liability. i.e., the superior is held criminally liable for the offences committed by his subordinates due to his or her failure to exercise control properly over such forces. [61]The rationale underlying this mode of omission liability is that the superior has the power to control the actions of the subordinates. The superior is, therefore, placed under legal duty to exercise that power to prevent or repress their subordinates' unlawful conduct

1999, para. 75-76, available at https://www.icty.org/x/cases/aleksovski/tjug/en/ale-tj990625e.pdf last accessed on 12/8/2022.

57 See Ibid ICTY, *Prosecutor v. Zejnil Delalić et al (Celebic case)*; *Prosecutor v Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura, decision on interlocutory appeal challenging jurisdiction in relation to command responsibility Case*: IT-01-47-AR72 at paras 29-31 available at https://www.icty.org/x/cases/hadzihasanovic_kubura/acdec/en/030716.htm last accessed 12/8/2022

58 the case of *Milanković v. Croatia (application no. 33351/20)* available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-215180%22]} last accessed 19/11/2022

59 The Constitution of Kenya available at http://kenyalaw.org/kl/ ; See also Supreme of Kenya, *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*; *Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR* at para 137-140

60 International Crimes Act, 2008 available at http://kenyalaw.org/kl/

61 See *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* -No. ICC-01/05-01/08 (15 June 2009) (hereinafter Bemba pre trial chamber decision) at para 405 available at https://www.icc-cpi.int/court-record/icc-01/05-01/08-424 last accessed on 12/8/2022

or to submit the matter to the competent authorities for investigation and prosecution. Where the superior fails to perform that duty diligently, they incur criminal sanctions in the form of individual criminal liability for the offences committed by their subordinates.[62]

In the Kenyan context, the NPS Act already places a legal duty on superior officers to do everything in their power to prevent unlawful use of force and firearms, and where such prohibited use of weapons, to report immediately to IPOA and the Inspector-General.[63] The gap, as afore discussed, is in linking that legal obligation to appropriate criminal liability for the superior. Currently, criminal liability is only related to failure to report to IPOA and is not linked to the offences committed by the subordinates. It, therefore, fails to capture the full panoply of the duty reposed to superiors. Conversely, the doctrine of command responsibility as captured in Article 28 of the Rome Statute does provide a solution to closing that gap, since under that provision, the superior can be held criminally culpable for the offences committed by the subordinates drawing from the superior's failure to prevent or repress the commission of crimes or failure to submit the matter to the competent authorities for investigation and prosecution. As aforementioned the provision already applies to international crimes in Kenya under section 7 of the ICA.

This article argues that this doctrine should be extended and made applicable to police superiors for serious domestic crimes through an amendment to the NPS Act. The penal code defines a serious offence as an offence punishable by imprisonment for twelve months or more.[64] This would cover offences where there is serious injury or death occasioned by unlawful use of force and firearms, typically charged under the penal code, such as assault causing grievous harm or maiming[65], manslaughter[66], attempted murder[67] and murder.[68] It would also

62 See *supra note* 54 *Celebici Trial chamber Judgement* para 334, 377; *Ibid* Bemba pre trial chamber at para 405; Bemba trial judgment para 172

63 The National Police Service Act, 2011 Schedule 6 part C rule 1 available at http://kenyalaw.org/kl/ last accessed on 12/9/2022

64 The Penal code, Cap 63 of the Laws of Kenya, section 122A available at http://kenyalaw.org/kl/ last accessed on 9/12/2022

65 Ibid s. 234

66 Ibid s. 2015

67 Ibid s. 220

68 Ibid s. 204.

apply to serious offences under the sexual offences Act[69] and also torture and cruel, inhuman, and degrading treatment provided for under the Prevention of Torture Act.[70] If Kenya ratified the convention against enforced disappearance, it would also apply to the offence of enforced disappearance.[71] Given the suggestion made in this article to extend and apply the doctrine of command responsibility to police superiors for serious domestic crimes, it is necessary to unpack what this doctrine entails and how it would apply to police superiors in Kenya.

5.0 Can command responsibility be applied to domestic offences?

As mentioned, the doctrine has already been developed in international criminal law, where it has attained the status of customary international law for international crimes. Similarly, according to section 6 of the ICA, command responsibility is currently only applicable in Kenya to international crimes. While in certain instances, especially concerning cases of widespread or systematic human rights abuse by the police as happened in the post-election violence of 2007 and 2017, it is possible to classify criminal conduct by police officers as amounting to international crimes, most cases of serious offending by subordinates where superiors fail to act will not fall within the purview of the ICA.[72] This can be exemplified by contrasting the baby Pendo and the Stephany Moraa cases.

In *The Baby Pendo case* following the Magistrate's court decision in 2017 directing the DPP to charge commanders with murder under command responsibility, it was evident that it was not possible to charge the officers since the Kenyan penal code does not provide for command responsibility as a mode of criminal liability for murder. IPOA, therefore, had to conduct fresh investigations to collect sufficient evidence for a charge under the ICA. The first criminal investigation of its kind by a domestic entity in Kenya. The complex investigations took nearly five years before the DPP was satisfied

69 Sexual offences Act, No. 3 of 2006 available at http://kenyalaw.org/kl/ last accessed on 9/12/2022

70 Prevention of Torture Act, No. 12 of 2017 section 5 and 7, available at http://kenyalaw.org/kl/ last accessed on 9/12/2022

71 Article 6 International Convention for the Protection of All Persons from Enforced Disappearance available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced last accessed on 9/12/2022

72 See report of 2007 and 2017

there was sufficient evidence to charge the superior officers with crimes against humanity based on command responsibility.[73] *The Stephany Moraa case,* on the other hand, has not yielded any criminal prosecution and is unlikely to unless sufficient evidence can be gathered to bring the offence under the broader rubric of crimes against humanity. The limited scope of the ICA leaves a vast accountability gap for serious offences that do not meet the criteria for international crimes.

The question that then naturally arises is whether the doctrine of command responsibility can apply to domestic offences (as opposed to international crimes). As aforementioned, command responsibility has its roots in domestic military law before it was abstracted and used after World War II for international crimes.[74] The first codification of command responsibility in the international convention is Article 86 (2) of the First Additional Protocol to the Geneva Conventions (hereinafter AP1), to which Kenya is a party.[75] The provision envisages the application of command responsibility, not just to grave breaches (international crimes) but also to other violations of AP1 or the Geneva Conventions that give rise to penal or disciplinary consequences under domestic law. While the protocol's application is limited to International Armed Conflicts, the point here is that nothing in the development of the doctrine of command responsibility limits its application to international crimes. The fact is made even more apparent concerning the crime of enforced disappearance. The convention against enforced disappearance obligates state parties to criminalise it under their domestic law. The convention further obligates state parties to hold criminally responsible a superior who *inter alia* "*Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent*

73 Refer to story, DPP presents to court officers accused in Baby Pendo case, available at https://www.odpp.go.ke/dpp-presents-to-court-officers-accused-in-baby-pendo-case/ last accessed on 12/9/22

74 See supra note 43 Carol T. Fox, Closing a Loophole in Accountability for War Crimes, at pages 445-449; see also supra note 43 Chantal Meloni, The Evolution of Command Responsibility in International Criminal Law at pages 4-5

75 See Article 86 the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 unts 3, (AP1) ; Pursuant to Article 2(5) of the Constitution ratified treaties and conventions form part of the laws of Kenya. However, Article 86 AP1 is not self-executing, it requires the state to come up with domestic legislation setting out penal or disciplinary sanctions for breaches of the protocol predicated on *interalia* command responsibility which Kenya is yet to do.

authorities for investigation and prosecution". [76] If Kenya ratifies the convention, it will, therefore, be required to create the offence under its domestic law and hold criminally responsible superiors who fail to prevent, repress or report the commission of the crime by their subordinates. It would make little sense, therefore, to have command responsibility only applicable to enforced disappearance but inapplicable to other serious offences such as murder.[77] Hence, command responsibility can be applied to domestic offences from the foregoing. Therefore, a critical step to taming this incorrigible leviathan lies in expanding the application of the concept of command responsibility to serious domestic offences committed by police officers.

6.0 Command responsibility: Mode of criminal liability or separate offence?

Command responsibility, as developed in international law, is a mode of criminal liability and not a separate offence, i.e., the commander is not held liable for a separate offence of dereliction of duty.[78] This is made clear, especially in how it is formulated in the Rome statute. Article 28 provides that it is applicable "*In addition to other grounds of criminal responsibility under this Statute*" Furthermore, the commander is held criminally liable for those offences committed by the forces under his command and control. The ICC trial chamber in the Bemba case restated this position.[79] The issue of holding commanders liable for offences committed by subordinates has engendered a lot of debate recently, especially given the principle of personal culpability, which means persons should be punished only for their wrongdoing encapsulated in the latin maxim, *nulla poena sine culpa* . [80] It has been argued that where

76 *Supra note* 74 Article 6 (b) (iii)

77 The Senate has recommended that the state vide the Attorney General does ratify the convention. See *Report on the Inquiry into Extrajudicial Killings and Enforced Disappearances in Kenya*, October 2021 at page 34 available at http://parliament.go.ke/node/16761 last accessed on 26/12/22

78 *Supra note* 55 *Celebici Trial chamber judgment* at pages 331-333.

79 *The prosecutor v. Jean-Pierre Bemba Gombo Trial chamber Judgement* at para 173-4, 21 March 2016 available at https://www.icc-cpi.int/court-record/icc-01/05-01/08-3343 last accessed on 9/12/2022; See also *Bemba Appeals Chamber* a Concurring Separate Opinion of Judge Eboe-Osuji at pages 66-69 available at https://www.icc-cpi.int/court-record/icc-01/05-01/08-3636-anx3 last accessed on 12/9/2022

80 . See *Ibid* Bemba trial chamber judgment at para 211; For detailed discussion of the arguments see ;Daryl Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution' (2012) 13 *Melbourne Journal of International Law* p. 13; Chantal Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (2007) 5 *Journal of International Criminal Justice* 619–637;Miles

command responsibility is applied without requiring any causal nexus between the failure of duty by the commander and the crimes committed by the subordinates, it violates this principle. This is the case, for instance, at the ICTY, where the concept, as developed in its jurisprudence, does not require the prosecutor to establish such a causal link.[81]

Given the challenge brought about by the principle of personal culpability, some scholars have suggested that command responsibility should, therefore, be a separate offence, whereby the commander is held criminally culpable for dereliction of duty and not for the violations committed by their subordinates.[82] In that way, the commander is not held criminally culpable for somebody else's wrongdoing but for their own. There is a lot of debate about the exact contours of the principle of personal culpability and its application to command responsibility, which debate is outside the purview of this article.[83] That said however the question of whether command responsibility for police superiors as suggested in this article, should be adopted as a mode of criminal liability or as a separate offence requires some consideration.

The concept of command responsibility will indeed stretch the principle of personal culpability if the principle is understood to require both the objective nexus element, i.e., causality between the accused's conduct and the offence charged and the subjective nexus, i.e., the *mensrea* nexus between the accused and the offence. For instance, if the underlying offence is murder, for the

Jackson, 'Causation and the Legal Character of Command Responsibility after *Bemba* at the International Criminal Court' (2022) 20 *Journal of International Criminal Justice* 437–458 https://academic.oup.com/jicj/article/20/2/437/6588147 accessed 10 December 2022 ; Mirjan Damaška, 'The Shadow Side of Command Responsibility' (2001) 49 *American Journal of Comparative Law* 455.

81 See supra note 55 *Celebici Trial Judgement*, at para. 398; ; *Prosecutor v. Tihomir Blaskic Appeal Chamber Judgement, 29 July 2004*, at para. 77 available at https://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf last accessed on 9/12/2022; *Prosecutor v. Sefer Halilović Trial Judgement, 16 November 2005* at para. 78 available at https://www.icty.org/x/cases/halilovic/tjug/en/tcj051116e.pdf last accessed 9/12/2022 ; *Prosecutor v. Enver Hadžihasanović Amir Kubura Appeal Chamber Judgement (22 April 2008)* para 38-40 available at https://www.icty.org/x/cases/hadzihasanovic_kubura/acjug/en/had-judg080422.pdf last accessed 9/12/2022; For a detailed discussion see also Evan Wallach and I Maxine Marcus, 'Command Responsibility' in Cherif Bassiouni (ed), *International Criminal Law* (3rd edn, 2008) 476.

82 See for instance *Prosecutor v. Ori´c, Case No. IT-03-68, Trial Judgment (July 30, 2006)* whereby the court appears to hold the accused responsible for dereliction of duty, rather than for the underlying crimes he failed to prevent. For a detailed discussion see supra note 79 Command Responsibility at page 471-2.

83 For a detailed discussion of the debate see supra note 79

superior to be found culpable of murder under command responsibility, they are not required to cause death, i.e., the *actus reus* and to share *mens rea* in terms of malice aforethought of the subordinate who murdered.

In Kenya, the jurisprudence on the principle of personal culpability is not yet settled. The Court of Appeal in the case of *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others*[84] held that our legal system is premised on the principle of personal/individual liability. On that basis, the court held that to find a governor in gross violation of the constitution for impeachment, a nexus must be established between the governor's conduct and the gross violation alleged.[85] This principle is, however, not applied in all cases in Kenya. For instance, concerning the concept of common intention, a person who forms a common intention with others to prosecute an unlawful purpose may be convicted for an offence committed by another person in the process of prosecuting the unlawful purpose if its commission was a probable consequence of the prosecution of that illegal purpose. [86] The accused person need not have lifted a finger in committing the charged offence or even remotely possessed the *mens rea* for that offence. It is sufficient for conviction under common intention that the accused was simply part of the group prosecuting the unlawful purpose whereby one member committed the offence.[87]

Commentators have interpreted the principle of personal culpability, which is the position adopted in this article, to require that the accused contribute to the crime to be liable for it.[88] Therefore, objective causality and the subjective element, i.e., mens rea link with the offence charged, are not required. Thus, where a causal nexus between the dereliction of duty and the commission of crimes is established, it is sufficient to assuage the requirements of personal culpability.

84 [2014] eKLR, paras 40–41 http://kenyalaw.org/kl/ accessed 10 December 2022

85 Ibid

86 See Supra note 63 at section 21 Penal code; See *Court of Appeal Eunice Musenya Ndui v. Republic [2011] eKLR* available at http://kenyalaw.org/kl/ last accessed on 10/12/22

87 Court of Appeal *Njoroge v. Republic [1983] KLR 197* cited also with approval by the Court of Appeal in *Hellen Anyango Oloo & 2 others v Republic [2018] eKLR* available at http://kenyalaw.org/kl/ last accessed on 10/12/22 ; see also *Haro Guffil Jillo v Republic [2014] eKLR* at page 4 available at http://kenyalaw.org/kl/ last accessed on 10/12/22; *Stephen Ariga & another v Republic [2018] eKLR* at page 6 available at http://kenyalaw.org/kl/ last accessed on 10/12/22.

88 See supra note 79 Daryl Robinson, 13;

6.1.0 Is causal nexus required under Article 28?

The ICTY's jurisprudence clearly states that, under customary international law, a causal nexus is not required to prove command responsibility.[89] However, this article argues for extending the principle of command responsibility set out in Article 28 of the Rome statute to police superiors for domestic offences since it is already applicable in Kenya, albeit currently only for international crimes.

The structure of Article 28 of the Rome Statute is different from the statute of the *ad hoc* tribunals, and the question is whether Article 28 of the Rome Statute requires a causal nexus to be proven between the failure by the commander to exercise effective command and control and the commission of crimes? The issue is the subject There has been much debate, and varied positions have been taken. The Bemba case is the first and only case of the ICC to deal with Article 28 of the Rome Statute, and the positions taken reflect the debate.

6.1.1 No causal nexus required position

The first position is that the provision does not require a causal nexus. Appeal Judges Christine Van den Wyngaert and Howard Morrison adopted this position in their separate opinions in the Bemba case.[90] This position has been argued on two limbs.

First is textual interpretation. The chapeau of Article 28 (a) provides;

> "A military commander or person effectively acting as an army commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and power as the case may be, as a result of his or her failure to exercise control properly over such forces, where:… (Emphasis mine)"

Two textual interpretations are plausible.

89 See supra note 77

90 *The Prosecutor v. Jean-Pierre Bemba Gombo, Appeals Chamber Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, 08 June 2018* at para 51-56 available at https://www.icc-cpi.int/court-record/icc-01/05-01/08-3636-anx2 last accessed on 11/12/2022

The first is that the phrase *"as a result of"* refers to the crimes committed by the subordinates. To mean that the crimes are as a result of the commander's failure to exercise proper control. The clause thus is read ;

> "A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:" (Emphasis mine)

In that case, a causal nexus must be established between the crimes committed and the superior's failure to exercise proper control.

The second interpretation favoured by proponents of this view is that the phrase "as a result of" refers to the criminal responsibility of the commander and not to the crimes committed.

> "A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under their effective command and control, or effective authority and control as the case may be, due to his or her failure to exercise control properly over such forces…" (Emphasis mine)

The import of the phrase "as a result of," therefore, is simply that the criminal responsibility of the commander (not the crimes) is due to or emanates from their failure to exercise proper control over the forces. Consequently, no causal nexus is required by the provision between the commission of the crimes and the failure of the superior to exercise control.[91]

The second limb of the argument is premised on a holistic reading of Article 28 that does not render any provision. Article 28 (a) (ii) provides that the superior can be held culpable under superior responsibility for *inter alia* failure

91 *The Prosecutor v. Jean-Pierre Bemba Gombo, Trial Chamber Separate opinion of judge Kuniko Ozaki* paras 3, 8 and 11 available at https://www.icc-cpi.int/court-record/icc-01/05-01/08-3636-anx2 last accessed on 11/12/2022

to punish or report the commission of crimes. Logically, there can be no causal nexus between the duty to punish and report the commission of the crimes since these duties apply after the crime has already been committed. Consequently, this view contends, with the causal nexus interpretation, it is not possible to prosecute a commander for failure to punish or report crimes that have already been committed, which is envisaged under Article 28 (a) (ii), the chapeau of Article 28 cannot, therefore, be interpreted to render otiose provisions of Article 28 (a) (ii) by requiring causal nexus.[92]

Challenges to this position

Concerning the textual argument. Firstly, as aforestated, two textual interpretations are possible. According to Article 22(2) of the Rome statute, where there is ambiguity, an understanding should be adopted that favours the accused.[93] In this case, the interpretation requires a causal nexus between the accused and the crimes favouring the accused, and therefore, that lends itself to adoption.[94] Secondly, as stated in Kenya, there is jurisprudence from the Court of Appeal that Kenya's legal system is premised on personal culpability. Consequently, the interpretation requiring the establishment of a causal nexus would be more in line with the precedent of the Court of Appeal. Finally, concerning the argument on the holistic approach to Article 28 to address culpability under Article 28 (a) (ii) for failure to punish or report crimes already committed, as will be discussed in infra part 5.1.4, it is possible to establish causal nexus between the general inability to exercise proper control over the forces and failure to punish or report crimes, where failure to exercise adequate control leads to the commission of crimes that the superior subsequently fails to punish or report. It is, therefore, still possible, with a causal nexus requirement, to hold criminally culpable superiors who fail to punish crimes committed due to their failure to control subordinates adequately.

92 See supra note 89 separate opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison
93 Section 6 of the ICA applies Article 22(2) of the Rome statute to Kenya.
94 Supra note 90 at para 11

6.1.2 Partial causal nexus

The second view takes a midway approach between the position in which no causal nexus is required and the position in which a causal nexus is required for all the duties. It holds that a causal nexus is required between the commander's dereliction of duty and the subordinates' crimes. However, the causal nexus requirement only applies to the duty to prevent and repress ongoing crimes because it cannot logically apply to punishing or reporting the commission of crimes. Since those duties apply after the commission of the crimes, this is the position adopted by the ICC. pretrial Chamber in *Bemba*.[95]

The problem with this approach is its apparent contradiction. Suppose causal nexus is essential in holding a commander culpable under command responsibility, as this view holds. In that case, abandoning that vital element regarding the duty to punish or report is inexplicable. Establishing a causal nexus regarding the duty to prevent and stay true to the principle of personal culpability is crucial. In that case, that same principle should apply to all duties. Where the causal nexus is inapplicable to duty, it should follow that the accused cannot be held criminally culpable under this approach.

6.1.3 Series of Crimes Approach

The third approach acknowledges the requirement for a causal nexus between dereliction of duty by the commander and the commission of crimes. The point of departure from the second approach concerns the duty to punish or report. This approach acknowledges the causal illogicality that was discussed before. The solution proffered by this approach is that a causal nexus regarding the duty to punish or report would apply whereby, in a series of crimes, a commander fails to punish the first crime, leading to the commission of subsequent crimes. In that case, a causal nexus can be drawn between the failure to punish the first crime and the commission of subsequent crimes.96 A novel solution indeed. This is the approach, for instance, proffered by Judge Eboe-

95 See *The Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo 15 June 2009* paras 423-424 available at https://www.icc-cpi.int/court-record/icc-01/05-01/08-424 last accessed 12/12/22 ; the Trial chamber also agreed with the pretrial chamber on the casual nexus requirement but did not elaborate on application of this nexus to duties to punish or report. See supra note 76, Trial chamber judgment at para 211-213.

96 See supra note 79 Daryl Robinson at pages 16-17

Osuji in his Concurring Separate Opinion in *Bemba Appeal*.[97] However, as is apparent, this solution is inapplicable whereby only one crime is committed by the subordinates since the only dereliction of duty by the commander is the failure to punish or report that crime. [98] Furthermore, no causal nexus regarding the failure to punish or report the first crime can be established, even in a series of crimes. Therefore, the approach leaves an appreciable gap in accountability in those circumstances.

6.1.4 General duty approach

The last approach differentiates between the general duty set in the chapeau to Article 28 (a) and the specific duties set out in Article 28 (a) (ii). The chapeau to Article 28 (a) sets out a general duty for the commander to exercise control properly over the forces. It provides;

> "A military commander or person effectively acting as a military commander shall be *criminally responsible for crimes……, as a result of his or her failure to exercise control properly over such forces …"*

This approach argues that the specific duties set out in Article 28 (a) (ii) to prevent, repress or submit matters to competent authorities are only the substantiations of that general duty that trigger criminal culpability. Still, they do not exhaust the peripheries of that general duty.[99] For instance, if it is shown that the commander failed to prevent the commission of crimes, that suffices to prove that the commander failed in the general duty to exercise proper control over the forces. However, other instances may not be as exerting as duty prevention, which would still entail the failure of the general duty to exercise proper control. [100] For example, the trial chamber in Bemba held that

97 *The Prosecutor v. Jean-Pierre Bemba Gombo*, *Appeals Chamber Concurring Separate Opinion of Judge Eboe-Osuji, 08 June 2018* at para 210-211 available at https://www.icc-cpi.int/court-record/icc-01/05-01/08-3636-anx2 last accessed on 11/12/22

98 Supra note 79 Daryl Robinson at page 18-19

99 See *The Prosecutor v. Jean-Pierre Bemba Gombo, Trial Chamber Separate opinion of judge Steiner* paras 11-15 available at available at https://www.icc-cpi.int/court-record/icc-01/05-01/08-3636-anx2 last accessed on 11/12/2022; See also O.Triffterer and R.Arnold, 'Article 28' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (2016) 1094–1095 ; See also O. Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?' (2002) 15 *Leiden Journal of International Law* 179, 198–205

100 See Ibid Judge Steiner at para 12; See Ibid O. Triffterer and R.Arnold, "Article 28"; See also *ICTY Trial chamber judgement Prosecutor v. Sefer Halilović* , (16 November 2005) at paras 79- 81, and 86 available

the duty to prevent is violated when the commander *"fails to take measures to stop crimes that are about to be committed or crimes that are being committed."*[101] When no crimes are committed or about to be committed, the commander must ensure officers are appropriately trained and issue routine orders to ensure discipline.[102]

It is the dereliction of that general duty and not the specific duty to repress (punish) or report in Article 28 (a) (ii) that is causally linked to the commission of the crimes. Article 28 (a), therefore, does not require that crimes are committed because of failure by the commander to punish or report crimes already committed, which is logically not possible, but rather, the crimes are committed because of failure by the commander to exercise the general duty to exercise proper control over the forces. Where crimes are committed as result of that general failure of duty by the commander and the commander additionally fails to punish or report the subordinates then criminal culpability attaches to that commander.[103]

Under this approach, a commander can be held criminally culpable for failure to punish or report crimes that occurred due to their inability to exercise proper control over their forces. This approach maintains the requirement for causal nexus in the chapeau of Article 28 (a) and does not render criminal culpability for failure to repress, punish or report in Article 28 (a) (ii) otiose.

This approach is favoured because firstly, unlike the approach that argues there is no causal nexus requirement in Article 28, this approach maintains a requirement for causal nexus, which is in line with the textual interpretation of Article 28 that is consonant with Article 22(2) of the Rome statute. Secondly, it does not suffer the apparent contradiction in the partial causal nexus approach, which requires causal nexus to be established only concerning the duty to prevent but not concerning the responsibilities to punish or report crimes that have already been committed. Lastly, it does not leave unaddressed

at https://www.icty.org/en/case/halilovic#tjug last accessed 12/12/2022.

101 See Supra note 78 *Bemba Trial chamber judgement* at para 202

102 Ibid Judge Steiner separate opinion at para 13; Supra note 98 O. Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?'

103 Supra note 98 O. Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?' at page 202

accountability gaps in the series of crimes approach. With this approach, causal nexus is applicable even with regard to the failure to punish or prevent a lone crime or the first crime in a series since the causal nexus is not required between the failure to punish or report the crime but rather nexus between the inability by the commander to exercise the general duty to control his forces and the commission of the crime which he then subsequently fails to punish or report.

This approach, in the view of the present writer, therefore, strikes a balance between adopting command responsibility as a mode of criminal liability and the principle of personal culpability by requiring a causal nexus between failure by the commander to exercise proper control over their forces and commission of crimes, while still maintaining culpability for failure by the commander to punish or report crimes. Command responsibility can, therefore, be applied in Kenya, as suggested in this article, for police superiors as a mode of criminal liability.

Furthermore, there are advantages to having command responsibility as a mode of criminal liability instead of a separate offence. Firstly, it would be inconsistent if command responsibility was adopted as a separate offence for serious domestic offences under the NPS Act while it is applicable as a mode of criminal liability for international crimes under the ICA. Consistency would, therefore, require its adoption as a mode of criminal liability even for police superiors for serious domestic crimes. Secondly, when applied as a mode of criminal liability instead of a separate offence, there is an additional deterrent element since the superior's culpability is linked to their subordinates' criminal conduct. The superior is, therefore, aware that should subordinates commit offences, they will be held liable for these same offences and not any lesser offence of dereliction of duty. The superior is therefore more incentivized to fulfill their duty to prevent, repress, punish or report the offences. Lastly, from the victim's perspective, access to justice appears concrete and not remote where the superior's culpability is tied to the offence (s) committed by their subordinates, especially where the subordinates cannot be identified for prosecution.

6.2 Standard for causal nexus

Having established that causal nexus is a requirement under article 28, the next logical question is what level/standard of causal nexus is required?

The pre-trial chamber in *Bemba* held that it was not necessary for the prosecution to satisfy a *"but for test*" (also referred to as *sine quo non* test) i.e., but for the commander's dereliction duty the crimes would not have been committed. The court, taking cognizance of the difficulties of establishing with accuracy the material effects of an omission, held that the prosecution only therefore needed to show the commander's dereliction of duty increased the risk of commission of crimes charged.[104] The trial chamber on the other hand did not address the particular standard required by article 28 for causation, it simply noted the standard would be satisfied where it is established *"that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes."* But added that this is a higher standard than that required by the provision. While the trial chamber therefore skirted the issue, Judge Steiner in her separate opinion proposed a high probability test. Causal nexus would be stablished whereby … "*there is a high probability that, had the commander discharged his duties, the crime would have been prevented, or it would not have been committed by the forces in the manner it was committed*."[105]

The Appeals chamber did not also address the issue, however in their dissenting opinion judges Sanji Mmasenono Monageng and Judge Piotr Hofmański endorsed the high probability standard.[106] This test, in the authors view, strikes a proper middle ground between the "but for test", which would set the bar too high for prosecution and could therefore lead to accountability challenges, and the increased risk test which could set a very low threshold especially where the increased risk could imply any risk, and therefore fail to take into proper account the personal culpability principle.

104 *Supra note* 94 pre-trial chamber decision at pages 150-151

105 *Supra note* 98 Judge Steiner separate opinion at pages 10-11

106 See *The Prosecutor v. Jean-Pierre Bemba Gombo, Appeals Chamber Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański* at para 339 available at https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2018_02987.PDF last accessed on 12/12/22

7.0 Some room for command responsibility as a separate dereliction of duty offence

From the foregoing analysis, command responsibility should be applied as a mode of criminal liability for police superiors whereby police superiors are held criminally liable for the offences committed by their subordinates.

However, in certain instances causal nexus cannot be established between dereliction of duty and the commission of crimes, in such cases there is still room for inclusion of a separate dereliction of duty offence for police superiors The first instance is whereby there is no failure at all on the part of the commander to exercise proper control but crimes are still committed by the subordinates, the commander however having found out about the commission of crimes fails to punish or report his subordinates. The point to consider here is whether a superior whose failure is to punish or report crimes committed by his subordinates for which he had no causal role at all, can be said to bear the same criminal culpability as a superior who fails to control his troops leading to commission of crimes which he also subsequently fails to punish or report. In the view of the present writer the answer should be no. Therefore, for the latter case holding such a superior criminally liable for the offences committed by subordinates which he had casual nexus seems apposite. In the former case the superior should be criminally culpable not for the offences committed by subordinates but for a separate offence of dereliction of duty in terms of failure to punish or report.

The second instance regards successor commanders. The issue is whether a commander who was not in command at the time of the commission of the underlying offences should still be held liable under command responsibility for failure to punish or report those crimes when they come to his notice. The controlling decision of the ICTY is the Appeals chamber decision in *Hadzihasanavovic* where the Appeals chamber on a bare majority of 3:2 and in the face of strong dissents held that as per customary international law the commander must have been in command at the time of the commission of crimes[107] This is quite a contested issue and the decision of the Appeals

107 *Prosecutor v Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura decision on interlocutory appeal challenging jurisdiction in relation to command responsibility* (16 July 2003) at para 53-56 available at https://www.icty.org/x/cases/hadzihasanovic_kubura/acdec/en/030716.htm last accessed on 12/12/22

chamber has come under criticism in scholarship and also in decisions of trial chambers [108] . The concern here is that this position may lead to a gap in accountability whereby successor commanders who while aware of wrongdoing by the subordinates and fail to punish or report them can escape criminal culpability thus engendering impunity.[109]

In what is the first interpretation of the Rome statute on this issue, the ICC pre-trial chamber followed the position of the ICTY Appeals Chamber *in Hadzihasanavovic* and held that it must be shown that the superior was in effective control at least when the crimes were about to be committed.[110] Consequently command responsibility would not apply to a successor commander. As opposed to the ICTY Appeals chamber which relied on customary international law however the pre-trial chamber referred to the language in article 28 (a) of the Rome statute. Indeed, the requirement of causal nexus means that the provision cannot apply to a successor commander, since logically there can be no causal nexus between the failure to exercise control properly over the forces in this case by punishing rogue subordinates, and the commission of the crime (s), since punishment can only be after commission of the offence.[111] A successor commander who fails to punish or report crimes that come to his knowledge can therefore only be criminally culpable for a separate offence of dereliction of duty.

From the foregoing therefore regarding police superiors in Kenya while applying provisions on command responsibility to the National Police Service Act, it would also be appropriate to create a separate offence of dereliction of

108 *Prosecutor v. Naser Orić ICTY Trial chamber II judgement* (30 June 2006) at para 335 available at https://www.icty.org/x/cases/oric/tjug/en/ori-jud060630e.pdf last accessed on 12/12/2022 ; See also *Special court for Sierra Leone Prosecutor against Issa Hassan Sesay Morris Kallon Augustine Gbao Trial chamber 1 (2 March 2009*) para 294- 306 available http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf where the court did not follow the ICTY Appeals chamber approach and instead adopted the position that a successor commander can be held liable under command responsibility

109 See *ICTY PROSECUTOR v Enver HADZIHASANOVIC, Mehmed ALAGIC and Amir KUBURA Appeals Chamber separate and partially dissenting opinion of judge David Hunt* at Para 22 available at https://www.icty.org/x/cases/hadzihasanovic/acdec/en/030716so.htm last accessed on 13/12/22 ; *Supra note* 44 Closing a Loophole in Accountability for War Crimes

110 *Supra note 94 Pre-trial* chamber para 419

111 Surprisingly however, having applied this reasoning on causality to find command responsibility was not applicable to successor commander, as will be seen below the pre trial chamber still found causality was not requirement to be proven with regard to duty to punish or report. The chamber was therefore not consistent on this point.

duty to apply to successor commanders who fail in their duty to punish or report commission of crimes that come to their knowledge.

8.0 Police superiors: military/military like commanders or non-military superiors?

While the ICTY and ICTR statutes do not differentiate between military and non-military superiors in the application of command responsibility, the Rome statute in Article 28 introduced a bifurcation between military commanders or persons acting as military commanders and non-military superiors otherwise referred to as civilian superiors This distinction is important for purposes of *mens rea* component. Regarding military or persons effectively acting as military commanders, the superior's liability is engaged where the *superior knew or owing to the circumstances at the time should have known* the forces were committing or about to commit such crimes.[112]

Where actual knowledge by the superior of criminal conduct by the subordinates is established, this would satisfy the *mens rea* component. However, this is a high standard especially noting the culture of the blue code of silence it is likely police officers covering up for each other would make it difficult to secure evidence to prove actual knowledge.[113] Bearing in mind the aim of closing the accountability gaps in the current law, then the second aspect of *mens rea* becomes important. It is sufficient to establish *mens rea* for military or military like superiors if it is shown the commander owing to the circumstances at the time, *should have known* that the forces were committing or about to commit such crimes. The pre-trial chamber in *Bemba* referencing jurisprudence from the ICTY, in particular the *Blaskic* case, noted that it was enough for this standard to be satisfied where the superior was negligent in acquiring information regarding his subordinate's illegal activity.[114] According to the pre-

112 Article 28 (a) Rome statute

113 See supra note 17

114 Supra note 94 Pre trial chamber para 432. The "*should have known standard*" in the Rome statute appears to be a lower standard than the "*had reason to know*" standard in the statutes of the Ad-hoc tribunals. In the former case the superior is held culpable where he negligently fails to acquire information, while in the latter case, the superior must already have in possession of information that would at least put him on notice of the risk of such offenses by indicating the need for additional investigation. (Celebici Trial chamber judgment supra note 55 at para 383, 393.) ; Mettraux, Guenael (2008) *Command responsibility in international law---the boundaries of criminal liability for military commanders and civilian leaders.* PhD thesis, London School of Economics and Political Science thesis at page 93

trial chamber there is therefore an active duty on the military or military like superior to take measures to secure relevant information on the subordinate's conduct.[115] The superior cannot therefore escape culpability where the lack of knowledge is due to their own negligence. This for instance would apply where there is general information available to the superior regarding the possibility of illegal conduct of his subordinates and the superior failed to follow up and get concrete information. [116]

On the other hand with regard to civilian superiors, the *mens rea* standard is much higher, the superior must either have *had actual knowledge or consciously disregarded information* indicating the subordinates were committing or about to commit crimes.[117] While the ICC is yet to expound on the second aspect of that *mens rea* requirement, as suggested by some commentators the standard indicates willful blindness, that is where the superior "*simply ignores information within his actual possession compelling the conclusion that criminal offenses are being committed or about to be committed*."[118] Negligence would therefore not suffice for purposes of criminal culpability for civilian superiors.

The bifurcation in the Rome statute between military and military like superiors and non-military or civilian superiors was intentional. From the *travaux preparatoire* of the Rome statute it was informed by the difference in the nature and scope of authority between military or military-like superiors and civilian superiors. Whereby with regard to military or military-like

available at http://etheses.lse.ac.uk/2576/ last accessed 18/12/2022

115 Supra note 94 Pre-trial chamber para 433

116 While the *mens rea* standard was not discussed in the Trial or the Appeals chamber judgements. It was discussed in the separate and dissenting opinions in the Appeal's chamber, in particular the Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison where they opined that the standard would be satisfied where "*awareness that something is going on without having sufficiently clear and dependable information as to what is happening/has happened, when it is going to happen/has happened, or who is/was involved, is precisely the sort of scenario that is envisaged by the 'should have known' standard*." This would bring the standard closer to the Adhoc tribunals standard of had reason to know as set out in Celebici case. See supra note 55 at para 47

117 Rome statute Article 28 (b); see *ICTR Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Trial Judgement (May 21, 1999)* para 227 available at https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-95-01/MSC45055R0000620218.PDF last accessed on 14/12/2022 ; See also Robert Cryer et al (eds), *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010) 394.; See also Guénaël Mettraux, *The Law of Command Responsibility* (OUP 2009) 194–196.

118 Celebici, Trial chamber supra note 55, para. 387; Greg Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)' (2000) 25 *Yale Journal of International Law* 89, 124.

superiors as opposed to civilian superiors, there is a clear system and structure of command and control, backed by a disciplinary system that undergirds the superior's authority to exercise control over subordinates.[119] Furthermore, the military or military-like superior is in charge of persons who exercise lethal force. Consequently, a more exerting obligation is reposed upon the military or military-like superior, as opposed to a civilian superior, to take active steps to secure information regarding subordinate's conduct, and where the superior is thus negligent, they may therefore be held criminally culpable.

The question that follows therefore is, under which category do police superiors fall? The concept of military or military-like commander is not simply restricted to the military as strictly defined under domestic law. For instance, the pre-trial chamber in Bemba opined that military-like commanders would encompass those who have authority and control over armed police units.120 The trial chamber in Bemba on the other hand drew a distinction between those *de jure* appointed as commanders and those acting *de facto* as commanders. It held that military commanders are persons appointed *de jure* or those appointed *de jure* as commanders over irregular non-governmental forces, while military-like commanders are those who while not *de jure* or formally appointed, *de facto* act as military commanders and those who do not perform exclusively military functions.121 According to the trial chamber the distinction between military commanders and military-like commanders is therefore predicated on the *de jure* or *de* facto exercise of command control.

The national police service is organized, with a clear hierarchical structure that follows chain of command coupled with a strict discipline code which ensures police superiors exercise effective command and control over their subordinates like the military. Furthermore, police superiors exercise *de jure* command and control over their subordinates, since the authority is formally

119 Summary Record of the 1st Meeting of the Committee of the Whole, UN Doc. A/CONF.183/C.1/SR.1, paras 67-82 available at https://legal.un.org/diplomaticconferences/1998_icc/docs/english/vol_2/a_conf183_c1_sr1.pdf last accessed on 15/12/2022; Supra note 94 Bemba Pre-trial chamber decision at para 43; see also Kai Ambos, 'Superior Responsibility' in Antonio Cassese (ed), *General Principles of International Criminal Law* 830–831.

120 *Supra note* 94 Bemba Pre-trial chamber decision at para 410 ; see also W. Fenrick, 'Article 28', in: O. Triffterer (ed.*), Commentary on the Rome Statute of the International Criminal Court*, (Nomos Verlag, 1999), 517-518; See also K. Ambos supra note 118, 839 at fn 219

121 *Supra note* 78 Bemba Trial chamber judgment at paras 176-177.

provided for in law as opposed to simply *de facto* control.122 Consequently, following the Bemba trial chamber jurisprudence, in the view of the present writer, police superiors would fall within the rubric of military commanders as opposed to military-like commanders. In any event if commanders of irregular non-governmental forces would be considered military commanders, how much more of regular, organized governmental force such as the police? That said, however, whether police superiors fall under the category of military or military-like commanders, it makes no difference in the analysis of the *mens rea* requirement which is the same in both cases. 123 What is, however, clear from the foregoing is that police superiors would not fall within the category of non-military superiors, under Article 28 (b) with its markedly higher *mens rea* threshold for prosecution. This view is buttressed when one considers that the UN basic principles on use of force and firearms by law enforcement officials, also adopts a similar *mens rea* standard "*know, or should have known*" in requiring superior officers to be held responsible where they fail to take all measures in their power to prevent, suppress or report unlawful use of force and firearms by their subordinates.124

Therefore, if command responsibility is introduced in the NPS Act, as this article suggests, it should be narrowed to the *mens rea* standard in Article 28 (a) of the Rome statute.

9.0 Conclusion

Command responsibility is not a form of strict liability whereby the superior is held criminally culpable simply because his subordinates committed serious crimes. Therefore, it is not about holding criminally culpable all police superiors, including those who have done their utmost to prevent/repress or report commission of crimes. Additionally, it is a principle that considers the concrete circumstances of operations applicable at the time. It is therefore not aimed at placing hypothetical burdens on police superiors removed from the practical realities on the ground. Rather it is concerned with holding culpable

122 *Supra note* 36 sections 22,51 and the first schedule of the NPS Act; Chapter 9 The National Police Service, Service Standing Orders, 9th June 2017, available at https://www.nationalpolice.go.ke/downloads/category/5-acts.html last accessed on 14/12/2022

123 Supra note 113

124 UN Basic principles *supra note* 38 Article 24

those superiors who are derelict in their duty and whose dereliction of duty leads to commission of serious crimes. The application of the principle to police superiors should therefore not worry those who conduct their roles genuinely in compliance with the law.

For victims on the other hand, it provides an avenue for justice, especially where the actual perpetrators of the offences, the subordinates, cannot be identified for purposes of prosecution. For the families of victims in cases such as baby Pendo and Stephany Moraa command responsibility provides the only viable path to justice in terms of criminal culpability.

For police reforms in Kenya, it provides an answer to a most intractable problem that has haunted investigations into unlawful use of force and firearms by police officers i.e., the blue code of silence, where superior officers cover up for their subordinates to help them escape culpability. With command responsibility, superiors will be keenly aware of their potential culpability should they fail to prevent commission of crimes or report subordinates who commit offences. It will therefore serve as a potent deterrence. Additionally, regarding those superiors who are not sufficiently deterred, they will themselves be held criminally culpable. Therefore, avoiding a situation like the case of baby Pendo and Stephany Moraa, where superior officers can frustrate attempts at identifying culpable subordinates and succeed in ensuring no officer is held criminally culpable. The principle of command responsibility therefore where applied as argued in this article will provide the much-needed weaponry to pierce the armor of that leviathan currently prowling undeterred by the current ineffectual provisions in our law with regard to command responsibility.

Comments:

1. Kindly check on the OSCOLA Citation format accessed here
2. Avoid making substantive commentaries in the footnotes section. The footnotes section is reserved for citations only; any other arguments should be addressed in the substantive paragraphs then properly cited.

ADDRESSING GENDER-BASED VIOLENCE IN KENYA: Legal Insights and Alleviation Measures

Author: Francis Sirma[1*]

There is that great quote

"Since St. Augustine announced that Eve - and, hence, collective woman - was responsible for original sin, rabid sexism has been a major pillar of patriarchal religious tradition."[2]

Abstract

Gender-based violence is a global phenomenon with grave health and development impacts. Yet, it has not been given the attention it deserves at all levels, namely, the community, institutional and governmental levels. Gender-based violence (GBV) remains a pervasive issue in Kenya, undermining human rights, social cohesion, and sustainable development. This study examines the legal frameworks and mitigating factors aimed at addressing GBV, focusing on their effectiveness and the challenges faced in implementation. By analysing Kenya's legislative policies, judicial interventions, and institutional mechanisms, the research highlights the critical role of legal underpinnings in combating GBV. The article also explores the socio-cultural dynamics that perpetuate violence, including entrenched gender norms, economic disparities, and inadequate access to justice for victims. While Kenya has made strides in enacting progressive legislation, such as the Sexual Offences Act and the Protection Against Domestic Violence Act, systemic barriers, such as limited awareness, weak enforcement, and resource constraints, hinder their full potential. This study further investigates community-driven initiatives, advocacy efforts, and partnerships between civil society and government institutions as alleviating factors in addressing GBV. Emphasis is placed on the importance of integrating legal frameworks with broader socio-economic

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2 Barbara G Walker, "All Great Quotes" (2025) < https://www.allgreatquotes.com/quote-62873/ > accessed 16 February 2025

reforms, including education, healthcare access, and poverty alleviation, to address the root causes of violence. The findings underscore the need for a multi-faceted approach that combines robust legal structures with cultural transformation and institutional capacity building. This research contributes to the discourse on eradicating GBV by proposing actionable recommendations for strengthening Kenya's response to gender-based violence, thereby fostering a safer and more equitable society.

Keywords: *Social justice, alleviating factors, legal frameworks*

Introduction

1.0 Background of the study

This chapter displays an outline of the existential problem of Gender-based violence in Kenya and rampancy in the Kenyan society and how it has become widespread in other societies as well. It outlines the research problem, research objectives and the significance of the study. Gender-based violence is a phenomenon deeply rooted in gender inequality, and continues to be one of the most notable human rights violations within all societies. GBV is simply defined as violence directed against a person because of their gender.[3]

GBV can include sexual, physical, non-physical, mental, and economic harm inflicted both in the public or private arena. GBV affects both women and men, but women are disproportionately affected. Based on reports such as that from the National Police Service in 2021, out of a total of 8,149 victims of sexual and gender-based violence in Kenya in 2021, 92 per cent of these victims were female, and 8 per cent were male. [4]Gender-based violence and violence against women are two terms that are often used interchangeably, as most violence against women is inflicted by men for gender-based reasons.[5] It

3 European Institute for Gender Equality, "What is gender-based violence?" (2025) <https://eige.europa.eu/gender-based-violence/what-is-gender-based-violence?language_content_entity=en> accessed 16 February 2025

4 Joshua Laichena, Rachel Njenga, "Ending violence against women in Kenya: A pathway to Achieving Food Security" [2024] <Kippra.or.ke/ending-violence-against-women-in-kenya-a-pathway-to-achieving-food-security>last accessed February 1, 2024

5 Council of Europe, "What is Gender-based Violence?" (2025) Gender Matters <https://www.coe.int/en/web/gender-matters/what-is-gender-based-violence> accessed 16 January 2025

is important at this stage to unequivocally assert that both women and men experience gender-based violence but the majority of victims are women and girls.

Different definitions exist on the definition of GBV. Still, the most succinct definition that has been given is that GBV refers to any harm that is perpetrated against a person or group of people because of their factual or perceived sex, gender, sexual orientation and/or gender identity.[6] Therefore, what can be surmised from this definition is that gender is the basis for violence meted against a person. Additionally, it is worth stating that there is more to gender than being male or female: someone may be born with female characteristics but identify male and female simultaneously, or sometimes as neither male nor female. This is to be interpreted as follows: - LGBT (lesbian, gay, bisexual, transgender and other people who do not fit the heterosexual norm or traditional gender binary categories) also suffer from violence which is based on their factual or perceived sexual orientation and/or gender identity.

GBV is based on an imbalance of power and is carried out to humiliate and make a person or group feel inferior and/or subordinate. Women's forced subordinate status (both economic and social) makes them more vulnerable to violence and contributes to an environment that wrongly accepts, excuses, and even expects violence against women. This statement will form the basis of my research work and the strong pillar, providing the much needed support for this buildup of words which make up my research (pun intended). In other words, the social conditioning, rather than socialization in the Kenyan society has contributed manifold to the prevalence of GBV and change is both inevitable and fundamental if society is to rid itself of the phenomenon.

As with any violence, GBV is an issue that involves relations of power and is based on a feeling of superiority and an intention to assert that superiority in the family, at school, at work, in the community, or in society.[7] The male sex is uplifted to the detriment of the female sex.

6 Council of Europe, "The Council of Europe Convention on Preventing and Combating Violence against women and Domestic Violence (Istanbul Convention)" (2025) Gender Matters <https://www.coe.int/en/web/gender-matters/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence > accessed 24 January 2025

7 Council of Europe, ''What is Gender-based Violence?" (2025) Gender Matters <https://www.coe.int/en/web/gender-matters/what-is-gender-based-violence> accessed 16 January 2025

GBV, in its manifestation, takes various forms and manifests itself in these various ways and forms; physical violence, sexual violence, verbal violence or abuse including hate speech, mental harm, emotional and psychological violence or abuse, sexual violence, domestic violence, sexual harassment, sexual exploitation, socio-economic violence, financial and economic abuse, intimate partner violence, child marriage, forced and coerced pregnancy; abortion and sterilisation, harmful cultural practices, i.e. female- gender mutilation, child marriage, human- trafficking, sorcery or witch-craft accusation related violence, honour-killing, conflict-related sexual violence and school-related gender-based violence.[8] In each of these myriad ways and forms, this paper aims to expound and dissect each one of them.

The cultural and societal norms that surround a person are necessary, especially in our diverse backgrounds, in understanding gender-based violence. This is the socialization aspect mentioned earlier, but as will be gleaned later in this discourse, it goes deeper than this.

Pre-historian Marylene Mathis has written on the origin of violence in humans and found that the origin of the wild and warlike prehistoric human, which persists even today, is actually a myth, devised in the second half of the nineteenth century and that archeological research has shown that, in fact, collective violence emerged with the sedentarisation of communities around 15 000 years ago, and the transition from a predation economy to a production economy. More importantly, that violence is not inscribed in our genes and that its appearance has historical and social causes.[9] It means that violence among humans is not innate and has socio-historical origins. Other subsets of violence, such as Gender-based violence, must then also have similar roots.

The system of patriarchy, too, has ancient origins. As historian Gerda Lerner posits in his book, it is a historic creation formed by men and women in a process that took nearly 2,500 years to complete. She traces its origin to early Mesopotamia, the cradle of civilisation.[10]

8 UN Refugee Agency, ''What is Gender-based Violence?" (2025) Gender Equality and Gender-based Violence <*https://reporting.unhcr.org/spotlight/gender-equality-and-gender-based-violence*> *accessed 21 January 2025*

9 Marylene Patou Mathis, "The Origins of Violence" (2020) SSN 2220-2285 < https://en.unesco.org/open-access/terms-use-ccbysa-en > accessed 16 February 2025

10 Gerda Lerna, *The Creation of Patriarchy (*Oxford University Press 1987) 7

Since the year 2020, the COVID-19 pandemic has helped raise awareness of the perils women face from gender-based violence, since it emerged that all types of violence against women and girls, particularly domestic violence, increased despite the pandemic. It became known as the shadow pandemic growing amidst the COVID-19 crisis. As COVID-19 cases continued to strain health services, essential services, such as domestic violence shelters and helplines, reached capacity.

The numerous ways in which gender-based violence is made manifest form the gist of this rubric, and it would thus be prudent to offer some explanations by providing definitions of the various forms of Gender-based violence. The United Nations High Commissioner for Refugees (UNHCR) has defined Gender-based violence as "harmful acts directed at an individual based on their gender." Therefore, to start with, it is worth taking note that GBV includes general harmful practices.

It follows that the consequences of gender-based violence are devastating, can have life-long repercussions for survivors, and can eventually lead to death. In the process, human rights are deprived, and the victim is put at risk of mental and physical health problems, both reversible and irreversible. Therefore, buoyed by this truism, the statement that prevention is better than cure couldn't and that response mechanisms and risk mitigation across all sectors are lifesaving would not be preposterous.

2.0 Elements of Gender-based Violence

This historical background provides evidence of three central elements of violence against women, which remain relevant today: historical, sociocultural roots, and global. On the historical aspect, violence against women, whether through sexual, physical assault, rape or femicide, goes back several millennia from the sedentarisation of humans in small communities.[11] Sedentarization occurs where a dominant group restricts the movements of a nomadic group and transitions to living in one place.

11 Marylene Patou Mathis, "The Origins of Violence" (2020) SSN 2220-2285 < https://en.unesco.org/open-access/terms-use-ccbysa-en > accessed 16 February 2025

Since violence is not inscribed in our genes, it has deep sociocultural causes or roots that have been fostered over the years. It is visibly apparent, justified, and encouraged in mythological texts, religion, and literature. On the global front, nearly every civilisation with a recorded history has left evidence of violence against women.[12] UN Women, which is a global champion for gender equality, is an organization delivering programmes, policies and standards that uphold women's human rights and ensures that every woman and girl lives up to her full potential. According to the global organization, in its estimates, one in three women globally face some form of sexual violence cutting across race, ethnicity, class, and nationality.

3.0 Statement of the Problem

The question on the majority of minds is: Why has violence against women, which began several millennia ago, remained nearly immutable up to this day? According to Rajni Bakshi, an author and rights activist, "we must locate Gender-based Violence as one element in the larger context of violence and war."[13]

Social conditioning, mentioned earlier which has reduced the status and of women to an inferior position to that of men has hindered substantial progress in this fight. The battle however, may be won if we eradicate the systemic patriarchal society which has now broadened its tentacles to each and every namable society. A complete overhaul of society may solve this problem no matter how difficult it would be. This will witness employing the following strategies; resocialization, cultural re-orientation, and gender mainstreaming. This is part of the efforts of solving the problem that causes GBV.

GBV is a sociological phenomenon and in addition to social conditioning, the advent of colonialism also added a new layer of complexity that set back the cause of women's rights. Neelam Deo, a former Indian ambassador, declared that "British colonialism froze our social structures and delayed any change we could expect with regards to women's rights." [14]

12 n 30
13 Hari Seshasayee, "Addressing the Historical Roots of Gender-Based Violence in Twenty-First-Century India" (2025) Wilson center 4
14 n 12

It is paramount that an investigation of other minor, though vital causes of Gender-based violence is given due attention. A keener study would reveal that it also emanates from gender inequality and the general acceptability or acquiescence of the norms and cultural beliefs in society. These are subsets of the major causes just mentioned.

Other causes include; poverty, conflict and war, displacement, stress in the home, poor behavioral control, deficits in social cognitive or information-processing abilities, high emotional distress, history of early aggressive behaviour, attention deficits, hyperactivity, learning disorders, history of violent victimisation and involvement with drugs and alcohol or tobacco. These causes coalesce as factors that ultimately increase the risk of gender-based violence, with an explanation offered that, generally, women and girls living through crises experience an increase in both frequency and severity of gender-based violence.[15]

Among the just highlighted causes of Gender-based violence, the most prevalent is gender inequality. The unequal status of men and women has led to norms and beliefs that inculcate acceptability in the general society that women are subordinate and should generally be economically dependent on men and that women and children are a man's possession and under his control.[16] This is the social conditioning that has been acquiesced and despite existence laws such as a progressive Constitution and many public pledges, enforcement of laws designed to fight against gender inequality was inconsistent just prior to a new dispensation in the year 2015.[17] In addition, various programs were underfunded in the country. The then head of state-Uhuru Kenyatta was steadfast in ending gender inequality by the year 2026 when in June 2021, during the Generation Equality Forum in Paris, where the Kenyan government made a historic commitment to women and girls, he announced a dozen concrete actionable steps to end all forms of GBV. This commitment which was pushed forward by a united and vocal coalition of

15 Rescue.org, "What is gender-based violence – and how do we prevent it" <https://www.rescue.org/article/what-gender-based-violence-and-how-do-we-prevent-it> accessed August 22 2023

16 n 15

17 Samburu Wa-Shiko "The COVID-19 pandemic exacerbated gender-based violence globally. It made the case for action even more dire." (2025) < https://www.gatesfoundation.org/ideas/articles/kenya-gender-equality-roadmap> accessed 16 February 2025

Kenyan advocates incurred up to $23 million for prevention and response, research and data collection, and the establishment of a survivors' fund. This was done amid the COVID 19 pandemic, which exacerbated gender-based violence globally and made the case for action even more dire.[18]

What makes gender inequality a thorny issue is that the economy is also affected due to this phenomenon when laws restrict women's voice and agency, and fail to protect them from violence, or discriminate them at the work place and in retirement, women are less likely to participate fully in the economy and to contribute with their talent, knowledge, and skills. Economies that limit women's contributions cannot reach their full potential. An economy is more dynamic, strong, and resilient when all citizens—women and men alike—can contribute equally.[19] A legal environment in which women have the same rights and opportunities as men leads to economic prosperity for everyone.

4.0 Global Gender Inequality

Gender inequality fuels gender-based violence to a considerable level, and although no country has achieved total gender equality yet, some lag further behind than others. It is factual that around the world, women are not given the same educational and occupational opportunities. They are prohibited from fully participating in society and fear GBV.[20]

Around the globe, evidence indicate that States that condone coercion of women into silence in the face of a harsh political order or as an expression of patriarchal culture directly support violence against women.[21]

Globalization has helped fuel GBV in Kenya owing to borrowed cultures, increased interdependence and integration among the economies, markets

18 n 16

19 Women, business and the law 2023 <https://openknowledge.worldbank.org/server/api/core/bitstreams/b60c615b-09e7-46e4-84c1-bd5f4ab88903/content#:~:text=Women%2C%20Business%20and%20the%20Law%202023%20identifies%20barriers%20to%20women's,of%20reforms%20for%20women's%20rights.> (2025) ISBN (paper): 978-1-4648-1944-5

20 Daniele Selby, "5 of the World's Worst Countries for Gender Equality" [2016] https://www.globalcitizen.org/en/content/worst-places-woman-yemen-congo-saudi-arabia/>last accessed July 12, 2016

21 See Ibid n.53.

and societies. While globalization is primarily an economic process of interaction and integration, it is also closely linked to social and cultural dynamics.[22] Economically, advances in transportation, like the steam locomotive, steamship, jet engine, and container ships, and developments in telecommunication infrastructure such as the telegraph, the Internet, mobile phones, and smartphones, have been major factors in globalization and have generated further interdependence of economic and cultural activities around the globe.[23]

The effect globalization has in a country like Kenya is that economic development related to globalization has resulted in increased femicide in the country. Kenya's social media has been termed as the "manosphere" where many comments have been shared blaming the women for their own deaths.[24] The term "manosphere" is a varied collection of websites, blogs, and online forums promoting masculinity, misogyny, and opposition to feminism.[25] While the specifics of each group's beliefs sometimes conflict, they are generally united in the belief that society is biased against men due to the influence of feminism, and that feminists promote misandry, or hatred of men.[26] Air bnb femicide cases in Kenya is a menace. Kenya is currently grappling with increased femicide, and the cases are unresolved owing to lack of knowledge and awareness of what attributes to these murders of women. These next chapters will aim to tackle these issues and propose recommendations.

5.0 The Legal Framework

This includes existing case laws cited and statutory laws that have been enacted. There are several legal underpinnings, and starting with statutory law, the Constitution reigns supreme as the supreme law of the land. Several policies and commissions have been set up to promote gender equality. These legal enactments offer protection for women in the eyes of the law and include concepts of equality and non-discrimination.

22 Globalization https://en.wikipedia.org/wiki/Globalization (2025) accessed 15 February 2025
23 n 21
24 Danai Nesta Kupemba "Kenya femicide: A woman's murder exposes the country's toxic online misogyny" (2024) <bbc.com/news/world-africa/67987347> accessed 16 February 2025
25 Manosphere (2025)< https://en.wikipedia.org/wiki/Manosphere >accessed 17 February 2025
26 n 24

5.1.1 The Constitution of Kenya

GBV is a violation of human rights under the Constitution of Kenya. The Constitution has been drafted in a manner that embraces and sanctifies fundamental rights and freedoms to the extent that the contravention or even denigration of any of its enactments will automatically attract the full force of the law from the least to the highest courts of the land.[27]

The Constitution provides that "every person has the right to life and that abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law." This provision, while it may seem to support abortion is actually rooted in radical feminism. While radical feminists aim to dismantle patriarchal society, their immediate aims are generally concrete. Common demands include expanding reproductive rights. According to writer Lisa Tuttle in The Encyclopedia of Feminism it was "defined by feminists in the 1970s as a basic human right, it includes the right to abortion and birth control, but implies much more. To be realised, reproductive freedom must include not only a woman's right to choose childbirth, abortion, sterilisation or birth control, but also her right to make those choices freely, without pressure from individual men, doctors, governmental or religious authorities.[28]

According to the highest law of the land, "Every person is equal before the law and has the right to equal protection and equal benefit of the law to include the economic sphere that emphasises equal opportunities, treatment and full enjoyment of all rights and fundamental freedoms" [29] However, gender parity is far from being realized in the country owing to entrenched cultural norms vis-a-vis patriarchy.

27 Constitution of Kenya, 2010 art 27
28 Radical Feminism (2025) <https://en.wikipedia.org/wiki/Radical_feminism >accessed 17 February 2025
29 See Ibid n.57.

5.1.2 The Protection Against Domestic Violence Act, 2015

This is the first law in Kenya that expressly criminalizes domestic violence and while it may seem as the major panacea to GBV, its implementation is the major stumbling block. It enhances victim protection by obligating police officers to whom domestic violence is reported to advise the complainant on all available measures of relief, their rights to apply for such relief, to make an arrest, and prefer charges without a warrant on suspects believed to have violated the Act.

However, reporting is even a challenge owing to the silencing of women and girls, and this alone, largely contributes to GBV.

5.1.3 The Prohibition of Female Genital Mutilation Act, 2011

The Act expressly makes it illegal to perform or practice all forms of Female Genital Mutilation on anyone, regardless of age or status. It bans the stigmatisation of a woman who has not undergone female genital mutilation and those aiding the performance of the practice, including the medical personnel.[30] However, despite its enactment, many communities in Kenya still practice the vice and the relevant stakeholders and those responsible for carrying out dissemination of information have been lax. It takes a research like this to create general awareness.

5.1.4 The Law of Succession Act, 2012

The Act provides for both situations where there is a will and no will, testate and intestate succession. According to section 35 of the Act, a surviving spouse is entitled to personal and household effects and retains a life interest in the residual estate.[31] However, a widow loses her life interest in remarriage and passes it on to the children. This provision is discriminatory since the widower's life interest is not affected by his remarriage.[32]

Despite the enactment of this statute and its revision in 2012, women are still discriminated upon when it comes to inheritance issues and many cases abound to prove this statement.

30 See Ibid n. 57, 23.
31 Law of Succession Act, 1987
32 See Ibid n. 68, 33.

6.0 Effects of Gender-Based Violence

GBV has a long-lasting effect on survivors and their families. Impacts can range from physical harm to long-term emotional distress to fatalities.[33] The global phenomenon undermines its victims' health, dignity, security and autonomy. For example, rape and sexual assault can result in unwanted pregnancies, complications during pregnancy and birth, and sexually transmitted infections, including HIV.[34]

GBV can lead to further threats of violence, social stigma and ostracisation. [35] GBV is also a key barrier to women and girls accessing other lifesaving services such as food, shelter and healthcare.[36] Crises are not short-term and can escalate due to climate-related disasters, which are recurrent crises. In the process, many women and girls who are forcibly displaced end up living in temporary accommodation for years.[37] Therefore, gender-based violence can lead to forced displacement, whether within a community or through fleeing a violent home environment.[38] Displacement disrupts established livelihoods and access to food resources, leaving survivors and their dependents in precarious situations with limited means to secure food.[39]

7.0 Challenges in Addressing Gender-Based Violence

Some of the challenges experienced in dealing with and eradicating gender-based violence in our societies have already been mentioned, such as that of deeply entrenched cultural and religious beliefs. These attitudes continue to perpetuate harmful practices in societies and contribute to the normalisation of gender-based violence. To aggravate matters, gender equality is not a concept that is shared by those in judicial, political, or law enforcement institutions, according to India's Ministry of Women and Child Development

33 [2025]<file:///C:/Users/USER/OneDrive/Desktop/What%20is%20gender-based%20violence%20%E2%80%93%20and%20how%20do%20we%20prevent%20it%20International%20Rescue%20Committee%20(IRC).htm> last accessed 26 January 2025

34 See Ibid n. 86.

35 See Ibid n. 86.

36 See Ibid n. 86.

37 See Ibid n. 86.

38 Joshua Laichena, Rachel Njenga, ''Ending violence against women in Kenya: A pathway to achieving food security" [2024] <Kippra.or.ke/ending-violence-against-women-in-kenya-a-pathway-to-achieving-food-security>last accessed February 1, 2024

39 See Ibid n. 91.

Report.[40] According to the report, despite constitutional protection and several legislations, gender discrimination and injustices continue to occur. This is mainly because those who enforce the laws or interpret them do not ride on the same boat and do not always share the philosophy of gender justice. An implementation deficit can be identified as the first significant challenge.

The second challenge is in the collection of evidence that is crucial to ascertaining access to justice for survivors of gender-based violence. The duty bearers must strengthen the chain of custody, crucial in handling and collecting evidence. The third challenge lies in the low levels of awareness of the National laws and policies that have been enacted in prevention and response to gender-based violence among those bearing the right to gender equality, meaning the general citizenry. Lack of coordination among the various stakeholders involved in the management of gender-based violence is listed as the fourth major challenge in terms of providing services to the survivors.

The sixth challenge is the limited resources to respond to gender-based violence and implement gender-based violence programs effectively. Goodwill and increased funding would go a long way in boosting the necessary response.

8.0 Recommendations and Conclusion

It is evident that the buck stops with the government, and there is a need to implement comprehensive and integrated strategies to help address the complex interplay between Gender-based violence and food security in Kenya. Women being the major contributors to agriculture, their value in society cannot be overemphasized.

Kudos goes to the president Ruto for convening a task force, the Baraza Task Force on 10th January 2025 to look into GBV in the country and increased femicides. The report will be out in 90 days.

Strengthening the enforcement mechanism of existing legal frameworks, such as the Sexual Offences Act and the Protection against Domestic Violence Act,

40 Hari Seshasayee, ''Addressing the Historical Roots of Gender-Based violence in Twenty-First-Century India" (Wilson Center) 5

will also ensure swift prosecution of offenders and perpetrators of GBV.[41] The intensification of advocacy like this one, education mechanisms, and awareness campaigns by NGOs and civil societies will serve to underscore the devastating consequences of gender-based violence and food security on individuals, families, and communities and act as agents of informing and reducing the vice.[42]

The government must also focus on providing psychosocial and educational support for survivors and the community, ensuring accessible healthcare services, and fostering a culture of respect and equality to challenge harmful norms and attitudes.[43] Furthermore, increasing the role of women in parliamentary roles and other big seats would be a significant step towards achieving gender equality and, consequently, the tackling of gender-based violence as female roles would supplement the previously male-dominated roles.

Gender mainstreaming would be a significant milestone towards achieving gender equality. The term means the employing of strategies and practices that ensure gender equality in policies, programs, and services, more so that the Government of the day undertakes ensuring, in the process, efficient allocation of resources that takes into account both women's and men's interests and concerns.[44] Gender mainstreaming is a concept that was first introduced at the 1985 Nairobi World Conference on Women and established as a strategy at the international level, to wit, in the global gender equality policy through the Beijing Platform for Action, adopted at the 1995 Fourth United Nations World Conference on Women in Beijing ten years later. It was envisioned as the yardstick to promote gender equality at all levels.[45]

As part of the recommendations, advocating for affirmative action would be instrumental in the push for gender equality and eliminating gender-based

41 Joshua Laichena, Rachel Njenga, ''Ending violence against women in Kenya: A pathway to achieving food security" [2024] <Kippra.or.ke/ending-violence-against-women-in-kenya-a-pathway-to-achieving-food-security>last accessed February 1, 2024

42 See Ibid n 94.

43 See Ibid n 94.

44 Gender Equality, ''What Is gender main streaming" [2025]<https://www.coe.int/en/web/genderequality/what-is-gender-mainstreaming#:~:text=Gendermainstreaming is a strategy, socially just and sustainable society>last accessed 26 January 2025

45 See Ibid n. 97.

violence. It comprises a set of procedures designed to eliminate unlawful discrimination among applicants, remedy the results of any prior discrimination, and prevent such discrimination from recurring. The Constitution of Kenya, 2010 seeks to repudiate the historical exclusion of women from mainstream society. The law allows women to manoeuvre their way both in the private and public globe on an equal footing with men.

Supporting feminism and increasing feminism campaigns would significantly bolster the fight for gender equality. At its core, the feminist movement includes both genders and advocates for equal rights, opportunities, and treatment. There is no doubt that feminism affects all of us, but most of all, it impacts the rights of women and girls.[46] The movement has its roots in the earliest eras of human civilisation, working to prioritise women's political, economic, and cultural equality across every society for thousands of years.

The movement considers several issues, including bodily autonomy, employment equality, fair wages, property ownership, education, and legal, marital, and parental rights. Feminism prioritises the need for all women and girls to have life opportunities equal to those of men and boys.[47] Additionally, it also means challenging and dismantling the existing systems of inequality and discrimination based on gender. The movement acknowledges that women have been historically marginalised and denied opportunities simply because of being women.[48] Feminism recognises that all individuals must be treated with equal respect and dignity.

Ending Gender-based violence is not only a matter of justice but a pathway to achieving food security and sustainable development in Kenya. [49] By breaking the cycle of violence, empowering women, and addressing the root causes of issues of gender-based violence, it creates a pathway for a society where women and girls thrive, free from violence and have peace, thus contributing

46 Angi Varrial, ''What is feminism and why is it important" [2025] <https://www.globalcitizen.org/en/content/what-is-feminism-and-why-is-it-important/>last accessed 24 January 2025

47 See Ibid n 99.

48 See Ibid n 99.

49 Jane Iredale, Jenny Conrad, "*Gender-based violence & Food security: What we know and why gender equality is the answer"* (Amira Taha, Beth Sorel, Anne Sprinkel tr 2002)

actively to the agriculture sector, boosting agricultural productivity, economic development, and the overall well-being of communities.

There is a commemoration of the International Day for the Elimination of Violence Against Women held on 25th November of each year, following the Declaration on the Elimination of Violence Against Women issued by the UN General Assembly in 1993. The significance of this remembrance worldwide each year is that it brings attention worldwide to the prevalent issue of violence against women. General awareness of the existence of gender-based violence is vital to the progress of society. This would serve as the first significant achievement in the combat of gender-based violence, which has been a thorn in the flesh of every society. Gender-based violence cuts across all races, class, religion, age, ethnicity, sexuality, culture and geographic region. It is time for prompt action in finding out the root cause of gender-based violence springs from, be it the societal structures or the harmful gender norms that accentuate the practice. The existing cultural and social norms that increase the risk of harm through gender-based violence to women must be done away with where it mainly occurs, that is, in our families, the created institutions and our communities.

It bears to conclude that implementing the two-thirds gender principle was made possible in the country when the Constitution of Kenya was promulgated back in 2010, casting a new dawn towards the fight towards the actualisation of the two-thirds gender rule. In particular, Articles 97 and 98 of the Constitution form the legal framework for achieving the two-thirds gender rule and advocate for equal representation in Parliament, what the Law Society of Kenya and six other petitioners through the 14th Chief Justice David Maraga had once bitterly fought for, in his advice to the then President, Mr. Uhuru Kenyatta to dissolve Parliament on September 21, the year 2020, for failure to enact the gender rule and derogating the Constitution of Kenya.

The author is a self-confessed radical feminism and bases his stand on the abolishing of the existing societal norms and practices based on social conditioning if any progress is to be made.

Evaluating The United Nations Guiding Principles on Corporate Responsibility in East Africa

Mafrick Munene[1*]

Abstract

The East African Community is one of the most strategic and economically viable trading blocs in the world due to its endowment with a variety of resources, including, oil, natural gas, gold, diamond, fertile arable land for agriculture, and a youthful and skilled labour force. This diversity has endeared the East African region to regional and foreign direct investments from multinational corporations. In this background, factors of production such as land, labour, natural resources, the flow of revenue or finances, and the impact on the environment need responsible handling practices by the various corporate entities. The article will mainly focus on what the Guiding Principles on Business and Human Rights (the protection, respect and remedy framework) are and why they are essential if incorporated into the corporate culture, distinguish Business and Human Rights (BHR) from Corporate Social Responsibility (CSR) and highlight the importance of Environmental, Social and Governance (ESG) in corporate practice. The article will recommend some compliance strategies, such as the inclusion of UNGP principles in the Treaty for the establishment of the East African CommunityEAC Treaty, fast-tracking the development and operationalisation of National Action Plans (NAPs) by partner states, Policies, Safeguarding, Undertakings, Voluntary Reporting, Audits and Certifications, Due diligence, and Judicial and Alternative Dispute Resolution mechanisms. Finally, it will highlight some possible challenges that may hinder the realisation of responsible corporate practices in the region, such as corruption, impunity, weak rule of law, and disobedience of court orders.

Keywords: *East African Community, Business and Human Rights, Corporate Governance, Environmental, Social, and Governance (ESG), Sustainable Business Practices*

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1.0 Introduction

Of the 100 largest economic entities in the world, 69 are corporations, and only 31 are countries.[2] The power of multinational corporations is rapidly expanding.[3] On 16th June 2011, a new dawn was heralded when the Human Rights Council[4] endorsed the United Nations Guiding Principles on Business and Human Rights (UNGPs).[5]

Under the guiding principles, all corporates, irrespective of their size, location, sector, ownership and structure, should respect and uphold human rights.[6] In actualising the guiding principles, corporates are called upon to (a) avoid causing or contributing to adverse human rights impacts through their activities and address such impacts when they occur, (b) be proactive to prevent or mitigate adverse human rights negative impacts that are directly linked to their operations and (c) remediate those impacts where and when they occur.[7] All corporates within the East African Community must take necessary measures in all operations, products, and services sectors to avoid engaging in practices that infringe or threaten to infringe on the human rights of others.[8] In some circumstances, despite best efforts, specific practices, acts, or omissions by directors, managers, or employees lead to violations. At this stage, concise and adequate measures to remedy[9] the violations should be put in place.

Corporates within the region are also appraised to develop adequate communication infrastructure to address their human rights impacts by providing sufficient information to evaluate the adequacy of a particular human rights violation if and when it occurs during business operations.[10]

2 Why do corporations have so much power? A publication of the Global Justice Now; available on https://www.globaljustice.org.uk/our-campaigns/climate/ending-corporate-impunity/;accessed on 18th January 2023.

3 ibid

4 An inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe.

5 Guiding principles on Business and Human Rights: Implementing the United Nations ''protect, respect and remedy" Framework; HR/PUB/11/04,2011. https://www.ohchr.org/sites/default/files/documents/publications/guiding principlesbusinesshr_en.pdf

6 ibid

7 ibid

8 Ibid, see Guiding Principle 11 of the United Nations Guiding Principles on Business and Human rights

9 Supra, note 5

10 Ibid, see Guiding Principle 21 of the United Nations Guiding Principles on Business and Human Rights

From the onset, therefore, Business and Human Rights should be understood and applied by corporations at the very least to incorporate, implement and advance the Universal Declaration on Human Rights,[11] the International Covenant on Economic, Social and Cultural Rights[12] and the International Labour Organization's Declaration on the Fundamental Principles and Rights at Work.[13] Corporates therefore need to be conscious of the human rights issues and opportunities that could arise through or affect their activities and business relationships, including labour standards, socioeconomics, security and environmental impacts.[14] This article is therefore a rallying call for"all businesses to apply their creativity and innovation to solving sustainable development challenges" and commit East African partner States to "foster a dynamic and well-functioning business sector while protecting labour rights and environmental and health standards following international standards and agreements and other ongoing related initiatives such as the United Guiding Principles on Business and Human Rights.[15]

2.0 United Nations Guiding Principles (UNGPs)

These are guidelines for states and non-state actors such as businesses to uphold human rights and prevent, address and remedy human rights abuses committed due to some omission or commission in business operations. They are also referred to as the Ruggie Principles because of Professor John Reggie's[16] work as a special representative of the United Nations Secretary-General on business and human rights. The principles are anchored on three pillars[17] and

11 Is a milestone document in the history of human rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217A) as a common standard of achievements for all peoples and all nations.

12 Is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966; Resolution 2200A (XX1) and came in force from 3 January 1976.

13 Is an expression of commitment by Governments, employers', workers' organizations to uphold basic human values vital to our social and economic lives adopted in 1998 and amended in 2022.

14 Clare Connellan & Tallat Hussain, White & Case: Business and human rights in Africa, companies and investors in African countries need to be conscious of the growing focus on human rights. Available on https://www.whitecase.com/insight-our-thinking/business-and-human-rights-africa, accessed on 7 February 2023.

15 UN Working Group on Business and Human Rights: The Business and Human Rights Dimension of Sustainable Development. Embedding "Protect, Respect and Remedy" in SDGs implementation. https://www.ohchr.org/Documents/Issues/Business/Session18/infoNoteWF BHR-SDG Recomendations.pdf; accessed on 21 January 2023. See also https://sdgs.un.org/2030agenda

16 Former special representative of the United Nations Secretary General on human rights and other transnational corporations and other business enterprises (2005-2011).

17 Available on hhttps://www.ohchr.org/sites/default/files/documents/publications/Guiding Principles

consist of 31 directives.[18] The pillars are: First, the State must protect against human rights abuses. Under international law, states or countries have the primary responsibility or obligation to protect against human rights abuses within their territories.

This protection extends to artificial persons and third parties, such as businesses or corporations operating within their jurisdiction. In this role, states must develop and implement practical steps to prevent, investigate, intervene, redress, and punish corporate human rights abuses.[19] A state can protect against these abuses by passing relevant laws, formulating adequate policies and regulatory measures and developing adjudicative processes and procedures. Therefore, states should explicitly apprise their relevant regulatory authorities to ensure all corporate commercial operations and transactions respect human rights. The duty of states to protect is in line with the spirit of the United Nations' sustainable development goals of non-discrimination on gender grounds, reduction of inequalities, responsible production and consumption, and accountable and inclusive institutions. Second is the corporate responsibility to respect human rights. This pillar obligates businesses or corporations to respect human rights wherever and whenever they operate their business activities. This duty is achieved by ensuring that corporates at all levels avoid and take all precautionary measures to ensure that no human rights abuses are occasioned and, where an accident has inadvertently occurred causing harm to an individual or community, to take appropriate steps to remedy the damage to the affected parties.

For this pillar to be identified, corporates must always conduct regular human rights due diligence to identify any inherent or external risks that may lead to human rights abuses and devise appropriate measures to avoid or mitigate them. Where human rights abuses have occurred despite all the proper measures, to ensure that the victims can access an effective and adequate remedy. This responsibility extends far and wide beyond the day-to-day internal operations to include other external or independent service providers such as suppliers, consultants and contractors. A mandatory requirement should be established

Business HR_EN.pdf; HR/PUB/11/04. accessed on 18 January 2023

18 Ibid

19 Ibid

to ensure that both private businesses and state-owned enterprises practice engaging those whose rights are likely to be adversely impacted by their operations.[20]

Third, it is about access to remedies for victims of business and related abuses. It is fundamental that adequate, specific, predictable, and responsive avenues for complaints, adjudication, and redress are in place whenever there is a victim of human rights abuses. This should be a merit-based and impartial body that spurs confidence and restorative justice to any victim of corporate human rights abuses. The victims whose grievances have been recorded, investigated and analysed should receive a just treatment ranging from monetary compensation, restitution, rehabilitation, written apology and a guarantee that the subject offender shall take all necessary measures to ensure non-repetition of the actions and inactions causing the human rights abuses in the future.[21]

The UNGPs seek to ensure a transformational and humane corporate operation culture and justiciable environment exist for both human and artificial persons. They also aim to ensure that artificial persons thrive and sustainably prosper without infringing on the rights of the employees, workers, communities, and the environment. The UNGPs also establish irreducible operation minimums for each business operating locally, nationally, regionally, and internationally.

With the coming into force of the UNGPs,victims of business and human rights can now seek legal redress in person or through their appointed legal representatives to get remediation in appropriate forums such as regional courts, national courts and alternative dispute resolution mechanisms. This empowers victims of human rights violations by providing avenues to petition judicial, quasi-judicial bodies and other dispute resolution mediums in their countries or regions and seek declarations, orders or agreements that their rights have been violated or are threatened with violations. After careful consideration, courts would issue appropriate orders or directions to protect and remedy the victims of human breaches caused by local and multinational corporations.

20 Ibid
21 Ibid

UNGPs are therefore very important since they seek to ensure transparency and genuine participatory due diligence that identifies, prevents, mitigates, ceases, and accounts for both actual and threatened human rights abuses in operations, recruitment, layoffs, management, supply chains, and outsourcing by corporates, their subsidiaries, and business venture partnerships during their day-to-day business operations.

3.0 Business and Human Rights (BHRs) vis a vis Corporate Social Responsibility (CSR)

The two subjects always seem to be duplicates of each other. Often, to a newcomer, there is no clear distinction between them; hence, the two are sometimes used interchangeably However, there are clear distinctions between obligations and their contextual application on matters of responsible corporate practice.

BHRs are those rights based on universal norms applicable to every corporation carrying out any business anywhere in the world. They are rights flowing from the three key UNGP pillars that require protection of human rights, respect for human rights and an avenue for the enforcement of rights to get the appropriate remedies commensurate to the rights infringed or threatened with infringement. Business and human rights focus on a more delineated commitment to human rights.[22] It is, in part, a response to the perceived or actual failures or shortcomings of the concept of corporate social responsibility. Business and human rights are in the realm of binding law, state-sponsored oversight and the importance of access to remedy as a measure of corporate responsibility.[23] BHR focuses on the private sector and the role of the states in overseeing state corporations' respect for human rights.[24]

Business and human rights also seek to scrutinise the flow of revenue or finances and their sources to eliminate illicit revenue. This ensures that corporations are not conduits for illegal business ventures such as money laundering and

22 Anita Ramasastry; Corporate Social Responsibility vs Business and Human Rights: Bridging the gap between responsibility and accountability; published on the journal of human rights14:237-259-2015 accessible on https://digitalcommons.law.uw.edu/cgi/viewcontext-faculty-articles.

23 Ibid

24 Ibid

funding terrorism and criminal enterprises in the guise of creating employment and conserving natural resources and the environment. This creates a broad ecosystem of financial transparency and responsible corporate culture that respects human rights and realises illicit financial flows can harm communities.

A more classic example is the case of displacements to pave the way for development-related projects. Though a worldwide trend, this phenomenon has become a norm within the East Africa region. International corporations have sued and directed to compensate communities who have been victims of inhumane evictions for lending corporations who, in turn, have used the finances to cause their business expansions by displacing populations to extend their land for agri-business.[25] Recently, the International Finance Corporation was sued and agreed to have an out-of-court settlement with affected victims of landing grabbing in Honduras by a violent palm oil company. This demonstrates how IFC engaged in reckless lending of a project that ended up inflicting serious human rights abuses on local communities and leaving communities vulnerable and alone to fend for themselves.[26]

On the other hand, corporate social responsibility is a management concept whereby companies integrate social and environmental concerns into their business operations and interactions with their stakeholders.[27] They are also strategies corporations implement as part of corporate governance designed to ensure the company's operations are ethical and beneficial to society.[28] The focus for CSR activities in as much as these activities contribute invaluably and immensely to society, is to leverage stronger brand image, recognition, reputation, retaining talented employees, tax exemptions, and funding in the long term.[29] CSR is, therefore, a voluntary and affirmative contribution to human rights driven majorly by the moral consciousness of being a responsible social partner, for instance, in the form of philanthropy. It is a self-guided

25 See Budha Esmail Jam et. Al. vs International Finance Corporation; 586 U.S, 139S, ct. 759 203L, Ed. 2d 53, where a U.S court held that organizations such as the world bank are not above the law and can be sued. 'Indian shipping community take world bank to court'.

26 See Juana Doe vs International Finance Corporation (Case No. 17-1494); 'World bank agrees to settle case alleging it abetted murder'.

27 https://www.unido.org/our focus/advancing economic competitiveness/competitive trade-capacities and- corporate-social-responsibility-market integration/what-csr; accessed on 18 January 2023.

28 https://corporatefinanceinstitute.com/resources/esg/corporate-socialresponsibility-csr/; accessed on 18 January 2023.

29 ibid

corporate decision rather than a legal imposition. Both concepts of BHR and CSR are like two close cousins who are intertwined and focused on corporate engagement to bring about responsible and socially beneficial activities despite their distinct identities based on their origins. They are, in essence, two different concepts with overlapping discourses.[30]

BHR and CSR undeniably have many entrenched similarities, such as environmental management, labour standards and working conditions, social equity, human rights, good governance and anti-corruption measures. They both may advance human rights in various forms, either in terms of remuneration to workers by providing, for instance, a living wage or paying the applicable minimum wage for the job cadre. It may also be informed by the need for a mitigation measure emanating from an environmental impact assessment to restore or conserve fauna and flora if the corporation's core business is mining and manufacturing, where effluent discharges and smoke are constantly released to the environment. This overlap is often confused, creating a blurred difference between the two terms. BHR is therefore concerned with the negative impact of business operations on the enjoyment of human rights violations committed by or contributed to by non-state actors and private companies. On the other hand, CSR is geared towards companies' positive impact on societies and communities.[31]

4.0 Environmental, Social and Governance (ESG) for responsible corporate practices

These are a broad range of environmental, social and governance factors that businesses progressively inculcate into their business.[32] They are also indicators used to set the criteria for socially responsible or conscious investors to assess whether to invest in any company or corporate venture[33]. Demonstrating respect for human rights is now seen as a corporate responsibility critical to a company's social license to operate.[34] It is an operational standard of conduct

30 Supra, note 21

31 Jorian Hanster, Senior Associate DLA Piper, Amsterdam: 10-year anniversary of the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs): A decade under review. A paper presented virtually during the African Business and Human Rights Forum side event held in Accra, Ghana on 11 October 2022.

32 The impact of ESG conditions on Financial institutions and their lending decisions-ALN-Kenya.pdf; available on https://aln.africa/wp-content/uploads/2022/07/; accessed on 20 January 2023.

33 ibid

34 Supra, Note 14

expected by investors, regulators, and other stakeholders.[35] ESGs are anchored in three main pillars as follows:[36]

1. The Environmental Pillar measures a company's impact on living and non-living natural systems, including air, land and water, and complete ecosystems to avoid environmental risks and capitalise on ecological opportunities to generate long-term stakeholder value. This pillar emphasises the environmental risks, natural resource management and climate change in a changing world within which corporate entities operate.[37] This pillar is gaining pace primarily due to legislative developments, regulations, and internal policies that follow an ever-increasing heightened risk profile driving global climate change. However, this pillar is highly susceptible to manipulation by corporate actors who often engage in what is referred to as 'Greenwashing'.[38] Greenwashing entails presenting skewed or misleading information about a corporation's sustainable initiatives.[39] It may also be an instance where a corporation publishes false information on the environmental soundness of its products, practices, operations and services.[40] This unethical endeavour by corporations, mainly due to an insatiable appetite for sales and money-making, leads to health risks to the clients and stakeholders who purchase or interact with these products and services in the mistaken belief that they are environmentally compliant with the required safety standards.[41] Greenwashing manifests itself in several ways and forms. These includes applying intentionally misleading labels such as 'green' or 'eco-friendly', which do not have standard definitions and can be easily misinterpreted, implying that a product meets the minimum regulatory requirements.[42] It also involves claims of being on track to reduce a corporation's polluting emissions

35 Ibid
36 FCS Catherine Musakari: Human Rights and Sustainability: Why ESG matters for African Companies. A paper presented during the African Business and Human Rights Forum, side event, Accra, Ghana on 11th October 2022.
37 Ibid
38 https://www.nrdc.org/stories/what-greenwashing
39 Adam Hayes (2022), Greenwashing occurs when corporates give unproven claims or use misleading labels, environmental imagery and hide trade-offs to conceal environmental wrongdoing or unpleasant situation which in fact is a poisoned chalice.
40 Supra, note 37
41 Supra, note 37
42 Supra, note 38

to net zero when no credible plan is in place, as well as false assertions that a corporation is significantly reducing its plastics footprint and that it recycles its plastics, which end up hurting the environment and emphasising a single environmental attribute while ignoring other aspects and being purposely vague or non-specific about a corporate's operations or materials used amongst other elements.[43]

2. Using best management practices, The Social Pillar measures a company's capacity to generate trust and loyalty with its workforce, customers and society. It can also be seen as a social criterion to evaluate a corporation's relationship with its social environment. This pillar is premised on permanent, contractual and casual employees and local communities where these corporations operate. The pillar concerns itself with issues like health, safety, data protection and privacy, DEI (diversity, equality and inclusion) and workforce employment terms. Therefore, corporate boards of directors must prioritise employee well-being, benefits, safeguards and workplace grievances in the corporate policies, manuals, procedures and culture.[44] This, if meaningfully and purposefully implemented, is crucial to all employee welfare in this era of increased mental health challenges within the employees and workers' fraternity.

3. The Governance Pillar measures a company's systems and processes, ensuring that its board members and executives act in the best interests of its long-term stakeholders. Approaches to stakeholder rights and responsibilities, corporate culture, how proper corporate governance principles are implemented, and formulation of sound policies are fundamental in this pillar's lens.

Therefore, it is a concept of conscious responsibility, where corporates deliberately commit to operating in sustainable business practices for long-term benefits.[45] It advocates for corporate social and environmental governance culture within which business activities take place. As part of good corporate practice, including ESGs in the corporate's internal policies and handbooks

43 Supra, note 38
44 Supra, note 35
45 ibid

would progressively promote sustainability in business practice. Corporate directors and managers should, in furtherance of the ESGs, promote fair, just and equitable employment policies, be committed and allocate resources for the preservation and protection of the environment, such as factors contributing to climate change and possible and sustainable mitigation measures. For instance, corporations in the finance sector should consider financial risks from climate change and incorporate mitigation measures by developing practical approaches to disclosing these risks.46 In the long term, this will cushion the financial markets from the adverse effects of climate change, thereby strengthening business operations.

Therefore, incorporating ESGs enhances business and human rights by promoting the right to a clean and safe environment, health, and fair labour practices as one package, thereby sustainably enabling corporates to operate responsibly.

5.0 A snapshot of Business and Human Rights footprint within East Africa.

It is vital to highlight the specific actions each partner state has undertaken in the journey to ensure responsible corporate practices are being encouraged and advanced.

a) Kenya

Article 20 [47] on the Bill of Rights binds all state organs and persons. Article 260 of the Constitution defines a person as a 'company, association or other body of persons whether incorporated or unincorporated'.[48] Article 22 further grants the right to all persons to institute court proceedings claiming denial, violation, infringement, or threat against any proper or fundamental freedom under the Bill of Rights[49]Kenya has numerous legislations that touch on business and human rights, including the Proceeds of Crime and Anti-Money

46 See Guidance on Climate-Related Risk Management 2021, available on https://www.centralbank.go.ke/wp content/uploads/2021/10/guidance on Climate Related Risk Management pdf.
47 Constitution of Kenya 2010
48 Ibid
49 Ibid

Laundering Act,[50] Employment Act,[51] National Environment and Management Act,[52] Climate Change Act,[53] Companies Act,[54] In addition, Kenya was one the first countries in Africa to develop a National Action Plan on Business and Human Rights. Kenyan courts have been vigilant in agitating for the realisation of respect for business and human rights, for instance, in *Save Lamu & 5 others vs National Management Authority (NEMA) & another*[55] where a community-based organisation representing the Lamu community challenged the grant of license for the construction of the Lamu coal plant.[56] In another case*, the Ogiek community case,* Indigenous people were forcefully evicted from their ancestral land in the Mau Forest, and their livelihoods were negatively affected.[57]

b) Uganda

Article 20 of the Ugandan Constitution, 1995, mandates corporate actors to respect human rights. It provides that 'the rights and freedoms of the individual and groups enshrined in the Constitution shall be respected, upheld and promoted by all the organs and agencies of Government and all persons. ' Uganda is in the process of finalising its National Action Plan on business and human rights.[58]

c) Tanzania

Even though the Republic of Tanzania Constitution does not have an elaborate Bill of Rights, its supreme law is alive to the fundamental rights and duties. It aims to protect human dignity and ensure human rights are respected and cherished. In its 2013-2017 Human Rights Action Plan, the Commission for Human Rights and Good Governance

50 No. 9 of 2009, laws of Kenya
51 No. 11 of 2007, laws of Kenya
52 No. 8 of 1999 (revised in 2015), laws of Kenya
53 No.11 of 2016, laws of Kenya
54 No. 17 of 2015, laws of Kenya
55 [2019] eKLR
56 Ibid
57 Amnesty International, 'Kenya: Ruling in Ogiek case gives hope to indigenous peoples everywhere'. The case has also been litigated before the African Court on Human and Peoples Right based in Arusha.
58 National Planning Authority, 'Third National Development Plan(NDPIII) 2020/21 – 2024/25',Available on https://www.npa.go.ug/wp-content/uploads/2020/08/NDPIII-Finale_compressed.pdf

(CHRAGG) was tasked with developing a National Baseline Study on Business and Human Rights.[59] The commission's work underscores the importance of human rights and business in Tanzania.[60] It identified a lack of a comprehensive policy and institutional framework to implement the United Nations Guiding Principles on Business and Human Rights. Tanzania has yet to develop and begin implementing a National Action Plan.[61]

d) Rwanda

Rwanda recognises that respecting and promoting human rights is an international commitment contained in the Constitution and international instruments and a strategic imperative for developing the private sector and sustainable economic growth. Rwanda has already kicked off the process of stakeholders' dialogue on the National Action Plan for Business and Human Rights. The dialogue aims to develop, adopt, and implement a National Action Plan and create a framework for protecting and promoting human rights in the business sector.[62]

e) Burundi

Generally, Burundi has no recorded process or initiative for developing a National Action Plan on Business and Human Rights or a National Baseline Assessment on responsible corporate practices. The Constitution[63] does not obligate businesses to protect human rights because it lacks a Bill of Rights. Article 19 gives some hope since it incorporates all rights and duties guaranteed by the international human rights instruments.

f) Democratic Republic of the Congo (DRC)

Political instability in the DRC negatively impacts the protection and promotion of Business and Human Rights. Though arguably one of

59 URT,'National Human Rights Action Plan, 2013-2017', available at: https://www.ohcr.org/Documents/Issues/Education/Training/actions-plans/Excerpts/Tanzania_en%202013-2017.pdf

60 Ibid

61 Ibid

62 USDOS,'2020 Country Reports on Human Rights Practices: Rwanda; available at https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/rwanda/

See also, https://www.rwanda.un.org/en/261481-human-rights-key-fundamentals-pillar-rwanda-private-sector-development.

63 Constitution of Burundi, 2018

the most well-endowed countries in the world, illicit natural resource exploitation, displacements, corruption, and human rights violations have heightened the necessity for a business and human rights agenda. Both local and foreign corporate activities, especially in the mining sector, have caused several long-term effects, including but not limited to toxic environmental pollution and human exploitation.[64] Despite the glaring human rights implications regarding corporate actors, the DRC has not yet embarked on a journey to develop a National Action Plan or executed a National Baseline Assessment on business and human rights.

g) Somalia

Due to the prolonged political instability and armed conflict, Somalia has borne the brunt of wanton human rights violations ranging from insecurity, civil unrest and war, piracy and lack of adequate state protection.[65] Notably, in 2013, the Government established a Ministry of Human Rights and endorsed a human rights roadmap. The Government also established a Human Rights Commission to promote knowledge of human rights, even though there is currently very little evidence of any progress towards human rights sensitisation in the country.[66] So far, Somalia has neither developed a National Action Plan nor conducted a baseline business and human rights assessment.

h) South Sudan

South Sudan has borne the brunt of armed conflict for decades. Different parties to perennial disputes have contributed to ethnic massacres, recruitment of child soldiers, killing of journalists and

64 Amnesty International, 'DRC: Alarming research shows long lasting harm from cobalt mine abuses; available at https://www.amnesty.org/en/latest/news/2020/05/drc-alarming-research-harm-from-cobalt-mine-abuses/

65 HRW,'Somalia Events of 2019'; available at: https://www.hrw.org/world-report/2020/country-chapters/somalia

66 UPI,'Somalia takes human rights steps' available at, https://www.upi.com/Top_news/special/2013/09/03/somalia-takes-human-rights-steps/34071378218185/?ur3=1

See also, 'Somalia:UN expert hails human rights effort but urges broader consultation process'; available at: https://www.archive.is/201402220063126/http://www.un.org/apps/news/story.asp/

gender-based violence.[67] South Sudan has not yet developed a National Action Plan or Baseline Assessment.

i) Ethiopia

Ethiopia hosted the United Working Group on the issue of human rights, and transnational corporations and other business enterprises held an African Regional Forum on Business and Human Rights in Addis Ababa on 16 –18 September 2014, which focused primarily on advancing a business and human rights agenda in Africa. It is also notable that Ethiopia hosted the second 2nd Business and Human Rights Forum on 6-7 September 2023 under the theme ***'For Africa, From Africa',*** which reflected the importance of local perspectives and solutions in the effort to implement the United Nations Guiding Principles (UNGPs) concerning operationalising the African Continental Free Trade Area (AfCCFTA).68 Ethiopia does not have a National Action Plan and has not conducted the National Baseline Assessment.

6.0 Suggested Compliance Strategies for Corporates within East Africa

Various strategies for entrenching business and human rights practices on corporates can be explored. Below are the suggested strategies:

a) East African Community Treaty (EAC Treaty)

Amendment of the Treaty[69] allows the adoption of the East African Business and Human Rights Act. This would, in effect, cause a trickle-down action by corporations, their subsidiaries, business partners, and financiers operating within the region to formulate policies that conform to responsible business practices across EAC partner states.[70]

67 BBC, 'South Sudan rivals Salva M. Kiir and Riek Machar strike unity deal', BBC News (22 February 2022), Accessible at https://www.bbc.com/news/world-africa-51562367

68 Available on, https://www.ohcr.org/en/events/forums/2023/african-business-an-human-rights-forum-2023-africa.

69 Treaty for the establishment of the East African Community which comprises of 7 partner States: Democratic Republic of Congo, Republic of Burundi, Republic of Kenya, Republic of Rwanda, Republic of Uganda, Republic of South Sudan and United Republic of Tanzania, Somalia. An application for admission of Federal Republic of Ethiopia is under consideration.

70 ibid

Such a legal regime dealing specifically with matters of business and human rights would be purposeful in ensuring compliance with UNGPs; as a result, responsible corporate practice would be progressively instilled in all business operations across East Africa.

It would also provide a basis for embedding the responsibility to respect human rights throughout all business functions, building trust with stakeholders, identifying processes to respond to human rights risks, fostering in-house learning and demonstrating international good practices.[71] The East African Community has no legislation, policy or programme on business and human rights.[72]

b) National Action Plans (NAPs)

These are statements of government policy actions to ensure businesses respect human rights. They apply to all businesses regardless of their size, sector, operational context, ownership, and structure.[73] They seek to localise the United Nations Guiding Principles on Business and Human Rights within local jurisdictions after formulating the necessary operational policies for uptake and implementation by local and multinational corporations.

East African partner states are currently at different stages in developing the NAPs. Kenya and Uganda lead the pack, having already created their NAPs and are in the process of formulating policies for implementing the UNGPs under the office of the Attorney General, department of justice,[74] and the Ministry of Gender, labour and social development[75] respectively. The Tanzanian government has already

71 Scott Martin and Joseph Kibugu: A Baseline Assessment on Business and Human Rights in Africa: From the First Decade to the Next, Pg. 42; available on https://www.undp.org/Africa/Publication/baseline-assessmentbusinessandhumanrightsAfrica first decade to the next, accessed on 21 January 2023.

72 Oyeniyi Abe, August 2022: African Union and the State of Business and Human Rights in Africa at Pg. 50; available on https://library.fes.de/pdf-files/bueros/fes-ua/19589-20221107.pdf

73 Republic of Kenya sessional paper No. 3 of 2021. National Action Plan on Business and Human Rights; For the implementation of the United Nations Guiding Principles on Business and Human Rights, 2020 – 2025, launched by the Honourable Attorney General on 9 February 2016.

74 https://statelaw.go.ke/wp-content/uploads/2022/11/NATIONAL-ACTION-PLAN-ON-BUSINESS-AND-HUMAN-RIGHTS-NOV-2020.PDF

75 https://iser-uganda.org/wp-content/uploads/2022/07/Business-and-Human-Rights-UPR2022-Fact-sheet.pdf

tasked the Commission for Human Rights and Good Governance with developing a National Baseline Assessment[76] on Business and Human Rights and support the development of a National Action Plan (NAP).[77] Rwanda, Burundi, Democratic Republic of Congo, and Southern Sudan have not yet launched their NAPs, but national human rights institutions or civil societies in the respective partner states have begun taking steps to develop them.[78]

c) Corporate Safeguarding

This is an internal policy initiative that corporates put in place to ensure that all its employees play their fair part in safeguarding and promoting the well-being of others who may be at risk of harm. This goes a long way to prevent abuses, harm and neglect. It includes keen monitoring of corporate and operational potential and actual risks to all aspects that may breach employee and other stakeholders' safeguarding issues and committing to clear safeguarding leadership at all levels of the enterprise, having a company-wide safeguarding awareness, and adequate infrastructure for reporting and handling concerns.

d) Corporate Undertakings

Regulatory bodies mandated to license and issue operational permits to corporates should make it a requirement that written undertakings with local communities and vulnerable groups are executed before the issuance of specific licenses or permits. Examples of such would be corporations intending to set up industries dealing in mining, extractives, and manufacturing. This is to ensure that in addition to the environmental impact assessments carried out for licensing, matters of waste disposal, management, recycling and effluent emissions prevention as well as labour rights are handled and implemented responsibly on a day-to-day basis. This would put corporations in check by ensuring they carry out their operations being conscious of

76 Baseline Assessment refers to a comprehensive evaluation conducted by a country to assess the current state of how businesses within its jurisdiction are adhering to international human rights standards.

77 https://www.business-humanrights.org/en/latest-news/Tanzania-releases-its-national-baseliness-assessment-on-business-human-rights-a-critical-step-towards-developing-a-nap/

78 See https://www.ohchr.org/specialprocedures/wg/business/national-action plans business and human rights.

the need to uphold human rights or refrain from doing that which is likely to violate human rights either directly or indirectly.

e) Audits and Certifications

Government agencies or bodies mandated with certification of quality assurance, compliance and assessments in consultation with the corporate institutions should set up guidelines upon which their business operations should conform responsible corporate practices. This would help authorities carry out periodic audits and approve certifications for those corporates that have fully complied, appraise those that are partially compliant and sanction those that have reneged and refused to take tangible compliance measures and initiatives.

f) Judicial and Alternative Dispute Resolution (ADR) Mechanisms

Both regional and national courts should step up effort to resolve disputes touching on business and human rights. Regional courts such as the African Court on Human and People's Rights and the East African Court of Justice can be instrumental in guiding the national courts on how to universally deal with cases of business and human rights abuses. The East African Court of Justice for instance should enlist qualified lawyers who are well trained in business and human rights from across the partner states to be part of its roll of experts. These experts would immensely enrich and contribute to the administration of justice involving monumental matters of business and human rights abuses occasioned by local, regional and multinational corporates operating within East Africa.

Total Energies (formerly Total) a case[79] filed by six civil society organisations in France is a classic example of a monumental dispute on business and human rights which could have been dealt with by our East African Court of Justice. This is premised on the fact that Total Energies is a multinational corporate entity which has been involved in prospecting, drilling and mining of oil and gas in Uganda, and laying of a pipeline through Tanzania threatening to adversely affect the right

79 See https://www.business-human-rights.org/en/latest news/total-lawsuit-re-failure to respect-French duty of vigilance law in operation in Uganda/, accessed on 21 January 2023.

to a safe and clean environment and health due to environmental degradation and oil spillage for the people of both countries.

Alternative Dispute Resolution (ADR)[80] especially mediation[81] should be utilized in dispute resolution involving cases of business and human rights to ensure that even after the dispute has been resolved parties maintain good relationships to continue operating and engaging in a healthy and friendly business environment.

g) Affirmative Action

Corporates should integrate affirmative action in the ranks of their business operations. Inclusion of women, indigenous people, youth, persons with disabilities and human rights defenders would fill in the gaps and expedite business and human rights responsiveness for corporates across East African Community. This usually forgotten and grossly ignored province if empowered and included in responsible corporate practices, would assist in sustainable development and expeditious growth of UNGPs in the region. In addition, promotion and protection of the rights of vulnerable groups such as indigenous people, youth and women would enhance and promote human rights and encourage participation of the host communities to the corporate growth and prosperity.

h) Policy

This is a company's public expression of its commitment to meet its responsibilities to respect internationally recognised human rights standards[82]. At the very least, it provides a basis for embedding the responsibility to respect human rights through all business functions, identify gaps and helps initiate a process that alerts the company of new rights risks. It also elaborates a company's commitment to respect

80 ADR is a method of dispute resolution that is non-adversarial i.e. working together considerately to reach the best declaration for everyone.

81 Mediation is an ADR mechanism where unprejudiced person called a "mediator" helps or facilitates a mediation process for parties to try to reach a communally acceptable resolution of the dispute without his/her settling the dispute for the disputants.

82 United Nations Global Compact. A Guide for Business: How to Develop a Human Rights Policy, Second edition (2015), https://www.ohchr.org/sites/default/files/Documents/issues/Business/guide-business-hr-policy.pdf , accessed on 7 February 2023

and support human rights.[83]All corporates with operations within the East African Community should as a matter of noble and responsible business practice, come up with internal policies in line with UNGPs and its directives. The policies should also be geared towards to advance international human rights, international labour declarations on fundamental principles on rights at work and all other relevant human rights instruments on labour, environment and anti-money laundering. This in the long term would help corporates to grow their business operations whilst creating positive social and environmental impact.

i) Voluntary Reporting

The UN Guiding Principles Reporting Framework is the indispensable tool companies have been waiting for.[84] Voluntary reporting helps corporates to identify salient human rights issues, those that are at greatest risk of severe negative impact and explains where the corporate has taken steps to manage those issues and some of the challenges ahead.[85] When the management discovers that there is or have been human rights violations within their business operations, voluntary reporting would be encouraged to unearth the extent of such violations or abuses. This enables the necessary correctional measures to be undertaken to avert such violations and abuses in the future while progressively remedying the situation at hand.

j) Due Diligence

Human rights due diligence is a process that a corporate should follow in order to identify, prevent, mitigate and account for how well it addresses its adverse human rights impacts. It includes assessing actual and potential human rights impacts; integrating and acting on findings; tracking responses and communicating about how impacts

83 Ibid

84 Professor John Ruggie, former special representative of the UN Secretary-General for Business and Human Rights. UN Guiding Principles Reporting Framework: Users and Supporters. https://www.ungpreporting.org/about-us/support-and-users/

85 See, Unilever Releases Human Rights Report using UNGP Reporting Framework (30 June 2015). Unilever is the first company to use the UNGP reporting framework comprehensively, following the company's commitment to being the first adopter of the reporting framework in 2014. https://ungpreporting.org/unilever-releases-human-rights-report-using-ungp-reporting-framework/

are addressed. Business should conduct human rights due diligence along their supply chain and in their procurement activities. [86]Regular and scheduled performance of BHR due diligence by corporates either internally or through outsourced services would help identify and ensure reporting of any gaps hindering responsible corporate operations in good time. This would help the management to expeditiously take protective, preventive and remedial actions before the situation escalates to alarming levels.

7.0 Possible challenges of implementing UNGPs within the East African region

Introducing new and drastic changes to an already entrenched corporate culture cannot be achieved without insurmountable challenges in some instances. This article will attempt to point out a few of those obstacles that are likely to derail the noble strategies of advancing the rule of responsible corporate practices within East Africa, as follows:

a) Corruption

Corporate corruption manifests itself as either; corruption as a rational action, as an institutionalized practice, as a cultural norm and as a moral failure.[87] Due to their immense resources, corporates wield certain powers, influences and connections which if not responsibly utilized, often lead to human rights abuses of immense proportions. This adversely impacts on the lifelong livelihoods of the local communities, workers and the natural ecosystem. For instance, some directors and managers would opt to offer bribes or favours to evade and renege on their role of ensuring responsible corporate practices. This would be possible where certain human rights violations have occurred and instead of addressing them using the guiding principles, they would consider giving out bribes, intimidation or using corporate connections to defeat justice against the affected victims.

86 Corporate human rights due diligence identifying and leveraging emerging practices. Available on https://www.ohchr.org/en/special/wg-business/corporate-human-rights-due diligence-identifying-and-leveraging-emerging practices. Accessed on 6 February 2023.

87 Armando Castrol, Nelson Phillips and Shaz Ansari: Corporate Corruption: A review and an Agenda for Future Research. Published online on 10 August 2020/https://doi.org/10.5465/annals.208.0156

b) Impunity

Most human rights violations by corporates go unpunished. The size, influence and complexity of corporations pose major challenges for States to hold them to account. Impunity regarding human rights abuses by corporates is ever increasing.[88]

In order to maximise profits and amass as much resources as possible, corporates may become susceptible to negative exploitation of both the environment and human capital. An example is a case involving *Wardi Nuts and Cashew Nut Processing plant in Tezo, Kilifi County, Kenya.*[89] *Kakuzi Plc*[90] is another classic example of impunity leading to massive human rights violations spanning many years of irresponsible corporate practices.[91]

Contributory corporate negligence for instance by Unilever, Liptons, James Finlay & Co. and Sislo Holdings have recently revealed massive corporate impunity perpetuated by senior employees who have committed and perpetuated sexual exploitation of workers in the tea plantations.[92] These human rights abuses have resulted in sexual

88 Business and Human Rights Resource Centre (2017) 'Corporate impunity is common & remedy for victims is rare-Corporate Legal Accountability Annual Briefing'. Available on https://www.businesshumanrights.org/sites/default/files/documents/CLA-AB-Final-Apr%202017.pdf. Accessed on 6 February 2023.

89 What is 'cashew nut oil' and why is it disfiguring Kenyan workers' hands? Workers' only get paid KShs. 6 per kilogram. Maximum a worker can do per day is 5 kilograms (Kshs. 30 per day), owners sell cashew nut at Kshs. 1,500 per kilogram while the oils sell for as much as Kshs. 4,000 per 500 ml bottle; available on https://observers.France24.com/en/Africa/20230118-cashew-oil-cnsl- Kenya-Kilifi-burning -workers-hands.

90 A listed Agricultural firm involved in cultivation and manufacturing. Its products include avocadoes, blueberries, macadamia, tea, livestock and commercial forestry. It is a subsidiary of Camellia Plc based in the United Kingdom.

91 Heavy price for Kakuzi's egregious human rights violations: Kakuzi committed atrocities and malpractices ranging from killings, rape and other forms of sexual and gender-based violence committed by its guards causing grievous bodily harm, abominable labour injustices, wanton violence, bad corporate governance to more than 13 neighbouring communities. Available on https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html

92 Sex for work: The True Cost of Our Tea-BBC Africa Eye Documentary. Available on https://www.youtube.com/results?search-query=sex+for+work+bbc+documentary . Unilever, James Finlay & Co. and Lipton are British multinationals running and managing tea plantations in Kenya for local and export to Europe. Sislo Holdings is/was a contractor owned by one of the senior employees involved in the sexual exploitation of women workers in the tea plantation.

harassment, indecent assault and deliberate transmission of HIV to the affected women employees.[93] More than 70 women told British Broadcasting Corporation (BBC) that they had been sexually exploited by their supervisors on farms owned by the corporates.[94]

c) Weak Rule of Law and Disobedient to Court Orders

Weak rule of law poses a major threat to social and economic development.[95] Courts are temples of justice and places of refuge for those seeking protection. They must never be despoiled either through acts of physical transgressions or blatant disregard of their pronouncements.[96] When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders are *ex cathedra*, compulsive, peremptory and expressly binding.[97] However, due to different stages of development, integration, transparency and human rights advancements and democracy within the region, adherence to rule of law and obedience to court orders are the sticky issues bedevilling the East African Community. Armed conflicts in the Democratic Republic of Congo and South Sudan and occasional diplomatic tiffs between Uganda and Rwanda, Tanzania and Kenya can hugely affect proper adherence to the rule of law as well as enforcement of court orders locally and across the borders.

In the past, Unilever tea Kenya[98] has found itself in the lens of human rights watch for "relentlessly hiding behind its corporate culture" to avoid legal redress until a group of workers called in the United Nations working group on business and human rights demanding that

93 ibid

94 BBC Uncovers Sexual Abuse on Kenyan Tea Plantations. Available on https://voanews.com/a/bbc-uncovers-sexual-abuse-on-Kenyan-tea-plantations/6970453.html

95 Yury Fedotov, 15 November 2013: 'Weak rule of law and lack of good governance a major threat to development, says UNODC Executive Director (as he then was), available on https://www.undoc/en/frontpage/2013/November/weak-rule-of-law-and-lack-of-good-governance-a-major-threat-to-development-says-undoc-executive-director.html

96 Hon. Justice David Kenani Maraga, Chief Justice emeritus of the Republic of Kenya. Available on https://www.businessdailyafrica.com/bd/data-hub/pain-of-increasing-non-compliance-with-court-orders-2285070

97 Mr. Bashira, advocate of the High Court of Kenya: It's not negotiable; court orders must be obeyed by all Kenyans, available on https://www.standardmedia.co.ke/opinion/article/2001431189/its-not-negotiable-court-orders-must-be-obeyed-by-all-kenyans

98 Unilever tea Kenya Limited is a subsidiary of Unilever, an Anglo Dutch conglomerate involved in the production of tea, mainly for export. In Kenya its operations are mainly in Kericho, Rift Valley.

Unilever make remediations.[99] This is after a long struggle and hope that rule of law would prevail by dint of the labour rights spelt out in the local and international laws in addition to several agitations from respective trade unions.

8.0 Recommendations and Conclusions

For the East Africa region to advance its human rights blueprint and enhance responsible corporate practices across its borders, several cross-cutting policies may be of fundamental importance. The policies may be summarised by recommending the following: development of guidelines for non-financial reporting under each of the partner states' Company laws, Capital Markets laws, regulations and processes, Competition laws and aligning the individual statutes with the relevant provisions of the East Africa Treaties. Strengthening and harmonising of oversight mechanisms for recruitment agencies involved in the recruitment of East Africans across the region. Partner states should take up deliberate initiatives to sensitize relevant sections of the public especially women, persons living with disabilities, indigenous people, youth and those living in the informal settlements about land laws, labour laws, environmental laws as well as data protection and privacy laws. Partner states should synchronise their systems to render Human Rights Due Diligence (HRDD) mandatory for all private and state actors in the corporate sector through an efficient consultative and stakeholder centred platform.

With the foregoing, it is apparent that partner states have their work clearly cut out for them to fully implement the UNGPs on business and human rights. Corporates have their mandatory responsibilities concisely stipulated if their quest to realize responsible corporate practices in the East African region. Resources both financial, intellectual, volunteerism, good will and human resource will be in high demand to actualize the dream of a corporate culture that respect human rights in all its forms for the benefit of current and future generations.

99 Kenya: Unilever accused of failing to respect workers' rights as alleged failure to compensate victims of violence on Kericho plantation branded part of historic pattern; available at https://www.business-humanrights.org/en/latest-news/ Kenya-Unilever-accused-of failing to respect workers' rights as alleged failure to compensate victims of violence on Kericho plantation branded part of historic pattern.

These recommendations are not exhaustive but are a tip of the iceberg on what can contribute to this noble and overdue endeavour of inculcating enduring responsible corporate practices. As an emerging market and a future economic tiger, deepening understanding on business and human rights among legal professionals, the corporate directors and civil society organisations; encouraging all partner states to develop, adopt and implement National Action Plans, carry out regular trainings on UNGPs among professionals such as lawyers, environmentalists, finance experts and human resources personnel across the region inform of career development courses, seminars, workshops and conferences. Enactment of relevant legislations by national legislatures as well as the East African Legislative Assembly requiring mandatory due diligence for corporates in certain businesses such a mining and extractives, manufacturing, finance, real estate and agroforestry.

Strong and stiffer penalties should also be meted out to specific corporates and directors who engage in criminal enterprise such as bribery and graft, illicit flow of finances, pollution of the environment and labour rights violations. Partner States should ensure that journalists, human rights defenders, human rights lawyers and free-spirited citizens are adequately protected from any harm by those whose corporate ventures are put into scrutiny and auditing to assess, evaluate and monitor their levels of compliance with responsible corporate practices. Respecting human rights by corporates will go a long way in assisting them to gain long term benefits such as reduced legal costs, fines and penalties for non-compliance; market leverage, good reputation and employee retention as well as ensuring health and safety of the environment and the entire ecosystem across the East Africa region.

Finally, with the continuing expansion of the East African region with the admission of the Federal Republic of Somalia and a possible admission of the Federal Republic of Ethiopia in the near future, it is paramount to integrate human rights spirit and commitment in all our dealings in cross-border businesses, environmental conservation, financial flows, employment and labour movements as well as in the digital platforms especially now the age of Artificial Intelligence (AI).

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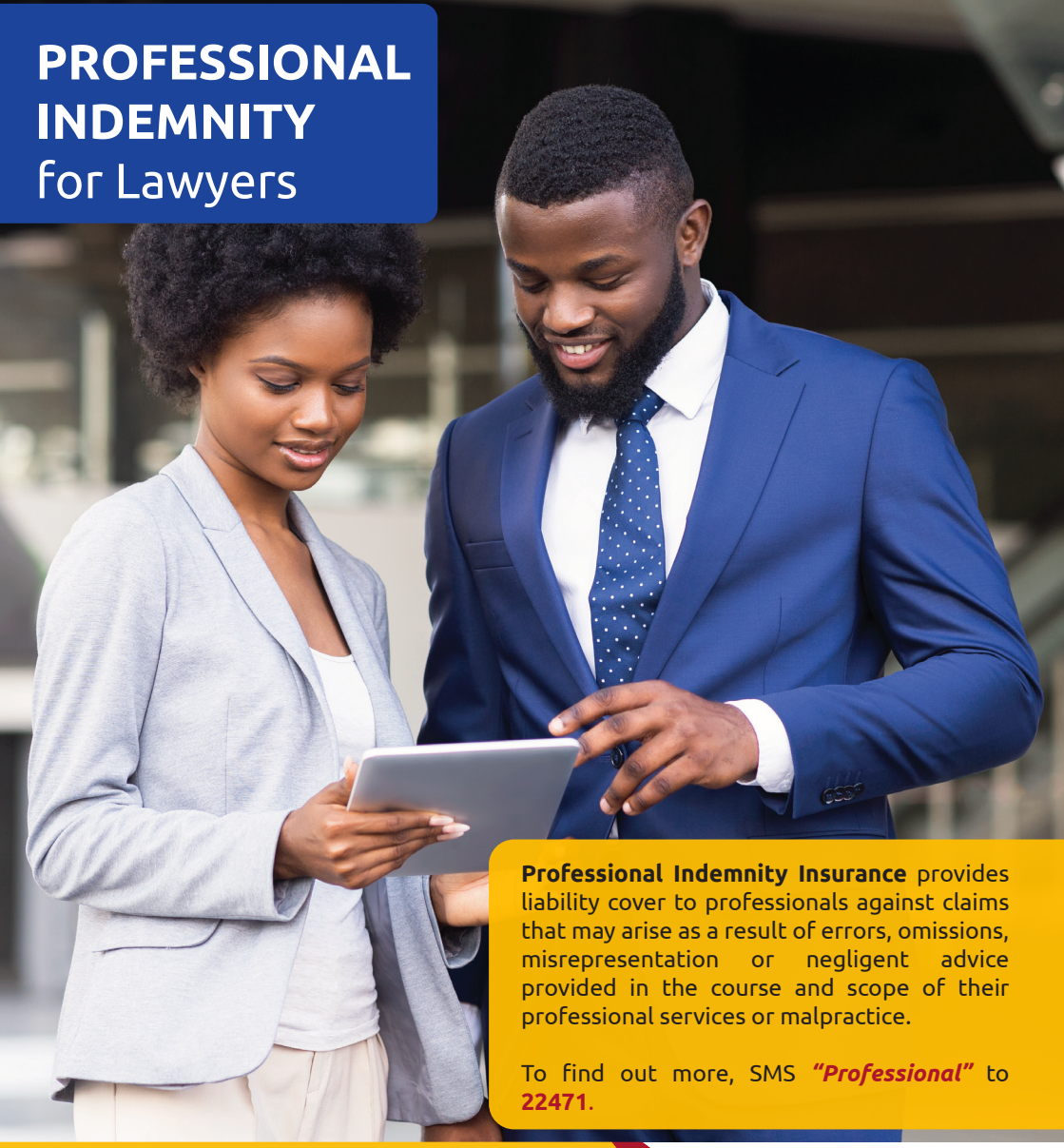

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KENYA'S DEMOCRATIC TRANSITION: Between Reform and Stagnation

Duncan M. Okubasu[1*]

Abstract**

Despite liberalising politics in the early 1990s, Kenya has not become a full-blown democracy. In 2002, after a change of political leadership, the *de facto* constitutional transfiguration occurred, and Kenya transitioned, going by the Freedom House classificatory scheme, from a "not free" to a "partly free" country, that is, from an authoritarian to a hybrid constitution in the sense of real constitutional change. Since then, the de facto constitution has neither regressed into an authoritarian one nor become fully democratic. While the environment is relatively free compared to the pre-1989 epoch, the transition to a democratic constitution is a yet-to-be-realised outcome if the endurance of its post-2002 de facto hybrid version is anything to go by. In 2010, a new, normatively attractive Constitution was promulgated. Whereas also some change has been registered for good, it has not substantially altered the nature of the descriptive aspects of its constitution. In prospecting for causal explanations behind partial transition, this contribution contends that the norms in the new constitution and the institutions it fashioned, such as judicial review, at best hedge against regression. In conclusion, it argues that the problem with transition in Kenya can be explained by structural factors on the one hand and transcendent influence of pre-1989 incumbency on the other hand under the watch of ambivalent international actors.

Keywords: *Democratic Transition, Constitutional Evolution, Hybrid Governance, Kenya Politics, Structural Challenges*

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1.0 Introduction

Kenya's *de facto* constitution- norms, practices and understandings about how power is acquired, used and lost in practice, has been partly authoritarian, especially after 2002. Indeed, it is one of the countries in Sub-Saharan Africa that did not successfully transition to a democratic constitution after the Third Wave of Democratisation (TWD) in the early 1990s. Like in most African countries, the TWD set into motion a robust institutional reform agenda that culminated in a new constitution in 2010.[2] The description of Stephen Ndegwa of the 1997 elections as "a disappointing confirmation of the extent to which the country's democratic transition has stalled" reveals the transitional trajectory taken just after the TWD.[3] Since 2002, Freedom House has considered Kenya a "partly free" country.[4] The quest for a democratic order, it could be imagined, should have been satisfied following the enactment of the normatively attractive constitution in 2010 through a process primarily considered "people-driven".[5] While one might argue that Kenya is on the way to democracy, the apparent stability of Kenya's *de facto* constitution both before and after 2010 creates an impression that Kenya's hybrid status was the final transitional outcome.

In the case of Kenya, several interwoven conditions have worked against a complete transition. These include minimal reforms at the dawn of the TWD, partly because there wasn't a substantial change to incumbent power holders and also because of the obstructive role that some international actors played in the early 1990s- to date. With this leverage, incumbent power holders carefully controlled reforms to seemingly comply with the bare minimum demands

2 For an understanding of the institutional reform process in Kenya, see Migai Akech, *Institutional Reform in the New Constitution of Kenya* (ICJ, Nairobi, 2010).

3 Stephen N. Ndegwa, 'The Incomplete Transition: The Constitutional and Electoral Context in Kenya' (1998)45 (2) *Africa Today:* 193, 211; Mai Hassan, Continuity despite change: Kenya's new constitution and executive power (2015) 22 (4) *Democratization* 587.

4 See Freedom House, 'Freedom in the World Kenya', <https://freedomhouse.org/country/kenya> accessed 8November 2020; ("Kenya is a multiparty democracy that holds regular elections, but its political rights and civil liberties are seriously undermined by pervasive corruption and cronyism, police brutality, and ethnic rivalries that political leader political leader exploits exploits"); Freedom House, Freedom in the World 2004 - Kenya, 18 December 2003, <https://www.refworld.org/docid/473c-549dc.html> accessed 2 June 2020.

5 Willy Mutunga, 'People Power in the 2010 Constitution: A Reality or an Illusion?' *The Elephant* 6 March 2010 <https://www.theelephant.info/op-eds/2020/03/06/people-power-in-the-2010-constitution-a-reality-or-an-illusion/> accessed 8 November 2020; See also Grace Maingi, 'The Kenyan Constitutional Reform Process: A Case Study on the work of FIDA Kenya in Securing Women's Rights (2011) *Feminist Africa* 63.

of the international community while leaving the formal and informal institutional and legal apparatus that undergirded authoritarian rule intact. The problem with Kenya's constitutional development had been perceived by pro-democracy forces to be associated with the frequency of textual change and the resultant institutional arrangements that did not support power diffusion.[6] Thus, they thought the solution to transition lay in a new constitution with entrenched rules of formal change.

As these groups pursued constitutional reform, new politicians were assimilated into the constitutional order and its political economy. Therefore, though the 2010 Constitution is normatively attractive, thanks to democracy-demanding groups, it was adopted way too late and has, in the main, helped to guard against change towards an authoritarian constitution. Judicial review, especially after 2010, has consequently been used as a "shield" against, rather than a "sword" for attacking, authoritarian norms and practices. The actor-based successes and failures registered in the political order are, in turn, attributed to two main structural conditions: first, Kenya's relative economic affluence and the geopolitical interest that other nations have in it, and second, the neo-patrimonial nature of Kenyan society and ethnic cleavages, both of which hinge on the land and settlement. This paper first considers the pre-1989 constitutional conditions to assess the transitional outcome.

2.0 Pre-1989 Constitutional conditions and transitions in the early 1990s

Though Kenya did not experience dramatic constitutional ousters and subjugations like the ones in West African countries,[7] Its de facto constitution was also authoritarian before the TWD. From the colonial to the post-colonial period, the idea of self-rule and protecting political rights has been elusive. As in other African countries, the colonial administration introduced democracy but in a distorted form. African elites inherited colonial, authoritarian governance from the British, its terms being that there would be an assurance of personal

6 See, Githu Muigai, 'Amending the Constitution: Lessons from History,' (1993) 2 (3) *The Advocate*; Media Development Association and Konrad Adenauer Foundation, <History of Constitution Making in Kenya,> (2012). <http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057> accessed 8 November 2020.

7 Boubaca N'diaye, 'How Not to Institutionalize Civilian Control: Kenya's Coup Prevention Strategies' 1964-1997 (2002) 1 AFS 619.

security and financial well-being.[8] Samson Ndai consequently remarks that Kenyatta had "accepted the colonial patron-client system that rewarded friends with public resources including land".[9]

Though, as mentioned, there was never a single incident of violent constitutional ouster, the period between 1964 and 1969 was characterised by comprehensive formal constitutional amendments.[10] As of 1969, the country's political system had changed from parliamentary to presidential. Kenya's bicameral legislature had been dismantled and supplanted with a single house. The regional governments had been abolished, and the procedure for amending the Constitution had been changed so that the process of changing the Constitution was synonymous with changing ordinary legislation.[11] In terms of managing dissent, following an incident in 1964, just after KADU's dissolution and its assimilation into KANU, twenty-nine right-wing members of KANU defected and formed a new political party, the Kenya People's Union (KPU).[12] A constitutional amendment was passed to provide that if a person defected to a new party, he would lose his parliamentary seat.13 As a result, a "Little General Election" was held, and defecting members from the region where the President hailed were trounced.[14] Defectors from the western part of Kenya, designated as Nyanza Province, won and became members of KPU in Parliament. There were only eight. In 1969, KPU clashed with President Kenyatta at an event in Nyanza Province and several people were shot. KPU

8 Generally see, Henry Amadi, 'Persistence and Change of Neo-patrimonialism in Post-Independence Kenya,' (2009) Research Paper Prepared for the Project "Persistence and Change of Neopatrimonialism in Various Non-OECD Regions" Based at the GIGA German Institute of Global and Area Studies, Hamburg Funded by the German Research Foundation (DFG) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.909.9240&rep=rep1&type=pdf> accessed 8 November 2020

9 Mickie Mwanzia Koster, Michael Mwenda, 'Introduction' Kenya After 50: Reconfiguring Education, Gender, and Policy,' (Palgrave Macmillan US, 2016)

10 *Ibid*.

11 *Ibid*. See also, N Kamunde-Aquino Kenya's Constitutional History REDD+ Law Project - Briefing Paper <https://www.4cmr.group.cam.ac.uk/filecab/redd-law project/20140821%20BP%20Kenyas%20Constitutional%20History.pdf.; Patrice LO Lumumba & Morris Morris Mbondenyi and Stephen Odero (eds.), *The Constitution of Kenya: Contemporary Readings*, (Law Africa Publishing (K) Limited, 2011), at 36.

12 See Peter Anyang' Nyong'o, 'State and Society in Kenya: The Disintegration of the Nationalist Coalitions and the Rise of Presidential Authoritarianism,' 1963-78 (1989) 355 Afr. Aff. 229.

13 Martin Goeke & Christof Hartmann 'The regulation of Party Switching in Africa,' (2011) 29 (3) JCAS 263-280, 269.

14 George Bennett, Kenya's 'Little General Election' (1966) 22 (8) *World Today* 336-343.

was also banned.[15] The outfit's leader, Jaramogi Odinga, was jailed, and Kenya became a *de facto* one-party state.[16]

With the dismemberment of provisions that gave a platform to alternative political voices, Kenya had a fully authoritarian constitution leading to extra-judicial killings, forcible transfer of communities from their ancestral homes, massive embezzlement and other phenomena typical of dictatorial regimes. Ghai and Cottrell observe in respect to this period that:

> "The institutions of the government and economy decayed under the shadow of a powerful president and his inner circle. These institutions became merely instruments of support to the ruling party, and even the electoral process was twisted to serve it. There was no effective separation of powers. Parliament became ineffective. There were few institutions for accountability, such as an ombudsman, and such institutions as existed, like the auditor-general, were rendered toothless. Political or ethnic connections or monetary payments replaced merit as the criterion for appointment or promotion in public services."[17]

Following Kenyatta's death, former KADU leader Daniel Moi co-opted into KANU and took over as president and leader. His philosophy, "Nyayo" (footsteps), meant a commitment to rule in the same manner and style as Kenyatta and to stand for his ideology.[18] He was not any different from Kenyatta and ruled for four years without any severe political crisis. Things got turbulent for him around 1982, however, and his terms of governance changed, too.[19] At that time, alternative political voices attempted to establish opposition political parties. In particular, an avowed KANU opponent, Mr.

15 See, Joel D. Barkan. Okumu, 'Semi-Competitive' Elections, Clientelism, and Political Recruitment in a No-Party State: The Kenyan Experience. In: Hermet G., Rose R., Rouquié A. (eds) *Elections Without Choice*, (Palgrave Macmillan, London, 1978).

16 *Ibid*.

17 Jill Cottrell & Yash Ghai, 'Constitution Making and Democratization in Kenya 2000–2005' (2007) 14 *Democratisation* 1.

18 Judith M. Abwunza, Nyayo: Cultural Contradictions in Kenya Rural Capitalism (1990) 32 (2) *Anthropologia* 183.

19 Kamau Mutunga, 'Moment of Bravado that Changed Kenya,' *Daily Nation* 31 July 2012; <http://www.nation.co.ke/lifestyle/dn2/How-1982-coup-changed-Kenya/957860-1467488-13vl42az/index.html>

Jaramogi Odinga, whose party had been banned in 1969 by Moi's predecessor, Kenyatta, intimated to a gathering in Britain that he and others intended to form a new political party to challenge the status quo of the time.[20] A constitution for the latest political party was under preparation when George Anyona, one of the leading proponents of the idea, was arrested on his way to launch the party.[21] Contemporaneously, there was increasing dissent, even from Moi's allies, and to deal with it, Parliament, which consisted of only one party, KANU, under Moi's chairmanship, quickly passed the famous section 2[a] amendment that provided that there would be only one political party: KANU.[22] The events of that year were worsened by an attempt by Kenya's military faction to overthrow the government.[23]

Subsequently, President Moi adopted very heavy-handed tactics, and all attempts to elicit the emergence of opposition groups were dealt with firmly. From 1982 onwards, detention without trial was restored and unfair and politically instigated trials became commonplace.[24] Control of movement in and out of the country also became a serious concern for the state, the confiscation of John Mwau's passport and his unsuccessful attempt at getting it through the courts being a ready illustration.[25] The legal profession, which could have been an alternative voice, was also held captive, and in some cases, Moi would intervene in the Law Society of Kenya elections.[26] His concern for total control also extended to universities. Moi was the Chancellor of all public universities, and teaching members of staff and students who criticised his government found themselves on the receiving end of harsh treatment. He removed the security of tenure of judges, and extra-judicial killings became popular.[27] Kenya's economic conditions also deteriorated, and corruption has reached alarming levels.[28] The increasing repression and the deteriorating

20 Elisha Stephen Atieno-Odhiambo 'Hegemonic Enterprises and Instrumentalities of Survival: Ethnicity and Democracy in Kenya' (2002) 61 (2) ASR 223, 228.
21 *Ibid.*
22 *Ibid.*
23 Mutunga (note 18 above).
24 Kevin Patrick Conboy 'Detention Without Trial in Kenya' (1978) 8 *Ga.J.Int'l.& Comp.L* 441
25 Kenya Human Rights Commission, 139.
26 *Ibid.*
27 *Ibid.*
28 Joel D. Barkan, 'Kenya After Moi,' (2004) 83 *Foreign Aff.* 87, 88-90. See Also, James Forole Jarso, The Media and The Anti-Corruption Crusade In Kenya: Weighing The Achievements, Challenges, And Prospects (2010) 26 (1) *AM. U. INT'L L. REV* 39.

political and economic conditions did not, however, leave Moi unscathed.[29] By 1988, he and his governance style had become so unpopular that in the elections of that year, the voter turnout was a mere 32.5 per cent.[30] This was essentially the state of affairs when Kenya encountered the TWD.

3.0 Transitional in late 1980s-early 1990s

The transition from a full-blown authoritarian state started in the late 1980s. It can be mainly attributed to three interdependent factors: a political crisis epitomised by widespread discontent with Moi's regime, an economic crisis, and the reaction of international actors towards Moi's response to the situation.[31] The political crisis was precipitated by a fallout with friends and allies around 1983. Moi detained one of his allies, Stephen Mureithi, who had rejected his transfer and unsuccessfully approached the High Court to review the President's power to hire and transfer civil servants.[32] He also had problems with Charles Njonjo – who had favoured his succession and had been Kenya's Attorney General – and appointed a judicial commission of inquiry to investigate him.[33] By 1985, disaffection towards Moi had risen to a level that necessitated the creation of a KANU Disciplinary Committee to deal with dissent within the party.[34] This fallout from within, as well as his heavy-handed tactics, was compounded by the fact that Moi had, since 1982, embarked on a systemic ethnicisation of the state and alienation of significant ethnic fractions.[35]

Though Kenya was going through an economic crisis like other African countries in the late 1980s, a series of events between 1989 and 1991 deepened

29 David Throup and Charles Hornsby, *Multi-party Politics in Kenya: The Kenyatta & Moi States & the Triumph of system in the 1992 Election* (East African Educational Publishers, 1998, Nairobi) 31.

30 African Democracy Encyclopaedia Project, Kenya: One party election (1969-1988) <https://www.eisa.org.za/wep/kenoneparty.htm> accessed 8 November 2020.

31 On Kenya's transition see Jasper Veen, 'Kenya's Flawed Transition in 1992 (Eindwerkstuk op niveau 3, TCG, Bachelor opleiding, 2012); Daniel Branch and Nic Cheeseman., 'Democratization, Sequencing, and State Failure in Africa: Lessons from Kenya', (2008) 108 (430) Aff. Aff. 1-26.

32 See their fall out is documented in *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi* [2011] KEHC 4272 (KLR), [2011] eKLR

33 Eisha S Atieno Odhiambo, Hegemonic Enterprises & Instrumentalities of Survival: Ethnicity & Democracy in Kenya in Berman, Bruce, Eyoh, Dickson, Kymlicka (eds) *Will Ethnicity & Democracy in Africa* (2004: Athens, Ohio University Press 171.

34 *Africa Watch,* Kenya: Talking Liberties July 1991.

35 Throup and Hornsby (note 28 above) at 32.

the political situation. One of them included the death of Robert Ouko, a minister in Moi's government, a few days after his mysterious disappearance.[36] It was believed that Moi had been involved in the killing, and his implausible explanation irked even the international community.[37] Related to this political crisis was a failed attempt at tightly regulating NGOs that had become significant vehicles for donor funding. Moi's regime had prepared a law called the NGO Coordination Act to restrict NGO activities. The law's harsh provisions were successfully opposed, though this attempt also made some NGOs change focus from pure humanitarian support to agitations for a democratic society.[38] Third was the arrest and detention of opposition figures who had become recalcitrant to the Moi regime.[39] Kenneth Matiba and Jaramogi Odinga, the face of the anti-KANU crusade, had insisted on holding a public meeting to declare the formation of a new political party despite the then-existing proscription on opposition political parties. According to the Human Rights Commission, the arrest of prominent pro-democracy advocates:

> "To stem the pro-democracy tide, on July 7, thousands of Kenyans gathered at Kamukunji grounds, the site for the planned rally. The crowds shouted for the release of Matiba and Rubia and flashed out the two-finger salute. Armed police tried to disperse the crowds, and chaos erupted. For three days, there were running battles with the police who stormed the poor sections of Nairobi, beating up innocent civilians. The unrest spread across the country."[40]

All these, at times overlapping, events elicited resentment from many parts of the country. They made Moi increasingly unpopular and heightened the agitations for reform. By 1989, the list of persons dissatisfied with Moi's record had expanded beyond politicians and included NGOs, members of

36 See David William Cohen and E. S. Atieno Odhiambo, *The Risks of Knowledge: Investigations into the Death of the Hon. Minister John Robert Ouko, 1990* (Ohio: 2004, Ohio University Press) 14.

37 Mark Palmer, *Breaking the Real Axis of Evil: How to Oust the World's Last Dictators by 2025* (Rowman & Littlefield Publishing Inc., Maryland, 2005) 127.

38 Juma Anthony Okuku, 'Civil Society and the Democratisation Processes in Kenya and Uganda: A comparative Analysis of the Contribution of the Church and NGOs (2003) 30 (1) *Politikon*, (2003) 51-63, at 55.

39 Fred Oluoch, 'Agitation That Shaped Today's Politics,' 7 October 2013, *Daily Nation*, <https://mobile.nation.co.ke/lifestyle/Kenya-Multiparty-politics/1950774-2020838-format-xhtml-wbqvy9z/index.html> accessed 8 November 2020.

40 Kenya Human Rights Commission at 142.

the academy, and, most importantly, faith-based organisations.41 As shown below, all these incidents attracted the international community's attention, which heightened demands for political reform. Moi bowed to the pressure and amended the Constitution's section 2[a] for multi-party politics.[42]

The transition process at that time did not end up in a democratic *de facto* constitution.[43] In a 1992 report compiled just after the liberalisation of politics, the Human Rights Commission observed as follows:

> "A year since the elections, these hopes have been dashed … The KANU regime … has barely changed how it has always ruled the country. Despite the presence of opposition politicians in parliament, the KANU regime still makes arbitrary decisions that have monumental economic and political consequences. It still arrests, jails and harasses its critics; it still pursues its version of ethnic cleansing in parts of the Rift Valley; it still condones banditry in North Eastern Kenya; its high-ranking officials are still involved in massive corruption and pilfering of state funds without sanction (sic)."[44]

Between 1992 and 1997, Kenya's *de facto* constitution remained authoritarian. As a precursor to the 1997 elections, there was a renewed clamour for constitutional change and reform driven by domestic and international actors.[45]

41 Solomon Owuoche, 'Faith-Based Organizations-State Relation and the Democratization Process in Kenya (2015) Open Access Library Journal, <http://file.scirp.org/pdf/OALibJ_2016071116232775.pdf>; Kiraitu Murungi *The Mud in Politics* (Acacia Stantex Publishers, Nairobi, 2000*)* 76.

42 Githu Muigai, 'Kenya's Opposition and the Crisis of Governance' (1993) 21 (1/2) *Journal of Opinion* 18, 26.

43 See, Stephen Brown, 'Theorising Kenya's Protracted Transition to Democracy' (2004) *Journal of Contemporary African Studies* 325-341. Stephen N. Ndegwa, 'The Incomplete Transition: The Constitutional and Electoral Context in Kenya' (1998) 42 (2) *Africa Today* 193-211; Nasong'o, S W, Political Transition Without Transformation: The Dialectic of Liberalization Without Democratization in Kenya and Zambia (2007) 50 (1) *African Studies Review* 83- 101; Joel D. Barkan, 'Protracted Transitions Among Africa's New Democracies,' (2000) 7 Democratization 227-243; Stephen Ndegwa, '"Kenya: Third Time Lucky?" (2003) 14, 3: *Journal of Democracy*, 145–58; Holmquist, F. and Ford, M. "Kenyan Politics: Toward a Second Transition?" (1998) *Africa Today*, 45, 2:22–58; Rok Ajulu. "Kenya: One Step Forward, Three Steps Back: The Succession Dilemma", (2001) *Review of African Political Economy,* 28,88:197–212.

44 Kenya Human Rights Commission, *Independence without Freedom: The Legitimization of Repressive Laws and Practices in Kenya in Kivutha Kibwana Constitutional Law and Politics in Africa* (1997, Claripress Limited) 113.

45 Hornsby (note 28 above).

As these initiatives threatened KANU again, it resorted to pre-1992 coercive means to thwart the demands. Violence was, however, met with continued disobedience. Following the suspension of aid again around July 1997 and the threat of degeneration into a "mass civil disorder," KANU compromised its stance and initiated legislative and constitutional changes.[46] In essence, a group of opposition and KANU MPs established the Inter-Parties Parliamentary Group (IPPG) to negotiate a political settlement in the wake of heightened tensions ahead of the elections that were to follow.[47] Some of the gains of these negotiations included that other political parties could get some airtime on state television, and certain amendments were also secured to criminalise offences relating to electoral fraud.[48]

Around 1997, *de facto* constitutional change towards a more hybrid constitution commenced. According to Hornsby, the 1997 elections were the first democratic elections as they held out a prospect for the defeat of the incumbent power holders.[49] The democratic space was expanded compared to what existed around 1992, and an impetus for formal change was set in motion, which pervaded the atmosphere for the better part of 1998-2005. The expanded democratic space provided room for free and fair elections. If not for opposition disorganisation and ethnic factors, a leadership change could have occurred earlier than 2002.[50] United opposition politicians under the National Rainbow Coalition (NARC) contested against Moi's nominee, Uhuru Kenyatta when Moi "retired" from politics and won the 2002 elections.[51] Mwai Kibaki then became president.

Since 2003, Freedom House has ranked Kenya as a "partly free" country, meaning that under the conception of real constitutional change, it has been

46 Jeffrey S. Steeves, 'The Political evolution of Kenya: The 1997 Elections and Succession Politic' (1999) 37 (1) *Commonwealth & Comparative Politics* 71.

47 Hornsby (note 28 above); See also Frank Holmquist and Ayuka Oendo, 'Kenya: Democracy, Decline, and Despair,' (2001) <http://faculty.wiu.edu/JP-Stierman/History/Kenya_1.pdf> accessed 8 November 2020.

48 Hornsby (note 28 above) 529 to 604.

49 *Ibid*.

50 See, D Foeken and T Dietz, 'Of Ethnicity, Manipulation and Observation: the 1992 and 1997 Elections in Kenya,' (2001) <https://openaccess.leidenuniv.nl/handle/1887/4672 > accessed 8 November 2020.

51 Jacob Ngétich, 'How Moi Made Uhuru and the Power Intrigues that Followed,' 7 February 2020, *The Standard,* <https://www.standardmedia.co.ke/article/2001359653/how-moi-made-president-uhuru#> accessed 8 November 2020.

a "hybrid regime."[52] Information from the UK's Economic Intelligence Unit [2006-2017] also shows that Kenya has been a "hybrid regime."[53] These two characterisations tally with the Ibrahim Index of African Governance, whose assessment of Kenya's governance reveals that, though Kenya has displayed increasing improvement between 2008 and 2017, its general score has oscillated at a slightly above average scale, between 53.7 per cent in 2008 to 59.8 per cent based on four broad indicators:[54] Safety and rule of law; participation and human rights; sustainable economic opportunity and human development. Participation and human rights improved from 51.6 per cent to 55.6 per cent in the period under review (2008- 2017), while safety and rule of law oscillated from 51.8 per cent to 55.1 per cent.[55] Studies that consider regimes known as "competitive authoritarian regimes" also enlist Kenya as one of such regimes.[56] From these profiles, it seems safe to deduce that Kenya has been in some state of stagnation, especially since 2003.[57] The section that follows considers and presents probable causal explanations towards the outcome.

4.0 Probable explanations

As observed in the introduction, the state of affairs in Kenya is self-evidently the result of interaction between changing formal constitutional norms and the initiatives of various actors acting against the background of enabling or limiting structural conditions. The following section begins to add detail to this very general picture by examining the role of the first of these factors in shaping the transitional outcome.

4.01 Partial change to incumbent power actors

Unlike other African countries that transitioned, like South Africa and Benin, there was no change to the incumbent President in Kenya for ten years following the TWD. Also, though there has subsequently been some change,

52 Freedom House (note 3 above).
53 Infographics <https://infographics.economist.com/2017/DemocracyIndex/> accessed 8 November 2020.
54 See Kenya's profile at <http://iiag.online/ > accessed 8 November 2020.
55 *Ibid.*
56 Steven Levitsky and Lucan A. Way, Competitive Authoritarianism: The Origins and Dynamics of Hybrid Regimes in the Post-Cold War Era, <http://homes.ieu.edu.tr/~ibagdadi/INT435/Readings/General/Levitsky-Way-Stanford%20-%20Competitive%20Authoritarianism.pdf accessed 8 November 2020.
57 *Ibid.*

it has occurred under a framework that allows for the continued assimilation of newcomers under the existing power structure. Thus, what can be seen through a study of Kenya's political order is that the old guard does not exit the political scene entirely and continues to be a fount of informal powers. As a result, though there has been a change of incumbent presidents, despite democratic elections, Kenya has yet to experience a significant departure from the pre-1989 epoch.

Indeed, persons who have competed for or occupied the highest political offices either served or had strong connections with the pre-1989 single party. They come up with new political parties or rebrand existing ones. Kibaki, President from 2003 until 2013, had been Moi's Vice-President from 1978 to 1988, during Kenya's darkest political moments. Kenyatta, who took over from Kibaki in 2013, is the son of Jomo Kenyatta, the first President. In 2002, Moi sought to extend his rule informally, so he nominated Uhuru Kenyatta to be his successor as the KANU leader and presidential candidate.[58] Before this, Moi's party had assimilated another opposition party, the National Development Party (NDP), headed by Raila Odinga, and converted KANU into "New KANU."[59] Several individuals within the new KANU, including Odinga and George Saitoti, had hoped that they would be nominated as Moi's successor. When this did not happen, most joined a newly formed opposition alliance, the National Alliance Party of Kenya (NAK), which became a major political opposition outfit in the run-up to the 2002 general elections as part of the National Rainbow Coalition (NARC).[60] Through this alliance, they won the 2002 General Elections. Yet this political grouping was not wholly extricated from the KANU regime and had intense connections with it or at least KANU's mode of leadership. As observed, Kibaki, the NARC's candidate, had been Moi's Vice President for 10 years during KANU's most repressive years.[61] He had been a Member of Parliament under KANU since independence and a Minister several times. It was only in 1989 that he was thrown out

58 Jacob Ngétich, 'How Moi Made Uhuru and the Power Intrigues that Followed,' 7 February 2020, *The Standard*, <https://www.standardmedia.co.ke/article/2001359653/how-moi-made-president-uhuru# > accessed 8 November 2020.

59 Jeffrey Steeves 'Presidential Succession in Kenya: The transition from Moi to Kibaki', (2006) 44 (2) *Commonwealth & Comparative Politics* 211.

60 *Ibid*, 219.

61 David Aduda, 'Mwai Kibaki: One of only two Vice Presidents to Have Risen to Presidency,' 16 March 2020, *The Citizen*

as a Vice President and subsequently became an opposition figure following the liberalisation of politics.[62] Several politicians in the 2002 coalition had previously served in the Moi regime, including George Saitoti, who was Moi's Vice President for around 10 years. Though Raila Odinga had been a victim of the Moi regime's brutalities, he had already essentially joined KANU when Moi nominated Uhuru as his running mate.[63] Therefore, this team was not entirely new and had only a few different entrants. It was unsurprising that in 2007, Kibaki, who had been thought to be a reformist, engaged in one of the most brazen electoral frauds in the post-TWD period in Kenya.[64]

When Kibaki's term ended in 2013, a hotly contested election saw Uhuru Kenyatta ascend to the presidency, deputised by William Ruto. As observed, Uhuru had been Moi's nominee in the 2002 elections but had himself dissolved his party and supported Mwai Kibaki's 2007 presidential candidature.[65] Ruto, his deputy, had been part of KANU's youth league and did support Uhuru in his 2002 presidential election bid.[66] Between 2007 and 2013, he was a minister in the grand coalition of the Kibaki-Raila government, which came into effect following the post-election violence. These two sub-subsequently won the 2017 elections, though this time round, they co-opted – as mentioned – Raila Odinga, who had been their political antagonist during the 2017 elections. It is noteworthy that President Uhuru visited Moi at his home several times. KANU's Secretary General, Nick Salat, announced that KANU had joined opposition alliances in 2017. Still, this statement was quickly retracted after President Uhuru's mother, Mama Ngina Kenyatta, reportedly visited former President Moi at his Kabarak home.[67] This tale can also be made towards

62 Kamau Ngotho, 'Lessons for Ruto: Three men and how they played their cards' 2 February 2020 *Daily Nation*, <https://mobile.nation.co.ke/news/politics/History-lessons-Ruto-can-pick-to-escape-siege/3126390-5440720-format-xhtml-k5s1v6/index.html>

63 Jeffrey Steeves (note 45 above) 219.

64 On the 2007 elections see, Axel Harneit-Sievers and Ralph-Michael Peters, 'Kenya's 2007 General Election and Its Aftershocks,' *(2008) 43 (1) Africa Spectrum*, Horn of Africa 133-144; Nic Cheeseman 'The Kenyan Elections of 2007: An Introduction,' (2008) 2 (2) *Journal of Eastern African Studies* 166-184.

65 Voice of Africa, 'Kenyan Opposition Leader to Support Kibaki's Re-election,' 1 November 2009, <https://www.voanews.com/archive/kenyan-opposition-leader-support-kibakis-re-election> accessed 8 November 2020.

66 Bauttah Omanga, 'How Ruto Rose to be an Influential Personality in Kenya,' 3 December 2012, *The Standard*, <https://www.standardmedia.co.ke/article/2000071980/how-ruto-rose-to-be-influential-personality-in-kenyan-politics#> accessed 8 November 2020.

67 Richard Kamau, 'Kanu to Support Uhuru Kenyatta's Re-election in August, Says Nick Salat,' 24 February 24 February 2017 *Nairobi Wire*, <http://nairobiwire.com/2017/02/kanu-to-support-uhuru-

Willian Ruto, and he can be traced to ruling parties since the early 1990s. Thus, overall, Kenya has only experienced a partial change in incumbent power holders, which is argued to be a factor in the transition state.

4.02 Ambivalent role of international actors

International actors have been interested in Kenya's political and constitutional processes, but this section contends that they have mostly played a limited and, at times, hesitant role.[68] It is noteworthy, though, that the very process of opening up the legal and political space in Kenya resulted from the structural adjustment programs and the political conditionalities on aid imposed on Kenya, among other African countries. The partial opening up of the democratic space in Kenya is thought to have been donor-induced or facilitated.[69] According to Hornsby, "there was little evidence – apart from its dependence on foreign aid – that political change was directly a product of domestic economic crisis."[70] While donors contributed to reform, the change registered in 1992 was not so profound as to destabilise the authoritarian norms generated over the years.

It is argued that one of the reasons why the Moi regime was not particularly vulnerable to demands for democratisation was the divided support towards the Moi regime. In particular, factions existed even within a single base, while certain countries contradicted others in other instances. A case in point for the latter issue is that there were different positions within the US about support for the Moi regime. While the US Ambassador at the time, Mr. Smith Hempstone, had profiled Moi as a dictator and had taken it upon himself to censure him, the Bush administration itself supported Moi.[71] The US Congress, for its part, supported the Ambassador.[72] Congress first stopped the release of a $5 million disbursement of military assistance and additional aid

kenyattas-re-election-in-august-says-nick-salat.html> accessed 8 November 2020.

68 Stephen Brown & Rosalind Raddatz, 'Dire consequences or empty threats? Western pressure for peace, justice and democracy in Kenya' (2014) 8 (1) *Journal of Eastern African Studies* 43–62.

69 See, Philip G Roessler, "Donor Induced Democratisation and the Privatisation of State Violence in Kenya and Rwanda (2005) 37 (2) *Comparative Politics* 207.

70 Hornsby (note 28 above).

71 Kamau Ngotho, US envoys: The bulldozers and doormats *Daily Nation*, 31 March 2019.

72 Stephen Brown, 'From Demiurge to Midwife: Changing Donor Roles in Kenya's Democratisation Process' in *Kenya: The struggle for democracy* (2007): 301-29.

of $8m because of the state of political affairs, presumably at Mr. Hempstone's suggestion.[73] Later, it passed a law that imposed restrictions on President George Bush's proposed budget of USD 15,000,000.[74] The restrictions were that the Bush administration was to certify that Kenya had complied with a multitude of conditions, which included that Kenya should have:

> "… taken steps to charge and try or release all prisoners detained for political reasons; ceased any physical abuse or mistreatment of prisoners; restored the independence of the judiciary; and restored freedom of expression."[75]

The Bush Administration did not ensure that all these conditions were met. Still, some of the required reforms were affected, mainly regarding increased judicial independence and the release of political prisoners.[76] It bypassed conditions by Congress and disbursed a sum of $5m to Kenya.[77] The US had given "geo-strategic interests" priority over democracy simply because Kenya had allowed the US to use its airspace and the Port of Mombasa for the US's pursuit of Saddam Hussein.[78] Later, though, the Bush administration was embarrassed following the arrest of Gitobu Imanyara, the publisher of a local periodical, Nairobi Law Monthly. From then on, the Bush administration became more lukewarm in supporting the Moi regime.[79] It was only after this incident that there was a familiar voice from the US, and it became explicit in its condemnation of human rights abuses in Kenya.[80]

Britain also played an ambivalent role in supporting democracy in Kenya, which influenced the approach of other international actors. As early as 1982, when a failed coup was staged against the Moi regime, Margaret Thatcher commented that "Britain was watching", sending a message that its military

73 *Ibid.*
74 *Ibid.*
75 Human Rights Watch World Report 1992: Events of 1991 at https://www.hrw.org/reports/1992/WR92/AFW-03.htm accessed 20 November 2020.
76 *Ibid.*
77 *Ibid.*
78 Michael Mubea Kamau, 'Kenya and Britain Diplomatic Relations,' 1963 TO 2017, M.A Thesis, Kenyatta University, 2018 16.
79 Stephen Brown, 'From Demiurge to Midwife: Changing Donor Roles in Kenya's Democratisation Process,' in Godwin R. Murunga and Shadrack Wanjala Nasong'o, *Kenya The Struggle for Democracy* (Zed Books, 2007).
80 Jane Perlez, 'Aid for Kenya cut as Donors Cite Corruption," *The New York Times*, October 21, 1991.

stationed in Kenya was not to be ignored entirely.[81] Thus, Britain's stance on the Moi was more accommodating than other Western countries. It can be argued that it persuaded other European countries to be more cautious in their condemnation of repression and maladministration in Kenya at first. Kenya was emboldened to sever its diplomatic ties with Norway due to its position on Moi's human rights credentials.[82] The UK had been a great advocate for Kenya at the World Bank and is claimed to have supported funding proposals that were not even appropriate for Kenya.[83] Through its Foreign Secretary, Douglas Hurd, it announced that aid in Kenya would continue flowing as usual, just after Denmark announced that it would withdraw assistance to Kenya.[84] Moi was reportedly cheerful about the UK's position and thanked Margaret Thatcher for her faith in his regime.[85] It was not until Thatcher was ousted in 1990 that the UK began to comment on Moi's human rights record.[86]

When the UK's position started to change, and repression persisted, other Scandinavian countries followed suit with renewed audacity. By then, some countries, such as Denmark, had already cut aid while others were still assisting. Following the arrest of opposition leaders who had called on donors to cut aid over their meeting on 16 November 1991, the major donors registered written and oral protests, and other countries like Australia, Finland, and the US joined them.[87] Britain's Minister for Overseas Development, Lynda Chalker, warned that donors would be "tough" on Kenya during a consultative meeting in Paris in 1991.[88] At the time of the meeting, the World Bank and IMF announced that "levels of aid for Kenya depend on clear progress in implementing economic and social reform."89 Britain subsequently froze aid to $ 350 million out of

81 Michael Mubea Kamau (note 77 above) 17.

82 Neil Fleming, 'Kenya Breaks Diplomatic Relations with Norway,' 22 October 1990 UPI. <https://www.upi.com/Archives/1990/10/22/Kenya-breaks-diplomatic-relations-with Norway/7457656568000/> accessed 8 November, 2020.

83 Stephen Weber, 'European Union Conditionality, in Politics and Institutions in an Integrated Europe,' in Barry Eichengreen, Jeffry Frieden, Jürgen v. Hagen 210.

84 David Himbara "Kenya: study reveals scale of foreign aid diversion offshore" *Nairobi Law Monthly* <https://nairobilawmonthly.com/kenya-study-reveals-scale-of-foreign-aid-diversion-offshore/> assessed April 1, 2020

85 Brown, (note 78 above).

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 Human Rights Watch World Report 1992: Events of 1991 at https://www.hrw.org/reports/1992/WR92/AFW-03.htm accessed 15 June 2020.

$1 billion. It also clarified that it would not send any foreign aid to Kenya for the following six months.[90] The US also slashed its aid from a pledged $47 million to $28 million.[91] The Paris meeting took place just after the murder of Robert Ouko, the Foreign Minister, and the unconvincing explanation given by the Moi government to the donor community about the circumstances of his death.[92] Moi's government reacted to the outcome of the meeting by announcing that two of Kenya's top government officials, one of whom was Moi's close friend, Nicholas Biwott, were under questioning concerning the murder of Ouko.[93] This came too late, however, as decisions about withholding and cutting foreign aid had already been made.[94] Moi took less than two weeks to react to these developments and allowed the introduction of multi-party democracy by repealing section 2[a]. Stephen Brown recounts that:

> "On 3 December 1991, after long asserting that it would never do so, Moi announced that the government would allow opposition parties to register. Within weeks, the government repealed the constitutional article enshrining the Kenya African National Union (KANU) as the sole political party."[95]

However, the donor community was not interested in a more profound reform of the legal and political order, particularly given its earlier contradictory positions. When, for instance, security of tenure for judges was restored after it had been removed in 1988, the US was satisfied, notwithstanding that, in the intervening period, Moi had already effected the changes to the judiciary he needed.[96] For these reasons, Kibwana and Mutunga observe that "foreign interests in Kenya simply superficially wanted political competition."[97] Armed with these changes, Kenya became eligible for more donor funding, but mere formal commitment to democratic norms did not translate into deeper democracy. After the 1992 elections, following a few reforms from liberalising politics, the international community could not exert any more pressure on

90 *Ibid.*
91 Brown, note 78 above.
92 *Ibid.*
93 *Ibid.*
94 Thomas E. Hitchings, *Facts on File Yearbook* (New York: Facts on File Publication) 1991, 925.
95 Stephen Brown (note 78 above).
96 *Ibid.*
97 Willy Mutunga and Kivutha Kibwana (on file with author).

the Moi regime. The state was not vulnerable to external demands at this point because the economic situation had already taken a different turn. Though the Structural Adjustment Programs had other far-reaching negative implications, they also pushed Kenya towards self-reliance by liberalising its domestic economy.[98] This meant that the opportunity to exert deeper reforms was lost, and international society could not play as facilitative a role as it might have played at the dawn of the TWD.

In the years that followed, especially after the end of the Moi era, the international community has continued to be interested in political and constitutional developments in Kenya. Still, once again, its involvement has been perverse, considering that for virtually all the elections that have taken place, its primary interest has been political tranquillity, even if that is to be achieved through acceptance of the results of a flawed election. As Jasper Veen put the point about the 1992 elections:

> "[t]he international community frightened by the instability caused by the "ethnic clashes" preferred stability over democratic reforms and more or less resumed business as usual."[99]

The 2007 elections, for their part, which raptured the political order, are claimed to have been stolen "with US connivance".[100] Stephen Brown has explained the impact of donor behaviour on Kenya's electoral process as follows:

> "Donors demonstrated a distinct lack of vision and understanding regarding what was required for a democratic transition in Kenya. They overly emphasised elections (and election day) at the expense of campaign conditions and the other components of democracy. In both 1992 and 1997, donors strongly supported minimal reforms to the constitution before the elections, which had little effect on the

98 See Joseph K Rono, 'The impact of the Structural Adjustment Programmes on Kenyan Society' (2002) 17 (1) *Journal of Social Development in Africa* 81; Jacob Chege, Dianah Ngui, and Peter Kimuyu, (2016) 'Scoping paper on Kenyan Manufacturing 7.

99 Jasper Veen (note 30 above) at 33.

100 Ken Flottman, 'The Debacle of 2007: How Kenyan Politics Was Frozen and an Election Stolen with US Connivance' 8 June 2017, *The Elephant*, <https://www.theelephant.info/features/2017/06/08/the-debacle-of-2007-how-kenyan-politics-was-frozen-and-an-election-stolen-with-us-connivance/ > accessed 8 November 2020.

> fairness of the elections. Still, they permitted the polls to proceed despite KANU's tremendously unfair advantage."[101]

For instance, the 2017 Presidential elections that the Supreme Court annulled revealed the disingenuous concern of international actors for Kenya's electoral process. The African Union, the European Union, the Commonwealth Nations, and the US-based Carter Center participated as observers in the 2017 elections and endorsed the results.[102] The European Union sent a delegation of election observers who concluded that the 2017 Presidential election had been conducted fairly and freely.[103] In a press conference, Marietje Schaake, the head of the EU Mission, remarked that the EU had not witnessed any signs of "centralised or localised manipulation".[104] Former US Secretary of State John Kerry stated the elections were free, credibly fair, and managed well.[105] Notwithstanding their bold statements about how free the elections were, the said elections were declared null and void by the Supreme Court.[106] Therefore, one can argue that these international actors were not sincerely concerned with the quality of elections.

It is noteworthy, though, that the influence of international actors has reduced over the years because of Kenya's apparent economic affluence and its adoption of trade-driven relations.[107] While Kenya still receives other forms of social services support from Western countries, its relative economic stability, when contrasted with its neighbours, makes it less susceptible to external pressure for change in its political practices. The increased presence of China as a development "partner" to Kenya raises concerns about the prospects of the international community ever again exerting any influence over its democratisation process. In 2017, Kenya was Africa's third most indebted

101 Stephen Brown, at 738.

102 Lily Kuo, Abdi Latif Dahir, 'Foreign Election Observers Endorsed a Deeply Flawed Election in Kenya' 6 September 2017, *Quatz Africa*, <https://qz.com/africa/1068521/kenya-elections-deeply-flawed-questions-foreign-observers/ > accessed 8 November 2020.

103 *Ibid*.

104 Mercy Wairimu, 'Kenya Election was Fair, no Sign of Manipulation - EAC, EU Observers' *The Star,* 10th August 2017, <https://www.the-star.co.ke/news/2017-08-10-kenya-election-was-fair-no-sign-of-manipulation-eac-eu-observers/> accessed 8 November 2020

105 Kuo and Dahir (note 101 above).

106 See, Presidential Petition 1 of 2017, *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] KESC 42 (KLR) [2017] eKLR.

107 Michael Mubea Kamau, note 77 above, at 18.

country to China, just behind Ethiopia and Angola.[108] China's foreign policy has not favoured interference in domestic matters.

As Taylor puts it:

> "Having seen that African nations had rallied around China in its time of need, Beijing began to adopt a posture that was designed to raise its prestige amongst the Third World and, at the same time, maintain its non-interference agenda. The democratisation process that swept Africa in the 1980s allowed China to pursue just this. The assertion that Africa needed "understanding rather than interfering in their internal affairs" was fundamental to China's approach.[109]

China has not commented on Kenya's elections, though it is apparent that it will support the de facto ruling regime at any time. This has made it a more attractive "partner" than Western countries, which imposed terms and conditions on aid. The effect of this newfound relationship is that the influence of Western liberal democracies has dwindled.[110]

4.03 Limited reach of formal change and judicial review

In the early 1990s, the main formal constitutional change to Kenya's Constitution was repealing section 2 [a]. Another was the restoration of the security of judicial tenure.[111] The legal arrangements that had been in place at the inception of the TWD largely remained intact. A 1992 Essay by the Kenya Human Rights Commission noted generally as follows about the change to legal apparatus and its implication on de facto constitutional change:

> "The reason for continuing status quo is simple: when the Country reverted to a multi-party system of government in 1992, the only

108 Capital News, 'Kenya Holds Third Highest Chinese Debt,' 20 September 2018. <https://www.capitalfm.co.ke/business/2018/09/kenya-holds-third-highest-chinese-debt-in-africa/> accessed 8 November 2020.

109 Ian Taylor, 'China's foreign policy towards Africa in the I990s' (1998) 36 (3) *Journal of Modern African Studies*, 443-60.

110 See, Wachira Maina, 'How China's Grand Entry into Africa has Weakened Democracy, *Daily Nation*, <https://www.nation.co.ke/oped/opinion/China-grand-entry-Africa-democracy-weakened/440808-4329540-m308d1z/index.html > accessed 8 November 2020.

111 Mutua (note 115 above). Constitution of Kenya Amendment Act No. 1 of 1990.

> laws and structures changed to reflect the new political realities were those dealing with the electoral system – and these only to express the fact that the country now permitted multi parties. Consequently, the country still operates under the same warped legal and administrative structures created in the colonial era. These structures favour an unaccountable and powerful executive necessary to maintain one-person dictatorship (sic)."[112]

After 1992, the only other significant developments were the adoption of the so-called Inter-Parties Parliamentary Group (IPPGM) in 1997, an arrangement whose main import was that political parties would participate in the empanelment of the electoral body.[113] For about 20 years, nothing substantial changed about this arrangement despite more than one attempt at enacting a new constitution: the 1997 Constitution of Kenya Review (CKRC) process that turned into the so-called 2003 "Bomas" and the 2005 Wako Draft Processes.[114]

The claim made here is not that Kenya needed to enact a new constitution if its transition process was to be complete. Instead, the institutional arrangements in place could not act as the breeding ground for genuine democratic norms to diffuse into the constitutional order. It is no wonder that after 1992, civil society organisations and opposition parties continued to clamour for more significant reforms, which would provide a formal basis for the dispersion of power from the Presidency and at least change the patterns of power acquisition and use.[115] Authoritarian norms and practices generated and enforced over the years and which could not sit well with the arrangements in the Independence Constitution, necessitating their amendment, still found a haven in the existing institutional arrangements.

112 Kenya Human Rights Commission, above.

113 Hornsby note 188 above at 529- 604. See also Frank Holmquist And Ayuka Oendo, Kenya: Democracy, Decline, and Despair (2001) <http://faculty.wiu.edu/JP-Stierman/History/Kenya_1.pdf> accessed 9 November 2020.

114 For an analysis of the constitution making process in Kenya, see Richard Stacey, Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-Making Process (2011), Vol. 9 No. 3–4, *International Journal of Constitutional Law* 587–614

115 See, Mutunga (note 4 above).

The eventual enactment of a new, normatively attractive constitution in Kenya in 2010 did not, contrary to expectations,[116] complete the transitional process. As mentioned, three elections conducted after the new constitution's promulgation have displayed attributes of an electoral authoritarian regime and cannot be adjudged as entirely free and fair.[117] Indeed, and perhaps except for the 2022 elections, the use of violence, particularly during elections in opposition regions, continues, just like in the pre-2010 era.[118] At best, the 2010 Constitution, though having come in late and even if not optimally enforced, has so far acted as a hedge against more profound regression and has also provided a framework for gradual change of the hybrid de facto constitution in the absence of conditions that can trigger a more rapid evolution of the constitutional order. It can be claimed, consequently, that the formal constitution has assisted in consolidating the hybrid legal order by preventing a relapse into full-blown authoritarian rule.

Arguably, the country could have regressed to an authoritarian constitution if it had not been for the 2010 Constitution. The first role the institutional arrangements and norms under the 2010 Constitution have played is giving the judiciary sufficient legal security to protect democracy-supporting rights, as the following section shows.[119] The success or failure of this process of judicial empowerment is discussed in greater detail in the following section. Second, these new arrangements have provided a platform for pro-democracy groups to demand democratic rule, either through protests or the pursuit of judicial redress, as discussed below. In other words, the legal apparatus has been supportive of democracy-demanding groups. A critical design aspect is the formal rules of change, which were reworked thoroughly in the 2010 Constitution and have successfully blocked all attempts at formal constitutional change.[120]

116 See, Joel Barkan, and Makau Mutua 'Turning the Corner in Kenya: A New Constitution for Nairobi,' Foreign Affairs, August 10, 2010 ("Ratification of the new constitution also returns Kenya to the path of democratization and economic growth.")

117 Aziz Rana, 'Kenya's New Electoral Authoritarianism, Boston Review,' <http://bostonreview.net/politics/aziz-rana-kenyas-new-electoral-authoritarianism> accessed 9 November 2020.

118 See Paul Okongo, 'Elections And Violence: The Kenyan Case' 9 November 2017, The Elephant, <https://www.theelephant.info/reflections/2017/11/09/elections-and-violence-the-kenyan-case/ > accessed 9 November 2020.
See The Elephant, https://www.theelephant.info/reflections/2017/11/09/elections-and-violence-the-kenyan-case/ accessed 9 November 2020.

119 James Gathii, *The Contested Empowerment of Kenya's Judiciary, 2010–2015: A Historical Institutional Analysis* (Sharia Publishing Nairobi, 2016); Migai note 1 above, Sihanya, note 15 above.

120 Constitution of Kenya 2010, Chapter 16

While formal change may be desirable, the fact that Kenya's authoritarian constitution was consolidated through opportunistic amendments makes the 2010 Constitution not subjected to an amendment thus far a joyous spectacle. Therefore, its hybrid status, it is argued, is partly sustained by the fact that the formal constitution cannot be easily amended to destroy the institutional framework that gives democracy-protecting institutions and democracy-demanding groups the means of monitoring breaches. In conclusion, though formal constitutional norms have been changed in Kenya, they have not helped push Kenya to a democratic constitution. Still, it has provided an environment that militates against regression.

Regarding the judicial review, it is argued that it has also had a limited, though helpful, reach. Before 2010, and especially during the Moi era, the institution of judicial review was utterly ineffective.[121] The President appointed judges, and their independence was severely compromised following a constitutional amendment that temporarily removed their tenure security in 1988.[122] Kenyan courts had initially refused to enforce the Bill of Rights, citing the absence of rules of procedure![123] Whenever an election petition was lodged to challenge the presidential election, it was consequently almost always struck out on technical grounds.[124]

After the 1992 elections, Mr Matiba filed a petition to challenge Moi's victory. He gave his wife a power of attorney to sign the petition on his behalf, but the judge struck out the petition because it had not been signed by the petitioner personally.[125] It is claimed that courts' inclination to tactically rule in favour of incumbents dissuaded opposition factions in the 2007 General Elections from petitioning courts and instead called for mass protests.[126] Despite the vast grievances about the elections, the Chief Justice had already sworn in the incumbent Kibaki in an evening private ceremony.[127] A Commission

121 See Mutua et al (note 110 above).

122 *Ibid*. See also, Korwa G. Adar and Isaac M Munyae, 'Human Rights Abuse in Kenya Under Daniel Arap Moi,'1978- 2001 (2001) 5 (1) *African Quarterly Studies* 1, at 4.

123 See also, United Nations, Committee on Economic, Social and Cultural Rights, Concluding Observations on Kenya, UN Doc. E/C. 12/1993/6, 1993.

124 *Kenneth Stanley Matiba v Daniel Toroitich Arap Moi & Others* Civil Application No. 241 of 1993 [1994] eKLR

125 *Ibid.*

126 James D. Long et al, 'Choosing Peace over Democracy,' (2013)24 (3) *Journal of Democracy* 140, a150.

127 Gilbert M Khadiagala, 'Forty Days and Nights of Peacemaking in Kenya,' (2008) 7 (2) *Journal of*

of Inquiry established under the leadership of Justice Kriegler to review the 2007 elections concluded that there was an "absence of an effective dispute resolution mechanism".[128] Ultimately, the dispute over the 2007 elections was resolved through a political settlement, rather than judicial intervention, at the behest of mediation talks led by Kofi Annan following a severe disruption of the legal and political order.[129]

As hinted at, the 2010 Constitution significantly empowered courts and entrenched their independence in a bid to restore their confidence as arbiters of political contests.[130] The new provisions depart from the previous arrangements in many respects- essentially judicialises politics.[131] However, courts have not fostered a transition to a democratic constitutional practice. This paper argues that this is partly because Kenyan courts sometimes, albeit justifiably, show diffidence towards "high-stakes" politics and "controversial" matters. Justifiably, because they are young courts, they could strive for institution-building and public support by siding with dominant public opinion. The main issues in question are the death penalty, abortion and minority rights. Several cases have, for instance, been filed challenging the death penalty or some of its aspects.[132] Court of Appeal ruled that "[s]hould Kenyans decide that it is time to remove the death sentence from [their] statute books, then they shall do so through their representatives in Parliament."[133] In another death penalty case, the Supreme Court found that, while the death penalty was not unconstitutional, its imposition as a mandatory sentence for capital offences interfered with judicial discretion.[134]

In all these cases, courts appear to be sensitive to public opinion even where the constitutional text allows them to act differently. Adopting this restrained and

African Elections, at 7.

128 Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007, at 141. See the Report <https://kenyastockholm.files.wordpress.com/2008/09/the_kriegler_report.pdf > accessed 9 November 2020.

129 See, Monica K. Juma, 'African Mediation of the Kenyan Post-2007 Election Crisis,' (2009) 27 (3) *Journal of Contemporary African Studies* 407.

130 See James Gathii, 'The Contested Empowerment of Kenya's Judiciary, 2010–2015: A Historical Institutional Analysis (Sharia Publishing Nairobi, 2016).

131 *Ibid.*

132 *Godfrey Ngotho Mutiso V Republic [2010] KECA 487 (KLR)* [2010] eKLR.

133 *Joseph Njuguna Mwaura & 2 others v Republic* [2013] KECA 541 (KLR) [2013] eKLR

134 *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (SCORK)

sensitive approach, Kenyan courts have sometimes not performed well when confronted with "mega politics".[135] Nevertheless, this should not be taken to mean that judicial review is ineffective in Kenya even on matters considered to be "high-stakes politics." In 2013, the Supreme Court, confronted with a presidential petition, dismissed it, citing want of evidence, yet noting that, though some irregularities had been disclosed, an election that had been conducted "substantially" per the law could not be annulled unless the irregularities interfered with the outcome.[136] Contrary in fact to international observers' position about the elections, in 2017, a presidential election petition was filed under a virtually similar set of circumstances, and the Supreme Court annulled the election, arguing on this occasion that irregularities need not interfere with the outcome of an election for it to be declared invalid.[137] Granted the history of judges dismissing presidential elections citing technical reasons, the fact that the Supreme Court could annul a presidential is evidence of some effectiveness of judicial review even in mega politics.

5.0 Influence of structural factors

Underlying contributions by various actors to the democratisation process are structural factors, without which the various actor-based contributions would, perhaps, yield different outcomes. As Jasper Veen puts it:

> "The transition in Kenya cannot be credibly attributed solely to actors' contingent choices as structural factors also played their part. A decade of economic crisis, low levels of growth coupled with a rapidly expanding population, and difficult structural adjustment programmes weakened the ability of the Moi regime to fund his patronage networks on which its support base depended."[138]

Kenya's post-2000 relative economic affluence and the geo-political interests that other countries have in Kenya, on the one hand, and the neo-patrimonial

135 Duncan Okubasu and Josephat Kilonzo, 'Judicialisation of Mega Politics in Kenya: Contributor to Democratization or Mere recipe for Institutional Backlash?' in James Ngondi (ed) *Reflections on the 2017 Elections in Kenya* (Nairobi: ICJ, Kenya Chapter, 2018)

136 Petitions No. 3, 4 and 5 of 2013; *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others* [2013] KESC 5 (KLR) [2013] eKLR.

137 See Petition No. 1 of 2017, *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] KESC 42 (KLR) *[2017]* eKLR

138 Jasper Veen (note 30 above) at 31.

nature of politics, as well as ethnic cleavages, on the other, can be said to have shaped not only the transitional outcome but also its pace. Regarding economic factors, it is undeniable that the crisis of the late 1980s made Kenya vulnerable to international actors' call for democratisation, particularly after the departure of Margaret Thatcher as UK Prime Minister.[139] Kenya, just like Cameroon, had been profiled as the "shining star" of Africa, but its economic situation became grim in the late 1980s, too.[140] The deteriorating financial situation was linked to massive corruption, evidenced by the fact that, as mentioned, the donor community had preferred to dispense aid directly through NGOs at a certain point.[141] Indeed, some of the most disturbing stories about corruption in Kenya arose during that period. The Goldenberg Scandal, Kenya's most significant known corruption saga, was conceived and partly executed during that time.[142] There is also a report that Kenya bought jet fighters from a French firm rather than a British one for double the price that the British firm had quoted simply because the British firm had refused to give kickbacks to persons negotiating the deal.[143] Massive corruption was being reported at a time when the donor community, notably the World Bank, had conceived the problems of Africa as being connected to lousy governance and had started imposing Structural Adjustment Programs as well as political conditionalities on foreign aid.[144] The economic hardships of that time gave democracy-demanding forces the springboard to address political issues, and the crisis became the exogenous force behind the transition. This crisis exposed Kenya to the donor community's demands, facilitating the transition.

However, Kenya's economic situation has improved from a GDP of USD 8.3 billion in 1989 to USD 74.9 Billion in 2019. In consequence, Kenya's national budget does not rely as heavily on donor funding as had been the case at the dawn of the TWD.[145] This profoundly impacted the interventions

139 *Ibid,* Brown

140 Nantang Jua, 'Cameroon: Jump-starting an economic crisis' (1991) 21 (3) *Africa Insight*162 – 170.

141 Juma Anthony Okuku (note 37 above).

142 See Peter Warutere, 'The Goldenberg Conspiracy' The game of paper, gold, money and power, ISS Paper 117 September 2005.

143 Bertha Z Osei-Hwedie and Kwaku Osei-Hwedie 'The Political Economic and Cultural Bases for Corruption in Africa in Hope' in Kempe Ronald, Sr, K. Hope, B. Chikulo, (eds) *Corruption and Development in Africa: Lessons from Country Case Studies* (Macmillan Press Limited, GB, 2000) 25.

144 See Samwel Decalo, 'The Process, Prospects and Constraints of Democratization in Africa' (1992) 91 (362) *African Affairs*, 7–35.

145 See World Bank <https://data.worldbank.org/country/kenya> accessed 9 November 2020.

of international actors who were genuinely concerned about Kenya's domestic situation over the years, particularly after Moi. Kenya's reduced exposure to external pressure became manifest in 2013 when Uhuru Kenyatta and Willian Ruto, who the ICC had indicted, were cleared to run for the Presidential election.[146] Before the elections, the US government, through its Assistant Secretary of State, had warned that it would maintain essential contact and cautioned the Kenyan electorate that "choices had consequences".[147] When the two were elected, several countries expressed dissatisfaction with the state of affairs, creating an impression that they would strain relations. Botswana even issued a statement stating that Kenya's President Uhuru should not set foot in Botswana if he were not cooperating with the ICC.[148] The statement was nonetheless withdrawn, and the rhetoric propagated by even the most powerful nations, like the US, dissipated over time.[149] This is attributed partly to Kenya's relative economic affluence and a second related structural condition, its regional geopolitical influence, and the geostrategic interests that influential countries and the UN have had in Kenya.

Before being overtaken by Ethiopia, Kenya had been the main transit hub for, and the economic powerhouse of, Eastern Africa.[150] It is also the site of the United Nations' only headquarters in Africa, hosting the UNEP.[151] Its

146 Mohammed Yusuf, Kenyan Court Clears Way for Kenyatta to Run in Election, https://www.voanews.com/a/kenya-court-clears-way-for-kenyatta-to-run-election/1604345.html accessed 9 November 2020.

147 Gabe Joselow, 'US Official Says Kenya's Elections Have 'Consequences' Voice of Africa 7 February 2013,<https://www.voanews.com/africa/us-official-says-kenyas-elections-have-consequences> accessed 9 November 2020.

148 Bame Piet, 'SKELEMANI WARNS KENYATTA ON ICC,' MMENGI ONLINE, 12 MARCH 2013, AT <HTTPS://WWW.MMEGI.BW/INDEX.PHP?SID=1&AID=1734&DIR=2013/MARCH/TUESDAY12#COMMENTS> ACCESSED 9 NOVEMBER 2020.

149 BBC News, 'Botswana Apologises to Kenya over Kenyatta ICC Warning, 14 March 2013, <https://www.bbc.com/news/world-africa-21784867> accessed 9 November 2020; Stephen Brown & Rosalind Raddatz Dire Consequences or Empty Threats? Western pressure for peace, justice and democracy in Kenya, Vol. 91, No. 362 *Journal of Eastern African Studies*, 8:1, 43-62.

150 Christina Okello, 'Post-Crisis Kenya Seeks to Affirm its Status as East Africa's Powerhouse,' 14 March 2018 RFI, <http://www.rfi.fr/en/20180313-spot-afr-13-03-18-post-crisis-Kenya-seeks-affirm-status-east-africa-powerhouse> accessed 9 November 2020; Bob Koigi, Ethiopia outpaces Kenya as East Africa's economic powerhouse, 31 May 2017, Africa Data available at <https://africabusinesscommunities.com/africadata/ethiopia-outpaces-kenya-as-east-africas-economic-powerhouse/> accessed 9 November 2020; See World Bank News, Regional Centre for Aviation Excellence Is Key to Kenya's Rise as Air Transit Hub 25 November 2019 <https://www.worldbank.org/en/news/feature/2019/11/25/regional-center-for-aviation-excellence-is-key-to-kenyas-rise-as-air-transit-hub> accessed 9 November 2020.

151 See UNEP, About UN Environment Programme, <https://www.unenvironment.org/about-un-environment/why-does-un-environment-matter> accessed 9 November 2020.

Port of Mombasa is one of East and Central Africa's gateways to Asia and of great importance to landlocked countries such as Uganda, Rwanda and South Sudan.[152] It is also the second largest refugee-hosting country in Africa of people displaced from the Great Lakes Region, and especially from Somalia, following the breakdown of its legal order.[153] Both the United States and the United Kingdom have economic as well as military interests in Kenya,[154] Britain has one of its training units hosting thousands of soldiers in Kenya over the years.[155] Its importance in the region makes Kenya's political cohesion and continuity a main interest of both the African Union and the international community at large. While most African countries are plagued with civil strife and wars, Kenya received a lot of attention following the 2008 post-election violence.[156] The AU, with UN support, helped to broker a deal between the two political sides under the leadership of former UN Secretary General, Koffi Anan, which resulted in a coalition government.[157] This geopolitical influence has an impact on Kenya's democratisation process because it moderates external support for democracy. Rather than withdrawing support for ruling regimes, and conscious of the impact that such a move can have on pro-democracy groups, who may in consequence resort to violent disruptions of the political order, the western countries adopts mostly a strategy of supporting democratic institutions, like the electoral body and the courts. In short, the imposition of political conditionalities or censure is less likely because of the interests that countries like the UK and US have in Kenya.

The other structural factors that are interlinked and which have shaped the transitional outcome are ethnic cleavages as well as neopatrimonialism. These have connections with land and natural resources, and as Kagwanja puts it, "the land issue constitutes the major structural factor underlying ethnically

152 Otavio Veras, 'Mombasa and Dar es Salaam, Gateways to East Africa,' Africa Business Insight, 1 December2016, <https://www.howwemadeitinafrica.com/mombasa-dar-es-salaam-gateways-east-africa/56866/> accessed 9 November 2020.

153 UNHCR- Kenya, Refugees, https://www.unhcr.org/ke/who-we-protect/refugees-and-asylum-seekers

154 See, Michael Mubea Kamau n 207 above. See also, US Department of State, US Relations with Kenya, <https://www.state.gov/u-s-relations-with-kenya/> accessed 9 November 2020.

155 Ministry of Defence 'The British Army in Africa', <https://www.army.mod.uk/deployments/africa/> accessed 9 November 2020.

156 See also David Onyango, 'Why World's Attention is Focused on Kenya, (2008) *East African Standard*, 17 February

157 See M Juma above and Mwagiru, M. *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*. (Nairobi: Institute of Diplomacy and International Studies, 2008).

driven electoral and political violence in Kenya."[158] These two are a fount of informal powers and politics and find strong expression in formal institutions and politics.[159] Their terms are, first, that communities view closeness to power as a precondition for societal development while individuals also see the opportunity to work for the government as a platform for personal progress. Political elites, for their part, capitalise on this understanding and exploit it.[160] The influence of these structural conditions is so overwhelming that corruption is a particularly common phenomenon in Kenya. As Stephen Brown put it in an interview for this study, the terms of power acquisition in Kenya are that for one to get into political office, he or she must rely on informal networks, which include ethnic identity, with the understanding that, should you get into office, you must empower, if not protect, those who assisted you. [161]As Kubai also put it in the interviews, Kenya's "politics is based on tribal affiliations. As such politics shift depending on who is seeking what position."[162]

Ethnic mobilisation of politics has been prominent after liberalisation of politics in the early 1990s. Ethnicity had played a role in fuelling resentment towards the Moi government in the 1980s following the foiled 1982 coup, because Moi reorganised the military by having people at the top drawn from his ethnic community.[163] This led to disenchantment, especially from larger tribes, given

158 Peter Kagwanja & Roger Southall (2009) Introduction: Kenya – A Democracy in Retreat? 27 (3) *Journal of Contemporary African Studies*, 259-277; See also, Rutten, M., and S, Owuor. 2009. Weapons of mass destruction: Land ethnicity and the 2007 elections in Kenya (2009) 27 Journal of Contemporary African Studies 305 24

159 See Yash Ghai, Ethnicity and the Kenyan System of Governance, Katiba Institute (23 June 2016) <http://www.katibainstitute.org/ethnicity-and-the-kenyan-system-of-governance-yash-pal-ghai/> accessed 9 November 2020; Luke M Obala and Michael Mattingly, 'Ethnicity, Corruption and Violence in Urban Land Conflict in Kenya, (2014) 51 (13) *Urban Studies* 2735-2751; Marcel Rutten & Sam Owuor, 'Weapons of Mass Destruction: Land, Ethnicity and the 2007 elections in Kenya, (2008) 27:3 *Journal of Contemporary African Studies*, 305-324; Wamwere, K. *Towards Genocide in Kenya: The Curse of Negative Ethnicity*, (Mvule Africa, Nairobi, 2008); Mueller, S. 2008. The political economy of Kenya's crisis. Journal of Eastern African Studies 2, no. 2: 185- 210; Muigai, G. 1995. Ethnicity and the renewal of competitive politics in Kenya. In Ethnic conflict and democratization in Africa, ed. H. Glickman, 161- 96. Atlanta: African Studies Association; Oucho, J. 2002. Undercurrents of Ethnic Conflict in Kenya. Leiden: Brill; Karuti Kanyinga 'The Legacy of the White Highlands: Land Rights, Ethnicity and the Post-2007 Election Violence in Kenya, (2009) 27:3, *Journal of Contemporary African Studies*, 325-344; Gettleman, J. Disputed vote plunges Kenya into bloodshed. *New York Times*, 31 December 2007.

160 Jacqueline M Klopp, 'Ethnic Land Clashes and Winning Elections: The Case of Kenya's Electoral Despotism' (2001) 35 (3) *Canadian Journal of African Studies*, 473.

161 Interview with Stephen Brown, Amsterdam, the Netherlands 28 May 2019.

162 Interview with C Kubai, Nairobi, 8 September 2017

163 See Generally, Charles Hornsby, *Kenya: A History Since Independence* (Tauris & Co Ltd, 2012).

that his was the fourth largest. Moi's objection to multi-party politics was that it would divide the country along ethnic lines. Indeed, other than electoral fraud and disenfranchisement of communities through denial of identity cards and hence voting rights, ethnic cleavages played a significant role in the 1992 elections. Opposition parties that sprung out of the democratisation process associated with the TWD had ethnic-based support depending where their leader came from. As a result, the ruling party, KANU, did not have any seat from the Central Province, home to the Kikuyu ethnic community.[164]

This meant that unless Moi nominated people from the community to be members of parliament, none would be part of the government even though it was the largest ethnic group. Hornsby recounts that because of this, Moi's government had little plurality following the 1992 elections.[165] This pattern largely continued even after the Moi era, especially after the new Constitution.166 The contest in the 2002 elections, where ethnic politics were overshadowed, was between Kibaki and Kenyatta, both of whom are from the Kikuyu community.[167] The 2007, 2013 and 2017 elections, where persons from different ethnic communities faced off against each other, were hotly contested, with voting being essentially along ethnic lines.[168] The post-election violence experienced in 2008, in this regard, was ethnic-founded violence between groups that supported Kibaki as against those that supported Raila.[169] This trend continued in both 2013 and 2017. In both elections the winning parties, the Jubilee Alliance Party (JAP) as well as Jubilee, were largely Kikuyu-Kalenjin parties and were supported by these two large communities in the main.[170]

Exploiting client-patron networks is a factor closely related to the ethnic mobilisation of politics. Outside of politics, there are high levels of corruption

164 James D. Long and Clark C. Gibson, 'Evaluating the Roles of Ethnicity and Performance in African Elections: Evidence from an Exit Poll in Kenya,' (2015) 68 (4) *Political Research Quarterly* 830.
165 Hornsby, note 162 above.
166 National Cohesion and Integration Commission, 'Towards National Cohesion and Unity in Kenya,' *Ethnic Diversity and Audit of the Civil Service Report* 2016.
167 Nic Cheeseman, Karuti Kanyinga, and Gabrielle Lynch, 'The political economy of Kenya: Community, Clientelism, and Class,' in Nic Cheeseman, Karuti Kanyinga, and Gabrielle Lynch (eds) *The Oxford Handbook of Kenyan Politics* (OUP, 2020).
168 *Ibid.*
169 *Ibid.*
170 *Ibid.*

within government bureaucracy, even in the so-called "independent offices."[171] Despite legally protected security, institutions in both the pre-and post-TWD have proven to be easy prey for capture by power seekers. Take for instance the institution of judicial review. In 2016, the Supreme Court was shrouded in controversy. It did not even operate – not just because of judicial controversy over the retirement of judges who had attained the mandatory retirement age, but because one of the justices, Tunoi, had been implicated in allegations of bribery.[172] Reports such as the one implicating Justice Tunoi are not isolated. In 2013, the Judicial Service Commission sacked the Chief Registrar of the Judiciary, Gladys Shollei, over allegations of "incompetence, misbehaviour, [and] violation of the prescribed code of conduct for judicial officers".[173]

According to the then Chief Justice, Willy Mutunga, "Shollei had admitted to 33 allegations in which Sh1.7 billion taxpayer funds had been lost or were at risk".[174] Some of those that have come to public attention include allegations about Justice Mutava, who was found to be culpable by a tribunal formed by the President to investigate his conduct.[175] In 2017 too , a clerk and secretary of a judge at the Judicial Review Division of the High Court, Justice Aburili, was investigated for receiving a Kshs. 2 million bribe at the High Court in Nairobi.[176] Similar examples can be found in other institutions. This implies that powerful commercial and political interests have captured many independent institutions, making them ineffective.

Some of the innovations in the 2010 Constitution include introducing a Chapter addressing "Leadership and Integrity".[177] Also, there exist several

171 Generally, see Danie Branch, Nic Cheeseman, and Leigh Gardner, eds. *Our Turn to Eat: Politics in Kenya Since 1950* (Lit. Verlag, Berlin, 2011).

172 Olive Burrows, 'Judiciary on Trial: Tunoi Saga Deals Courts a Blow, 5 February 2017; Capital New; <https://www.capitalfm.co.ke/news/2016/02/judiciary-on-trial-tunoi-saga-deals-courts-a-blow/>accessed 9 November 2020.

173 See, *Gladys Boss Shollei v Judicial Service Commission & Another* [2014] KECA 334 (KLR) [2014] eKLR

174 Nation Reporter, 'JSC Sacks Chief Registrar Gladys Shollei 18 October 2013,' <http://www.nation.co.ke/news/politics/1064-2038326-woee1o/index.html> accessed 9 November 2020.

175 Ghosts of Goldenberg: Tribunal recommends sacking of judge Joseph Mutava, available at <https://www.youtube.com/watch?v=DZlMLqwo21A> accessed 9 November 2020.

176 Dominic Wabala, EACC probes Sh2 million High Court bribery bid 9 January 2017, <https://www.the-star.co.ke/news/2017/01/09/eacc-probes-sh2-million-high-court-bribery-bid_c1484041> accessed 9 November 2020.

177 Constitution of Kenya 2010, Chapter Six.

provisions dealing with ethnic diversity, such as one which demands that political parties must not be founded on an ethnic basis.[178] Political elites who exploit ethnic cleavages for political mileage strive for formal compliance by ensuring that a few individuals are listed in the party from most parts of the country. In reality though, the party remains ethnic-based.[179] As Jeffrey Steeves put it:

> We have then three pillars of Kenyan politics, political leadership based on ethnic representation and reward, an emphasis on accumulation and distribution of valued resources, and unbounded politics whereby leaders and their associates view political parties and alignments as passing instruments in the struggle for power and influence. To capture the most coveted prize – the presidency – requires crafting a coalition of ethnic leaders who use their community's support to lever positions of power and influence within the ruling group.[180]

Therefore, while one would expect societies with relatively better economic circumstances to do better than less developed ones in pursuit of democracy chronic neopatrimonialism has negated this advantage in the case of Kenya. The next segment concludes

6.0 Concluding observations

This article has examined changes to Kenya's constitutional practice, especially the democratic aspect of it both before and after democratic diffusions in the late 1980s. A case has been made that Kenya, like some other countries, embarked on a journey towards constitutional reform in a bid to entrench democratic governance upon its encounter with democracy's Third Wave. Despite opening up of the political space in the early 1990s, it was not until 2002 that its descriptive constitution transformed from an authoritarian to a hybrid one. There have been several efforts at pushing Kenya to a more democratic practice which have included constitutional substitution in 2010. However, these

178 *Ibid*, article 91 (2) (a).

179 See Cheeseman et al (note 268 above); Jill Cottrell Ghai and Yash Pal Ghai, 'Constitution has failed to produce true political parties, so will BBI,' *The Star*, 13 March 2020.

180 J Steeves 'Presidential succession in Kenya: The Transition from Moi to Kibaki' (2006) 44 (2) *Commonwealth& Comparative Politics* 211, 215-216.

endeavours have at best hedged against regression to authoritarianism, they have not succeeded in completing the transition to democracy. To date, Kenya can still be classified as embodying hybrid constitutionalism.

It has argued that there are several explanations for the partial transition to, and endurance of, Kenya's hybrid constitution. While incumbent political power holders have changed, the legal order has yet to profit from their departure because the political order has been closed to a few individuals or families that were either the beneficiaries of, or have deep connections to, Kenya's authoritarian past. This has arguably facilitated a continuum of patronage networks and informal powers. Second, international actors, played a significant role in the early 1990s in facilitating change from a one-party state, but over the years, their strategic interests in Kenya have inhibited their support for democracy-demanding groups. These interests, combined with Kenya's relative economic affluence and strategic international relations, mean that only endogenous forces can be relied upon to foster de facto constitutional change. Because of other structural conditions, however, including neopatrimonialism and ethnic cleavages, it is unlikely that Kenya will rapidly transition to liberal democracy without a serious economic or political crisis. A gradual change to the *de facto* constitution in this direction is nonetheless expected at the behest of democracy-demanding groups with the support of judicial review pursued under a normatively attractive formal constitution enacted in 2010.

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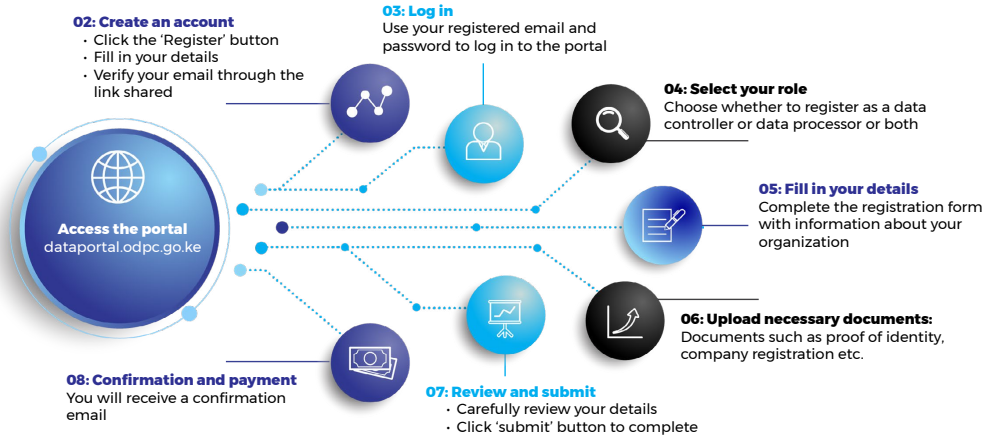

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Purposive Interpretation of The Amendment Provisions Under Kenya's 2010 Constitution

Leonard Muye Mwakuni[1*]

Abstract

The Constitution of Kenya 2010 dedicates Chapter 16 for its amendment through parliamentary and popular initiative amendments. A purposive interpretation of the amendment provisions is vital to discern their true meanings and purposes to give effect to these provisions. This approach of constitutional interpretation is rooted in the 2010 Constitution and the Supreme Court Act 2011 and incorporates both intra and extra-textual contextualisation. Intra-textual contextualisation comprises the literal meaning rule and wholesome constitutional interpretation. Extra-textual contextualisation comprises the preparatory drafting materials, general principles of international law and ratified treaties, foreign laws and judicial decisions, the political, socio-economic, and cultural contexts (with historical, contemporary and future dimensions), and scholarly works. The role of the superior courts in the constitutional interpretation of the amendment provisions must be emphasised. Superior courts have the jurisdiction to interpret the 2010 Constitution and determine the constitutionality of amendment processes and Bills. There have been several proposed constitutional amendments to the Constitution since 2013 through both parliamentary and popular initiatives that have all been unsuccessful. In certain instances, the superior courts have had the opportunity to pronounce themselves on the constitutional interpretation of the amendment provisions and determine the constitutionality of the amendment processes and Bills. What approach is adopted by the superior courts in interpreting the amendment provisions from the emerging jurisprudence? This article critically analyses the purposive approach of interpreting the constitutional amendment provisions using the emerging jurisprudence emerging from the superior courts, comparative jurisprudence and scholarly literature.

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1.0 Introduction

There is a need to breathe life into the amendment provisions as dry letters of the supreme law to give their true meanings in implementing Kenya's 2010 Constitution. The Supreme Court of Kenya (KESC) has had the opportunity to define what 'constitutional interpretation' is. In *Evans Kidero & 4 others v Ferdinand Ndungu Waititu & 4 Others*,[2] the KESC explained that 'constitutional interpretation' refers to 'revealing or clarifying the legal content or meaning of constitutional provisions, for purposes of resolving the dispute [sic]'.[3] Robbitt defines it as a study of and the process of construing the Constitution.[4] These definitions converge at the point that any principles of constitutional interpretation must provide the means of ascertaining the true meanings of the constitutional provisions and allowing the application of such provisions to the issues or circumstances in question to resolve the disputes amicably.[5]

Superior courts around the world have come up with theories of constitutional interpretation, including interpreting the Constitution as a living tree,[6] in a liberal and purposive manner,[7] or as an integral whole, with each provision sustaining and not destroying one another.[8] The Kenyan courts have been referring to these constitutional interpretation principles from foreign jurisdictions for a long time.[9] The 2010 Constitution ushered in a new constitutional dispensation and its attendant doctrines of interpretation for

2 (2014) eKLR (hereinafter 'the *Evans Kidero* case').
3 *Evans Kidero* case [142].
4 Philip Bobbitt, 'Constitutional Interpretation' in Kermit L Hall and others (eds), *The Oxford Companion to the Supreme Court of the United States* (OUP 1992) 183.
5 Miyawa Maxwel, 'The Genesis of Mainstreaming the Theory of Interpreting the Constitution of Kenya, 2010: An Analysis' (2016) 15 The Platform 36.
6 *Edwards v Attorney-General for Canada* [1930] A.C. 124 (P.C.) 136; *Ndyanabo v Attorney General* [2001] 2 E.A. 485, 493 (hereinafter 'the *Ndyanabo* case'); *Attorney General v Hislop* [2007] 1 S.C.R. 429, 2007 SCC 10 [96].
7 *Tuffuor v Attorney-General* [1980] GLR 63; *Njoroge & 6 others v AG &3 Others* 2 KLR E.P
8 *Tinyefuza v Attorney-General* Const. Pet. No. 1 of 1996 [1997] UGCC 3 (hereinafter 'the *Tinyefuza* case'). See also *Olum v The Attorney-General of Uganda* [2002] E.A. 508.
9 For example, the Kenyan Court of Appeal in C*entre for Human Rights and Awareness v John Harun Mwau & 6 Others* [2012] eKLR quoted the harmonisation principle in the *Tinyefuza* case with approval.

developing indigenous jurisprudence in Kenya.[10] The KESC has unanimously pronounced the theory or approach of interpreting the 2010 Constitution.[11] The approach calls for a contextual and holistic constitutional interpretation founded on non-legal considerations (including historical, socio-economic, political, cultural, traditional, theological, technological, and spiritual) to promote its values, purposes, and principles.

On matters of constitutional amendments, all three superior courts, the Kenyan High Court (KeHC), the Court of Appeal and the KESC,[12] have had the opportunity to revisit the theory of constitutional interpretation, this time specifically in cases involving constitutional amendments as proposed by the Building Bridges Initiative (BBI).[13] Koome CJ & P correctly asserted that courtesy of the 2010 Constitution, superior courts' judges have 'sufficient arsenals that include our own canons of interpretation which we must exhaust before borrowing from other jurisdictions [sic]'.[14] The amendment provisions are provided for under Chapter 16 (Articles 255, 256 and 257) of the 2010 Constitution.[15] This article covers the approach to interpreting constitutional

10 Kenyan Constitution, Arts. 20(3) and (4), 159(2)(e), 259(1) and (3); Supreme Court Act 2011, s 3.

11 For example, the *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* [2014] eKLR [137] (hereinafter 'the *Communications Commission of Kenya* case'); *In Re National Land Commission* [2014] eKLR.

12 *David Ndii & others v Attorney General & others* [2021] eKLR (hereinafter 'the *BBI 1* case'); *Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others* (Amicus Curiae) [2021] eKLR (hereinafter 'the *BBI 2* case'); *Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others* (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) (hereinafter 'the *BBI 3* case').

13 The BBI and the Constitution of Kenya (Amendment) Bill 2020 have a history of the 'Handshake' between Uhuru Kenyatta and Raila Odinga, who came together after the 2017 presidential rerun, which the latter boycotted. In a mockery ceremony, Odinga was sworn in as the 'People's President' by the controversial lawyer Miguna Miguna. Uhuru then formed a Taskforce to spearhead the BBI to promote national unity. The Taskforce later morphed into a Steering Committee whose functions included proposing constitutional amendments. The Committee drafted the amendment Bill which is commonly referred as the BBI Amendment Bill. The constitutionality of the Bill was challenged in all three superior courts, KeHC, Court of Appeal and KESC, in what is commonly referred to as the *BBI* cases.

14 BBI 3 case [200] (Koome CJ & P).

15 The 2010 Constitution can be amended via parliamentary and popular initiative amendments. For parliamentary initiative amendments, Art. 256 provides for the stages involved as the introduction of the amendment Bill in either House of Parliament (National Assembly and Senate), second and third readings stage, publication and public discussion stage, assent and referral stage, and the national referendum stage for matters (basic structure) listed under Art. 255(1) of the Constitution such as the popular sovereignty, constitutional supremacy, human rights, devolution, and the amendment provisions. On the other hand, popular initiative amendments under Art. 257 require the initiation stage by the promoters (one million voters' signatures and a draft amendment Bill), verification stage by the IEBC, approval by majority of County Assemblies, passage by Parliament, assent and referral

amendment provisions incorporated in a transformative constitution to give effect to such provisions. It critically analyses the interpretation approach set by the 2010 Constitution using the emerging jurisprudence from the superior courts, comparative jurisprudence, and scholarly literature. This article adopts a purposive interpretation of the constitutional amendment provisions to give effect to such provisions. It looks into the role of the superior courts, pre-2010 constitutional interpretation, the purposive interpretation under the 2010 Constitution, intra and extra-contextual interpretation of the 2010 Constitution, the pre-2010 Constitution-making history and its relevance on future (post-2010) constitutional amendments.

2.0 Role of superior courts

The superior courts in Kenya are the KESC, Court of Appeal, and KeHC (including the Environment and Land Court and the Employment and Labour Relations Court).[16] These superior courts have the judicial power of constitutional interpretation and judicial review that can be used to strike down statutes, acts, or omissions inconsistent with the 2010 Constitution. Per Article 2(4) of the Constitution, laws inconsistent with the Constitution are void. Per Article 165(3)(d)(i) of the Constitution, the KeHC has jurisdiction to interpret the Constitution and determine the consistency or otherwise of any law, acts, or omissions with the Constitution. This borrows from the US Supreme Court's finding that courts have a role to play in looking into the constitutionality of acts of Parliament and other State organs to declare them unconstitutional and invalid if inconsistency with the Constitution.[17] The KeHC has, on many occasions, acknowledged the role of superior courts under the 2010 Constitution. For instance, in *Trusted Society of Human Rights and others v Attorney-General and others*,[18] the KeHC correctly noted that the '[Superior] Courts have an interpretative role- including the last word in

by the President, and the national referendum for Art. 255(1) matters. The threshold for the national referendm is (a) at least 20% of registered voters in at least 24 Counties voting in the referendum, and (b) a simple majority of the voters supporting the amendment, per Art. 255(2).

16 Kenyan Constitution, Art. 162(1), (2) and (3). See also the Supreme Court Act 2011, Court of Appeal (Organization and Administration) Act 2015, High Court (Organization and Administration) Act 2015, Environment and Land Court Act 2011, and the Employment and Labour Relations Court Act 2011.

17 See generally *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

18 (2012) eKLR (hereinafter 'the *Trusted Society* case').

determining the constitutionality of all governmental action'.[19] The KESC has pronounced itself as the final arbiter of right or wrong when the prosecution of mandates of the different State organs raises constitutional conflicts.[20]

In constitutional amendments, superior courts can determine the constitutionality of any laws, amendment Bills and processes. Therefore, a superior court 'always reserves the constitutional obligation to intervene', especially where there are 'clear and unambiguous threats such as to the design and architecture of the Constitution'.[21] However, this jurisdiction of the superior courts must be exercised with restraint and caution. The warning of Mwilu DCJ & VP serves this right as follows:

> [J]urisdiction ought to be exercised very reservedly in the face of express provisions of the Constitution; very reservedly in the face of the constitutional exercise in sovereignty by the people; and very reservedly where the substantive import of any action is not what is in contention.[22]

The 'political questions' doctrine, which implies that superior courts must avoid legal issues that have political implications, does not apply in Kenya.[23] Superior courts in Kenya are permissive by adopting liberal interpretations of justiciability and assuming jurisdiction in matters with political and policy issues or considerations. In the *Speaker of the Senate* case, the KESC adopted the view of the South African Constitutional Court (ZACC) in the *Doctors for Life* case[24] where it was stated that courts have a 'responsibility of being the ultimate guardian of the Constitution' with a duty to 'adjudicate finally in respect of issues which would inevitably have important political consequences'.[25] It should be noted that the constitutional interpretation in

19 *Trusted Society* case [64].
20 *In the Matter of the Speaker of the Senate & another* [2013] eKLR [64] (hereinafter 'the *Speaker of the Senate* case').
21 *BBI 3* case [421] (Mwilu DCJ & VP).
22 *BBI 3* case [443] (Mwilu DCJ & VP).
23 Walter O Khobe, 'A Rebel Without a Cause? Justice Njoki Ndungu's Legacy of Dissent and the Doctrine of Separation of Powers' (2019) The Platform <www.theplatform.co.ke/rebel-without-a-cause-justicenjoki-ndungus-legacy-of-dissent-and-the-doctrine-of-separation-of-powers-2/> accessed 10 April 2024, where the author correctly argues that the 'political questions' doctrine is inapplicable in Kenya.
24 *Doctors for Life v Speaker of the National Assembly and others* 2006 (12) BCLR 1399 (CC).
25 *Speaker of the Senate* case [201] (Rawal DCJ & VP (Rtd)).

South Africa since 1994 has been accompanied by an awareness of the courts' unavoidable political involvement.[26] This was a change from the apartheid era, where judges professed abstention from policy issues and considerations to avoid the legal system and courts from becoming entangled with or 'tainted' by politics. In *Judicial Service Commission v Speaker of the National Assembly and another*,[27] the KeHC made various policy issues and recommendations regarding what should or should not be legislated. Courts under Kenya's Constitution also have a broad and special responsibility for enforcing human rights.[28] There is no doubt that judges do politics. There is a blurred line between politics and law. As a result, judges' rulings and judgments usually draw from the socio-economic and political contexts.

Judges of the superior courts have a vital role in constitutional interpretation, which entails more than the literal reading of the constitutional text. However, these judges have a fettered discretion because they are subject to the Constitution just like other State organs.[29] Even though the judges are masters of the Constitution, they are not free to choose an interpretation, thus making them bound to interpretation rules. Therefore, they can be branded as 'slaves' of the Constitution.[30] This slavery of superior courts' judges to the Constitution has the import of ensuring that they strictly follow the constitutional rules of interpretation and exercise judicial restraint where necessary. The KeHC has acknowledged that the courts' express duty to interpret the 2010 Constitution is a limited power.[31] It follows that a transformative Constitution must be interpreted differently. This does not imply the denial that the words in the 2010 Constitution have natural meanings in English or other languages, and the judges have to give effect to such meanings. Instead, it means that superior courts should look beyond the natural meaning of words to avoid absurdity and vitiating constitutional principles and values.[32] Mutunga CJ & P (Rtd)

26 Lourens du Plessis, 'Interpretation' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008) 47.
27 [2014] eKLR [268].
28 *Jasbir Singh Rai v Tarlochan Singh Rai and others* [2013] eKLR [96] (hereinafter 'the *Jasbir Rai* case').
29 John Kangu Mutakha, 'An Interpretation of the Constitutional Framework for Devolution in Kenya: A Comparative Approach' (LLD thesis, UWC 2014) 44.
30 Dominique Rousseau, 'The Constitutional Judge: Master or Slave of the Constitution' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (DUP 1994) 263.
31 *Federation of Women Lawyers (FIDA-K) and others v Attorney General and others* [2011] 2 KLR 4.
32 *Timothy Njoya and others v Attorney General and others* (2004) AHRLR 157 (KeHC 2004) [29]

correctly noted that the purposive approach should promote the aspirations and dreams of people in a manner that does not stray from the constitutional text.[33] The starting point in constitutional interpretation is looking at the text. The 2010 Constitution has incorporated the developed purposive interpretation to provide guidance and judicial restraint.

3.0 Pre-2010 constitutional interpretation

Section 3 of the previous Constitution of Kenya provided for constitutional supremacy. This means that the idea of construing a supreme Constitution differently from an ordinary statute was evident even before the promulgation of the 2010 Constitution. Despite the previous Constitution's explicit provision favouring a different interpretation approach, Kenyan courts kept intermixing both the ideas of constitutional supremacy and parliamentary sovereignty, leading to a contradiction in the suitable principles of constitutional interpretation. Thiankolu correctly observes that before the constitutional review cases and a few isolated cases, such as *Githunguri v Republic*,[34] Kenyan courts adopted an 'unprincipled, eclectic, vague, pedantic, inconsistent and conservative approach to constitutional interpretation'.[35]

The preceding interpretation was based on a colonial legacy in which the previous Constitution was enacted as a subsidiary of British legislation. Its interpretation was based on parliamentary sovereignty, in which the standard common law system had developed into a statutory interpretation based on the intention of Parliament, however absurd the results may be.[36] However, subsequent cases moderated this approach. It was only when a statutory provision was ambiguous that courts looked for other sources of law to give meaning to such statutes.[37] This approach took the literal meaning view without having regard to historical and contemporary contexts.

(Ringera J (Rtd)) (hereinafter 'the *Njoya 1* case').

33 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR [8.6] (Mutunga CJ & P (Rtd)) (hereinafter 'the *Gender Representation* case').

34 (1985) KLR 91.

35 Muthomi Thiankolu, 'Landmarks for El Mann to the Saitoti Ruling: Searching a Philosophy of Constitutional Interpretation in Kenya' (2007) 1 KLR 188, 189.

36 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 47.

37 TRS Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority' (2004) 63(3) CLJ 685, 685.

In *Crispus Karanja Njogu v Attorney General*,[38] the KeHC took a new turn and stated that a supreme Constitution must be interpreted differently from ordinary legislation. As such, where an ordinary statute is inconsistent with the Constitution, such a statute is void. A Constitution must be interpreted liberally and broadly as it embodies the people's values, principles, dreams, and aspirations.[39] The *Crispus Njogu* case inspired the reasoning in the *Njoya 1* case. Ringera J (Rtd) affirmed that a Constitution is a living instrument embodying values and principles and must be interpreted liberally, broadly, and purposely to give effect to such principles and values.[40] This clearly shows that when the 2010 Constitution was promulgated, Kenyan courts had already recognised and applied an approach to constitutional interpretation different from ordinary statutes.

4.0 Purposive interpretation under the 2010 Constitution

The 2010 Constitution has incorporated the purposive approach to constitutional interpretation. Mutunga CJ & P (Rtd) correctly noted that the KESC does not have to come up with other approaches to interpretation 'other than those that are within the Constitution itself'.[41] Article 259(1), (2) and (3) of the Constitution provide as follows:

> (1) This Constitution shall be interpreted in a manner that—
> (a) promotes its purposes, values and principles;
> (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
> (c) permits the development of the law; and
> (d) contributes to good governance.
> (2) If there is a conflict between different language versions of this Constitution, the English language version prevails.
> (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking…

38 HC Cr. Appl. No. 39 of 2000 (Unreported) (hereinafter 'the *Crispus Njogu* case').
39 See generally the *Crispus Njogu* case.
40 *Njoya 1* case [29].
41 *Gender Representation* case [8.2].

In section 259(1)(a), the term 'promotes' requires a constitutional interpretation that supports, actively encourages, or furthers its principles, values, and purposes. The term 'advances' in Article 259(1)(b) requires a constitutional interpretation that improves, develops, or progresses the rule of law, human rights, and fundamental freedoms. The term 'permits' requires a constitutional interpretation that allows or enables the development of the law. It is the role of the superior courts, through constitutional interpretation and judicial review, to develop the law. Lastly, the term 'contributes' requires a constitutional interpretation that leads to or brings about good democratic governance.

Article 159(2)(e) of the Constitution explicitly requires the courts and tribunals to exercise judicial authority purposively to promote and protect its purposes, values, and principles. The 2010 Constitution must be interpreted in a manner that defends, supports, actively encourages, and furthers its purposes, values, and principles. Article 20(4) of the Constitution provides for the application of the Bill of Rights in a purposive manner as follows:

> In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—
> (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
> (b) the spirit, purport and objects of the Bill of Rights.

Article 10(2) of the Constitution also provides for the national values and principles of good governance as follows:

> The national values and principles of governance include:-
> (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
> (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
> (c) good governance, integrity, transparency and accountability; and
> (d) sustainable development.

The national values and principles of good governance bind all State organs, public officers, and State officers and all persons who apply or interpret the

Constitution, enact, apply, or interpret any law, or make or implement public policy decisions, per Article 10(1) of the Constitution. Mutunga CJ & P (Rtd) examined the preceding provisions and correctly concluded that they set out a theory of purposive interpretation that the KESC and the other courts and tribunals must follow.[42] Mutunga CJ & P (Rtd) reiterated this theory in the *Jasbir Rai* case.[43] The question that follows is: What is this theory's meaning, clear methodology, and guiding principles? Below, justice is done to this question.

Article 259 of the 2010 Constitution develops a theory of constitutional interpretation that is purposive, principled, value-based, pro-people or people-centric, decolonised, de-imperialised, de-radicalised, de-ethnicised, gender-just, patriotic, robust (rich or generous), Indigenous, contextual, aspirational, transformative, visionary, and progressive. This theory is *Kenyanprudence*[44] and is cognisant of the people's political, socio-economic, cultural, and spiritual struggles that underpin the 2010 Constitution's text and spirit.[45] Purposive constitutional interpretation takes into account the grammatical (words and phrases), systemic (constitutional totality), teleological (purposes, goals, and aspirations of the constitutional language), and historical (the original intent of the framers and values they intended to constitutionalise) methods of analysing the constitutional text.[46] Mutunga CJ & P (Rtd) correctly noted that a purposive constitutional interpretation must seek to promote 'the dreams and aspirations of the Kenyan people'.[47] In other words, purposive interpretation entails identifying the purposes, principles, and values of the 2010 Constitution and giving effect to them.

When it comes to constitutional amendment provisions, the superior courts must identify the purposes, values, principles, and objectives of the particular provisions and give effect to such provisions. Notably, the purposes, values, goals,

42 *Gender Representation* case [8.6], [8.8].
43 *Jasbir Rai* case [89].
44 This is my neologism. The term is coined from the words 'Kenyan' and 'jurisprudence'. It is used to refer to the development of Kenyan jurisprudence (homegrown and indigenous). It takes into account the peculiar circumstances of the Kenyan society, including socio-economic, cultural, political, legal, constitutional, theological, and spiritual factors.
45 Willy Mutunga, 'Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?' (2021) 8 THR 30, 56.
46 DP Komers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) 48-49.
47 *Gender Representation* case [8.6]; *Jasbir Rai* case [89], [94].

and aspirations to be identified and effected in a purposive interpretation are sometimes clear and can contradict each other. The KESC, in the *Speaker of the Senate* case, held that the superior courts have a role in resolving 'Constitution-making contradictions; clarify draftsmanship gaps; and settle constitutional disputes' arising from compromises that often attend the Constitution-making processes.[48] The KESC stated that 'Constitution-making does not end with its promulgation; it continues with its interpretation' and the superior courts must 'illuminate legal penumbras that constitutions borne out of long drawn compromises' tend to create.[49]

The starting point in interpreting a constitutional provision is looking at the language and structure of the text. Wanjala SCJ correctly notes that there can be:

> [N]o higher or superior coordinate from which a court of law, may launch its examination of the meaning, tenor, or import of a constitutional provision, than the text. Only after it has immersed itself in the contents of a constitutional text, only after it has accorded such words their natural and ordinary meaning, can a court venture into other phenomena, should the nature of the dispute before it so warrants.[50]

However, looking at the constitutional text may not be conclusive in determining the constitutional provisions' true meanings, purposes, principles, values, and objectives. Such purposes can only be obtained from reading the provisions in their context, such as reading the provisions wholesomely (by looking at the Preamble, national values and principles of good governance, and schedules); looking at the preparatory drafting materials, general principles of international law and ratified treaties; foreign laws, jurisprudence, and scholarly literature; the historical background of the provisions; and the political, socio-economic, and cultural contexts. Context is categorized into two: intra-textual and extra-textual. Intra-textual context looks at the literal meaning of the provision in the context of other provisions (wholesome constitution interpretation). Under the intra-textual context, the literal meaning rule

48 *Speaker of the Senate* case [156].
49 *Speaker of the Senate* case [156].
50 *BBI 3* case [1014] (Wanjala SCJ).

and wholesome constitutional interpretation (Preamble and national values and principles of good governance) are discussed. On the other hand, the extra-textual context, which goes beyond the constitutional text, looks into preparatory drafting materials; general principles of international law and ratified treaties; foreign laws and decisions; non-legal sources and phenomena, that is the historical, political, socio-economic, and cultural contexts of the constitutional provisions, and scholarly works. Both intra-textual and extra-textual constitutional interpretation are discussed below.

5.0 Intra-textual contextualisation

This approach involves looking at the natural meaning of words of the provisions from the text and language together with other constitutional provisions. The approach goes beyond the relevant provisions to the other constitutional provisions but does not look beyond the Constitution. This is commonly referred to as the wholesome interpretation of the Constitution.

5.01 Literal meaning rule

This rule posits that the meaning of constitutional provisions can be found in the literal words of such provisions. This involves looking at words' clear and ordinary English meaning and the standard grammatical and natural language of the words and phrases used. However, the natural language of the constitutional provisions is only sometimes clear. This is because constitutions are written in broad language to serve the present and future unpredictable scenarios.[51] It follows that to obtain the words' literal and ordinary meaning, they must be looked at within the context of other constitutional provisions. Superior courts in Kenya and South Africa have rejected textual interpretation only when construing the Constitution. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*,[52] the KESC quoted Lord Griffiths with approval in *Pepper v Hart*,[53] who favoured the purposive approach over the literal meaning of the language. Ngcobo J in *Matatiele Municipality and others v President of the Republic of South Africa & others*[54] rejected the literal interpretation only by

51 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 55.
52 (2014) eKLR (hereinafter 'the *Peter Munya* case').
53 [1992] 3 WLR.
54 2007 (1) BCLR 47 (CC) (hereinafter 'the *Matatiele* case').

stating that the proper approach combines the textual and structural approach to provide the context in construing the constitutional provisions.[55] It is now settled that more than literal interpretation is needed to deduce the purpose of the provisions; hence, there is a need to look for purposive meaning from other constitutional provisions.

5.02 Wholesome interpretation of the Constitution

Wholesome constitutional interpretation requires the interpretation of the constitutional provisions as an integral whole, including the Preamble, national values and principles of good governance, and the Schedules. The Constitution must be interpreted holistically to reveal the purposes of the individual provisions. The KESC has explained that a holistic interpretation of the Constitution means the contextual interpretation and analysis of the provisions, that is, reading such provisions together with other provisions to maintain a 'rational explication' of the meaning of the provisions per history, disputed issues, and prevailing circumstances.[56]

In the *BBI 1* case, the KeHC emphasized that the structural holistic interpretation breathes life into the Constitution as was intended by the drafters.[57] It follows that the superior courts must adopt purposive and liberal interpretations and that the constitutional provisions must be read as an integrated whole without destroying each other.[58] The ZACC has also advocated for the holistic interpretation of the 1996 Constitution of South Africa, which avoids interpreting individual provisions in isolation from each other, which could lead to conflicts among each other.[59] In *Gopalan v State of Madras*,[60] Kania CJ (Rtd) of the Supreme Court of India also emphasised

55 *Matatiele* case [37].

56 *In the Matter of the Kenya National Commission on Human Rights* [2014] eKLR [26] (hereinafter 'the *KNCHR* case').

57 *BBI 1* case [399].

58 See generally *Council of Governors v Attorney General & another* [2017] eKLR; *KNCHR* case.

59 *Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) [37], [38]. In *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) (22 June 2017) (hereinafter 'the *United Democratic Movement* case'), the ZACC opined that the constitutional provisions are 'inseparably interconnected' hence must be purposively and consistently construed entirely.

60 (1950) SCR 88, 109. See also the *Matatiele* case [36] (Ngcobo J), where the wholesome, systematic, or contextual constitutional interpretation was emphasised in the context of the South African Constitution.

the wholesome interpretation of the Constitution, which considers all the provisions integral to ascertain the true meaning and purpose. In closer Kenya, as held in the Ugandan *Tinyefuza* case, the entire Constitution should be read as an integrated whole with the provisions not destroying but sustaining each other in harmony, completeness, exhaustiveness, and paramountcy. Conflicting constitutional provisions must be harmonised when interpreting them.[61] The KESC has already asserted that 'a Constitution does not subvert itself'.[62]

In the interpretation of the amendment provisions, the wholesome constitutional interpretation is essential because other relevant provisions to the amendment provisions can be found in other provisions of the Constitution. The constitutional amendment provisions must be interpreted together with other relevant provisions such as the provisions on the Preamble, popular sovereignty,[63] constitutional supremacy,[64] national values and principles of good governance,[65] construing the Constitution,[66] the role of Parliament (National Assembly and Senate),[67] the role of County Assemblies,[68] and the role of the Independent Electoral and Boundaries Commission (IEBC).[69] The KeHC in the *BBI 1* case stated that constitutional interpretation must be holistic, with the amendment provisions read in conjunction with other provisions.[70] In the *BBI 3* case, Koome CJ & P correctly stated that purposive and value-based interpretation:

> [B]egins from and remains rooted in the text of the Constitution whilst interpreting it holistically, giving effect to its values and

61 Two principles guide the harmonisation of conflicting constitutional provisions. (a) General provisions usually yield specific provisions in a conflict, as general provisions cannot prevail against unambiguous specific provisions. (b) Conflict can be resolved by favouring human rights, constitutional values, and purposes. See also Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 64-66.

62 *Speaker of the Senate* case [185]. See also the *BBI 3* case [416], [439] (Mwilu DCJ & VP).

63 Art. 1.

64 Art. 2.

65 Art. 10(2).

66 Art. 259.

67 Arts. 94, 95, and 96.

68 Art. 185.

69 Art. 88.

70 *BBI 1* case [496]. See also the *BBI 3* case [416] (Mwilu DCJ & VP), where it was stated that the 'Constitution has to be interpreted cumulatively and not on clause by clause basis' and that it is a 'peremptory rule of Constitutional construction that no provision of the Constitution is to be segregated from the others'.

> principles, and never losing sight of the historical context and the backdrop of the provisions being interpreted.[71]

Therefore, a purposive interpretation of the amendment provisions must be informed by a wholesome interpretation that considers other constitutional provisions relating to constitutional amendments. There must be unity when interpreting all the constitutional provisions.

5.03 Preamble

The Preamble of the 2010 Constitution is a vital source of authority, constitutional values, and principles. Notably, the Preamble is separate from the 264 Articles and six Schedules of the Constitution. However, it has a probate value in interpreting the 2010 Constitution. The Preamble can be regarded as a statement of purpose, just as with the long legislation title. The KeHC in *Rose Wangui Mambo v Limuru Country Club*72 correctly affirmed the values, purposes, and principles of the 2010 Constitution mentioned by Article 159(1)(a) that must inform interpretation and include the values recognised by the Preamble.[73]

The Preamble sets out several values of good governance relevant to constitutional amendments. First and foremost, the Preamble starts with 'We, the people of Kenya' which shows that the people are the supreme sovereign and that the Constitution is their will. The people's voice is very active in the Preamble, which reveals the Kenyans' centrality, supremacy, and sovereignty in good governance matters. Secondly, the Kenyan people honour those who 'heroically struggled to bring freedom and justice to our land',[74] which can be interpreted to mean the history of struggle from colonialism, post-colonial impunity, and the struggle to come up with the 2010 Constitution by the drafters and the people as a visionary, progressive, and transformative charter. Thirdly, the people recognise the aspirations and dreams of all Kenyans for a value-based government on freedom, human rights, democracy, the rule of

71 *BBI 3* case [188] (Koome CJ & P).
72 (2013) eKLR (hereinafter 'the *Rose Mambo* case').
73 *Rose Mambo* case [56].
74 Preamble, para 2.

law, equality, and social justice.[75] The people are making a clear statement that they recognise and respect the aspirations and dreams of all Kenyans for value-based governance and a human rights State. In the *United Democratic Movement* case, the ZACC opined that the Preamble to the South African Constitution is a concise statement that records where the people have come from, where they are going, their aspirations and dreams, and ways of realising them. Fourthly, the people exercise their sovereign right to determine the governance system and acknowledge their full participation in Constitution-making. This right relates to popular sovereignty and the affirmation that the people were actively involved in Constitution-making. This is important in constitutional amendments as public participation is crucial and mandatory, and it is a principle provided for under the Preamble. Lastly, the people confirm the adoption, enactment, and giving of the 2010 Constitution to themselves and future generations. The Constitution serves present and future generations, and constitutional amendments serve the same purposes once lawfully enacted.

The meaning of the substantive constitutional provisions must be arrived at after they have been read together with the Preamble as an integrated whole.[76] In *Olum & Another v Attorney General*,[77] the Court stated that the constitutional preambular should, where reasonably possible, be given effect without losing the words' meaning. The ZACC in *S v Mhlungu*[78] correctly explained that the Preamble's value is to help establish and indicate the basic constitutional design, architecture, and fundamental purposes.[79] In the *Jasbir Rai* case, Mutunga CJ & P (Rtd) held that the aspirations found in the Preamble are relevant in constitutional interpretation.[80] In the *BBI 2* case, Kiage JA correctly noted that the Preamble provides the 'context and setting, the background and canvas, against which an analysis or interpretation of the Constitution must be undertaken'.[81] The Preamble must, therefore, always act as a reference point when interpreting the constitutional amendment provisions.

75 Preamble, para 6.
76 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 60.
77 (2) [1995-1998] 1 EA 258.
78 1995 (7) BCLR 793 (CC) (hereinafter 'the *Mhlungu* case').
79 *Mhlungu* case [112].
80 *Jasbir Rai* case [94].
81 *BBI 2* case 35 (Kiage JA).

5.04 National values and principles of good governance

The 2010 Constitution provides for national values and principles of good governance that identify the people's aspirations.[82] Therefore, the spirit of the Constitution must permeate the processes of constitutional interpretation that enforce constitutional values.[83] Ringera J (Rtd) correctly stated that there are constitutional principles and values that courts must always fix their eyes on in constitutional interpretation.[84] As already stated, Article 10 of the 2010 Constitution provides for the national values and principles of good governance that bind all persons and government institutions. Also, as already stated, Articles 159 and 259 require constitutional interpretation to promote and protect constitutional values, purposes, and principles.[85] The 2010 Constitution is rich in values, objects, and principles, and Mutakha correctly describes it as a 'value-laden Constitution'.[86] In the *Speaker of the Senate* case, the KESC thus concluded that in constitutional interpretation, the Court must consider the purposes, values, principles, vision, and ideals enshrined in the 2010 Constitution.[87] In the same case, Mutunga CJ & P (Rtd) also concluded that the constitutional interpretation must advance, give effect to, and illuminate the Constitution's purposes, intention, and contents.[88]

In interpreting constitutional amendment provisions, the national values and principles of good governance found in the Constitution must be considered. In the *BBI 1* case, the KeHC correctly observed that the principles must be infused at every stage of the amendment process, including collecting one million signatures in popular initiative amendments.[89] For example, collecting signatures before informing the people of the proposed amendment Bill's contents is a violation of Article 10 of the 2010 Constitution, especially public

82 Art. 10(2) of the 2010 Constitution lists governance's national values and principles, including the rule of law, good governance, democracy, and public participation. The Preamble also lists several values, such as freedom, human rights, democracy, equality, rule of law, and social justice, as already stated.

83 See generally the *Interim Independent and Electoral Commission*, Constitutional Application No. 2 of 2011 (2011) eKLR [86] (hereinafter 'the *IIEC* case'). See also Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 46.

84 *Njoya 1* case 277.

85 See Part 4.0 above of this article.

86 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 61.

87 *Speaker of the Senate* case [41].

88 *Speaker of the Senate* case [156].

89 *BBI 1* case [606].

participation. The KeHC also noted that the Court promotes constitutional principles, values, and purposes in constitutional interpretation.[90] The learned judges associated themselves with the position adopted in the *United Democratic Movement* case, where the ZACC opined that the context, purposes, and values must always guide constitutional interpretation. Closer Kenya, in the *Ndyanabo* case, the Tanzania Court of Appeal held that the Constitution is a living instrument with fundamental objectives, principles, and purposes to guide constitutional interpretation as framed by the drafters.[91] The interpretation of constitutional amendment provisions must be done to promote and protect the values, objects, and principles of the 2010 Constitution. National values and principles of good governance are so important that their amendment requires holding a national referendum in terms of Article 255(1)(d) and (2) of the 2010 Constitution.

6.0 Extra-textual contextualisation

Extra-textual contextualisation involves the use of other sources in constitutional interpretation, such as preparatory drafting materials, general principles of international law and ratified treaties, foreign laws and decisions (including constitutions, legislation, and comparative jurisprudence), the historical, political, socio-economic, and cultural contexts[92] and scholarly works. Because constitutions borrow from other countries' constitutions and international law instruments, it is prudent to consider other sources when interpreting the constitutions.

6.01 Preparatory drafting materials

One of the most essential sources of extra-textual context is the historical or background drafting documents, records, and materials used to make a Constitution. These materials have value in interpretation and must be distinguished from statements made by politicians or participants during the Constitution-making processes those are of no value.[93] Kenya's Constitution-making process was fairly consultative and participatory. The process lasted over ten years, with Kenyans voting in the 2005 and 2010 national referenda.

90 *BBI 1* case [607].
91 *Ndyanabo* case 493.
92 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 66.
93 I Currie and J De Waal, *The New Constitutional and Administrative Law: Volume 1 Constitutional Law* (Juta 2001) 154.

Numerous draft constitutions, official reports, accords, and other documents formed part of the country's Constitution-making history. A study of these documents reveals the drafters' intentions and Kenyans' aspirations regarding constitutional amendments. Sihanya correctly observes that the intention of the 2010 Constitution can be obtained from reviewing the history and practice, including the preparatory materials or record of the final drafting and adoption proceedings under the guidance of the Committee of Experts (CoE) and earlier Constitution of Kenya Review Commission (CKRC) works.[94] In the *BBI* cases, the superior courts used preparatory drafting materials such as the Final Reports of the CKRC and CoE, which were recognised as essential sources in interpreting the constitutional amendment provisions.[95]

6.02 General principles of international law and ratified treaties

The 2010 Constitution recognizes 'general rules of international law' and 'Any treaty or convention ratified by Kenya' as laws in the Kenyan legal system.[96] No doubt, courts must consider the general rules of international law and ratified treaties when interpreting the Constitution and other laws. The general principles of international law and ratified treaties give rise to international law obligations which bind a country. Constitutions also borrow from international law instruments, which must be considered in constitutional interpretation. The express recognition of the general principles of international law and ratified treaties in the Constitution is arguable a monistic approach to international law where they can be applied directly by the Kenyan courts.[97] Constitutional provisions must be interpreted harmoniously with Kenya's international law obligations and principles.

94 Ben Sihanya, 'Amending the Constitution of Kenya 2010 Post 2017: Interests, Process and Outcomes' in Yash Pal Ghai, Emily Kinama and Jill Cottrell Ghai (eds), *Ten Years On***:** *Assessing the Achievements of the Constitution of Kenya 2010* (Katiba Institute 2021) 278.

95 See for example the *BBI 1* case [409], [426], [477]; *BBI 2* case [327] (Musinga P); *BBI 3* case [188], [190], [219], [237] (Koome CJ & P), [733], [758], [759], [763], [765], [773], [785] - [788] (Ibrahim SCJ), [1414] – [1417], [1448], [1530], [1531], [1699] (Lenaola SCJ), [1783], [1802], [1832], [1895], [1896] (Ouko SCJ). See also the Technical Working Committee Group 'K', *Final Report of Technical Working Committee Group 'K' on Constitutional Commissions and Amendments to the Constitution* (2005).

96 Art. 2(5) and (6).

97 Nisuke Ando, 'National Implementation and Interpretation' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 702. Ando states that the monism approach is where international law and domestic laws form part of a single universal legal system; that is, there is automatic or general acceptance (also known as the French formula) of the treaty provisions upon ratification, allowing them to be invoked directly before domestic courts. Kenya arguably follows this monism modality.

6.03 Foreign laws and judicial decisions

Foreign laws and judicial decisions are also critical extra-textual sources, as constitutions are not original per se and usually borrow heavily from the constitutions of other countries. The 2010 Constitution borrows from the experiences of different countries. The interpretation of the 2010 Constitution must benefit from comparative foreign laws and judicial decisions on similar or related matters or issues. Mutunga CJ & P (Rtd) noted that Commonwealth and international jurisprudence must play a pivotal role in developing Kenyan jurisprudence.[98]

While foreign laws and judicial decisions are important, care must be taken while using them. In *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others*,[99] the Court correctly stated that applying foreign jurisprudence in Kenya was improper without questioning. Using these comparative methods requires knowledge of the foreign laws, judicial decisions, and the respective countries' political, socio-economic, and cultural contexts.[100] Borrowing from foreign jurisprudence without consideration of its context is dangerous because different countries adopt constitutional texts that suit their unique contexts and needs. In the *Peter Munya* case, Mutunga CJ & P (Rtd) correctly stated that references to foreign jurisprudence must consider the 'peculiar Kenyan needs and context'.[101] While Kenyan jurisprudence can benefit from the strength of comparative jurisprudence, it must avoid its weaknesses to enrich the Kenyan jurisprudence.102 Interpreters of the Constitution should refrain from borrowing unthinkingly from comparative jurisprudence. They must always remember that they are interpreting the Kenyan Constitution (not the foreign one), which has set out its theory of interpretation. In *Kenya Airports Authority v Mitu-Bell Welfare Society*,[103] the Court of Appeal stated that while reliance on foreign jurisprudence is valuable, foreign aspirations, values, and experiences should rarely be invoked as progressive Kenyan needs differ from those of other jurisdictions. The KESC, in the *Mitu-Bell* case, emphasized that any foreign jurisprudence must be

98 *Jasbir Rai* case [100].
99 [2014] eKLR.
100 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 69.
101 *Peter Munya* case [232] (Mutunga CJ & P (Rtd)).
102 *Jasbir Rai* case [101].
103 [2016] eKLR [124].

construed within Article 2(5) of the 2010 Constitution and only applied as a fallback if internal recourse to the disputes is not available.[104] Moreover, for foreign principles to be accepted, they must meet the muster of Article 2(4) to the extent that they must be consistent with and not in contravention of the Constitution.

An interpretation of the constitutional amendment provisions should pay attention to comparative jurisprudence from, for example, South Africa and India. The Kenyan Constitution borrows heavily from its South African counterpart, especially on the transformative constitutionalism and the high threshold majorities in Parliament before amending specific constitutional provisions. While the Kenyan and South African contexts and texts of the constitutions may be different, some similarities can be identified. For example, South Africa had an apartheid system in which the Constitution and other laws were amended and enacted quickly to serve the apartheid masters. On the other hand, Kenya had a dictatorial or imperial presidency (with the Parliament being its appendage), which resulted in numerous constitutional amendments to serve the greedy and selfish ambitions of the political elites at the expense of ordinary Kenyans. Both countries, therefore, required a Constitution with rigid amendment procedures and the active involvement of the people before amending the constitutional provisions. Therefore, Kenyan jurisprudence can benefit from the strengths of the South African jurisprudence. Kenyan experience has also raised questions on whether the Indian basic structure 'doctrine' is applicable in Kenya.[105] Kenya can also benefit from the strengths of Indian jurisprudence regarding the basic structure 'doctrine'. There can also be 'reverse learning'[106] in which the Kenyan progressive jurisprudence on constitutional amendments can benefit South Africa and India.

6.04 Political, socio-economic, and cultural context

The extra-textual approach also examines the political, socio-economic, and cultural contexts that informed the circumstances leading to the adoption

104 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa* (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) [132].

105 The Indian basic structure 'doctrine' and its relation to constitutional amendments is beyond the scope of this article.

106 Cesar Rodriguez-Garavito, *Law and Society in Latin America: A New Map* (Routledge 2015) 8-9.

of the Constitution. The KESC has acknowledged that these contexts are significant in interpreting constitutional provisions.[107] A transformative Constitution is interpreted differently from a mere statute, does not favour formalistic or positivist approaches to its interpretation,[108] incorporates non-legal considerations and reflects the political, socio-economic, and cultural contexts relevant to developing indigenous jurisprudence in Kenya.[109] Non-legal phenomena are essential to interpreting constitutional provisions, giving them their true meaning, principles, and values. The KESC has expounded on incorporating non-legal phenomena and their significance in constitutional interpretation.[110] Mutunga CJ & P (Rtd) in the *Peter Munya* case, stated that the theory of constitutional interpretation introduces non-legal phenomena whose overall objective per the Supreme Court Act 2011 is to facilitate Kenya's political and socio-economic growth.[111] These contexts occur in three dimensions: historical, contemporary, and future.

On the historical dimension of the context, the purpose of a constitutional provision can be discerned by looking at the mischief that such provision sought to cure. Once that mischief is found, interpreting that provision must always be done, considering the suppression of the mischief and serving the intended purpose. The inclusion of the amendment provisions in the 2010 Constitution was meant to address the problem of abuse of amendment provisions and the culture of 'hyper-amendments' that bewildered the previous Constitution. The authoritarian or imperial presidency, with the Parliament as its appendage, amended the previous Constitution many times without involving the ordinary people. The 2010 Constitution has rigid constitutional amendment procedures via parliamentary and popular initiatives in which the people must be involved, as already stated. The amendment provisions were included in the 2010 Constitution to remedy the problem of abuse of the amendment provisions and culture of 'hyper-amendments', and through history, the purpose of these provisions can be discerned. The superior courts' judicial decisions must consider the history of amendments and Constitution-

107 *Communications Commission of Kenya* case [356].
108 *BBI 1* case [399].
109 *IIEC* case [86]. In the *Gender Representation* case, the KESC considered the agonised history of Kenya's constitutional reform. See also the *KNCHR* case [26].
110 *Communications Commission of Kenya* case [356].
111 *Peter Munya* case [233].

making. Such decisions must move the country to a future where constitutional amendment processes are highly participatory and people-centred. Kiage JA correctly asserted that 'Any court interpreting the Constitution must perforce be alive to the historical background if it is to do justice to the text of the Constitution'.[112]

Regarding the pre-2010 Constitution-making history, the *BBI 1* case examined and narrated the history leading to the promulgation of the 2010 Constitution.[113] However, the KeHC improperly construed the historical context in the Constitution-making and downplayed the role of political settlement and compromises made by the various players. This history illustrates why the 2010 Constitution entrenched the rigid constitutional amendment procedures that are highly participatory and people-centred. Wanjala SCJ correctly warns against under-estimating the role played by the political elites in the making of the 2010 Constitution because the democratic polity comprises a complex mix of the *Wanjiku*,[114] the political elites, and the philosophers, which are all entitled to participate in the constitutional amendment processes meaningfully.[115] As it was correctly observed by Koome CJ & P, courts must bear in mind that historical narratives are 'interpretive and normative hence often informed by value judgments', making such narratives 'subjective depending on the discretion of the interpreter'.[116] It follows that courts should strive to extract exhaustive and complete accounts of the history of the constitutional provisions being interpreted to illuminate the true meanings and purposes of such provisions.[117] Failure to do so could result in the danger of not capturing the real desires of Kenyans and losing sight of all the problems or mischiefs that the constitutional provisions sought to remedy.[118]

112 *BBI 2* case 36 (Kiage JA).

113 This history is narrated in Part 7.0 of this article below.

114 This is a common or popular name or lexicon in the Kenyan socio-economic and political lingua used as a generic reference to the ordinary Kenyan people.

115 *BBI 3* case [1043] (Wanjala SCJ).

116 *BBI 3* case [220] (Koome CJ & P). See also Renáta Uitz, *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication* (CEUP 2005) 53.

117 *BBI 3* case [221], [222] (Koome CJ & P).

118 See, for example, the *BBI 1* case and *BBI 2* case (6-1 majority decision), where the judges focused only on the Kenyans' desire to end the culture of hyper-amendments instead of also the need for a balance between rigidity and flexibility as achieved through the two 'tiered' design of the Chapter 16 on constitutional amendment provisions.

The contemporary dimension of the context looks into the current political, socio-economic, and cultural circumstances in which the 2010 Constitution operates.[119] It involves applying and interpreting the constitutional provisions to resolve societal problems. In interpreting the amendment provisions, the superior courts must draw from history to develop solutions to the current issues. The context's future dimension looks into Kenyans' aspirations and dreams. It interprets the Constitution to respond to future promises and new challenges that the drafters did not capture. The 2010 Constitution must be interpreted forward-looking based on past and current experiences. As the Constitution is interpreted to solve societal problems, past experiences must be linked with future aspirations or new ideas. The Constitution is drafted in a broad language with room for development and growth to serve present and future generations. The Preamble states that the people, as the present generation, enacted the Constitution to themselves and the future generations.[120] Therefore, the 2010 Constitution must also be interpreted as a living instrument per the 'doctrine of interpretation that the law is always speaking'.[121] This means that the context constantly changes, and the Constitution always speaks to and serves the present and future generations. Kenyan superior courts must breathe life into all constitutional provisions while consistently promoting the dreams and aspirations of the Kenyans with the Constitution. As such, superior courts are entrusted with the growth and development of the Constitution through a value-based and purposive interpretation of its provisions.[122]

6.05 Scholarly works

These works are persuasive and guide superior courts' judges in analysing issues before them and making reasonable decisions. Superior courts have admitted legal scholars and academicians as *amici curiae* (the Court limits friends of the Court and their participation), such as professors, scholars, academicians, and legal researchers who possess a wealth of knowledge to assist the Court in reaching reasonable conclusions. These scholars and academicians make submissions on the issues framed by the Court as non-partisan and neutral

119 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 75.
120 Preamble, para 8.
121 Art. 259(3).
122 *Pharmaceutical Manufacturers Association of SA and others; In re: Ex parte Application of President of the RSA and others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) [44].

actors. In the *BBI* cases, all the judges of the three superior courts referenced several scholars' works (such as books and journal articles) on constitutional law theory and practice.[123] Superior courts usually seek guidance from these works as they add value to the interpretation of constitutional provisions.[124] The Supreme Court Rules, 2020, Rule 3 allows the admission of *amici curiae* as the Court's friends. Rule 54(1) and (2) sets factors such as expertise, independence, and impartiality of the persons and public interest. According to the KESC, *amici curiae* and their briefs should be limited to legal argumentations, bound by principles of neutrality and fidelity to the law, address points of law not already addressed by the suit parties, and the Court should ensure that they remain non-partisan throughout the proceedings.[125]

For example, in the *BBI 1* case, four Law Professors: Linda Musumba, Duncan Ojwang, Jack Mwimali, and John Ambani, were admitted as *amici curiae* based on their expertise in Constitutional Law as they offered to assist in adjudicating on the issues before the Court. The KeHC agreed with their description of the previous Constitution's culture of 'hyper-amendments'.[126] The Court of Appeal agreed with the KeHC that the *amici curiae* were correctly admitted and that helpful briefs were filed in the Court.[127] In the *BBI 2* case, the Court of Appeal also admitted two more Law Professors: Migai Aketch and Charles Fombad, as *amici curiae* who filed briefs on the historical context of the 2010 Constitution and the basic structure 'doctrine', respectively.[128] In addition to the *amici curiae* admitted in the KeHC and Court of Appeal, the KESC also admitted Law Professors and Doctors: Richard Albert, Gautam Bhatia, Rosalind Dixon, Yaniv Roznai, David Landau, and Adem Abebe in

123 See, for example, the superior courts in the *BBI* cases made good use of the scholarly writings of Yaniv Roznai, Richard Albert, HWO Okoth-Ogendo, David Landau, Rosalind Dixon, Yash Pal Ghai, Jill Cottrell Ghai, John M Kangu, Charles M Fombad, and BO Nwabueze.

124 See the *BBI 3* case [1891] (Ouko SCJ), where it is appreciated that where the Constitution or legislation does not define phrases and words, the proper approach is to turn to scholarly writings such as books and book chapters and journal articles. See also *BBI 2* case 69 (Kiage JA).

125 See *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR; *Justice Philip K. Tunoi & another v Judicial Service Commission & 2 others* [2014] eKLR. See also the ZACC decisions: *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* (CCT 69/12) [2012] (as friends of the Court, *amici curiae* assist the courts to promote and protect the constitutional rights); *Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign & Others* (CCT8/02) [2002] ZACC 13 (*amici curiae* must remain impartial and owe fidelity only to the Court).

126 *BBI 1* case [406].

127 *BBI 2* case [494] (Musinga P).

128 *BBI 2* case [493] (Musinga P).

the *BBI 3* case. The superior courts admitted these *amici curiae* because their scholarly works were heavily quoted and relied on by the parties to the *BBI* cases. Mwilu DCJ & VP correctly noted that the superior court judges should greatly benefit from their exposition, right "from the horse's mouth" because the parties quoted their scholarly works.[129] It was, therefore, essential for the *amici* to directly express their views in case they were misquoted or quoted out of context.[130]

7.0 Pre-2010 Constitution-making history

As identified in Part 6.0 above, history is one of the extra-textual sources in purposively interpreting the transformative 2010 Constitution. This Part looks briefly into the Constitution-making history of the 2010 Constitution and its relevance to the post-2010 constitutional amendments. This history is believed to provide an essential historical context for interpreting constitutional amendment provisions. The making of the 2010 Constitution can be described as a 'model' of 'participatory constitution building processes'.[131] The KeHC has observed that participatory constitution-building processes involve direct and meaningful public participation in Constitution-making as opposed to the pre- to mid-20th Century when experts wrote constitutions.[132] The background of Kenya's constitutional history points to the need for public participation.[133] The twenty-six constitutional amendments to the 1963 Independence Constitution (between 1964 and 1991) and thirty-eight up to 2004[134] stripped most of its initial good democratic governance and social justice systems,[135] including separation of powers, devolution, and multiparty democracy that ensured checks and balances of excessive executive power.[136] Indeed, it is amendments that substantially defaced the previous Constitution in the process of establishing an authoritarian state in Kenya that lasted for

129 *BBI 3* case [388] (Mwilu DCJ & VP).
130 *BBI 3* case [388] (Mwilu DCJ & VP).
131 Vivien Hart, 'Constitution Making and the Right to Take Part in a Public Affair' in Laurel E Miller and Louis Aucoin (eds), *Framing The State in Times of Transition: Case Studies in Constitution Making* (USIPP 2010) 2.
132 *BBI 1* case [403].
133 See generally, Robert M Maxon, *Kenya's Independence Constitution: Constitution-Making and End of Empire* (FDUP 2011).
134 *Njoya 1* case (Ringera J (Rtd)).
135 See generally, Yash Pal Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (OUP 1970).
136 CoE, *Final Report*.

decades. The result was Kenya becoming an autocratic State characterised by detention without trial, extra-judicial executions, enforced disappearances, massive violations of human rights and fundamental freedoms, abuse of legal processes, massive corruption, police brutality, executive interference with judicial independence, and marginalisation of many communities.[137] This is what has been described as a 'culture of hyper-amendments' in which Parliament amended the previous Constitution to the extent that it could not reflect the genuine aspirations of the *Wanjiku*.[138]

Against this background, constitutional reforms began in the 1980s. These reforms led to Kenya reverting to a multiparty state in December 1991.[139] In sum, highly participatory and people-centred processes have been at the heart of constitutional reforms since the mid-1990s, pointing to people-driven, solid constitutional review processes. Indeed, the theme of Kenya's constitutional history was establishing a constitutional regime based on the ideals and values of democracy, human rights, the rule of law, social justice, equality, equity, and good governance. The three main stages of the brief history and their relevance to post-2010 constitutional amendments are discussed below.

7.01 Constitution of Kenya Review Act 1997

Notably, even before the late former dictator President Daniel Moi set up a formal constitutional review process in early 2000, there was already a civil society process in place: the People's Commission.[140] The Constitution of Kenya Review Act[141] is the starting point for formally demonstrating the participatory

137 *Council of Governors & 47 others v Attorney General & 3 others; Katiba Institute & 2 others (Amicus Curiae)* [2020] eKLR [107], [110]. See also Ghai and McAuslan, *Public Law*; Makua Mutua, *Kenya's Quest for Democracy: Taming the Leviathan* (LRP 2008); James T Gathii, 'Kenya's Legislative Culture and the Evolution of the Kenya Constitution' in Yashwant Rai Vyas and others (eds), *Law and Development in The Third World* (UoN 1994).

138 *BBI 1* case [406], [407].

139 James T Gathii, 'Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya' (2008) WMLR 1116; Willy Mutunga, *Constitution-making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Mwengo 1999).

140 The Ufungamano Initiative's Peoples Constitution Review Commission (PCRC), led by the late Oki Ooko-Ombaka, advocated for more grassroots public participation in Constitution-making. When the PCRC started collecting views in then Kenya's eight provinces, the late former dictator President Moi kick-started the official constitutional review process and appointed Yash Pal Ghai as the CKRC Chair. Ghai insisted that these two bodies, PCRC and CKRC, must be merged before serious official work on a new Constitution could begin.

141 1997 (Cap 3A) Laws of Kenya (hereinafter 'the CKR Act').

nature of the 2010 Constitution-making. This Act was enacted to 'facilitate the comprehensive review of the Constitution by the people of Kenya' and establish the Constitution of Kenya Review Commission (CKRC), the District Constitutional Forums, and the National Consultative Forum.[142] The CKRC derived its membership from those nominated by political parties, religious and women's political organisations, civil society, persons with disabilities (PWDs), the youth, women, professional associations, and regional representatives.[143] The CKRC functions included civic education to trigger public discussions and awareness, collecting the peoples' views on the desirable constitutional changes, including the form and organs of government, and research and evaluations on the Constitution.[144] The District Forums comprised elected and religious representatives, PWDs, and members of Parliament and every local authority. On the other hand, the National Constitutional Consultative Forum comprised the civil society, all members of Parliament, and the CKRC as *ex-officio*, representatives from each district and political parties, religious and women's organisations, civil society, and other members representing special interests.[145] Doubtless, the design and architecture of the Constitution-making process under the CKR Act was a 'home-grown' process that laid a framework for consultation with *Wanjiku*, extensive deliberation amongst the drafters, and emphasised broad public participation at all stages.[146] The CKR Act also required the CKRC to ensure the people gave consideration and made recommendations on various issues, such as the form and organs of the State, human rights, public finance, and citizenship.[147] The CKRC prepared civic education materials in both English and Kiswahili and widely distributed them among the Kenyans for an active, free, and meaningful civic education. While the CKRC commissioners travelled all over Kenya to collect and document views of Kenyans, its report and subsequent CKRC Draft Constitution did not see the light of the day as then President Moi dissolved Parliament just before the 2002 general elections, thus scuttling the constitutional review process.[148]

142 Preamble of the CKR Act. Emphasis added.
143 CKR Act, s 3(2) and (3).
144 CKR Act, s 16.
145 CKR Act, s 12A.
146 *BBI 1* case [420]. See also Alicia L Banon, 'Designing a Constitution-Building Process: Lessons from Kenya' (2007) 116 The YLJ 1824, 1832-1833.
147 CKR Act, s 17(d).
148 Banon, 'Designing a Constitution-Building Process' 1833-1834.

7.02 Bomas Draft 2004 and the failed Wako Draft 2005

After the 2002 general elections, the newly elected government under the leadership of President Mwai Kibaki continued with the constitutional review process. Beginning in April 2003, the Bomas Conference[149] started debating the draft CKRC Constitution, reported on it, and delivered the Constitution Draft in 2004 (Bomas Draft). This Conference considered the public participation of women and marginalised groups, including ethnic minorities such as the Goans, Ogieks, Nubians, and Somalis, who gave their views as the CKRC provided sign language interpretation to accommodate the needs of PWDs.[150] The Bomas Draft was neither approved by Parliament nor presented to the people in a national referendum.

The then President Mwai Kibaki effected a revision of the Bomas Draft by the political elites, resulting in amendments enacted via a parliamentary initiative: the Wako Draft.[151] This Draft was named after the former Attorney-General, Amos Wako. The Bomas Draft was challenged, and the KeHC in the *Njoya 1* case held that any new Constitution must be ratified via a national referendum. This is a fundamental right to exercise their constituent power and derives from popular sovereignty as the basis for the Constitution's creation.[152] Consequently, Parliament amended the CKR Act to provide for a national referendum and parliamentary approval of the Draft. In 2005, the Wako Draft was submitted to a national referendum. The Draft was rejected by the people in a national referendum with a 58 per cent vote against 42 per cent.[153]

149 The National Constitutional (Bomas) Conference was an assembly composed of over 600 members, including all 223 members of Parliament; 210 district representatives; 29 CKRC members; political parties, religious, professional, youth, PWDs, and women's groups' representatives; trade unions; and non-governmental organisations.

150 See generally Jill Cottrell Ghai and Yash Pal Ghai, 'The Role of Constitution-Building Processes in Democratization' (*International IDEA*, 2006) <https://tinyurl.com/GhaiRoleCAs> accessed 10 April 2024.

151 Eric Kramon and Daniel Posner, 'Kenya's New Constitution' (2011) 22(2) JD 89, 92. The Wako Draft resulted from tinkering with the Bomas Draft by the Kibaki administration, especially on executive power, via a series of Kilifi and Naivasha retreats the opposition led by Raila Odinga boycotted.

152 See *Njoya 1* case (Ringera J (Rtd)).

153 Kramon and Posner, 'Kenya's New Constitution' 92; Banon, 'Designing a Constitution-Building Process' 1830; Gathii, 'Popular Authorship and Constitution Making' 1119-1120. The Wako Draft changed the executive structure found in the Bomas Draft by weakening the powers and functions of the Prime Minister against the President, providing for limited devolution and an unspecified number of party-list seats.

7.03 Constitution of Kenya Review Act 2008

Enacting the CKR Act 2008, which facilitated the completion of the review of Kenya's Constitution, catalysed another constitutional reform.[154] The CKR Act 2008 has a history in the 2007 presidential elections that led to post-election violence in the country. The former UN Secretary-General, Kofi Annan, resolved this crisis via a peace agreement between the Orange Democratic Movement (ODM) and the Party of National Unity (PNU) under the mediation of the Kenya National Dialogue and Reconciliation (KNDR).[155] Through the KNDR, ODM and PNU formed a coalition government and undertook far-reaching legal reforms to achieve stability, peace, and social justice via respect for human rights and the rule of law.[156] Later, the parties formed two commissions: the Independent Review Committee on the General Elections (IREC), or the Kriegler Commission, and the Commission of Inquiry on Post-Election Violence (CIPEV), or the Waki Commission, to investigate and report on the problematic issues in the 2007-2008 post-election crisis. The KNDR Team identified the lack of constitutional reforms as among the long-term problems that caused conflict in the country. Kibaki and Odinga agreed to institute legal and political reforms to address the issues effectively. Generally, both IREC and CIPEV also recommended constitutional reforms as a solution to the issues. These commissions specifically recommended constitutional, legal, and institutional reforms; land reforms; combating inequality, poverty, regional development disparities, youth unemployment, and impunity; and addressing national unity, transparency, and accountability in governance.[157]

The preceding recommendations led to enacting the CKR Act 2008, which provided for a constitutional review process to promote public participation, good governance, democratic, free and fair elections, devolution, and the peaceful resolution of disputes.[158] The Act set up the CoE as one of the organs

154 See the long title of the CKR Act (Cap 3A) 2008.

155 See generally Jeremy Horowitz, *Power-sharing in Kenya: Power-sharing Agreements, Negotiations and Peace Processes* (Centre for the Study of Civil War 2008). In the 2007 presidential elections, ODM claimed that the then-President Kibaki-led PNU had rigged the election. The KNDR brought together representatives from the ODM and PNU to mediate the conflict. The National Accord and Reconciliation Act 2008 embedded the KNDR agreement.

156 See generally Kenya National Dialogue and Reconciliation, *Monitoring Project Draft Review Report* (2011).

157 *BBI 1* case [440].

158 CKR Act 2008, s 4.

for the constitutional review to study the existing Draft constitutions, reports, and accords and prepare a report to identify contentious and non-contentious issues.[159] The CoE worked by building the work of the CKRC and considered the following documents: the CKRC Draft Constitution, the Bomas Draft, the Wako Draft, the Kilifi Report of June 2005, the Naivasha Accord of November 2004, the Kiplagat Report,[160] the Referendum Debates; the Kriegler Report;[161] and the Waki Report.[162] The CoE boasts of collating 26,451 memoranda and presentations from the public, including organised groups (women's groups and civil society organisations), political parties, the private sector, religious organisations, and statutory bodies.[163] The CoE conducted and attended regional hearings with more than 1,917 presentations and various stakeholders' consultations.[164]

Despite the above highly participatory and people-centred processes, the Kenya Human Rights Commission (KHRC) concluded that the CoE failed to conduct effective civic education because time, bureaucracy, and financial constraints limited it.[165] As a result, the CoE was unable to produce enough copies of the proposed Constitution in Kiswahili, and civic education was unsustainable because, in areas like Samburu, Turkana, Kuria, and Marakwet, no meaningful engagement was done due to low Kiswahili and English literacy levels.[166] Doubtless, this criticism shows that Kenyans seriously took the highly participatory and people-centred nature of the Constitution-making processes.[167]

Towards the promulgation of the 2010 Constitution, the CoE completed the constitution-review process as required under the 2008 Act, which included

159 CKR Act 2008, s 30.
160 Committee of Eminent Persons, *Report of the Committee of Eminent Persons on the Constitution Review Process* (2006). This Committee was chaired by Amb. Bethuel A Kiplagat presented to Mwai Kibaki in 2006.
161 Independent Review Commission, *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (17 September 2008).
162 Commission of Inquiry on Post-Election Violence, *Final Report* (16 October 2008).
163 Committee of Experts on Constitutional Review, *Final Report of the Committee of Experts on Constitutional Review* (October 2010).
164 CoE, *Final Report*.
165 Kenya Human Rights Commission (KHRC), *Wanjiku's Journey: Tracing Kenya's Quest for New Constitution and Reporting on the 2010 National Referendum* (November 2010).
166 KHRC, *Wanjiku's Journey*.
167 *BBI 1* case [447].

giving the public thirty days within which to give their views on the Draft Constitution and preliminary report,[168] incorporation of the public views,[169] the publication of the question for determination by a national referendum and the conduction of civic education by the CoE for thirty days.[170] This constitution review process culminated with the national referendum, where 68.55 per cent of Kenyans voted for the Draft officially promulgated as Kenya's Constitution on 27 August 2010.

7.04 Relevance of the history to future constitutional amendments

The above brief history points to highly participatory and people-driven constitutional review processes. Ghai and Ghai correctly point out that the emphasis on the history of Kenya's Constitution by the judgment in the *BBI 1* case must not be overlooked, as the processes leading to the promulgation of the 2010 Constitution were 'extremely participatory'.[171] Looking at the Constitution-making history, the people must play a pivotal role in post-2010 constitutional amendments, thus showing the relevance of the history to future constitutional amendments. The history of amendments to the previous Constitution between 1963 and 2010, and the history of attempted unsuccessful at least twenty-two amendments to the 2010 Constitution since its promulgation (2013-2023) prove that the people must actively be involved in all post-2010 amendments processes. Mwilu DCJ & VP correctly stresses that the Constitution-making processes indicate that *Wanjiku* took centre stage in debating and designing the 2010 Constitution.[172] Therefore, public participation is necessary to protect the values, objectives, and principles of the 2010 Constitution and enact constitutional amendments.

168 CKR Act 2008, s 32(a).
169 CKR Act 2008, s 32(c).
170 CKR Act 2008, s 35 and 37(1).
171 Jill Cottrell Ghai and Yash Pal Ghai, 'BBI Court's Emphasis on History of Kenya's Constitution Must Not be Overlooked' *The Star* (Nairobi, 21 May 2021) <www.the-star.co.ke/siasa/2021-05-21-bbi-courts-emphasis-on-history-of-kenyas-constitution-must-not-be-overlooked/> accessed 10 April 2024.
172 *BBI 3* case [470] (Mwilu DCJ & VP).

8.0 Conclusion

The amendment provisions in Kenya's 2010 Constitution represent a deliberate effort to balance adaptability with preserving constitutional integrity. These provisions were crafted to safeguard the Constitution's transformative ethos while allowing necessary modifications to address emerging societal needs. A purposive interpretation of these provisions is essential for maintaining this delicate balance, ensuring that the amendment process reflects the Constitution's democratic and progressive aspirations. The people-empowering constitutional amendment provisions must be interpreted generously, broadly, and liberally in favour of the people to give effect to their popular sovereignty in constitutional amendments. The 2010 Constitution is rooted in constitutional principles, such as popular sovereignty, public participation, constitutional supremacy, the separation of powers, and the promotion of social justice. A purposive approach to interpreting amendment provisions demands that these principles remain at the heart of any proposed constitutional changes. Courts, lawmakers, and stakeholders must go beyond the literal wording of amendment clauses to consider the overarching goals and values enshrined in the Constitution. This approach ensures that amendments serve the collective good rather than transient political agendas or narrow interests.

In practical terms, any amendments, particularly those affecting core constitutional tenets, should be scrutinised to prevent undermining the basic structure of the Constitution. Applying a purposive interpretation is especially significant when amendments may alter the balance of power, erode rights, or weaken institutional independence. Such scrutiny is critical to safeguarding the transformative intent of the Constitution and ensuring its enduring relevance. Ultimately, the purposive interpretation of amendment provisions protects the Constitution from regressing into an instrument of political expediency. It ensures that constitutional changes remain faithful to the spirit of the 2010 Constitution: fostering democracy, good governace, human rights, inclusivity, equity, equality, freedom, and the rule of law. By embracing this interpretative approach, Kenya can continue to uphold its constitutional vision and consolidate its democratic gains while adapting to new realities in a principled and measured manner.

A REFLECTION OF DEVOLUTION 12 YEARS LATER: Assessing the Legal Obstacles to the Realisation of Devolution in Kenya

Nelson Ndalila[1*]

Abstract

Over a decade ago, Kenya embarked on devolution by promulgating the Constitution of Kenya in 2010. This shift to a devolved system of governance has transformed the local governance and service delivery landscape in most parts of the country throughout the forty-seven county governments. However, this journey has not been smooth since several legal and institutional challenges have characterised this transition period. For instance, the 2023 Annual Devolution Conference highlighted several legal obstacles that devolution still faces 14 years after the promulgation of the Constitution. This article critically analyses some prevalent legal challenges bedevilling counties, such as the lack of proper entrenchment of the two-third gender rule within County frameworks and the lack of adequate public participation within devolved units. Further, there is a lack of legally sound public procurement regulatory systems within counties and complexities in transferring functions from national to county governments. The article further examines the progress of implementing certain aspects in counties, such as the status of the two-third gender rule, public participation, public procurement and transfer of functions to county governments. This is done to expose possible loopholes and areas of improvement in these frameworks. Finally, the article offers several recommendations towards addressing the legal challenges identified in the counties.

Keywords: *Public participation, public procurement, county, two-third gender principle and devolution*

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1.0 Introduction

The Constitution of Kenya, 2010 (COK) created a decentralised system of government with 47 counties where the primary objective of decentralisation was to devolve power, resources and representation to the local level.[2] The objects of devolution include giving powers of self-governance to the people and enhancing their participation in the exercise of power in making decisions affecting them.[3] Before the introduction of devolution, the central government faced several obstacles, such as marginalisation, vast inequalities, mismanagement of resources, and the exclusion of many communities from the decision-making process.[4] Therefore, devolution addressed some of the above challenges by restoring power to local communities to manage their affairs, particularly in local development matters.[5]

This research focuses on the themes of 2/3 gender rule, public participation and transfer of functions within county governments. This work reimagines how to amplify the quest for equal gender representation in governance by addressing prioritization of women's participation in governance at county level. Further, this work focuses on transfer of functions and public participation in counties which are crucial in fostering transparency, accountability, and effective service delivery by allowing sound decision-making in counties.

This article is presented in six main parts. The first part introduces the idea of devolution in Kenya and gives an overview of this article. The second part critically analyses the lack of proper entrenchment of the two-third gender rule within county frameworks. This is done by discussing the status of the two-third gender rule realisation in countries and analysing its legal framework and its implications to countries. This part examines the lack of adequate public participation within devolved units. It interrogates explicitly the status of public participation in county governments and further discusses the legal framework of public participation and its implications for counties. The fourth part of the work delves into the lack of legally sound public procurement regulatory

2 Samuel Ngigi, 'Devolution in Kenya: The Good, the Bad and the Ugly' (2019) PPAR 9.
3 Constitution of Kenya, 2010, art 174.
4 Masaba J.K. et al, 'Devolution of healthcare system in Kenya: progress and challenges' (2020) 189 PH 135-140.
5 Githinji, 'The Principles and Objectives of Devolution in Kenya' (2021) < https://afrocave.com/objectives-of-devolution-in-kenya/> accessed 3 May 2024.

systems within counties. This is realised by an in-depth discussion of the status of public procurement in county governments within the county and a critical view of the legal framework of public procurement and its implication to devolved units. The fifth part of the paper discusses the complexities of transferring functions from national to county governments. It specifically examines the status of the transfer of functions to county governments. It analyses the legal framework for transferring functions to county governments and its implication on devolution. The article further examines the progress in implementing the status of the two-third gender rule, public participation, public procurement, and the transfer of functions to county governments. This is done to expose possible loopholes and areas for improvement in these frameworks. Finally, the paper offers recommendations for addressing the legal challenges identified in the counties.

2.0 The Lack of Proper Entrenchment of the Two-Third Gender Rule within County Frameworks

The journey towards realising the two-third gender rule within the counties appears to be significantly frustrated by the lack of willingness of key players, shattering all possibilities for discovering this constitutional promise.[6] To demonstrate this unwillingness, Parliament has yet to enact legislation to operationalise the two-gender rule, which points to the lack of political goodwill.[7] However, there have been several efforts by several non-government actors to address this challenge. For instance, the Law Society of Kenya tried to compel former President Uhuru Kenyatta to dissolve the 12th Parliament for failure to give life to the two-thirds gender rule.8 Further, the former Chief Justice, David Maraga, advised former President Uhuru to dissolve the Parliament according to Article 261(7) of the Constitution of Kenya for failure to realise the envisioned proportional representation in Parliament.[9] The above

6 Mzalendo, 'The Implementation of the Two-Thirds Gender Rule: A Seesaw Progress' (2020) < https://mzalendo.com/posts/implementation-two-thirds-gender-rule-seesaw-progr/> accessed 23 April 2024.

7 Ibid.

8 Brian Wasuna, 'LSK wants Parliament dissolved for failing to implement gender rule' *The Nation* (Nairobi ,19 July 2020) < https://nation.africa/kenya/news/lsk-wants-parliament-dissolved-for-failing-to-implement-gender-rule-1901540> accessed 23 April 2024.

9 Kevin Cheruyoit, 'CJ Maraga advises Uhuru to dissolve Parliament for failing to enact gender rule' *The Star*, (Nairobi 21 September, 2020) < https://www.the-star.co.ke/news/2020-09-21-cj-maraga-advises-uhuru-to-dissolve-parliament-for-failing-to-enact-gender-rule/> accessed 23 April 2024.

instances reveal the prevalent lack of political will at both the national and county levels of government to fully implement the Constitution's provisions on the two-third gender rule.[10]

This section looks at the status of implementing the principle of the two-third gender rule by discussing reports on the current extent of participation of women in county matters. Further, it looks at the existing legal framework on the two-third gender rule and possible loopholes that frustrate the implementation of this principle in the counties. Finally, it examines the decisions of courts on the application and implementation of this principle and the effect of such judicial positions in the realisation of the two-third gender rule in counties.

2.1 The Status of the Two-Third Constitutional Gender Rule in County Governments

Article 27(8) of the Constitution of Kenya obliges the state to ensure that not more than two-thirds of members of all elective and appointive positions are of the same gender.[11] Fourteen years after the promulgation of the Constitution of Kenya in 2010, specific legislation is yet to be enacted to operationalise this constitutional provision on gender equality within county governments.[12] The above provision requires strategic legislation to promote the advancement of a two-third gender rule. There is no express constitutional edict directed at Parliament requiring it to pass legislation to ensure compliance with the two-thirds gender principle concerning members of parliament. This is provided for Members of County Assemblies under Articles 177 and 197 of the Constitution, which expressly require creating special seats to ensure compliance with the gender principle.

Consequently, the Kenyan Parliament and County assemblies have been castigated for failing to enact relevant legislation to address this systemic and historical problem that persists. This provision applies to county assemblies and bodies since they have elective bodies such as county assemblies, for which

10 Mzalendo, 'The Implementation of the Two-Thirds Gender Rule: A Seesaw Progress' (2020) < https://mzalendo.com/posts/implementation-two-thirds-gender-rule-seesaw-progr/> accessed 23 April 2024.

11 The Constitution of Kenya 2010, art 27(8).

12 Kenya Law, 'National Assembly Speaker's Statement on the Gender Rule' (2020) <http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> accessed 23 April 2024.

Article 27(8) of the Constitution requires that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. Most county governments have not achieved compliance with the two-thirds gender rule when appointing County Executive Committee Members (CECMs) and Chief Officers (COs).[13]

The National Gender and Equality Commission (NGEC) has reported that no county government within Kenya has complied with the constitutional two-thirds gender rule in appointing CECMs and COs.[14] The NGEC notes that no county has more women CECMs or COs compared to men, and counties have not complied with other domains of inclusion and diversity, such as representation of youth, persons with disabilities, and minority and marginalised people.[15] Implementing the two-third gender rule has remained on the agenda during house discussions, with minimal goodwill from the political class.[16] For instance, members of the National Assembly promised to develop a bi-partisan approach to implementing the two-thirds gender rule for elective positions, which has continued to stall in Parliament.[17]

Surprisingly, there have been four failed attempts to pass the two-thirds gender law in Kenya.[18] The first two relate to the Duale bills[19] in the National Assembly, which failed to muster the number of supporters to pass a constitutional amendment, and the "Sijeny Bill," which failed twice at the Senate level.[20] In both instances, legislators deliberately avoided the legislature or voted against the bills.

13 Parliament of Kenya, 'Counties have not met Two-thirds Gender Rule in appointing CECMs Chief Officers' (2024) <'http://www.parliament.go.ke/counties-have-not-met-two-thirds-gender-rule-appointing-cecms-and-chief-officers> accessed 27 January, 2025.

14 Parliament of Kenya, 'Counties have not met Two-thirds Gender Rule in appointing CECMs Chief Officers' (2024) <http://www.parliament.go.ke/counties-have-not-met-two-thirds-gender-rule-appointing-cecms-and-chief-officers> accessed 9 April 2023.

15 Ibid.

16 George Kaiga, 'New Push To Implement Two-Third Rule' *Kenya News Agency,* (Nairobi,9 April, 2024), <*https://www.kenyanews.go.ke/new-push-to-implement-two-third-rule/* > accessed 9 April, 2024.

17 Parliament of Kenya, 'We will Work to Achieve Two-third Gender rule: House Debate' (2024) <http://www.parliament.go.ke/we-will-work-achieve-two-third-gender-rule-house-debate > accessed 9 April 2024.

18 Centre for Rights Education and Awareness, 'Tracing the Journey: Towards Implementation of the Two-thirds Gender Principle' (2019) 38.

19 The Two-Third Gender Rule Laws Bill, 2015,Kenya Laws.

20 Moses Njagih, 'How parliamentarians failed four times to enact bill on gender rule' *'The Standard* (Nairobi, 23 April 2021), < https://www.standardmedia.co.ke/politics/article/2001387256/how-parliamentarians-failed-four-times-to-enact-bill-on-gender-rule> accessed 23 April 2024.

The Duale and Sijeny Bills contained the same contents and echoed a similar position, with Duale's bill being introduced before Sijeny's Bill. These bills sought to amend articles 97 and 98 of the Constitution, which provide for the fixed membership of the National Assembly and Senate, respectively.[21] The amendment sought to increase the number of special seat members necessary to ensure that no more than two-thirds of the members of the two houses are of the same gender.[22] Further, the number of such special seats would be determined after the results of a general election are declared. The bill proposed that the gender top-up nominations lapse 20 years from the date of the first general election after the amendment is enforced and sought to amend Article 177(1) (b) to have the sunset clause apply in County Assemblies.

Thereafter, the Departmental Committee on Justice and Legal Affairs developed a bill, popularly known as the Chepkong'a Bill, dated 28 April 2015.[23] Stakeholders vehemently opposed the Bill, arguing that it was evil in law, offended the Constitution, and brazenly disregarded the Supreme Court advisory opinion and other judicial determinations on the two-thirds gender principle.[24] However, the initiator declined to withdraw the bill, which still went ahead and failed in parliament.[25] The shift in positions by legislators who had publicly supported the two-thirds gender rule bill reveals a lack of determination to enact the law in compliance with the Constitution and the judicial pronouncements.

2.2 A Critical View of the Legal Framework on Two-Third Gender Rule and its Implication to Counties

The Kenyan legal system gives every citizen of the 47 counties the democratic right to participate fully in their governance.[26] This democratic right applies to special groups such as women, minorities, marginalised groups, and

21 Centre for Rights Education and Awareness, 'Tracing the Journey: Towards Implementation of the Two-thirds Gender Principle,' (2019) 26.

22 Ibid.

23 The Two-Third Gender Rule Laws (Amendment) Bill, 2015,Kenya Laws.

24 Centre for Rights Education and Awareness, 'Tracing the Journey: Towards Implementation of the Two-thirds Gender Principle' (2019) 38.

25 Ibid.

26 Mbondenyi, Morris Kiwinda. 'Entrenching the Right to Participate in Government in Kenya's Constitutional Order: Some Viable Lessons from the African Charter on Human and Peoples' Rights' (2011) 55 Journal of African Law 30–58. <http://www.jstor.org/stable/41149839 > accessed 23 April 2024.

persons with disabilities.[27] Specifically, Article 81(b) of the Constitution of Kenya, 2010 (COK) provides that "the electoral system shall comply with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender." Unfortunately, the key obstacle to realising the two-third gender principle has been actualising it in the county assemblies and the parliament.

Kenya's new 2010 constitution advances gender equality and equity at national and county levels. The COK entrenches the right to equality, which entails the full and equal enjoyment of all rights and fundamental freedoms irrespective of gender.[28] It explicitly states that to give full effect to the realisation of equality rights, the state must take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.[29] Additionally, Kenya is constitutionally bound to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.[30] Even though the Supreme Court and other courts have pronounced themselves on the need to implement this provision, the national assembly and counties have yet to enact express legislation to realise it. Consequently, the absence of a statutory framework challenges the implementation of the two-thirds gender rule within counties due to the lack of county legislation.

The COK also provides for the right to equality and equal political representation under the national values and principles of governance.[31] The national values and principles of governance include equity, equality, and protection of marginalised groups.[32] Article 177(1) of COK provides special seats necessary to ensure that no more than two-thirds of the membership of the county assembly are to be of the same gender. From the above provision, county assemblies meet the threshold for the two-thirds gender rule by design since the COK requires them to fill special seats with female members until

27 National Gender and Equality Commission, 'Mandate and Functions of the Commission' (2024) < https://www.ngeckenya.org/about/15/mandate> accessed 23 April, 2024.
28 The Constitution of Kenya, 2010, art 27.
29 Ibid, art 27(6).
30 Ibid, art 27(8).
31 Ibid, art 10(2).
32 Ibid.

the two-thirds gender rule is achieved. On the contrary, this position does not expressly speak to the realisation of this principle in the County Executive Committee Members (CECMs). Therefore, it is unsurprising that the National Gender and Equality Commission has reported that no county government within Kenya has complied with the constitutional two-thirds gender rule in appointing CECMs and Chief Officers (CO).[33]

Despite various constitutional provisions for implementing the two-thirds gender rule, the same is yet to be fully realised within countries. For instance, the 2022 General Elections still recorded low participation of women in elective positions within counties compared to the number of men.[34] Six counties did not elect women to any other elective seat, including the Governor, Senator, or Member of the National Assembly, apart from the woman representative seat.[35] These counties are Garissa, Mandera, Marsabit, Samburu, Kajiado, and Nyamira.[36] This speaks to the long journey we still have to go on as a country to realise the two-thirds gender rule within countries. The National Gender and Equality Commission notes that no county has more women CECMs or COs than men, and counties have not complied with other domains of inclusion and diversity, such as representation of youth, persons with disabilities, and minority and marginalised people.[37]

The Supreme Court of Kenya, in the Matter of the *In the matter of the Principle of Gender Representation in the National Assembly and the Senate* [38] Elaborated on the history behind Article 27 of the COK, noting that the state had a particular responsibility towards ensuring that women are considered to

33 Parliament of Kenya, 'Counties have not met Two-thirds Gender Rule in appointing CECMs Chief Officers' (2024) <http://www.parliament.go.ke/counties-have-not-met-two-thirds-gender-rule-appointing-cecms-and-chief-officers> accessed 9 April 2023.

34 Larry Madowo and Bethlehem Feleke, 'A record number of women are running in Kenya's elections but many face harassment and abuse' *CNN Word* (Nairobi, 23 April,2022) < https://edition.cnn.com/2022/08/06/africa/kenya-elections-women-candidates-intl/index.html> accessed 23 April, 2024.

35 United Nations Women, 'A Summary Analysis of Women's Performance in Kenya's 2022 Election' (2023) < https://africa.unwomen.org/sites/default/files/2023-01/Women%27s%20Performance%20in%20the%202022%20Election-%20Final%20F%202%20pagers.pdf> accessed 23 April, 2024.

36 Ibid.

37 Parliament of Kenya, 'Counties have not met Two-thirds Gender Rule in appointing CECMs Chief Officers' (2024) <http://www.parliament.go.ke/counties-have-not-met-two-thirds-gender-rule-appointing-cecms-and-chief-officers> accessed 9 April 2023.

38 *In the matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR 67.

appoint or elective office.[39] The court took judicial notice that women's current disadvantage regarding membership in elective and appointive bodies arises from deep-rooted historical, social, cultural and economic power relations in the society. Therefore, for the female gender to occupy an equitable status in civil and political rights, the state must introduce various measures, including affirmative-action programmes. In a similar case, the court in *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another,* [40] it was appreciated that the state was obliged to implement measures to achieve a more equal society free from discrimination. The court in Federation of Women Lawyers Kenya (FIDA-K) buttressed the position that Article 27(8) of the COK permits Parliament to enact legislation for people disadvantaged by past discriminatory laws or practices in the socio, political, economic, and education fields.

Recently, the Court of Appeal in the case of *Adrian Kamotho Njenga v The Judicial Service Commission & 9 Others*[41], the Court of Appeal (COA) held that there cannot be more than four (4) members of the same gender out of the seven (7) Judges of the Supreme Court of Kenya. While determining the matter, the COA interpreted Article 27 (6) and (8) of the COK to the effect there could be no more than four (4) members of one gender in the Supreme Court. Further, the Judicial Service Commission was mandated to take progressive steps to ensure the effective implementation of the two-third gender rule as advised in the Supreme Court Advisory Opinion No 2 of 2012.

From the above decision, it can be rightly concluded that the two-gender rule has been widely emphasised as a key pillar in the composition of public institutions. Therefore, county governments are bound by the above judicial decisions to ensure that their elective and appointive institutions comply with these constitutional provisions. Political goodwill at the county level is needed to strictly implement the two-third gender rule to realise the values and principles of good governance pronounced by the COK.

39 Ibid.
40 *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another* [2011] eKLR.
41 *Adrian Kamotho Njenga v The Judicial Service Commission & 9 Others* Civil Appeal No. 234 of 2017.

3.0 The Lack of Effective Public Participation within the Counties

The COK recognises the benefits of public participation, thus creating new spaces for interaction that demand the public's involvement in every aspect of public governance.[42] Some counties in Kenya have made considerable progress in public participation under the new Constitution since any legal and institutional measures have been taken to actualise this principle within counties.[43] However, there is a consensus that most county governments have not achieved the nature and extent of participation contemplated by the Constitution and the laws.[44] There is no clarity on what constitutes adequate participation, the nature of the involvement that meets the constitutional threshold or the most effective mechanisms of public participation in counties.

This part looks at the current implementation status of the principle of public participation by discussing reports on the current extent of the involvement of residents in county matters. Further, it looks at the existing legal framework on the principle of public participation and possible loopholes that frustrate the implementation of this principle in the counties. Finally, it examines the decisions of courts on the application and implementation of this principle and the effect of such judicial positions in the realisation of good governance in counties.

3.1 The Status of Public Participation in County Governments

Several public participation surveys reveal that some form or other of public participation is taking place in most of the processes in the devolved system of governance.[45] However, this public participation is unsatisfactory in most county governments due to a lack of policies and laws on public participation and a lack of public awareness due to the failure to provide adequate civic education.[46] This part looks at some of the notable surveys conducted

42 Jerameel Kevins, 'Public Participation As Espoused in the Constitution During a Legislative Process' (2021) 2 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3860179> accessed 24 April, 2024.

43 Intergovernmental Relations Technical Committee, 'The Status of Public Participation in National and County Governments' (2017) 43-45.

44 Intergovernmental Relations Technical Committee, 'The Status of Public Participation in National and County Governments' (2017) 43-45.

45 County Government Toolkit, 'Public Participation' (2024) < https://countytoolkit.devolution.go.ke/public-participation> accessed 24 April, 2024.

46 Intergovernmental Relations Technical Committee, 'The Status of Public Participation in National and County Governments' (2017) 43-45.

by government and non-government agencies on the status of public participation in Kenya, including Transparency International-Kenya, Society for International Development study, Commission for the Implementation of the Constitution, Kenya School of Government and World Bank, and Institute of Economic Affairs.

To begin with, Transparency International-Kenya surveyed awareness of county planning documents, and only 7% of the respondents knew about the County Fiscal Strategy Paper, which provides an overview of a county's revenue and expenditure plans.[47] Further, only 16% of respondents knew of the County Integrated Development Plan, which informs the county's annual budget. These findings indicate that county governments are not doing enough to ensure public access to information, and consequently, very few Kenyans are aware of the right to public participation.

Secondly, the Society for International Development (SID) study through a report on the Citizens Report Card reviewed various aspects of the milestones achieved after the promulgation of the Constitution, such as public participation.[48] The SID report revealed several constraints to greater participation, such as absent leaders, time constraints, inaccessible venues, and a lack of feedback and follow-up. The report's statistics on constraints to public participation reveal that most county governments are not doing enough to ensure effective public participation among their residents.

Thirdly, in its final report assessing the implementation of devolved government, the Commission for the Implementation of the Constitution (CIC) noted that public participation is inadequate.[49] The CICI attributed this inadequacy to limited public awareness of the COK, devolution and the lack of a framework for public involvement in terms of policy and legal framework in counties. The Kenya School of Government /World Bank working papers on public participation also note that the infrastructure for effective public participation

47 Transparency International Kenya, *Strengthening Public Audit Accountability in Kenya: A Baseline Survey Report* (2018) 30.
48 Intergovernmental Relations Technical Committee Report, *Citizens Report Card Report* (2017) 43-45.
49 Ibid.

is not yet in place in most counties.[50] Finally, the Institute of Economic Affairs (IEA) also conducted a study on public participation and dissemination of information within counties in Kenya.[51] The IEA found public participation in the budget-making and policy-formulation processes, during which people were allowed to give suggestions on allocating funds to various projects.

3.2 A Critical View of the Legal Framework on Public Participation and its Implication to Counties

The COK has several provisions on public participation that are binding to the county governments in the course of execution of their duties. To begin with, the COK declares that sovereign power belongs to the people of Kenya and may be exercised by them directly or through their elected representatives.[52] The national values and principles of governance include democracy and participation of the people[53] while every person has the right to receive and impart information or ideas.[54] The other constitutional provision with implications of public participation include Article 34 on freedom of media and Article 35 on access to information.

The constitutional objectives of devolution include giving powers of self-governance to the people and enhancing their participation in the exercise of the powers of the state and in making decisions affecting them.[55] Further, the COK provides for public participation and County Assembly powers where county assemblies are mandated to facilitate public participation and involvement in the legislative and other business of the assembly and its committees.[56] The values and principles of public service include involvement

50 World Bank, 'Public Participation Key to Kenya's Devolution' (2015) < https://www.worldbank.org/en/news/feature/2015/04/30/public-participation-central-to-kenyas-ambitious-devolution> accessed 24 April, 2024.

51 Institute of Economic Affairs, 'Review of status of Public Participation, and County Information Dissemination Frameworks: A Case Study of Isiolo Kisumu Makueni and Turkana Counties' (2021) < https://ieakenya.or.ke/download/review-of-status-of-public-participation-and-county-information-dissemination-frameworks-a-case-a-of-isiolo-kisumu-makueni-and-turkana-counties/> accessed 24 April, 2024.

52 Constitution of Kenya, 2010 art 1.

53 Ibid, art 10(2) (a).

54 Ibid, art 33.

55 Ibid, art 174(c).

56 Ibid, art 196 (1) (b).

of the people in the process of policymaking[57] and counties are to coordinate the participation of communities in governance at the local level.[58]

The Public Finance Management Act, 2012 provides for mechanisms on how citizens can engage at the national and county levels on matters relating to finance. Further, the Act requires the observance of the principle of public participation in budgetary matters.[59] The County Governments Act, 2012 provides for public participation at the county level by entrenching principles of public participation in counties such as timely access to information and reasonable access to the process of formulating laws.[60] Additionally, the Act also sets out the principles of civic education which include empowerment and enlightenment both of citizens and government in order to create a citizenry that is informed and actively participates in the governance of society.[61]

The Intergovernmental Relations Act, 2012 establishes mechanisms for consultation and co-operation between the national and county governments. It specifically provides for consultation between the two levels of government on matters affecting them.[62] The Act states that the objects of intergovernmental structures is to provide for a forum for sharing and disclosing of necessary data and information, which is an aspect of public participation.[63] Finally, section 38 of the Act empowers the Cabinet Secretary to make regulations for public participation.

There are a number of judicial decisions on public participation that have been brought before the Courts since the promulgation of the Constitution of Kenya that have implications on county governments. These includes cases challenging lack of public participation in appointments, legislation, budgets, development projects and impeachments, among others. The filing of these cases shows that many Kenyans appreciate the need for public participation in governance at the county level.[64] These judicial determinations have touched

57 Ibid, art 232 (1) (d).
58 Ibid, Fourth Schedule Part 2.
59 Public Finance Management Act, 2012, s 10 (2).
60 The County Governments Act, 2012, s 87.
61 Ibid, s 98 and 99.
62 The Intergovernmental Relations Act, 2012, s 3.
63 The Intergovernmental Relations Act, 2012, s 5 (d).
64 Intergovernmental Relations Technical Committee Report, *The Status of Public Participation in National and County Governments* (2017) 29-33.

on a several aspects of public participation, such as the threshold for public participation, timelines, who is responsible for public participation, and impact of lack of public participation among others.[65] The significance of public participation has been emphasized in the many cases that have challenged the enactment of laws at the County governments, development plans, and decisions by several organs of government devoid of public participation.

The case of *Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v County Government of Nairobi & 3 others* [66] involved a statutory clause in the Nairobi City County Finance Act of 2013 which authorized the County Government to charge parking fee which the petitioners claimed to be in violation of the principle of public participation. The court ruled that indeed there was public participation since the County Government and the City County Board involved the public in the process leading to the enactment of the impugned Act.[67] It added that the process was highly public as there were public forums, meetings with stakeholders, media reports and even lobbying and an opportunity to make written representations. Finally, the court stated that it does not matter how the public participation was effected for so long as some reasonable level of participation was accorded.[68]

Justice Odunga held that there was no public participation in the enactment of the County legislation in the case of *Robert N. Gakuru & Others v Governor Kiambu County & 3 Others* [69]. Justice Odunga observed as follows:[70]

> In my view to huddle a few people in a 5-star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another, a one-day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury

65 Ibid, 25.
66 *Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v County Government of Nairobi & 3 others* [2013] eKLR 49.
67 *Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v County Government of Nairobi & 3 others* [2013] eKLR 49.
68 Ibid, Para 47.
69 *Robert N. Gakuru & Others v Governor Kiambu County & 3* [2014] eKLR 76.
70 Ibid, Para76.

> leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation". Justice Odunga concluded by saying, "having considered the foregoing, the inescapable conclusion I come to is that there was no public participation as contemplated under the Constitution and the County Government Act, 2012.

The High Court in Murang'a in the case of *Thuku Kirori & 4 others v County Government of Murang'a* [71] dismissed a Petition that challenged public participation in matters affecting county residents. However, the judge observed that the concept of public participation as contemplated under articles 10 and 174 of the COK is that the participation of the public should not be narrowly interpreted to mean engagement of a section of people purporting to be professionals.[72] The county government is to provide basic infrastructure at a minimum cost for the economic empowerment of its people. Further, in the case of *Andrew Ireri Njeru& 34 others v County Assembly of Embu & 3 others* [73], the petitioners challenged the impeachment of the Embu Governor on the grounds that there was no public participation. The court made a reflection on the clear and explicit constitutional provision requiring public participation and involvement in the legislative and other processes in the assembly. The Judge held that a prima facie case had been established for a finding that there was scant public participation in respect of the removal of the governor and that the Petitioners' rights were violated.

From the above court pronouncements, it can be rightly concluded that the principle of public participation has been widely emphasized as key pillar in achieving good governance of county institutions. Therefore, county governments are bound by the above judicial decisions to ensure that their key organs and other institutions are in compliance with this constitutional principle to create people-centred governance. There is a need for political goodwill at the county level to adhere to the principle of public participation as a means of achieving good governance in the devolved units.

71 *Thuku Kirori & 4 others v County Government of Murang'a* [2014] eKLR 6.
72 Ibid, p.6.
73 *Andrew Ireri Njeru& 34 others v County Assembly of Embu & 3 others* [2014] eKLR.

4.0 The Lack of Effective Public Procurement Regulatory Systems within Counties

Public procurement in Kenya is highly decentralized at the level of procuring entities, with several public entities such as ministries, state agencies, and county departments are actively involved in the procuring process.[74] This decentralization approach has been mixed with some level of centralization for purposes of economies of scale in the procurement of common user items.[75] The Kenyan public procurement arrangement at the county level allows consortium buying to enhance efficiency, economy and economies of scale in joint procurement of common interest goods.[76]

This part looks at the current status of implementing the principles of public procurement by discussing reports on the extent of public procurement compliance in county matters. Further, it looks at the existing legal framework on public procurement and possible loopholes that frustrate the implementation of transparent and fair public procurement in the counties. Finally, it examines the courts' decisions on applying and implementing public procurement and the effect of such judicial positions in the realization of good governance in counties.

4.1 The Status of Public Procurement in County Governments

It is estimated that public procurement transactions account for 13% to 20% of Gross Domestic Product (GDP) globally.[77] Additionally, the global expenditure in procurement is estimated at over USD 9.5 trillion worldwide. Domestically, it has been estimated by the World Bank that public procurement in Kenya accounted for about Ksh 3.146 trillion contribution towards the GDP in 2020.[78] The Public Procurement Regulatory Authority is required to ensure that this expenditure sum stated above is spent in

74 Public Procurement and Asset Disposal Act, 2015, s 2.

75 Organization for Economic Co-operation and Development, *Centralized and Decentralized Public Procurement,* SIGMA Papers No. 29, (2000) 6.

76 Public Procurement Regulatory Authority (PPRA), *Annual Report (2021 – 2022),* (2022) 16.

77 Public Procurement Regulatory Authority (PPRA), 'Public consultation/invitation of comments and feedback on the proposed public procurement capacity building levy,' (2023) < https://ppra.go.ke/capacity-building-levy/> accessed 1 May, 2024.

78 World Bank, 'Global Public Procurement Database: Share, Compare, Improve!,' (2020) < https://www.worldbank.org/en/news/feature/2020/03/23/global-public-procurement-database-share-compare-improve> accessed 1 May, 2024.

compliance with constitutional provisions on Procurement of public goods and services.[79] Open public contracting is widely used in counties with efforts by government implementing reforms aimed at deepening its principles in public procurement.[80] An estimate of 43,195 tendering opportunities have been advertised through the procurement portal between 2018 to 2022, of which 92.08% have been through open tendering, which is the preferred method of procurement.[81]

Kenya's national and county governments are facing a constrained fiscal space and calls for consolidation.[82] Consequently, these two levels of government have implemented several measures aimed at ensuring that public procurement delivers value for money, including the adoption of electronic procurement systems.[83] The Kenyan government implemented the Procure to Pay module, which is used to undertake procurement transactions electronically, including preparation of procurement plans and tendering through requests for quotation and open tender in counties. The country prioritised public procurement reforms to enhance efficiency in creating fiscal space that allows for shifting resources to implement priority projects.[84]

The causes of the public procurement challenges experienced mainly include inadequately qualified procurement professionals, inadequate procurement planning, lack of supplier pre-qualification, violation of due process, and poor inventory management.[85] The Consequences of these challenges experienced include offences of financial misconduct, low absorption of resources, delays in project implementation and wasteful spending.[86] This calls for the need to

79 Githinji, 'Functions of Public Procurement Regulatory Authority in Kenya,' (2021) < https://afrocave.com/public-procurement-regulatory-authority/> accessed 1 May, 2024.

80 Public Procurement Regulatory Authority (PPRA), *Annual Report (2021 – 2022),* (2022) 19.

81 Ibid

82 International Monetary Fund. African Dept, 'Kenya: Fifth Reviews Under the Extended Fund Facility and Extended Credit Facility Arrangements and Request for a 20-month Arrangement Under the Resilience and Sustainability Facility; Requests for Extension, Rephasing, and Augmentation of Access, Modification of a Performance Criterion, Waiver of Applicability for Performance Criteria and Waiver of Nonobservance for a Performance Criterion, and Monetary Policy Consultation Clause—Debt Sustainability Analysis,' (2023) < https://www.elibrary.imf.org/view/journals/002/2023/266/article-A002-en.xml> accessed 1 May 2024.

83 Public Procurement Regulatory Authority (PPRA) *Annual Report (2021 – 2022)* (2022)16.

84 Kenya Vision 2030, < https://vision2030.go.ke/> accessed 1 May 2024.

85 The Africa Centre for Open Governance (AfriCOG), 'Public Procurement in Kenya's Counties: Experiences from three counties,' (2015) 20-12.

86 The Africa Centre for Open Governance *AfriCOG* (2015) 23-24

address the above challenges by ensuring the development of staff capacity, development of procurement plans, pre-qualification of suppliers, following due process and inventory management.[87]

4.2 A Critical View of the Legal Framework on Public Procurement and its Implication to Counties

The Constitution of Kenya, 2010 (COK) requires that public procurement be carried out in a system that is fair, equitable, transparent, competitive and cost-effective.[88] There are additional constitutional provisions which ought to be adhered to in public procurement, such as the national values of equality and freedom from discrimination[89], principles of public finance[90], and values and principles of public service.[91] The High at Nyamira, in the case of *Noa Investment Limited v County Government of Nyamira [2021]*[92], emphasized the need for counties to strictly adhere to Article 227 of the Constitution of Kenya while undertaking public procurement. The court was of the view that the defendant county's conducts was in violation of Article 227(1) of the Constitution which requires that the procurement by public organs and entities must be fair, competitive, transparent and equitable.[93] The defendants were faulted for beginning the process through a request for quotations (open tendering) and later on resorting to direct procurement without any reasons hence locking out competition.

The Public Procurement and Asset Disposal Act (Revised Edition 2022) (PPADA) and the Public Procurement and Asset Disposal Regulations, 2020 (PPADR) guide in all matters of procurement and asset disposal in Kenya. The PPADA establishes the Public Procurement Regulatory Authority (PPRA)[94] and the Public Procurement Administrative Review Board (PPARB)[95], which are responsible for overseeing public procurement in the country. The two

87 Ibid, 26.
88 The Constitution of Kenya, 2010, art 227.
89 Ibid, art 27.
90 Ibid, art 201.
91 Ibid, art 232.
92 *Noa Investment Limited v County Government of Nyamira [2021]*eKLR.
93 Ibid, 20.
94 The Public Procurement and Asset Disposal Act, 2015, s 8.
95 Ibid, s 10.

legislations contain the roles and responsibilities of county governments in public procurement; the powers of regulatory bodies to ensure compliance with the procurement laws; and internal organization of procuring entities in procurement.[96] Further, the PPADA contains provisions on general procurement principles and procurement planning; administrative review of decisions of procuring entities; and public procurement offences.[97]

The Public Finance Management Act, 2012 is aimed at ensuring that public finances are managed in accordance with the principles in the COK and to ensure accountability, transparency, and efficiency in the management of public finances. The Act supplements the procurement regime by outlining the role of accounting officers of public entities to ensure the keeping of accurate and legally compliant accounting records.[98] The Public Officers Ethics Act of 2003 provides for a Code of Conduct and Ethics for public officers and requires financial declarations from certain public officers. The legislation specifically addresses certain qualities of public officers' conduct which is necessary for efficient procurement, such as efficiency, honesty, professionalism, integrity, avoiding conflicts of interest, and political neutrality.[99]

The Public Audit Act, 2015 empowers the Auditor General to undertake audit activities in state organs and public entities to confirm whether public money has been applied lawfully.[100] Therefore, this legislation is useful in ensuring that proper auditing of public procurements in counties is done, hence supplementing the county procurement regime. The Leadership and Integrity Act, 2012 aims to ensure that State officers respect the values, principles and requirements of the Constitution.[101] These include values and principles provided for in the COK, which are essential in ensuring the realization of the principles of public procurement.

Further, the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003 contains provisions on the protection of public property and revenue including

96 The Public Procurement and Asset Disposal Act, 2015, ss 33, 34 and 44.
97 Ibid, ss53, 70, and 176.
98 The Public Finance Management Act, 2012, ss148 and 149.
99 The Public Officers Ethics Act, 2003, ss 9,10,12 and 16.
100 The Public Audit Act, 2015, s 3.
101 The Leadership and Integrity Act, 2012, s 3.

in tendering.[102] This Act is useful in ensuring adherence to effective public procurements in counties since failure to comply with procurement laws and guidelines is an offence under the Act. Finally, the Public Service (Values and Principles) Act, 2015 entrenches values and principles such as honesty, high standards of integrity, transparency, accountability and observance of the rule of law.[103] The Act specifically addresses certain aspects of public service which are necessary for efficient procurement, such efficient, effective and economic use of resources.

There are a number of judicial decisions on public procurement that have been brought before the Courts since the promulgation of the Constitution of Kenya that have implications for county governments. These include cases challenging the lack of public participation in enacting procurement regulations, legislation and the absence of transparency and corruption, among others. The filing of these cases shows that many Kenyans appreciate the need for a transparent and open public procurement for governance at the county level.[104] These judicial determinations address several aspects of public procurement, such as the threshold a fair public procurement process, timelines, who is responsible for public procurement, and its impact on counties among others.[105] The significance of a fair public procurement process has been emphasized in many cases, challenging the enactment of laws by county governments and decisions made by several government organs devoid of public participation.

In the case of *Republic v Public Procurement & Administrative Review Board & 2 others Ex parte Applicant Dar-Yuksel-Ama (A Consortium of Dar-Al-Handasah In Joint Venture With Yukelproje A.S & AMA Consulting Engineers Ltd; Korea Express Corporation (KEC) Korea Consultants International Company Limited (KIC) & Apec Consortium Limited & 2 others (Interested Parties)*[106], it was held that the Review Board did not act ultra vires in directing that the termination

102 The Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003, ss 44 and 45.
103 The Public Service (Values and Principles) Act, 2015, ss 5,8 and 9.
104 Intergovernmental Relations Technical Committee, The Status of Public Participation in National and County Governments, (2017) 29-33.
105 Ibid, p. 25.
106 *Republic v Public Procurement & Administrative Review Board & 2 others Ex parte Applicant Dar-Yuksel-Ama (A Consortium of Dar-Al-Handasah In Joint Venture With Yukelproje A.S & AMA Consulting Engineers Ltd; Korea Express Corporation (KEC) Korea Consultants International Company Limited (KIC) & Apec Consortium Limited & 2 others (Interested Parties* [2022] eKLR.

of the procurement proceedings and the letters of notification of termination be cancelled. The court noted that the Public Procurement & Administrative Review Board properly exercised its mandate legally or procedurally since the Board had jurisdiction to direct the termination of the procurement proceedings.[107] The High Court expressed itself as follows on the burden of proof when it comes to the termination of the procurement process.[108]

> "In a nutshell therefore and based on the above decided cases where the decision of a procuring entity to terminate procurement process is challenged before the Board, the procuring entity is under a duty to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and the procedural requirements set out under the provisions of Section 63 of the Public Procurement and Asset Disposal Act 2015.

The High Court in the case of *Noa Investment Limited v County Government of Nyamira*[109] determined whether the Procurement and Supply of goods by the plaintiff to the county defendant gave rise to a contract between the parties. The case interpreted the meaning of procurement being done directly due to urgency under section 74(3) of the Public Procurement and Asset Disposal Act.[110] It was stated that a procuring entity may use direct procurement if satisfied that there is an urgent need for the goods or services being procured; because of the urgency, the other available methods of procurement are impractical; and the circumstances that gave rise to the urgency were not foreseeable.

It was found that the above conditions had to be met for the procurement to be legal. There was no contract in writing between the plaintiff and the County, so even if there was urgency for procurement of the goods, that contract would still be in violation of the law. Additionally, the Procurement Committee could

107 Ibid,55.
108 Ibid,54.
109 *Noa Investment Limited v County Government of Nyamira* [2021] eKLR.
110 Ibid,20.

not have entered into any direct procurement without first giving reasons in writing for doing so to the Tender Committee. It was also observed that while the parties began through open tendering, they afterwards resorted to direct procurement without any reason, hence locking out competition. This was found in violation of Article 227(1) of the COK and the law then applicable to procurement. Both required that the procurement by public organs and entities was fair, competitive, transparent and equitable.

From the above court pronouncements, it can be rightly concluded that the principle of a fair and just public procurement has been widely emphasized as a key pillar in achieving good governance of county institutions. Therefore, county governments are bound by the above judicial decisions to ensure that their key organs and other institutions are in compliance with this constitutional principle to create people-centered governance. There is a need for political goodwill at the county level to ensure transparent public participation as a means of achieving good governance in the devolved units.

5.0 The Complexities in the Transfer of Functions from National to County Governments

The Kenyan experience of transitioning from centralized to devolved governance systems has proven more contentious regarding the transfer of functions between different levels of government.[111] Several political, legal, and economic risks still affect the actual implementation of the function transfer process.[112] Whereas the Fourth Schedule of the COK details the separation of functions to be undertaken by each level of government, not all county functions have been transferred to devolved units by the national government.[113] Many political functions, fiscal resources, and administrative responsibilities have been delegated to forty-seven county governments at the sub-national level.[114]

111 Gabrielle Lynch and Justin Willis, 'Decentralisation in Kenya: the governance of governors' (2016) 54 The Journal of Modern African Studies, Cambridge University Press 1-35. < https://www.jstor.org/stable/26309775> accessed 3 May 2024.

112 Muli, Joel Ngui, 'The challenges of Implementation of Devolution strategy at the Nairobi city-county government in Kenya' (2014) Master's Thesis, University of Nairobi 34.

113 Mabel Keya Shikuku and Erastus Gichohi, 'National Government Readies Itself To Transfer The Remaining Devolved Functions,' *Kenya News Agency* (2024) < https://www.kenyanews.go.ke/national-government-readies-itself-to-transfer-the-remaining-devolved-functions/> accessed 3 May 2024.

114 Commission on Revenue Allocation, *Promoting an Equitable Society Devolved Functions Transfer De-*

This part examines the current status of implementing the transfer of functions from national to county by discussing reports on the current extent of residents' participation in county matters. It undertakes an introspection of the process of transitioning to a devolved system of government, including matters in the realm of function transfer and challenges experienced. Further, also examines the existing legal framework on the transfer of functions and possible loopholes that frustrate the implementation of this transfer to counties. Finally, it examines the courts' decisions on applying and implementing the tenets of the transfer of functions and the effect of such judicial positions on the realization of good governance in counties.

5.1 The Status of the Transfer of Functions to County Governments

The Kenyan devolution environment is still nascent, with a number of cross-cutting issues challenging its success, such as low level of engagement in devolution issues by special or marginalized groups such as women, youth and people living with disabilities who still cannot access the 30% government tenders.[115] Challenges due to the functions transfer process in Kenya include transferring functions without any or with insufficient resources and transferring tiny and fragmented functions.[116] These fragmented functions include wage expenditures, operation and maintenance expenditures and inter alia spending on sectoral supplies. The process of transferring functions to counties to experience challenges in transferring functions that were never done or funded before and promoting general competence but without finances.[117] Finally, there is also a challenge in obtaining data, making it difficult to make appropriate decisions that the situation may demand, and financial transparency by ministries is ineffective.[118]

pendence & Fiscal Responsibility: Challenges, Research Direction, Policy and Practice, Second Annual Development Finance Conference (2020) 29.

115 Intergovernmental Relations Technical Committee (IGRTC), *End term Report of the Intergovernmental Relations Technical Committee Members 2015 – 2020,* (2020) 24.

116 Ibid.

117 Alvin Mwangi, 'Counties to wait longer for transfer of devolved roles' *The People Daily* (Nairobi 3 May 2024) < https://www.pd.co.ke/news/counties-to-wait-longer-for-transfer-of-devolved-roles-218967/> accessed 3 May 2024.

118 Silas Mwiti , 'All devolved functions to be transferred by end of February,' *Kenya Broadcasting Corporation* (Nairobi 3 May 2024) < https://www.kbc.co.ke/all-devolved-functions-to-be-transferred-by-end-of-february/> accessed 3 May, 2024.

Counties still continue to contend with extensive duplication of functions by the national and county governments whilst undertaking their respective performance of either concurrent or exclusive functions.[119] Such extensive duplication of functions has been evident in areas like security, water services provision and agriculture.[120] Devolved units still deal with the fact that there are functions that have been gazetted for transfer to devolved units but are still being performed at the national level, such as agriculture, water, museums, and library services.[121] Further, devolved units are affected by intergovernmental disputes originating from unhealthy competition for resources between the national and county governments and ambiguity on concurrent functions.[122] This concurrence of functions at two levels of government includes lands, housing and road functions at the county level. Intergovernmental disputes are spurred up by the duplication and overlapping roles of the two levels of government and delayed in the release of county funds by the National Treasury devolved units.

5.2 A Critical View of the Legal Framework on the transfer of functions to county governments and its Implication

Article 187 of the COK provides for the transfer of functions and powers between levels of government. A function or power of government at one level may be transferred to a government at the other level by agreement between the governments upon satisfying two main conditions.[123] These conditions include the requirement that the function or power would be more effectively performed or exercised by the receiving government, and the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.[124] The COK requires that arrangements be put in place to ensure that the resources necessary for the performance of the

119 Ann Ngige Nyamu, 'Gov't Committed to Transferring Devolved Function To Counties' (2024) < https://www.citizen.digital/news/govt-committed-to-transferring-devolved-functions-to-counties-cs-chelugui-n335394> accessed 3 May 2024.

120 Intergovernmental Relations Technical Committee (IGRTC), 'Emerging Issues on Transfer of Functions to National and County Governments,' (2017) 22.

121 Ibid.

122 The East African News, 'Clash between national and county govts with onset of devolution,' *The East African* (Nairobi, 3 May 2013) < https://www.theeastafrican.co.ke/tea/news/east-africa/clash-between-national-and-county-govts-with-onset-of-devolution--1315704> accessed 3 May 2024.

123 Constitution of Kenya, 2010, art 187(1).

124 Ibid, art 187(1)(a)(b).

function or exercise of the power are transferred.[125] Where a function or power is transferred from a government at one level to a government at the other level, constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.[126]

The transfer of functions process was to be undertaken in two phases under Kenya's transfer of functions statutory framework set out in the Transition to Devolved Government Act, 2012. To begin with, the first phase entailed the preparation for the uptake of county governments' functional roles.[127] This includes auditing of assets, liabilities and staff of the national government in the now defunct local authorities, facilitation of civic education and preparation of county budgets and financial management systems.[128] On the other hand, the second phase involved the completion of activities commenced during the first phase. This includes the gazettement of the functions to be transferred, rolling out the transfer and implementation of the specific functions asymmetrically and in a phased manner to the county governments.[129]

The cases discussed at this stage reveal the challenges the courts face when determining disputes on functional assignment between the national and county governments. There are a number of judicial decisions on the transfer of functions that have been brought before the courts since the promulgation of Kenya's Constitution, which have implications for county governments. These include cases challenging the lack of public participation in function transfer, legislation making, budgetary process, and development projects. The filing of these cases shows that many Kenyans appreciate the need for effective citizen involvement in governance at the county level.[130] These judicial determinations have touched on several aspects of function transfer, such as the principles of function transfer, timelines, who is responsible for the transfer, and the impact of the lack of such functional transfers.[131] The significance of adherence to the

125 Ibid, art 187(2)(a).
126 Constitution of Kenya, 2010, art 187(2)(b).
127 The Transition to Devolved Government Act, 2012, s 3(a)(b)(c).
128 Ibid, s 3(d).
129 Intergovernmental Relations Technical Committee (IGRTC), 'Emerging Issues on Transfer of Functions to National and County Governments' (2017) 19.
130 Intergovernmental Relations Technical Committee, 'The Status of Public Participation in National and County Governments' (2017) 29-33.
131 Ibid, 25.

principles of functional transfer has been emphasized in the many cases that have challenged the process of function transfer to the county governments.

The court in the case of *Africa Rafiki Ltd & 2 others v Nairobi City County Government & 3 others*[132] expressed itself as follows on the question of conflict of laws and transfer of functions;

> "What is before me is an obvious conflict of legislations and I am certain that the delineation of functions both in the Sentrim Elmentaita Meeting and Section 4(1) and (2) of the counties legislation only fuel that conflict because it is unclear what Enforcement of compliance e.g. spot checks on betting and other forms of gambling licensed by the County Government means when the licensing function has not been explicitly given to county governments, save that they can license business premises including those in the said business. I would have expected language such as licensing of and enforcement of compliance in the betting, gaming or lotteries business or stating categorically that licensing of casinos, gaming activities including online gaming shall be functions of the national government and similar language used in the specific functions assigned to county governments. An example is licensing of business premises in which gaming, casino or betting and lottery business are conducted shall be the function of a County Government. The said clarity is lacking as stated elsewhere above and therein lies the conflict."[133]

In the above matter, the High Court ended up suspending the operations of the Nairobi City County Betting Act, 2014, as passed by the County Assembly to license gaming, betting, and lotteries.[134] This dispute involved the functional responsibilities between the national and county governments concerning betting, gaming, and lotteries. This involved Section 34 of Part 1 of the Fourth Schedule to the COK and Section 4(a) of Part II of the Fourth Schedule.

In the case of *Council of County Governors v Energy Regulatory Commission & 7 others*[135] the petitioner sued several national government agencies including the

132 *Africa Rafiki Ltd & 2 others v Nairobi City County Government & 3 others* [2015] eKLR.
133 Ibid,99.
134 Ibid,103.
135 *Council of County Governors v Energy Regulatory Commission & 7 others* Petition 279 of 2017 [2023]

National Housing Corporation (NHC). The petitioner's bone of contention is that to the extent that the NHC, under section 7B of the Housing Act continues to establish, promote, organize companies and syndicates for purposes of carrying out housing functions, which is a devolved function, then it is in contravention of articles 6(2), 186, 189 and 259 of the Constitution. The matter was referred to mediation by the Intergovernmental Technical Relations Committee in accordance with the provisions of Section 31 of the Intergovernmental Relations Act, 2012 and Article 189(3) and (4) of the Constitution. Under the COK, the national government oversees housing policy, while the county governments are in charge of planning and development including housing. This easily amounts to the national government overseeing the housing regulatory framework whilst county governments deal with matters on the implementation of the framework.

The petitioners in the High Court case of *Okiya Omtatah Okoiti and Anor v The Attorney General and others*[136] filed the matter seeking an interpretation of Section 23, Part 1 of the Fourth Schedule to the COK as regards the meaning of the words "national referral health facilities" and "county health facilities". They particularly claimed that the Respondents, as well as the 2nd interested party, have given the wrong interpretation to the words "national referral health facilities" and "county health facilities and pharmacies". The High Court held that the COK has not classified the health facilities into certain levels, as that is a matter of policy.

The learned presiding judge expressed himself on this matter as follows:

> "I therefore politely decline to get into the arena of defining what the phrases 'national referral health facilities' and 'county health facilities' are or what hospitals belong to what category. I say so because the court is not the maker of the health policy in Kenya. The Court has no ability or mechanism to determine the criteria to be used to categorize hospitals, and it cannot examine the equipment, facilities and manpower available in the hospitals, as that is the exclusive mandate of the national government through the Executive. "I am therefore in agreement with the submissions by

KEHC 21365 (KLR).

136 *Okiya Omtatah Okoiti and Anor v The Attorney General and others* Petition No 593 of 2013.

> the respondents, the 2nd interested parties and the Amicus Curiae that this Court cannot determine the issues raised herein as it would amount to implementing and making policies for and on behalf of the Executive. To paraphrase that finding, the Court will be stepping into the mandate of the Executive State organs and agencies, which act is generally constitutionally frowned upon and in that regard, I am also in agreement with the High Court in Republic v The TA (supra) where the learned Judges stated: "The inadequacies of the provision of health services in this County is a matter of national concern and the national government must ensure that every person's right to the highest attainable standard of health."[137]

From the above court pronouncements, it can be rightly concluded that the principle of effective functional transfer from the national to county units has been widely emphasized as a key pillar in achieving good governance of county institutions. Therefore, county governments are bound by the above judicial decisions to ensure that their key organs and other institutions are in compliance with this constitutional principle to create people-centred governance. There is a need for political goodwill at the county level to ensure a smooth transfer of functions as a means of achieving good governance in the devolved units.

6.0 Recommendations Towards Addressing the Legal Challenges in Counties

As discussed in the above cases, the four prevalent legal challenges in the counties majorly include the lack of effective realization of the two-third gender rule, lack of proper public participation, absence of fair procurement process and poor transfer of functions to county government. This part attempts to offer possible solutions to the above challenges in order to have counties functioning based on the existing legal and institutional framework. The faithful interpretation and implementation of the provisions of the COK 2010 touching on county governments is central towards overcoming the challenges identified in this paper.

137 *Okiya Omtatah Okoiti & another v Attorney General & 6 others* [2014] eKLR, para 90.

There is a need for a robust architectural framework and design of county legislation on the two-third gender rule, public participation, public procurement and transfer of functions to county government from the national governments. This is based on the fact that the COK is deliberate in requiring a shift from gender-neutral to gender-sensitive laws and from unilateral decisions to public involvement. This legislative shift at the county level should be able to appreciate the historical context in which public procurement has been conducted without due regard to basic procedure and constitutional adherence. Therefore, such an inclusive design should recognize that in order to reverse the historical and systematic unfair procurement practice, there has to be deliberate and special consideration of special groups like youth, women and persons with disabilities in the tendering process.

As evidenced in the above case laws, stakeholders at the national and county levels need to appreciate the constitutional shift towards a robust, independent, competent and functional judiciary able to uphold the rule of law. For the judiciary to guarantee the two-third gender rule and public participation at the county level, it must be subject only to the COK and not subject to the control of any external parties. Decisions by county stakeholders must be fashioned in a manner that recognizes the sacrosanct place of the judiciary in either overturning or upholding those decisions in the event of judicial review. The judiciary can fairly adjudicate on the transfer of functions and justly interfere with procurement decisions where it is independent, distinct and free from manipulation of the political wing of government.

County legislation and policy have to be reviewed in order to capture public participation as a continuous process and not a one-time event. Further, such devolved legislation and policy should ensure that public participation provides for timely and relevant information to the county residents. Additionally, there has to be accessibility for all members of the public so they are aware and can engage in decisions that affect them at the county level. The decision at the county level must be inclusive and provide equal access to opportunities for the citizens to participate. This will ensure that all citizens are provided with reasonable access to opportunities, spaces and mechanisms within their reach to governance processes. Further, effective public participation should demand

attention towards inclusion and equity so that all special groups like women, youth and persons with disabilities are engaged and their needs expressed and considered.

There is a need for reforms in county legislation to provide for improved incentive structures in the procurement area in order to make the most of the existing systems with a view to optimizing these tools so that they support sound procurement practices. There has to be better access to procurement information since this research revealed that access to procurement information remains a major weakness of Kenya's procurement system. Such law reforms need to provide access to a variety of readily available and complete procurement information as a vital principle to a well-functioning procurement system for several reasons. This will increase competition levels, provide for control by the audit system, enable civil society to conduct social audits and enhance the understanding of the procurement system within the devolved units.

The Fourth Schedule of the COK needs further legislative breakdown because the functions listed therein are still highly aggregated. Reliance on the Fourth Schedule alone as the basis for delimiting the boundaries of responsibility between the national and county governments in matters of functional allocation has proven futile. It is vital for legislation to ensure that the different spheres and departments of government complement each other in achieving nationally accepted policy goals.

6.1 Conclusion

The efforts towards implementation of the two-thirds gender principle in the county government have revealed that a good constitution, in and of itself, does not guarantee the realization of this principle. The prescribed minimum threshold for women's representation in counties is yet to be achieved in Kenya despite clear constitutional timelines and judicial orders on the same. There is a need for county assemblies to be fully co-opted into the inclusive mission of the COK. Public participation at the county level has been appreciated as a two-way process with feedback to citizens given on decisions made, actions taken and results achieved by the county government. The process should

also provide feedback on decisions and the quality of services provided to the government.

The process of public procurement is expected to be guided by principles such as the national values and principles provided under COK, the equality and freedom from discrimination and affirmative action programmes. Unfortunately, most of these principles are yet to be well incorporated in most of the county legislation and policy, hence posing a challenge in implementation at the devolved unit. The process of function assignment and transfer is one of the most critical aspects of Kenya's devolved governance structure. Whereas the same is constitutionally provided for, there are still challenges that are being experienced in the transfer of functions and the role that is played by each level of government in Kenya.

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RETHINKING LEGAL EDUCATION IN KENYA: Adapting to Domestic and Global Shifts

Sussie Wairimu Mutahi[1*]

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Abstract

The link between the quality of legal education and the effectiveness of legal practice in Kenya is undeniable. While legal training equips lawyers with knowledge of foundational principles and statutory prescriptions, this does not always translate into competent or ethical legal practice. Many graduates struggle to bridge the gap between theoretical learning and practical application, raising concerns about the effectiveness of legal education in preparing professionals for the evolving demands of the legal field. To address this challenge, this article offers four key recommendations. First, fostering collaboration between legal institutions at both domestic and international levels to enhance knowledge exchange and best practices. Second, life skills should be integrated into legal education, emphasising ethics and ensuring that lawyers understand and practice the law with integrity. Third, research efforts focused on legal entrepreneurship and innovation should be strengthened, and interdisciplinary collaboration should be encouraged to develop creative legal solutions. Finally, equipping law lecturers with modern teaching methodologies tailored to the needs of 21st-century law students ensures that pedagogy evolves alongside the profession. By implementing these reforms, Kenya can develop a legal education system that produces knowledgeable but also ethical and adaptable lawyers. This reflection highlights the need for a forward-thinking approach to legal training, ensuring that future legal practitioners are well-prepared to navigate domestic and global legal landscape complexities.

Keywords: *Legal Education, Legal Practice in Kenya, Ethics in Law, Legal Innovation, Law Curriculum Reform*

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1.0 Introduction

The demands upon higher education institutions often, and now in increasing frequency, surpass the traditional teaching-research dyad. Once regarded merely as transmitters of technical knowledge,[3] these institutions are now required to impart life skills, attract talent, foster innovation, cultivate social cohesion and provide linkages to international communities.[4] The new Higher Education Institution's (HEI) core mandates are brought to bear by wide-ranging external and internal pressures. On the external front, industry players, the government, and other stakeholders behove educators to offer education relevant to industry and societal needs.[5] In addition, HEIs face pressure to be entrepreneurial,[6] ecologica[l7] and technologically adaptive.[8] [I]n addition to the pressure, studies show a strong link between high education levels and the resultant national development.[9] Internally, HEIs are expected to grapple with accountable governance[10,] budgetary constraints[11,] provision of quality education in an era of massive intakes[12], digitisation of education[13], indigenisation of education to fit local contexts[14], graduate employability[15] and the creation of supportive

3 Tristan McCowan, *Higher education for and beyond the sustainable development goals* (Palgrave Macmillan 2019).

4 Mitchell Young, Romulo Pinheiro, Aleksandar Avramovic, 'Unpacking resilience in higher education: investigating twenty-first-century shifts in universities' academic cores' [2023] Higher Education 1.

5 George Odhiambo, 'The role of Kenyan Universities in national development' (2018) 4 Forum for International Research in Education 200.

6 Yamleka Nhleko, Thea Westhuizen, 'The role of higher education institutions in introducing entrepreneurship education to meet demands of industry 4.0' (2022) 28 Academy of Entrepreneurship Journal 1.

7 Shalini Menon, M. Suresh, 'Development of assessment framework for environmental sustainability in higher education institutions' (2022) 23 International Journal of Sustainability in Higher Education 1445.

8 Peter Mbithi, Judith Mbau, Nzioka Muthama, Hellen Inyega, Jeremiah Kalai, 'Higher Education and Skills Development in Africa: An Analytical Paper on the Role of Higher Learning Institutions on Sustainable Development' (2021) 4 Journal of Sustainability, Environment and Peace 66.

9 Nico Cloete and Ian Bunting and Francois Van Schalkwyk, *Research Universities in Africa* (African Minds 2018).

10 Pedro Teixeria, Amelia Veiga, Maria da Rosa, Antonio Magalhaes, *Under pressure* (Brill 2019).

11 Ibid.

12 Goolam Mohamedbhai, 'Massification in higher education institutions in Africa: Causes, consequences and responses' (2014) 1 International Journal of African Higher Education 59.

13 Hanife Akar, Elanur Yilmaz_Na, Rukiye Ayan-Civak, Anil Kandemir, 'Digitizing borderless higher education landscapes through curriculum policy change to educate global citizens' (2023) 15 Journal of Educational Technology Development and Exchange 1.

14 Laurie McCubbin, RozenAlex, Jude Brgkamp, Celeste Malone, Chiachih Wang, Amy Reynolds, 'Returning the colonizers gaze: Critiquing whiteness in our training programs' (2023) 17 Training and Education in Professional Psychology 14.

15 Ming Cheng, Olalekan Adekola, JoClarisse Albia, Sanfa Chai, 'Employability in higher education: A review of key stakeholders' perspectives' (2022) 16 Higher Education Evaluation and Development 16.

mental health structures for students and staff.[16] Although these pressures apply evenly across disciplines, the legal profession faces additional nuanced challenges in the form of a changing legal landscape, the emergence of new specialisations and technology substitution for lawyering services. To cater effectively to the dizzying demands placed upon HEIs approaches to teaching, learning, research, career progression, and staff responsibilities invariably need updating.

The paper addresses itself to four key areas upon which these updates are of immediate necessity. The first portion discusses collaboration as a key skill in legal education. The second portion focuses on the new contours of research, especially within the African context. The third section turns attention to the 'softer' requirements of life skills in the law school and in the profession. The last portion devotes itself to capacitating the lecturer, one of the key players in legal education, to assist HEIs in meeting their competing demands.

2.0 Justifying the need for collaboration in legal studies

2.01 Defining collaboration

Collaboration has been defined as a process characterised by the sharing of norms and rules between autonomous actors interested in a jointly desired outcome.[17] Part of the rules of engagement entail the nature of resources to be pooled, such as the relevant expertise or finances and prescribe the amount and nature of contribution between the stakeholders.[18] It has been argued that the markers of a true collaboration include the accrual of benefits to all involved stakeholders, the creation of new value and the allowance of an informal system that allows for connectivity between the persons and concomitant infrastructure. [19] From the introductory portion of this paper,

16 Shruti Agrawal, Nidhi Sharma, 'Barriers and role of higher educational institutes in students' mental well-being: A critical analysis' (2022) 2 Atlantis Highlights in Social Sciences, Education and Humanities 173.

17 Donna Wood, Barbara Gray, 'Toward a comprehensive theory of collaboration' (1991) 27 The Journal of Applied Behavioral Science 139.

18 Adrianna Kezar, 'Redesigning for collaboration within higher education institutions: An exploration into the developmental process' (2005) 46 Research in Higher Education 831

19 Rosabeth Kanter, 'Collaborative advantage: The art of alliances' [1994] Harvard Business Review 96.

the inadequacy of singular HEIs to meet all the demands, often tugging in opposite directions, is evident. To make a decent attempt at offering effective higher education in general and quality legal education in particular, a lot of partnering and support is crucial.[20] The expectations of industry relevance, response to societal challenges, and effective use of technology towards just outcomes make it imperative to have various levels of collaboration. On the primary level, internal collaborations within the law school genus between lecturers themselves, students amongst themselves and lecturers and students would form the foundation of the collaborative pyramid. On the second tier of this primary level, collaborations between staff and students across disciplines within the same university would feature. The first tier of the secondary level would be characterised by collaborations between various law faculties across the country, region and globe, with the second tier featuring interdisciplinary collaborations with other academic institutions on a similar local and global scale. Collaborations outside academia, between law faculties and government, industry and private sector, tiered nationally, regionally and globally, would typify the third level and apex of the pyramid. Framed in this way, the massive structure of support within and without the law school makes the realisation of quality legal education, adaptive to 21st-century needs, scalable. The ensuing portion discusses collaboration's internal and external impetuses in legal education.

2.02 External and internal impetuses for collaboration in legal education

The challenges facing 21st century higher education, including financial constraints, changing demographics, and the advent of the 4th industrial revolution cannot be confronted with isolated effort.[21] A collaborative atmosphere allows for greater efficiency, improved knowledge creation and effective deployment of scarce resources within the context of legal education.[22] Because the end goal of the legal system is the achievement of

20 Irma Othman, Muhammad Yussof, Anna Bakar, Mohd Esa, 'The importance of global collaboration in empowering higher education and cultivating holistic graduate leadership' (2023) 8 International Journal of Education, Psychology and Counselling 57.

21 Adrianna Kezar, 'Redesigning for collaboration in learning initiatives: An examination of four highly collaborative campuses' (2006) 77 The Journal of Higher Education 804.

22 Adrianna Kezar, 'Redesigning for collaboration within higher education institutions: An exploration into the developmental process' (2005) 46 Research in Higher Education 831.

justice, collaboration with industry, experts, and citizens affected by various legal provisions helps frame the contours of justice as early as during the legal education process. Collaboration also presents a platform for sound-boarding, proposed solutions to common problems especially within emergent specializations and in response to new and novel challenges.23 The lessons learned from the collaboration exercise are also amenable to transfer and replication in similar contexts, benefitting more than just the collaborating stakeholders.[24]

Collaboration in legal education also holds the potential to bridge the employability information asymmetry, allowing for the adaptation of course units to market needs.[25] For some time, it has been assumed, erroneously, that the litigation component of legal practice is the predominant preoccupation of law, perhaps because the other legal functions are carried on in a less publicised arena.[26] The 21st century welcomes an avalanche of legal specialisations, including legal engineering, legal project management, and legal hybrids, which plain theoretical law concepts are hopelessly equipped to address. [27] In this collaborative model, the industry has supplied real-world challenges for classroom deliberation and informally contributed to curriculum revisions by shedding outdated concepts and including much-needed skillsets where the collaboration involves a triple helix of the academic institution, government and the private sector, hybrid institutions such as offices for technology transfer have emerged, leapfrogging socioeconomic advancements.[28]

Lastly, the legal profession is set up for collaboration. In practice, the lawyer will permanently, be called upon to examine and understand how the law operates in the various occupations and contexts with which he has been required to

23 Elizabeth Creamer, 'Collaborators' attitudes about differences of opinion' (2004) 75 The Journal of Higher Education 556.

24 Hala Hadidi, David Kirby, 'University-industry collaboration in a factor-driven economy: The perspective of Egyptian industry' (2017) 31 Industry and Higher Education 195.

25 Mastercard Foundation, '2017-2018 Youth Think Tank Report: Harnessing the Potential of Hospitality and Tourism for Young People's Employment' [2018] Mastercard Foundation 1.

26 Emmanuel Olowononi, Ogechukwu Ikwuanusi, 'Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers' (2019) 5 KIU Journal of Social Sciences 31.

27 Stephanie McMahon, 'What law schools must change t what law schools must change to train transactional lawyers' (2022) 43 Pace Law Review 106.

28 Henry Etzkowitz, Loet Leydesdorff, 'The dynamics of innovation: from National Systems and "Mode 2" to a Triple Helix of university–industry–government relations' (2000) 29 Research Policy 109.

render advise. Because the law in itself is an inert abstraction until applied to human affairs, the lawyer will invariably fraternise with members of the medical field to personal injury cases or surrogacy-related disputes, the social worker to adoption cases, the politician with election or governance matters and village elders concerning customary law. This professional freedom and mandate makes the profession capable of importing lessons observed from members of different professional species and enriching scholarship and service delivery. [29] The external impetus for collaboration aside, within the profession itself, lawyers often come together to establish law firms and, even in sole practice, are constrained to engage their fellows hired by the opposing party. [30] It would then appear that collaboration in legal teaching comes naturally to the law teacher and the law school. Not so. The next portion explores the challenges of cooperation between HEIs that offer legal education.

2.03 Barriers to collaboration

Although a large body of research throws its weight behind the benefits of collaboration in HEIs, they often do not play out in practice, and when they do, have been observed to unravel quickly.[31] At the core of the problem is that most HEIs are not, from the get go, designed for collaboration. Apart from a passive nod in the mission statements of HEIs towards collaboration, nothing in the shape of resources, human, financial, time or otherwise are placed at the disposal of collaborative efforts. The culture of working within departmental silos and abiding by a hierarchical structure of administration snuffs out any hope of successful collaboration.[32] Public HEIs in Kenya have especially been blamed for a tedious and unfriendly bureaucratic practice repulsive to collaborative engagements.[33] At no time is this problem more apparent than in the 4th year dissertation writing exercise. Most students struggle with formulating a legal problem and even more with developing

29 Ronald Gilson, Robert Mnookin, 'Foreword: Business Lawyers and Value Creation for Clients' (1995) 74, Oregon Law Review 1.

30 Paul Brest, 'The responsibility of law schools: Educating lawyers as counselors and problem solvers' (1995) 58 Law and Contemporary Problems 5.

31 Adrianna Kezar, 'Redesigning for collaboration in learning initiatives: An examination of four highly collaborative campuses' (2006) 77 The Journal of Higher Education 804.

32 Ibid.

33 Kisilu Kombo, Minae Mwangi, 'Strengthening University Partnerships and Collaborations in Kenya: Strategies for Sustainability' (2018) 6 The Cradle of Knowledge: African Journal of Educational and Social Sciences Research 2617.

legal recommendations, owing to the straight jacket appreciation of the law.[34] And the problem invariably spills over into practice blinding the lawyer to the myriad of possible legal solutions and outcomes applicable in a legal context, perpetuating injustice.

Another usual anti-collaboration culprit is competitive individuality.[35] Unfriendly intervarsity competition aimed at outranking the other institution nibs out any potentials for collaborations. Internally, some members of staff have complained that the collaborations they have pursued are often exclusively taken up by the school, sidelining them from further contributions or benefits.[36]

Even when the requirement for collaboration has been prioritised, there appears to be a hurdling of teaching and research efforts within homogenous units. [37] Lawyers flock with their kind, prescribing their dose of legal recommendations, while economists stick together and develop economic solutions, often on dissimilar problems. [38] The social and cognitive proximities which make these collaborations easy and convenient serve, at the same time, to remove the possibility of arriving at wholesome solutions. And yet, the complexities of 21st-century problems cannot be solved by tunnel vision contributions.

Administrative opaqueness within the collaborative units is also not helpful to partnership efforts, sooner or later subverting any gains made. In Kenyan research on HEIs, over 67% of the interviewed faculty members admitted that they were not aware of the collaborations entered into by their institutions and could obviously therefore not advance these relationships.[39] Additionally, it

34 Solomon Munyao, Truphena Oduol, ''

35 Sandra Abegglen, Tom Burns, Sandra Sinfield, 'Editorial: Collaboration in higher education: Partnering with students, colleagues and external stakeholders' (2021) 18 Journal of University Teaching & Learning Practice 1.

36 Kisilu Kombo, Minae Mwangi, 'Strengthening university partnerships and collaborations in Kenya: Strategies for sustainability' (2018) 6 The Cradle of Knowledge: African Journal of Educational and Social Sciences Research 2617.

37 Adrianna Kezar, Jaime Lester, *Organizing Higher Education for Collaboration: A Guide for Campus Leaders* (Jossey-Bass 2009).

38 Jun Huang, Andrew Brown, 'Enabling collaborative work in higher education: An exploration of enhancing research collaborations within an institution' [2019] 50 The Journal of Research Administration,63.

39 Kisilu Kombo, Minae Mwangi, 'Strengthening university partnerships and collaborations in Kenya: Strategies for sustainability' (2018) 6 The Cradle of Knowledge: African Journal of Educational and Social Sciences Research 2617.

was discovered that over 60% of the universities participating in the research had no policy guidelines on partnerships. [40]

3.0 Designing an effective collaboration framework for legal education

3.01 Identifying the priorities for collaboration

As discussed above, collaboration in the provision of legal education portends manifold benefits to the students, faculty, HEIs, society and the nation at large. As a starting point, the law school needs to establish the outcomes to which it elects to apply itself, in line with its purpose for existence. Naturally, quality legal education would occupy the top slot, although the contours of what this means must be unpacked in individual contexts. Even then, themes such as industry relevance, digitization, internationalization, indigenization and sustainability are cross cutting. In addition, we argue that research, life skills and faculty capacitation, discussed in later portions of this paper, are of equal importance to teaching and learning and instrumental in the fulfilment of a law school's mandate.

3.02 Setting up for collaboration

With this appreciation, the first logical course to a law school ready for collaboration is to design structures that attract, encourage and retain collaborative efforts.[41] The starting point is to embed collaboration as a key strategy in legal education pervading all activities with which the school is involved. In order to move beyond the tokenism of paper appearance, the concept needs to be incarnated in speeches, meetings, budgets and timetables. [42] In order to get the faculty and students involved in collaborative efforts, some schools have charted novel ways of drilling in the reasons and benefits of the exercise including hosting events themed around collaboration, opening

40 Ibid.

41 Dan Denison, Stuart Hart, Joel Khan, 'From chimneys to cross-functional teams: Developing and validating a diagnostic model' (1996) 39 The Academy of Management Journal 1005.

42 Adrianna Kezar, 'Redesigning for collaboration within higher education institutions: An exploration into the developmental process' (2005) 46 Research in Higher Education 831.

up faculty meetings to faculty members of diverse schools and even using meals spaces to spur conversations around the topic. [43]

A strong internal collaborative culture will undoubtedly support external collaborative efforts. To this end and in keeping with the collaboration pyramid described in preceding portions of the paper, collaboration within the law school will go a long way in creating the necessary synergies upon which external partnerships can plug. In teaching and assessments for example the inculcation of employment law into a contract law draft, or the use of mooting in solving a tax dispute presents fertile interlinkages upon which scholarship, and research can undoubtedly thrive. Invitation of students into ongoing research projects by faculty improves the quality of legal writing and natures curiosity for research. Faculty wide research projects and legal aid sessions would also be invaluable avenues for creativity. Interdisciplinary collaborations within campus open the possibilities for wholesome and effective solutions to some of the societal problems, and tend to attract grants easier than mono-disciplinary applications. [44]

3.03 Seeking collaborations

Once the internal introspection and structure set up is complete, law schools can venture out to seek collaborations, with the benefit of being ready to consider any incoming collaborative advances. A well-resourced partnership office devoted to this enterprise would help screen potential partners against the institution's value system, value additions, historical performance and collaborative needs. To avoid bureaucratic strictures, individual faculty members and students should be allowed to pursue potential partnerships with the advice and support of the office. [45]

43 Adrianna Kezar, Jaime Lester, *Organizing Higher Education for Collaboration: A Guide for Campus Leaders* (Jossey-Bass 2009).

44 G. Gillard, S. Kemmis, L. Bartlett, 'Collaboration between two universities in course development' (1984) 3 Higher Education Research & Development 71.

45 Caroline Plewa, Pascale Quester, 'Key Drivers of University-Industry Relationships: The Role of Organizational Compatibility and Personal Experience' (2007) 21 Journal of Services Marketing 370.

3.04 Integrating the collaboration

Entering partnerships has been found to be relatively easier than maintaining them. In order for the collaborations to be successful, Rosabeth Kanter advocates for five levels of integration: strategic integration that requires for the top leaders of the collaborating parties to keep in touch on the progress of the collaboration; tactical integration which brings together the professionals to map out the project activities and timelines; operational integration for the daily or more frequent management, as needed, of the collaboration projects; interpersonal integration that allows for friendships beyond the specific project and create seedbeds for further collaboration and cultural integration, especially in international contexts to understand the not so subtle cultural nuances that have a tendency to breed conflict and mistrust.[46] In short, success in maintaining collaborations requires the involvement of various actors in the law school in order to create ownership and a system to regularly check in on the progress and solve any challenges.

4.0 The Centrality of Research in Legal Education

4.01 Calibrating the dearth in research

It is trite knowledge that Africa is not a strong player in research and development compared to other continents. Its contribution to the global body of knowledge is around one per cent. [47] Unsurprisingly, Africa also puts the least expenditure into research and development at 1.01% compared to Asia's contribution, at 45.7%.[48] Kenya's gross domestic expenditure on research and development relative to GDP is 0.79%.[49] Apart from inadequate public funding, a barrage of other reasons has been attributed to this disappointing trend. Bleeding out of researchers from Africa to countries which take research seriously; inadequate legislative gaps resulting in weak intellectual property

46 Rosabeth Kanter, 'Collaborative advantage: The art of alliances' [1994] Harvard Business Review 96.

47 Isaac Olufadewa, Miracle Adesina, Toluwase Ayorinde, 'From Africa to the World: Reimagining Africa's research capacity and culture in the global knowledge economy' (2020) 10 Journal of Global Health 1.

48 UNESCO, Are we using science for smarter development? (UNESCO 2021)

49 Isaac Olufadewa, Miracle Adesina, Toluwase Ayorinde, 'From Africa to the World: Reimagining Africa's research capacity and culture in the global knowledge economy' (2020) 10 Journal of Global Health 1.

protections; low wages for researchers, and a dearth of PhD holders.[50] While these form the usual excuses, the ideological problem is much more profound.

First, the construction of research as a means to an end. Research conducted by Africans has been observed to serve the purpose of career progression, academic achievement, or grant income. [51] The opportunity to publish in high-tier journals and invitation to major conferences are especially attractive.[52] The central goal of research as a tool to understand societal challenges and inform interventions is usually a by-product of the exercise. From this starting point, there is very little pressure to build quality or accurate research. The numerous volumes of undergraduate project works and dissertations, including Masters theses that only make it as far as the shelves of university libraries as mere evidences of degree attainment stand in testament. In some instances, even that evidence is faulty, given the vibrant project writing enterprise for hire by students. It is little wonder therefore that the disconnectedness of research from real life problems survives student life into work life. And because government and industry are full aware of the goings on, they look to foreign led research to base policies and decisions.

Second, because of this less than noble starting point, Africans are not eager to fund research. So, resort is sort elsewhere. It is indisputable that international agencies and governments have made a descent attempt at filling the research funding gap. However, the funding is usually directed at causes deemed important by the donor.[53] And there is often incongruence between what is important for the donor and what is priority for the HEI, partly because there is little data to back up what the recipient considers important. [54]

Third and tied to the second reason, overdependence on donor funding for research work from multiple sources creates a haphazard research outcome

50 Ibid.

51 Emma Chukwuemeka, et. al., 'Research and development in Africa: Addressing the elephantine problems' (2014) 4 Kuwait Chapter of Arabian Journal of Business and Management Review 46.

52 Damtew Teferra, 'The irrelevance of the re-configured definition of internationalisation to the Global South: Intention versus coercion' (2020) 7 International Journal of African Higher Education 157.

53 Gift Masaiti, Edward Mboyonga, 'Financing and resourcing international collaboration in African higher education: Beyond negotiated power between the global north and global south' (2022) 9 International Journal of African Higher Education 153.

54 Nico Cloete, Ian Bunting, Francois Van Schalkwyk, *Research Universities in Africa* (African Minds 2018).

where some projects are not seen through to their logical conclusion, or where the African contribution is not recognized.[55] Often also, the funding resembles a consultancy arrangement, because it is channeled through the individual applicant on the basis of their experience and skill as opposed to the cumulative research strength of the HEI.[56]

4.02 Making research relevant to legal education

The challenges outlined above, notwithstanding, serious research emphasis is critical for African HEIs in general, and Kenyan law schools in particularly. Because Africa represents the youngest and fastest growing population in the world[57], and shoulders 20% of the global disease burden, rule of thumb and conjecture decision-making has to be brought to an end. The diversity of the African continent and the impact of globalization and digitization obligate invigorated efforts at research. The law is already playing catch up to the rapidly evolving 21st century complexities including AI governance, bioethics, climate change regulation, space regulation and a host of other advancements.[58] On the African continent, there has been a tendency to copy-paste existing foreign frameworks, such as the General Data Protection Regulation into a context that has slightly different nuances.[59]

The inculcation of a research ethic within taught law units on here-and-now questions pervading local and international contexts is called for. Some of these questions arise naturally out of case law, such as the enduring quagmire of non-exploitative but non-consensual sexual intercourse between adolescents.[60] Within a contract law context, for example, the understandability of the expressway contract to a lay Kenyan or the implications of website cookie policies vis-a-vis the contract signature rule is fundamental. This way, legal research and writing is not relegated to the last year of school but becomes an

55 Ibid.

56 Nico Cloete, Ian Bunting, Francois Van Schalkwyk, *Research Universities in Africa* (African Minds 2018).

57 United Nations, World Population Prospectus 2022 (UN DESA/POP/2021/TR/NO. 3 2022)

58 Kristian Humble, 'Artificial Intelligence, International Law and the Race for Killer Robots in Modern Warfare' in Ales Zavrsnik, Katja Simoncic, *Artificial Intelligence, Social Harms and Human Rights* (Palgrave Macmillan 2023).

59 Susan Brokensha and Eduan Kotze and Burgert Senekal, *AI in and for Africa-A humanistic perspective* (Chapman& Hall/CRC 2023).

60 *Eliud Waweru Wambui v Republic* [2019] eKLR 102 of 2016 (Criminal Appeal).

ongoing exercise. Soon enough, law students will discover the inadequacy of the law in providing conclusive solutions to the problems under investigation. Hopefully, this will start the much-needed collaborations outside their discipline towards practical recommendations. By partnering with faculty members in their ongoing research projects, students will benefit from first-hand experience with research and, hopefully, the building of sufficient curiosity to elect legal research as an essential component of their practice.

Although the worth of collaboration relating to legal education has been canvassed generally, it bears repeating that collaboration in research portends great benefits for all concerned. Collaborations with industry in research will provide real life appreciation for Kenya's legal research priorities and the manner in which they relate to similar concerns outside of the borders. The final year dissertation will also hold meaning and be consumable in the market, on the basis of industry relevance, serving the added advantage of crafting a career path for the student in their area of interest.

As observed, African HEIs' primary motives regarding international research collaborations are financial or material gain. [61] This usually means that the collaborating partners are largely sourced from the Global North, where the intended collaborators are thought to be endowed with the scarcities with which African HEIs are fraught. A recent study found that the typical African HEI has a disproportionately longer list of partnerships with institutions in the Global North compared to their Global South counterparts.[62] In the field of legal studies, the audience of legal systems also plays an important factor in the choice of collaborator. That said, there is a growing South-South collaborative network worth exploring to generate new ideas and compare socio-economic conditions closer.[63]

61 Damtew Teferra, 'The irrelevance of the re-configured definition of internationalisation to the Global South: Intention versus coercion' (2020) 7 International Journal of African Higher Education 157.

62 Kisilu Kombo, Minae Mwangi, 'Strengthening university partnerships and collaborations in Kenya: Strategies for sustainability' (2018) 6 The Cradle of Knowledge: African Journal of Educational and Social Sciences Research 2617.

63 Abdoulaye Gueye, Edward Choi, Carolina Guzmán-Valenzuela, Gustavo Gregorutti, 'Global South Research Collaboration: A Comparative Perspective' (2022) 9 International Journal of African Higher Education 62.

5.0 Infusing Life Skills into the Legal Education

Even after the curriculum has been rigorously updated to cater to a multitude of legal concerns, numerous collaborations secured and the law student thoroughly schooled in the ways of 21st century law, success in legal education and the resultant legal career appear increasingly premised on other additional factors. From the very get go, the 1st year law student is adjusting to life in HEIs. At the same time as they are defining contract law, they are figuring out how to make friends, to live away from home, to make financial decisions and to build self-esteem and identity.[64] If these transitions are not managed well, the risk of dropping out or performing poorly becomes imminent.[65] And it is not just the 1st year law student who is struggling with life outside the class. Student dissatisfaction with academic performance, physical illness, drug and alcohol abuse, parent's divorce or separation, strained relationships and school fee challenges contribute significantly to student attrition rates.[66] In extreme cases, these challenges have even contributed to suicide ideation. Studies show that the African suicide rate is higher than the global average by 2 percentage points. [67] Within the continent, suicide is the second highest cause of death among the 15-29 age group, in which undergraduate students are situated.[68] Post school, going hand in hand with a rich legal understanding, empathy, time keeping, effective communication and other skills determine success in the field. It goes without saying that the technical components of the course must be matched with the life skills necessary for optimal schooling and subsequent legal practice.

64 Tulus Winarsunu et. al, 'Life skills training: Can it increases self-esteem and reduces student anxiety?' (2023) 9 Heliyon 1.

65 Solomon Omer, 'Social adjustment challenges of first-year students: Peer influence, misuse of freedom, ignorance of life skills management, living in anxiety and guilt' in Peter Aloka, Kananga Mukuna, *Handbook of Research on Coping Mechanisms for First-Year Students Transitioning to Higher Education* (IGI Global 2023).

66 Mark Kaggwa, 'Suicidal behaviours among Ugandan university students: A cross-sectional study' (2022) 22 BMC Psychiatry 1.

67 World Health Organization, one in 100 deaths is by suicide - WHO guidance to help the world reach the target of reducing suicide rate by 1/3 by 2030 (World Health Organization 2021)

68 World Health Organization, Suicide in the world: Global health estimates (World Health Organization 2019).

5.01 Defining Life Skills

The World Health Organization defines life skills as adjusting to life's challenges to maintain physical, mental and emotional well-being. [69] Five facets of life skills have been identified: decision-making, problem-solving, critical thinking, communication, and self-awareness. [70] In the legal profession, the characteristics primarily associated with soft skills include intrapersonal and interpersonal competencies such as practical problem-solving, stress management, self-confidence, initiative, optimism, interpersonal communication, ability to convey empathy to another, the ability to see a situation from another's perspective, teamwork, collaboration, client relations, business development and the like.[71]

Consequently, law schools worldwide are expanding their offerings beyond legal training to better prepare their students for the demands of the profession. Strathmore Law School, for instance, has undertaken a thorough review of the curriculum to identify the forces at play, both within and outside the profession, that are shaping the evolution of the field.[72] Through such curriculum reviews, legal educators are recognizing the opportunity to assist students in developing insights, attitudes, and skills essential to their personal wellbeing and capacity for learning. By enabling students to improve their personal lives, they are better equipped to succeed in their legal careers, serve society, and contribute to the global community.[73] This paper discusses four approaches law schools are able to do this.

5.02 Introduction of mindfulness in law schools

One way law schools are equipping their students with the skills necessary for success in their legal profession is by introducing mindfulness. Mindfulness has gained popularity because infusing mindfulness across the curriculum has

69 World Health Organization, Life skills education: Planning for research as an integral part of life skills education development, implementation and maintenance (mnf/psf/96.2 Rev 1 1996).

70 Randall Kiser, *Soft skills for the effective lawyer* (Cambridge University Press 2017).

71 Randal Kiser, 'Soft Skills for the Effective lawyer' (2017)6.

72 Strathmore University Guidelines for Curriculum Development and Management 2014 'in the development of curricula and review, the learning outcomes should be aligned to assessment and should include knowledge and understanding of the subject, cognitive skills, core professional skills, personal attitudes and generic skills' 'the curriculum review is based on feedback from the students, lecturers, external examiners, other academics, industry and the educational market analysis..' 4,5.

73 Peter Huang, 'Mindfulness in Legal Ethics and Professionalism' (2019) 48 Southwestern Law Review 401.

been seen to promote a deeper understanding of and engagement with course content.[74] For instance, the University of Miami School of Law offers a course on mindful ethics, which combines mindfulness and professional responsibility, to provide students with an innovative approach to legal ethics.[75] Research has suggested that embracing mindful ethics as a life skill and legal practice skill can help a lawyer avoid the ethical pitfalls of legal practice and maintain civility and professionalism. Jacobowitz[76] describes mindful ethics as the ability to provide an individual with the ability to 'entertain a thought without accepting it' and to modulate and channel emotions civilly towards a productive outcome.[77] Mindful ethics provides the students an engaged, interactive, interconnected learning experience that brings together professional responsibility readings, mindfulness discussions, and exercises, allowing deeper exploration and material absorption.[78]

In Psychology for Lawyers,[79] the authors explore the cognitive process involved in how lawyers perceive the world, formulate judgments, and make decisions. They also highlight the influence of cognitive biases and emotions on judgment and decision-making. By being aware of the underlying variables that affect judgment and decision making, lawyers can enhance their professional judgment and be more effective in school and in serving their clients.[80]

The history of legal education has played a significant role in shaping its current delivery, where the first aspiring lawyers served as apprentices in law offices to gain practical experience.[81] While this approach to legal training may have provided the practical experience that Aristotle valued, the apprenticeship

74 Maynard, B. R., Solís, M., & Miller, V. L. (2015). PROTOCOL: Mindfulness-Based Interventions for Improving Academic Achievement, Behavior and Socio-Emotional Functioning of Primary and Secondary Students: A Systematic Review [Review of PROTOCOL: Mindfulness-Based Interventions for Improving Academic Achievement, Behavior and Socio-Emotional Functioning of Primary and Secondary Students: A Systematic Review]. Campbell Systematic Reviews, 11(1), 1. The Campbell Collaboration. https://doi.org/10.1002/cl2.143

75 Miami School of Law, Mindfulness in Law Program

76 Jan Jacobowitz, Scott Rogers, 'Mindful ethics – A pedagogical and practical approach to teaching legal ethics, developing professional identity, and encouraging civility' (2014) 4 St Mary's Law Journal 198.

77 Ibid.

78 Ibid. 238.

79 Jean Sternlight, Jenniffer Robbennolt , 'Behavioral legal ethics' [2013] Scholarly Works 88.

80 Jan Jacobowitz, Scott Rogers, 'Mindful ethics – A pedagogical and practical approach to teaching legal ethics, developing professional identity, and encouraging civility' (2014) 4 St Mary's Law Journal 198.

81 A. Spencer, 'The law school: Critique in historical perspective' (2012) 69 Washington and Lee Law Review 1948.

lacked the instruction in knowledge and analytical skills that are the other components for developing practical wisdom, which translates into professional legal judgment. William Blackstone perceived the apprenticeship program to be deficient at that time. He noted that if a lawyer were not instructed in the elements and principles upon which the rule of practice was founded, he would be distracted and bewildered at any variation from established precedent.[82] In response to William Blackstone, law schools began to teach legal principles. They progressed into the late 90s without much regard for developing practical skills and knowledge from apprenticeship. There was also little regard for teaching ethics, which was not considered central to the curriculum. Principles of morality were either presupposed or too anti-intellectual for this type of law school study.[83] By 1895, the model of legal education, which emphasised the theoretical over the practical, prevailed in the 19th Century. In the late 19th Century, however, consistent calls came to include practical training and legal ethics in legal education from organisations such as the Carnegie Foundation and the American Bar Association (ABA).[84] The development of clinical education and other courses offering more practical experience followed suit.

In light of these developments, law school curriculum should prioritize transmitting the skills and values that complement doctrinal instruction, and students learn how to work like lawyers not just think like them.[85] To produce the kind of lawyer that the profession and the community requires, law schools must therefore provide a curriculum and pedagogy that equips their students to succeed in the profession.

5.03 Start teaching ethics in the early years of university

The reputation and confidence of a profession are assets that influence public perception and consumption of its services.[86] Lawyers have been subject to recurrent public scrutiny and criticism for centuries.[87] The legal academia has

82 A. Spencer, 'The law school: Critique in historical perspective' (2012) 69 Washington and Lee Law Review 1948.
83 Benjamin Madison, 'Professional identity formation-Legal education's early emphasis on character, the evisceration of this priority, and what the first law schools can teach us' [2013] SSRN 1.
84 Ibid.
85 Ibid
86 Daniel Oure, 'Towards a fair lawyers' disciplinary system in Kenya' [2013] University of Nairobi, 1.
87 "Sustainable Professionalism." n.d. Accessed January 2025. https://doi.org/10.60082/2817-

an opportunity to offer concrete actions to counteract this rhetoric through, according to legal ethics, the same level of attention given to other courses. Several law schools have recommended redesigning the ethics curriculum to place legal ethics at the centre of the curriculum. For instance, the Boalt Hall Law School at the University of California at Berkeley experimented with a three-year program introducing legal ethics into the first-year curriculum. While the faculty rejected the idea, the rationale was that introducing professional responsibility in the first year would counteract the adverse effects of law school's negative learning and promote social intuition development earlier.[88] Further, students are eager to be introduced to law and lawyering during the first year. They are emotionally prepared to accept and learn what is essential to being a lawyer.[89] Russell G. Pearce contends that what is included in the first-year courses sends an implicit message of what lawyers need to learn. The initial immersion in legal education determines what the students perceive as necessary in their training. As law has tremendous societal implications, it cannot be separated from ethics or treated purely as a science.[90] While questions remain about whether teaching ethics in law schools makes any difference, research shows that values are malleable in adulthood. Law school is when students' values undergo significant changes.[91] Developing ethics and personal responsibility during the initial years of legal education can help students maintain their ethical obligations to themselves and the community, preventing a downward slip towards unethical behaviour.[92]

5.04 Integrating experiential learning into legal studies

Experiential learning in law school is a pedagogical approach that integrates practical, hands-on experiences into the legal curriculum to develop students' professional skills and competencies.[93] It seeks to bridge the gap between theory and practice and to equip students with the knowledge and skills necessary

5069.1207.

88 Alan Lerner, 'Using our brains: What cognitive science and social psychology teach us about teaching law students to make ethical, professionally responsible, choices' (2004) 23 QLR 704.

89 Ibid

90 Russell Pearce, 'Teaching ethics seriously: legal ethics as the most important subject in law school' (1998) 29 Loy U Chi LJ 731.

91 Ibid.

92 Jerome Organ, David. Jaffe, Katherine. Bender, 'Suffering in silence: The survey of law student well-being and the reluctance of law students to seek help for substance use and mental health concerns' (2016) 66 Journal of Legal Education 116.

93 Cecilia Chan, *Assessment for Experiential Learning* (Routledge 2023). 1.

to function as practical and ethical legal professionals. Combining learning substantive law with experience in practice has persuaded many universities to intentionally increase opportunities for students to have more exposure to the operation of law in practice in their curricula, which has been shown to enhance professionalism and communication skills.[94] James Moliterno explained that in the evolution of teaching law, teaching would slowly move away from the scientific Langdellian approach to more collaboration with the public and private legal entities to better expose law students to the ethics and realities of legal practice. The experiential style of teaching has already begun through simulations and ordered apprenticeship for most students in Kenya through judicial attachments and clinicals. For instance, a mandatory six-week attachment at a law court in Kenya has become integral to legal education, allowing students to gain insights into courtroom procedures and legal practice.[95]

The Legal Education Act prescribes the minimum core units a law university must offer at undergraduate level.[96] Kenyan law schools may offer any other program they consider necessary, considering the developments in the law and the society.[97] It can be inferred that the responsibility of devising and implementing experiential learning and training programs within the legal education system rests upon individual law schools, while adhering to the quality benchmarks established by the Council of Legal Education.[98] While, this presents a valuable opportunity for law schools to devise and introduce innovative and tailored approaches to integrating experiential learning within their curricula, uniformity in experiential learning will vary, depending on the institutional support of the law school.[99]

Several suggestions can be made to enhance the provision of well-rounded experiential learning opportunities. Firstly, pooling training resources to finance comprehensive skills and ethics development programs could be a

94 Juliet Turner, Alison Bone, Jeanette Ashton, 'Reasons why law students should have access to learning law through a skills-based approach' (2018) 52. Law Teacher 1.
95 https://judiciary.go.ke/careers/
96 Section 24, The Legal Education Act, 2012, Acts No. 27
97 Section 24, The Legal Education Act, 2012, Acts No. 27
98 Section 23, The Legal Education Act, 2012, Act No.27
99 Emily Sitati, 'Quality assurance in higher education. A case of legal education and training in Kenya' (2017) 22 IOSR Journal of Humanities and Social Science 44.

viable approach towards better preparing law students to face the challenges of practice and ethical dilemmas. Additionally, it is recommended to benchmark with other law schools globally, which have successfully incorporated experiential learning into their curriculum through clinical programs, pro-bono opportunities, externships, and client counseling. These measures would significantly contribute to the advancement of legal education, equipping students with the necessary practical skills and ethical values required for their professional growth and success.[100]

5.05 Introducing life skill programs

There is a growing recognition among law schools that they have the potential to bring positive change by assisting their students in managing the various challenges they may face during their academic journey.[101] This includes instances where students may struggle to maintain their initial motivation and purpose for attending law school or experience setbacks that diminish their confidence and well-being. Through the implementation of targeted support systems and interventions, law schools can provide their students with the necessary resources and guidance to help them navigate such challenges and, ultimately, enable them to excel and flourish in their legal careers. Research has indicated that legal education can have significant implications for the mental well-being of law students, as evidenced by the outcomes of various surveys conducted in this regard.[102]

The existing literature highlights a concerning prevalence of mental health disorders and related issues among law students, which can have lasting impacts on their professional careers.[103] Observations from the report indicate that the legal education system tends to promote values of rationality, adversarialism, competition, and isolation, potentially leading students to prioritize financially rewarding goals over altruistic pursuits. The emphasis placed on professionalism

100 Victor Quintanilla, Sam Erman, 'Mindsets in Legal Education' (2020) 69 Journal of Legal Education 412.

101 Digvijay Singh Bagga, Ravneet Chawla, 'Legal Education- The Elevation from a Person to a Citizen' (2019) Research Association for Interdisciplinary Studies 101.

102 Natalie Skeade, Shane Rogers, Rupert Johnston,'The role of place, people and perception in law student well-being' (2020) 73 International Journal of Law and Psychiatry 101631.

103 Matthew Dammeyer, Narina Nunez, 'Anxiety and depression among law students: Current knowledge and future directions' (1999) 23 Law and Human Behaviour 55.

and civility in contemporary law schools has been criticized as a form of institutional denial, as it may be unrealistic to expect lawyers suffering from mental health issues to demonstrate exemplary behavior, regardless of their academic training.[104] Moreover, faculty members may not possess adequate training or expertise to address these concerns effectively, given their similar experiences during their own legal education.

According to landmark studies on human well-being and goals, extrinsic motivations such as those prioritising monetary gain, power, and reputation may not contribute to a fulfilling life and can instead undermine it.[105] Such goals, deeply ingrained in many law schools and firms' cultures, may decrease well-being, meaning, and personal integration. On the other hand, individuals whose primary goals involve intrinsic aspirations, such as personal growth, intimacy, and community integration, tend to experience more significant meaning, personal and social integration, and overall well-being.[106] The evaluation findings suggest that law teachers must explore innovative approaches to prevent their students' declining happiness, psychological health, and social consciousness, either by reconsidering traditional teaching methods or dedicating additional resources and time to address these issues proactively.[107]

Institutionalized mentorship is recognized as an efficient tool for fostering the professional and personal growth of law students. It involves pairing of lecturers or industry mentors who serve as mentors. The benefits of institutionalized mentorship in law schools are numerous, but it is worth noting that such programs are not yet commonplace in Kenyan universities and depend largely on the availability of mentors and institutional support for their implementation.

A deliberate system of integrating life skill program is demonstrated by Strathmore Business School, which offers a mandatory four-year program

104 Peter Huang, 'Mindfulness in Legal Ethics and Professionalism' (2019) 48 Southwestern Law Review 401.

105 Lawrence Krieger, 'Institutional denial about the dark side of law school, and fresh empirical guidance for constructively breaking the silence' (2002) 52 Journal of Legal Education 112.

106 Tim Kasser, Richard Ryan, 'Further examining the American dream: Differential correlates of intrinsic and extrinsic goals' (1996) 22 Personality Social Psychology Bulletin 280.

107 Ibid.

called the *Maisha Program*. It is a core university program but separate from the main bachelor's degree. The *Maisha program* is designed to help undergraduates understand and navigate important aspects of their lives as they come into adulthood, such as professional vocation, dating, marriage, and the meaning of life. The program equips young participants with soft skills to analyze their reality and make pertinent decisions. The program aims to help students gain skills, knowledge, and dispositions to manage themselves and relationships, think critically, develop social and emotional intelligence, make responsible decisions, and appreciate how to shape their personality. The program spans four years and has different sessions that cover various topics, including projecting the unfolding future, professions and dilemmas, maturity and self-esteem, emotional life and intelligence, married love, work-life balance, and more.[108] The students' feedback has shown that *The Maisha program* is useful, and many report that it has helped prepare them for adulthood and enabled them to build and maintain a healthy social network that goes beyond their university years. During a recent curriculum review meeting, the faculty expressed enthusiastic support for the inclusion of the Maisha Program in the law curriculum, in response to the program receiving predominantly positive reviews.

5.06 Promoting intrinsic motivation among law students

It is important for law schools to consider how they can foster experiences of authenticity, relatedness, competence, self-esteem, and security, to promote intrinsic motivation among law students. This requires a shift away from promoting extrinsic motivations, such as the desire for money, power, status, and image, and towards promoting optimal human values, such as personal growth, intimacy, community enhancement, and altruism. Krieger,[109] suggests that law teachers should have the confidence to discuss these topics with students, reflecting on their own experiences of fundamental needs, internal motivations, and intrinsic goal pursuits. Without sharing personal reflections of the teacher's internal motivations, the student cannot be motivated.

108 https://sbs.strathmore.edu/maisha-for-emerging-young-professionals/#
109 Ibid

The law schools can also support intrinsic motivation in their students by sharing research findings with students and encouraging them to make informed choices about priorities, career directions, and time management. Griswold similarly argues that legal educators have an obligation to broaden their message beyond institutional service missions and to include scientific research related to the health, happiness, and life satisfaction of law students.[110]

One way to encourage dialogue about these topics is through the sharing of personal experiences in the classroom.[111] Professor Melissa Marlow notes that this is still a relatively rare occurrence, but that students often respond positively when lecturers share their thoughts on improving legal writing, fulfilling life as a lawyer, and living life well. Krieger also suggests several strategies for working with students, including curricular integration and faculty workshops aimed at raising awareness about student well-being. Rather than relegating discussions of well-being to extracurricular programs or orientation meetings, law schools should embed solutions for student well-being directly into their curricula.[112]

Treating students' engagement, learning, and well-being as interconnected and improvable requires a concerted effort by law schools to prioritise their students' mental health and well-being.[113]

6.0 Training of Law Teachers

We have put up a robust raft of recommendations aimed at the wholesome preparation of law students to tackle the law and the life realities that accompanying its scholarship and practice. At the center of this invigorated system of legal education is the law teacher, who is expected to deliver quality legal education, monitor and mentor students, supervise dissertations, conduct research and attract grant funding. Needless to say, for the teacher to be effective, there needs to be constant upskilling, especially within the current climate of multitudinous e-learning platforms.[114] Chat GP is a quick example in this

110 Lawrence Krieger, 'Institutional denial about the dark side of law school, and fresh empirical guidance for constructively breaking the silence' (2002) 52 Journal of Legal Education 112.
111 Brian Clarke, 'Coming out in the classroom: Law professors, law students and depression' (2015) 64 Journal of Legal Education 403.
112 Ibid.
113 Ibid 128.
114 Raymond Brescia, 'Teaching to the tech: Law schools and the duty of technology competence' (2023)

regard, requiring the teacher to go beyond hackneyed assessment questions and methodologies into real-life applications of the law.[115] It is essential that law teachers possess the ability to relate class lessons to the students' life experiences to provide a compelling and effective learning experience.[116] Experience in the academy has shown that a tough but important endeavor is in preserving the enthusiasm of students right from the first year.[117] Practitioners and students have confessed to having lost interest, and their integrity and idealism in law school being dampened.[118]

Part of the problem is that where the institutions provide in-house faculty development, participation is often voluntary. Junior law teachers are usually discouraged from experimenting with learning technologies for fear of detracting from their research. Increasing adjunct or contract faculty use exacerbates the problem, as local universities are reluctant to invest in training individuals who may leave and take their skills to a competitor. Pedagogical knowledge, encompassing teachers' specialised knowledge for creating effective teaching and learning environments, is increasingly recognised as a critical component of practical legal education.[119]

He requires teachers to employ various methods to accommodate students with different learning styles and abilities instead of dismissing them as lazy. Even excellent, experienced, and passionate law teachers are challenged by the large size of most doctrinal classrooms. Law teachers often become dominant to save time. A one-size-fits-all approach to teaching becomes problematic as it fails to accommodate students' diverse learning styles.[120] As such, the curtains are closing on the role of the teacher as a stage, ushering in a new era of teacher-guides who teach and learn alongside the student.[121]

62 Washburn Law Journal 1.

115 Tammy Oltz, 'Chat GPT, Professor of law' [2023] SSRN 1.

116 Lawrence Krieger, 'Institutional denial about the dark side of law school, and fresh empirical guidance for constructively breaking the silence' (2002) 52 Journal of Legal Education 112.

117 Ibid.

118 Lawrence Krieger, 'The inseparability of professionalism and personal satisfaction: perspectives on values, integrity and happiness' (2005) 11 Clinical Law Review 425.

119 "Analysis of Pedagogical Content Knowledge on Students of Science Education as Pre-Service Teachers in Madura Secondary School." n.d. Accessed January 2025. https://doi.org/10.1088/1755-1315/747/1/012108.

120 Paul Ramsden, *Learning to Teach in Higher Education* (RoutledgeFalmer 2003).

121 Charles Morisson, 'From 'sage on stage' to 'guide on the side': A good start' (2014) 8 International Journal for the Scholarship of Teaching and Learning 1.

One way law teachers could be encouraged to improve their teaching is by a system. Rewards teaching excellence.[122] Excellence in teaching should be measured by methodologies that prioritise student well-being, practical skills, and experiential learning rather than relying solely on traditional lectures. Faculty who implement innovative teaching strategies should be recognised and rewarded.[123] Law schools should offer intrinsic and extrinsic incentives to encourage excellence, including salary increases, awards, course releases, and professional development opportunities.[124] Aligning rewards with meaningful teaching measures fosters an academic culture that values and supports high-quality legal education.

Secondly, universities can leverage the technology-support units that emerged during the COVID-19 lockdown by providing continuous blended and online learning training. These units, initially established to facilitate emergency remote learning, have since expanded their roles to support developing and implementing advanced digital pedagogies. As institutions increasingly integrate technology into their teaching strategies, these departments now serve as key drivers of innovation, providing faculty with the necessary tools, training, and resources to enhance online and hybrid learning experiences.

Thirdly, peer mentoring should be encouraged, especially for non-specialist law teachers who could benefit from the guidance of more experienced colleagues. In summary, it is imperative that law teachers are trained to use effective teaching methods and incorporate emerging technologies into their classrooms. This will allow them to accommodate the diverse learning styles and abilities of their students, and better prepare them for the demands of the legal profession in the digital age and the future of law.

7.0 Conclusion

In conclusion, legal education in Kenya faces a daunting task of ensuring that its graduates are not only technically competent but also have the necessary

122 Guarding Our Identities: The Dilemma of Transformation in the Legal Academy. (n.d.). https://doi.org/10.5204/qutlr.v14i1.512

123 "Guarding Our Identities: The Dilemma of Transformation in the Legal Academy." n.d. Accessed January 2025. https://doi.org/10.5204/qutlr.v14i1.512.

124 "Motivators and Inhibitors for University Faculty in Distance and E-learning." n.d. Accessed January 2025. https://doi.org/10.1111/j.1467-8535.2008.00845.x.

skills to practice law in a manner that is just and equitable. The paper has argued that this requires a multifaceted approach that involves collaboration between law faculties in Kenya and practitioners, the infusion of life skills in legal teaching, research geared towards legal entrepreneurship, and innovation within a climate of interdisciplinary collaboration, and teacher training focused on teaching rather than just the law. It is hoped that by implementing these recommendations, legal education in Kenya will be transformed, and the country will produce lawyers who are not only technically competent but also have the necessary skills to promote justice and equity for all.

VISION, VALUES AND VIRTUES:
A Look at Justice, Ethics and the Lawyer's Preferential Option

Charles Kanjama[1*]

Ethics is doing more than the law requires and less than the law allows. – Michael Josephson [2]

Abstract

The legal profession is a technical practice, and a moral enterprise rooted in justice, ethics, and social responsibility. This article examines the intersection of vision, values, and virtues in shaping the role of lawyers in contemporary society. It explores how legal practitioners navigate ethical dilemmas, uphold justice, and exercise their preferential option for the marginalized. Drawing from philosophical, moral, and legal perspectives, the discussion highlights the lawyer's duty to foster fairness, integrity, and societal well-being beyond mere legal compliance. Justice, as a foundational legal principle, demands impartiality and equity, while ethics provides the moral compass guiding legal practice. Honesty, diligence, and empathy shape a lawyer's professional conduct and influence decision-making in complex cases. The article further interrogates whether lawyers are merely neutral agents or moral actors obligated to champion the rights of the disadvantaged. Case studies on public interest litigation and human rights advocacy illustrate how legal professionals can embody ethical leadership. Ultimately, the paper argues that the legal profession must balance legal expertise with moral responsibility. A lawyer's preferential option for justice requires a commitment to ethical practice, ensuring that legal systems serve both individual clients and the broader society equitably. This reflection contributes to the discourse on legal ethics, emphasizing the role of values and virtues in sustaining a just legal order.

Keywords: *Legal Ethics, Justice and Morality, Lawyer's Duty, Professional Responsibility, Virtue in Law*

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2 https://www.azquotes.com/author/20059-Michael_Josephson

1.0 Introduction

Like any other profession, the legal profession is of great honor. Legal professionals must conduct themselves honorably, provide proper assistance to the court in a responsible manner, and foster public trust in the legal system. They are also obligated and expected to conduct themselves with decency and integrity when performing their duties with other legal professionals. In addition to being professionals, advocates serve as officers of the court and are essential to the administration of justice.[3]

Nevertheless, there has been widespread discontent with advocates inside and outside the profession. [4]Reputable observers in the profession contend that the "wise-counselor" or "lawyer- statesman" impression to which advocates originally aspired has been displaced. This has in turn led to the decline of the ethical standard of law as practiced today.

Several factors have been identified as contributing to this ethical degradation. Some of them include competitive pressures among lawyers for legal work, immense pressure to record more billable hours, increased opportunities for significant profits and fear of financial failure. All of these issues result in or demonstrate a focus on maximizing financial gain rather than improving humanity.

The question that then arises is, can there be ethical lawyers who contend to the "wise-counselor" or "lawyer-statesman" ideal? This article seeks to demystify the place of ethics in legal practice and in the same breadth, affirm and underpin the cardinal principles and strong value system for any successful legal professional and most importantly unify the legal profession relationship within the human society.

2.0 Vision, Values and Virtues

Vision, values, and virtues are interconnected, and often, it might be challenging to distinguish one from the other completely. Vision is concerned

3 S and others, "Professional Ethics in Law" (*iPleaders* January 28, 2022) https://blog.ipleaders.in/professional-ethics-law/#_ftn1 accessed November 10, 2022.

4 James W Perkins, 'Virtues and the Lawyer' (2003) 38(3) The Catholic Lawyer https://scholarship.law.stjohns.edu/tcl/vol38/iss3/4/ accessed 17 February 2025.

with the future an organization or individual seeks to create. It lays down the goals, purpose, and objectives. Values are standards that form the basis of an ethical and/or moral compass that guides behavior. Virtues are qualities of the mind, the will, and the heart that instill strength in character and personality stability. Virtues are simply good habits or dispositions. In summary, the vision is the destination. It paints a picture of the result and not the process of achieving success.[5] Values provide the required approach or methodology for one's choices and deeds. They characterize an individual's day-to-day operations as they work towards realizing their vision. Subsequently, values and virtues influence each other. Our daily habits reflect our values or ideals and our purpose. This interconnection of the vision, values and virtues is vital in demystifying the place of legal ethics in the legal profession.

2.01 Vision

From a teleological perspective, legal ethics involves recognizing that man and society exist for a purpose. Man aims to attain a social and transcendent good. He seeks immediate, mediate, and transcendent good and attains happiness when he achieves what is truly good.[6]

In recent decades, the visage and profile of the legal profession have dramatically varied. To begin with, the increasing number of graduating law students has undoubtedly led to an influx of legal practitioners in today's society. Consequently, a habitual sense of entitlement has been cultivated with increased conviction that all wrongs should be remedied or redressed through the courts. Regrettably, this belief system has occasioned a significant wound to our legal system's prestige and justice.

Secondly, with the increased population of legal practitioners, large firms and monetary considerations have subjugated the legal enterprise. Many young lawyers have developed a distaste for contemporary legal practice, with many believing it to be mercantile, leading to chunk and tedious work, long hours of work, and often involving questionable ethical decisions. However, many law

5 Stoner JL, 'The Key to Visions That Work - Jesse Lyn Stoner' (*Seapoint Center for Collaborative Leadership* December 29, 2016) <https://seapointcenter.com/vision-statements/> accessed November 24, 2022.

6 Kanjama C, *Freedom and Decency*: *A Legal Comment*, (Law Africa Publishing Ltd,2004).

graduates still seek employment opportunities in large law firms attracted by the earnings drawn. Additionally, usually, brilliant young legal minds swiftly transition to the teaching of law devoid of professional experience or very little knowledge. Even though they become teachers of the coming generation of legal practitioners, they have minimal experience in the active practice of law.

In light of the foregoing changes, the path and course of public interest have significantly been impacted. This shift has prompted inquiries into the evolving landscape of the legal profession and whether it has lost sight of its original vision.

Indeed, it is the role of legal professionals to take reasonable steps to create a new, wholesome vision for the legal profession. As Joseph A. Califano, Jr. stated in his keynote address at the District of Columbia Bar's Annual 1997 Mid-Year Conference,

> We lawyers must get our house in order. We must do so not simply out of self-interest and desire for societal status and prestige. We must do so because, in a turbulent democracy, lawyers are key to nourishing freedom and protecting it when it is threatened. Lawyers are responsible for crafting ways for individuals to perceive and receive justice in a society threatening to swallow citizens in more extensive and impersonal government and corporate and union bureaucracies. Lawyers are key to prosecuting criminals and protecting law-abiding citizens.

From this perspective, it can be reasonably inferred that a legal practitioner's vision is achieving justice in society. As doctors of human relationships, their spirited efforts towards building a just society posit the epitome of meaningful correlation within the human family.

2.02 Values

"Values motivate, morals and ethics constrain." Simply put, values describe what is essential in a person's life, while ethics and morals prescribe what is or is not considered appropriate behaviour in living one's life. Values elucidate

the individual qualities that guide the actions of human society, the people we want to become, the status of treatment we accord to others and ourselves, and generally, the nature of our interaction and conduct with the surrounding community. In a narrow sense, values are good, desirable, or worthwhile. They describe the intent of acts of purpose.

Today's characteristic behaviour is the belief that "The End Justifies the Means." This belief suggests that people's actions, whether moral or not, are justified if they achieve their desired result. The origins of that phrase date back to consequentialism, a normative ethical theory that posits that the moral quality of an action is entirely determined by its consequences.

However, in the profound words of Mahatma Gandhi,

> If I want to deprive you of your watch, I shall certainly have to fight for it; if I want to buy your watch, I shall have to pay for it; and if I want a gift, I shall have to plead for it; and, according to the means I employ, the watch is stolen property, my property, or a donation. Thus, we see three different results from three different means. Will you still say that the means do not matter?

The above quote attests that the means through which we achieve our outcomes are as necessary as the outcomes themselves. For several reasons, one must be intentional about the result of one's actions and how one goes about it. I will enumerate it threefold. First, it bears a mark on one's character. As one journey towards their desired goals and purpose, they build character. For us as human beings in the first instance, and secondly, as lawyers, the foundation of our lives is our character. Remember, the depth of its foundation determines the height of a building. As one goes through that journey, one must build character by intentionally doing ethically and morally right things. Second, learning happens in the process. Life is a process, and as one goes through life, one learns what will eventually shape one's decisions and actions. As one goes through this learning process, one should not get too fixated on the results and forget one's values. One should always remember that life is a learning curve; therefore, one should not sacrifice one's values or cut corners and trust the process. Third, one's decisions affect other people. As individuals, the decisions

we make not only affect us but invariably affect us. The people around us and our future generation. I understand that making the right choices can be difficult, but we must remember that making those choices would positively affect everything and everyone around us. Hence, before embarking on any action or decision, commit to ensuring that your "Means Justify the End."

It is reasonable to conclude that the success of any legal practice is mainly dependent on our character. Nature does not force us but sticks with our character. In our province, we strengthen, mold, and shape our character, achieving Bennis's centeredness, congruity, and balance. Through the practice of moral-ethical human values, a character leaves an indelible imprint on our habits, which subsequently ceases to dominate our personality.

2.03 Virtues

Virtues are good habits. Human virtues are firm attitudes, stable dispositions, habitual perfections of intellect and will that govern our actions, order our passions, and guide our conduct according to reason and faith. They make ease, self-mastery, and joy possible in leading a morally good life. The virtuous man is the one who freely practices the good.

Once people determine their true individual good, they can pursue it. The good may be easy or difficult. However, an individual must learn to seek the good regardless of the immediate cost. This habitual pursuit of the individual good, Aristotle called it virtue. Virtues or good habits are, therefore, the primary goals of the individual and the roadmap to happiness.[7]

Every lawyer needs to acquire the skills of dispatch, order, and thoroughness. A legal scholar or practitioner with forethought and prudence of admirable intensity ought to proceed to make all the necessary arrangements to ensure the success of the legal enterprise.[8] Every movement is to be marked with great caution. When entrusted with the responsibilities of being the custodian of justice and human relationships to an individual, the question arises as to

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8 Alasdair C Macintyre, *After Virtue: A Study in Moral Theory* (Bloomsbury 2014).

whether one is honest, faithful, and industrious despite his accomplishments.[9] Without these qualifications, he is utterly unfit for any position of trust, such as advocating for people's rights or counseling to harmonize societal relationships.

When practiced progressively, virtues enhance the capacity to act. In his book Virtual Leadership, Alexander Harvard discusses four main cardinal virtues, as Plato defined justice: self-control, prudence, and courage. He expounds on prudence as the ability to make the right decisions. Courage is the ability to stay on course and resist pressures of all kinds. Self-control is the ability to subordinate passions. of The spirit to enable the fulfilment of the mission at hand. Justice is the duty to give every individual his due. Virtues do not replace professional competence but are part and parcel of it and substantially so.[10] For instance, a consultant who lacks prudence may find it difficult to give clients sound advice. A legal practitioner who lacks courage loses his ability to lead in the face of opposition when cardinal virtues are at stake or face the threat of violation. Therefore, professional competence includes the capacity to use knowledge possessed well for some fruitful purpose other than mere possession.

3.0 Nature of the Legal Profession and its Calling

A calling is a bid inviting one to a lifetime mission. The legal profession calls for faithfully representing and counselling clients and/or the general public. It also involves service to academia with research and advancement of the law towards a newer level of justice and equal service to the bar for colleague lawyers. The legal profession is more than a mere profession; it is a service.[11]

A few examples suffice to fortify this assertion. The practice of law involves representing a variety of clientele, ranging from families to colleagues, and assisting them in working towards amicable conflict resolution. It may sometimes mean helping clients build harmonious relationships to enhance societal relations. Secondly, in teaching, the unique calling translates to teaching law students the best mechanisms of serving clients needing a healing

9 Nietzsche F, *Beyond Good and Evil,(* Start Publishing LLC ,1887).
10 Harvard A, *Virtuous Leadership: An Agenda for Personal Excellence*, (Scepter Publishers,2007).
11 Khom M, Law is more than a Profession, Regent University (2009).

salve, offering wise counsel to enable informed decision-making, and playing the role of an advocate in circumstances of breakdown in negotiations. The significance of this translates into well-groomed future lawyers and competent practitioners who have undergone legal training, hence changing the terrain of the legal landscape.

Legal professionals have had similar experiences where they found a calling to 'do right, seek justice, defend the oppressed, take up the cause of the fatherless and plead the case of the widow.' Insofar as such a calling inspires the work of passionate advocacy, legal professionals can reduce their risk of falling into a state of "ethical winter" or "hibernation of the soul" that may result in self-contempt or cynicism.[12] Nonetheless, when the law is treated as a money-making machine, legal professionals are subject to forgetting that the 'law is rooted in something bigger than the people who hand it down and that law is rooted in history and the moral order of the universe.'13 Legal professionals should view their daily work as a calling. They aim to build, rebuild, secure, and cure human relationships and surpass fluctuating material rewards.[14]

3.01 Nobility/ Vocation.

After attending the legal training, every young lawyer is ushered into the fraternity of legal practice with the opening statement, 'Welcome to this noble profession'. The question arises: why is the legal profession considered a noble profession? Justice Lyer Krishnaswamy, in his book Professional Conduct and Advocacy, refers to the legal profession as 'the most brilliant and attractive of peaceful professions, with responsibilities both inside and outside it, which no person carrying on any other profession has to shoulder'.

In addressing the aspect of legal practice, Justice Lyer says, 'An advocate has to deal with the greatest possible variety of human relations and has his mettle constantly tried from every direction. For the same reason, an advocate earns

12 Robert F Blomquist, 'The Pragmatically Virtuous Lawyer?' (2009) 15 Widener L Rev 93.

13 Harold J. Berman, *The Crisis of Legal Education in America*, *in* Faith & Order: The Reconciliation of law & Religion (Atlanta Scholars Press) (1993)

14 Jacqueline Nolan-Haley, *Finding Interior Peace in the Ordinary Practice of Law: Wisdom from the Spiritual*

great social distinction, which should not be misused at any cost.'[15] In reality, he underscores that the underlying duty in the legal profession is service to society, akin to that of a medical practitioner whose aim is to protect citizens from social ills and pervasion. The law serves to preserve moral ties that are binding to society. For the sole purpose of acting as an upholder and protector of the rule of law in society, it suffices to be considered a noble profession. Anybody engaged in the legal profession is involved in a service organisation. The essence of this statement was well captured by Roscoe Pound in his work when he stated, 'Historically, there are three ideas involved in a profession: organisation, learning, and a spirit of public service. These are essential. The remaining idea of gaining a livelihood is incidental.' Since legal disputes are constituents of legal change, lawyers are considered social engineers who introduce social development and social change.

The relentless efforts exerted by the legal fraternity and commitment to safeguarding society's moral ideals underscore the nobility of the legal profession. This has been enhanced by the vigorous pursuit of the rule of law reflected in court decisions and other areas where the pursuit of justice and morality has considerably impacted. societal values. All justice system stakeholders, including lawyers and judges, work together hand in glove. They are strengthened, inspired, enriched, and guided by concepts of good conscience, justice, and equity to discharge their obligations to society with utmost integrity and sincerity. The work of dispensing justice is not a solemn duty bestowed only upon the Judiciary but also upon the Bar, and in equal breadth.

3.02 Goal/ Purpose

In a strict sense, the goal of the law has been declared to be justice for many centuries. Justice entails giving each individual what they deserve or, in more traditional terms, "justice is the constant and perpetual desire to give to each one that to which he is entitled." This definition comes from Ulpian, a Roman jurisconsult from the second century AD. It appears in the Institutes of Justinian, a sixth-century codification of Roman law. It may also be defined as the ethical and philosophical idea that people are to be treated impartially,

15 KV Krishnaswamy Iyer, Professional Conduct and Advocacy (2nd edn, Madras Bar Council 1945).

somewhat, correctly, and reasonably by the law and by arbiters of the law. Laws ensure that no harm befalls another and that, where harm is alleged, both the accuser and the accused receive a morally right consequence merited by their actions.[16]

Publius Iuventius Celsus, a Roman Lawyer from the second century AD, made a profound statement about the objective of law. He made it in Latin: ius est ars boni et aequi, which is translated as 'The law is the art of goodness and equity.' That is, The law aims to determine what is fair and equitable and what is just. This implies that unless the law becomes an object or device through which justice is obtained, it has no reason for existence. There is a possible historical demonstration that without justice being the law's end goal, it would never exist. It is all very well to speak of law as the technique of justice or justice as the goal of law, but it would be just as correct to turn the phrase upside down. This would then say that justice is not merely the goal and result of law, but it is the source. This means that it enters every stage of the operation of law and at the final stage when it becomes a test for determining whether the operation has successfully produced law.[17]

3.03 Law as Practice and Business

The issue of whether law is a business or a profession has been debated for decades. The legal profession refers to lawyers' training, licensure, ethical responsibilities, client obligations, and other practice-related matters. The profession is about the zealous, ethical representation of individual clients. Lawyers also enter into a social compact to represent society by defending the rule of law. Similarly, the legal profession can be viewed as a business enterprise. It involves the financial returns in exchange for work done. Economic gain is the ultimate measure of the value of services rendered. The business angle of legal practice is paramount since it is the basal instrument for sustainability in law practice; therefore, if one is a legal Puritan, a proper balance must be established between offering legal services- practice and sustainability of the legal enterprise.

16 Wex Definition, Cornel Law School, Legal Information Institute, New York.

17 Ishita Jannat, *Ethics for Legal Profession* (2020) https://www.researchgate.net/publication/345226911_Ethics_for_legal_profession accessed 17 February 2025.

3.04 Role of Ethics and Morality in Legal Practice

Ethics refers to values and principles responsible for regulating a profession, such as the legal profession, in consonance with the laws and rules of conduct. Ethics provides Practical guidelines for legal practitioners enable them to comprehend the significance of adhering to high moral and professional standard practices while being accurate and remaining faithful to their duties in society. A few pillars that encompass ethical standards in the legal profession include a lawyer's responsibilities to various entities, including client relationships, competence, and access to justice. There are several reasons why ethical practice and standards need to be maintained in the practice of law. I will identify three prepositions. To begin with, ethics establishes access to justice by the members of a society and equally ensures upholding of the rule of law. Should the legal practitioners fail to adhere to rules of professional conduct, promote fairness and undermine the course of justice and equity, they bring the legal profession into disrepute, thereby hindering access to justice. To this extent, legal practitioners have a broader and far more exceedingly greater duty to protect individual freedoms and rights, upholding the rule of law and protecting from vast abuse of rights in society.

Additionally, ethics enhances and endows the reputation of the practice of law. Since a profession's collective reputation is crucial to the confidence it inspires, the reputation of the legal profession is linked to how the public views the administration of justice. Where there is no public confidence in the legal profession, trust in the justice system is undermined.[18] Finally, ethics enhances accountability and enforceability. To achieve accountability, it is also essential to ensure that rules of ethics, once developed, are publicized amongst the legal profession and the public. To ensure enforceability, disciplinary measures must be established to enhance compliance. We live in an era characterized by rudimentary ethical practices. Provable science and emotive philosophy have transcended to become the standard measurement of moral truth. The distinction between wrong and right has been widened to the extent that the perpetrators of guilt and crime attract and successfully gain more sympathy than the actual victims. However, lawyers must adhere to ethical standards, including dignity, honesty, and independence. They must navigate potential

18 Christoffel H van Zyl: Legal Ethics, Rules of Conduct and the Moral Compass, *Potchefstroom Electronic Law Journal* (2016).

conflicts of interest and maintain the highest standards of loyalty, integrity, fairness, and honesty in their dealings with clients and society.

It can be reasonably said that law is not only a system of rules and regulations but also involves the application of certain principles, such as the equitable common good for different parties in a legal case. By applying these principles to legal rules, the judicial process distils moral content from the legal order. However, it is admitted that this does not permit the rules themselves to be rejected because of their immorality. If value judgments, such as moral factors, form an inevitable feature of the climate of legal development, as is generally admitted, it isn't easy to see the justification for this exclusive attitude.[19]

The entrance of value judgment into law would undoubtedly need just and fair rules, which must not necessarily derive their basis from absolute truth but in consideration of the existing ethical standards and moral principles in society. Further, considering the concerns of the law, without referencing subjective factors, it is challenging to disregard the influence and place of value judgment in the dealings between ethics and law.

3.05 Cardinal Virtues/Excellence as a Legal Practitioner

Like any other thriving institution, the practice of law requires pillars to live by.

Consider a grand and imposing courthouse, symbolising the legal profession. At this courthouse's entrance are four magnificent pillars representing cardinal virtues: prudence, courage, self-control, and justice. These pillars stand tall and strong, signifying the foundational principles that uphold the legal practice.

Such pillars serve as the building blocks of the legal profession. In Blackburn's view, virtue amounts to a character or trait that warrants or attracts admiration, making its housing embodiment both intellectually and morally advanced or perhaps the conduct of specific affairs.[20] The import and focus of this are towards an internal quality character trait or a moral norm object capable of

19 Kharit Amrel, 'The Concept of Legal Profession' (2018) 25 Legal Studies Review 40
20 Summers and Holmes Collins English Dictionary 1350.

directing or influencing one's ability to make a judgment between wrong and right and subsequently act accordingly.

In legal practice, the four cardinal virtues are of consideration: prudence, courage, self-control, and justice, which St. Thomas Aquinas collectively considers. Even so, classical period authors such as Aristotle, Socrates and Plato can be traced in the responsibility of their significance. These four virtues were termed "cardinal", a term from the Latin word meaning "the hinge of the door." All other virtues are, therefore, said to pivot or "hinge" on the four principal or fundamental virtues. Apart from these four cardinal virtues, there are also three "inspired" or theological virtues: faith, hope and charity.[21]

3.06 Prudence

Prudence is the virtue that makes effective decision-makers. To make the right decisions, lawyers must demonstrate professional knowledge in the line of duty. Alexander Havard expounds on this and says we do not develop the virtue of prudence through life experience but through contemplation of that experience. We must learn to use it to grow in spiritual acuity and develop the knack for perceiving reality as it is. In this way, we enhance our powers of diagnosis and intuition. He further says that experience has value, but combining experience with contemplation makes prudent decisions effective.[22] This calls for cultivating practical wisdom. If a lawyer employs this as a moral compass, then prudence encompasses two ideals. First, prudence refers to a sound "theoretical knowledge" of the law and internalization of its ethics and workings.

Additionally, prudence obligates a lawyer to apply 'practical common sense' in his dealings with the courts, clients, society, and colleagues. He must heed the proverb that 'the prudent man looketh well to his going.'[23] Prudence, therefore, navigates the means between impulsiveness and over-cautiousness and performs the unique function of assisting in the choice 'between good and evil'.

21 Jo-Marí Visser and Christoffel IV, 'Legal Ethics, Rules of Conduct and the Moral Compass – Considerations from a Law Student's Perspective' (2016) 19 Potchefstroom Electron L J 1.

22 n10.

23 Proverbs 14:15

3.07 Self-Control/Temperance

Self-control refers to the ability to subordinate strong passions, emotions and feelings to fulfil the mission. Overindulgence obscures the light of reason and consequently harms the intellect, and therefore, one who is committed to pursuing authority, success, or any other valuable thing loses an objective reality. While commenting on the significance of self-control, Havard states that intemperance harms the will; it undermines courage and justice so that one in hot pursuit of money or power is unlikely to consider dignity and respect for the people he deals with or their common good. Further, self-control clouds humility and magnanimity, causing great harm to the heart. A lawyer without self-control loses all sense of mission and the capacity to serve others, which is the essence of the legal profession.

In his wisdom, Plato likened human passions to chains orchestrating slavery to the soul tomb. The body. He believed man must free himself from the tyranny of passions by transcending the material world and entering the spirit realm. For Plato, human freedom means freedom from matter.[24] A lawyer exercises temperance while considering the repercussions of overindulgence in any pleasurable occasion that may attend to the course and pursuit of justice.

Failure to cultivate self-control in pursuing justice dwindles the profession's desire for service to nought. When the pleasures attendant to the pursuit of justice become so obsessive, the sense of service will dim its light and become soon forgotten. Consequently, the sense of nobility will have no meaningful impact as nothing will be left to consider noble.

Undoubtedly, lawyers must learn to shun anything that debases the moral integrity of the profession but equally uphold the noble values and virtues, a character consequent to magnanimity. Far from being something pinched and puritanical, self-control is the vital pre-condition for the flourishing of the soul, which is magnanimity.[25]

24 n17.
25 n21.

3.08 Courage/Fortitude

Alexander Havard defines courage as the sacrifice of self to realize prudence and just goals. Although courage rightly implies boldness and daring features, it often invites endurance in its premise over time. Endurance is an essential element of courage. Havard fortifies this position by saying endurance is not passive, requiring a strong, proactive spirit. In endurance, man's inmost and most profound strength reveals itself. [26] Essentially, the import or call for endurance among lawyers is an invitation to uphold and maintain the integrity of their conscience, even in moments of toil, trouble and trial. Cicero points out that when dealing with trouble or toil, the virtue of courage precedes in the anterior.[27]

A courageous lawyer is, therefore, one who perseveres when he has to prepare for a case and when he has to toil at a complex legal problem. A courageous lawyer is not afraid to do all he can to ensure that justice prevails and is accessible. He boldly pursues his goals and dreams. A brave lawyer is one who, in the face of losing much profit, follows the advice of the former president of the United States of America and lawyer Abraham Lincoln: Discourage litigation.[28] The key ingredient is to persuade compromising neighbours and show them how often a real loser is a nominal winner in many ways, including waste of time, expenses, and fees. A lawyer has the superior responsibility and opportunity to be a good person by being a peacemaker since sufficient business for the legal service is warranted.

Courage is essential in the pursuit of justice and practising moderation in the process of acquiring knowledge. Further, courage entails the ability to run and withstand risks. A scanty population understands the gross creative labour that needs to be employed to commence practice from scratch. However, when the practice was rolling, many would think it was such a mundane task that anyone could afford. Even so, those who succeed in building small enterprises to translate them into substantial practice are often people who are willing to trade perseverance and withstand obstacles till the conclusion of a properly installed project.

26 n10.
27 n18.
28 n17.

3.09 Justice

Virtue dictates that every lawyer must behold an integral justice system: justice. Justice is the habit of giving others their due, not merely now and then, but always. The just lawyer is committed to doing good as he faithfully fulfils his professional responsibilities.[29] Cicero defined justice as 'the intention to give to each what he deserves', and St. Thomas Aquinas shared the same sentiments. On a larger spectrum, justice can also mean 'fairness' in all circumstances. The epic of justice can be traced from the time of writers like Aristotle and has been extensively interpreted as a correlation between obedience to legal commands or dictates and subjecting each individual to fairness so deserved. In it, as a fulcrum, justice encapsulates loyalty, faithfulness and truthfulness. It is the cardinal virtue underlying the universal interests in human relationships and dictates that to each who shares, his portion must be discharged to him.

In law practice, justice remains the thematic virtue in legal business and dealings. This calls for a lawyer to exercise fairness at all costs in his interaction with colleagues, clients, courts and the wider society. Conversely, a fundamental duty bestowed upon a lawyer is advocating fairness to a purported perpetrator of a criminal act and the alleged victim. Cicero shows that each cardinal virtue has its place and role to fulfil even though justice takes precedence and attention in the justice or legal system. He also stated that by applying the said '[...] one could achieve the 'greatest good' which would be reflected by leading a virtuous, moral and ethically correct life'. These pivotal virtues provide a framework that will foster the development of other relevant and vital virtues to the individual and his profession or occupation. Such virtues include honesty, responsibility, mercifulness, deference, commitment, dependability, diligence, persuasion, thoroughness, punctuality, tolerance and truthfulness.[30] The classes of justice can be broadly considered in three categories as more particularly discussed hereunder.

29 n10.
30 n17.

4.0 Forms of Justice

4.01 Commutative/Justice among the citizens themselves

In the initial discussion, we said that the objective of law is to nurture, enhance and maintain human relationships in society. Society comprises different cadres of individuals on the string of responsibility: private citizens and state officers. There is a need to hold the course of justice in all cadres of society to ensure harmonious relations. Lawyers often settle disputes and conflicts arising among the citizens themselves. In resolving such conflicts through applying the law, the laws will be assessed to determine whether the conduct of a citizen complained of reflects the ethical standards promoted or denounced by the law. So, when the law is the reason for an official to penalise a citizen for certain conduct, the law may be assessed by an ethical evaluation of the conduct for which the citizen was condemned. A law that punishes ethically appropriate conduct is unjust. This injustice is compounded when a person who has been ethically treated complains of the treatment and brings a legal penalty against the ethical citizen.[31]

4.02 Distributive/Justice between the citizens and the state

Ethics contributes A robust underpinning in the judgment of the conduct of a private citizen and that of a state officer to determine a dispute between the two parties. While judging a state officer's conduct, additional models apply, such as provisions on leadership and integrity, as part of the legal system's considerations. The standard of ethical conduct varies between individuals of equal status and those subject to a monopoly. Therefore, a differential standard of moral principles may be applied to a state officer due to the uneven relationship between him and the citizen, the discretionary ideal prescribed to the officer's role, the involuntariness of the private citizen and the obligations bestowed upon the state officer. In such circumstances, if the outcome has to result in justice, then the law demands ethical conduct or action on the part of the state officer or that he does not conduct an unethical action.

31 Shepherd S: Perspectives on Ethics and Justice (2015

Reflections of justice may take a binary route in a particular dispute between a state officer and a private individual citizen, determining whether the instant dispute is within the officer's discretion or without his discretion. Those actions within the official's discretion are those in which the official is the least constrained by other legal obligations and, correspondingly, the highest constraint by ethical duty.[32] Therefore, the consideration of justice of such actions is materially a consideration of the justice of the state officer's action. Equally, actions bound to the limitation in exercising discretion are subject to legal principles and obligations founded by state officers in the preceding times. Therefore, considering justice in such actions is a consequence of considering justice in previous commitments and compelling actions.

5.0 Legal Justice in Both the Substance and Procedure of the Law

As the preferential option, justice serves as the quintessential virtue and thus assesses the law in two considerations: substance and procedure. In the substance of the law, justice contributes to an assessment of the law and its requirements, as displayed in the lives of private individual citizens. On the other hand, in the procedures of the law, justice plays a critical role by providing a ceiling for the adoption and enforcement mechanisms of the law to serve the citizens. Given this, therefore, the process of employing ethical principles in the assessment of substantive law in the course of dispute resolution does not only speak to its substance but wholly as a phenomenon because such an assessment is arrived at in consideration of the social structure in entirety which is subject to regulation by the legal system.

An unethical social structure is an unethical social structure that enshrines protects, or merely allows the continued existence of seriously unethical relationships among citizens. The legal system that protects or fails to disturb such an unethical social structure is unjust. The use of ethical principles of justice to assess the procedure of laws likewise may be used to determine whether the adoption of a particular edict or the resolution of a specific dispute was done justly. Moreover, the ethical assessment of justice may be used to assess processes that affect the legal system as a whole.[33]

32 n18.

33 Hendrix C & Visser J: Legal Ethics, Rules of Conduct and the Moral Compass (2016).

5.01 The Lawyer's Preferential Option

"Preferential Option" is a concept that stems from the Catholic Social Teaching doctrine, a guideline for humanity in society to co-exist as a people who esteem justice enriched with mercy. In the quest to fulfil the privilege of discharging evangelical duty, the Church responds to the call and mission to stand in solidarity with the poor, enabling them to get the justice deserved satisfactorily through the singular lens of the common good. As Christ's disciples, a challenge is mounted upon the Church to deeply consider preferential options for the poor. This takes various forms, including defending the defenseless, providing environments for a fair hearing for the voices of the marginalized and actively engaging in policy formulation with a keen impact of consequential exposure to the poor. The Preferential Option is a call to the faith community to strengthen society by offering profound assistance to the most vulnerable.[34]

The ideal criminal justice system employs a retributive technique in administering justice. In upholding the rule of law, the focus is pinned on the guilt assignment and punitive measures to prevent the wrong committed. In this approach, the pivotal concern is assessing the violated legal provision, the violator, and the requisite punishment. Conversely, the restorative approach is the justice technique that focuses more on healing relationships and resonates with ethics and morality. Here, both the crime committed and harm inflicted are considered through the lens of the impact created on people and their relationships as opposed to the broken rule or law. It seeks to repair broken societal relationships through reconciliation encounters that typify transformation.

Given the foregoing, mercy remains an integral part of justice for the legal puritan. What, then, must the lawyer do? There is a dire need to interrogate mercy and the legal question. In Criminal Law, the State is vested with the objective responsibility of being the custodian of public good. If an individual commits an offence and a conviction is secured, punishment is meted out against him. At this point, justice is reflected in its true sense; mercy takes the bar. Upon mitigation, an offender is accorded a lesser punishment; upon remorse, early parole may be administered, and in exceptional circumstances,

34 Sollicitudo Rei Socialis, Centre for Social Concerns, University of Notre Dame (2015).

a convict is committed to probation. However, in Civil Law, an individual becomes the defender of private rights whose breach attracts compensation in pursuit of recovery, avoidance, or affirmation. Equally, mercy comes into play so that if minor harm is inflicted, nominal damages will be awarded; unconscionable claims attract discretionary remedies, while breaches of onerous obligations are compensated concerning proportionality. This is the ideal system of justice a lawyer ought to pursue.

Therefore, the terrain of legal practice, with all its meanders and planes, ultimately leads to oceanic justice. It is fit and proper to say that the ideal objective of law is justice. The Lawyer looks at obtaining justice as the end game. It is the perfect pursuit and a metric that assesses the effectiveness of the law. Consequently, justice can be reasonably considered and concluded as the standard measure of the conduct of lawyers and legal practitioners in the legal chain. The requirements of legal ethics and the rule of law impose special obligations upon the legal practitioners in their conduct in the practice of law. To the extent that ethics can be applied in assessing and ascertaining the principles of justice, it suffices to say or hold that ethics is an essential element to determine that the law and the conduct of the practitioner applying it is just.

6.0 Conclusion

The quest for justice is a universal longing. The legal profession is privileged to have been accorded this rare calling. As handmaids of justice, lawyers must engage and pursue their professional calling with utmost integrity and discipline. Herein lies the role of ethics in establishing a morally grounded cultural matrix of acceptable conduct within the profession and in the larger society. The unspoken premise is that law is a tool to build society's legal, cultural, and social construct. A legal enterprise without regard for ethics in its discourse is not an authentic practice. Thus, we must enrich our professional liberty and esteem justice as our perpetual cynosure.

REFLECTIONS ON LAW AND RELIGION IN THE 21ST CENTURY: Is Law Taking the Place of Religion in Society?

Dr. Andrew Barney Khakula[1*]

Abstract

In the 21st century, the relationship between law and religion continues to evolve, particularly in societies where religious beliefs have historically influenced legal and moral frameworks. In Kenya, a country with a rich pluralistic heritage, the interplay between law and religion raises critical questions about whether law is gradually replacing religion as the primary moral authority in society. This article explores the shifting role of law and religion in Kenya, considering constitutional, legal, and socio-cultural dimensions. Kenya's 2010 Constitution establishes a secular state while recognising the role of religion in personal law, education, and public life. However, increasing reliance on legal mechanisms to regulate social behaviour, address moral questions, and resolve conflicts suggests a growing dominance of law over religion. While reflecting on the Supreme Court of Kenya's 2023 decision on the LGBTQI community's right to associate and the 2023 Shakahola tragedy in Kenya, this paper examines how legal frameworks redefine traditional religious norms and the role of religion in influencing legal discourse and public policy in 21st Century Kenya. While the law provides a unifying and enforceable structure for governance, religion remains a profoundly ingrained source of identity and ethical guidance for many Kenyans. The article argues that rather than outright replacement, law and religion continue to exist in a dynamic tension, shaping and contesting each other's influence. This reflection on Kenya's legal and religious landscape contributes to broader discussions on secularism, pluralism, and the evolving boundaries of law and faith in contemporary societies.

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Keywords: *Law and Religion, Secularism, Legal Pluralism, Religious Influence, Morality and Law*

1.0 Introduction

I recently read a book titled "The Fall of the Priests and the Rise of the Lawyers."[2] by Professor Philip R. Wood Q.C, C.B.E, a distinguished jurist and academic. The book analyses a modern world where the 'priests' or 'religion' quickly gives way to secular law in all human life, hence "the fall of the priests and rise of the lawyers." Professor Wood posits that the law is increasingly becoming the "one universal secular religion which practically everybody believes in." The phrase 'secular religion' is an oxymoron, I submit, because the word 'secular.'[3] is the complete antithesis of 'religion' or 'religious.' Secular religion is "a communal belief system that often rejects or neglects the metaphysical aspects of the supernatural, commonly associated with traditional religion, instead placing typical religious qualities in earthly entities."[4] Religion, on the other hand, is defined as "a system of faith and worship involving belief in a supreme being and usually containing a moral or ethical code." [5]

The oxymoron 'secular religion', therefore, connotes a belief system with strong moral or ethical values that derive their justification or validity from societal consensus or logic as opposed to the supernatural and/or spiritual. This oxymoron sets the stage for scintillating reflection on the relationship between religion and the law juxtaposed against two recent events in Kenya: The Supreme Court of Kenya's decision on LGBTQI rights of association and the *Shakahola* tragedy.

2.0 The 2023 Supreme Court of Kenya LGBTQI Decision.

On the 24th of February 2023, the Supreme Court of Kenya (SCOK), Kenya's apex court, in NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)' [6] held that the lesbian, gay, bisexual, transgender, queer or

2 Wood R.P *The Fall of the Priests and the Rise of the Lawyers* Hart Publishing 2016.
3 Garner B.A (ed) *Black's Law Dictionary 9th Edition* (2009 Thompson Reuters) 1474; Secular is defined as worldly as distinguished from spiritual.
4 https://en.wikipedia.org/wiki/Secular_religion accessed on 4th July 2023.
5 Garner B.A (ed) *Black's Law Dictionary 9th Edition* (2009 Thompson Reuters) 1405.
6 *(Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights).*

questioning (LGBTQI) community has a right to form an association as guaranteed and protected under Article 39 of the Constitution of Kenya. The main issue for determination in the appeal before the SCOK was the refusal by the NGO Co-ordination Board to reserve proposed names and objects of a non-governmental organisation (NGO) to address the violence and human rights abuses suffered by the LGBTQI community in Kenya pending its registration under Regulation 8 of Non-Governmental Organizations Coordination Regulations, 1992.

Three out of the five Judges of the Supreme Court held that it would be unconstitutional to limit the right to associate through the refusal to register an association purely based on sexual orientation. The court further held that the refusal to reserve the name of the LGBTQI lobby group's intended NGO on the ground that sections 162, 163, and 165 of the Penal Code of Kenya criminalised gay and lesbian liaisons was discriminatory. The two dissenting Judges, the minority, on the other hand, held that as long as sections 162, 163, and 165 of the Penal Code of Kenya remained valid laws, disallowing the reservations of names that included the terms "gays" and "lesbians" could not be considered unreasonable, irrational or illegitimate. The minority further held that the names were rejected for being inconsistent with the law, and thus, their rejection did not amount to discrimination based on sex or sexual orientation.

This decision understandably attracted much debate from society, including the different religious groups. The apex court's decision was met with demonstrations and statements of protest by various community and religious groups. The legal interpretation offered by SCOK was that the LGBTQI community has a constitutionally protected right to associate in the absence of legislation limiting this right for this group, dissenting religious and social views notwithstanding. It is true to argue that forming an association to advocate for the rights of the LGBTQI community does not amount to committing the offences under sections 162, 163, and 165 of the Penal Code of Kenya. However, some critics have argued that it is foolish to allow people to form an association to advocate for the human rights of persons who engage in activities that are perceived as criminal under section 165 of the Penal Code. It

is akin to allowing robbers to form an association, hence the view that allowing the formation of an LGBTQI association would encourage people to engage in acts that are not only illegal under the statute but also contrary to societal mores, resulting in anarchy in society.

The Supreme Court, in its dissenting opinion, stated that,

> "The right to freedom of association as enshrined by article 36 of the Constitution included the right to form, join or participate in the activities of any association. Although the wording "of any kind" in article 36 could seem wide-ranging and open-ended, the drafters of the Constitution and, indeed, the people of Kenya who ratified the Constitution did not intend for the formation of groups whose activities or objectives were against the law or the Constitution to be included."[7]

In addition, where the constitutionality of sections 162(a)(c) and 165 of the Penal Code have been challenged to be discriminatory, particularly to the male gender, the court has consistently found such impugned sections not to be unconstitutional and have remained valid edicts of the law.[8] Supreme Court Judge Mohammed K Ibrahim, in his dissenting opinion, held that,

> "Sections 162 and 165 of the Penal Code criminalised male homosexual relationships while section 163 of the Penal Code prescribed a penalty of imprisonment for seven years. Due to the usage of the phrase «having carnal knowledge of any person,» which was «against the order of nature,» section 162›s interpretation allowed for the inference that female same-sex relationships were also unnatural. That meant that those clauses could be used to prosecute both men and women who were in same-sex relationships."[9]

According to section 162 of the penal code on unnatural offences,

> "any person who has carnal knowledge of any persons against the order of nature or permits a male person to have carnal knowledge

7 *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment)* (with dissent - MK Ibrahim & W Ouko, SCJJ) at Para 13.

8 *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (amicus curiae), HC petition 150 & 234 of 2016 (consolidated) (2019) eKLR.*

9 Supra at Para 10.

> of him or her against the order of nature is guilty of a felony and liable to 14 years."

It also states that if the offence was committed without the consent of the person who was carnally known or was engaged with that person's consent, but the consent was obtained by force, threats, intimidation of some kind, fear of bodily harm, or false representations as to the nature of the act, the person shall be sentenced to 21 years. A reading of the above provisions indicates that the Penal Code does not criminalise homosexuality or the state of being homosexual, but only certain sexual acts "against the order of nature." That the State does not set out to prosecute people who confess to being lesbians and homosexuals in this country is a clear manifestation that such sexual orientation is not necessarily criminalised. What is deemed criminal under the above provision of the Penal Code is certain sexual conduct "against the order of nature", but the provision does not define the "order of nature". More importantly, the Penal Code does not criminalise the right of association of people based on their sexual orientation and does not contain any provision that limits the freedom of association of persons based on their sexual orientation.[10]

3.0 The 2023 *Shakahola* Tragedy.

In the year 2023, in Malindi County, in the forest of Shakahola, more than 400 people lost their lives allegedly as a result of religious extremism. While the circumstances surrounding the tragedy are still unclear, on the face of it, it appears as though the followers of the Good News International Church leader, Paul Mackenzie, were convinced to sell all their 'earthly possessions' and engage in a fast to the death. This incident brought to the fore the dire need for stricter regulation of religious activities in Kenya as the current legislative and policy framework under the Societies Act CAP 108 seems to be archaic and out of touch with the current global challenges around religious extremism. While the debate in favour of self-regulation as against government regulation rages on, the fast-emerging reality is that religious freedom is now under greater scrutiny by the government.

10 *Petition No. 440 of 2013 EG v Non- Governmental Organizations Co-ordination Board & 4 others [2015] eKLR Paras.114 -115.*

Centuries ago, religion was the sole source of law and answered all the socio-political questions faced by society in their day-to-day dealings. Religion responded to questions about marriage and divorce, fair trade practices, taxation, crime and punishment. Jesus Christ himself is quoted saying, "Render to Caesar the things that are Caesar's and to God the things that are God's."[11] When he asked a question about taxation, Cicero[12] viewed the law as the 'right reason in agreement with nature.' This means that there existed absolute values against which the validity of law ought to be tested, which are related to rational behaviour that is consistent with nature. This meant that anything considered 'good' is consistent with nature, and society's 'bad' things are invariably against nature. On this ground, it was argued that the law must have some moral validity to be a 'just law' or acceptable law.

St Thomas Aquinas[13] In Summa Theologica, a Catholic scholar and philosopher argued that God was the source of all good and the source of man's rational thought. This sensible thought gives rise to lex humana, or man-made law, meaning that man-made law can never be inconsistent with *lex aeterna* or God's eternal law. The works of these philosophers of old, who shaped our understanding of jurisprudence, demonstrate that the law as we know it today was primarily influenced by religion, the age when the 'priests' reigned supreme.

In traditional African societies, it was not uncommon for political leaders to include spiritual leaders such as diviners as advisors. When there was no rain, the people would seek the intervention of the gods through the rainmakers. The rain gods would perhaps demand a sacrifice of a few animals for the rains to be released from the skies. In contemporary times, however, drought is tackled through scientific research and government-led initiatives to address climate change.

Currently, there is a global consensus that there should be deliberate efforts by governments to tackle climate change. The floods that hit Kenya in the first quarter of 2024 have been blamed on the government's lack of disaster

11 Mark 12:17.
12 106 – 43 BCE.
13 1225-1274.

preparedness, poor urban planning and failure to enforce environmental protection and conservation laws, to mention but a few. No one has blamed some 'metaphysical phenomena' for the floods.

History shows that religion played a significant role in politics. Even today, religion plays a substantial role in socio-political revolutions that have birthed new political regimes worldwide. The rise of Islamic extremists in the Middle East and political movements such as the 1986 - 1987 Alice Lakwena's Holy Spirit Movement in Uganda are examples of how religion has been used to serve political ends. In fact, according to Prof Wood, 'Religions have been one of the most potent ideologies the world has ever seen. They have penetrated pervasively into every society; they have driven history, wars, and inspiration since the very earliest times.'[14]

Christianity is one such religion that has profoundly impacted law and politics. While there is no clarity as to when the Christian biblical canon was established, it is undeniable that the Council of Nicea in 325 CE, under the authority of Emperor Constantine, shaped the foundations of Christianity as we know it today. The Council defined the Christian Church doctrine and beliefs, particularly relating to the holy trinity and the relationship between God and Jesus, as is still accepted today. It has been suggested that the mighty Roman Emperor Constantine[15] made Christianity the main religion for political expediency to unify and consolidate his rule over the Roman Empire. Whether Constantine's conversion to Christianity was sincere or a political manoeuvre remains debatable. According to Constantine's biographer Eusebius, Constantine and his forces were preparing to battle Constantine's rival to the throne when they saw a cross of light in the sky, along with the Greek words for "In this sign conquer." That night, Constantine had a dream in which Christ reinforced the message, inspiring him to mark the Christian symbol of the cross on his soldiers' shields. When Constantine defeated his enemy, he attributed the victory to the God of the Christians and later issued the edict of Milan granting Christians and other religions religious freedom. With Christianity as the State religion and Constantinople's rise as the world's most powerful city, the church became a mighty political player in medieval

14 Wood R.P *The Fall of the Priests and the Rise of the Lawyers* Hart Publishing 2016.
15 280– 337 CE.

Europe, Asia, parts of the Arab world, and even Africa. In the name of religion, the bloody crusades of the late 11th century were justified and funded by State coffers, as there was no clear separation between the law and religion. The Crusades were a series of religious wars between Christians and Muslims between 1096 and 1291 to secure control of holy sites considered sacred by both groups.

Religion was also used to introduce and justify colonialism in Africa. The British agenda in Kenya was a "civilising mission", describing Africa as a "dark continent".16 The British believed they were endowed with "a higher civilisation" and were morally obligated to educate, uplift, and develop resources for humankind's natives.[17] In this context, British author Ruark paints a grim picture of Africa, depicting the natives as endowed with "impulsive savagery that is greater than anything we civilised people have encountered in two centuries."[18] Through a fictional account of the Mau Mau rebellion in Kenya, Ruark's book was touted as "the best-known account of the Mau Mau".[19] The book clearly illustrates that the British colonisers perceived the natives as "undeveloped", and their responsibility was to introduce "development" in Kenya.

To enable the British to fulfil their civilising mission, they were determined to firmly assert their "civilisation" on Kenyan natives without compromise. Therefore, the British had to systematically dismantle all social, political, economic and cultural systems in pre-colonial Kenya and replace them with "civilised systems" that would facilitate realising their objectives in the colony. Missionaries, therefore, played a key role in the 'civilising' process. They worked to change the mindset of the natives, convinced them to adopt a new religion, a new way of life, and new names, and embraced Western civilisation because the traditional African way of life was backward. Eric Wainaina, a celebrated Kenyan musician, in his song 'Fungeni Macho'[20] draws a vivid lyrical picture of religion and colonialism. He sings about the natives being instructed to close their eyes and pray, and while the prayers were going on, the Union

16 See generally, Stanley *Through the dark continent*.
17 Izuakor 1988 *Transafr J Hist* 35-36.
18 Ruark *et al Something of Value* forward.
19 Clough *Mau Mau Memoirs* 38.
20 Wainaina E, The Album 'Twende Twende' released in 2006.

Jack was raised and their land stolen by the colonialists. History, therefore, unequivocally demonstrates that politics and religion were 'inseparable bedfellows'. Even today, the Church of England continues to enjoy proximity to the monarchy in the U.K. The same was replicated in colonial Kenya, where the official residence of the Archbishop of the Anglican Church (formerly known as the Church of England) was built across the road from the official residence of the governor of colonial Kenya, now known as the Statehouse.

On a broader spectrum however, I would argue that politics and religion were 'strange bedfellows' because historically, human rights abuses in the pursuit of a political agenda were supported by the religion. This was evident in instances of colonialism, where religious missions were often intertwined with imperial ambitions, leading to the oppression of indigenous populations.

4.0 The Rise of the Law

The 18th century, which is referred to as 'the Enlightenment Age' or 'the Age of Reason', saw the rise of legal positivists such as Immanuel Kant (1724-1804), John Locke (1832-1704), David Hume (1711-1776) and Jeremy Bentham (1748-1832) among others. It is argued that their philosophical writings supported separating religion from the law. They questioned the origin of law and challenged the social contractarian ideas associated with legal philosophers such as Thomas Hobbes and Jean-Jacques Rousseau on society and the State. Their shared view was that the law was a product of human action and had nothing to do with metaphysics or religion. These enlightenment thinkers further questioned monarchs' 'God-given right' to rule over their subjects, believing that society should freely choose who should govern them. This saw the rise of democratic/republican governments founded on the belief that all men were equal under the law with an equal right to participate in government. The American War of Independence in 1775-1783 and the French Revolution in 1789 further debunked the myth propagated by religion that the monarchs were divine appointees to reign over their subjects at will.

Today, most modern democracies have separated the State from religion. Article 8 of the Constitution of Kenya separates State and religion by providing that there shall be no State religion. Laws have been enacted to deal with all

matters that affect the day-to-day dealings of the citizens. The same rules also address religious issues, such as protecting the right to religious freedom and expression under Article 32 of the Constitution of Kenya. Laws such as the Societies Act Cap 108 have also been enacted to create a legal framework to enable religious groups to associate. Despite a clear separation between religion and the State, some vestiges of our spiritual beliefs can also be found in our laws. A good example is the evolution of Islamic Banking or Sharia-compliant banking systems in contemporary times and the Kadhis courts in the Kenyan judiciary.

It is also right to argue that the purpose of religion in society is to guarantee the survival of man not only on earth but also in the afterlife, as most religions ascribe to the idea of an afterlife. This is a common denominator in many religions, hence the importance of performing good deeds on earth as life continues after physical death. Religion functions in metaphysics since it is a matter of faith and belief.[21] It has been argued that the purpose of law in society is to ensure man's survival. This was the essence of the writings of social contractarian philosophers such as Thomas Hobbes, John Locke and Jean-Jacques Rousseau. They were of the standard view that the State exists to protect the welfare of the people. The common thread that ran through their theories on government was that human beings have an innate, natural or instinctive desire or will to survive and preserve themselves, thus forming a "social contract" between society and the government. Governments were, therefore, set up to ensure the survival and preservation of humankind because man's existence in a state of nature was no longer tenable. The creation of government led to the development of various laws whose *raison d'etre* was the preservation of man's welfare.

5.0 The Theory of Social Revolution.

Auguste Comte (1798 – 1857) wrote about a theory of social revolution that is discernible in society today. He argued that society undergoes three phases in its quest for the truth: a theological stage, a metaphysics stage, and a positive

21 Hebrews 11:6 'without faith it is impossible to please God and that those who come to God must believe that he exists.'

stage. In the theological stage, society blindly follows what its ancestors taught it, including the belief in fetishism and the supernatural. In a sense, society is at the mercy of supernatural forces. The stage of metaphysics is where society begins to reason and question societal beliefs. It was the beginning of a world that questioned authority and religion. The idea of universal rights as being sacrosanct and beyond the purview or reach of human rulers was also born.

Finally, the positive stage, the scientific age, emerged when people turned to science to fix societal problems. This was necessitated by the failure of the metaphysics stage's social, economic, and political philosophies (Age of Enlightenment) to correct societal ills. Some social, economic and political philosophies were embodied in inspiring human rights proclamations, such as the 1789 French Declaration on the Rights of Man and the Citizen, which birthed the French Republic.

> 'The representatives of the French People, formed into a National Assembly, considering ignorance, forgetfulness or contempt of the rights of man to be the only causes of public misfortunes and the corruption of Governments, have resolved to set forth, in a solemn Declaration, the natural, unalienable and sacred rights of man…'

Similarly, Thomas Jefferson's 1776 United States Declaration of Independence also contained inspiring words birthed in the Enlightenment era;

> 'We hold these truths to be self-evident, that all men are created equal, that their Creator endows them with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness'.

Today, science continues to drive the human race's quest for survival in many ways. Science supports the argument that man needs to master his universe. Significant milestones in scientific research, digital innovation, and the proliferation of artificial intelligence evidence this. All these aim to ensure that humans manage their environment and are not slaves to the vagaries and vicissitudes of nature. Using Comte's theory of social revolution, it is correct to assert that religion is rapidly ceding ground to the law because society has reached a positive stage. Religion is unpredictable and beyond human control,

while positive law is predictable and specific, and that is why science continues to drive the human race's quest for survival to the next frontier.

6.0 Points of Reflection: Is Religion Ceding Ground to the Law?

The 2023 SCOK LGBTQI decision demonstrates that man-made law, or what legal philosophers described as positive law, is gradually emasculating our moral perceptions about things by complying with societal consensus over issues previously considered *mala mores*. The concept of 'societal consensus' is also rapidly evolving. With increased access to the internet, the world has now been described, using the cliché expression, as a 'global village' exemplified by the recent debate about banning TikTok in Kenya.[22] Societal consensus is no longer limited to the geographical boundaries traditionally defined by time, space, and travel. Societal consensus can be viewed from a global perspective, with the world's citizens as members of society. The law traditionally derived its justification and moral compass from religion. As society rapidly embraces the scientific age, with no foreseeable point of return, religion's prominence in society is shrinking. Perhaps religions must reevaluate their engagement with culture and recalibrate their strategies to ensure they effectively influence society, especially at the political level.

The happenings of *Shakahola* are evidence that law plays a vital role in protecting society from its extremities, preserving culture, and taking care of its welfare. Without proper laws or regulations in spiritual matters, there is a danger of criminal acts being committed against unsuspecting believers by unscrupulous 'religious leaders' or criminals masquerading as religious leaders. Article 8 of the Constitution, which establishes Kenya as a secular State by declaring the absence of a state religion, alongside the explicit provisions within the Bill of Rights, solidifies Kenya's democratic framework. These provisions are the foundation for shaping the country's social, economic, and cultural policies. Moreover, Article 27(4) prohibits discrimination based on various grounds, including religion, conscience, belief, and culture. Additionally, Article 32 guarantees freedom of conscience, religion, belief, and opinion.

22 Miriri Duncun "Kenyan government recommends regulating, not banning, TikTok" Reuters, 24th April 2025 available at https://www.reuters.com/world/africa/kenyan-government-recommends-regulating-not-banning-tiktok-2024-04-25/

These constitutional provisions set the stage for fostering Kenya's inclusive and tolerant society.

In the case of *Seventh Day Adventist Church (East Africa) Limited v. Minister of Education & 3 Others,*[23] The Court articulated that freedom of religion encompasses two distinct yet interconnected aspects. The Court emphasised that freedom of religion entails the freedom to adopt a religion or belief of one's choosing and the freedom to outwardly express and practice that religion or belief through worship, observance, practice, and teaching. Internationally, this understanding of freedom of religion recognises the inner act of believing and the external acts of demonstrating and expressing one's faith.[24] Holding a religious belief pertains to personal conviction or inner belief, while manifesting that belief involves the outward expression and demonstration of one's faith through various forms of spiritual practice and observance. In this regard, the manifestation or what could otherwise be interpreted as the outward expression of faith is and should be subject to law and order.[25] This means that the government can limit religious freedom, which is essential to maintaining public order and protecting other human rights.

This issue was addressed in *Nyakamba Gekara v. A.G & 2 Others*, where the court had to assess whether the petitioner's exercise of religious freedom under Article 32 of the Constitution of Kenya would infringe upon the freedom of other parents to convene Parent-Teacher Association meetings on Saturdays.[26] The court determined that PTA membership was voluntary and that Saturday meetings had been conducted for years with participation from Seventh-day Adventist (SDA) parents without objection. Consequently, the Court dismissed the petition. Limiting rights is an acceptable practice, and many modern constitutions have internal limitation clauses to provide a legal threshold for this. Article 24 of the Kenyan Constitution, 2010 carefully considers the protection of both public interest and individual rights. It allows the government to restrict rights under specific circumstances through general provisions applicable to all rights or specific measures for particular rights.

23 (2014) eKLR
24 ICCPR, art. 18
25 Morris Mbondenyi Kiwinda, *International Human Rights and the Enforcement in Africa* (1st edn, LawAfrica 2011)
26 High Court Petition No. 82 of 2012, (2013) eKLR

The primary objective behind imposing these limitations is to ensure societal stability and order. In this regard, the Constitution of Kenya is keen to ensure the balance between the freedom of religion on the one hand and on the other hand, the protection of individuals and society from pseudo-religious practices, or what is otherwise called spiritual manipulation, which could negatively affect other people's enjoyment of their rights. While the Constitution does not explicitly prohibit the government from regulating religious practice, it does provide for circumstances where the State may limit an individual's exercise of religious freedom. Such limitations are permissible if they pass the limitation test under Article 24 of the Constitution of Kenya.

Article 24 of the Constitution outlines specific factors to consider when determining the permissibility of limiting rights. These factors include the nature of the right, the importance of the purpose of limitation, the nature and extent of the limitation and the need to ensure that the exercise of rights does not infringe on other people's exercise of their rights. Apart from the Constitution, statutes and case law provide further guidance on the limitation of rights. For example, the Penal Code criminalises hate speech and incitement to violence, including those propagated by religious figures. Similarly, the Prevention of Terrorism Act addresses acts of terrorism, including those carried out under the guise of religion, aiming to maintain public safety and security.

Freedom of thought, conscience, and religion, including the right to manifest one's faith, are key elements of democratic societies. However, in pluralistic democratic societies where multiple religions coexist within the same population, imposing restrictions on the outward expressions of religious beliefs may become necessary. This is done to balance the competing interests of different religious groups and ensure that each individual's beliefs are respected within the broader societal framework.[27] Such limitations are crucial for maintaining social harmony and upholding the principles of tolerance and mutual respect among diverse religious communities.[28] Thus, although religious entities might contend that they are entitled to deceive the public, such actions are rightfully within the purview of State regulation. As articulated in *Sherbert*

27 Collium Banda, 'Redefining religion? A critical Christian reflection on CRL Rights Commission's proposal to regulate religion in South Africa' (2019) 40 *Verbum et Ecclesia* 1, 11.

28 *Republic v Head Teacher, Kenya High School & Another ex-parte smy [2012] eKLR*

v. Werner, while the freedom to hold religious beliefs is inviolable, the freedom to partake in religious practices is not unfettered.[29]

Hence, society has the prerogative to protect itself against evils committed under the guise of religious freedom. Under the social contract theory, the government is legally obligated to enforce this protection. Religious groups are entitled to self-governance in accordance with their internal norms, provided they adhere to their religious tenets while also respecting the legitimate requirements of public order.[30] The harm principle is one of the justifications for limiting the freedom to manifest religion. In his widely discussed essay "On Liberty" (1863), John Stuart Mill (1806–1873) delineates the principle of harm in the following manner:

> "The only legitimate reason for exercising authority over any member of a civilised society against their will is to prevent harm to others... The only aspect of one's behaviour that warrants societal scrutiny is that which affects others. In matters concerning oneself alone, absolute independence is rightfully upheld. An individual is sovereign over their mind and body."[31]

Mill argues that neither the inherent nature nor the intent behind an action can independently justify its prohibition or legal sanction. To warrant prohibition, an action must demonstrably lead to adverse effects on others. Mill aimed to safeguard individual autonomy and restrain the State from unjustly criminalising personal behaviour. The harm principle remains vital in criminal law theories and liberal political thought.[32] It has been instrumental in human rights jurisprudence, guiding the assessment of when State coercion is warranted to prevent harm to others.[33] Additionally, international courts have invoked this principle in cases concerning preserving or regulating religious freedoms.[34] However, the argument that 'an individual is sovereign over their

29 374 U.S. 398, 402-403 (1963).
30 Declaration on Religious Freedom-*Dignitatis Humanae*, Proclaimed by His Holiness, Pope Paul VI on December 7,1965 at the second Vatican Council. Available at < http://www.christusrex.org/www1/CDHN/v10.html> accessed 5 April 2024.
31 John Stuart Mill, *On liberty, Ticknor and Fields*, (Boston 1863), 22.
32 Donald Dripps, 'The Liberal Critique of the Harm Principle' (1998) 17 *Criminal Justice Ethics* 3.
33 Georgia Du Plessis, 'The Legitimacy of using the Harm Principle in Cases of Religious Freedom within Education' (2016) HRR 17, 349, 350.
34 Stephanie H Barclay, 'First Amendment "Harms"' (2020) 95 ILJ 331, 334.

mind and body' meets headwinds when viewed against acts sanctioned by the law but can be viewed as 'an act of sovereignty over oneself.' These include suicide, euthanasia and even private gay relationships.

The Harm Principle becomes particularly relevant in discussions surrounding religious freedoms and practices, where the actions of individuals or religious institutions may pose a risk of harm to themselves or others. In the Shakahola incident, the Harm Principle offers a framework for evaluating when intervention may be necessary to protect individuals from harm, even if it means limiting their freedom to exercise their religion in a specific manner. While freedom of religion is a fundamental human right, it is not absolute and must be weighed against the potential harm it may cause. When the risk of damage is clear and substantial, the government has a moral and legal obligation to intervene, employing measures such as regulation or even prohibition to protect the people. This approach seeks to strike a delicate balance between respecting religious beliefs and protecting individuals from harm, ensuring that liberty is exercised responsibly within the bounds of societal welfare and safety.

What is the place of religion in society today? How can religion continue to play its traditional role, being the 'true north' of society and government? If the law were to answer life's fundamental questions like, "Why don't we have food? Why don't we have proper shelter, health care, social security?" would society need religion or God, especially in third world countries? Is the law becoming the one secular religion to be embraced by all? I dare to answer these questions in the affirmative.

PROTECTION OF THE FAMILY UNIT: Quest for conjugal visits in Prisons in Kenya

Fridah Lotuiya

"It is pertinent to pause to consider why legal systems exist. The universal object of a system of law is obvious- the establishment and maintenance of order."[1]

Abstract

Society comprises units, with the smallest unit being the family unit. The family consists of people who usually stay together for prolonged periods, sometimes even till death. Each family member is assigned duties and obligations for the family and the society. The social contract has led the state to have rules to be followed. Families bear the most significant burden when people do not follow the rules and end up imprisoned. The convict will be taken away to prison, while the family is left to bear the obligations that the offender did. Some of the obligations can be delegated to other members of the family, but some, such as sexual satisfaction and reproduction, need the presence of the offender. The Constitution provides fundamental human rights to which every individual is entitled. On top of that list is the right to dignity, right to reproductive health, and right to a family. Incarceration affects not only the offender's rights but also the rights of the family members dependent on the offender. In other jurisdictions, some of these rights, especially reproductive health rights, are made possible by putting in place a framework for conjugal/family visits for offenders in prison. This has not yet been achieved in Kenya. This paper presents a case for implementing legal and institutional frameworks for family/conjugal visits in Kenyan prisons.

Keywords: *Punishment, dignity, reintegration, conjugal rights, restorative justice*

1.0 Introduction

The legal system exists to maintain order in society. The criminal justice system's intervention is necessary when law and order are absent. Offenders adjudged guilty and sentenced to a custodial sentence are sent to prison. The duration

1 R v Howe [1987) AC 495

of the sentence differs depending on the provisions of the law on the offence committed and the severity of the offence committed. According to the prison system in Kenya, rehabilitation is a critical component of a custodial sentence as it prepares the accused person for reintegration into society at the end of the sentence2. This raises several questions, especially regarding those who are sentenced to life imprisonment or death. What is the sentencing objective in such a case if rehabilitation is preparation to rejoin society? If one is prepared to rejoin society, society should be ready to receive them. Society's basic unit is the family, which is the unit that receives one back after a prison sentence.

1.01 The History of the prisons in Kenya

The formal prison system as we know it today came about because of colonisation.3 The traditional African justice system had rules and norms to follow. It also had a precise dispute resolution mechanism, including a framework for punishing those who had broken the rules. Offenders were punished according to the offence committed. One peculiar aspect of the traditional criminal justice system is that there was seldom individual criminal responsibility in the strict sense as we know it today.[4] It was more focused on the families of the offender and the victim, and one of the justice system's goals was reconciliation. Another aspect of the traditional justice system was that there were no prisons, and neither were their appellate facilities. Therefore, the decision and the action of the elders were final.[5]

The East Africa Protectorate introduced the formal prison system in 1902 with the passing of the East Africa Prisons Regulations. At independence, the Kenya Prisons Act and the Borstal Acts were passed, leading to the Kenya Prisons as we know it today. The Prison Act is silent on the rehabilitation of adult

2 Kenya Prisons Website https://prisons.go.ke/background#:~:text=The%20current%20prisoners'%20population%20stands,uniformed%20officers%20and%20auxiliary%20staff. Accessed April, 10 2024

3 Florence Bernault. "The Shadow of Rule: Colonial Power and Modern Punishment in Africa." *In Cultures of Confinement: A history of the Prison in Africa, Asia and Latin America, (Edited by Frank Dihotter & Ian Brown. Ithaca: Cornell University Press, 2007).*

4 David Killingray. "Punishment to Fit the Crime? Penal Policy and Practice in British Colonial Africa." *In A History of Prison and Confinement in Africa, 97-118. (Edited by Florence Bernault. Portsmouth: Heinemann, 2003)*

5 Nyaura, J & Ngugi, M., 'A Critical Overview of the Kenyan Prisons System: Understanding the Challenges of Correctional Practice. International Journal of Innovation and Scientific Research' (2014) Vol. 12 No. 1 Nov. 2014, pp. 6-12

offenders in Kenya. However, it is vocal on rehabilitating the youth through the Youth Corrective Training Centers.[6] This is likewise reflected in the Borstal Institutions Act, which creates Borstal Institutions and mandates them to train the youth and reintegrate them into society.[7]

The Prison Act is also silent on providing conjugal rights or the welfare of convicted persons' families.[8] In 2022, a woman petitioned the court to be allowed conjugal visits to her husband, who had been imprisoned, since she was still of childbearing age, and she wanted to get children by her husband. The husband was serving an extended sentence of 30 years. The petition was brought under Article 43[9] and Article 24 (1)[10] of the Constitution. In refusing the plea, the courts agreed that the right to conjugal rights in prisons is closely related to reproductive health rights and the right to have a family, which are provided for under our Constitution. The judge, however, reasoned that the Constitution offers limitations on rights that can only be done openly and justifiably. She noted that the right to conjugal visits can only be possible in private sets because of the nature of the right, but that privacy is not available currently in prison sets in Kenya.[11] Even though the application was denied, it highlights that family visits, including conjugal visits, are possible if facilities are available. It is not a question of whether the prisoners are entitled to this right but of the lack of facilities.[12]

6 Section 66 and 67 of the Prisons Act Cap 90 of the Laws of Kenya
7 Section 2 of the Borstal Institutions Act
8 Cap 90 of the Laws of Kenya
9 Economic and social rights. 43. (1) Every person has the right— (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
10 Limitation of rights and fundamental freedoms. 24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose
11 Sharon Mwende. 'No room for intimacy! Court denies man conjugal rights in custody'. (The star, 19 Oct 2023)< https://www.the-star.co.ke/news/2023-10-19-no-room-for-intimacy-court-denies-man-conjugal-rights-in-custody/ >Accessed 23rd May 2024
12 Article 43 of the constitution of Kenya envisages the progressive realization of socio-economic rights

2.0 Legal Framework on the dignity and right of family visits/ conjugal visits in prison

2.01 Constitution of Kenya

Kenya has made great strides in protecting the rights of imprisoned persons. The Constitution of Kenya provides that persons detained or held in prison are entitled to all their rights in the Bill of Rights except when a right is *"clearly incompatible with the fact that the person is detained, held in custody or imprisoned."*[13]

The Constitution denotes the Bill of Rights as an integral part of Kenya's democratic state and a pillar in the economic, social and cultural manifestation of the people of Kenya[14]. The constitution appreciates that the purpose of recognising rights is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings[15]. The Constitution does not define what it means and the scope of human dignity but stresses that everyone has inherent human dignity and the right to respect that dignity. From this, it can be deduced that since prisoners are human beings, they have intrinsic dignity, and since it is inherent, that dignity will not be lost by incarceration. The history of human dignity goes way back to Aristotle and the era of slavery when dignity was used as a tool for social stratification[16]. One would gain dignity as he gains social status in society. Enslaved people were considered as "things" and seen to have no dignity. However, the definition of dignity as we have it now owes its existence to Emmanuel Kant, who argued that human beings are an end to themselves, with independent will, and that when one is born human, they need nothing else to qualify them as human. It is enough that they are human[17]. Indeed, the Constitution recognises this aspect of inherent dignity and notes that the rights envisaged belong to the individuals and are not granted by the state[18]. It follows, therefore, that the concept of punishment in the Kenyan Criminal

13 Article 51 of the Constitution of Kenya
14 Article 19 (1) of the Constitution of Kenya
15 Article 19 (2) of the Constitution of Kenya
16 Horward Curzer, *Aristotle and the Virtues. (Oxford, England: Oxford University Press, 2012)*
17 Herbert James Paton, *The Categorical Imperative: A Study in Kant's Moral Philosophy. (Penssylvania: University of Pennsylvania Press, Pennsylvania 1999)*
18 Article 19(3) of the Constitution of Kenya

Justice system should respect the offender's dignity not as a prisoner but as a person. Constitutional rights should apply to all persons and only be limited to serving the purpose for which the prisoner is incarcerated.

2.02 Intentional Covenant on Civil and Political Rights (ICCPR)

Intentional Covenant on Civil and Political Rights (ICCPR) is a multilateral Treaty that Kenya became a signatory to in 1972. The treaty seeks to protect individuals' civil and political rights, and the United Nations General Assembly adopted it in December of 1966. United Nations Human Rights Committee[19] reviews regular reports on compliance with the ICCPR. Regarding the rights of persons incarcerated, the ICCPR states that the aim of incarceration by the state should be to reform and rehabilitate the offender[20]. This facilitates a smooth re-entry and assimilation into society upon release. The treaty also contends that every person has a right to be recognised as a person before the law[21]. Notably, this provision does not refer to only citizens or classes of citizens but to persons generally. It means that regardless of the state of a person, whether incarcerated or not, they are to be treated as human beings. Therefore, incarceration does not strip a person of his entitlements. Such entitlements include property, marriage, children, bank accounts, access to government services, etc. ICCPR also recognises the family unit and protects it by the law and society. It also recommends that both members be accorded equality of rights and responsibilities in marriage during and after its dissolution[22]. The state is tasked with protecting the family unit both directly and indirectly, and this can call for the states to adopt administrative, legislative, and other measures to ensure that the family unit is protected at all costs. During the subsistence of marriage, each spouse has various rights and responsibilities. They include conjugal rights, the responsibility to provide, the responsibility to protect, and the responsibility to parent, amongst other responsibilities. When one party to the marriage is incarcerated, the burden of those responsibilities is left to the other party, who also gets to be denied the rights accruing from the incarcerated spouse[23]. This goes against the concept of individual criminal

19 Established under article 28 of the ICCPR
20 Article 10 of the ICCPR
21 Article 16 of the ICCPR
22 Article 23 of the ICCPR
23 Carlson BE & Cervera N, *Inmates and their wives: incarceration and family life. (Greenwood Publish-*

responsibility in that as much as it is seen in the public eye that the incarcerated spouse is paying for his criminal wrongs, the spouse left behind is also subjected to challenges for a crime they did not commit.

This protection of the family unit can also imply that the state should create a conducive environment for families to live together and procreate. This living together and procreation will not be possible if incarcerated people are not given the right to have conjugal visits. Procreation by females is limited by a biological clock, with menopause starting at any point after 45 years.[24]. Therefore, for offenders serving long imprisonment sentences, the chances of having biological children with their spouses are drastically reduced.

2.03 The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)

These rules were adopted on December 7, 2015, and were called Mandela Rules in honour of former South African president Nelson Mandela. It is composed of 122 rules that give guidance to the member states on how to treat incarcerated people. These rules are divided into two parts, with part 1 dealing with issues of general application and part 2 dealing with matters that are more specific to sets of prisoners[25]. They work to ensure that all persons denied the right to liberty are accorded some fundamental minimum rights because they are still persons[26]. Rule 1 provides for the human treatment of prisoners as human beings and due respect for their human dignity. On allocation, it recommends that prisoners should be held as near home as possible so that they do not feel that he has been plucked away from their society[27]. The rules also provide guidelines on contact with the outside world and provide that prisoners should be allowed contact with their families without any discrimination, stressing the right of women prisoners to be allowed to see their children. Prisoners should be able to inform their people how they are doing. They should also

ing Group: Westport, CT, USA, 1992).

24 Paula Briggs, *Fast Facts For Patients Menopause (S. Karger Publishers Ltd 2021)*

25 Issues touching on specific class of prisoners such as remandees, those arrested on civil debts etc

26 UN Chronicle. Nelson Mandela Rules. Protecting the rights of persons deprived of Liberty. https://www.un.org/en/un-chronicle/nelson-mandela-rules-protecting-rights-persons-deprived-liberty#:~:text=to%20sentenced%20prisoners.-,The%20Rules%20are%20based%20on%20an%20obligation%20to%20treat%20all,disciplinary%20measures%20to%20medical%20services. (Accessed 28th May 2024)

27 Rule 59

be informed of how their people are doing, including any serious illnesses or deaths in the family. It also provides that conjugal visits should be allowed without discrimination[28].

2.04 International Professional Practices Framework (IPPF)

IPPF is an international platform that advocates for the rights of men, women, and children, particularly sexual and productive health. It has a declaration that has guiding principles and a tabulation of sexual rights[29]. One of its guiding principles[30] provides that sexuality and the pleasure derived from it is a human right. This is regardless of whether a person wants to reproduce or not. This brings in another dimension that even those who are imprisoned are entitled to the enjoyment of sexual rights regardless of whether they are enjoying such rights for purposes of reproduction or whether they are enjoying them by being human. The other principle that limits the enjoyment of sexual rights is that the limitation can only be done through the law. The right can only be limited by ensuring that the restriction is not discriminative and when it is proportionate to the reason for the limitation.[31].

3.0 Theories of Punishment

In the criminal justice system, punishment is served to those who have disrupted social equilibrium. In traditional and current society, some actions are considered to disrupt social equilibrium.[32]. In modern society with codified law, punishable actions must be expressly provided in a statute, and the punishment should be served in case of breach. There are various theories of punishment, and four will be discussed in depth in this article.

3.01 Retribution theory of punishment

The state makes the law, and the subjects are expected to obey. The sovereign can punish the offender if they fail to follow the law. This is the rationale of

28 Rules 43, 58-60, 68, 70
29 Can be accessed through https://www.ippf.org/sites/default/files/sexualrightsippfdeclaration_1.pdf
30 Principle 4
31 Principle 7 of the IPPF
32 Philip Bean, *Punishment: A Philosophical and Criminological Inquiry. (Oxford, England: Martin Robertson 1981)*

retribution as a theory of punishment: inflicting revenge for breaking the law. Retribution as a form of punishment has come a long way to the state it is in today's society.

According to retributive punishment, it is essential and legal for a person to suffer because of his wrongdoing. The question of proportionality requires that a person suffers in proportion to the wrong they committed. Utilitarianism opposes this theory of punishment, as they believe that punishment can only be justified if the good that will come from it outweighs the pain. The question that arises from this position is to whom? Is it the society? Is it suitable for the victim? To the convict? To whom? If it is the good that society will get, then deterrence will only achieve this. People are afraid to commit a crime because of the punishment they will get, which leads to society's overall well-being. If the good is to the victim, then this will be determined by the nature of the crime committed and if the punishment comes with reparation. Can the pleasure derived from seeing the offender punished count as good? If it does not, reparation would be necessary for the victim to feel good. What if the crime committed is murder? Can anything good accrue to a dead man? The good can only be obtained in progressive sentences if the good is to the offender.[33] Sentences that increase with repeated offence. So if the punishment for robbery is 20 years for a first offender, and 25 years for a second offender, then it follows that if the offender is prevented from committing the second offence, then some good has accrued to them. Reforming the offender can also count as a good to be measured in the justification of retributive punishment. However, this can be very subjective because it assumes that the offender suffers from the offence committed, which is not entirely true. Suppose an offender would steal and live comfortably off the proceeds of theft while a reformed offender suffers abject poverty because of lack. In that case, the abject suffering cannot be considered suitable for utilitarian theory.

Since retributive punishment focuses on the offender and the offence committed, except for a few instances of deterrence, the accused person's conduct will matter even after committing the offence. This is why the offender's remorse can act as mitigation in sentencing the offenders.

33 Acton H.B, *The Philosophy of Punishment. (Macmillan, London, 1969)*

3.02 Deterrence theory of punishment

Deterrence as a theory of punishment has its backbone in preventing the commission of offences in the future. Deterrence as a policy agrees that the present offence has been committed, and to prevent it from being engaged in the future, there is a need to instill fear in the would-be offenders. For a punishment to be a deterrent in nature, it must instill fear. Therefore, the question of proportionality would be whether the sentence is severe enough not to concern the action committed but severe enough to prevent the future commission of a crime. Therefore, this explains why, in some communities, especially Muslim countries, offences that would otherwise attract custodial sentences or fines are punished by death. For example, what would be the rationale for punishing adultery with a death sentence? To prevent other people from committing it. In some traditional African societies, the punishment for stealing was the burning of the forelimbs. This was done regardless of the value of the item that was stolen. In some cultures, a baby born out of wedlock would be strangled to death by the baby's grandmother. The baby would be blameless, a victim of circumstances, but it had to be killed not because it committed a crime but as a lesson to unmarried girls not to bear children. Severe punishments would act as a deterrent, but the question that would arise is proportionality and protecting the rights of convicted persons.

Incapacitation or imprisonment is also a form of deterrence. First, it puts away the offender so he cannot commit further offences. Secondly, the fear of incarceration will make other would-be offenders shy away from committing the crimes in fear of imprisonment. However, for this to be a deterrent, the offender must have something to lose by being incarcerated. Corporal punishment and inhuman labour have been eradicated in most prison systems in the world, Kenya included.[34] Therefore, the question is whether denying the constitutional right of liberty alone is enough to punish. A pertinent question to consider in this paper is whether denying family access and conjugal rights is an element of denial of freedom. What would constitute a proper denial of liberty enough to make it a deterrent?

34 Criminal Law (Amendment) Act 5 of 2003 outlawed Corporal Punishment in Kenya

Prison facilities also affect how effective incarceration is to deterrence[35]. There is an upsurge of prison reform activists fighting for better facilities, treatment, food, and nutrition. In some countries, prison facilities are far better than the average living situation in third-world countries. Therefore, there is the argument that there is a need to make the prison as good as possible to uphold human dignity but not so good as to erode the concept of deterrence. For example, if prisoners are only made to sleep in prison and then let go every morning to do personal chores, it would uphold high standards of human dignity, but it would not be a deterrent.

Some authors believe that incarceration is not an effective measure to ensure deterrence. This is because the number of prison inmates is increasing instead of reducing. Some have argued that the fear of being caught is more detrimental to the commission of a crime than the fear of imprisonment.[36]

3.03 Rehabilitation theory of punishment

Rehabilitation is a form of punishment that punishes the offence and not the offender. The rehabilitation theory is based on the hope that the offender will rejoin society someday. It has two concepts. One is to change the moral aspect of the offender and make them less delinquent. They are taught good manners and the importance of becoming good people. Some offenders come from complex backgrounds that predispose them to commit the offence, and it is hoped that the prison term will transform them. The second concept assumes that the commission of a crime is closely related to poverty. Therefore, when imprisoned, offenders are taught a skill that would help improve their economic status once they come out of prison. But what if the offender will be coming back to a broken family? Will rehabilitation have helped at all? In the following sections, the author will do an in-depth analysis of jurisprudence surrounding conjugal visits and the benefits or drawbacks that flow from a state allowing conjugal visits.

35 : Daniel S. Nagin, *"Deterrence in the Twenty-First Century," in Crime and Justice: A Review of Research, vol. 42: Crime and Justice in America: 1975-2025, (2013) ed. Michael Tonry, Chicago: University of Chicago Press*

36 : Daniel S. Nagin, "Deterrence in the Twenty-First Century," in Crime and Justice: A Review of Research, vol. 42: Crime and Justice in America: 1975-2025, (2013) ed. Michael Tonry, Chicago: University of Chicago Press.

3.04 Preventive theory of punishment

The preventive theory of punishment entails taking away the offender from society. The individual's right to liberty is curtailed completely, and, to some extent, the right to association. Most criminal justice systems have this method of punishment, and other techniques, such as rehabilitation, can be used when the offender is already in custody[37]. The rationale of this method of punishment is that when the offender has been taken away from society, he cannot offend any more. During the offender's custody, rehabilitative measures are taken to reform the offender so that he does not commit a crime when rejoining society. Another rationale for imprisonment is to deter others from committing the crime for fear of imprisonment[38].

Imprisonment denies the offender the chance of society and founding a family if he does not yet have one during imprisonment. The offenders who have a family are denied the society with their families, and this affects the sexual rights of the other spouse, procreation, and the inability to do the duties one usually does in their family. Even with technological progress, the incarceration of offenders has not changed much.[39].

Imprisonment can take many forms, such as custodial and non-custodial sentences. Custodial sentences can be short-term, long-term, life imprisonment, or death. The sentences are passed depending on the severity of the offence committed. In Kenya, most offences have a maximum sentence.[40]It is the court's discretion to award a sentence based on the nature of the offence committed. Before sentencing, the court would invite mitigation from the offender. The court would consider any remorse the offender shows and any other thing the court thinks should affect the sentence.[41]

A criticism of this theory of punishment is that the focus is on society rather than the offender.[42]The offender is taken away to protect society. This criticism

37 Andrew Ashworth, *Sentencing and Criminal Justice (Cambridge: Cambridge University Press, 2005)*
38 Michael Foucault, *Discipline and Punish: The Birth of the Prison (London: Penguin. 1997)*
39 David Garland, *Punishment and Modern Society. (England: Oxford University Press, 1990)*
40 Apart from a few offences under the Sexual Offences Act
41 Hough, M., Jacobson, J. and Millie, A. *The Decision to Imprison: Sentencing and the Prison Population, (London: Prison Reform Trust, 2003)*
42 Graeme Newman, *The Punishment Response, 2nd edition. (Albany, NY: Harrow and Heston, 2008)*

is remedied by ensuring the offender is rehabilitated and deterred from rejoining society and committing any more crimes after release.[43].

4.0 The Concept of Family

The family has been defined as the smallest unit of society. It comprises persons, commonly men or women and sometimes their children.[44]The family's concept and composition have significantly changed, especially with the idea of same-sex relationships. Now, it is possible to find a family composed of two females or two males with or without children.[45]. The family is an institution that imposes duties and obligations on its members, and sometimes, these duties and responsibilities are from birth to death.[46]In some instances, duties are divided according to gender. In most societies, the woman's role is to give birth and nurture the family, while the man is tasked with providing and protecting the family unit. However, with modernisation, the line between gender roles has blurred, and it is not surprising to find a family in which the woman provides while the man stays at home to take care of the children.[47]

In the family setting, and even with modernity, procreation is still a conjoined effort between the woman and the man through conjugal relations and sometimes through assisted reproductive techniques.[48]

43 Joel Feinberg, *The Expressive Function of Punishment. (England: Oxford University Press, 1994).*

44 Arslan, A. "Characteristics, types and functions of family concept" (2023) *African Educational Research Journal, 11(1): 45-48.*

45 Ertan, C., *The Extended Family: Same-sex Partnerships and Marriages (Nursen, 2012)*

46 Epik, M. T., Çiçek, O., and Altay, S., The changing/unchanging roles of the family as a social policy tool in the historical process. (2017)*Journal of Social Policy Studies, 17(38): 35-58*

47 Ibid

48 Assisted Reproductive techniques are techniques that are used when it is not possible to have a conception naturally. It entails the removal of the ovum, the sperm, and fertilizing them outside the bodies of either the woman and the man, and then transferring the fertilized egg to the woman's womb.

In Kenya, the concept of the family is protected by various laws that assign rights to the parties before, during and after the dissolution of marriage. These laws include the Constitution,[49] the Marriage Act[50], the Children's Act,[51] and the Sexual Offences Act[52].

Arslan[53], has enumerated various family unit functions, including biological, psychological, economic, protective, socialisation, educative, religious, and prestige-giving functions.

The family unit is usually disorganised during the incarceration of either of the parents. The biological and social division of duties in the home means that some duties will not be entirely done due to the absence of the incarcerated parent. At the same time, some, such as provision or nurturing, can be delegated to another family member during the period one is in jail. The duties that cannot be done include conjugal rights provision and procreation. The law in Kenya forbids conjugal relations between married people with partners who are not their legal partners and can be a basis for divorce if proven in a court of law. We note that even though infidelity is not a crime under any Kenyan law, the fact that it is a basis for divorce in Kenyan law, and in many jurisdictions for that fact, means that it was not envisaged in marriage. Sexual rights are rights that are associated with the right to dignity and reproductive health that are provided for under our Kenyan Constitution. When one partner is incarcerated, it means that the partner who is left cannot access conjugal rights without opting for infidelity, which was not envisaged and which is frowned upon by Kenyan law and society at large. The partner who is not incarcerated

49 Article 45(1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.
(2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.
(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
(4) Parliament shall enact legislation that recognises--
(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 any such marriages or systems of law are consistent with this Constitution.

50 Marriage Act, 2014

51 Cap 141 – assigns rights of a family to a child

52 Cap 63A- protects from sexual violence

53 Arslan, A., Characteristics, types and functions of family concept. (2023) *African Educational Research Journal, 11(1): 45-48.*

is already bearing all the burdens of the effects of incarceration and raising the family, providing, and keeping the family alive. It is only fair that the incarcerated person is allowed to perform the one duty they can perform while in prison, which is conjugal duty towards their spouse. Conjugal rights can also be interpreted as an obligation by married parties. In the case of *G R v I M [2015] eKLR, t*he court held that

> *"It is the court's view that if the husband either deserts a wife or neglects to perform his marital obligations without proper reason, then the wife can apply for restitution of conjugal rights."*

When one applies and the court grants an order, conjugal rights are a duty owed to another person.

In African traditional society, the family unit and its continuation are paramount.[54] In instances where a man cannot bear children for one reason or another, then another close male family member will be called upon to sire children for the person who is unable to bear children.[55]. This also happens when a man dies before getting a boy child because traditional African society is patriarchal, and the family name is continued through the male members of the society. In the case when a male is incarcerated before bearing a boy child, and the sentence is long, there is the fear in society that the man's name will die with him. Conjugal practices in traditional African societies are more than rights. They have the purpose of continuing the name of the male. The drawback of taking this argument is the quest for the provision of conjugal visits to incarcerated persons is that it will focus only on the male. In traditional African society, the woman's name dies with her. Therefore, if the rationale of conjugal rights is to continue the family name, then only the males will be considered for conjugal visits.

54 George Monger, *Marriage Customs of the World: From Henna to Honeymoon (California: ABC–CLIO, 2004)*

55 Francis-Xavier Kyewalyanga, *Marriage Customs in East Africa: With Special Reference to selected Tribes of Kenya: Akamba, Bantu Kavirondo, Gusii, Kipsigis, Luo, Nandi, and Teita. (Hohen Shäftlam: Renner Publications, 1978).*

5.0 Conjugal/Family Visits to Prisons Defined

Conjugal visits would help satisfy the biological needs of the family[56]. Conjugal visits in prison are traced to Mississippi, Parchman penitentiary. Conjugal visits are tied to the prison system. When Parchman Penitentiary was converted from a plantation into a prison that was racially segregated, conjugal visits were allowed only for black inmates first. However, the facilities were not good enough, such that some prisoners took to the camp guards' tool sheds and living quarters[57]. Commercial sex workers were allowed to visit the penitentiary on Sundays when the workers were on their day off. According to Columbus, conjugal visits were allowed as an incentive to the prisoners who were allowed to do hard work on the plantations with no pay[58]. This continued unregulated until the late 1960s when the inmates would self-regulate on shifts to use the private facilities, dubbed red houses. By the 1960s also, the prison facility would not allow prostitutes to attend to the inmates but only common-law wives[59]. Prisoners on death row were not allowed to have conjugal visits. This raises a pertinent question on the rationale of the conjugal visits, whether it was accorded as a fundamental human right or whether the same was allowed to enable a smooth transition of the inmates back to society. Formally, the First Offender's Unit was opened in 1965, and it contained a proper red house. In the late 1970s, with the conclusion of the class action *Gates v. Collier,*[60] there were significant improvements in the Mississippi, and the red houses were not left behind[61]. Women were allowed to have conjugal visits in 1972, and by 1974, conjugal visits had expanded to include a three-day family visit to the prison.[62]Conjugal rights are not a matter of right but are earned through good behaviour. When an inmate first arrives, they don't benefit from a conjugal visit, but with time, they earn the right and other rights in the prison. Therefore, it acts to motivate prisoners to do well[63]. However, despite being the

56 Arsan above defines biological function as a family function that encompasses fulfilling sexual desires, having children who will then lead to the continuation of the generation.

57 Alex Mayyasi, '*The Dark Origins of Conjugal Visits'(2010)< available at https://priceonomics.com/the-dark-origins-of-conjugal-visits/> (accessed 20 May 2024)*

58 Columbus Hopper, *Sex in Prison. (Baton Rouge: Louisiana State University Press, 1969)*

59 Columbus Hopper "The Conjugal Visit at the Mississippi State Penitentiary." (1962) Journal of Criminal Law, Criminology and Police Science 53 (September):340-44

60 Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972)

61 David Lipman "Mississippi's Experience." (1974) Mississippi Law Journal 45:685-755.

62 Columbus Hopper, 'The Evolution of Conjugal Visiting in Mississippi' <https://www.ojp.gov/pdffiles1/Digitization/120664NCJRS.pdf> (Accessed May 20 2024)

63 Paul Foreman and Julien Tatum, "A Short History of Mississippi's Penal System." (1938) *Mississippi Law Journal 10 (No. 3}:249-60.*

pioneer of conjugal visits, Mississippi ended the practice in 2014[64]. The basis for ending the practice is the high cost of maintaining conjugal visits, as well as the uncertainty of what happens if pregnancy were to result from such a visit. Inmates must be provided with a private facility for their visit and someone to search and escort the inmates. There was also fear that it was not possible to enforce the use of contraceptives, and if pregnancy resulted, it would lead to an undue burden on the single parent[65].

After the Mississippi Penitentiary, many countries have dealt with the issue of conjugal visits. Studies show that conjugal visits are beneficial to both the inmate and the state because they boost good behaviour.[66] However, many states have not allowed conjugal visits for various reasons, such as the cost of implementation. There have also been arguments that there is no correlation between rehabilitation and conjugal visits, and the notion that conjugal visits divert the core reason why prisons exist, and that is to punish offenders.[67]. Near home, Tanzania allowed conjugal rights to avoid homosexuality in prison. However, the practice was banned in 2018.

5.01 Arguments for and against conjugal rights

Many studies have been done on the effects of conjugal rights on the society[68]. There have been arguments that there is a high prevalence of homosexuality in prisons because of the lack of sexual relations in the prisons. The setting of the prison system is that prisoners are segregated in terms of gender, either male or female prisons. Therefore, the males who are together, or the females who are together, will tend to enter sexual relations, not because they are homosexuals, but because of circumstances. Therefore, allowing prisoners to have contact with the outside world, and especially with their spouses, will tend to reduce

64 Sanburn, Josh (13 January 2014). "Mississippi Ending Conjugal Visits for Prisoners" < https://nation.time.com/2014/01/13/mississippi-ending-conjugal-visits-for-prisoners/> (Retrieved 21 May 2024).

65 Sanburn, Josh (13 January 2014). "Mississippi Ending Conjugal Visits for Prisoners". https://nation.time.com/2014/01/13/mississippi-ending-conjugal-visits-for-prisoners/ (Retrieved 21 May 2024)

66 Knowles, G. J, 'Male prison rape: A search for causation and prevention' (1999) The Howard Journal, 38, 267-282.

67 Johnson-Roehr, S. N. (13 February 2023, JSTOR Daily). "*Controversy and Conjugal Visits". <https://daily.jstor.org/controversy-and-conjugal-visits/> . (Retrieved 21 May 2023.)*

68 Pierce, M. B., Freiburger, T. L., Chapin, J. R., Epling, B., & Madden, T. J.. 'Assessing the impact of visitation on inmate misconduct within a county jail' (2018) Security Journal, 31(1), 1- 20.

the prevalence of homosexuality in prison. However, it is noted that countries that have allowed conjugal visits don't make a blanket allowance. Certain conditions are placed on conjugal visits, such as behaviour and application[69]. Conjugal visits have also been seen to sustain the family unit despite the prisoner being locked away for long durations of time. One can seek divorce in Kenya because a spouse has been sentenced to over 7 years. However, with conjugal visits, the inmates can participate in their expected marital duties, making it possible for them to raise families even while in prison. The other advantage is that it becomes easy for the prisoner to reintegrate into society and his family at the end of the sentence. This is particularly important for those prisoners who are not serving life sentences. The ability to go back home and to society is a key aspect that most prisoners who have lost their families and who suffer stigma from society suffer from for long periods after release and even some time for the rest of their lives. Re-offending has also been associated with the inability of the offender, once released, to integrate into society. It has also been argued that it aids in the psychological health of the prisoner while in prison.[70] This good psychological health has also been associated with good behaviours and reduced violence in prison. Conjugal visits are not automatic rights even when a prison system has adequate framework to provide them. It is qualified for good behaviour in prison. Therefore, this will act as a motivating factor for the prisoners to behave well and reduce violence in prison[71]. Consequently, it is used as a tool to control behaviour in prison. However, there have been concerns that if conjugal visits are accorded as a matter of right, it might be challenging to use to control behaviour. When the rights-based approach is taken, it means that all prisoners without discrimination are entitled to the right and will be made to be something like roll call that they are required to attend by being incarcerated humans.

On the other hand, there have been concerns about consent by the spouse who is not in prison. The conjugal visits work in such a way that the prisoner would apply for the conjugal visit, and his spouse is informed accordingly. Questions

69 D'Alessio, S. J., Flexon, J., & Stolzenberg, L., The effect of conjugal visitation on sexual violence in prison. (2013). American Journal of Criminal Justice, 38(1), 13-26.

70 Shaun Esposito. Conjugal visitation in American prisons today. (1980) *Journal of Family Law 19(2): 313-330.*

71 Indeed the inception of conjugal visits in Mississippi was so that the prisoners would be motivated to work hard in the plantations since they received very little pay.

have arisen on whether the spouses in prison attend to these conjugal rights because they want or because of obligation. A study conducted by Toepel & Grieves concluded that sometimes women who are made to participate in the conjugal visits feel that they are attending out of obligation and that they think that their lives are being institutionalised.[72]. They have been denied the free will to decide when to engage in conjugal relations. Violence has also been reported during conjugal visits in prison, with reports of a woman being killed in one of the visits.[73]. Imprisonment can impact the life of a human being in various ways. Some prisoners feel or are indeed imprisoned for crimes that they did not commit and develop resentment. Prisoners can also feel rejected and that their spouses are continuing with their lives outside while they serve a sentence.[74]. All these are changes that happen after incarceration and, therefore, can lead to violence.

5.02 Sexual rights as human rights

In 1999, the 14th World Congress of Sexology amended the Sexual Rights Declaration to affirm that sexual rights are universal human rights. These rights are based on the inherent rights of dignity, equality and freedom for all human beings. The components of sexual rights encompass sexual freedom, sexual pleasure, rights to sexual anatomy, right to privacy, right to sexual expression, right to make responsible reproductive choices, rights to sexual education and rights to sexual health care. The conference also defined the denial of sexual rights to be an act of sexual violence. The question that arises is to what point these rights can be accorded in the case of incarcerated persons. In its preamble, the Universal Declaration of Human Rights recognises that everyone is entitled to the inherent dignity of inalienable rights. If these rights are accorded to the family members, it will lead to freedom, justice, and peace.

72 Toepell, A. R., & Greaves, L. 'Experience of abuse among women visiting incarcerated partners' (2001) Violence Against Women, 7(1), 80-109.

73 Reynolds, J. (2024). 'Young mother is killed by her convicted-murderer boyfriend during conjugal visit after writing a message saying she would be 'loyal even beyond death'. *Available on* <https://www.dailymail.co.uk/news/article-13344815/Young-mother-killed-convicted-murderer-boyfriend-conjugal-visit-writing-message-saying-loyal-death.html> (Accessed May 30 2024)

74 Toepell, A. R., & Greaves, L., 'Experience of abuse among women visiting incarcerated partners'. *(2001) Violence Against Women, 7(1), 80-109.*

6.0 A Restorative justice appraisal and conjugal rights

The situation in Kenya is that no conjugal rights are allowed in the Kenyan prison system. Prisoners, regardless of the duration of their sentences, are not accorded the right to have conjugal relations with their spouses or anyone else for that matter. Both female and male prisoners are affected by this. There has been a case whereby a prisoner applied to be allowed to have conjugal relations with his wife for procreation, and the court denied that request based on the unavailability of the facilities since the courts noted that for conjugal rights to be accorded, there is need for private facilities. The history of punishment has come a long way, from when the principal objective of punishing was the main focus to the current state, where many aspects, such as rehabilitation, have been incorporated into it.

6.01 Concept of Restorative Justice

The concept of restorative justice is gaining momentum in the world's prison systems. Restorative justice differs from the norm of punishment, as we have come to know, because of the position that the government takes[75]. In the traditional form of punishment, the government plays a central role in ensuring that the objectives of punishments are met. In restorative justice, however, the government steps somewhat aside to allow the victim, offender and society to participate. According to Kurki[76],

> "Core restorative justice ideals imply that government should surrender its monopoly over crime responses to those directly affected—the victim, the offender, and the community. Restorative justice considers crime to be an offence against an individual or community, not the state, and this is where it sharply divides from the current American criminal justice system of penalisation. The goal is to restore the victim and the community and to rebuild fractured relationships in the process that allows all three parties to participate."

However, it is accepted that there ought to be an interrelation between the state and the victim, offender, and the community because the state provides

75 Cyndi Banks, Criminal Justice Ethics: Theory and Practice. *(3*rd ed. Sage Publications, 2013).

76 Leena Kurki,. 'Restorative and Community Justice in the United States'. (2000) Crime and Justice, Vol. 27, 235-303 (pg 236)

the socio-economic rights that are much needed in restorative justice, and material support may be required for victim reintegration.[77] The concept of restorative justice can be a pathway in the achievement of conjugal visits in Kenyan prisons since it is very different from the traditional concepts of punishment. Restorative justice looks at the offender, not on how much he has been punished for the offence committed, but on how the injury of crime and incarceration has been addressed. It also increases the stakeholders of the punishment to include the person who was wronged and the community that the offender will be reintegrated into. Finally, it dilutes the concept that a crime is a wrong against the state, including a wrong against an individual and society. In essence, restorative justice is kinder towards the offender. It uses cycles, conferencing, and victim restoration through measures such as compensation. In cycles and conferencing, the victim, the offender and the department meet to discuss the crime and the suitability of the given punishment.[78]. Victim and offender meetings are sometimes done inside the prison after sentencing by people who do not know the offender and who will give an objective view of the punishment.

In essence, restorative justice is very similar to the traditional African dispute resolution mechanism, whereby the aim of resolving the dispute was not only to punish the offender but also to reconcile the two families that the offender had brought asunder because of his offence. The families would meet and talk under the guidance of elders, and then a proper punishment was meted upon the accused person. Sometimes, the accused person would be banished from society, leaving two families in harmony with each other. The victim's family will be paid compensation as a way of restoring them from the shame that the offender had put them through. The departure of the African justice system from restorative justice is that there was more focus on the community and the families than on the offender in the African Traditional Justice System. In restorative justice, the focus on all the stakeholders is proportionate[79]. The scope of this focus can be increased to cover the welfare of the offender regarding conjugal and family visits. If the offender is released to a solid family

77 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society. (Chicago, IL: University of Chicago Press, 2002)*

78 Conferencing started in New Zealand but has spread to almost all continents.

79 MR. JUSTICE N.R.O. OMBIJA. *'Restorative Justice and Victims of Crime in Kenya'. Accessed at* <https://kenyalaw.org/kl/index.php?id=1895> . (Accessed on May 5th 2024)

after incarceration, it will be easier to reintegrate into society. However, Kenya would not be without its dynamics.

6.02 Dynamics of allowing conjugal visits in Prisons in Kenya

The question of conjugal visits has been tested in Kenyan courts at the High Court in Meru. What came out was that conjugal visits are not allowed because of a lack of facilities. These dynamics can be encountered when Kenya has enough privacy facilities to allow for conjugal visits in prisons.

The justice system does not discriminate on any basis when one has committed an offence and is sent to serve a jail term. Both married and unmarried persons are sent to jail without any regard to their marital status. Even recently, marriage cannot be a mitigating factor during sentencing. In most jurisdictions, conjugal visits are only allowed for married prisoners. This brings in several questions. If conjugal visits are allowed as a right to which everyone is entitled because of human dignity, then it would mean that enabling it only for married couples would be discriminatory. This will be different for same-sex couples offenders since the law in Kenya does not recognise same-sex relationships. Allowing conjugal visits for those imprisoned for long periods to allow them to pass down their name according to African customs will mean that priority is given to those who are not married because those who already have families already have children to carry their names.

6.03 Duration of sentence

The duration of the sentence will also matter when considering conjugal visits to prisons. If facilities allow it, everyone should be granted the opportunity without any discrimination. However, if facilities are insufficient, long-term offenders should be prioritised. What is long-term or short-term will be a matter of discretion based on the circumstances of each case[80]. For those serving life sentences and death sentences in prison, sentences that don't envisage the offender getting back to society, the conjugal visits will only be justified based on the rationale they are accorded. So, if they are accorded as a matter of right

80 Such that an offender serving a one year sentence will not normally be given this right , but if the offender's spouse or child is terminally ill, then this changes everything.

because one is human, everyone, even offenders who might never be released, is entitled. However, if the rights are accorded to prepare the offender to rejoin society, then conjugal visits in such a case will be debatable.

6.04 The nature of the offence convicted for

"He who comes to equity must come with clean hands." This is a maxim of equity, which means that when one seeks a right, they should not taint themselves. Offenders who have been convicted for sexual offences breached the sexual rights of others, and therefore, it is arguable if they are allowed to enjoy this same right they took from others while still serving a sentence for it. One would say that such offenders should not be accorded conjugal visits. However, if conjugal visits are viewed from the angle of the innocent spouse, a case can be considered. For those who have been convicted of domestic violence and other related crimes, the person should only be allowed the visit if the same can be supervised.

6.05 Funding the Facilities

One of the reasons why conjugal visits are not allowed in prisons today is because of lack of facilities. The constitution of Kenya provides for the progressive realisation of socio-economic rights, including housing and infrastructure. In developing countries, many other priorities may supersede building private facilities for the offenders to use during the conjugal visits. A question arises on whether the offenders can bear these costs. This will bring about the issue of discrimination because some offenders may not be able to afford it, but those who can afford it will be allowed to enjoy the right. The facilities can be outsourced and funded by offenders. The government can provide small things such as water, soap, condoms, and bed linens, while the offender and their family bear the cost of renting the apartment for the allowed duration. The government will also provide offenders with medical and mental check-up facilities before rejoining their families.

6.06 Assisted Reproductive Techniques

Assisted reproductive techniques are techniques that allow a person to conceive a child without going through the traditional process of sexual intercourse.

This can be accorded to offenders imprisoned for long sentences and wanting to have families. This will, however, only work for the male offenders since it would mean that female offenders would be subjected to pregnancy and bearing the child while in prison. In as much as this will give families to offenders who would otherwise not make families because of the long sentences, it also raises the issue of single parenting of the children. The free spouse will be responsible for carrying, nurturing and providing for the children single-handedly, and it is doubtful if this was the intended outcome of childbearing.

7.0 Conclusion

The punishment of offenders has evolved from the aim of punishing beings to maiming to the current dispensation when the criminal justice system aims at rehabilitation, reformation, and successful restoration of the offender back to society after serving their prison sentence. The issue of rights has also evolved from when fundamental rights were the right to life and other rights to a point where the right to sexual and reproductive health is paramount. Kenya has a very progressive constitution that has put human dignity at the center of the rights.

The right to conjugal visits for incarcerated offenders has not been accorded in Kenya. Case law has shown that denying such a right is because of a lack of private facilities to exercise that right. The benefits of offenders' access to conjugal rights outweigh the drawbacks. Access to conjugal rights enables the prisoner to take part in the affairs of their family even when they are still in jail. This assists in a smooth transition to society once the offender is released from prison. It also enables the offender, if male, to procreate and get children regardless of the length of time they will be in prison. The drawback is that the free spouses will bear the burden of raising the children. With the progressive realisation of socio-economic rights, the government can consider partnering with private institutions providing private facilities. Then, the offenders will bear the rental costs if they can. The government can also consider assisted reproductive technology to help those women who may want children while their husbands are in prison for a prolonged duration of time.

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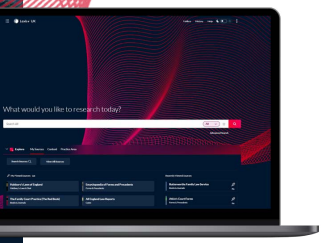

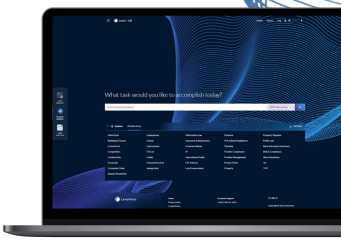

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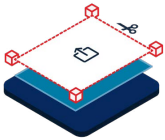

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ARTIFICIAL INTELLIGENCE AND LEGAL PRACTICE: Transforming Law in the African Context

Charity Cheruto Kipkorir[1*]

Abstract

In 2014, Gartner, a leading research and advisory firm, predicted that artificial intelligence (AI) and machine learning would be among the key technologies accelerating globalisation and digital transformation. This prediction has materialised, with AI becoming a transformative force across various sectors. AI can interpret and learn from data as a general-purpose technology, offering solutions that reshape economies and societies. This article explores the evolution of AI, its applications in different economic sectors, and its growing influence in the legal profession. It examines AI's challenges and opportunities, particularly in Africa, where regulatory, economic, and infrastructural factors often influence technological adoption. The paper emphasises that AI is not solely a business or financial tool but a critical innovation requiring ethical oversight. It highlights the role of international and national regulatory bodies in ensuring responsible AI development and implementation. Additionally, the article discusses how Kenyan lawyers can leverage AI to enhance legal practice, improve efficiency, and strengthen access to justice. By embracing AI-driven tools, legal professionals can optimise case management, legal research, and decision-making processes. The article underscores the necessity of balancing AI adoption with ethical considerations, ensuring that technological advancements align with legal principles and society.

Keywords: *Artificial intelligence, Algorithmic Bias, Ethical AI, Lawyers, Legal practice, Data, Africa*

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1.0 Introduction

John McCarthy is credited for coining the word Artificial intelligence,[2] but the concept has existed and morphed glacially from the first to the third industrial revolutions with limited attention.[3] Information technology's critical role in the fourth revolution, the availability of Big data and its use in all major sectors of the economy set the pace for the use of AI.[4] When most people think of Artificial Intelligence, they imagine 'super-powered computers that act and think like human beings, with complicated motives, wide-ranging capacity and often dangerous tendencies.'[5] That is not the case, at least with the kind of AI technology available at present.

AI has been defined as the study of cognitive processes using computer science's conceptual frameworks and tools. [6] It has also been defined as any artificial system that performs tasks under unpredictable circumstances without significant human oversight, or that can learn from experience and improve its performance.[7] AI is developed through algorithms, defined as "a set of defined rules to achieve a certain result." [8] Algorithms are designed to learn from data to improve program performance through its continuous usage.[9] A common experience most of us have had with algorithms, are the similar content feeds that are suggested to us or come up in most social media platforms timelines, when one clicks on a post article and/or or video. Algorithms achieve this

2 See generally, John McCarthy, "What Is Artificial Intelligence", Computer Science Department, Stanford University, Stanford, CA 94305, November 12, 2007 [Online] Available: http://jmc.stanford.edu/articles/whatisai/whatisai.pdf (accessed on 24/4/2024) Anyoha, R. (2017). The History of Artificial Intelligence. Science in the News - Harvard University, 1-19. Plant, R. (2012). An introduction to artificial intelligence. American Institute of Aeronautics and Astronautics. Smith, C. (2006). The History of Artificial Intelligence. History of Computing - CSEP 590A, 1-27. Spector, L. (2006). Evolution of artificial intelligence. Artificial Intelligence, 170, 1251-1253.

3 Schwab, K. (2016, January 14). The Fourth Industrial Revolution: what it means, how to respond. Retrieved from World Economic Forum: https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/#:~:text=We%20need%20to%20shape%20a,of%20our%20heart%20and%20soul. (accessed on 24/4/2024)

4 See, V Salomé 'A Relational Theory of Data Governance' 131(2021)2 YLJ 585 and D Nguyen and M Paczos, 'Measuring the Economic Value of Data and Cross-Border Data Flows' OECD Digital Economy Papers August 26, 2020.

5 William Magnuson, 'Artificial Financial Intelligence' (2020) 10 Harv Bus L Rev 337.

6 Edwina L. Rissland, Artificial Intelligence and Law, Steeping stones to a Model of Legal Reasoning, (1990) Vol 99 YLJ, 1957.

7 Pablo J. Olmo Rodriguez; Artificial intelligence Law; Applications, Risks & opportunities. Revista Jurídica UPR, (2021) Vol 90, 703.

8 Domion Eke, Kutuma W, Simisola A, eds, (2023) Responsible AI in Africa, Challenges and Opportunities, Palgrave Macmillan, pp 198.

9 ibid

through perception, planning, reasoning, learning, communication, decision-making, and acting. [10]

While artificial intelligence has different attributes and applications, such as robotics and expert systems, machine learning and natural language programming are the most important for AI, at least in the context referenced herein.[11] The latter is the computer's capacity to teach itself and learn from experience to improve its capability based on the data provided. The former is the ability of computers to understand the meaning of spoken and human speech and to apply and integrate that to perform human-like analysis.[12] It can take the form of supervised, unsupervised or reinforced learning where;[13] 'external empirical data are used to create and update rules for the improved handling of similar data in the future, and to express these rules in a comprehensible symbolic form.'[14]

In November 2022, OpenAI, a Microsoft-backed company publicly made available a prototype of generative AI, known as ChatGPT.[15] It quickly gained traction due to its ability to understand and respond to natural language. This led to hype about similar applications of large language models (LLMs), such as Bard by Google and Claude by Anthropic.[16] The term 'generative' has been defined as being able to "produce or create something." [17] Generative AI is not some form of magic; the AI models are trained using LLMs. LLMs, are very large deep learning models -meaning they can recognize patterns in the data set and create new output from learned input.[18] For example, they can

10 n 6, p704

11 Malluwawadu N.G, Artificial Intelligence and Law, ResearchGate (2019), p1. https://www.researchgate.net/publication/341520298_Artificial_Intelligence_and_Law (accessed on 23rd April 2024)

12 Gary E. Marchant, Artificial intelligence and the future of legal practice, (2017) TheSciTechLawyer, https://www.iadclaw.org/assets/1/7/10.4-_Marchant-_ai_and_practice_of_law_SciTech_lawyer.pdf (accessed on 23rd April 2024) p 21

13 Rafal Rejmaniak, 'Bias in Artificial Intelligence Systems' (2021) 26 Bialostockie Studia Prawnicze, p 27

14 ibid

15 Ooi, K. B., et al (2023). The Potential of Generative Artificial Intelligence Across Disciplines: Perspectives and Future Directions. Journal of Computer Information Systems, 1–32. https://doi.org/10.1080/08874417.2023.2261010 (accessed on 23rd April 2024)

16 ibid

17 Francisco José García-Peñalvo, Andrea Vázquez-Ingelmo, What Do We Mean by GenAI? A Systematic Mapping of The Evolution, Trends, and Techniques Involved in Generative AI, International Journal of Interactive Multimedia and Artificial Intelligence, Vol. 8 no 4, p 7.

18 Difference between Artificial Intelligence, Machine learning, LLM, and Generative AI see, https://toloka.ai/blog/difference-between-ai-ml-llm-and-generative-ai/ accessed on 15th February 2025.

analyze the text in several books and then use the information to generate new sentences and paragraphs not found in the original books. An LLM generally builds 'itself as they predict what word is likely to come next in a sequence of words.'[19] To achieve this, LLMs use a type of neural architecture known as a transformer, which is designed to process and generate data in a sequence.[20] A neural architecture is a method of machine learning, that uses deep learning to teach computers to process data in a way that is inspired by the human brain.[21] It creates an adaptive system that computers use to learn from their mistakes and improve continuously.[22] The model then can generate original content as it learns patterns within the available data. Then, it creates inputs that present the data in new ways to create high-quality human-like material. [23] Generative AI can predict a response to a user prompted by a question or instructions that has the impression of novel-generated content.[24] Simply put, LLM is auto-complete at scale, by using immense data and computing power. The more data they are trained on, the more nuanced they become in predicting the following content, finding information, conversing and organising data.[25]

AI is rapidly being applied in all major sectors of the economy and society.[26] The technology allows humans to develop previously impossible solutions through its analysis and compilation of enormous amounts of data. For instance, courtesy of climate change and the need to phase out fossil fuels, the demand for batteries, motors and wires and their core minerals, cobalt, copper, lithium and nickel, which build them, is at an all-time high.[27] Using existing technologies, mining companies use AI to improve the odds of surface strikes and detect undetectable underground ore.[28] They use software modes to train AI models such as Earth AI, Kobold, VerAI, sensor, and OReFox with geological, geochemical, and geophysical data, with the hope that they will draw inferences and enable them to know where to mine more precisely.[29]

19 n14, p 3.
20 ibid
21 n17
22 ibid
23 n 16, p 1
24 n 14, p 3
25 The Economist, July 13th 2024, p 64
26 The Economist November 1st 2023, p 73-74
27 ibid
28 ibid
29 ibid

Generative AI has made creativity commonplace. Boomy, an American Startup, allows amateur composers generate original tunes with a few clicks and upload them to earn royalties on streaming platforms such as Spotify.[30] Byte Dance, Tiktok's parent company, is training an app called Ripple, which makes any melody that users sing into their phone into a polished song. [31] Publishing books has also been made easy. In September 2023, Amazon limited self-published authors to three e-books a day on its Kindle platform and required them to specify if AI wrote it.[32]AI has also created digital botox, which has increased the shelf life of actors and singers.[33] ABBA Voyage, a performance by virtual avatars of the popular septuagenarian music group, generated with AI's help, has earned 2 million dollars weekly since its debut.[34] Disney has acquired the voice of the late James Earl Jones, the voice of Darth Vader, to use it in future Star Wars movies in his absence.[35]

Pricewaterhouse Coopers International Limited (PwC), a business advisory firm, has estimated that by 2030, AI technologies will increase the global economy by $15.7 trillion. $ 6.6 trillion is generated from productivity and $ 9.1 trillion from consumption.[36] If African countries could capture 10% of the growing AI market, they could contribute $ 1.2 billion to their GDP by 2030.[37] The economic revolution is underway; the Economist reported in 2023 that PWC, in its annual survey of global chief executive officers, indicated that a quarter of them expect to cut their workforce by at least 5% this year because of generative AI.[38] The report specified that Google and Amazon have laid off staff in their advertising and streaming businesses because of AI. [39] In addition to this, AI is now a lucrative skill. 5% of American big banks between 2020-

30 The Economist November 11-17th 2023
31 ibid
32 ibid
33 ibid
34 ibid
35 ibid
36 PWC (2017) Sizing the prize: What's the real value of AI for your business and how can you capitalise? London: PricewaterhouseCoopers (PWC). https://www.pwc.com/gx/en/issues/analytics/assets/pwc-ai-analysis-sizing-the-prize-report.pdf (accessed on 23rd. April 2024)
37 Faustine Ngila, Africa is joining the global AI revolution. 2022. https://qz.com/africa/2180864/africa-does-not-want-to-be-left-behind-in the-ai-revolution (accessed on 23rd April 2024)
38 The Economist, January 20th 2024 p. 6
39 ibid

2023 cited AI in the job descriptions. [40]8% of patents registered by tech firms in 2020-2023 were AI-related.[41]

2.0 Responsible and Ethical Artificial Intelligence

The first AI safety summit was held in London in November 2023.[42] The summit, was part of the growing efforts by countries in the developed world to regulate AI. Regulators have been slow in the past. Many of them wish they had acted earlier to police social media in the early 2010s, and are keen to be on the front foot this time.[43] The worry has been that unbridled competition would lead to the development and use of models that could easily be abused.[44] Regulation is necessary to ensure that AI does not become a tool for malfeasance and turn against humanity.[45]

This is based on a recurrent concern about machine learning algorithms operating as "black boxes." This makes it challenging to identify how and why they reach decisions, recommendations and predictions.[46] The unboxing of AI algorithms has shown to be an engineering challenge. This level of opacity is seen as 'surreptitious, incorporated by complex data processing, purported as a matter of deliberate practice'.[47] The fact that developers of LLMs cannot say for certain what capabilities they will have, creates a lacuna and makes it hard to rely on such models when they make high-stake decisions.[48]

The need for regulation is also premised on AI bias. During the creation of artificial intelligence, human beings inevitably conceive of this technology with their own prejudices, whether conscious or unconscious.[49] The phenomenon of AI bias is a complex one. Bias can occur through the data that is the basis of

40 The Economist, November 13th 2023, p 14
41 ibid
42 The Economist October 28th 2023
43 ibid
44 ibid
45 ibid
46 Ashley Deeks, 'The Judicial Demand for Explainable Artificial Intelligence' (2019) 119 Colum L Rev 1829
47 n7, p38
48 The Economist November 25th-1st 2023; The predicted catastrophes that could arise include the development of bio weapons and AI engineered financial crisis.
49 Abdessalam Jaldi, Artificial intelligence Revolution in Africa, Policy Center for the New South, Mohammed VI Polytechnic University, Morroco, p 18

the training that makes the predictions and decisions, the construction of the system itself, or the user who interprets the systems decisions and predictions.[50] Data gaps can be harmful to marginalized identities, low income individuals and disadvantaged groups. [51] This can lead to discrimination against individuals or even entire social groups.[52]

AI is prone to realistic manipulation.[53] AI can create hyper realistic deep fakes, that could sway opinions before their messages could be debunked.[54] There has been a rising concern on voice cloning, false audio and non-consensual AI enabled edits, especially sexual-related content.[55] Before AI, disinformation was already a problem, which led social media platforms to implement mechanisms to reduce the spread of misinformation.[56] With AI, propaganda bots are more challenging to detect than existing disinformation efforts that the public is used to. [57] This disinformation has been used to dismantle checks and balances that underpin good governance, such as free and fair elections, a free press, independent courts and NGO's.[58] Societies now understand that images, audio or video of something do not prove that it happened. Reputation and provenance are now more critical than ever.[59] Tech firms are searching for ways to watermark their output so that real pictures and texts can be distinguished from machine-generated content.[60]

There is also a growing discourse on the importance of focusing on good -AI. [61] The emphasis of good AI is; the role of public policy should be to oversee the digital advancement of AI, verify its capabilities and build public trust, alongside safeguarding against public risk.[62] This will bring the benefits of AI to the forefront, not just those that will result in errors, biases, intrusion

50 n12, p 28
51 Orly Lobel, 'The Law of AI for Good' (2023) 75 Fla L Rev 1081
52 n12, p 25.
53 The Economist September 2nd -7th 2023.
54 ibid
55 Taylor swift a pop singer, was a victim in late January 2024. AI-generated images that appeared to depict the singer in the nude appeared on social media sites including X (formerly known as Twitter) and messaging apps such as Telegram.
56 n52
57 ibid
58 ibid
59 ibid
60 ibid
61 n 50
62 ibid, p 1076

and exclusions[63]. The proponents of this conversation address the fact that policy on AI need to be balanced, concrete and nuanced.[64] And that irrational aversion to automation, can be mitigated through education, private-public governance and innovative policy design. [65]

New York Times tech reporter Kevin Roose, in his article titled *We Need to Talk About How Good A.I. Is Getting*, whilst outlining the contemporary mindset and conversations surrounding AI, explained the kind of tech policy needed, as follows:

> *"It's a cliche in the AI world to say things like, "We need to have a societal conversation about AI risk." There are already plenty of Davos panels, TED talks, think tanks, and AI ethics committees out there sketching out contingency plans for a dystopian future. What's missing is a shared, value-neutral way of talking about what today's AI systems can do and what specific risks and opportunities those capabilities present.".*[66]

Individual countries have enacted their own regulations on AI. The European Union, has an AI Act that was approved by the European parliament in March this year.[67] The G7 group of countries has a code of conduct for AI firms.[68] China in October 2023 unveiled Global AI initiative.[69] Unlike their conduct in the past, technology companies have embraced and even encouraged the regulations. Alphabet, Microsoft, Anthropic and OpenAI have lobbied for

63 ibid, p 1077
64 ibid, p 1083
65 ibid, p 1074
66 Kevin Roose, We Need to Talk About How Good A.I. is Getting, N.Y. TIMES (Aug. 24, 2022), https://www.nytimes.com/2022/08/24/technology/ai-technology-progress.html (accessed on 24th April 2024)
67 The Artificial Intelligence Act is a European Union regulation on artificial intelligence (AI). It was proposed by the European Commission on 21 April 2021 and passed on 13 March 2024, see https://www.europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law (accessed on 24th April 2024)
68 The G7 AI Principles and Code of Conduct (AIP& CoC) are voluntary; governments of the G7 will endorse them and encourage businesses and other organizations to commit to them. available at file:///C:/Users/User/Downloads/Hiroshima_Process_International_Code_of_Conduct_M8CtFC-Uob4UmDz3UoB5zQuCT6FE_99641.pdf (accessed on 24th April 2024)
69 n52; The Economist reported that China in October 2023 unveiled Global AI initiative. China has a system of extreme regulation, there AI algorithms must be registered with a government body and somehow embody core socialist values. This form of regulation may erode innovation.

it.[70] However, international regulations are yet to be agreed on. Suggestions include; a licensing regime for AI models that exceed certain performance thresholds, the control of sale of powerful chips used to train LLMs, and mandating cloud computing firms to report when customers train frontier models.[71] The European parliament wants model makers to test the LLMs for potential impact on human beings from health to human rights.[72] They also insist on getting the information on the data used to train the models.[73] There is also the question of who is to do the regulating apart from governments. Suggestion has been made that a body akin to the Intergovernmental Panel on Climate Change (IPCC) be formed. IPCC is a body established by the United Nations and the World Metrological Organization. Their role is mainly to research climate change science. The role of the proposed body would be to study AI, the new laws needed to track the use of copyrighted materials when training LLMs, and to define privacy rights as AI models guzzle up personal data.[74]

The responsible use of AI will require interdisciplinary studies on privacy, data protection, copyright infringement, and bias. The input of programmers, lawyers, ethicists, and experts in the fields in which AI systems are to be deployed in such studies is key.[75] Ethical impact assessments must be commonplace to ensure that technology developers and deployers consider their systems' broader social and economic impacts.[76] In addition, governments should intentionally and continuously invest in research, analysis, innovations, and cross-border and intersectoral knowledge transfer.[77] It is also important that regulations that result should not stifle competition; that it does not entrench incumbents and block out competitors especially open source models.[78]

70 n 41
71 ibid
72 ibid, see also n 66
73 ibid
74 ibid
75 n 12, p 36
76 n 48, p 11
77 ibid
78 ibid

3.0 Artificial Intelligence: An African Experience

The potential surge of AI in Africa is underpinned by several factors; the continuous improvement in the continent's digital landscape, increasing mobile penetration and the growth of financial inclusion facilitated by fintech innovations, as well as Africa's demographic makeup, characterised by a youthful population that largely consists of digital natives.[79] Data from the Center of Intellectual Property and Information Technology Law (CIPIT) shows that Africa has more than 2,400 organisations working on AI innovation, 41% of which are startups operating in various industries, including health, agriculture, education, law, and insurance.[80] AI solutions are successfully being deployed in countries such as Kenya, Nigeria and South Africa.[81] For instance, *Zenvus,* a data driven platform provides insight to farmers in Nigeria. In South Africa, money transfer services known as *Mama Money* and *Mukuru* enable easy and quick transfer of money across the continent. *Kudi,* an AI powered chatbot provides financial services in Nigeria.[82] Kenya's AI based agritech Apollo Agriculture, utilises machine learning, to assist in formulating better decisions concerning the loans that can be granted to specific farmers.[83]

In spite of the foregoing, African countries face challenges in the uptake and adoption of AI. The European Union Joint Research Centre's (JRC) in 2021 compared Africa's AI economic players, such as research institutes, firms and governmental institutions, with the other regions. Their finding indicates that Africa's contribution to AI remains small as the United States, China, the EU, the UK and India dominate global AI development. [84] Oxford Insight's Global AI Index in 2024, places African countries among the 'waking up' and 'nascent' nations in terms of AI investment, innovation, and implementation.[85] Mauritius leads the region in AI readiness, followed by South Africa and Rwanda. Kenya

79 African Union Continental Artificial Intelligence Strategy (2024) African Union, available at https://au.int/sites/default/files/documents/44004-doc-EN-_Continental_AI_Strategy_July_2024.pdf p 27

80 ibid, pg 18

81 n 7, p v

82 ibid p102

83 Kenya AI based Agritech , Apollo Agriculture https://www.wearetech.africa/en/fils-uk/solutions/kenya-ai-based-agritech-apollo-agriculture-helps-farmers-maximize-profits accessed 15th February 2025

84 Righi, R. et al, AI Watch Index 2021, Lopez Cobo, M. and De Prato, G. ed(s), EUR 31039 EN, Publications Office of the European Union, Luxembourg, 2022, https://publications.jrc.ec.europa.eu/repository/handle/JRC128744 accessed on 15th February 2025.

85 Oxford Insights, 'Government AI Readiness Index' Oxford Insights, (2024) available at https://oxfordinsights.com/ai-readiness/ai-readiness-index/> accessed on 15th February 2025

came in sixth. [86] The report highlights Kenya's role in building human capital for AI adoption. This is because the Kenyan Government as part of its digital master plan for 2022-2032, announced the establishment of the Africa Centre of Competence for Digital and Artificial Intelligence skilling, in collaboration with the United Nations Development Program (UNDP) and Microsoft.[87]

The Continent's dismal performance could be because Africa has not maximised the benefits of previous industrial revolutions.[88] The existing inequalities are being transferred to the digital space.[89] Issues such as digital divides of varying degrees across the continent, as well as structural inequalities have hindered the uptake of AI. [90]The digital divides are linked to inadequate telecom networks, lack of infrastructure such as electricity, and lack of digital skills and literacy.[91] Low levels of AI investment would result in low adoption of the technology for the businesses that operate across Africa. In turn the continent misses out on the opportunities created by AI mentioned hereinabove. This could lead to wage stagnation, increased unemployment, and income gap growth, exacerbating inequality. [92]

As explained above, machine learning relies on vast amounts of data to train algorithms. The lack of high-quality data accessible to African researchers and the relevance of this data to African problems is a challenge observed; particularly in unstable or conflict-affected areas.[93] If data is sparse and unrepresentative; the results will be less effective. It is also vital that users and developers do not import machine learning algorithms built and trained abroad, using data that may not recognise or be biased against substantial parts of the African population.[94] When data is African based, it includes factors like ethnicity, tribal affiliations and other cultural nuances. This helps datasets

86 ibid
87 Ibid, see also the Kenya National Digital Master Plan, available at https://cms.icta.go.ke/sites/default/files/2022-04/Kenya%20Digital%20Masterplan%202022-2032%20Online%20Version.pdf accessed on 15th February 2025.
88 n 48, p 16
89 ibid, see also World Bank, Artificial intelligence in the Public Sector, available at https://documents1.worldbank.org/curated/en/809611616042736565/pdf/Artificial-Intelligence-in-the-Public-Sector-Maximizing-Opportunities-Managing-Risks.pdf (accessed on 24th April 2024)
90 n 48, p 16
91 ibid
92 ibid
93 n 48, p 17
94 ibid

become genuinely inclusive and relevant to solving African challenges. Local communities within the African continent should be involved in the creation, sharing and use of datasets.[95] Data set bias, applicable in Western countries such as representation of minority populations, should not be wholesomely imported in regions where the social construct in use, such as race, is not present.[96]

UNESCO's Artificial Intelligence needs assessment survey, [97] identified the policy priorities and capacity building needs in 32 African countries. The survey noted the need to strengthen multistakeholder-driven policy initiatives for AI governance at the national level. They include fostering legal and regulatory frameworks for AI governance, enhance capacities among public administrations, judiciary and parliamentarians for AI governance and use. The survey emphasizes cooperation between countries around some of the common priorities like personal data protection and data governance, updating education, skills and training systems, supporting AI research and development.[98]

The foregoing requires strong political will from African leaders and governments. It is prudent that they create an enabling environment for AI to flourish.[99] This includes incentives such as funds, tax policies, and seed capital that reward innovation for actors in AI-related innovative endeavours.[100] The education systems must be repositioned to cater to the needs of emerging digital opportunities.[101] This will increase the number of people aware of AI opportunities, increase its adoption, and create a pipeline of skills to compete in the emerging economy. [102]They should emphasise a problem-driven approach, contextualising local needs, problems, and developments in AI

95 n 7, p 46
96 n 48, p 18
97 Artificial Intelligence Needs Assessment Survey in Africa, UNESCO (2021) pp 68-73 https://unesdoc.unesco.org/ark:/48223/pf0000375322 accessed on 15th February 2025
98 ibid
99 Ibid pp 39-40
100 Arakpogun E, Elsahn Z, Olan F and Elsahn, F, (2021) Artificial intelligence in Africa: challenges and opportunities. In: The Fourth Industrial Revolution: Implementation of Artificial Intelligence for Growing Business Success. Studies in Computational Intelligence. Springer, Cham, Switzerland, pp. 375-388
101 ibid
102 ibid

policy.[103] This ensures that the AI policy that develops, is relevant to their unique context. Lastly, African leaders should examine and scrutinize the role and intention of international communities in building the technological gaps in Africa.[104] They should also actively participate in global initiatives on AI and highlight their unique challenges.[105] To this end, the African Commission on Human and People's Rights developed resolution 473 on 25 February 2021, which called on national governments, the African Union and others to work towards developing legal and ethical frameworks to govern AI and emerging technologies. The African Union formulated AI for Africa Blueprint in 2021 and a continental strategy for AI in 2024. Both policies emphasize the importance of AI governance regulations, high-quality and diverse data sets, data infrastructure, responsible and ethical AI, and right-based regulation of AI to guarantee African sovereignty.[106]

Kenya's digital master plan confirms that the country faces the shortfalls identified in the uptake of AI.[107] To ease the uptake of AI, the government's plan is to support research and development of AI and emerging technologies and encourage the use of AI to solve local problems.[108] This will be done through the establishment of a research fund for that purpose and development of curricula in academic institutions on AI, as well as develop a government and private sector sandbox for emerging technology. The plan champions for principle-based technology-neutral legal frameworks.[109] That legislature design is unlikely to be obsolete as technologies develop, and will mitigate the costs constrains associated with legal reform. The plan also emphasizes the importance of ethical AI that conforms to national values[110] as well as collaboration with other African governments on AI and emerging technologies.[111] AI will be used in

103 ibid

104 n99

105 ibid

106 See; SMART Africa Artificial Intelligence for Africa Blueprint (2021) and African Union High-Level Panel on Emerging Technologies (APET); the African Union Development Agency (AUDA-NEPAD) AI for Africa: Artificial intelligence for Africa's Socio-Economic Development (2023) and African Union Continental Artificial Intelligence Strategy (2024).

107 n86, p 37,52,72-74.

108 ibid

109 ibid

110 ibid

111 ibid, national values outlined in Article 10 of the Kenya Constitution as follows; patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people,

the day to day running of government and in solving perennial problems such as corruption, financial inclusion, and improve delivery of public services.[112]

4.0 Artificial Intelligence and the Law

It has been posited that AI cannot enhance the practice of law. This is because law has unique characteristics that make it a seemingly particularly challenging field for AI.[113] For instance, legal reasoning is multi-dimensional and requires reasoning with cases, rules, statutes and principles.[114] In common law jurisdictions, the concept of stare decisis gives case law a specific style and standard of reasoning.[115] In addition, specialised legal knowledge is available from many sources, such as scholarly commentaries, treatises, and case reports.[116] Law is also self-aware and self-critical; it has stabilised a system of examining its process and assumptions.[117] Worse still, legal answers are a matter of degree, rather than a clear-cut yes or no.[118] The use of machine learning and natural language processing, and in particular generative AI, has busted the foregoing myth. It is now possible for an AI program to ingest the mentioned repositories of legal knowledge by context. AI can then make assessments of their relevance to the instruction given, distinguish contrary opinions, describe them in detail, and then build a program to execute them for legal practice, teaching, and research.[119]

Initially intended for non-lawyers, AI technologies do and have affected the legal profession.[120] In the United States and United Kingdom, lawyers use *Lex Machina* offered by LexisNexis legal analytics, which uses big data, algorithms and AI to make predictions from, or detect trends in large data sets, and predict

human dignity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability and sustainable development.

112 ibid
113 n5, p 1961
114 ibid
115 ibid
116 ibid
117 ibid
118 ibid
119 See, Surden, Harry, Artificial Intelligence and Law: An Overview (2019). Georgia State University Law Review, Vol. 35 Available at https://ssrn.com/abstract=3411869 (accessed on 24/4/2024)
120 John Villasenor, How AI will revolutionize the practice of Law, Brookings (2023) p 1-5.

outcomes in litigation.[121] They have also used *Raval Law* which uses analytics of judicial opinions to predict how specific judges will decide cases, including recommendations of specific legal language that may appeal to a particular judge. [122]*Ross,* an online research tools powered by IBM Watson, provides legal research and analysis for several law firms in the mentioned jurisdictions and can reportedly read and process a million legal papers per minute.[123] TIMI, an AI enabled legal assistant developed in Nigeria assists lawyers with legal research, litigation, drafting and filing of cases.[124] It is similar to Legal tech Kenya's AI chat box -Artemis legal AI. [125] Andersen law, a leading law and tax firm in Egypt, utilises AI to increase the efficiency and effectiveness of its lawyers and tax specialists. [126]Legal bots, interactive online programs designed to interact with customers, assist in giving customized answers to a recipient's specific situation are also in use. They deal with prospective clients with legal issues based on their own unique circumstances and facts.[127]

AI is also being used to enable judicial decision-making in several ways. It has been used in sentencing.[128] In the United States, an AI-powered system known as COMPAS, designed to make criminological predictions and justify resocialisation decisions regarding specific individuals, was used by judges in many American states to determine offenders' sentences.[129] Online dispute resolution mechanisms that completely circumvent the judicial process have been developed. Microsoft and the United States Legal Services Corporation have teamed up to provide machine-learning legal portals. These portals provide free legal advice on civil law matters to people who cannot afford to hire lawyers.[130] The UK government is developing an internet-based dispute

121 n 11, p 22
122 ibid
123 ibid
124 TIMI AI Companion for every young lawyer< https://legalnaija.com/timi-ai-companion-for-every-young-lawyer/029009519416476813l4/> accessed on15th February 2025
125 The State of AI in Africa Report, Center of Intellectual Property and Technology Law CIPIT, (2023), Strathmore University available at <https://cipit.strathmore.edu/wp-content/uploads/2023/05/The-State-of-AI-in-Africa-Report-2023-min.pdf> accessed on 15th February 2025.
126 Egypt: Pioneers In Integrating Artificial Intelligence to Enhance The Efficiency of Lawyers and Tax Professionals ,available at https://www.mondaq.com/new-technology/1297704/pioneers-in-integrating-artificial-intelligence-to-enhance-the-efficiency-of-lawyers-and-tax-professionals accessed 15th February 2025.
127 n11,p 22
128 ibid
129 ibid
130 ibid

resolution mechanism to resolve minor disputes under 2500 pounds, without court involvement.[131] Modria, an online dispute mechanism offered by E-bay, has been used to settle thousands of disputes online.[132]

AI technology has been subject of litigation as well. In *Cruz v. Talmadge*,[133] the manufacturers of a semi-autonomous AI, were sued after passengers were injured while riding a bus that struck an overpass. At the time the bus driver was following directions given by an AI. The plaintiffs sued the manufacturers of the two GPS devices (a popular AI item) that were guiding the driver under the theories of breach of warranty, strict liability, and negligence. The plaintiffs successfully argued that the accident was foreseeable in that many substantially similar accidents had occurred over the years. In *State of Arkansas vs. Bates,*[134] the police wanted to investigate certain records of interactions with the home owners Alexa, which was stored in the Amazon servers. Amazon moved to suppress the warrant citing the first amendment protection granted to the privacy rights of their clients. The case was later dropped. Such cases give a prelude to the kind of arguments expected.[135] A lawsuit that showcases the importance of counterchecking the content generated by AI as it is prone to hallucinations (incorrect responses) is *Mata v. Avianca Inc.*[136] In that case ChatGPT, generated a brief responding to the prompts of Mr. Mata's attorney, completely fabricated the citations, holdings, and even direct quotes of at least six cases crucial to the generated arguments in the brief. The trial judge could not find any actual cases that contained the quotes, let alone find the cases with the style and citation invented by ChatGPT.[137]

AI is data-intensive and relies on oodles of data. The supersize models powering the generation of AI have downloaded too much of it from the Internet without permission.[138] It is indicated that AI models from Google and Meta have been trained on over 1 trillion words. For comparison Wikipedia, an

131 ibid
132 ibid
133 *Cruz v. Talmadge*, 244 F. Supp. 3d 231-233.
134 *State of Arkansas v. James A. Bates*, Case No. 2016-370-2 (Ark. Cir.)
135 n6, pp 715
136 *Mata v. Avianca, Inc.*, 1:22-cv-01461-PKC, Document 32-1 (S.D.N.Y. May 25, 2023)
137 ibid
138 The Economist- August 13th 2023

online encyclopedia has about 4 billion words.[139] As there will always be a need for new data to feed the frenzy,[140] this has set a pace for conflict of misuse of data and infringement of copy right.[141] John Grisham (author of books such as The Firm), George R.R. Martin (of Game of Thrones fame), and the New York Times have filed class action suits against Open AI. [142]They have argued that they have used their works without permission.[143] Universal Records accuses Antropic, an Amazon and Google-backed AI firm, of doing something similar with music lyrics.[144]

When clients possess vast amounts of useful data, such as customer spending records, they tend to turn to AI models to design bespoke tools to help them use their untapped data for specific business purposes. Microsoft, Google, Weaviate, PineCone, and Neon offer services that help businesses manage their unstructured data sets.[145] Lawyers in such transactions should query and seek to know what will happen to their clients' personal, confidential, and sensitive data.[146] They should ask what would happen to the data of the clients and firm if the AI company they use is sold, merged, retired, or goes bankrupt. What would happen if the AI company is summoned to court? Are they required to give notice to enable the lawyers to challenge it? They should also ensure that the client's information is safeguarded against privacy violations and misuse.[147] In such transactions, it is prudent for lawyers to hire an expert as needed, to check out the AI product, learn what it can, and cannot do.[148]This will ensure clients are protected from exposures such as leaks of sensitive information and records, online tracking and unauthorized collection and sharing of private information.[149]

139 ibid
140 ibid
141 See generally, Ryan Abbott & Elizabeth Rothman, 'Disrupting Creativity: Copyright Law in the Age of Generative Artificial Intelligence' (2023) 75 Fla L Rev 1141.
142 n29
143 ibid
144 n29
145 n 137
146 n6, p 719
147 ibid
148 n 6, p 718
149 n 14, p 6.

As I conclude this aspect of the article, I opine it is prudent for lawyers to ponder on the following queries that come up with respect to the future of AI and the law. When AI eliminates the work that is usually done by young associates, what does that speak to the future of legal work?[150] How will AI affect the training to be done in law schools to equip future lawyers with the needed skills?[151] Will businesses start obtaining legal services directly from legal technology vendors skipping lawyers entirely?[152] Will lawyers be liable for malpractice for relying on AI that makes mistakes? Will self-learning AI be called as witnesses to explain their own independent decision making? [153] How can we ensure the accuracy, legality and fairness of AI decisions? Will AI be liable to charges of unauthorized practice of law?[154]

5.0 How Lawyers Can Harness and Use Artificial Intelligence

At the time of writing this paper, most aspects of legal work are still in the purview of human lawyers.[155] Most lawyers globally are still doing their documentary work without using AI; or at least they are not using legal software.[156] The use of hard files is still rampant. The analysis of artificial intelligence outlined above, and considering the working schedule of lawyers, most of their tasks can be effortlessly replaced by automated legal technologies.[157] Generative AI, presents the biggest opportunity as well as the greatest threat to the legal profession since its formation.[158] This is already the case. A Study by Deloitte estimated that about 100,000 legal jobs will be eliminated by automation in the United Kingdom by 2025.[159] JP Morgan an investment firm used AI to replace 366,000 hours of billable attorney work.[160]

150 n 11, p 23.
151 ibid
152 ibid
153 ibid
154 ibid
155 n 10, p 8
156 ibid p, 5
157 n, 10, p 1. They include preparing legal documents, advising clients, interpreting laws, rules and regulations, analyzing the outcomes of cases, presenting and summarizing cases.
158 Joanna Goodman, Robots in Law: How Artificial Intelligence Is Transforming Legal Services (2016) ARK group
159 Deloitte Insight: Over 100,000 Legal Roles to Be Automated, Legal IT Insider (Mar. 16, 2016) https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/corporate-finance/deloitte-uk-technology-in-law-firms.pdf (accessed on 24th April 2024)
160 Hugh Son, JPMorgan Software Does in Seconds What Took Lawyers 360,000 Hours, Bloomberg (Feb. 27, 2017), https://www.bloomberg.com/news/articles/2017-02-28/jpmorgan-marshals-an-army-of-developers-to-automate-high-finance?utm_source=website&utm_medium=share&utm_cam-

The saving grace lawyers have, especially in the African context, is that a lot of people are not tech savvy and are not likely to give their cases to a digital lawyer.[161] Laymen may not also take in the rapid speed of AI.[162]Even with innovations of AI in law, the building cost of an AI lawyer is not cheap. AI with the creative, imaginative and innovative ideas of a human lawyer is an extremely difficult task with existing technologies.[163] Especially considering that AI is truly far off in acquiring the emotional intelligence of a human.[164] The foregoing can also change very quickly as the AI technology is being transformed each second. This underlines the importance of the collaboration between human lawyers and AI.[165]

While knowing about the technical intricacies of AI is not necessary for lawyers, they must know the potential impact of AI on businesses, consumers and society as outlined as those are their clients. Skills key in the uptake of AI include an understanding of programming, computer science, data analysis, and cloud computing. [166] Additional skills include socio-emotional and creativity-based skills. [167] These are communication skills, leadership and management skills, innovation, research, problem solving and mentorship. [168] This will require lawyers to develop new skills to leverage this collaboration. Law Schools curricula needs to be updated to provide law students with instructions on how to use AI. It is important for law students for instance to understand the underlying architecture of AI, in particular the algorithms it uses, the risks it creates, data inputted, as well as the legal loopholes it poses.[169]

AI systems offer opportunities for innovation of bespoke tools to enhance access to justice. For instance, it could inform an additional form of alternative online dispute resolution mechanism, with the requisite legislative backing, as part of

paign=copy (accessed on 24th April 2024)

161 n 10, p 5

162 ibid,

163 ibid, p 6

164 ibid

165 ibid, p 2

166 Borgonovi, F., et al. (2023), "Emerging trends in AI skill demand across 14 OECD countries", *OECD Artificial Intelligence Papers*, No. 2, OECD Publishing, Paris, https://doi.org/10.1787/7c691b9a-en. (accessed on 29th April 2024) p 33

167 ibid

168 ibid

169 n 119

the Small Claims Court in Kenya (SCC).[170] This is a court that was specifically instituted to handle civil claims worth less than one million shillings.[171] The idea of the court is to reduce the judicial time spent in resolving petty disputes (the cases should be resolved within 60 days) with little reliance on the Law of Evidence to increase access to justice. This enables anyone to litigate without the need for a lawyer/legal knowledge.[172] The Kenyan Judiciary uses an online, case filing and tracking system known as Case Tracking System (CTS).[173] All pleadings in civil cases are filed through the online system; and all cause listed court attendances and decisions are also inputted, making it a performance measuring tool as well. With the immense data available through the CTS, an analysis can be done on the possibility of automated decision making, akin to ebay's Modria, without a human adjudicator rendering decisions. Data from the CTS, can be used to determine the kind of cases filed in the SCC, where the litigants act in person, and with infrequent appeal rates to be handled by the online dispute resolution mechanism. Such innovations could free up adjudicators to handle other cases and can be a blueprint for similar rerouting of cases for the other kinds of case types, that form part of the litigation in our courts.

6.0 Conclusion

How then should lawyers think about AI? It is clear that lawyers who effectively leverage emerging AI technologies, will be able to offer services at a lower cost and higher efficacy. It is prudent that they use the technology themselves, learn the joys of knowledge acquisition and experimentation. Knowing the limits and strengths of AI technology, will help lawyers have a realistic understanding of where AI is likely to impact the practice of law. Upskilling is also prudent; lawyers will benefit from being proficient in digital trade, digital rights, programming, data analysis, cybersecurity, cloud computing and ethics. Collaboration with IT experts to explore the opportunities the emerging technology creates in litigation, contract, copyright, competition and antitrust law, or the social, legal, economic and ethical challenges associated with the

170 Small Claims Court Act, available at Kenyalaw.org. The description and jurisdiction of the court is available at, https://judiciary.go.ke/small-claims-court/ accessed on 23rd April 2023

171 Section 12(3) of the Small Claims Court Act.

172 Section 32 of the the Small Claims Court Act

173 See the State of the Judiciary Report(SOJAR) (2023-2024) available at< https://judiciary.go.ke/downloads-reports/#flipbook-df_35371/95/> p 67-73, Accessed on 15th February 2025.

uptake of AI is key. The bedrock for the foregoing is legislation and policy on AI. Kenya, is on the front foot in this regard, with a digital master plan in place, that highlights how uniquely African concerns such as digital divides, skills, connectivity, governance, regulation and availability of indigenous data will be worked on. The key objectives of the master plan are to focus on digital innovation and enterprise, which turns ideas into sustainable digital businesses, improve the efficiency in the provision of government services and enhance the foundation of good governance. These are the nitty-gritties which offer a conducive environment that improve the competence and efficiency of the progress of law and related legal practice.

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