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KENYA LAW REVIEW

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Long'et Terer

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Introduction
The Kenya Law Review Journal is a publication that provides a forum for the scholarly analysis of Kenyan law and interdisciplinary academic research on the law. The focus of the Journal is on studies of the legal system and analyses of contemporary legal issues with particular emphasis on every article making a substantive contribution to understanding some aspect of the country's legal system. The Editorial Policy of the Journal is to be non-ideological and with a multi-disciplinary outlook, to include articles showing the interplay between the law and other disciplines.

Submission Requirements
Articles should not normally exceed 12,000 words (excluding footnotes); Case Comments should not normally exceed 5,000 words (excluding footnotes). In all cases footnotes should be used only to make necessary citations rather than to provide additional text. All submissions should be accompanied by a statement that the material is not under consideration elsewhere, and that it has not been published or is not pending publication elsewhere. The text and the footnotes must be double spaced, with margins on both sides. A statement of the number of words should be included.

The author's name should appear under the title, and should be asterisked, with the author's designation just above the notes.

The selection committee, composed of the editorial board of the Journal, will review and consider all submissions for publication and the contributors will be given notification of the acceptance of their works for publication in the Journal.

Each submission should be written in English and submitted both in signed paper copy and in soft copy as an editable word - processed computer file. They should conform to academic citation standards and include an abstract of up to 350 words.

The submissions should include:

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Foreword

Since our inaugural publication the quality and quantity of Kenyan legal literature has been on the rise over the years and there has been high quality commentary on our laws and judgments. This has been deeply reflected in this edition of the journal as it features articles from wide and varied areas of the law which seek to develop the direction legal discourse intends to take.

Kenya adopted a new Insolvency Act in line with the culture adopted by many other modern insolvency regimes. This reformed legislation shifts the focus from recovery to rescue. One article in this edition focuses on this and gives an outline of alternatives to bankruptcy as provided in the insolvency Act. The authors of this article give an in-depth view of the framework that the Act has put in place to facilitate the rescue of troubled businesses in the interests of all stakeholders.

Another author takes a critical look at the interface between political and judicial power in the Constitution of Kenya, and highlights the interface between them that informs and guides the practice of judicial review.

These are a few of the articles that are featured in this journal and this edition will prove to be an interesting read to legal professionals. Special thanks goes to the contributors of the journal for their trust, patience and timely revisions. We continue to welcome article submissions in interdisciplinary research on the law.

Long'et Terer
Editor

Asserting the legitimacy of judicial power in the Constitution of Kenya: Can judicial review of national security be justified?

By
Stephen Ouma, Prof Kiarie Mwaura, and Dr Njaramba Gichuki*

Abstract

The currency of executive pleas in cases calling for limitation of rights in matters of national security is often grounded on its functional competence and being elective as opposed to an appointive Judiciary. This concern is not academic as illustrated by the narrative propagated by President Kenyatta on the outcome of the 2017 presidential petition of an unelected minority deciding for the majority.[1] This paper addresses itself to the question whether judicial review is a legitimate and desirable and effective way to check and balance the exercise of executive power in matters of national security.

1. Introduction

The question of judicial legitimacy vis a vis the executive and legislature forms the core of what American jurists have called the Countermajoritarian difficulty—the ability of unelected judges to thwart majority will in a democracy. In Kenya, for example, the difficulty would manifest in Article 1(2) of the Constitution where "The people may exercise their sovereign power either directly or through their democratically elected representatives" but they have no certainty that their decisions will prevail. If someone who disagrees with the exercise of a legislative or executive authority impacting rights decides to bring the matter before a court under Article 165(3), and the view that finally prevails is that of the judges, the difficulty emerges.

Judicial review of executive conduct in matters of national security necessarily imputes the legitimacy conferred on the executive by democratic or majoritarian attributes and so the first part of this paper [1.1] explores and explains the majoritarian attributes of judicial review. It argues that sometimes the judicial arm freed of sectarian interests that hold back progressive change in the democratic arms and motivated by majoritarian proclivities of its own, is able to reflect the public will more accurately. It may in fact be that what triggers judicial intervention in the first place is because the public will is unable to find expression in the Executive or Legislature. This is merely an aspect of checks and balances. It illustrates that judicial review can, at times, be better at effecting the public will than the elected arms that are, under the Constitution, designed for that very purpose. Ultimately, this reasoning rejects the narrow conception of judicial review as inherently antidemocratic and that it in fact, sometimes, supports democracy by

ignoring the majoritarian process but ultimately, and more significantly, producing majoritarian results. This may be anathema for those who care more about process than results, and who view the judiciary as unelected and antidemocratic, and it is of no consequence that it may represent the majority will accurately than the elected arms. This paper delves beyond the fact that the judiciary is unelected and reflects on how much that actually matters if the majority will is to be determined. It also analyses the forces that push the democratic arms away from majoritarian outcomes, and the judicial arm the opposite way.

The second part [1.2) also supports desirability of judicial review of executive conduct in national security by considering the effect of the Constitution of Kenya 2010 upon our traditional constitutional order. It clarifies the environment in which both the judiciary and the elected branches of government are now operating as a result of the new Constitution. It is argued that the Constitution has introduced a new order in which any limitation of constitutional rights must be objectively justifiable. By providing for justifiability, the Constitution is able to provide a general outline on how to measure and control the exercise of executive power in matters of national security. The judiciary has been charged with the responsibility of assessing such justifications. The obvious implication of this responsibility is that it paints a picture of judicial review that is much more complex than the conventional narrative of democratic and non-democratic arms allows.

The third part [1.3] investigates whether judicial deferment to national security is in fact a threat to the new constitutional order. The fourth and final part [1.4] addresses and justifies the effectiveness of judicial review as a way to check and balance the exercise of executive power in matters of national security. The justifications for a vigorous judicial review of executive conduct in national security are enumerated.

1.1. Majoritarian attributes of Judicial review: What happens when the elected branches are 'undemocratic'?

The foremost theoretical justification offered for limitation of rights is that identification of threats to national security is a policy function and that the Executive is functionally better placed to identify and implement matters of policy than the judiciary. This position reflects the supposed countermajoritarian nature of judicial review where a court does not exercise deference to the Executive.[2] According to Roberts Wray, the primary responsibility for governing the country rests with the Legislature and the Executive, and it is neither the function nor the wish of the judiciary to hinder or interfere more than necessary.[3]

Beyond the foregoing arguments founded on constitutional theory, a way needs to be found around the countermajoritarian difficulty by projecting on the failings of the democratically elected branches to protect individual rights.[4] In Kenya, political polarization, ethnicity, monied special interests, voter ignorance and

electoral malpractices—are all dynamics that push democratic decision making away from majoritarian outcomes, just as there are a number of forces that push judicial review the opposite way.

Taken together, the theoretical and institutional approaches to rights limitation analysis suggest a possibility where the elected branches are actually the least majoritarian in practice. In this inverted scenario, a judicial ruling may look countermajoritarian only because the base line against which it is judged is the ostensibly democratic nature of the legislative and executive branches,[5] but it turns out to be more popular amongst the electorate.

In a scenario where a judicial decision is more popular than a legislative or executive act, it would overturn the basic premise of the countermajoritarian difficulty on its head, giving rise to a radically different understanding of limitation analysis. Since majoritarianism assumes that the elected branches are democratic institutions and the unelected judiciary is not,[6] what happens when the opposite is true?

Instead of an undemocratic judiciary checking the democratic branches, we see a democratic judiciary checking the not-so-democratic branches, enforcing Human Rights and the popular will when the elected branches do not. This forms the basis of this paper's conception of the institution of judicial review under the Constitution as distinctly majoritarian.

A number of writers have recognized this phenomenon, noting that judicial rulings are often more majoritarian than the legislative or executive actions they invalidate.[7] What is, however, unclear is an understanding of the institutional forces that drive this phenomenon. The following part analyses the dynamics behind the phenomenon while exploring the reasons why the executive, though democratic in theory may in practice be most undemocratic in practice.

There are a variety of reasons why a democratically elected executive branch may not reflect majority will. On the one hand, it may be a reflection of structural impediments to majority will and yet on the other hand it may stem from the pull of politics. Standing alone, each of the following reasons would represent a distinct impediment to expression of majority will by the executive while setting the stage for judicial intervention.

1.1.1. Structural impediments to executive conduct.

Although majority rule is considered to be the cornerstone of democratic governance, the Constitution of Kenya 2010 had a different sort of democratic governance in mind. The Constitution has structured our governing institutions to make change difficult, even when backed by majority will. By creating a number of veto points—opportunities to block change—the Constitution forms a democracy that requires the assent of not one, but multiple representative bodies to alter the

status quo.

Within this system, the President is one veto point,[8] Parliament another—and within Parliament, our co-equal, bicameral legislature presents its own structural impediment.[9] In the Senate, counties with large populations like Nairobi and Kakamega get no more votes than those with small ones like Lamu and Tana River, resulting in disproportionate power for the least populated counties.[10] It is indeed probable that at a time in future the counties having a majority in the Senate will have a minority of the National Assembly. Should this happen, legislation emerging from Senate will have literally nothing to do with majority will.

Other structural impediments to the popular will in this category include the supermajority requirements for overriding the president's veto[11] and amending the Constitution.[12] The fundamental point here is that the very structure of our Constitution places significant obstacles in the way of Executive ability to enforce majoritarian preferences. The answer to any lingering doubts why the executive branch does not any better reflect majority will is that the Constitution does not design it that way in the first place.

1.1.2. Political impediments to executive conduct.

The second set of impediments to executive conduct are political in nature. Political impediments revolve around the question whether elected executives are agents of the people, duty bound to represent their views—or are they trustees, elected to do what they think is right, regardless of whether it reflects majority? The answer is unclear,[13] which allows for substantial discrepancies between the people and their elected representative.

The incumbency re-election rate may be one example.[14] Where incumbency advantages are so strong, social scientists are correct in concluding that voters lack meaningful say in who represents them[15]—and that, in turn, has antimajoritarian implications of its own. Incentives to respond to the public's wishes are stronger when the public can more easily strip [elected representatives] of their power and today in Kenya that ability is weak.

Another example is the influence of special-interest groups such as the Kenya Bankers Association and the Tobacco Lobby. As public-choice theory has long recognized, a small but intensely interested minority can exert more influence than a large but diffusely interested majority.[16]

Yet another antimajoritarian force is the increasingly polarized nature of Kenyan political parties, attributed in large part to ethnicity and the exceedingly high percentage of safe seats where certain parties are dominant.[17] The dynamics of ethnic parties create "safe seat" constituencies where a nomination is as good as a win. This phenomenon eliminates competitive elections as a mechanism by

which representatives are held accountable to mainstream public opinion. The executive is then often a result of a coalition of ethnic communities politicians who pander to the narrow ethnic base, not the median voter, resulting in what political scientists Jacob Hacker and Paul Pierson describe as "policymaking that starkly and repeatedly departs from the centre of public opinion."[18]

The Kenyan public's input into the political process is also an important source of democratic dysfunction as well. The average Kenyan voter is "rationally ignorant", rarely appreciates the benefits of a well-informed vote and prefers party and ethnic as opposed to policy preferences.[19] It is reasonable therefore to assume that executive conduct cannot be considered as a product majority will in any meaningful sense.

The above listed political dynamics work to prevent the executive and legislative branches from being truly representative of the majority will.

1.1.3. Topic-Specific impediments to executive conduct.

The nature of the issue under consideration can, and often does, create impediments to majoritarian change of its own. One way this can happen is if support for a policy is correlated with a particular demographic constituency, but which is underrepresented in the executive which can safely ignore the issue.

The other possibility in this category is issues that are too hot, or cold, for the executive to handle. An issue can be too hot—too polarizing—to trigger a response from the executive branch for a number of reasons. Sometimes the executive finds it too costly to take a stand on an issue. Unwilling or unable to decide the issue itself, the executive will facilitate, invite, solicit, and even plead for judicial involvement.[20]

An issue also may be too cold—too low priority—to trigger a response from the executive branch. Such issues are rarely, if ever, executed because they are out of step with prevailing social imperatives, but the very fact that they are rarely, if ever, enforced is what keeps them low priority.[21] Low political prioritisation explains why the executive may be ill-suited to remedy the problem.[22] Cold issues such as these lack democratic legitimacy, so judicially invalidating them is not radically inconsistent with democratic ideals.

In concluding this section, reasons have emerged which show why although democratically elected, the executive may not accurately represent majoritarian views. The next question then becomes how judicial decision making compares and how it may in fact be a more accurate representation of majority views.

1.2. Why the Judiciary may be most representative in practice.

Judicial decision making differs from executive decision making in at least two respects. First, in the Supreme Court, for example, a majority of four carries the day and since it is the apex court, it can set new precedent by changing its own decisions. Second, judicial decision making is free of electoral pressures which define executive decision making.[23] Judicial independence is enhanced since the justices are appointed and enjoy security of tenure until the age of seventy years. The fact of the court not being the subject of an electoral process would suggest that it is less majoritarian than the executive. But as seen above, electoral pressures are themselves cause of why the executive is often times less majoritarian and the Judiciary, being free of the same pressures more majoritarian. In the absence of the pull exerted by partisan elections, the Judiciary is freed of the majoritarian impediment to decision making…the democratic process itself.

The fact that the judiciary, although a non-majoritarian institution, could reflect the majoritarian will begs the question *why?* An understanding of the mechanisms by which majoritarian influences infiltrate and legitimise judicial law making are not well understood. If understood, such would fortify the democratic legitimacy of judicial review and lessen objections to judicial review of executive conduct in matters of national security. The following sections, however, make an attempt at classifying and clarifying those mechanisms.

1.2.1. Judicial appointments process

The judicial-appointments process under Article 161 is the primary explanation for the judiciary's majoritarian proclivities.[24] Judges are recommended by the Judicial Service Commission, appointed by the President and in the case of the Chief Justice and the Deputy Chief Justice subject to the approval of the National Assembly.[25]

The composition of the Judicial Service Commission aside, the President who appoints judges and the legislators who confirm them are presumably political actors who favour the appointment of judges with political and ideological leanings similar to their own and the constituents who elected them.[26]Implicit in this theory is the assumption that elected officials have majoritarian policy preferences by virtue of their election, so judges appointed in their likeness will have majoritarian policy preferences too.

The foregoing notwithstanding, the judicial-appointments process is not a complete explanation for judicial tendencies to make majoritarian decisions. Judges have a judicial life expectancy much longer than those who put them on the Bench, so their views could easily differ from the prevailing ideology of any given moment.[27]

1.2.2. Majoritarian constraints on judicial decision making

A second explanation for judicial majoritarian proclivities is that the force of majority will imposes constraints on the Judges' ability to deviate significantly, and for long from the majority views. A judiciary with non-majoritarian views will not always be able to pursue those views because ultimately the execution of its decisions will fall on the executive rendering it not so independent after all. Because it lacks the power of enforcement, the Judiciary has three compelling reasons why it should never digress from majoritarian preferences even where it could. These are to ensure that its rulings are enforced, to protect itself from retaliatory legislative measures, and to preserve its institutional legitimacy. These reasons are each discussed in turn.

The judiciary needs the support of the executive branch to make its rulings matter by ensuring obedience and yet the Executive may choose to undermine or simply ignore the ruling instead. In recognition of this impediment, judges act strategically as a result, anticipating the reaction of the executive branch and adjusting their decisions accordingly.[28] Although majoritarian rulings do not guarantee that the executive branch will enforce them, the public's anticipated reaction does play an integral part in the mix. The more popular the ruling, the riskier it will be for the Executive to oppose or subvert it; conversely, the more unpopular the ruling, the more difficult it will be for executive officials will commit to enforcement. In sum, one reason for the Judiciary to be concerned to issue majoritarian rulings is the worry over its execution by the executive.

The other reason the Judiciary will look out to issue majoritarian rulings is the possibility of the Executive implementing measures to compel it to toe the line. The Executive can push through Parliament measures to curtail its budget, pack its JSC membership, strip its jurisdiction or even propose constitutional amendments to reverse its rulings.[29]

Here again, majority will plays a part in the mix. The more unpopular the court's decision, the more likely that the executive branch will not execute it, and the converse is true as well; the Executive will retaliate against the Judiciary only when doing so does not militate against the public will. Ultimately the judiciary is safest going with the majority will.

The last majoritarian constraint is the Judiciary's need to preserve its institutional legitimacy. When judicial rulings go unenforced, or the Judiciary itself is attacked, judges lose some modicum of political power, which, over time, can render the judiciary vulnerable to further disregard and attacks by the democratic branches.[30]

In conclusion, the main reason the judiciary is majoritarian is that it often has little choice. Majority will imposes significant constraints on the Judiciary's ability to deviate from majority preferences. The next question then becomes how much

such constraint matters.

1.2.3. Majoritarian influences on judicial decision making.

In the same manner as majority will constrains the Judges decisions, it also influences the decisions they ultimately make. This is largely attributable to the larger cultural backdrop against which cases are decided. Because the Constitution is largely a declaration of principles as opposed to a strict set of rules it is inherently indeterminate and therefore subject to interpretation. This makes it unavoidable that its interpretation will be reflection of attitudes, assumptions—even prejudices—that define a given place and time.[31] Steven Winter makes the same point when he says,

> "[J]udges cannot even think without implicating the dominant normative assumptions that shape their society," resulting in "unarticulated normative assumptions that shape and produce legal outcomes with distinctly majoritarian overtones."[32]

Just like everybody else, judges are also a product of a particular time and space that defines their existence.

The pull of dominant public opinion is another majoritarian force which influences the decision making of judges. Empirical studies have proved that dominant public opinion is a statistically significant and powerful influence on the Judges.[33] On the impact of public opinion on judicial decision making, Chief Justice Rehnquist wrote over twenty years ago, "Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs."[34] Whether judges decisions are influenced by social opinions or factors that that shape social opinions, the ultimate result is that whatever the outcomes of their decisions, such decisions will tend to reflect majority opinions.

In conclusion, there are numerous factors that would account for judicial decisions leaning towards majoritarianism. This is not to suggest that courts always make majoritarian decisions but rather, it explains why the judiciary in many respects reinforces majoritarian views so that the institution that is not thought of as majoritarian often is and those that are majoritarian sometimes are not.

Conclusion

The main contribution of this article is its argument that the judiciary, although unelected and supposedly having less democratic credentials than the executive and legislature, is as democratic in its functions and outcomes, at times more than the two.

The article argues that under the Constitution, any law or exercise of executive power that limits rights must be justified and the judiciary has the responsibility of assessing such justification. In the process it may emerge that legislative or executive output is countermanded which raises the question of the legitimacy of such judicial output viewed against the democratic character of the legislature and executive.

Using a plea of national security as justification for limitation of rights by the executive where it argues for judicial deference to executive, the article illustrates instances when the executive may actually be undemocratic through structural, political and topic specific impediments.

The article also advances arguments which exhibit the democratic credentials of the judiciary such as the appointments process, majoritarian constraints and influences on judicial decision making which lend democratic legitimacy to judicial output. In view of the above, the democratic credentials of the judiciary and its justification to review matters of national security are justified.

Endnotes

* Lecturers, School of Law, University of Nairobi.

1 East African Standard 2nd September 2017 ..."I respect the Supreme Court's decision but I don't agree with it... Millions of Kenyans queued and voted, but six people have decided that they will go against the will of Kenyans..."

2 See Mark A Graber: " Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power" (2006) 65 Md L Rev l; Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy" (1998) 73 NYU L Rev 333 at 335; Samuel Issacharoff, "Constitutionalizing Democracy in Fractured Societies" (2004) 82 Tex L Rev 1861 (equating judicial review with constitutionalism which "exists in inherent tension with the democratic commitment to majoritarian rule. At some level, any conception Of democracy invariably encompasses a commitment to rule by majoritarian preferences, whether expressed directly or through representative bodies. At the same time, any conception of constitutionalism must accept pre-existing restraints on the range of choices available to governing majorities").

3 Kenneth Roberts-Wray: "Human Rights in the Commonwealth" (1968) 17 Int'l & Comp LQ 908 at 924.

4 See Mark A. Graber, The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order, 4 ANN. REV. L. & SOC. SCI. 361, 362 (2008) (presenting literature review of how "scholarly concern with democratic deficits in American constitutionalism has shifted from the courts to electoral institutions," and noting that within the social sciences, "[t]he countermajoritarian difficulty is emigrating from the judiciary to the elected branches of government")

5 See George I. Lovell, Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy, at xv (2003) ("The basic idea of th[e] conventional framework is that outcomes created by elected legislators form a democratic baseline against which to evaluate outcomes produced by other branches .

. . .”); Thomas R. Marshall, Public Opinion and the Supreme Court 5 (1989) (lamenting the “ipso facto assumption that the policies of the popularly elected branches necessarily represent a nationwide public opinion majority.”).

6 See Barry Friedman, Dialogue and Judicial Review, 91 MICH. L. REV. 577, 630 (1993) (“The countermajoritarian difficulty posits that the ‘political’ branches are ‘legitimate’ because they further majority will, while courts are illegitimate because they impede it. . . . [C]ountermajoritarian theory rests explicitly on the notion that the other branches of government ‘represent’ majority will in a way the judiciary does not . . . .”).

7 See, e.g., Barry Friedman, The Will of The People: How Public Opinion has influenced the Supreme Court and shaped the meaning of the Constitution 368 (2009) (“It frequently is the case that when judges rely on the Constitution to invalidate the actions of the other branches of government, they are enforcing the will of the American people.”); Jeffrey Rosen, The Most Democratic Branch: How The Courts Serve America 4 (2006) (“How did we get to this odd moment in American history where unelected Supreme Court justices sometimes express the views of popular majorities more faithfully than the people’s elected representatives?”); Michael J. Klarman, Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments, 44 STAN. L. REV. 759, 795 (1992) (reviewing Bruce Ackerman, We The People: Foundations (1991)) (“Where legislative self-interest is that intense, judicial review is likely to be more majoritarian than legislative decision making.”).

8 Article 115. (1) Within fourteen days after receipt of a Bill, the President shall—
(a) assent to the Bill; or
(b) refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.

9 (4) Parliament, after considering the President’s reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President’s reservations, by a vote supported—
(a) by two-thirds of members of the National Assembly; and
(b) two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate.
(5) If Parliament has passed a Bill under clause (4)—
(a) the appropriate Speaker shall within seven days re-submit it to the President; and
(b) the President shall within seven days assent to the Bill.

10 Article 98(1) The Senate consists of—
(a) forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency;

11 *Supra* note 12 Article 115 (4)

12 Article 256(1) A Bill to amend this Constitution— (d) shall have been passed by Parliament when each House of Parliament has passed the Bill, in readings, by not less than two-thirds of all the members of that House.

13 For an attempt to empirically answer this question, see Justin Fox & Kenneth W. Shotts, Delegates or Trustees? A Theory of Political Accountability, 71 J. POL. 1225 (2009).

14 No incumbent President has lost an election in independent Kenya.

15 Patrick Basham & Dennis Polhill, Uncompetitive Elections and the American Political System, POL’Y ANALYSIS, June 2005, at 1, 2–3; see also id. at 1–2 (reporting that 99.3% of “unindicted congressional and state legislative

incumbents" won re election in the 1980s and recommending that elected officials be disconnected from campaign and election rule making and regulation);see also Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 GEO. L.J. at 498, 509–28 (discussing various entrenchment measures adopted by policymakers and concluding, "In [none of these entrenchment contexts] is legislative decision making likely to be majoritarian; judicial review quite plausibly would be more so".

16 See generally James M. Buchanan, Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications, in The Theory Of Public Choice—II, at 11 (James M. Buchanan & Robert D. Tollison eds., 1984) (providing a summary of "the emergence and the content of the 'theory of public choice'");

17 2013 National Elections TNA-Kikuyu, ODM Luo/Luhya, URP-Kalenjin, Wiper-Kamba etc.

18 See Jacob S. Hacker & Paul Pierson, Off Center: The Republican Revolution And The Erosion of American Democracy 9, at 16, 19 (2005).

19 Ilya Somin, Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory, 89 IOWA L. REV. 1287, 1290, 1370 (2004) at 1324–29 (supporting "rational ignorance" theory of low voter knowledge with empirical evidence). Interestingly, politicians tend to be "rationally ignorant" themselves. Given the volume and technical detail of proposed legislation, legislators rarely have the time to ponder the bills they are voting on, turning instead to party leadership or political allies to tell them how to vote. See Jason T. Burnette, Note, Eyes on Their Own Paper: Practical Construction in Constitutional Interpretation, 39 GA. L. REV. 1065, 1093 (2005).

20 Thomas M. Keck, Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools, 32 LAW & SOC. INQUIRY 511, 516 (2007) (book review).

21 Cass R. Sunstein, What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, 2003 SUP. CT. REV. 27, 50–58 (analyzing same-sex-sodomy statutes as an example of this phenomenon).

22 George I. Lovell & Scott E. Lemieux, Assessing Juristocracy: Are Judges Rulers or Agents?, 65 MD. L. REV. 100, 107 (2006) ("[R]epeal campaigns never develop much momentum because lack of enforcement makes the campaign seem mostly symbolic and thus less important than fights over more consequential laws.").

23 See Article 160. (1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

24 See William Mishler & Reginald S. Sheehan, Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective, 58 J. POL. 169, 171 (1996) (recognizing judicial-appointments process as the "conventional explanation of the relationship between public opinion and Supreme Court decisions"); see also Terri Peretti, An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch, in The Judiciary and American Democracy: Alexander Bickel, The Countermajoritarian Difficulty, And Contemporary Constitutional Theory 123 at 132 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005) [hereinafter The Judiciary And American Democracy] ("[T] he countermajoritarian features of American democracy . . . were deliberately

adopted by the Framers precisely because of their antimajoritarian effects. Federalist 10 clearly expresses the Framers' strong fears of majority tyranny.")., at 132 (noting that "[m]ost scholars agree that the appointment process is the dominant path through which public opinion influences Supreme Court decisions");

25 166(1) The President shall appoint—
(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and
(b) all other judges, in accordance with the recommendation of the Judicial Service Commission.

26 See Lee Epstein et al., The Supreme Court as a Strategic National Policymaker, 50 Emory L.J.583, 586 (2001)

27 See Article 167. (1) A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.
See also Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, 29 HARV. J.L. & PUB. POL'Y 769 (2006) (documenting the average tenure of retiring Justices from 1971 to 2000 at just over twenty-six years).

28 See Lee Epstein et al., The Supreme Court as a Strategic National Policymaker, 50 EMORY L.J. at 610 (2001); ("Tests at both the individual and the aggregate levels support the proposition that the Justices adjust their decisions in anticipation of the potential responses of the other branches of government.");

29 See Jesse H. Choper, Judicial Review and The National Political Process 10 (1980) at 47–55 (discussing variety of court-curbing measures); Neal Devins & Louis Fisher, The Democratic Constitution 22–28 (2004)

30 See, e.g., Lawrence Baum & Neal Devins, Why the Supreme Court Cares about Elites, Not the American People, 98 GEO. L.J. at 1530

31 As Oliver Wendell Holmes explained, "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Oliver Wendell Holmes, The Common Law 1 (Harvard Univ. Press 1963) (1881); see also Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 294 (2004) at 5–6 ("[B]ecause constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times."); see also Larry Kramer, Generating Constitutional Meaning, 94 CALIF. L. REV. 1439, 1441 (2006); at 1440 (noting "the inevitable ways in which the views of courts and judges are shaped by the evolving understandings of the societies in which the judges also live").

32 Steven L. Winter, An Upside/Down View of the Countermajoritarian Difficulty, 69 TEX. L. REV. 1881, 1925, 1927 (1991); see also Lawrence M. Friedman, Coming of Age: Law and Society Enters an Exclusive Club, 1 ANN. REV. L. & SOC. SCI. 1, 10 (2005) ("In some ways, people are like animals born and raised in zoos; they are not aware that their world of cages and enclosures is highly artificial, that their range of behavior is limited by conditions they did not create for themselves. . . . This is true for legal behavior as much as for any other form of behavior.").

33 Kevin T. McGuire & James A. Stimson, The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences, 66 J. POL. 1018, 1033 (2004) ("We set out trying to determine whether the Supreme Court responds directly to movements in public opinion and whether the data used in prior analyses undercut accurate estimation of this relationship. We have unusually clear answers to both. . . . [W]e have found that the Court's policy outcomes are indeed affected by public opinion, but to a degree far greater than previously documented.")

34 William H. Rehnquist, Constitutional Law and Public Opinion, 20 SUFFOLK U. L. REV. 751, 768 (1986).

Towards Free, Fair, Transparent, Accountable and Verifiable General Elections in Kenya

By
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Abstract

This paper examines the regulation of elections in Kenya. It commences by reviewing national and international standards required in conduct of elections. Notable of these laws is the Constitution of Kenya, international instruments and national laws regulating elections. The paper also focuses on the practice of how elections are conducted and the challenges that the electoral body faces. The work offers some steps that need to be taken by the electoral body in ensuring that public officers and security agents act in non-partisan manner in election processes. The paper briefly outlines some comparative study in other jurisdictions best practices and also why some countries fail in conduct of free and fair elections. Thereafter the article draws a conclusion and gives recommendations in upholding the will of the people in elections.

Key words: Elections in Kenya, free and fair elections, freedom of expressions, election manipulation and interference

1. Introduction

Election process is the main basis in which citizens participate in choosing their representatives in many form of governance. In any democratic state, it is through elections that citizens express their will. For the process to be democratic in nature, the election process is supposed to be free and fair to truly reflect the wishes of people. According to United Nation Development Programme (UNDP), in reference to elections as a tool of attaining good governance, "it entails the processes, and mechanisms through which citizens and groups articulate their interests, mediate their differences and exercise their legal rights and obligations."[1]

This paper provides how conduct of elections in Kenya can be carried out in an accountable, free, transparent and verifiable manner. It goes further to offer appropriate measures that need to be addressed to ensure the election body which is constitutionally mandated to conduct elections, carries out the process without influence or interference from the executive or any other person. The paper examines some standards in elections that need to be observed at both national and international level. A conclusion is drawn that it is only in free and fair elections that citizens can be said to achieve their democratic right of constituting a legitimate government.

1.1 Right to political participation and freedom of expression

The role of a state is expressed through governance by the functional organs of the state. According to G Fox, elections connote the process through which the state acquires legitimate political power to manage a nation's affairs.[2] Freedom of expression in Kenya is mainly exercised through voting where every adult citizen has an opportunity to exercise this right. Citizens elect their representatives after every five years to represent their wishes indirectly. This right is protected constitutionally under article 38(1).[3] The provision provides that "every citizen is free to make political choices, which includes the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors, and the right, without unreasonable restrictions, to be registered as a voter, to vote by secret ballot in any election or referendum, and to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office."[4] H Lisa argues that universal or near universal voting participation is important because it serves and enhances a number of fundamental democratic values, among them; popular sovereignty, legitimacy, representativeness, political equality and minimization of elite power.[5] Accordingly, legitimacy of those in governance can only be validated through free and fair exercise of freedom of expression by citizens.[6] Further the public should participate whenever important decisions are being made like constitutional amendment. This is through referendum and partly through public participation as provided in Article 10 of the Constitution.

1.2 Enhancing Conduct of Free and Fair Elections

National and international law gives standards that need to be observed in conduct of elections.[7] The United Nations (UN) is the main body that advocates and recommends democratic elections.[8] The Universal Declaration of Human Rights (Universal Declaration),[9] 1948 and the International Covenant on Civil and Political Rights (ICCPR),[10] 1969 provides various legal measures that should be observed in all elections. These instruments set a general framework inter alia of freedom of expression which states should comply with. S Donnie argues that, for there to be democratic government; free and fair election is the only process of achieving it.[11]

In exercise of citizens' right to choose their leaders democratically, jurisdictions have established electoral bodies to oversee the process of elections. According to the Constitution of Kenya[12] and principles of good governance, Independent Electoral and Boundaries Commission (IEBC) is supposed to ensure that elections are free and fair and reflect the wishes of the people of Kenya as opposed to those in power. The Constitution of Kenya provides in Article 1 that sovereign power belongs to the people of Kenya and shall be exercised in accordance with the Constitution. The overall conduct of elections is provided in chapter seven of the Constitution. Article 88(1) of the Constitution constitutes IEBC as a body mandated in conducting elections in Kenya. The IEBC is expected to conduct

elections that meet constitutional requirements and international standards. The Constitution requires that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.[13] The elections should also abide to international threshold like the universally agreed standards of one man one vote,[14] universal suffrage[15] and voting in secret[16] and tallying be strictly observed. The reason behind these standards is to insulate the voting process from manipulation. Such standard protects the secrecy of the voters choice,[17] ensures majority wishes and enhances the transparency of the process.

There are certain parameters that must be observed in conduct of elections in all democratic states. According to election standards acceptable nationally and internationally, the election process commences when an election date is announced.[18] Thus it is right to state that conduct of free and fair elections, requires the whole process commencing from the time an election date is announced, throughout campaign period, conduct of party nominations to the conduct of elections, tallying and announcement of results be free and fair.

Conducts of elections that do not meet the principles of democracy emanate far back from political parties activities. E Abuya argues that free and fair presidential elections in Africa can be achieved when the whole process of conducting elections is free and fair which includes party nominations.[19] According to M Omosa the main aim of political parties is to win majority votes in the main elections and form and run the government.[20] With such objective, majority of political parties pursue interest that will enable them achieve this. This includes favouring candidates that support them with resources as opposed to upholding the wishes of their members and those that might protect their interest at the national level. In some instances parties conduct nominations but end up giving certificate to their favourite person as opposed to the one elected by members. This attribute can be taken as the main failure by IEBC to observe election standards in parties' nominations and take the necessary action. Despite the fact that party nominations are conducted by political parties they fall under the ambit of the electoral body of Kenya.[21] This culture of electoral body failing to discharge its mandate of supervising nominations despite wide manipulation in party primaries culminates and finds its way in the general elections. Any malpractice or failure on nomination is a flaw on the general conduct of election by IEBC. G Fox posits that the success of free and fair election is premised on a strong electoral body.[22]

Free and fair elections are affected by malpractices, voter intimidation, bribery, violence and biasness in the election process especially during the campaign period. These acts are mainly perpetuated by politicians who engage in acts of voter bribery,[23] intimidation and manipulation of participants in the process.[24] In Kenya the electoral body has not taken punitive measures to deter such practices despite existence of legislations to be implemented.

State officers including state security are used to manipulate the election processes. This is contrary to the Constitution and legislations where such agencies are supposed to maintain law and order. Section 12 of the Election Offences Act 37 of 2016 criminalises the act of candidates or any other person using public officer or security organs to induce or compel any person to support a particular candidate or political party. Unfortunately such acts remain rampant in preparation for and conduct of elections in Africa. For example, Human Rights Watch gives a clear outline of how police officers are employed to intimidate voters in Zimbabwe.[25]

As a matter of practice and in some cases under provisions of law, there is requirement of observation and reporting of the manner in which elections are conducted by independent bodies, parties' enjoyment of equal access to the media, elections by secret ballot and universal suffrage among others.[26] Article 88(4) of the Constitution of Kenya, 2010 mandates the IEBC to facilitate election observation, monitoring and evaluation. Pursuant to this mandate, the IEBC accredit both domestic and international observers during the electioneering process. The IEBC has developed guidelines and a code of ethics for election observation.[27] The electoral body should consider the importance, role and report played by election observers and take appropriate measures. Further election observation enhances transparency and integrity of the process. The reports given by observers give an objective critique of the process which allows reflections on how best the election managers and key stakeholders can improve future processes.[28] The electoral body should come up with mechanism of conducting audit after elections and consider such reports in fine-tuning the election processes.

As discussed earlier, some scholars argue that electioneering process commences from the date election date is announced although in some cases like in Kenya election date is already provided by the Constitution. However, the counting and tallying of the ballots is one of the crucial stages and most manipulated. Centre for Human Rights suggest that the process should be transparent and open to scrutiny.[29] The electoral body should establish mechanisms to facilitate recounts in the event of disputes relating to the accuracy of the counting and tallying.[30] Further there must be provisions of sufficient time to undertake verification of the results by all stakeholders involved.[31] The results must then be announced promptly and openly.

In most jurisdictions the practice has tended to deviate from these universal standards. In some jurisdictions such as Nigeria and Zimbabwe, there have been cases of open violation of the process by electoral officers stuffing ballot papers in the ballot boxes.[32] Similarly, Kenya being a case in point, there has been instances where the secrecy of the process has been manipulated by those in powers or by state agencies.[33] A wide range of processes of manipulation are employed. At the vote counting and tallying stage, manipulation has sometimes been in the form of excluding observers from the counting and tallying halls[34] and the deliberate interference with the markings on the ballots.[35]

To curb such vices, some jurisdictions like America have adopted the use of biometric voter machines.[36] This technology has been adopted by a number of other countries including some in Africa. The success of this approach has varied depending on advancement in technology and how a country is prepared in electronic voting, counting and tallying. Kenya for instance experienced challenges in the use of machines in 2013 and slightly in 2017 general elections. The electronic voting was one of the recommendations by Kriegler report on the conduct of elections in Kenya. Of late this has been the subject of debate between different factors in the state. The amendment to the Election Act 2016 requires that election be carried out through electronic identification of voters, and results announced and transmitted immediately to the national tallying centres electronically. Unfortunately the amendment on the same was also made to allow for alternative method in case machines fails. This being a heated debate was and still remains a subject for further discussion as it opened a heated debate in 2017 presidential elections. Even if technology goes with some shortcomings, it is the best measure in aiding identification of voters, counting of votes and transmission of results as recommended by Kriegler Commission.[37] The procedure for 4th March 2013 general elections was that the voter identification was to be carried out through Biometric Voter machines. However, in most cases, the machines failed or did not work at all and the commission therefore reverted to the manual register. This approach was criticized heavily and was one of the grounds relied on challenging the presidential election results in 2013 at the Supreme Court.[38] Unfortunately, the commission insisted that the manual register was only a print out of the electronic register.[39] The challenge with it is that there is no proper and effective mechanism to establish that the voters indeed presented themselves in the polling station. The electoral body should carry out proper and credible tests to the machines before the actual conduct of elections. This requirement has now been backed by legislation in Kenya under the Elections Act 2016 amendments. The process was relied upon in the two 2017 presidential elections but coupled with some challenges.

It has been argued that in Africa incumbent politicians or their preferred candidates have often used public officers and the armed forces in manipulating and rigging elections. This is carried out through various means including instilling fear on the electoral body officials. The other practice is that of bribing electoral body officers or other stakeholders in the election process. In some cases public officers have used their position in wooing voters. The Election Act as amended 2016 requires elected public officers who wish to participate in elections to resign six months before the election date.[40] The Public Officer Ethics Act 4 of 2003, Chapter Six of the Constitution and the Election Act prohibits appointed public officials from engaging in certain things during elections.

According to the Constitution and Elections Act, public officials must not engage in activities of any political party or candidate or act as an agent of a political party or a candidate in an election. Section 16 of the Public Officer Ethics Act provides that public officials must not publicly indicate support for or opposition against any

party, side or candidate participating in elections. The law also provides that such officials must not engage in political campaigns or other political activity. Similar provisions barring public officers from participating or engaging in political party activities including supporting or being against a party or candidate are found in section 12 of the Political Parties Act 11 of 2011. Unfortunately this has not been the case in Kenya as majority of public officials' campaign openly and show support to their preferred candidates. They even use state resources or their influential position to popularize their preferred candidate. Despite existence of the above stated laws barring them from such conduct, state/public officers' goes scot free.

This unfair practice has an impact on the majority populace who believe the benefits received by them are a favour from such leadership. According to the Election Act, any public officer who contravenes the above requirements commits an offence and is liable to a fine or imprisonment. The challenge has been weakness by the electoral body to hold such public officers accountable. Partly this is because some of the public officers do not participate in electoral activities where the electoral body may take an action against them which may include disqualification. Similar prohibitive provisions are found in other provisions of the Public Officers Ethics Act. For example section 12 provides that a public officer to do the best in avoiding conflict of interest between his official duties and personal interests. While public officers are entitled to have political opinions and freedom of expression as outlined in the Constitution, they have a duty not to declare those opinions in public.

The Constitution emphasizes on the importance of service delivery to the citizens by the government. This means that citizens are entitled to equal reception of services free from discrimination. This therefore means that public officers should discharge their duties without political inclinations or based on partisan interests. As stated earlier the Public Officers Ethics Act prohibits public officers from making public comments that support or criticize a political party or make public comments that may compromise, or may reasonably be seen to compromise, the political neutrality of the office they hold.[41] The role of enforcing these provisions in relation to election matters largely lies on the electoral body. Despite the existence of such legislation conferring powers of enforcement on the electoral body in Kenya, the IEBC has not been courageous to take such measures against senior public officers. This is disregard of the rule of law and conferring some quotas with unfair advantage.

The Constitution of Kenya under Chapter Six provides leadership and integrity requirements of those in or aspiring to hold public offices. Various codes of conduct and ethics have been put in place to regulate the conduct of the relevant public officers during elections. The code of conduct and ethics are made pursuant to Chapter Six of the Constitution and section 5 of the Public Officers Ethics Act 2003 and must at least conform to the general code of conduct under its Part III particularly section 16 and also chapter six of the Constitution.[42] It is the role of public officers, therefore, to conform to the codes of ethics as well. The IEBC should make bold steps which may even involve preventing those who act contrary

to the law to run for any elective position within its mandate notwithstanding the position they hold in society. This is a mandate that the electoral body is granted by law and this was done with a purpose.

The practice in Kenya has been that government officials have been seen and heard publicly indicating their support for or opposition against any party, side or a candidate who is participating in presidential elections. This practice is done both in their individual capacity and when furthering their official duties. It happens a lot when public officials are acting in their individual capacities as opposed to official capacity.[43] However, it is during their official capacity that they get media coverage and public notice. Due to this individual capacity, it becomes difficult to enforce the rules and the codes of conduct. There has been an outcry that preventing public officials to state their position is infringing on their fundamental right to hold an opinion. However, this practice seems to contravene the law. With such controversies, legal provisions should be clearly formulated by the electoral body in a balanced manner.

The IEBC is supposed to ensure that public officers offer their services impartially in election related duties. The fairness of an election should not only be done but should also be seen to be done. Public officers should not hinder the functioning of the Commission but should facilitate its smooth running. They are required to give the electoral body maximum cooperation, support and collaboration necessary for the Commission to execute the activities relating to the conduct of an election.[44] The role of the public officers to the electoral body goes round the election cycle. Their responsibility before elections is required at campaigns and other arenas. On the day of elections, the law enforcement officers have a role to ensure that Commission officers and materials arrive at the polling station safe and secure. Also they must ensure that the design laid out at the polling stations by the electoral body is implemented. For example design like security corridor and the space between the door of the polling room and the security rope aimed at ensuring free access and exit from the polling centre[45] is complied with. Security officers, as required by law should ensure reasonable access to polling stations by the election officials, agents, observers and voters, including managing such issues as parking and queuing. It is the role of the law enforcement officers, in liaison with election officials, to ensure that, nobody bribes voters within or near the polling station; campaign leaflets or pamphlets are not distributed or found in or around the polling station; there is no canvassing for votes; no voter is wearing clothes with a candidate's slogan, symbol or photograph; no voter utters campaign slogans or engages in singing or dance at the station; once a voter casts his/her vote, they leave the station immediately; the secrecy of the vote is observed and maintained; and that no form of violence, intimidation and threats occur during the entire period of voting and tallying of votes.[46] This simply means that the work of public officials is to ensure that voters conduct themselves in a manner that enhances a free and fair election.[47]

Although the law enforcement officials are under the direction of the Commission and are deemed as election officials during elections,[48] they must enforce the electoral laws without fear or favour. The electoral body officials has a role to play in directing law enforcement officers to provide security inside and outside the polling room for all persons and property involved in the polling.[49] They are entrusted in enhancing conducive environment for conduct of free, fair and peaceful elections. After the polling and tallying is complete, it is the duty of the law enforcement agencies to escort the polling officials and the ballot boxes to designated centres or their final destination safely and ensure security until the elections are over.[50]

The electoral body is supposed to ensure that if any public official disregards electoral rules put in place, is prosecuted and held accountable. It happened in Zimbabwe where they violated human rights during the 2008 and 2013 elections and many got away without punishment. Thus elections directions on malpractice and other election related offences in Kenya should be dealt with by the IEBC and no other organ or individual should have power in giving directions. According to Human Rights Watch on the situation in Zimbabwe between April and July 2008, serving public officers and police across the country were issued with specific instructions of not investigating or arresting ZANU-PF supporters and their allies implicated in political violence.[51] The Human Rights Watch reports that the officers followed the orders to the letter.[52]

Section 107 of the Elections Act provides that a law enforcement officer designated by the IEBC has power to arrest any person suspected of having committed or committing an offence. Prosecution power of election offences is done by the Commission pursuant to section 107 of the Elections Act while section 21 of Election Offences Act places this power in the Director of Public Prosecution. Apparently, the role of enforcement officers in this regard seems limited to the directions given by the Commission. Therefore failure by the Commission to give directions in such circumstances leads to non-prosecution in the process. This is one of the explanations why there are very few prosecutions regarding election offences since the Commission have deliberately chosen not to prosecute. This eventuality is bad for freeness and fairness of election because there are no effective mechanisms to deter commission of election offences.

The extensive powers granted to electoral commission and election management board majorly determines the success or failure of election processes. In Nigeria, generally good laws in regard to elections exist, but in most cases the members of the Electoral Management Board (EMB) have for a long time fragrantly departed from these laws.[53] Enabulele argues that the Nigerian EMB has changed from being a shepherd to a wolf.[54] Instead of safeguarding existing laws, it has fragrantly breached them.[55] The situation has been the same in a number of African countries. However the electoral body in Nigeria has been praised in regard to conduct of the latest election as having upheld the integrity of the process.

The other important aspect in regard to electoral body mandate is on the appointment of position holders. In 2007 in Kenya, the then president Mwai Kibaki appointed ten commissioners and another five in October of the same year, a couple of months before the elections. Kriegler's report states that this resulted in pre-election tensions that injured the credibility of the ECK.[56] This explains why the 2010 Constitution of Kenya shifted this power of appointment of commissioners solely from the president. The electoral body should be independent and impartial as stated in the Constitution and legislations made there under. This is premised on the fact that partial body will always be hesitant to act against the appointing authority.

In USA, the citizenry have confidence in their EMB because of the efficiency in carrying out its duties.[57] A Heard argues that voter registration and administration of the voting exercise in the USA is highly respected because of the level of technical performance.[58] Despite some few challenges with system failures, the success associated with the system have been above board. E Abuya argues that for the outcome of an "election to be respected, each individual member of the EMB must not only be neutral, but must also be seen to be impartial."[59]

The IEBC must invoke its powers and order enforcement officers in investigating complaints promptly. This should be done without regard of who the complainants or accused persons are and their political inclinations. Further the positions they hold in the state should not be a determinant on whether to prosecute or not. The complaints must be responded to and where the election officials are not able to deal with complaint, they should forward it to an appropriate authority and follow up to ensure it is resolved. Unresolved complaints attract resentments that may generate to violence compromising free and fair elections. L Newman argues that compelling adherence to the tenets and principles of legislation is paramount to its overall effectiveness particularly in cases with poor implementation or flagging political commitments.[60]

There are cases where election officials have openly failed to follow up with investigation of complaints. Notable is in jurisdictions like Kenya in 2007 and the numerous cases in Zimbabwe. In Zimbabwe, Human Rights Watch in its 2008 report found that, of at least 163 politically motivated extrajudicial killings that occurred, most of them were on opposition MDC supporters.[61] The report also stated that after conduct of 2008 elections, police only managed to arrest two suspects who were not even prosecuted.[62] Similarly in Kenya the police officers have failed to arrest and prosecute those who perpetuate malpractice especially from the government side. Namibia is also another state that has shielded those interfering with conduct of free and fair elections over the years.[63] W Lindeke contends that the O'Linn Commission in Namibia was presented with 218 complaints of intimidation and it only resolved 128 of them.[64] In Kenya, during 2007 general elections, an operation by police had shot to death at least 50% of all the people who had lost their lives during the violence.[65] According to J Okungu

it is only some few police officers who were on duty in Kisumu Town, that were arraigned in court and were later acquitted of those charges.[66] The result in all these instances was that elections were not free and fair and the citizens' confidence in the electoral process was eroded.

Towards realizing free and fair elections, there are other measures not directly placed within the electoral body but within their reach that can be employed. These include invalidation of an undemocratically conducted election and party nominations. Institutional mechanisms may also be employed and have effect of instilling discipline in electoral process. The dispute resolution mechanism under the Political Parties Act, Elections Act and Independent Electoral and Boundaries Commission Act, have the capacity to check on malpractices by fearlessly disqualifying persons who obtain nomination via irregularities. This offers immediate relief to the persons disadvantaged by the flaw while at the same time acts as a deterrent against future malpractices. However, flawed nominations seem to be manipulated by party leaders and officials who happen to be the major contenders in the presidential elections. The 2004 Ukranian Election is one such example.[67] P Natalia argues that Victor Yanukovyeh won amid claims of irregularities, fraud, corruption, theft and an attempt to eliminate those against him. The international hue and cry with the accompanying publicity coupled with the shame of being ushered out of office no doubt acted as deterrence against future violations. The international community should not shy away from placing sanctions and other punitive measures in forcing states to comply with the will of the people through democratically conducted elections. Punitive measures may also be employed by empowering the electoral body like where a person charged with electoral offences being barred from contesting in any election. This will also have the effect of deterring future violations.

In Kenya the 2010 Constitution,[68] the Elections Act[69] and the rules made thereunder[70] bestow upon the judiciary the power to hear and determine election petitions as well as try election offences. Judicial proceedings also have the effect of precipitating legislative and administrative intervention to curb future irregularities. Further the challenges experienced in any election process should be applied in developing measures to be employed in subsequent elections. Claims of machine error during the 2000 United States Presidential Election which saw Albert Gore contest George W. Bush's victory[71] precipitated administrative reforms in Florida. Since the judgment, all Florida counties use precinct-tabulated equipment.[72] Such administrative intervention has the effect of enforcing credibility in future polls.

According to E Abuya, an independent judiciary is an essential ingredient in free and fair elections given their central role in resolution of electoral disputes and the promotion and protection of democracy.[73] The 2013 presidential election in Kenya was disputed in the Supreme Court whereby the court upheld the election and declared that the president elect was validly elected. The same court also

nullified the August 2017 presidential election but upheld the October repeat presidential election.

African countries continue to suffer democratically due to manipulation and involvement of government officials and agencies on the conduct of elections by the bodies mandated to oversee the process. As discussed earlier, some African countries continue to suffer from undemocratic processes where elections are marred by irregularities, manipulation, violence, intimidation and malpractice. Taking Zimbabwe as an example, these processes are characterized by human rights abuses amid increased militarization of the state. This culminates to interlinked crisis that leads to flawed elections.[74] For a long time in Zimbabwe, the ruling party- ZANU-PF headed by Robert Mugabe had progressively tightened their grip on power, rigging elections and intimidating and organizing violence against their opponents.[75] Public officials who are supposed to be neutral in all election related processes have been found to be in support of the ruling government and leadership. The military and police have been used to rig and interfere in the nation's political and electoral affairs. This in turn prevents citizens from exercising their right to elect their leaders through free and fair elections.

Growth, critic and opposition to impunity both by internal and external pressure may force governments and electoral bodies to review and rethink their policies. This may have been the case in South Africa. In South Africa, the abolition of apartheid and the recognition of all South Africans as citizens of the country led to substantial progress in expanding social services, healthcare, education through provision of water and electricity and expansion of educational opportunities.[76] In 1994, the first democratic elections were held in South Africa and subsequently in 1996, a new constitution was enacted.[77] Critically, though this position may have changed overtime, it acts as a good lesson to African countries in trying to achieve development championed by legitimate government.

Botswana illustrates itself as among the best democracies in Africa.[78] Nevertheless some other African states like Ghana are working towards full democracies by enhancing the integrity and transparency of elections. Democracy in Botswana has been attributed to its continued maintenance of an open-liberal multi-party system.[79] According to International Report, Botswana is the least corrupt country in Africa.[80] Botswana also has a civil-military relations hinged on the subordination of the military to a civilian government. Further, according to R Dale, the national security needs in Botswana have been perceived in terms of social justice and equitable distribution of resources.[81]

Although the Kenyan Constitution together with other laws have granted IEBC, Director of Public Prosecution and law enforcement agencies extensive powers and authority to oversee, investigate and prosecute all election offences in Kenya, majorly these agencies tends to treat these cases specially. This paper has demonstrated that these bodies have not yet invoked their powers. Further

as evidenced in this article, voting in Kenya must comply with the law so as to enhance integrity of election processes that meet the international standards and requirement. The processes must also observe rule of law, democracy and public participation principles as required by Article 10 of the Constitution. This will in turn promote good governance through election of suitable leaders where the voices of all citizens are heard through the ballot. Appropriate laws must be in place to prevent manipulation and influencing the body mandated to conduct elections. Although the law in place seems to be appropriate to enable the electoral body conduct free and fair elections, implementation part of it is the most important. More importantly the IEBC must create systems and structures that facilitates and promotes conduct of free and fair elections. The electoral body on its part must apply the law and invoke its extensive powers in holding those who breach the elections legal framework into account.

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Who Takes the First Bite? - Human Rights and Good Governance in Kenya

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> Therefore justice is far from us, nor does righteousness overtake us; we look for light, but there is darkness! For brightness, but walk in blackness! In transgressing and lying, speaking oppression and revolt, justice is turned back, and righteousness stands afar off; for truth is fallen in the street, and equity cannot enter. So truth fails, and he who departs from evil makes himself a prey.[1]

Abstract

In the August 2010 referendum, nearly 70% of voters in Kenya supported a new Constitution, underlining the progress that has been gained since Kenya became a multi-party democracy in 1991. The new Constitution provides for a united and strengthened foundation for change and reform of the country's governance systems as also an opportunity for the nation to move beyond the 2007 Presidential election slugfest. Kenya, as a united republic will be critical for successful results in subsequent elections. Development efforts in the country since independence remain committed to strengthening democracy and guaranteeing human rights to all Kenyans. Although legislative reforms have been lagged in the past, the new Constitution sets a deadline for reforms, keenly monitored by citizens in and beyond the country as well as international observers. The cut-off date for reform gains inescapable importance when looked at the mirror of the 2007 disputed election which brought to the fore the vulnerabilities and weaknesses of government institutions mandated to uphold democracy and human rights. The National Book will be crucial for strengthening these state institutions and protecting the safety and rights of the Kenyan people if implemented properly as a dynamic and a living law of the beautiful land that Kenya is. This paper focuses on the relationship between Human Rights and Good Governance, the importance of an ecosystem that nourishes as well as fosters the full enjoyment of human rights and it also underlines that good governance and human rights are mutually reinforcing and that the former is a precondition for the realization of the latter. An attempt has been made to show how governance can be reformed to contribute to the protection of human rights by discussing the mechanisms for the protection of Human rights and promotion of Good Governance as is established under law in Kenya and concludes that Good governance and human rights should be prime priorities for any government that is serious about the welfare of its citizens.

Keywords: Kenya, Constitution, Human Rights, Good Governance, Democracy, Reforms, Politics.

1. Introduction

Kenya's independence Constitution of 1963 was based on two important principles which are, 'parliamentary government and minority protection'.[2] The question of minority protection; for Europeans, Asians and certain indigenous groups largely informed the architecture and design of the independence constitutional framework.[3] A battery of constitutional assaults, manipulations and mutilations baptised as amendments struck with a lethal sword the safeguard of regionalism, obliterated the Senate and fortified the arms of the presidency.[4] By 2010, the often-amended independence national book had scrapped the construction of minority protection in an attempt to reorganize the power chart by reinforcing the already fortified sturdy chest of the presidency in the governance agenda plunging Kenyans to a consensus that the lionized fete of flag freedom from imperialism was in principal a futile venture.

In 2010, Kenya adopted a transformative Constitution[5] as the fundamental law of the country. This new Constitution designates the nation as a multi-party democratic republic[6] whose all sovereign power resides in the people of Kenya[7] and shall be exploited or exercised only in conformity with this Constitution.[8] It devises a fitting scheme where, 'the people may exercise their sovereign power either directly or through their democratically elected representatives.'[9] Sovereign power is delegated to state organs, including 'parliament and the legislative assemblies in the devolved county governments.'[10] The emanating portrait is that the scheme of representative multiparty democracy is a basic feature and a leading attribute of the contemporary Kenyan political superstructure.

The most basic and principal argument of those who advocated constitutional reform is that the political, economic and social climate of Kenya had evolved to levels where the existing machinery that had been hoarded-up over the years did not adequately meet the expectations of the people as a system capable of delivering elections which they would readily endorse.[11] This necessarily envisaged addressing whether the single member plurality/*first-past-the post*[12] electoral system should continue or whether an alternative system should be adopted. The argument was informed by the idea that for democracy to be sustainable, it must be seen to deliver beyond the ballot box and must be experienced as a process that betters the lives of the citizens and ensures that citizens are integrated into the larger national development project in a meaningful way. The discourse on constitutional reforms offered an opportunity for the country to design a system that was expected to ensure political stability and fair representation and sustain nation building efforts.

With such enormous and huge agenda therefore, the imperatives of institutional and legislative reforms that are sensitive to the country's diversity could no longer be ignored. It is unnecessary to emphasise that after the 2007 post-elections violence, Kenya was in desperate need of a strong system of governance that would ensure greater citizen participation and promote accountability and transparency in public affairs. Such is a system that would ordinarily provide equal opportunities for all citizens by creating conditions that would encourage their input in democratic governance of the country, provide for the effective transfer of power and periodic renewal of political leadership through representative and competitive elections.

This would mean establishing an accountable and transparent electoral mechanism and strengthening legislative and administrative institutions, like parliament, the judiciary and other state institutions. Such a system should empower citizens to hold public officials accountable for their conduct, omissions and decisions by ensuring effective public sector management, stable economic policies, effective resource mobilisation and efficient use of public resources. Lastly, it should adhere to the rule of law by deterring impunity in a manner that would protect human rights and democracy and ensure equal access to justice for all.

2. Kenya's human rights and governance inclination before the 2007 election violence – An Overview

After and even before independence, Kenyans have been subjected to political regimes that have sought to define and implement governance within the context of violence, intimidation, corruption and the general lack of transparency and accountability, bringing a near consensus that Kenya is an authoritarian state.[13]This state of affairs in Kenya particularly and much of the developing world in general has been tagged as democratic recession, leading observers and democracy advocates to characterize the last decade as a period of democratic "*rollback*," "*erosion*," or "*decline*,"[14] in which new democracies have fallen victim to a "*powerful authoritarian undertow*,"[15] in which global freedom has "*plummeted*"[16] suggesting that "*we might in fact be seeing the beginning of the end for democracy*."[17]

Summarizing Freedom House's annual survey of freedom, *Arch Puddington* warned in 2006 of a growing "*pushback against democracy*,"[18] characterized 2007 and 2008 as years of democratic "*decline*,"[19] claimed that the democratic erosion had "*accelerated*" in 2009,[20] and described global democracy as "*under duress*" in 2010.[21] Following a brief moment of optimism during the Arab Spring, Freedom House warned of a democratic "*retreat*" in 2012 and an "*authoritarian resurgence*" in 2013.[22]

The country has largely been plagued with various negative ingredients that undercut the positive execution of human rights and good democratic governance. These elements comprise of muscular ethnic crevasses, antithetical politics, political manipulation, socioeconomic imparities, deepening levels of poverty and

endemic corruption.[23] These, can be clustered together for the sake of categorisation as histo-social, ethnicisation of politics, socio-economic and legislative which cumulatively act as the dynamic buoyant factors that add fuel to the fire if not rubbing salt to the wounds of repeated disruptions and violence the republic has witnessed throughout its borders after the 2007 elections and beyond.

a. Histo-Social Factors

A number of socio-historical factors hampered the thriving of human rights and democratic governance in Kenya in the period prior to the 2007 post-elections violence. In the main, colonialism perpetuated and subsequently left behind an undesirable legacy on inter-communal interactions in the country, in that the notion of statehood was imposed on communities that historically lacked inter-communal coherence. By amalgamating ethnic communities without known history blending together, the imperial ruler ignored and overlooked or even intentionally used such a ploy as a device to possibly polarise, on ethnic lines the emerging state as an extension of their divide and rule policy.[24]

Further, throughout its tendencies that preferred the investment of wherewithal only in high and prospective regions plenty of rainfall and productive lands, colonialism procreated lop-sided growth in the country.[25] The British regime persisted on developing infrastructure and social services in rewarding regions at the expense of the larger sections of the nation, and this inequality remains largely unaddressed in the policies and practices of independent Kenya. Indeed, immediately following independence, the government reiterated the colonial position that public funds would only be spent in regions where they would carry the highest premium.[26] Accordingly, asymmetries in the advancement of the various sections as against the whole nation generally were apparent.

The ensuing disentanglement among the different communities particularly based on language, ethnicity and regions of the country gave birth to the ethno-regionalised root for political and economic prejudice against some citizens. It is somewhat regrettable that this inclination received approval from a certain category of post-colonial political leaders, who favoured it, both as a bargaining instrument to reinforce their political persuasion and as a device to exclude their professed competitors from the gaining access to the national cake. While consecutive post-colonial regimes were expected to put to flight the inconvenience that had been planted by the colonial bequest, this went for the most part unattended to.

For various reasons, the political class in successive governments opted to entertain and nurture these inequalities. It is thus not astounding that the causal regional asymmetries and the attendant inter ethnic inequalities effortlessly glued-up the unrelenting conflicts regarding the nation's wherewithal, including land, and equal access to public services. This socio-historical truth carried with it a heavy yoke that impacted the positive execution of human rights and democratic governance.[27]

b. Identity politics in Kenya

Almost all post-elections violence in Kenya, particularly which is connected to the sumptuous pot of soup referred to as the presidency beginning from the 2007-08 bloody slugfest onwards, is partly a culmination of citizens' dissatisfaction with a system of governance that demonstrates overt weaknesses and inherent inequities. The outbreak of the violence is manifested in ethnocentrism and utter tribalism that is tightly spun around the country's political substratum due to which vested ethnic interests including presidential power is personalised. These issues have incessantly posed certain challenges to the effective realisation of democracy and human rights in the country most often than not.

It goes without saying that Kenya, akin to scores of other African states, continues to have its hands soiled by the sin of knowingly characterising citizenship inside the constricted mirror of ethnic lineage. As a result, the country has always been pressed with the incessant effort to assimilate its diverse communities into a democratic contemporary nation, while leaving intact their relevant ethnic distinctiveness. As a rule, ethnocentrism has presented before the nation multiple negative consequences including cheering up the culture of politicising and deviously wangling ethnic interests whenever it favoured those in power tremendously and unashamedly. It has also given rise to frustration due to marginalisation and exclusion of particular tribes and minorities from state dealings and benefits.

In other words, it has habitually led to the personalisation of political supremacy which was hither to the passage of the 2010 constitution achieved through unilateral self-serving amendments of the now repealed Constitution by the then subsisting political class. At the beginning of the last decade of the past century, for instance, the republic's law of the land (now the annulled constitution) had been revised and tampered with 32 times with the sole reason of affording more privilege, comfort and power to those in office, their tribe-mates and cronies. Amongst the most controversial revisions was the incorporation of section 2A into the independence constitution, legally transforming Kenya into a monist party state until that stipulation was revoked in 1991.

By and large, Kenya's politics of identity resulted to the wrong understanding and postulation that it was vital for one's ethnic grouping to wrest the Presidency in a bid to have unobstructed admission to exploit state resources, offices and services.[28] Therefore, regime authority, predominantly the Presidency, was supposed to be the oasis of the person the helm of affairs and his tribe, and may well then be perverted without any grave legal consequences. This hypothesis plays out the motivational rules why every ethnic community in the country desired the have the seat of the Presidency, and for that reason, why lacking access to it was so expensive and hence deplorable. It is also logically discernable why, since the country revoked section 2A giving fresh air to multi-party politics in early 1990's till date, the nation's political parties are primarily regional, ethnic magnets with

scant regard for institutionalisation.

It is relatively regrettable that the ethnic feature in Kenya's politics has repeatedly been brushed aside, neglected or considered peripheral, even when it has been one of the unswerving stimulating situations standing on the way to the full enjoyment of democracy, human rights and socio-political renewal. *Rothchild* accurately admonished against such a careless outlook by underscoring the fact that '*as long as stakeholders disdainfully neglect ethnicity as an unfounded remnant of the by-gone era, recognising its vigour and appeal will be an illusion in contemporary times*'.[29] It goes without mentioning that the crisis of governance in Kenya, serious human rights violations and the attendant decay of democracy could not have reached the scale that it touched during the political stalemate that was witnessed in the country in 2007/08 and subsequent other general elections if the underlying ethno-political factors had been resolved beforehand.

While various scholars would differ with the changing semantics of ethnicity and tribalism, the fact is that the very thought of extreme postures that the members of a tribe assume is currently noticeable in the very topic of identity politics where even a legitimate and valid fight against corruption that is directed at individuals is portrayed as a threat to the heart patriarchal tribalism. The morals of democracy weep out for encouraging anti-tribalism. Constricted tribalism can be surmounted by a more tolerant, intricate and elaborate accord that not only embraces but also celebrates the veracity of our national diversity, historical heritage and lineage.

c. Subjacent Social and Economic conditions

Although Kenya was the largest economy in East Africa in the period prior to the 2007 post-elections violence, its economic performance plummeted with a plop that was far below its potential.[30] The country's poverty credentials have been seriously shuttered by the statistics of the country's extremely poor people swelling by 5.9 million between 1997 and 2015.[31] This phenomenon can be attributed to a combination of factors, including natural calamities, corruption, deteriorating infrastructure, weak implementation capacity and low levels of donor funding.[32] Poverty in the country was also quite structured, with certain regions being disproportionately affected due to political and historical reasons.[33] The country also lacked effective anti-corruption laws and policies.[34]

Corruption in the republic has exacerbated the socio-economic crisis to such a magnitude that the rules of fair play are either simply ignored or have been replaced with influence vending and downright nepotism. This has in the long run affected the competence, integrity and output of government. Moreover, it has entrenched socio-economic inequality as well as inequitable access to the sumptuous pot of soup of mixed meat and fish i.e. public resources and services amongst citizens.

Whereas the government has attempted to establish anti-corruption commissions

and agencies, there has been a general lack of political will to put a full stop to corruption in all spheres of society. In fact, serious allegations of version are abundant in some government ministries, departments, corporations, the judiciary and even local authorities. This is not an attribute of good governance because corruption and related vices fail to ensure the most efficient utilisation of resources in the promotion of development, the enhancement of human rights and accountability.[35]

An additional socio-economic issue that was a stinging tip in the republic before the 2007 post-elections violence related to land distribution and sharing. Authoritative figures pointed out that less than half of half of the arable land in Kenya during that instant was in the hands of over 80 per cent of the poor population.[36] This was partly because the post-colonial land redistribution policy was deliberately designed to favour the ruling class and not the landless masses. With the aid of such a policy, politicians in successive governments used land to induce patronage and build political alliances.[37] Thus, much of the land ended up in the hands of the political class, members of their families, friends and tribe-mates rather than the communities from which the colonialists had taken it.[38] An investigation on unfair allocation of land found that:

> "The practice of illegal allocations of land increased dramatically during the late 1980s and throughout the 1990s ... and land was ... granted for political reasons or was ... simply subject to 'outright plunder' by a few people at the expense ... of the public."[39]

The tradition of illicit allotment and sharing of terra firma led to a universal sentiment of contempt as well as that of denigration amongst some communities as well as the ethnicisation of the land in question. While the repealed Constitution permitted individuals to own land in any part of the country without any form of discrimination, this, in reality, was not the case. Many areas outside the major cities and towns were ethno-geographically demarcated, a phenomenon that led to the emergence of 'ethnic reserves'. Besides being a source of corruption in terms of illegal or irregular land allocation, this phenomenon was also tapped by politicians to instigate ethnic violence, especially during election campaigning periods.[40]

d. Legislative sterility

The repealed Constitution was tailored by successive regimes to enhance undemocratic inclinations such as ethnic polarisation, electoral frauds and deranged access to public resources. Democratic culture was therefore made alien in Kenya, mainly due to an totalitarian constitution that placed colossal unchecked and uncanalised authority in the Presidency empowering the President to be the Head of State and Commander-in-Chief of the Armed Forces of the Republic.[41] Additionally, the President could hire and fire the Vice-President and Cabinet Ministers;[42] enjoyed immunity from criminal and civil proceedings;[43] and

appointed Permanent Secretaries,[44] the Attorney-General,[45] the Chief Justice and other judges,[46] the Controller and Auditor-General,[47] Commissioner of Police[48] and Chief of General Staff of the Armed Forces of the Republic.[49] Moreover, he or she could summon, prorogue and dissolve Parliament at whims;[50] assented to legislation before it became law;[51] and unilaterally appointed members of the then Electoral Commission.[52]

Manifestly, apart from insulating the Presidency with unchecked authority, the annulled constitution accorded the institution devastating control over the executive, judicial and legislative functions of government. As correctly emphasised in the African Peer Review Mechanism report on Kenya:

> "The subordination of Parliament to the Executive in law making and parliamentary oversight functions; the failure of the Executive to heed to Parliamentary recommendations; Executive interference in appointments to the Judiciary, do not conform to the accepted norms of democracy and are a source of disquiet in certain segments of Kenyan society. The traditional democratic notion of checks and balances is seen as a safety net that can best ensure that government organs work in a perfect equilibrium to deliver to the citizen an acceptable governance package."[53]

Concern with the obliterated authoritarian Constitution that had lost its basic structure, together with abhor for the misuse of executive authority by those in office, led to the shakeup for an all-inclusive constitutional and legislative reform stoutly suggesting that only such wide-ranging reforms could guarantee separation of powers and usher in a system of checks and balances as a safety net which could restrain unbridled exercise of executive powers. It was similarly supposed that an innovative constitutional bid would situate the country on a positive corridor which accords respect to human rights and good democratic governance. This explains why, for decades, constitutional reforms became the gist of all political discourse in the country, in the lead period to the promulgation of a new Constitution on the 27th day of August 2010.

3. Human Rights before the Constitution (2010)

One dominant view holds that human rights are those entitlements which become due to every human at the commencement of life with an unyielding belief that all people yearn for certain things: the ability to speak your mind and have a say in how you are governed; confidence in the rule of law and the equal administration of justice; government that is transparent and doesn't steal from the people; the freedom to live as you choose.[54] These are not just abstract ideas; they are human rights that ought to be earned with the only qualification of simply being human. It follows that rights are not granted by governments but flow as well as accrue to human beings naturally.[55] Law and governments only affirm this reality.

Because of their centrality to human worth and dignity, rights have become an important subject and theme of contemporary constitutions. The issue of their recognition, promotion and protection is generally given centre stage.[56] Indeed, most countries claim to be founded upon a jurisprudence and culture of protection and promotion of fundamental rights and freedoms.[57] Constitutions are therefore judged based on how effectively they secure fundamental human rights and liberties. In the modern society, it is becoming increasingly difficult to fathom a constitution without a Bill of Rights.

So crucial are human rights that in Kenya's context the problem of the Bill of Rights in the annulled constitution was the prominent reason why the people opted for a review of the constitution in the first place. There are quite a number of explanations why the former Bill of Rights was perpetually measured as regressive and archaic. One such description is that the section of the Bill of Rights[58] was abounding with restrictions, whose scale had translated the delectation of human rights peripheral.

Certainly, one of the principal exertions with basic human rights in Kenya stems from the issue of limitation of rights. The Kenyan Bill of Rights has even been described as a bill of exceptions rather than rights,[59] besieged with 'claw-back' clauses which often defeated the very essence of guaranteeing human rights.[60] Taking refuge under the inner restrictions designated to explicit rights as well as the universal restraint provisions implying that rights may be constrained for larger public interests,[61] for example, of public safety, security and health,[62] the realm and its agencies shoed an inclination to confine rather than uphold and defend human rights. Due to these restraints, the Bill of Rights in reality abrogated the rights it was intended to safeguard more than it assured them.[63]

These retrogressive clauses also found favour in the manner in which the repealed Constitution was interpreted. The judiciary, which was entrusted with the task of protecting fundamental rights and individual liberties, had adopted a very restrictive approach to human rights litigation and constitutional interpretation. In one instance, an applicant's pleadings was dismissed by a High Court on the technical ground simply that he did not identify which constitutional provision had been contravened.[64] In another case[65] the Court held that section 72 of the Constitution protected the fundamental right to liberty, but did not specify the manner in which arrests could be made, or where such arrests could be effected. In *Republic v Elman*,[66] the High Court early on set the precedent that the Constitution is to be taken as any other piece of legislation and ought to be interpreted in a strict, rigid, legalistic and conservative manner which was to the detriment of human rights. That position, however, seemed to change during the last days of the old constitutional order.

There were many other dynamic and innovative judicial precedents during the period of 10-15 years prior to the promulgation of the 2010 Constitution, even

though it was at the same time complex to ascertain a tendency. For example, a higher court of record understood in a case before it, *inter alia*, that the right to fair trial includes in it prosecution by a competent person,[67] the right to access prosecution's information relating to the charge in advance, particularly eyewitness accounts, to be able to effectively prepare his defence.[68] The demanding situation, conversely, was that the judiciary by no means germinated any assured and knowable values in the construal of the Bill of Rights, and the realisation of rights stagnated as a twist of fate instead of a promise. Stung by the happenings, a writer blatantly observes:

> "That the issue of the proper approach to constitutional interpretation has haunted Kenyan courts for as long as we have been independent ... the courts adopted an unprincipled, eclectic, vague, pedantic, inconsistent and conservative approach to constitutional interpretation."[69]

In addition, for instance, despite ratifying the International Covenant on Economic Social and Cultural Rights (CESCR),[70] the state hardly took any deliberate legislative steps to wholly domesticate its obligations under the Treaty.[71] Socio-economic rights were neither contained in the former Constitution nor in a separate Bill of Rights. Moreover, judicial tribunals did not play a critical nor creative role in their enforcement using the international instruments ratified by the state, calling for the following meaningful and accurate assessment that:

> "The scope of the human rights protections is rather limited, in terms of those who are protected, in the types of rights protected and in the range of those who are bound by the duties associated with the rights. There is no provision of social and economic rights; and nothing to ensure the basic needs of Kenyans. There is nothing on solidarity rights including but not limited to peace, development, or environment. Such cultural rights as exist are somewhat negative; culture, in the form of customary law, justifies exceptions to equality rights, which mainly disadvantages girls and women. There are no special provisions for minorities; the Constitution says nothing about the rights of the child, the elderly or disabled persons; the protection against discrimination applies only to citizens of Kenya. Even in the area of civil and political rights, not all are protected: for example there is no recognition of privacy, or rights of political or other forms of people's participation'; the right of an accused to fair trial does not oblige the state to provide a lawyer to the accused even in cases where the death penalty may be imposed. Many modern constitutions are more explicit in the rights of particular sections of society, which in the Kenyan context should include pastoral communities, consumers, prisoners and people on remand, refugees, and trade unionists. It does not give citizens a right to obtain information held by the government and thus minimises opportunities for people to scrutinise the efficiency, integrity and honesty of public authorities."[72]

Another observer had the following to say about the independence Constitution of Kenya:

> "The current Constitution is not exactly 'human rights friendly'. Since 1963, Kenya has ratified or acceded to a number of international and regional human rights instruments which have increased the range of human rights standards designed to benefit the people. For example, there are now specific protections of women's rights as well as those of children in international conventions and declarations, which are not captured in the post colonial constitution of Kenya. In theory, at least, Kenya has a Bill of Rights just like any other country with a written constitution. However, in practice, the Bill, far from reflecting the interests of the ordinary Kenyans, represents the parochial interests of the ruling class."[73]

It is important to point out however, that a number of statutory safeguards pertaining to particular sectors were later enacted to cater for some other categories of people who were not sufficiently protected constitutionally. An illustration of such classes incorporates differently-abled individuals who find solace and remedy in the Persons with Disabilities Act,[74] HIV/AIDS positive patients, under the HIV/AIDS Prevention and Coordination Act,[75] fair sex, through the National Commission on Gender and Development Act[76] and minors, through the Children Act.[77] These compartmentalised and canalised initiatives to equality and human rights were hardly successful hence the desire for a comprehensive equality and non-discrimination law.

Third, affirmative action, as a substantive equality principle, was without constitutional expression in Kenya. The Bill of Rights was further faulted as inadequate by modern standards, because its enforcement procedures and institutions were found to be wanting on several aspects.[78] The annulled Constitution had no practised authorities reminiscent of an Ombudsman or Human Rights Commission for promoting or enforcing rights; there was no proper legal aid to enforce rights, and only provided for few effective remedies.[79]

4. Human rights as embodied in the new Constitution (2010)

The 2010 Constitution, seeks to establish a society permeated by the spirit of liberty and democracy, the spirit of the laws and the habit of order breaking away from the hitherto polity characterised by impunity, scant regard for rule of law, rampant human rights abuses and violations, weak institutions of governance that more often than not led to the demise of constitutional democracy that Kenya ought to be. Its Bill of Rights is presented as an integral fabric of Kenya's democratic framework for social, economic and cultural policies, a crucial feature of good governance principle.[80] It runs beyond the precincts of the law and judicial tribunals to be the thread that weaves through national policies and agenda.

This is consistent with the purpose of the Bill of Rights which is 'to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings'.[81] The Bill of Rights is envisioned to have all round application. When contrasted to the catalogue of Rights that were contained in the annulled constitution or those in many other contemporary jurisdictions, the Bill of Rights in the 2010 Constitution stands out with its distinctiveness and uniqueness in as far as human rights are concerned by providing for a near exhaustive catalogue of entitlements, and different genres of human rights defying the nomenclature of human rights into generations.

It is noteworthy to mention that while civil and political rights mostly impose restraints on the exercise of state power and are therefore 'negative' rights, socio-economic rights tend to extend the scope of state activities, translating them into 'positive' rights.[82] Therefore, the inclusion of all generations of human rights in the Bill of Rights underscores as it underpins the fact that one category of rights cannot survive without the other. This development is in line with the prevailing wisdom which claims that human rights are interrelated, interdependent, interconnected and equal in status.[83]

5. Who takes the first Bite?

A historical inquiry of the foundations of Kenya's political system, traceable to the colonial aggressive rule, underscores the very political basis of Kenya's Constitution. *Lord Delamere*, a pioneer European farmer in Kenya believed that the extension of European civilisation was desirable.[84] In 1927, he described the British race as superior to heterogeneous African races that were emerging from centuries of relative barbarism."[85] It appeared that the post independence leaders did not want to disappoint this thinking and that in essence, the struggle for independence was in fact the struggle for co-option in the class of privilege. The manner in which the political leadership dismantled the constitutional framework and falsified the hope of a new dawn in the independent Kenya was a chilling reality that the political leadership hardly identified with the disenfranchised masses, and used every opportunity to disadvantage them further, rather than work towards their general improvement.[86]

The revolutionary evolution of Kenya's struggle for a new constitutional dispensation, which was epitomised as "*the struggle for the second liberation*", was triggered by the need to have a "*modern democratic nation*" which balances democratic governance, respect for human rights and the entrenchment of the rule of law founded on the quest for self determination, freedom and dignity for all people, then referred to as natives, by the colonial administration. However, the spirit and object of our independence was vitiated at the advent of independence when those who took over the realm of political leadership sacrificed these ideals for personal aggrandizement.[87]

The sanctity of the independence Constitution was adulterated and its architecture and design so heavily concocted and mutilated that it lost its original identity and form. Post-independence constitutional changes and legal amendments spanning over three decades undermined and weakened key institutions including the Judiciary, the Police, the Electoral System and Parliament while strengthening the Executive, particularly the presidency.[88] The changes resulted in the centralisation and monopolisation of power by the executive and minimised checks and balances on the executive by other institutions which resulted in plunging Kenya into a state of poor governance demonstrated by widespread corruption, ethnic conflict, insecurity, political uncertainty and poverty among others.[89]

The 2010 Constitution of Kenya has fundamentally deflected as well as altered this defective governance framework through various earth shuttering reforms. The most critical of these reforms are the introduction of a new normative framework; Devolution of power through the creation of two levels of government; Constraining of executive power through the introduction of various checks on the Executive; The creation of a bicameral legislature; and the introduction of an expansive Bill of Rights making it to be celebrated by the Kenyan people, human rights proponents, civil society organizations and the reformed political class as one of the most transformative and progressive constitutions in a modern democracy. However, it introduces fresh challenges of effective implementation. The pace of the implementation process together with demonstrable commitment by the political leadership is what may inspire and restore confidence in the new institutions of government.[90]

Highlighting the burden of responsibility for the fast and effective implementation of the Constitution, former President of the Republic of Kenya, *Mr. Mwai Kibaki* described the process on the launch of the first-ever Annual Kenya year-book as follows:

> "This Constitution will fundamentally transform our nation politically, economically and socially. Some of the changes will be immediate and we must be ready to support them. Other changes will take time. We must remain resilient and focused as we work towards their fulfilment. The changes envisaged in the new Constitution will present some challenges along the way. However, the new Constitution gives us better structures of governance to address the challenges more efficiently. Our resolve to complete the journey of our nation's transformation must remain firm. As we embark on the journey of national renewal, I ask all of us to keep in mind the vision of the New Kenya."[91]

It is this vision for democratic governance, respect for rule of law and the preservation of the dignity and worth of the human person that forms the foundation of the new Constitution. The Constitution must therefore be deployed in a manner that inspires national renewal and healing, encourages peaceful and

harmonious coexistence, provides equal opportunities for all, ensures uniform, just and equitable application of the law and promotes the advancement of the well being and maximum happiness of the individual.

The Constitution of Kenya, 2010 has laid great emphasis on transparent, accountable and democratic governance.[92] It has meticulously defined, distributed and constrained the use of state power along multiple lines. The organization of governance and state power requires that power be divided, distributed and dispersed so as to ensure that power is applied to the objectives for which it was invented and in the manner in which it was intended. It is this conceptual necessity that forms the foundation upon which the devolved systems and structures of government are premised.[93] Devolution and sharing of power as one value and principle that should guide our governance system.[94] By embodying the various human rights provisions in Chapter IV of the Constitution, it has provided for the normative framework for the recognition, protection and promotion of fundamental, constitutional and human rights and other freedoms so material for good governance in any democratic society.

The Constitution of Kenya, 2010 provides for elaborate checks and balances mechanisms that will ensure efficient, accountable and equitable governance of the political and economic affairs of the state at all levels. The creation of Constitutional Commissions such as the National Land Commission, Kenya National Human Rights and Equality Commission, Judicial Service Commission, Commission on Revenue Allocation, Kenya Anti-Corruption and Ethics and Anti-corruption Commission, Police Service Commission are important institutions in this respect. It recognises good governance as an important national value and a necessary principle for ensuring accountability in the management of public affairs and the promotion of national renewal.[95] It further sets out high standards on leadership, integrity and public service to ensure good management of national and regional resources.[96]

Conclusion

Good governance and Human Rights are closely related, mutually reinforcing concepts that cannot be addressed separately. Good governance is the prerequisite for development and human rights. Full realization of human rights is the goal of all humanity. History has repeatedly borne witness to the destructive effects of bad governance on humanity, economy and society. Without a peaceful and stable national environment, not only is it impossible to move in the positive direction towards good governance, but also existing achievements may more often than not perish in wars, ethnic clashes and other internal wrangling in which case, human rights are bound to be violated and trampled upon making the goal of preserving and developing human rights out of reach. Violence of any kind breeds insecurity and instability, and has a profoundly negative impact on human development and the respect for fundamental rights. Conversely, the enjoyment of human rights

contributes to prevention of conflict and to stability, which in turn facilitates good governance.

Respect for and observance of human rights should be a major goal in any human society as it is an important symbol of modern civilized society and a shared pursuit of people across the world ever since the UN General Assembly adopted the world renowned Universal Declaration of Human Rights as a solemn declaration by organized international community to embody the lofty aspiration of all nations to build "a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want" which has made indelible contributions to promoting the world's human rights cause.

The fundamental importance of access to information as an empowerment tool and its pivotal role in democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency, the right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions as an initiative that can place the country onto a path of sustainable development which encompasses good governance and prosperity with a consolidation of peace, security, and stability by agreeing among other things, to subject official institutions, policies, decisions and programmes for public scrutiny and assessment to see that they comply with, at least, the general and minimum codes, and standards pertaining to governance and sustainable development as was seen in the country in 2017 when for the first time presidential election results were nullified by the Supreme Court of Kenya yet the incumbent regretted but chose to accept and respect the court decision encouraging and advised Kenyans to shun violence and instead imbue peace as that was the true character and nature of a democratic way of life.

Thus used, the Right to Information has the capacity to assess the performance and processes of governance for their compliance with a number of agreed codes, standards, and commitments that underpin the good governance and sustainable development framework by checking political impunity and abuse of rule of law.

Endnotes

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1 Holy Bible, Old Testament, Isaiah Chapter 59: 9 – 15.

2. Y.P. Ghai & JPWB McAuslan, "*Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present*" (1970) 180.

3 Government of Kenya, "*Report of the Committee of Eminent Persons"* (Kiplagat Report) (2006) Para 28. @http://www.constitutionnet.org/files/KERE-433.pdf.

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4 M. Mutua, "Kenya's quest for democracy: Taming Leviathan" (2008) African Studies Review, Vol. 52 No. 1, April 2009. @http://www.jstor.org/stable/27667438. Accessed on 24/12/2015

5 The concept as an ideal recognises that past failures of constitutionalism in Africa to a significant degree entailed state abuses of fundamental rights and the corresponding inability of the courts to uphold these rights. See, E Kibet & C Fombad "*Transformative constitutionalism and the adjudication of constitutional rights in Africa*" (2017) 17 African Human Rights Law Journal @ http://www.scielo.org.za/pdf/ahrlj/v17n2/02.pdf. Accessed last on 16/01/2019.

6 Art 4 of the Constitution of Kenya, 2010 (Constitution).

7 Sovereign Power is thereby inherent in the people of Kenya, and not necessarily derived from the Constitution as the court highlighted in *Patrick Ouma Onyango* case.

8 Art 1(1) of the Constitution

9 Art 1(2) of the Constitution.

10 Art 1(3)(a) of the Constitution

11 F.O. Kowuor "*The 2007 general elections in Kenya: Electoral laws and processes*" (2008) 7 *Journal of African Elections* 121. Instead, the cumulated system replaced freedom, democracy, prosperity and happiness that many Kenyan people had hoped for by political instability, ethnicisation of politics, dictatorship, civil strife, corruption, massive violations of human rights and misery. For more details see, E Kibet & C Fombad "*Transformative constitutionalism and the adjudication of constitutional rights in Africa*" (2017) 17 African Human Rights Law Journal @ http://www.scielo.org.za/pdf/ahrlj/v17n2/02.pdf. Accessed last on 16/01/2019.

12 This majority criterion states that "if one candidate is preferred by a majority (more than 50%) of voters, then that candidate must win." First-past-the-post meets this criterion (though not the converse: a candidate does not need 50% of the votes in order to win). Although the criterion is met for each constituency vote, it is not met when adding up the total votes for a winning party in a parliament.

13 In most parts of Africa the much-hyped liberation from the yoke of imperialism was by far and large a case of sour grapes. To put it figuratively, independence largely became a case of replacing Mr. Jones with Napoleon in George Orwell's famed *Animal farm* classic. Ibid note 11.

14 See Larry Diamond, "The Democratic Rollback: The Resurgence of the Predatory State," *Foreign Affair*s 87 (March–April 2008): 36–48; Diamond, "Democracy's Deepening Recession," *Atlantic.com,* 2 May 2014; Arch Puddington, "*The 2008 Freedom House Survey: A Third Year of Decline*," *Journal of Democracy* 20 (April 2009): 93–107; Puddington, "*The Freedom House Survey for 2009: The Erosion Accelerates*," *Journal of Democracy* 21(Hereinafter cited as Arch Puddington) (April 2010): 136–50; Joshua Kurlantzick, "*The Great Democracy Meltdown*," *New Republic,* 9 May 2011, 12–15, available at *tnr.com*. Visited on 02/01/2016.

15 Diamond, "*The Democratic Rollback*," at 36, Ibid.

16 Joshua Kurlantzick, "The Great Democracy Meltdown," @https://newrepublic.com/article/88632/failing-democracy-venezuela-arab-spring. Visited last on 02/01/2016.

17 See Robert Battison, "The '*Democratic Recession' Has Turned into A Modern Zeitgeist of Democratic Reform*," *Open Democracy,* 21 December 2011. @https://www.opendemocracy.net/robert-battison/democratic-recession-has-turned-into-modern-zeitgeist-of-democratic-reform. Visited on 02/01/2016.

18 Arch Puddington, "*The 2006 Freedom House Survey: The Pushback Against Democ-*

racy," *Journal of Democracy* 18 (April 2007): 125–37. @http://www.journalofdemocracy.org/article/2006-freedom-house-survey-pushback-against-democracy. Visited on 02/01/2016

19 Puddington, "A Third Year of Decline." @https://muse.jhu.edu/login?auth=0&type=summary&url=/journals/journal_of_democracy/v020/20.2.puddington.pdf. Visited on 02/01/2016.

20 Puddington, "*The Erosion Accelerates*." @http://muse.jhu.edu/journals/jod/summary/v021/21.2.puddington.html. Visited on 03/01/2016.

21 Arch Puddington, "*The Freedom House Survey for 2011: Democracy Under Duress*," *Journal of Democracy* 22 (April 2011): 17–31.

22 Arch Puddington, "*The Freedom House Survey for 2012: Breakthroughs in the Balance*," *Journal of Democracy* 24 (April 2013): 49; Arch Puddington, "*The Freedom House Survey for 2013: The Democratic Leadership Gap*," *Journal of Democracy* 25 (April 2014): 90.

23 The Standard Team '*It's up to you, Annan tells House members'* http://www.eastandard.net (accessed 22 Dec. 2015). In societies severely divided by ethnicity, race, religion, language, or any other form of ascriptive affiliation, ethnic divisions make democracy difficult, because they tend to produce ethnic parties and ethnic voting. An ethnic party with a majority of votes and seats can dominate minority groups, seemingly in perpetuity. Some version of this problem informs the politics of a great many severely divided societies. In severely divided societies with ethnically based parties, ordinary majority rule usually results in ethnic domination which is mirrored by the Kenyan political culture.

24 See generally K Hopkins 'A new human rights era dawns on Africa' (2003) 18 *South African Public Law* 350.

25 African Peer Review Mechanism "*Country Review Report of the Republic of Kenya*" @http://www.polity.org.za/article.php?a_id=99422 and http://www.nepad.org/aprm (accessed 22 Dec. 2015) 46. The areas in question were in the Central Province, the Rift Valley Highlands and parts of the Western Province.

26 See "*African Socialism and its application to planning in Kenya*" (Sessional paper no 10, Government Printer, 1966).

27 For further reading on the subject see, Morris Kiwinda Mbondenyi, *"Human rights and democratic governance in post-2007 Kenya: An introductory appraisal*" Pretoria University Law Press, 2015. @http://www.pulp.up.ac.za/pdf/2015_07/2015_07.pdf. Accessed on 23/12/2015.

28 *Ibid*

29 D. Rothchild "*Ethnic insecurity, peace agreements and state building*" in R Joseph (ed) *State, conflict and democracy in Africa* (1999) 320.

30 African Peer Review Mechanism (Ibid Note 25) at 17. This report indicates that the country's GDP fell precipitously from an annual growth rate of 7,5% in 1971 – 1980 through 4,5% in 1981 - 1990, to a mere 1% in 1997 - 2002. The conditions remain precariously bad even today as the data indicate that during the year 2014 the GDP growth rate was only 5.3%. @http://www.worldbank.org/en/country/Kenya. Accessed last on 27/01/2016.

31 The Star, Kenya: Poverty Levels a National Scandal, 19 February 2015, It is a disgrace for the richest nation in East Africa to also have the biggest numbers of poor people in the region and be ranked the sixth poorest country on the continent. @http://allafrica.com/stories/201502191233.html. Accessed last on 25/01/2016.

32 *Ibid* note 30.

33 See generally UNDP *Fourth human development report for Kenya* (2005) @http://hdr.undp.org/sites/default/files/reports/266/hdr05_complete.pdf; and Society for International Development *Pulling apart facts and figures on inequality in Kenya* (2004) @ http://www.sidint.net/sites/www.sidint.net/files/docs/pullingapart-mini.pdf. Accessed on 23/12/2015.
34 *Ibid*
35 K Hope "*The UNECA and good governance in Africa*" Paper presented at the Harvard International Development Conference, Boston Massachusetts, 4–5 April 2003 2.
36 See generally G. Njuguna "*The lie of the land evictions and Kenya's crisis*" (2008) 2.
37 Kenya National Commission on Human Rights "*Unjust enrichment*" (2004) 1. @http://www.kenyalandalliance.or.ke/wp-content/uploads/2015/03/Unjust-Enrichment-Volume-1.pdf. Accessed on 23/12/2015.
38 *Ibid*
39 *Ibid* at 146.
40 See generally, Republic of Kenya "*Report of the commission of inquiry to the illegal/ irregular allocation of public land*" (2004) (known as the *Ndung'u* Report). See also A report by Erin O'Brien titled, *"Irregular and illegal land acquisition by Kenya's elites: Trends, processes, and impacts of Kenya's land-grabbing phenomenon*"@ http://americalatina.landcoalition.org/sites/default/files/WEB_ERINKLA_Elites_final_layout.pdf. Accessed on 23/12/2015.
41 See Repealed Constitution of Kenya, Sec 4.
42 Repealed Constitution of Kenya, Secs 15 & 16.
43 Repealed Constitution of Kenya, Sec 14
44 Repealed Constitution of Kenya, Sec 111.
45 Repealed Constitution of Kenya, Sec 109.
46 Repealed Constitution of Kenya, Sec 61.
47 Repealed Constitution of Kenya, Sec 110.
48 Repealed Constitution of Kenya, sec 108.
49 *Ibid*
50 Repealed Constitution of Kenya, sec 59.
51 Repealed Constitution of Kenya, sec 46(2).
52 Repealed Constitution of Kenya, sec 41.
53 African Peer Review Mechanism (Ibid Note 25) at 50.
54 Speech by U.S. President, Barack Obama, 2009 Cairo, Egypt as given in USAID Strategy on Democracy, Human Rights and Governance, June 2013.@ https://www.whitehouse.gov/the-press-office/remarks-president-cairo-university-6-04-09. Visited on 02/01/2016.
55 The 2010 Constitution at art 19(3)(a) takes cognisance of the fact that rights and fundamental freedoms 'belong to each individual and are not granted by the State'.
56 J. Mutakha-Kangu '*The theory and design of limitation of fundamental rights and freedoms'* (2008) 4 The Law Society of Kenya Journal 1.
57 *Ibid*
58 See Chapter V of the repealed Constitution on 'protection of fundamental rights and freedoms of the individual'.
59 *Ibid* Note 56.
60 The following provision from the repealed Constitution is illustrative of how rights would be provided for and limited extensively within the same clause in what came to be called 'claw back' clauses. Section 80, for instance, read:
'(1) Except with his own consent, no person shall be hindered in the enjoyment of his

freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -
   (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
   (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;
   (c) that imposes restrictions upon public officers, members of a disciplined force, or persons in the service of a local government authority; or
   (d) for the registration of trade unions and associations of trade unions in a register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration, and conditions whereby registration may be refused on the grounds that another trade union already registered or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

61 Repealed Constitution, Sec. 70.

62 See for example the limitations in sec 81(3)(a) & (b) of the repealed Constitution.

63 W.V. Mitullah et al, "*Kenya's democratisation: Gains or losses? Appraising the post Kanu state of affairs"* (2005) 3.

64 Kenneth Njindo Matiba v The Attorney General HCCC Misc Application No 666 of 1990 in Judicial Intervention in Kenya 's Constitutional Review Process. @http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1310&context=law_globalstudies. At 306.
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65 Koigi wa Wamwere v Attorney General Misc Application NC No 574/90. @https://books.google.co.in/books?id=D9pDzO27OK0C&pg=PA183&lpg=PA183&dq=Koigi+wa+Wamwere+v+Attorney+General&source=bl&ots=dtQjZxB81r&sig=Z4OpgNU4piDK37dUqBcnSl6hYL4&hl=en&sa=X&ved=0ahUKEwjfmrvijJ3KAhXHBI4KHbpWA4wQ6AEILTAD#v=onepage&q=Koigi%20wa%20Wamwere%20v%20Attorney%20General&f=false. At 183. Visited on 01/01/2016

66 Republic v Elman (1969) EA 357. @ http://johnnyanje.blogspot.in/2012/11/constitutional-interpretation-in-kenya.html. Visited on 01/01/2016

67 Roy Richard Elirema and Another v Republic Nairobi Criminal Appeal No 67 of 2002. @ http://kenyalaw.org/caselaw/cases/view/10506/. Visited on 02/01/2016

68 George Ngothe Juma and two Others v Attorney General Nairobi High Court Misc Application No. 34 of 2001. @ http://kenyalaw.org/Downloads_FreeCases/Cholmondeley%20_vs_%20Republic.pdf. Visited on 02/01/2016

69 M Thiankolu *"Landmarks from El Mann to the Saitoti ruling: Searching a philosophy of constitutional interpretation in Kenya"* @ www.kenyalaw.org (accessed 22 Dec 2015). See, also, G Muigai "*Political jurisprudence or neutral principles: Another look*

at the problem of constitutional interpretation" (2004) *East African Law Journal* 1.

70 International Covenant on Economic Social and Cultural Rights (CESCR) Adopted by the UN General Assembly on 16 December 1966, entry into force 3 January 1976; acceded to by Kenya on 1 May 1972

71 Concluding observations of the Committee on Economic, Social and Cultural Rights: Kenya (3 June 1993) UN Doc E/C.12/1993/6 (1993) Para 10.

72 Constitution of Kenya Review Commission (CKRC) *"The peoples' choice: Report of the Constitution of Kenya Review Commission"* (2002) 35. @http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/transitions/Kenya_3_Peoples_Choice_Report.pdf. Visited on 11/01/2016

73 M. Hansungule '*Kenya's unsteady march towards the lane of constitutionalism*' (2003) 1 *University of Nairobi Law Journal* 43,as cited in Morris Kiwinda Mbondenyi and Osogo Ambani, "*The New Constitutional Law of Kenya*" at 175. @https://books.google.co.in/books?id=9p2yAwAAQBAJ&pg=PA175&lpg=PA175&dq=.+Hansungule+%E2%80%98Kenya%E2%80%99s+unsteady+march+towards+the+lane+of+constitutionalism%E2%80%99+(2003)&source=bl&ots=LeWrdivxwk&sig=RXwAZfPSTDb78XUhQgv-BVWBhZY&hl=en&sa=X&ved=0ahUKEwirztjXmKTKAhVBjo4KHY5wCREQ6AEIGzAA#v=onepage&q=.%20Hansungule%20%E2%80%98Kenya%E2%80%99s%20unsteady%20march%20towards%20the%20lane%20of%20constitutionalism%E2%80%99%20(2003)&f=false. Visited on 11/01/2016

74 Persons with Disabilities Act, 2003.

75 HIV/AIDS Prevention and Coordination Act, 2006.

76 National Commission on Gender and Development Act, 2003.

77 Children Act, 2001.

78 Constitution of Kenya Review Commission. Ibid Note 72.

79 *Ibid*

80 2010 Constitution, art 19(1).

81 2010 Constitution, art 19(2).

82 W. Eno '*The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa*' LLM thesis, University of South Africa, 1998. Ibid

83 See art 5 of the Vienna Declaration and Programme of Action. @ http://www.ishr.ch/sites/default/files/article/files/vdpa.pdf. Visited on 12/01/2016

84 Comments by Lord Delamere reproduced in *The Kenya Yearbook*, 2010, p. 23 as cited by Prof. Christian Roschmann, Mr. Peter Wendoh & Mr. Steve Ogolla in, *'Human Rights, Separation of Powers and Devolution in the Kenyan Constitution, 2010: Comparison and Lessons for EAC Member States'* @ http://www.kas.de/wf/doc/kas_33086-1522-2-30.pdf?121213123738. Visited on 12/01/2016

85 *Ibid*

86 Makumi, Mwagiru, *"Elections and the Constitutional and Legal regime in Kenya"*, in Chweya, Ludeki, ed. *Electoral Politics in Kenya*, Nairobi: Claripress, 2002.

87 Hassan Omar Hassan, "Why Central Province is no different", *The Standard Newspaper*, Nairobi, Wednesday, July 28, 2010, p. 34. Ibid at 107

88 When Kenya adopted its first national constitution in 1963, executive power was shared amongst two posts: an executive prime minister and a governor-general (a British subject acting on behalf of the Queen of England, who still exercised executive powers). In addition, the constitution called for a multi-layered legislative structure in the form of a bicameral parliament. However, in 1964, after Kenya was officially

declared an independent state, first Kenyan Prime Minister Jomo Kenyatta, dissatisfied with a restrictive executive, lobbied parliament to amend the constitution to abolish both the governorship and the post of Prime Minister and replace them with a single presidency which concentrated executive power within the office of the president. This led to the establishment of an imperial presidency and a *de jure* one-party system as the presidential authority grew relentlessly, with each subsequent president seeking to tighten his control and increase his influence. Unfortunately, this occurred at the expense of the other branches of government, which instead of serving as a check upon executive power, served only to facilitate its abuse. In addition, Kenyatta also called for the elimination of the Senate leaving Parliament the sole legislative body. To further advance executive control, the constitution was amended again; this time to give the president powers to appoint federal judges without approval from any other governing body. Then in 1966, another constitutional amendment was passed, barring candidates and sitting Members of Parliament from legislative office, if they had been jailed for six months or more, regardless of the charge. This heightened fear amongst MPs of being arbitrarily arrested and detained without trial and subsequently losing their position for attempting to challenge the new order. Since then, the Constitution was on a free fall as key institutions of government collapsed to give way for a tyrannical leadership.

89 Human Rights, Separation of Powers and Devolution in the Kenyan Constitution, 2010: Comparison and Lessons for East African Community Member States @http://www.kas.de/wf/doc/kas_33086-1522-2-30.pdf?121213123738. Accessed on 23/12/2015.

90 So far, there is little evidence that the general populace have been properly inducted into the "the culture of human rights" and respect for constitutional, legal and alternative dispute resolution mechanisms established under the Constitution. A case in point is the recent Tana River County clashes involving the Pokomo and the Oromo communities in which the raging storm of violence claimed the lives of over 100 villagers. The violence thought to have been triggered by ethnic mobilisation by politicians and inter-ethnic competition for common resources, is a strong signal that Kenyans are yet to fully apply their minds to the need to show fidelity to the rule of law. The interethnic conflicts have also exposed the government's lackadaisical commitment to guarantee the safety of Kenyans and the reluctance by the political class to discourage violent responses whenever people's rights are threatened with breach. Ibid

91 Speech by the Hon. Mwai Kibaki, President of the Republic of Kenya on the Occasion of the Promulgation of the New Constitution, Friday, 27th August, 2010. @ http://www.nation.co.ke/blob/view/-/998162/data/189174/-/1m232f/-/kibaki+speech.pdf. Visited on 02/01/2016.

92 The Preamble of the Constitution of Kenya, 2010; See also, Article 10 thereof.

93 *Ibid.*

94 The Constitution of Kenya, 2010, article 10.

95 *Ibid.*

96 *Ibid.*

Sentencing of Child Offenders in Kenya: A Latent Contradiction in Law

By
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Abstract

The law in Kenya as regards sentencing of child offenders is quite diverse. However, the bottom line of the procedures involved in handling of child offenders and leading to their sentencing is that of the best interest of the minors. Article 53 of the Constitution of Kenya as well as several other legislations have made it mandatory that the best interest of the child should always be inculcated in decisions affecting the minors. In instances where a child offender undergoes trial and is found guilty, the minor is sent to a rehabilitation institution or a borstal institution depending on the circumstances that apply. A contradiction however exists under section 25 of the penal code which provides for sentencing during the president's pleasure. This sentence has been made to apply to child offenders thereby infringing upon the constitutionally laid down requirement of best interest for child matters. I have elaborated on this contradiction between section 25 of the penal code and Article 53 of the constitution as read together with the Children's Act and the Borstal Institutions Act. It is my contention that the institutions of rehabilitation established for child offenders are not and should not be construed to be punitive but basically rehabilitative. We should accept to entertain a discussion on totally doing away with the sentence under section 25 of the penal code or to at least amend the section to exempt its applicability to child offenders.

1. Introduction

The United Nations Convention on the Rights of the Child[1] defines a child to be 'every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier[2].' Its counterpart, the African Convention on the Rights and Welfare of the Child seems to be on the same reading as it defines a child as 'every human being below the age of 18 years[3]' Both of these conventions are essential since they have been ratified by Kenya and therefore made part of Kenyan law[4]. Prior to the ratification of the two Conventions, the word child used to attract different meanings based on how it was being used. Hussain and Mashamba note that there could be a different definition of child in respect of labour laws, evidence laws, marriage laws, minimum ages of criminal liability, adoption laws, etc[5].

In Kenya, most statutes will base on the definition of a child in the Children Act[6]. The Act defines a child as, any human being under the age of eighteen years[7]. This

definition was inculcated within the Children's Act having been borrowed from the ACRWC with an intent of protecting such individuals from such adversities that the Act sought to concur. It is common knowledge that children receive a specialized treatment in almost all the activities they engage in that an adult would otherwise not receive. This is due to the historical perceptions of children as properties of the family and thus not requiring any specialized treatment. Rebecca Rios-Kohn notes that

> "it is well documented that until approximately the nineteenth century, children were treated like property or chattel but were valued by their families for their contributions in their work[8]."

Blackstone goes further to opine that the father might 'indeed has the benefit of his children's labour while they live with him and are maintained by him.[9]' these common law stipulations and which have been a reality in most of the developing countries, usurped the rights of children leaving children within the domain of charity. However the introduction of the CRC and the ACRWC has revolutionized the conception of children rights around the globe after an increase in their violations.

The preamble to the Children's Act reads in part;

> 'An Act of Parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children...'

From the precept, care and protection of children form a basis upon which the Act was enacted. The Sexual Offences Act[10] assigns to the word 'child' the meaning assigned to it under the Children's Act. Basically, the Sexual Offences Act (herein referred to as SOA) was enacted due to the rise in cases of sexual offences against children. Under the Penal Code[11] (herein referred to as PC), no direct reference has been made to the word 'child' save for a few instances where the words, '*under the age of eighteen years*' have been used. This is meant to draw our attention to the definition assigned again under the Children's Act.

The Constitution[12] seems to have been inspired by the definition under the Children's Act. The drafters of the Constitution may have made reference to the definition adopted under the Children's Act since the latter came much earlier than the former. The Constitution defines a child as, 'an individual who has not attained the age of eighteen years[13]' and an adult is defined as, 'an individual who has attained the age of eighteen years[14]'

After having considered the various definitions of a child under the legislations relevant to this piece of work, it becomes vital to consider the various provisions regarding child offenders in the same legislations. An offence is defined by the PC

as an act, attempt or omission punishable by law[15]. The *Black's Law Dictionary*[16] defines an offence as a violation of the law. That said, it becomes obvious that anyone could engage in an offence. It is not only the adults who commit crimes (used synonymously as offence) but the children too either knowingly or unknowingly, engage in crimes consistently. Berverline Ongaro notes that, 'Childhood is a stage in human development where all persons are susceptible to deviant behaviour, but some by providence and pronounced guidance are not caught in the intricate yet intimidating web of criminal justice system. It is true when it is considered that children are likely to be offenders because the range of their behaviour that would constitute offence is wide in comparison to behaviour by adults. This poignant fact then requires concerted efforts by actors in a criminal justice system to invest towards ensuring children within its environment are well rounded and grounded individuals[17].' The Black's law Dictionary defines a youthful offender also referred to as 'young offenders' or 'status offenders' as 'a person in late adolescence or early adulthood who has been convicted of a crime.' It goes further to provide that 'a youthful offender is often eligible for special programs not available to adult offenders, including community supervision, the successful completion of which may lead to erasing the conviction from the offenders record.'

As noted in the Dictionary definition of young offender, they are bound to receive special treatment in punishment which may not be open to adult offenders. Children are delicate individuals protected nationally and internationally through a number of treaties[18].

The Borstal Institutions Act[19] defines 'youthful offender' as a person who has been convicted of an offence punishable with imprisonment and has been found by the court, at the time of such conviction, to have attained the age of fifteen years but to be under the age of eighteen years[20]. This definition adopted by the Act is aimed at specifically limiting its scope to persons capable of being referred to the institutions[21].

The Children Act deals with some of the specialized criteria in which child offenders are to be handled. Section 190 provides that;

'(1) No child shall be ordered to imprisonment or to be placed in a detention camp.

(2) No child shall be sentenced to death

(3) No child under the age of ten years shall be ordered by a Children's Court to be sent to a rehabilitation home.'

Section 191 then follows to provide,

'(1) In spite of the provisions of any other law and subject to this Act, where

a child is tried for an offence, and the court is satisfied to his guilt, the court may deal with the case in one or more of the following ways:

a. By discharging the offender under section 35(1) of the Penal Code

b. By discharging the offender on his entering into a recognizance, with or without sureties

c. By making a probation order against the offender under the provisions of the Probation of Offenders Act

d. By committing the offender to the care of a fit person, whether a relative or not, or a charitable children institution willing to undertake his care

e. If the offender is above ten years and under fifteen years of age, by ordering him to be sent into a rehabilitation school suitable to his needs and attainment

f. By ordering the offender to pay a fine, compensation or costs, or any or all of them

g. In the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions

h. By placing the offender under the care of a qualified counselor

i. By ordering him to be placed in an educational institution or a vocational training program

j. By ordering him to be placed in a probation hostel under the provisions of the Probation of Offenders Act

k. By making a community service order; or

l. In any other lawful manner'

Therefore, any court of law that adjudicates a matter and finds a young offender guilty of an offence, the above section ought to be in mind to guide the court in passing the sentence.

The PC also has a special way of dealing with child offenders where it notes[22];

'sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time

> when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.'

Under the SOA, and in regards to matters of defilement, the Act provides that[23];

> 'where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.'

2. Synonymity Between Cap 92, Act No 3 of 2006 and Act No 8 of 2001

It appears evident from the provisions of the three legislations that they agree with each other as regards punishment of child offenders. The Borstal Institutions Act has been made a basis upon which guidance for the punishment of such offenders emanates. Both the Children's Act and the Sexual Offences Act make reference to Cap 92. But then, strictly construing section 191 of the Children's Act, it is noticeable that not all minor offenders can be referred to the Borstal Institutions. Subsection (1)(g) of section 191 provides that a youthful offender could only be referred to a Borstal Institution where he has attained sixteen years. Subsection (1)(e) provides that where the offender is above ten years, but below fifteen years, he should be sent to a rehabilitation school. This raises an implication that the only offenders to be referred to Borstal Institutions are those between the ages of fifteen and seventeen years.

3. Why Borstal Institutions?

The preamble to Cap 92 provides that it is 'an Act of Parliament to make provision for the establishment of borstal institutions for youthful offenders and for the detention of youthful offenders therein, and *for connected purposes*.'

Connected purposes in this instance could mean such requisites as under section 4 of the Act as;

a. Proper sanitary arrangements, water supply, food, clothing and bedding for the inmate thereof;

b. The means of giving such inmates educational, industrial or agricultural training; and

c. An infirmary or proper place for the reception of inmates who are ill.

Minors are taken to have a whole life lying before them. Their many years cannot therefore be ruined by a few years they are sentenced for an offence. Sentencing minors in a similar way as adult offenders would serve an injustice to the minors in that, some of the offences they may be involved in may be as a result of unawareness. Even though ignorance of the law is no defense, minors' case may be special because being minors they may not have developed the requisite knowledge of what is wrong and right. The minors can only be referred to a borstal institution for a period three years. Section 6[24] provides;

> '(1) where the High Court or a subordinate court of the first class or a juvenile court is satisfied, after considering the matters specified in section 5, that *it is expedient for his reformation* that a youthful offender should *undergo training in a borstal institution*, it may, instead of dealing with the offender in any other way, direct that the offender be sent to a borstal institution for a period of three years.'

It is evident from the preceding provisions that reference could be made to borstal institutions only in instances where reformation of a youthful offender is expedient. Reference is made also to section 5 which reads;

> 'before sentencing a youthful offender, a court shall consider the evidence available as to his character and previous conduct and the circumstances of the offence, and whether it is expedient for his reformation that he should undergo a period of training in a borstal institution.'

Therefore, not all youthful offenders can be referred to borstal institutions; one exception is those below the age of fifteen who are required by the Children's Act to be referred to rehabilitation institutions, and the other is those exempted by section 5 of Cap 92, where according to the evidence available regarding his character and previous conduct, the judicial officer finds that it is not expedient to refer such an offender to a borstal institution, then the minor will be dealt with in other lawful ways.

4. Consistency of These Provisions with the Constitution

In 2010, Kenyans took a bold step and passed the current Constitution. The Constitution has indeed received much applause both nationally, regionally and even internationally due to its progressive nature. It has been described by scholars as a transformative charter and one of the best around the world[25]. One of the factors that give the Constitution its transformative character is the Bill of Rights (BOR)[26]. Article 2 of the Constitution begins us off by binding the Constitution to all persons and all state organs at both levels of government. The courts and tribunals that adjudicate child matters are state organs thus directly bound by the provisions of the constitution. Under the BOR the constitution has explicitly provided for the rights of the child[27]. It provides in part;

'Every child has the right—

(b) to free and compulsory basic education,

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and harzadous or exploitative labour...

(f) not to be detained, except as a measure of last resort, and when detained, to be held-

(i) For the shortest appropriate period of time, and

(ii) Separate from adults and in conditions that take account of the child's sex and age

(2) A child's best interests are of paramount importance in every matter concerning that child.'

This provision raises the amount of care to be given to children when any person or entity is dealing with them. A child's best interest is of paramount importance in everything related to them including the punishment meted upon them. Analyzing the provisions of the three legislations on modes of punishment of child offenders and weighing them against the backdrop of the constitutional provisions on children, the question raises as to whether or not they are in tandem with the desires of the Constitution.

Both provisions of the legislations agree on how children offenders ought to be punished which is *inter alia* through sending them to borstal institutions. Borstal institutions are suited to provide correctional services to the children. Going back to section 4 of Cap 92, the borstal institutions are established to among other things, *provide the means of giving inmates educational, industrial or agricultural training*. Further, the Act provides that such inmates shall be subject to the discipline of a borstal institution and to all rules, orders and directions made under the Act during the period of detention[28]. This brings an implication that, the inmates are not just thrown in the institutions and left on their own as the case may be in most prisons, but they are closely monitored to ensure they adhere to the rules of the institutions. This enhances discipline of the children from the time of their entry into the institution until their exit. Also, reading the reasons with which a youthful offender may be committed to a borstal institution, key among them is that the judicial officer should be satisfied that it is expedient for the youthful offender to reform.

Having such provisions in mind, it becomes worthwhile noting that they are to a large extent aligned with the constitutional requirement of children's best interest.

5. Evaluating The Provision By Cap 63

Section 25 of the Penal Code is my area of concern, and it requires that instead of child offenders being sentenced to a death sentence, they ought to be sentenced at the President's pleasure in offences that attract a death sentence to adults[29]. It suffices that not only under the Penal code does the sentence arise. Under the Criminal Procedure Code[30], a disabled person can also be sentenced during the president's pleasure in cases where he does not understand the proceedings of the court. These provisions envision confusions in law and fact. They take away much clarity that the drafters of the legislations may have intended to provide. Any legal practitioner or student would have difficulties defining what is meant by 'sentencing during the president's pleasure.' Felicia Mburu notes that '*There are no guidelines on sentencing 'at the president's pleasure'. One does not know if the sentence can be reviewed, when it can be reviewed, procedure for release or even the rights of persons with mental disabilities while serving the sentence. Consequently Section 167(1) of the CPC becomes a tool for institutionalising persons for life.*[31]'

6. Sentencing 'During President's Pleasure'

Much controversy surrounds the sentence of detaining during the president's pleasure. It has not been clear in most jurisdictions that provide for this sentence what it entails and the logistics. In Kenya for example, little has been done to attempt clarity as regards this sentence. Advocates flood court corridors with appeals from decisions that left their clients detained during the president's pleasure[32]. Such appeals do not question the validity of the proceedings but basically focus on the gray areas within the sentence.[33] The sentence for example as was noted by Felicia Mburu,[34] does not provide a specific period within which a particular person shall be detained, neither does it provide on the procedures or mechanisms of termination.

Sub-section 3 of section 25 of the Penal Code stipulates that when a person has been sentenced to be detained at the president's pleasure in accordance with sub-section 2, then the presiding judge ought to forward to the president a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observation on the case he may think fit to make. This provision could be construed to mean that the fate of persons detained under the president's pleasure is at the hands of the presiding judge. Based on how the proceedings were conducted and assessing the behavior of the minor during trial, the judge may recommend for the minor to be pardoned by the president after such duration as his conscience may please.

The case of James Weru[35] may suffice as a demonstration of what could become of someone detained under the pleasure of the president in Kenya. He was arrested back in 1974 and 43 years later he still is languishing within the confines of Kamiti

prison. Weru was charged of murder and convicted in 1983. The judge ruled that Weru was not in his right frame of mind when committing the offence and so he proceeded to sentence Weru to be detained at the president's pleasure. Neither of the presidents including Daniel arap Moi and Mwai Kibaki considered Weru's case for pardon.

Strictly reading the provisions of the Penal Code,[36] section 25(2) it is worth noting that its drafters must have intended a specialized way of dealing with persons detained during the president's pleasure. The section requires that the president shall specify the place and conditions under which such persons shall be held. Weru was nonetheless handled like any other criminal and locked up in the Kamiti prison without any form of favorable differentiation from the other convicts.

Weru's case frightens any sane mind that is alive to the provisions of section 25 of the Cap 63. Far as child offenders are concerned, the provision is so vague as to leave the rights of the children offenders open to violations.

7. Presidential Pleasure in other Countries

7.1 Singapore

The Singapore Criminal Procedure Code (SCPC)[37] provides under section 213 thus,

> "a person, who is under 18 years old, shall be sentenced to be detained during the President's pleasure in lieu of the death sentence."

This provision read in exclusion of any other provision, makes detainment during the president's pleasure a compulsory sentence for any crime committed by a minor, and which would otherwise attract death sentence for adults. However, the provisions of section 38(1) of the Children and Young Persons Act (CYPA)[38] come in to sanitize section 213 of SCPC. The section reads in part;

> "the Court may, sentence a young person convicted of murder to be detained either for a fixed or indefinite period as a last resort."

The use of the word 'may' gives discretion to judicial officers to be able to assess the best sentence favourable to the child's welfare. Arguing for the prevalence of the CYPA over the SCPC provisions, Paul Quan[39] states,

> "I not only argue that the two provisions can be interpreted such that section 38(1) of the CYPA prevails, but also that this should be done. This is because section 28(1) of the CYPA requires any court that deals with a young person to have regard to his or her "welfare". Sentencing is arguably one way of "dealing" with a young person. Welfare in sentencing entails the court meting out individualised sanctions, which are tailored

> to the perceived needs of the young person appearing before the court, with the aim of improving his or her future overall well-being. Section 213 of the CPC dictates that it is mandatory to impose detention during the President's pleasure on a young person convicted of murder. This implies that the sentence is to be imposed regardless of whether or not it will meet his or her individual needs. This does not accord with having regard to the welfare of the young person, which section 28(1) of the CYPA demands of a court sentencing that young person."

It is not only Quan who feels that Singapore should adopt an abolitionist approach, Associate Professor Chan also opines that a review of the sentence is necessary and suggests its abolition. Writing in a letter to The Straight Times Forum, he said that,

> 'a defined term of imprisonment offers more hope to young persons and therefore assists in rehabilitation'

This he wrote due to the nature of the sentence during president's pleasure. It is indefinite and as the Assianone News correctly captured,

> "In prison right now, there are seven youths with no inkling of when they would be released. They were aged below 18years when they committed the crimes. That is what it means to be detained during the president's pleasure; you enter the slammer not knowing when you will get out[40]. "

In Singapore as the spokesman for the Ministry of Home Affairs noted, there is no preferential treatment for inmates detained during president's pleasure. He notes that, 'depending on their conduct and behavior, they can also work in workshops within the institution or be placed in vocational and educational programs.' The person's conduct and progress are monitored and reviewed annually. When the offender is found suitable for release, a recommendation will be made to the president, may in turn direct that the person be released forthwith.

Mr. Subhas also notes in agreeing with Quan states that '*from the inmates point of view, not knowing exactly when he could be released is a form of punishment in itself.'* Despite this voices of reason dissenting against the sentence, courts in Singapore have continually used the sentence[41] as originally coached in the wordings of the SCPC.

7.2 Zambia

It has adopted the Britain's approach of having the sentence exist alongside minimum sentences that ought to be served before a minor can be considered for release. Recently, the son of the former Minister of Defence George Mpombo was charged and convicted by Ndolo High Court judge Emeli Sunkutu for murder and robbery with violence. The boy was 17 years when he committed the crimes.

It was averred that he used his father's gun to shoot his pregnant girlfriend before he cut off her head.

It was argued by the defence counsels for a sentence that would see the boy be referred to a reformatory school. However, the judge maintained her ground that for the charge of murder, the boy would be sentenced to be detained at the president's pleasure and as regards the concurrent charge of robbery with violence, he would be referred to the reformatory school for a period 12 months. In holding this position, the judge stated;

> "(...) sending you to Katombola reformatory school will be a de-service to you and the society. Therefore, I order to the crime of murder to be detained at the president's pleasure. I will submit a report to the president and the recommendations from the social welfare. The Court shall send you to the president's pleasure for a period that will be suitable for your detention. You should be confined for at least ten years"

Zambia's position enhances the viability of the sentence for stipulating the minimum period with which someone could be held at the president's pleasure. Even though it fails to provide for the maximum, the minimum period could be well used by the inmates in knowing when to apply to the president for pardoning.

7.3 Britain

They use the phraseology, 'at Her Majesty's Pleasure' or 'Queens Pleasure.' Used in Britain's Powers of Criminal Courts (Sentencing) Act, 2000. The Act provides for minimum sentences that persons serving the sentence ought to serve before they are considered for release. The trial judge reviews the conduct of the victim and ends the prisoners sentence if satisfied that there has been a significant change in the offender's attitude and behavior.

8. Assessing Section 25(2) & (3) of Cap 63 Against Constitutional Provisions

Having analyzed the sentence of being detained during the president's pleasure both in Kenya and other jurisdictions, it is easily noticeable how the sentence impugns on the enjoyment of children rights. It is even questionable whether the sentence is calculated to meet the best interest of child offenders. Unlike in Singapore, Kenya's Penal Code[42] does not make the sentence compulsory. Unfortunately though, most of the judges in Kenya will easily pass the sentence[43] in complete disregard of the Children's Act[44]. Sentencing a person to be detained during the president's pleasure first engenders thoughts of an indeterminate restraint on the liberty of the person. This sentence therefore has to fail *ab initio* based on this ground alone much as child offenders are concerned. Associate Professor Chan discourages sentencing child offenders during the president's

pleasure by opining thus, '*a definite term of imprisonment offers more hope to young persons and therefore assists in rehabilitation*.'

Article 53(1) demands that no child should be detained unless it is the very last resort. This provision if correctly read with the Children Act[45] would be taken to mean that, all the options of punishing a minor offender have to first be explored before the sentence of detainment is reached. Based upon this alone, the provisions of section 191 of the Children Act[46] seem to be elevated above those of section 25(2) and (3) of the Penal Code[47]. Sentencing during the president's pleasure is a form of detainment which Article 53[48] abhors unless other measures like those under section 191 of the Children Act[49] have been explored in futility.

Most judicial officers seem to interpret the law selectively focusing entirely on the provisions of section 191(1) (l) of the Children Act[50] which requires them to sentence in accordance with any other lawful manner. They argue that this sub-section gives them the discretion to choose between the provisions of the Children Act and those of the Penal Code[51]. This I argue, is reading the piece of legislation in total isolation. The Constitution is Kenya's '*Grundnorm*[52]', it ought to be the starting point in resolving any lacuna in law. Detention could indeed be a tool of deterrence to child offenders, a sentence which is validly provided for by the penal code. However, in passing the sentence, the judicial officer has to have ascertained that they go by the constitutional desires of using the sentence only as an alternative when no other sentence under the Children Act would meet the best interest of the child in question.

Sub-article 1 of article 53 goes further to provide that where detention has to be used, then first it has to be for the shortest appropriate period of time. In Kenya, unlike in Zambia and Britain, no provision points to the minimum time after which a person detained during the president's pleasure may be released. The case study of Mr Weru (herein above) is a demonstration of the period of time a person can be detained during the president's pleasure. Having been in jail for a period 43 years under three different regimes, Weru's fate is still unclear and whether or not he may be considered for pardon is a concern of another day. When such a sentence that is indefinite is meted against a child offender it directly contravenes the provisions of the Constitution. The requirement of the *'shortest appropriate period of time'* points to certainty. It shocks the conscience of any reasonable man to imagine that an indefinite sentence can be equated to a shortest appropriate period of time.

Sub-article 2 of article 53 requires a *child's best interest to always be of paramount importance in matters children*. The wording of this provision makes it non derogatable. The Constitution demands that, care ought to be exercised when dealing with children. When passing a sentence to a child offender, the judicial officer has to weigh the options and come up with a sentence that is in the best interest of the child. Best interest has been defined as 'a standard by which a court

determines what arrangements would be to a child's greatest benefit[53].' Assessing this definition then it suffices to note that, a sentence that would help develop the child and nurture him would be taken to be in the best interest of the child compared to a sentence that would leave a child offender being treated like any other offender. The sentence under section 25(2) does not meet the constitutional threshold in matters regarding child offenders and thus it has to be declared unconstitutional in that regard.

Article 2(5) of the Constitution allows application of International Law in Kenya. Part of this law is the UN Convention on the Rights of the Child and the African Convention on the Welfare and Rights of the Child. These are the main documents that explicitly provide on the various rights and safeguards of the child. I will analyze them separately below;

9. UNCRC

It was adopted by the United Nations General Assembly (UNGA) on the 20th November, 1989 vide General Assembly resolution 44/25 and entered into force in September of 1990 a period less than a year after its adoption, thus becoming one among the very few treaties to come into force after such a short period[54]. The treaty has been termed unique for having near-universal ratification within just a decade[55]. Doek contends that no other human rights treaty comes close to universal ratification and the CRC is the treaty with widest coverage[56]. Mohammed and Mashamba opine that the CRC is the first instrument to enshrine both civil and political rights on the one hand and economic, social and cultural rights on the other hand[57].

Article 3 of the Convention provides for the best interest of the child. It provides thus;

> 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.'

This provision is of much concern in the area of sentencing of child offenders. As has been discussed above from the Constitutional perspective, best interest of the child connotes placing the child under the necessary care that would further develop him as a special member of the family. The Instrument provides in its preamble that the members to the charter bear in mind that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'

However, article 37 shall form the basis of my interest in this Instrument. The Article has much semblance with article 53 of the Constitution[58]. It is worded as

below;

"States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

This provision read together with article 2 of the Convention which requires State parties to respect the provisions within the present Convention obligate the State parties to maintain a higher threshold when dealing in children matters.

Finally, article 40 of the charter reads in part,

'1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'

It goes further to provide,

> '4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.'

10. The ACRWC

It was adopted by the Organization of African Unity (OAU) in 1990 and came into force in 1999. Like the CRC, it also comprehensively covers both the civil, political, economic, social and cultural rights. I shall focus on articles 1, 16 and 17 of the Convention. Article 1 provides;

> 'Member States of the Organization of African Unity Parties will recognize the rights, freedoms and duties in this Charter and will adopt laws these rights. Any custom, tradition, cultural or religious practice that is inconsistent with these rights are discouraged.'

Article 16 on the other hand reads thus;

> 'Children should be protected from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.'

Article 17 which is my point of departure far as this Convention is concerned provides;

> 'Every child accused or found guilty of having broken the law should receive special treatment, and no child who is imprisoned should be tortured or otherwise mistreated.'

Article 1 frowns upon the enactment of any law that contravenes the provision of this Convention among its State parties. It demands respect of the provisions within the charter. Article 16 goes further to discourage torture or any form of mistreatment of children. Article 17 then finalizes by reiterating the provisions of Article 16 in regards children found guilty of an offence. Relating these provisions with the provisions of the Penal Code, sentencing of child offender during the president's pleasure contravenes the Convention. The uncertain period of detention is torturous both physically and mentally. It falls short of being in the best interest of the child in question.

Conclusion

Reforms are inevitable as regards to the laws governing sentencing child offenders and especially the Penal Code. Kenya has to live the talk. The passing of the Children Act providing specifically for the children affairs and the ratification of the CRC and the ACRWC coupled again with the inclusion in the new Constitution of an elaborate Bill of Rights that contains Children Rights has to be reflected in practice. Section 25(2) and (3) has to be aligned with the other legislations providing for best interest of the child. Either we adopt the abolitionist approach as was fronted by Prof. Chan in Singapore or rather we amend the provision to include a minimum period within which a person held during the pleasure of the president may petition the president for release as is in Britain and Zambia.

Endnotes

* Lawyer

1. Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with *Article 49*
2. Article 1
3. Article 2
4. Constitution of Kenya 2010, Article 2
5. Prof.(Dr) Mohammed S. Hussain and Dr. Clement J. Mashamba, '*Child Rights and the Law in East Africa*' LawAfrica 2014
6. No. 8 of 2001
7. Section 2
8. Rios-Kohn, '*Comparative Study of the Impact of the Convention on the Rights of the Child; law reform in selected Common Law Countries' in United Nations Children Fund, protecting the World's Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems'* New York, Cambridge University Press, 2007
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10. No. 3 of 2006
11. *Cap 63, Laws of Kenya*
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13. Article 260
14. Ibid
15. See Section 4
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17. Berverline Ongaro, '*Perils of child offenders in a criminal justice system that ignores them'* find on, http://nairobilawmonthly.com/index.php/2015/12/08/perils-of-child-offenders-in-a-criminal-justice-system-that-ignores-them/ accessed on 25th January 2017 at 1230hours
18. The UN Convention on the Rights of a Child; the African Convention on the Rights and Welfare of the Child
19. Chapter 92 of Laws of Kenya
20. See section 2
21. See Children's Act No. 8 of 2001, section 191(1)(g)
22. See section 25(2)

23. Section 8(7)
24. Borstal Institutions Act, cap 92
25. See, John Harrington and Ambreena Manji, '*Restoring Leviathan? The Kenyan Supreme Court, Constitutional Transformation, and the Presidential Election of 2013*' Journal of Eastern African Studies, Vol. 9, 2015; See also, John Mutakha Kangu, '*Constitutional Law of Kenya on Devolution*' Strathmore University Press, 2016; see Humphrey Sipalla, '*Kenya: Can Kenya see its Transformative Constitution As a Law of 'Maybe'?* AllAfrica, 2014; see Dr. Willy Mutunga, '*The 2010 Constitution of Kenya and its Interpretation; Reflections from the Supreme Court Decisions*' University of Fort Hare, where he notes in the introductory statements thus, '*In 2010 Kenya created a new modern transformative constitution that replaced both the 1969 and the post colonial constitutions. This was a culmination of almost five decades of struggles that sought to fundamentally transform the backward economic, social, political and cultural developments in the country.*'
26. Chapter 4
27. Article 53
28. Section 17
29. Penal Code, Cap 63. Section 25(2)
30. Criminal Procedure Code, Cap 75. Section 167(1)
31. Felicia Mburu, '*Sentencing at 'the president's pleasure' and what It means to persons with mental disabilities in Kenya.*' *https://africlaw.com/2014/09/17/sentencing-at-the-presidents-pleasure-and-what-it-means-to-persons-with-mental-disabilities-in-kenya/* accessed on 25th January,2017 at 1309hours
32. See, *Criminal Appeal No 552 of 2010, between J.M.K(applicant) and the Republic(respondent)*; see also, Criminal Appeal No 257 of 2003, between *O.O.N.(applicant) and Republic(respondent); see also, Koech and Another v Republic* (2004) 2 KLR 322
33. See Asiaone news, '*Just Punishment or too Harsh?*' *http://news.asiaone.com/News/The+Straits+Times/Story/A1Story20080524-66752.html* accessed on 26th January, 2017 at 1112hours
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35. Daily Nation Newspaper, 31st October,2015 http://www.nation.co.ke/lifestyle/lifestyle/Forty-one-years-behind-bars-and-counting/1214-2937086-format-xhtml-8j8tse/index.html accessed on 26th January, 2017 at 1038hours
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38. Cap 38, 2001 Rev Ed
39. Paul Quan Kaih Shiuh *LLB (Hons) (National University of Singapore); Deputy Public Prosecutor and State Counsel, Criminal Justice Division, Attorney-General's Chambers* He is an anti Presidential pleasure sentence and advocates for sentencing in accordance with the CYPA. Once a prosecutor and now a magistrate, he has vast knowledge in child sentencing matters and wrote arguing that, '*jailing a boy for an indefinite period was a severe penalty in sharp contrast of the* CYPA *which allows a judge to exercise discretion in deciding an appropriate sentence.*' He wrote this in an article in the Singapore Academy Law Journal called,' *Detention During the President's Pleasure: A Foregone Sentence for a Young Person Convicted of Murder.*'
40. Supra n 32
41. See for example in; *Mohd Iskandar bin Mohd Ali v PP (1995)* Criminal Appeal No 7 of 1995, it is directly relevant since the accused was a young person (being a 14-year-old

boy) convicted of murder; see also *PP v Gwee Siew Kuan* [1996] SGHC 4 is also relevant in that the first accused was also a young person (being a 15-year-old girl). However, it should be noted that she was convicted not for the capital offence of murder but for the capital offence of drug trafficking. The other three decisions are of comparative value. They involve youths, who are not young persons, but are below 18 years old, convicted for the capital offences of murder or drug trafficking, and sentenced to be detained during the President's pleasure: *Ng Beng Kiat v PP* [1995] 3 SLR 335, CA, which affirmed *PP v Ng Beng Kiat* [1995] SGHC 62; *Ong Chee Hoe v PP* [1999] 4 SLR 688, CA, which affirmed *PP v Ong Chee Hoe* [1999] SGHC 162; *PP v Poon Yuen Chung* [1993] SGHC 269.

42. Cap 63 Laws of Kenya
43. *Supra* n 31
44. *Supra* n 42
45. Act No 8 of 2001, section 191
46. Ibid
47. *Supr*a n 43
48. Constitution of Kenya 2010
49. *Supra* n 47
50. Ibid
51. Supra n 48
52. See Hans Kelsen, '*Pure Theory of Law*' 1st Ed, 1934
53. Black's Law Dictionary, 9th Ed; it could also be defined as, '*focusing on the child's "best interests" means that all custody and visitation discussions and decisions are made with the ultimate goal of fostering and encouraging the child's happiness, security, mental health, and emotional development into young adulthood.' http://family.findlaw.com/child-custody/focusing-on-the-best-interests-of-the-child.html accessed on 27th January,2017 at 1141hours.*
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Like a Phoenix from the Ashes of Insolvency: An Appraisal of the Rescue Culture of the Kenyan Insolvency Act of 2015

By
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Abstract

Before the commencement of the Insolvency Act of 2015, the statutory provisions regulating insolvency law in Kenya were found in the Companies Act, Cap 486 of the Laws of Kenya and the Bankruptcy Act, Cap 53 of the Laws of Kenya. The pertinent provisions of the former outlined the procedure to be followed in the event of corporate insolvency while the latter detailed the course of action to be followed in the event of personal insolvency, or bankruptcy as it is more commonly known.

Despite the dissimilarities in the two regimes of insolvency law there was one crucial similarity between them, that is, neither the Bankruptcy Act nor the Companies Act espoused a rescue culture. An individual found to have committed "an act of bankruptcy" would be declared bankrupt by a court of competent jurisdiction and a corporate body would in most cases be wound up. It is for this reason that the insolvency laws in Kenya were for a long time referred to as the "Kiss of Death" Laws. This reality was articulated in *Jambo Biscuits v. Barclays Bank* (2002) where Justice Ringera stated, "I think it is notorious facts of which judicial notice may be taken that receiverships in this country have tended to give the kiss of death to many a business."[1]

The Kenyan Insolvency Act of 2015 is closely modelled upon the UK Insolvency Act of 1986. This latter Act epitomizes the rescue culture. As elaborated upon by Lord Browne-Wilkinson the rescue culture seeks to preserve viable businesses and is fundamental to much of the Insolvency Act of 1986.[2] This Act was the governmental response to the report and recommendations of a multi-disciplinary committee tasked with reviewing insolvency law and practice in the United Kingdom in the late 1970s.[3] The Cork Committee laid the foundations for the so called rescue culture and argued that a good, modern system of insolvency law should provide a means for preserving viable commercial enterprises capable of making a useful contribution to the economic life of the country:

> "We believe that a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked."[4]

Rescue procedures are thus major interventions necessary to avert the eventual failure of a company. Central to the notion of rescue is, accordingly, the idea that drastic remedial action should be taken at a time of corporate crisis.[5] This remedial action should take place *ex ante* as opposed to attempting to deal with the backlash that follows total corporate failure *ex post facto*.

The term rescue culture has primarily been used in the context of corporate insolvency, but the present research will attempt to extend its use to personal insolvency specifically arguing that the various alternatives to bankruptcy do have the effect of rescuing an insolvent individual from otherwise imminent bankruptcy which has grim ramifications for persons adjudged bankrupt.

This research will be divided into three subsequent parts. Part I will endeavor to summarize the roots of the current insolvency regime in Kenya, as well as examine the meaning of rescue culture together with its importance in any well-functioning insolvency regime. Part II will analyze the aspects of the Insolvency Act, 2015 that espouse a rescue culture for insolvent natural persons. Part III will analyze the rescue options for corporate bodies whose financial position is redeemable. The paper will end with a brief conclusion.

Key Words: Insolvency Act 2015, Rescue Culture, Personal Insolvency, Corporate Insolvency

1. An Outline of the Roots of Kenyan Insolvency Law and the Nature of Rescue Culture

1.1 The Roots of Kenyan Insolvency Law

Kenyan Insolvency Laws, both the current and previous regime, can be traced back to the Insolvency Laws that developed in the United Kingdom. The earliest insolvency laws of the United Kingdom have a common law heritage dating back to medieval times and were concerned with individual insolvency or bankruptcy.[6] This early common law offered no collective procedure for the administration of a bankrupt person's estate and a disappointed creditor could seize the effects of the debtor or his person. Moreover, disgruntled creditors had to pursue remedies against errant debtors individually. This is because there was no collective mechanism that allowed the general body of creditors to pursue the debtor jointly.

The Statute of Bankrupts passed in 1542 by Henry VIII introduced the *pari passu* principle of distribution and directed requisite authorities to seize and sell assets of debtors and pay creditors according to the debt owed to them.[7] *Pari passu* means "equal in right of payment" and is one of the most important principles underpinning Insolvency Law. In essence, this principle means that all unsecured creditors in insolvency processes, such as administration, liquidation and bankruptcy must share equally any available assets of the company or individual,

or any proceeds from the sale of any of those assets, in proportion to the debts due to each creditor i.e. *pro-rata* to the debts that they are owed. This ensures fairness and equity in insolvency proceedings.

Numerous bankruptcy laws followed but in contrast to modern bankruptcy law their aim was penal rather than rehabilitative. For instance, when the person of the debtor was seized, detention in person at the creditor's pleasure was allowed by law. Insolvency and the ensuing bankruptcy was therefore seen as an offence a little less criminal than a felony.[8]

The Bankruptcy Act of 1705 began to move towards rehabilitation by introducing relief for bankrupts through the concept of discharge from debts for those who co-operated with their creditors.[9] It is however interesting to note that until 1861 there were two systems in place, bankruptcy for traders and insolvency for non-traders. Because of this distinction non-traders could not be declared bankrupt, the assumption being that traders could find themselves unable to pay their debts through no wrong doing of their own, but rather because of the vagaries of trade. As such they deserved the limited protection offered by the then bankruptcy laws. Non-traders on the other hand were considered to have wantonly defrauded their creditors and therefore were not offered any protection by the bankruptcy laws.[10] For instance, a difference that existed between the bankruptcy laws available to traders and the insolvency schemes for non-traders was that whereas the bankrupt's liabilities to creditors could be discharged on surrender of assets (even if these assets were insufficient to satisfy his entire debt), the insolvent non-trader was still obliged to repay the remainder of his judgment debt even though he had suffered seizure of his goods or served his term of imprisonment.[11] The Bankruptcy Act of 1861 abolished this distinction and was later replaced by the Bankruptcy Act 1914 which codified the laws on bankruptcy.

It is important to note that throughout this history the bankruptcy Acts never applied to companies. This is because companies as artificial legal persons only came into existence in the 19th century. More specifically, the birth of corporate insolvency laws goes back to 1844 when the then United Kingdom parliament enacted the Joint Stock Companies Act of 1844 and the subsequent recognition of companies as separate legal entities in the seminal *Salomon v. Salomon & Co.* case.[12] Corporate insolvency law therefore initially piggy backed on bankruptcy laws and did not assume a truly distinctive status until the advent of limited liability for members of a company. The Companies Act 1862 contained detailed winding up provisions including a provision for *pari passu* distribution. Later Companies Acts made further provisions for corporate insolvency The Insolvency Act 1986 combined the insolvency of natural persons and artificial persons under one statutory regime. The Kenyan Insolvency Act 2015 borrows heavily from the UK 1986 Act. The Companies Act Cap 480 of the Laws of Kenya and the Bankruptcy Act Cap 53 of the Laws of Kenya (both repealed by the Insolvency Act of 2015 were also closely modelled on their United Kingdom predecessors.

Modern Insolvency Law regimes have metamorphosed in a way that now places a new emphasis on rescue and on early actions to respond to corporate and individual troubles. It can be argued that a fundamental shift in both the law and practice has decreased the focus on *ex post* responses to financial crises to one that increasingly involves influencing the ways that corporate and individual actors manage the risks of insolvency *ex ante*.

In the context of the financial turmoil occasioned by the recent global financial crisis and the collapse and/or near collapse of major retail companies in Kenya such as Uchumi Supermarkets and Nakumatt Supermarkets the importance of a strong rescue framework has never been more relevant.

1.2. Unearthing the Core Precepts of Rescue Culture

The rescue culture which seeks to preserve viable businesses has been said to be essential to much of the United Kingdom's Insolvency Act of 1986,[13] and by extension to the Kenya Insolvency Act of 2015. As previously mentioned in this article the so called rescue culture can be traced back to Kenneth Cork and the Cork committee.[14] It was asserted therein that too many financially distressed companies were unnecessarily liquidated despite the fact that they had a reasonable chance of survival. As such, the intention of rescue was to save viable but financially struggling companies from demise, because once a company was liquidated it ceased to exist.

We would herein posit that the term rescue culture can and should be extended to personal insolvency proceedings, where an insolvent individual can be rescued from the finality of a bankruptcy order. In these situations, rather than declare an individual bankrupt, the Insolvency Act of 2015 offers reprieve by enumerating several alternatives to bankruptcy. In both corporate insolvency and personal insolvency therefore liquidation and bankruptcy respectively should be a last resort. Where it is possible to salvage financially viable companies or to provide individuals in financial distress with breathing room without or before subjecting them to the liquidation or bankruptcy process then this should be a laudable goal of any modern insolvency regime. Rescue in this sense therefore means offering both individuals and companies a second chance before relegating them to the murky depths of bankruptcy and liquidation.

The rescue culture is a concept born out of the ideology that in any economy where there is a reliance on credit, financial risk is inevitable. Credit is contractual deferment of debt while insolvency is the inability to pay one's debts. It necessarily follows that insolvency is predicated on the extension of credit because without credit there can be no debt, and without debt there can be no insolvency. Both individuals and companies enter into credit arrangements in the course of day to day life. Failure to satisfy the obligations arising as a consequence of these arrangements should not automatically translate into bankruptcy and/or liquidation. Obviously rescue should not be perceived as a mechanism that offers

an absolute solution to a financially distressed company or individual. Rather, it should be considered as an attempt to prevent, where possible, bankruptcy and/or liquidation.

Rescue culture should therefore be considered to be a multi-faceted term having both a positive and protective role as well as a corrective and sometimes punitive aspect.[15] Specifically, a true rescue culture means that there should be munificent treatment of insolvent persons, both companies and individuals, in so far as these persons deserve such treatment. For instance, where the insolvent individual or company has attempted to discharge his or its obligations to creditors by entering into either Individual Voluntary Arrangements (IVAs) or Company Voluntary Arrangements (CVAs) respectively, such persons should be allowed to try and honor their obligations under the IVA or the CVA. On the other hand however, where insolvent persons are deliberately irresponsible therefore increasing the losses suffered by creditors it follows that the law should not sanction such behavior. In these latter cases there is no compunction to attempt a rescue as it were.

It has been compellingly argued that there are ten key principles underpinning the notion of a rescue culture.[16] We opine that the most important of these principles are that an insolvency regime that espouses the rescue culture should be capable of exercising judicial pressure on an unpaid creditor to accept any reasonable arrangement proposed by a *bona fide* debtor, and that there is a public interest in the preservation and salvage where practicable of productive entities and enterprises.[17] Where insolvency proceedings have been commenced against an insolvent debtor it may behoove the court to ask whether there are reasonable grounds for protecting the debtor from being declared bankrupt or being wound up, and for not requiring his or its affairs to be administered in bankruptcy or through winding up proceedings. This kind of reasoning is essential to the rescue culture. In considering what amounts to reasonable grounds it may be necessary to go beyond the interests of individual creditors and consider the socio-economic interests of the community in which the debtor operates or resides. To put this in context, consider the case of Nakumatt Supermarket Holdings Ltd. Once considered the biggest retail franchise in Kenya Nakumatt has in recent times found itself on the receiving end of multiple insolvency proceedings from dissatisfied creditors.[18] Under the previous insolvency regime this may very well have been sufficient reason to liquidate this retail powerhouse. Under the new regime however, with its emphasis on rescue culture where possible, it would be essential for the courts to consider whether there are other options available rather than rushing to liquidate. The deleterious socio-economic impact of "killing" a company as huge as Nakumatt Supermarkets Ltd. cannot be overstated. In fact, in recognition of precisely this interest the honorable Fred Ochieng ordered that Nakumatt holdings be put under administration.[19] He optimistically held, "I have also taken note of the positive results of the Pilot Project which the Company undertook in December 2017. Those results, tentative though they may be, led me to believe that there is a possibility that the Company can turn around. In other words, it would appear

that the company's business may still be a viable concern."

One of the most important weapons in the armory of the rescue culture is the moratorium. A lot of the rescue procedures provided for under the Insolvency Act provide for a freezing of creditors' actions during the subsistence of the moratorium. For example, as provided for under section 559 there is a moratorium on all insolvency proceedings against the company where an administration is under effect. This cessation is not permanent, but is certainly important if a true rescue of the company in question is under contemplation. The moratorium provides the insolvent debtor with the much needed time and space necessary to chart the way forward in as far as improving its financial position is concerned.

In order for the rescue culture to have real life tangible effects as opposed to being merely aspirational it is necessary to concern ourselves with the people who are authorized to take part in insolvency proceedings. Another critical advancement introduced by the Insolvency Act, 2015 is the creation of the office of the Insolvency Practitioners. Section 4 of the Act stipulates that bankruptcy trustees, liquidators, administrators and supervisors of voluntary arrangements for both natural and artificial persons must in all cases be qualified insolvency practitioners. Section 5 provides that it is an offense for someone to act as an insolvency practitioner without the requisite authority. Section 6 thereafter outlines the qualifications and disqualifications of insolvency practitioners and section 8 provides that any person who wants to act as an insolvency practitioner must apply to the official receiver for authorization. By creating and requiring an efficient, honest and properly regulated profession made up of duly trained and qualified personnel it is likely that the ethos of the rescue culture will be manifested in reality.

2. Rescuing Insolvent Individuals: The Alternatives to Bankruptcy

2.1 Do Individuals Need to be Rescued from Bankruptcy?

Bankruptcy is the status of a debtor who has been declared by a judicial process to be insolvent or unable to pay his debts.[20] Bankruptcy law can be argued to have two primary objectives:

a. Vesting all the property which the debtor has at the commencement of the bankruptcy or acquires before his discharge in a trustee for distribution among the creditors *pari passu* according to their rights[21]

b. Releasing the debtor from liability to those creditors at the end of a specified period subject to his conduct during the bankruptcy.[22]

The law provides that there will be an automatic discharge of the bankrupt individual after 3 years, although an application may be made for an earlier discharge.[23] During this period of bankruptcy and before the bankruptcy debtor is

discharged certain negative consequences follow. For instance, until the bankrupt is discharged all property (whether in or outside Kenya) that the bankrupt acquires or that passes to the bankrupt before bankruptcy vests in the bankruptcy trustee without that trustee having to intervene or take any other step in relation to the property, and any rights of the bankrupt in the property are extinguished; and the powers that the bankrupt could have exercised in, over, or in respect of that property for the bankrupt's own benefit vest in the bankruptcy trustee.[24] Additionally, the trustee in bankruptcy may apply to the court for an income payment order. The effect of this income payment order is that a portion of the money earned by the bankrupt individual during this period of time may be validly received by the trustee for use in discharging the bankrupt's debts.[25]

The problem with this state of affairs lies in the fact that where an individual is insolvent and has multiple creditors it may prove impossible by the culmination of the bankruptcy to fully pay his creditors. The creditors may therefore have to contend themselves with distributions that do not entirely satisfy the obligations that the debtor owed them, and after the bankruptcy comes to an end they will be deemed to have given up the legal rights to pursue the remainder. On the other hand, for the bankruptcy debtor, during his period of bankruptcy he is compelled by operation of law to cede his autonomy to a bankruptcy trustee which has, as has already been mentioned, ramifications for his ability to hold property, retain his incomes or even enter into contracts, a state that may last for up to three years. We would therefore argue that where an insolvency regime fails to provide alternatives to bankruptcy it is inevitable that a kind of lose-lose situation will arise for both the creditors and the bankruptcy debtor.

2.2 The Alternatives to Bankruptcy

The Insolvency Act of 2015 has been feted for introducing into the Kenyan Insolvency regime a number of alternatives to bankruptcy. Specifically, the insolvent debtor is allowed to:

a. Enter into Individual Voluntary Arrangements after a proposal to creditors is made and accepted by them

b. Pay creditors in installments

c. Enter the no asset procedure[26]

Individual Voluntary Arrangements

Division 1 of part IV of the Act deals with Individual Voluntary Arrangements, or IVAs. One of the biggest advantages of an IVA is the flexibility given to the debtor and his creditors in reaching a mutually satisfactory arrangement.

A debtor may make a proposal to his creditors for a composition in satisfaction of his debts. The proposal has to identify a suitably qualified insolvency practitioner to act as the supervisor. The debtor is expected to obtain the consent of the insolvency practitioner to act as a nominee and submits his proposals to the nominee. The debtor then applies to the court to give him an interim order of protection while the nominee considers his proposals.

The court considers the proposals as well as the nominees comments and directs whether a creditor's meeting should be held or not. A creditors meeting will be convened by the supervisor in order to consider the debtor's proposal. The main purpose of a creditors' meeting is to decide whether to approve the debtor's proposal or not. This may be done with or without modifications.

If the requisite majority of creditors approve the proposal a court order confirming the same will be required. A debtor's proposal takes effect as an IVA by the debtor on the day after the date on which it is approved by the Court and is binding on all creditors.

However, a challenge may be brought against the confirmed proposal on the ground that it unfairly affects the interests of a creditor or that there was a material irregularity as regards the meeting. In the event that there are no challenges however, the proposals are implemented by the supervisor. IVAs can only be set up and implemented by a suitably qualified insolvency practitioner. This person is likely to play three roles during the subsistence of the IVA process:

a. Adviser – the insolvency practitioner will advise the debtor as to whether an IVA is suitable in light of the circumstances

b. Nominee – the insolvency practitioner will help the debtor put together the proposals and make an application to the court as well as organize meetings with the creditors

c. Supervisor – once the IVA has been approved by the Court the insolvency practitioner will supervise it ensuring that creditors receive their entitlements under the agreement

Unlike its United Kingdom counterpart, the Kenyan Insolvency Act of 2015 and the accompanying Insolvency Regulations of 2016 have failed to outline whether all debts can be subject to an IVA or whether there are some debts that cannot be settled using an IVA. Specifically, under an IVA entered into in England the following debts cannot be included; maintenance arrears that have been ordered by a court, child support arrears, student loans and magistrates' court fines.[27] It will be interesting to see whether debtors will be able to utilize this mechanism to settle any and all types of debts without distinction.

A debtor who intends to enter into an IVA should ensure that he has access to necessary income to enable him to meet his obligations under the IVA. As such, this kind of arrangement would be most suitable for a debtor who has regular income e.g. from a business or even from employment. Where a debtor fails to meet his obligations under the IVA, the arrangement will be terminated and either the creditors or the supervisor can petition for the debtor's bankruptcy.[28]

It may be argued that one of the biggest advantages of an IVA as compared to bankruptcy is the autonomy that the debtor retains. The debtor has a say in how his property will be used to settle creditors' debts. The implication of this is that so long as the creditors consent the debtor may be able to propose plans that do not unduly injure his interests. For instance, if the debtor owns a house or other assets that he does not want to lose he may be able to retain ownership of this property for the subsistence of the IVA so long as he makes suitable arrangements to repay his creditors from alternative sources. This can be directly contrasted with bankruptcy where all the debtor's property automatically vests in the trustee for purposes of realization and distribution, with the debtor having little chances of retaining any property outside the list of protected property provided for in the Insolvency Act.[29]

Summary Installment Orders

Division 2 of Part IV deals with this alternative.

This is an order made by the official receiver instructing the debtor to pay the debt in installments or in some other way and in full or to the extent considered practicable. Either a debtor or a creditor who has the consent of the debtor can apply for a summary instalment order. The summary instalment order will usually identify a supervisor in charge of ensuring that the debtor complies with the requirements of the order.

A summary installment order will have to propose how payments will be made over a three year period, maximum. However, if the supervisor feels that the unique circumstances of the case warrant him doing so he may extend this period to five years.[30] During the subsistence of the summary instalment order no proceedings may be brought against the debtor unless he defaults in compliance, or if the Official Receiver gives his permission. Additionally, no proceedings may be instituted against the debtor for recovery of the debts owed to his creditors and agreed to be settled under the summary installment order. The supervisor will be required to send notice of the order to all known creditors of the debtor in question. Failure by the debtor to meet the payments under the order will result in the debtor being in default.[321] The implication of this is that legal proceedings against the debtor for recovery of debts by his creditors may be continued or commenced. A debtor who has entered into a summary instalment order must inform all new creditors of its existence if he plans to incur an additional credit of one hundred thousand

shillings or more, failing which he will be deemed to have committed an offence.[32] The most attractive aspect of summary installment orders lies in the fact that so long as the debtor meets his obligations to creditors under the order he retains autonomy over his assets. Although the debtor is free to give up any assets he pleases so that the proceeds of their sale is used in repayment of creditors' dues.

The No Asset Procedure

Division 3 of Part IV deals with a debtor who has no realizable assets.

In order for an insolvent debtor to be able to enter into the no asset procedure the debtor must prove that they have no realizable asset, that they have never entered into the no asset procedure before or been declared bankrupt. In addition, the debtor's total debts should not be less than one hundred thousand shillings and not more than four million shillings and there should be no way to repay the debts in question.[33] If bankruptcy proceedings have already been commenced against the debtor it is impossible for him to enter into the no asset procedure.

The no asset procedure is only available to truly deserving debtors. Which is to say that where a debtor concealed assets with the intention to defraud his creditors, or that the debtor has committed offenses under the Act or has incurred debts knowing full well that he will be unable to repay these debts then such a debtor falls outside the ambit of the no asset procedure.[34] However, where a debtor has successfully entered into the no asset procedure his creditors are forestalled from any attempts to enforce debts owed by the debtor. Amounts payable under matrimonial causes, the Children Act and loans to secure the education of a dependent child are still payable by a debtor despite entry into the no asset procedure.[35]

Unlike bankruptcy which may last for a period of 3 years before the bankrupt debtor is discharged, a debtor who enters into the no asset procedure is automatically discharged after 12 months. Additionally, the procedure may be terminated if the official receiver feels that it was wrongly entered into, or if a creditor with the requisite authority to enforce his debt makes an application to the Court to adjudge the debtor bankrupt. Where a debtor is validly discharged from the no asset procedure his debts are cancelled and he is not liable to pay any penalties or interests so long as there was no fraud involved.[36] On the other hand, where the no asset procedure is terminated for a valid reason the debtor will not be absolved from liability. The debtor's debts that became unenforceable on the debtor's entry to the no asset procedure become enforceable again and the debtor becomes liable to pay any penalties and interest that may have accrued.[37]

3. Rescuing Insolvent Corporations: Administration and Company Voluntary Arrangements

3.1 Do Companies Need to be rescued from Liquidation?

Under the Act a company can be said to be unable to pay its debts (or insolvent) when[38]:

a. A creditor who is owed one hundred thousand shillings or more by the company serves it with a statutory demand for the debt but the debt remains unpaid 21 days afterwards

b. Execution or other process issued on a judgment, decree or order of any court in favor of a creditor of the company is returned unsatisfied in whole or in part

c. It is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due. This is the cash flow test of assessing insolvency. Here the fact that the company's assets exceed its liabilities is irrelevant. The courts, moreover, will pay regard to the company's actual conduct so that insolvency will be assumed if the company is not in fact paying its debts as they fall due.[39]

d. It is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities). This is the balance sheet test for assessing insolvency. Liability is a much broader term than debts. It embraces all forms of liability whether liquidated or unliquidated and whether arising in contract or in tort or by way of restitution or for damages for breach of statutory duty. This may involve assessing the value of assets and judging the amount the asset would raise in the market.[40]

Insolvency is neither a crime nor a death sentence for a company. It may be possible for a company experiencing financial difficulties to go back to financial health. However, where insolvency persists liquidation will be imminent. Under the previous insolvency regime an insolvent company would have to grapple with the inevitability of winding up proceedings being commenced against it by dissatisfied creditors. In the new regime however, with its emphasis on rescue, a financially distressed company does not have to receive the "kiss of death:" There is finality to liquidation of companies that is akin to the death of an individual. Where a company is liquidated it ceases to exist, becoming nothing more than a memory. Rescue culture in this context therefore means that where it is possible and desirable, a company that is experiencing financial difficulty i.e. one that is in the throes of insolvency should be resuscitated and brought back to financial

health and wellbeing. Not all companies that falter or experience serious financial difficulty in a competitive marketplace should necessarily be liquidated; a company with a reasonable prospect of survival (such as one that has a potentially profitable business) should be given that opportunity where it can be demonstrated that there is greater value (and, by deduction, greater benefit for creditors in the long term) in keeping the company alive.[41]

Liquidation portends numerous undesirable consequences for the stakeholders of a company whether internal or external; the bigger the company the more dire the consequences. For instance, employees are likely to lose their jobs and sources of livelihood, shareholders lose their investments, suppliers of the business lose a potentially important customer, customers of the business may face difficulty in accessing substitute services or products, the government loses out on tax revenue and creditors may fail to recover some of the debts owed to them where the proceeds from asset realizations are insufficient to discharge all the obligations that the company owes. Because of the potentially widespread ramifications of the liquidation of a company as illustrated by the foregoing it is essential to consider alternatives to liquidation that may just save the company.

3.2 The Alternatives to Liquidation

There are two alternatives to liquidation for a company that finds itself unable to pay its debts. The company may either elect to enter into a Company Voluntary Arrangement (CVA)[42] or go into Administration.[43] Ultimately the choice of which of the two alternatives is appropriate depends on the unique circumstances of the company and perhaps, even more importantly, the relationship between the company and its creditors.

Company Voluntary Arrangements

CVAs, just like administration, can be traced back to the Cork Committee. The committee argued that the insolvency laws as they then existed were deficient because they failed to provide that a company could be allowed to enter into a binding arrangement with its creditors by a simple procedure that would allow it to organize its debts, and potentially come out of insolvency without being wound up.[44]

A CVA commonly begins with the directors making a proposal to the company and its creditors. (If the company is under liquidation or administration the liquidator or the administrator respectively may propose a CVA). This proposal outlines the possibility of the company entering into a composition in satisfaction of its debts or a scheme for arranging its financial affairs.[45] The proposal will be required to identify a suitably qualified insolvency practitioner to function as the supervisor of the CVA. A meeting of both the company members and the creditors must be convened shortly thereafter in order to outline the terms of the arrangement. The main purpose of this meeting is to determine whether to approve the proposals

with or without modifications. The proposal (including any modifications made) needs to be approved by a majority of the creditors voting in person or by proxy with reference to the value of their claims. It also requires the approval of a majority of the members/shareholders present at a shareholders' meeting.[46] Once the proposal has been approved an application has to be made to the court for confirmation of the proposal. If confirmed, the scheme becomes operative and binding upon the company and all of its creditors (those who were entitled to vote at the meeting or would have been so entitled if they had had notice of it) as a CVA on the day after the date on which it is approved by the Court.

Once a proposal takes effect as a CVA, the supervisor becomes responsible for implementing the arrangement in the interests of the company and its creditors and monitoring compliance by the company with the terms of the arrangement. In the event of default aggrieved creditors can apply to the Court for redress. The CVA therefore operates under the aegis of the court but without the need for court involvement unless there is a legitimate ground for disagreement requiring judicial resolution.[47]

It is important to highlight that the law does not prescribe exactly what a company should offer its creditors as part of the CVA. Discretion is given to the parties to agree on the most viable option. However, the point is that creditors must be satisfied that all or part of their debts will be paid during the subsistence of the CVA. The consent of the creditors is essential to the commencement of the CVA. This means that the agreement could be a plan to repay creditors from future profits assuming that the company is able to improve its financial performance and working capital position. Alternatively, the deal could require the company to sell certain pre-identified assets and to discharge the obligations to creditors from the sale proceeds. Whatever the eventual contents of a CVA the entire enterprise is premised upon an attempt to preserve the company (or rescue it from liquidation), rebuild the sales and profits of the company, while at the same time paying back the creditors part or all of their dues over the period of time agreed upon.

The supervisor of the CVA is responsible for implementing the arrangement in the interests of the company and its creditors and monitoring compliance by the company with the terms of the arrangement. In all other respects however the directors of the company are likely to retain control over the affairs of the company during the CVA. It is only in the event of default that the supervisor may take over. For eligible companies, an additional advantage that could accompany the CVA is a moratorium on debt payments.[48] An application has to be made to the court for authority for the moratorium to take effect in these cases. If successful, the moratorium protects the company from liquidation petitions, actual liquidation, administration, levy of distress of rent by an unpaid landlord, execution, enforcement of securities among others.

Once the agreed period for the CVA is completed and the supervisor has certified

that the company has met all its obligations under it, then the company leaves the CVA state. Any remaining unsecured debts (where partial repayment was approved) are written off and the directors continue to run the business for the shareholders. Where a CVA is successful the company is therefore rescued from the "kiss of death".

Administration of Companies

Where the reasons for corporate failure can be attributed to the poor leadership of the company management, an alternative approach to turn around the financial status of the company and bring it back to financial prosperity where possible is to appoint an administrator. The roots of administration can be traced back to the Cork Committee's belief that corporate rescue could often be possible where an independent expert is allowed to take over the management of a financially distressed company with the intention of resuscitating it.[49]

Administration puts a qualified insolvency practitioner, the administrator, in control of the company with a defined plan that most times involves rescuing the company from insolvency as a going concern. However, rescuing the company is not the only possible objective of an administration process[50], even though it may be argued to be the most important. Administration may aim to achieve a better outcome for the company's creditors as a whole than would likely be the case if the company were liquidated. Alternatively, the aim may be to realize the property of the company in order to make a distribution to one or more secured creditors.

The reality of insolvency is that not all insolvent persons can be rescued. In such situations it would clearly be futile for an administrator to attempt a rescue. The task of the administrator in this kind of circumstance could very well be to attempt to achieve a better outcome for creditors even if liquidation is imminent. Arguably, during liquidation there is often an urgency to wind up the affairs of the company, realize the assets and use the proceeds to pay off the company debts. The problem with this state of affairs lies in the fact that creditors may have to contend themselves with receiving distributions *pari passu*, but not the full amount they are owed. A liquidator's key task is to sell the assets, pay creditors and liquidate the company, often the quicker this happens the better. An administrator on the other hand may be driven by the need to implement measures that will facilitate a more than advantageous realization of assets thus increasing creditors' allocations during liquidation. This is a more than laudable goal of a proper rescue regime. Even if the company cannot be rescued, at least its creditors can be rescued from the misfortune of losing a considerable portion of what the insolvent company owes them.

Administration orders and liquidations are mutually exclusive. Once an administration order has been passed by the court, it is no longer possible to petition the court for a winding up order against the company.[51]

Administrators may be appointed either without or by a court order[52]. For the former option an administrator can be appointed by either the floating charge holders of the company (only if their charge instrument allows them to do so) or by directors. For the latter option a petition to put the company under administration would have to be filed with the court. This petition may be made by the company, the directors, or creditors of the company.

One of the most important effects of appointing an administrator is the commencement of a moratorium over the company's debts. This happens automatically and continues until the culmination of the administration. No creditor can enforce their debt during the administration unless they have the court's permission. Additionally, there is a freeze on all insolvency proceedings during this period.[53] However, the court or the administrator may give permission for security over company property to be enforced, or for goods held under hire purchase by the company to be repossessed, or for a landlord to conduct forfeiture by peaceable entry or for commencement and/or continuation of any legal process against the company.[54]

When the administrator comes into office he/she is expected to come up with the proposals he intends to implement in order to achieve any of the possible objectives of administration already outlined above. The creditors of the company will have to approve the proposals with or without modification before the administrator can implement them. If the creditors fail to approve the proposals the court may have no recourse but to terminate the administration. Conversely, where the creditors approve the proposals an administrator will have a period of twelve months to effect them. This is because the Act provides for automatic termination of administration after twelve months, although an application may be made for an earlier or later termination.[55]

Clearly administration may or may not end up rescuing the company from financial oblivion. If it does well and good, but even if it doesn't at least an attempt was made to forestall liquidation and its irrevocability. Where administration is successful the company may continue in existence as a going concern, members could experience an enhanced share value because of the regeneration of the business and creditors may be able to have a continued business relationship with the company once the business has been turned around.

4. Post Script: Final Thoughts

With the coming into force of the Insolvency Act 2015 and the accompanying Insolvency Regulations of 2016 we are living in very exciting insolvency times. While the interpretation of the Act may still be argued to be in its very nascent stages it is undoubted that there is a more than positive change in the Kenyan insolvency regime. The authors of this paper hope that the rescue procedures will be adequately utilized in order to ensure a lasting change in the administration of

the insolvency regime in Kenya. It is hoped that there will be no need to be 'rescued from rescue' procedures as a result of misuse or abuse of these mechanisms. We remain optimistic that under the aegis of this fortified rescue culture many deserving debtors, especially companies worth saving, will live on to fight and trade and enrich the nation.[56]

Endnotes

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Devolution and the EAC Integration: Participatory Opportunities and Challenges for County Governments of Kenya

By
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Abstract

The establishment of devolution in Kenya brought to light the intersection between EAC matters and functions of county governments thereby changing the landscape of how EAC matters are handled at the national level. The early phases of devolution brought significant compliant challenges for Kenya's obligations under the EAC, as county governments engaged in legislations and activities that hindered free movement of goods thus contravening provisions of the EAC common market that seeks to liberalize trade. On the other hand, county governments raised concerns on the impact of EAC treaty and protocols on their functions and on their county budgets. While some of these challenges were resolved, county governments are constantly been urged to remove blocks and constraints they have put in place that frustrates regional integration efforts six years into the implementation of devolution in Kenya. This raises a major concern which this article looks into of the changes in policies, legislations and participatory frameworks established to facilitate the participation and inclusion of county governments in EAC integration bearing in mind foreign affairs is a function of national governments and certain areas of EAC intersect with devolved functions.

Keywords: Devolution, participation, East African Community (EAC), county governments, intergovernmental co-operation.

1. Introduction

Local governments are major stakeholders in any regional integration arrangement as they provide channels for implementation and 'transposition of regional and international commitments into local/sub-national government development agenda'[2]. The re-establishment of the East African Community (EAC) in 1999[3] acknowledged the participation of various stakeholders as a crucial factor in the practical achievement of the objectives of the community as enshrined under the principle of subsidiarity and people-centeredness[4]. Provisions for participation of the private sector, civil society, business organizations and associations, employees and employers' organization, professional bodies, and other interest groups[5] in the integration process was enshrined in the EAC Treaty, 2010. Further, representation and inclusion of political parties was achieved through election of their representatives to East African Legislative Assembly (EALA) as community

legislators securing their role and place in EAC integration process[6]. However, the same cannot be said of local governments within the community.

The lack of entrenchment and institutionalization of local governments' role and place in the EAC integration process is a fundamental reason that resulted to low implementation of EAC resolutions and decisions at national levels on one hand, and their continual engagement in activities and legislations within their domestic constitutional rights that have conflicted with their respective national governments obligations under EAC on the other, particularly for Kenya. The constitution of Kenya, 2010[7], established devolved governments creating two levels of governments (national and county governments) with their mandates, roles and functions clearly stipulated in the fourth schedule. The implementation of devolution in 2013 brought a significant change in the way EAC integration issues are handled at the national level and brought to light the intersection between EAC matters and county government functions and the challenges this brought in upholding Kenya's obligations.

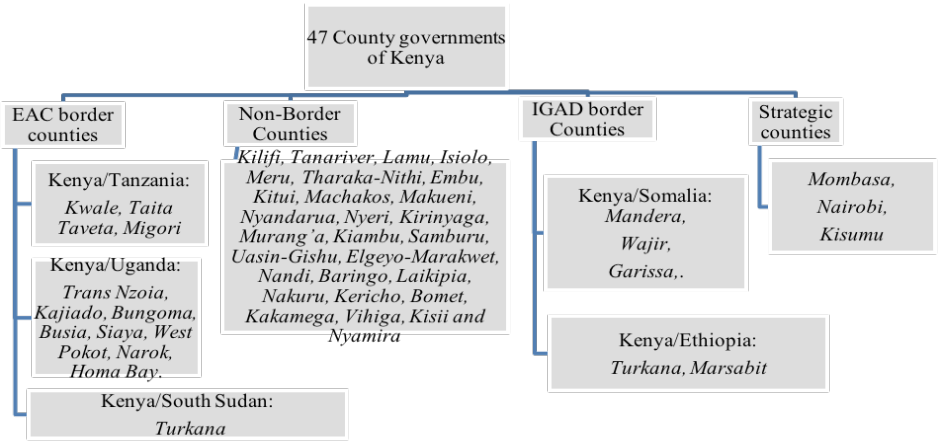
One notable conflict was the EAC Common market and Customs union that seek to liberalize trade through free movement of goods within the EAC region and the constitutional right of the county governments to impose charges for the services they provide under Article 209(4) of the constitution. In exercising this right, county governments passed financial legislations and engaged in imposition of levies and charges on goods transiting their territories. As a result, in 2015, Tanzania reported Kenya to the EAC that its county governments of Kajiado and Kwale reintroduced country transit fee[8] while in 2016, Burundi reported Kenya to EAC that the county government of Mombasa imposed charges on transit trucks waiting to load cargo in the parking yard of Kshs. 500 per day and transit fee charge of Kshs. 6,000 for transit cargo truck[9]. Additionally, traders in the region encountered demands for multiple single business permits for distribution of goods, vehicle branding charges in each county that track passes through, entry charges, pass through charges and port levies (Waithera, 2015).). It's been six years into devolution and county governments are still urged to stop double taxation and 'imposing illegal taxes on transit goods such as road blocks[10]. These charges constituted Non-Tariff Barriers (NTBs) that were anticipated even before inception of county governments as national government through the state department for EAC integration urged county governments not to impose non-tariff barriers once they assume office (Kitimo, 2013,The East African). On the other hand, county governments faced the impacts associated with the free movement of people under the EAC common market protocol. Busia and Kisii county governors expressed their concerns for taking the burden for provision of health services to (East African citizens) particularly Ugandans who flock into their counties seeking access to health services such as medical treatment; and this had an effect on their budgets as the 'county does not have extra money in the budget to cater for the foreigners' (Shilitsa, 2018)

This intersection between the EAC matters and the functions handled by the county governments of Kenya raises a major concern for this study that focuses on how devolution has changed the landscape of how EAC matters are handled at the national level by looking into whether there has been new legislations and policies enacted to secure the involvement of county governments in EAC integration within the domestic context, establishment of joint intergovernmental participatory structures for EAC matters, and how the county governments participate in the EAC integration process.

Methods

Our study focused on local governments within the EAC by focusing on the 47 county governments of Kenya. Random Stratified sampling was used to cluster the 47 county governments with similar characteristics into three strata and purposive sampling was used to select a representative county from each stratum. *Kwale county government* was chosen to represent border county between Kenya and Tanzania and more so as its governor served as a vice chair for Council of Governors[11], *Busia county government* was chosen as it has the busiest borders with Uganda compared to other counties, *Mombasa County government* was selected as one of the strategic counties for its great importance to the EAC integration as it provides port services for importation of goods to EAC countries while *Bomet county government* was chosen as a non-border county that shares Trans-boundary resources with Tanzania.

Figure A: County governments of Kenya



The concept of participation used in this article was adopted from Kenny (1997) who provided various definitions by different authors in understanding of what participation entails. In his paper, participation is defined as 'been able to have an input into structures in which decisions are made', (quoted from combat Poverty Agency, 1995); and further defined as 'taking part in activities in a way designed to influence events whether in policy formulation, implementation or evaluation' (as defined by 'Faughnan and Kellagher and quoted in Reynolds and Healy, 1993). These definitions provide us with two important features in analyzing the participation of county governments in EAC integration.

First, to 'take part in' greatly depends on the availability of legislation/policy/frameworks that gives the county governments the right to participate, and defines how they participate and specifies activities/functions they are to participate since some functions are reserved for the national government only. This forms a variable in our study of whether there is a laid down EAC participatory framework and processes that allow local governments to take part and whether the nature/type of participation allows for effective influencing the outcome, Secondly, it looks at the evidence of the actual participation, as structures and policies may be in place but do not guarantee participation unless participants are willing. Given the nature of our study and the reality of the two levels of government, we focused on intergovernmental cooperation and whether there are domestic measures put in place to facilitate participation of county governments given the state centrism of the EAC integration and the fact that this falls under the function of national government.

Table 1: Variables

dependent Variable	Independent variable 1	Independent variable 2
Level of participation	EAC participatory framework (policies, procedures and structures for participation)	Intergovernmental cooperation between national and county governments.

The variables were measured using six indicators are showed in Table 2 below:

Table 2: Indicators of Measurement

Variables	Indicators
EAC participatory framework	(i) Existence of established EAC participatory policy, process, and structures. (ii) How county governments have participated in (i) above (iii) Nature of participation (consultations, decision-making, policy making, advisory e.t.c)
Intergovernmental cooperation between national and county governments	(i) Existence of national policy/legal framework for engagement between the two levels of government and EAC (ii) Existence of domestic intergovernmental frameworks on EAC issues (iii) Evidence of intergovernmental cooperation on EAC activities/matters

The study made use of qualitative research data collection methods of in-depth interview that was applied to key informants and review of official documents such as parliamentary debates Hansard. The interviews took a form of face-to-face for respondents easily accessible while telephone interviews were administered to respondents from far places and those not available for face-to-face interviews. The interviews were guided by the interview schedule as the main research tool used to collect data that outlined structured questions that addressed each of the research objectives. Recording of interview data took place by means of note taking. Table 3 gives a summary of respondents that participated in this study totally thirty two respondents.

Table 3: Number of respondents interviewed

Target category	Number of respondents
Ministry of East African community and regional development	5
Ministry of trade	3
Ministry of devolution and ASAL	2
Council of governors	3
Intergovernmental Relations and Technical Committee	1
County government of Bomet, Busia, Kwale, and Mombasa	18
Total	**32**

In the case of data analysis, qualitative data analysis was used to generate findings on data collected. Content Data analysis was analyzed based on the questions asked and identical answers to the same question were grouped together and formed sub-themes for presentation of results. The study made use of strategies for analyzing interviews provided by Patton, and involved three steps. The first step involves writing a case analysis for each person/unit interviewed using all the data for each interview session. Cross-case analysis follows as the second step where all answers to a common question from those interviewed are grouped together or are analyzed different perspectives on central issues (Patton,1996:376-377), and the third step involved data analysis and interpretation.

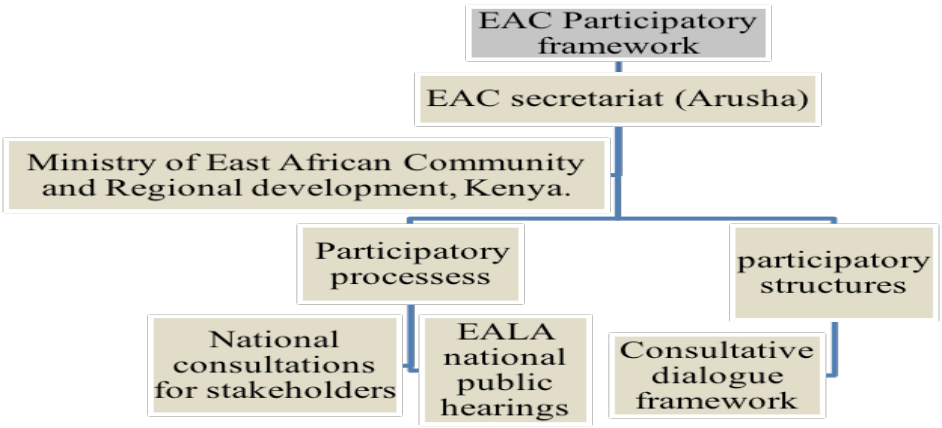
Results and Discussions

The responses were categorized into two. First, I examined the EAC participatory channels and how county governments have participated through them and secondly I look into the domestic context on how EAC matters are handled between and within the two levels of government by examining the legislations, policies and intergovernmental channels of their participation.

2. EAC participatory channels and the county governments

To understand the participation of county governments in EAC matters, I examined channels put in place by the EAC that facilitates their participation or stakeholders in general. From the respondents' answers I designed an analytical EAC participatory framework for our study as shown in figure B below and used it to analyze how county governments have participated in them.

Figure B: EAC participatory framework



2.1 Participation in EAC National consultative process in Kenya

Respondents from the national government noted that there are established national consultations processes in all EAC partner states that are coordinated by respective ministries or state departments in charge of EAC matters. These consultations may take form of a policy formulation or general discussions, and give stakeholders the opportunity to input their recommendations and views in the formulation of national positions towards the development of EAC policies and other matters as cited by the respondents. For Kenya, the ministry of EAC and regional development at the time of research, coordinates participation of stakeholders in EAC matters at the national level. From the interviews, I categorized the stages of this process as follow:

Stage I: The EAC secretariat upon directive or request by other organs of the community communicates a particular matter (either policy, or issue) for consultations. EAC secretariat writes to partner states' ministries in charge of EAC integration in this case the Ministry of East African Community and regional development, Kenya.

Stage II: The state department for EAC, under the ministry forms a committee to spearhead the consultations processes of getting views and opinions from stakeholders. If the matter/issue falls outside the jurisdiction of the Ministry, the state department of EAC then writes to the relevant ministry, which forms a committee to spearhead the process.

Stage III: Identification of stakeholders to participate in the consultations is done by the committee, which then invites the stakeholders to a national meeting.

Stage IV: The First National stakeholders meeting is convened which brings all identified stakeholders to participate in the development of a national position concerning the matter under deliberations. This forum provides stakeholders to voice out their interests. It's expected that before an individual stakeholder comes to the national meeting they would have convened their own individual meetings and consolidated their positions to the main committee. The outcome of this meeting is a draft paper/document that reflects Kenyan position paper on the matter under consideration, and a national delegation team to participate and present Kenyan position in the regional meeting convened by EAC secretariat.

Stage V: A regional meeting is convened by the EAC secretariat in which national delegations from all the EAC partner states meet and negotiate to come up with a regional position on the matter. Where negotiations seem not to favour the interests of a particular stakeholder, the national delegations are allowed an hour or two to consult with their respective stakeholders back at home to get the stakeholders fallback position if other stakeholders from the region do not agree. The outcome of this meeting is harmonised positions from all EAC partner states to form a

regional zero draft policy/position, which is developed by the EAC secretariat. The zero draft is sent back to partner states ministry in charge of EAC integration for final inputs.

Stage VI: The second national consultative meeting is convened by the relevant state department/ ministry after the zero draft is sent to stakeholders. This meeting validates the contents of the policy/matter under consideration. Once the stakeholders are satisfied that the draft policy reflects their interests, this is communicated to the EAC secretariat.

Stage VII: The EAC secretariat upon receiving reports from all partner states, then presents the regional draft zero policy to the responsible EAC sectoral committees who discusses it in their meetings and tables it to respective EAC sectoral council. This then moves to the council of ministers that either adopts or rejects the policy or gives directions and finally submitted to the Summit for adoption.

Three critical points were given by respondents when asked about participation of county governments in this process. First, county governments are only invited to participate in the consultation processes when the issue under consultation directly touches on their functions and, an example was given of where county governments were involved in the formulation of EAC Axe load limits. This means that the identification of stakeholders to participate in the national consultations process by national government ministries does not deter or hinder involvement of county governments. This is because County governments are much advantaged compared to other stakeholders as their participation and inclusion in EAC matters that touch on their function is secured and guaranteed under the constitution and respective Acts.

Article 6(2) and 189 of the CoK, 2010 and Intergovernmental Relations Act, 2012 obligates both levels of government to cooperate and consult in discharging their mandates in a "manner that respects the functional and institutional integrity of government at the other level"[12]. And while this guarantees their inclusion and participation it also limits their participation to EAC matters that intersect with county governments function. Additionally, it gives county governments the power to take national government to court in the event they get excluded on matters that touch on their mandates whether its domestic, regional or international matters. The CoK, 2010 therefore serves as a protector of county governments interests in regional and international matters by providing a legal basis for their engagement. However, the same cannot be said of other stakeholders who face the challenge of been excluded from the consultations. For example, in its considerations of participation and consultations of stakeholders in the drafting and process of the EAC Monetary Institute (EAMI) Bill 2017 tabled before EALA on 8th February, 2018 prior to introduction to the Assembly, the committee noted that not all stakeholders were involved in particular the East African Business Council and the general public were not consulted. This rose a concern amongst the committee

of how comprehensive and representative the consultations had been, and this affirms the fact that stakeholders may be excluded from this process, which is controlled by respective national governments.

Secondly, the respondents noted that the 47 county governments' participation is through the council of governors as no individual county government directly participates in this process. The council of governors therefore serves as a direct linkage between the EAC national government ministries and the 47 county governments. The EAC national consultation processes therefore have provided county governments with an opportunity to have their interests incorporated into the document that stipulates Kenya's position and serves as the point of reference during negotiations at the regional level. Additionally, negotiations at the regional level are open to stakeholders to attend and participate, as they are not reserved for national government representatives only. County governments' representatives can be part of the national delegation attending the negotiations processes at the regional level and thus achieve influencing the negotiations when negotiations touch on their functions.

2.2 Participation in EAC Consultative dialogue framework (CDF)

The CDF was developed by the EAC secretariat and adopted by the EAC council of ministers during its 26th meeting in 2012 as a dialogue framework for private sector, civil society Organizations, professional organizations, and other interests groups' participation in EAC integration process[13]. The CDF is therefore an official framework that provides a structured dialogue and mechanism of engagement for groups such as the private sector, civil society, among other interests groups that do have a representation mechanism at the EAC[14]. The CDF has three phases or levels of consultations that feed into each other as shown below:

SG's Forum

Regional Dialogue Forum (Regional Dialogue Committee)

National Dialogue Forum (National Dialogue Committee)

Unlike the national consultation process that employs a top-down approach, respondents noted that this framework involves obtaining views and opinions from grassroots organizations and agencies to discuss issues that affect them at the national level and submit the same at the regional dialogue framework where issues form all the partner states are discussed and prioritized to be discussed at the Secretary General (SG) forum that is held annually. Recommendations from

the SG forum are presented to relevant EAC organs and institutions and may for an agenda for them. This therefore gives stakeholders opportunity to have their views and opinions be taken up for consideration by the EAC. The Kenya NDC has so far held three (3) NDF forums; the first was held in August 18th-19th 2015, the second was held on 15th-16th September, 2016 and the third was held on 12th -13th June 2018.

The respondents pointed that county governments of Kenya have participated in all the three NDF upon invitation from the state department of EAC. Further, where issues to be deliberated touched on county governments, the individual county governments were invited to speak in these forums as in the case of the third NDF where the county executive committee member in charge of Trade from the county governments of Busia, Mombasa and Kajiado spoke on refugee issues and cross border trade issues. The NDF therefore provides a channel for county governments to participate in shaping the direction of the EAC integration concerning issues that matter the most and need attention.

2.3 Participation in EALA legislative procedures and Public hearings

The parliaments of EAC partner states have a fundamental role to play in the EAC legislative processes. The establishment of devolution brought to existence the second chamber for Kenyan parliament, the senate and established 47 small independent county legislatures. As a result, debates and changes were incorporated to formalize the participation and inclusion of senate in regional integration in particular EAC as shown below;

> 'Hon. Members, it is my view that the current elections rules which were adopted by the National Assembly in April, 2012 and published in the *Kenya Gazette* through legal notice No. 31 of 11th May, 2012, requires a review to conform to the bicameral nature of our parliament. In this regard, a team of officers of the both Houses of parliament has been constituted to propose amendments....'[15]

Subsequently, as a result, a Joint Parliamentary Select Committee consisting of five (5) members from each House of parliament (National Assembly and Senate) was thus established to lead the election processes. More so, a review of the parliamentary debates established that there were changes that realigned the role of the Kenyan parliament in Election of Kenyan members to EALA to reflect its bicameral nature and compliance to Article 50 of EAC treaty, 2000, that vests the responsibility of electing the nine representatives from each partner state on their respective national legislatures. Ultimately, Kenya revised its rules, the East African Legislative Assembly Elections (Election of Members to the Assembly) Rules, 2017 under the EALA Act, 2011, to formalize the role and participation of the senate in election of Kenyan members to EALA.

Additionally, the relationship between the regional assemblies with those of partner states national legislatures is provided for under Article 65 of the EAC treaty. Article 65(a &b) of the Treaty mandates the clerk of EALA to submit copies of the records of all relevant debates, Bills and Acts introduced to the Assembly to the clerks of national assemblies of partner states for considerations. Similarly, clerks of partner states national parliaments are required under Article 65(c) to submit their considerations and resolutions to the clerk of EALA together with copies of records of debates, and this was domesticated as envisaged in the Kenya national Assembly standing order No. 212A and Senate standing order No. 234 provides guidance on how both houses were to be involved in EALA process. The clerks therefore serve as a direct link between partner states parliaments and the EALA as shown below:

Figure C: relationship between EALA clerks and those of partner states

These structural changes at the national level were not extended to the forty seven county legislatures. Respondents' from the county assemblies noted that they have no formal roles in EALA process and have never participated in EAC issues or in consideration of EALA Bills. Further, they noted that the senate, which represents the counties and serves to protect the interests of the counties and their governments,[16] has not yet included the county assemblies in its role in considerations of EALA bills; does not seek views and recommendations of the county assemblies and does not communicate its resolutions to the assemblies. On the other hand, respondents were of the opinion that the middle player (senate) should have provided a stronger and indirect linkage between the county assemblies and EALA, however, the lack of initiate from both the county assemblies, and the Kenyan parliament to promote a three tier legislative process that is inclusive of EALA, Kenyan parliament (senate and National assembly) and 47 county assemblies has continually locked out their involvement in EAC integration.

Further, there is no link between the regional committees of both houses with the county assemblies and respondents noted that the agenda of EALA is not directly linked to the county assemblies' agenda and vice versa and this resulted to the slow rate of domestication of regional laws at the county level. This therefore means that the county assemblies who should be the major stakeholders in this process have

been excluded and have no role and participation in this process and the gap in legislation done by EALA not communicated to county assemblies. Their voice is not heard in the legislative process and acts of the community are not communicated to county assemblies. This raises a major question on the place and role of county assemblies in the Kenyan parliaments' roles in EAC integration, which involve consideration of EALA bills[17] Election of EALA Kenyan representatives[18], and domestication of regional laws.

On the other hand, The East African Legislative Assembly as an independent arm of the EAC also has a participatory process to involve stakeholders through public hearings on its bills. From the rules and procedures of the assembly as stipulated in article 66(4)[19], I categorized the process is as follows:

(i) Stage I: The bill is introduced to assembly in form of a First reading and is committed to the relevant committee(committee on Bills)

(ii) Stage II: The committee on Bills conducts public hearings on the Bill in all partner states to ensure that various stakeholders input their amendments for consideration by the committee

(iii) Stage III: The committee meets with other organs of the community such as the council of ministers for their inputs

(iv) Stage IV: The committee prepares its report together with amendments received from all stakeholders' and presents this report and is debated and adopted or not.

These public hearings are conducted in all partner states and give stakeholders the opportunity to scrutinize the bills and have their input. However, all respondents acknowledged that they have not participated in the legislative process and they have been sidelined and are not major stakeholders in EALA. However, the county assemblies, which are the legislative arm of the county governments, have the opportunity to make submissions on bills once public hearings are scheduled in Kenya. Having established that the senate and the parliament in general does not involve county assemblies in its business related to EALA bills, it important for the county assemblies to take advantage of the EALA public hearings as an avenue through which they participate in EALA business and make submissions on bills once public hearings have been scheduled in Kenya either individually or collectively.

2.4 Regional local governments' institutions and coordination on EAC integration

The local governments within the EAC partner states through their respective national associations are part of the East African Local Government Forum

(EALGF) and the East African Local Governments Association (EALGA). These two institutions provided for a common platform of engagement at the regional level, however, there haven't been significant efforts by the EAC and its organs in facilitating the institutionalization of local governments as part of the EAC institutional structure to allow for direct representation and engagement. Respondents noted that Both EALGA and EALGF have no voice and place in the EAC integration process resulting to the lack of direct engagement between the EAC and its local governments limiting their involvement within their respective domestic contexts.

This has therefore limited to a great extent the participation of local governments in crucial decisions that affect them while at the same time expected to uphold EAC resolutions. It's also the explanation given by respondents of the reason why the EAC agenda has not been mainstreamed into county governments' plans.

3. Domestic legislations, policies and structures on engaging the EAC between the two levels of government

3.1 The national regional integration policy for Kenya

The national integration policy for Kenya was developed in 2015 and acknowledges amongst others the importance of involving county governments in EAC integration as well as the challenges these counties pose that contravene regional integration commitments made by Kenya. It states that…

> "…successful regional integration requires the participation and buy-in at all levels of government (national and county)….the current process also does not reflect the devolved system of governance as entrenched in Kenya's 2010 constitution, leading to some counties imposing charges of tariffs equivalence effects on transit goods contrary to the spirit or commitments made in regional integration agreements. These county imposed charges also hurt the competitiveness of Kenya's products and of Kenya itself as a regional transit hub and business base" (regional integration policy for Kenya, pg.11)

To curb the above mentioned challenges, the policy provided for policy measures such as: 'establishment of a regional integration service charter that would ensure coherence between regional, national and county governments' policies and programmes; ensure adequate stakeholder consultation by including county governments, policy makers, implementers, Non-State Actors in regional integration matters; development of a clear framework for collaboration between national and county governments as well as establish targeted joint inter-governmental partnerships'[20].

However, up to the time of this research, the policy had not yet been adopted thus

remains as a draft. The failure to adopt the regional integration policy for Kenya is one great setback for county governments. As the bearer of this responsibility i.e. the national government, it would have been obvious to have such a policy in place, however, the efforts to have such a policy have stopped at it been a draft policy.

3.2 Intergovernmental cooperation in implementation of EAC activities

The establishment of two levels of government laid a fundamental need for intergovernmental cooperation on EAC matters between the national and county governments of Kenya in such areas. Interviews with respondents from the county governments of Busia, Bomet, Kwale and Mombasa, as well as national government representatives in these counties shode lighter on this aspect that indicated some level of cooperation between the two levels. Respondents were able to provide examples of how they have participated in EAC matters and the role they played. Respondents from Bomet County cited their participation and role in organizing and hosting the EAC Mara Day celebrations that happens annually in the month September on the 15th Day. Further, thy indicated that this celebration is hosted on a rotational basis between Kenya and Tanzania and in Kenya, the county governments of Bomet and Narok are major stakeholders as Bomet hosted this celebration in 2016 and Narok county government is expected to host it this year, 2018. The county government CEC in charge of environment in collaboration with the national government and the Lake Victoria Basin Commission secretariat were involved in planning of the celebrations that have a purpose of creating awareness on the trans-boundary issues of conservation on the Mara River Basin. More so, respondents also cited the role of county governments in pre-Mara Day activities in which the county governments engage together with other stakeholders in planting of trees.

Respondents from Kwale County pointed to their involvement in the cross border management of Tran's boundary animal disease. Agriculture as a devolved function gave powers to county governments to exercise plant and animal disease control. The free movement of goods (livestock) under the EAC common Market protocol resulted to cross-border movement of livestock as well as cross border livestock trade necessitating the need for trans boundary animal disease control measures such as cross-border animal disease control. The Kwale county government department of Agriculture, Livestock and Fisheries acknowledged it's involved in the implementation of preventive measures against animal diseases in collaboration with the national government. Further, the county government, through the department, participated in conferences where decisions were made on how to deal with Tran's boundary issues affecting animals and agriculture as a whole.

The respondents from Busia County indicated that their overarching role is to support and complement national government policies, plans and projects that

advance EAC integration by collaborating with the respective national government ministries and departments to create a conducive environment for trade and enhance cross border relations with EAC countries by solving cross border issues. For example, the county government of Busia took the initiate to resolve a conflict between the fisherman of Kenya and Uganda. The fishermen of Kenya and Uganda had an agreement that prohibited buying fish directly from the individual fishermen but only though the established fisheries cooperatives, however, some traders violated this agreement and this prohibited selling, buying and transportation of fish between Kenya and Uganda at the Busia border. The county government of Busia together with other agencies worked together and resolved the problem thus restoring cross border fish trade.

Further, respondents of Busia County noted that they have collaborated with the regional integration center at Busia border to cooperate and work together towards creating awareness and disseminate information on benefits of EAC customs union, common market among others to the border communities and stakeholders. Further, they have conducted sensitization workshops for women and youths to interest them in doing business across border either Uganda or beyond. This resulted to formation and registration of 3 groups which do business across the border. The government also disseminated the EAC simplified guide on cross border trade, which provides detailed information of EAC trade to communities that assisting in reaching a wider citizenry.

While there is minimal engagement between the two levels of governments on EAC matters, some of these county governments have gone an extra step in collaborating with neighboring countries in matters common interests that ultimately will enhance integration of the EAC. For example,

> "Bungoma county government governor, H.E Wycliffe Wangamati and Uganda's minister for East African Affairs, Kirunda Kivejinja together opened the 'first cross-border (cultural/tourism) Expo between Uganda and Eastern Uganda which was commended as the first and critical step towards integration of the EAC and the joint expo provided opportunity for Bungoma and Eastern Uganda to discuss cross-border relations and other issues of mutual interest[21]'

This is a great step towards enhancing cooperation between governments serving border communities in particular those that share cultural and language and it should be encouraged as culture is one of the devolved functions.

3.3 Participation and inclusion in bilateral talks

Given the intersection between EAC and county government matters, there has been significant change witnessed in the inclusion of county governments in bilateral talks whenever an issue of discussion between EAC partners states touches on the

function under the county government. County governments have formed part of national delegations during state visits, for example, governors accompanied the Deputy President in his visit to the president of Uganda, Museveni, on 19th August 2018, where the two held talks on trade between the two countries and further discussed integration issues in East Africa. Among those who accompanied the deputy president were Hon. John Lonyangapuo, governor of county government of West Pokot, Hon. Sospeter Ojaamong, governor of county government of Busia, and Hon, Josephat Nanok, governor of county government of Turkana amongst other leaders of the national government[22].

In this issue, respondents noted that the ministry of devolution wrote letters to the CoG and individual governors inviting them to be part of the delegation to Uganda because the discussions on trade and EAC issues would affected the counties and thus need for the county executives presence and part of the discussion. ..."we are having this meeting, and we would like the accompaniment of the following governors...". The respondents noted that, if bilateral/multilateral talks touch on functions of county governments then governors would form part of the delegation and talks. However, the national government decides who among the governors attends such talks and this raises a major concern of whether these selected individual governors actually represented the 47 county governments or their individual counties.

On the other hand, trade integration is at the heart of any regional integration arrangements and respondents mentioned of the national governments efforts to include stakeholders in national trade negotiations. The international trade policy of Kenya formulated within the framework of multilateral, regional and preferential Tariff Agreements (PTAs) that Kenya is party to envisioned an establishment 'of a standing trade negotiation team to with expertise on trade negotiation matters to be in charge of all trade agreements; and establish a stakeholders trade negotiation committee and enhance stakeholder's participation in trade negotiations'[23]. To achieve this, the Ministry of Trade, Kenya, established the NTNC which draws its membership from both private and state departments. Some of the functions of the NTNC is to coordinate with government ministries, state departments, state cooperation's on all bilateral, inter-regional and multilateral trade matters; analyze all received negotiating agendas/ from stakeholders and consequently generate national negotiating positions and strategies in which the Council of Governors (CoG) is a member[24].This membership is another formal avenue through which county governments role and participation in the development of national negotiations positions of issues of international trade is secured. This is a great effort from the national government in its efforts to involve other stakeholders in international trade.

Though the research could not establish how they have been involved or their contribution in the negotiations because the NTNC is a new initiative that was formed and gazette towards the end of 2017, it firmly established efforts by

the national government through the ministry of trade to involve stakeholders including county governments in the negotiations of trade agreements.

Additionally, the state department of EAC integration under the national government together with border county governments jointly organized border inter-county workshops on regional integration which brought together county governments bordering EAC partner states to deliberate on EAC integration issues with the objective of harmonization of laws, rules and regulations on cross border trade. All border counties participated in these workshops. One was held in Mombasa in 2015 where county legislative assemblies, County executive committee members of Mombasa, Kwale, Taita-Taveta and Kajiado counties participated. The second was held in Kisumu in 2016 and it brought together county governments of Kisumu, Migori, Narok, and Homa Bay while the third was held the same year in Kakamega bringing together county leaders of Bungoma, Busia, and Trans Nzoia in 2017. However, this harmonization is yet to be done.

3.4 Intergovernmental structures (intra-county) and the EAC integration

Intergovernmental cooperation is largely enhanced by the presence of established intergovernmental structures. The intergovernmental Relations Act No. 2 of 2012 established intergovernmental structures to serve as platforms for consultations and cooperation between the two levels of governments and its gives room for establishment of further structures. Respondents noted that there is no specific intergovernmental structure between the two levels of government on EAC matters. However, where an EAC resolution touches on the county government functions, the county governments through the Council of Governors (CoG) is notified. The ministry of EAC and Regional development of Kenya fills in this gap by liaising with CoG on matters that touch on their functions.

The Council of Governors (CoG) is an intergovernmental structure that provides a forum for consultation and cooperation amongst the 47 county governments under section 19 and 20 of the Act[25]. One of its functions is to consider matters of common interests to county governments (20(c); offer a collective voice on policy issues; and collective consultations on matters interest to county governments[26]. Additionally, respondents noted that CoG coordinates such matters common to all the 47 county governments, however, EAC matters do not fall within this category and EAC matters are dealt with on county-to-county need basis as noted by the respondents. This means that there is no collective coordination of EAC matters affecting county governments at the CoG level which is the national level despite the effects of EAC on county functions and the CoG does not offer a voice for county governments on this matter. Other respondents noted that CoG committee on security and foreign affairs which according to the respondents handles issues such as EAC and if there are any EAC resolutions that touch on the county governments, the CS will directly engage the CoG. Further, the CoG has participated in regional

forums organized by the East African Local Governments Association.

The lack of coordination at the national level and lack of participation and involvement of COG in EAC matters does not exclude individual county governments' participation and involvement in EAC matters as respondents gave an example was given where wrangle at the EAC borders bordering Kenya where Kenyan traders faced many hurdles in doing business in the neighboring countries was reported to the ministry of EAC and regional development by affected county governments (name of counties). Subsequently, the collaboration and cooperation between the ministry and affected counties resolved the matter. Thus, the participation of county governments is on county-to-county need basis and this matter of EAC matter is left for individual counties and the ministry of EAC and regional development under the national government, which has the mandate to coordinate EAC issues in the country. Further, respondents acknowledged that the connection comes when policies/legislations made at the regional level have to trickle down and implemented/adhered to by county governments who have individual responsibility of ensuring that their legislations, and policies as well as activities do not contravene Kenya's obligations under the EAC as well as international obligations. However, when asked whether there is a collective mechanism to ensure this, respondents noted that there was none.

Further, there is no implementation of the recommendation by the ministry of EAC and regional development calling county governments 'to formulate a cooperative strategy that will develop a joint approach to harmonization of laws, rules and regulations and to propose a structure of engagement with its department (state departnemet for East African Affairs, Kenya) in order to enable them approach EAC integration from a common platform[27]' Three years down the line and county governments are yet to come up with a joint strategy and established their own intergovernmental structures for those affected by EAC in particular the 12 border counties to give them a collective voice on the matter and leverage their inclusions and participation. This could be largely attributed to the fact that EAC is neither an agenda for county governments nor an agenda for discussion for CoG as evidenced in its absence in the annual devolution conference themes organized by the CoG. This lack of initiatives even from county assemblies to secure their participation is the gap in the EAC integration within the domestic context.

4. Recommendation

From the foregoing results and discussions, there is need for establishment of intergovernmental forum on EAC/IGAD matters to allow for high-level cooperation and consultation on these matters that affect county governments that intersect with EAC/IGAD functions. In line with this, there is need for the parliament of Kenya to revise its rules to make room for the inclusion and participation of county assemblies in its business on EAC matters. This would ensure that both the two arms of county government (executive and assembly) have equal opportunities

in participation in EAC matters and will ultimately raise awareness of EAC/IGAD matters to county levels, which is a shared goal for the national government, and EAC of ensuring citizens are aware of the developments in EAC.

Secondly, there is need for adoption of the national regional integration policy for Kenya to guide the country and other stakeholders on how EAC matters and the larger regional integration issues are to be handled. And thirdly, there is need for the county governments through the CoG to formulate a joint strategy that stipulates how they will engage with the national government and other stakeholders on EAC matters. Moreover, the CoG should collective mainstream the EAC as an agenda in the county government plans and in its annual devolution conference.

The implementation of these recommendations should be preceded by an intensive study on areas of EAC that intersect with county governments functions and financial implications for the county governments on one hand, and financial costs incurred by the national governments as a result of violation of Kenya's obligations under EAC by county governments on the other hand. Further, contribution of county governments should also be highlighted. This study should inform areas of collaboration and roles to be accorded.

Conclusion

There is evidence of political goodwill shown by the national government in its great efforts to involve other stakeholders including the county governments in EAC integration matter as evidenced in the intergovernmental cooperation in implementation of EAC activities, inclusion of county governments in bilateral talks that have a bearing on their functions. The county governments on the other hand have shown commitment and support to the EAC integration processes. This article has shown existence of greater opportunities that have advanced participation of county governments in EAC matters through the EAC established participatory channels at the national level as well as intergovernmental cooperation and frameworks that have facilitated their participation at the domestic level. Though this participation is minimal at the moment and restricted within the domestic national context because of the lack of an institutionalized framework or platform for direct engagement with local/sub-national governments within the EAC institutional structure, county governments can take comfort in the constitution and intergovernmental acts that protects its participation and inclusion in matters that touch on their functions and push for formal structures and policies that will secure their involvement.

Declaration of Interests

I hereby certify that this article is the result of my original work extracted from my thesis title "Local governments and the EAC integration; participatory

opportunities and challenges for the county governments of Kenya" submitted for the award of Master's degree in Regional integration at the Institute of Regional Integration and Development, Catholic University of Eastern Africa, Nairobi, Kenya. This work was supervised by Dr. Catherine Biira[28] and I had assistance from Prof.Benson Mulemi[29]

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4 EAC Treaty, 2000. Article 7 (1)a & d

5 EAC Treaty,2000, Article 127, 128, and 129

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A new judicial review: Defining the interface between political and judicial power in the Constitution of Kenya

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Abstract

The Constitution establishes the principle of judicial review in Kenya, meaning that courts have power to invalidate laws and executive actions that contravene the Constitution. But outside of the constitution, no case has settled the boundary between the political and judicial branches within the constitution and beyond which the judiciary may not go.

The constitution places limits on governmental power, and those limits would be meaningless unless they were subject to judicial review and enforcement. The written nature of the constitution which defines and limits governmental power inherently establishes judicial review and the judiciary has no choice but to follow the constitution.

Constitutional judicial review seems to consider the judiciary as the ultimate arbiter of all constitutional questions. A contrary view is that the constitution has granted no such power to the judiciary, but instead considers all three arms of government as co-equal and co-sovereign under the constitution. If this is the case, there must be an interface between them that informs and guides the practice of judicial review.

This paper argues that the power of judicial review is neither arbitrary nor unlimited. The institution of judicial review has enshrined within it constitutional and common law doctrines that define how it interfaces with the other arms of government; it's scope. The first part identifies sources of authority for judicial review in the constitution. The second part justifies judicial review by setting out its significance in the scheme of the constitution and the third part identifies factors relevant to its scope and its limits. It concludes that the constitution has diluted common law restraints on judicial review and opened up many more areas to review than has been the case in the past.

1. Introduction

Traditional judicial review has its origins in the doctrine of ultra vires and the rules of natural justice and has grown to become the most powerful tool in enforcement of constitutionalism and rule of law and perhaps one of the greatest and most powerful tools against abuse of power and arbitrariness. The role of the court has been to ensure that public bodies do not exercise their powers unlawfully. To

ensure this Courts have intervened to quash a decision if it is considered it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The landmark decision on this principle was made in1948 in the celebrated decision of Lord Green in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*[1]:-

> If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming...

The above grounds were reiterated in the case of *Pastoli vs Kabale District Local Government Council and others*[2] and that such grounds are incapable of exhaustive listing.[3] In fact the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions.[4] Whereas it is true that so far the jurisdiction of a judicial review court has been principally based on the "3 I's" namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.[5]

The promulgation of the Constitution in 2010 was a legal watershed that entrenched and expanded the power of judicial review as a constitutional principle**.** Just like in South Africa, it shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law.[6] Judicial review now opens the avenue for one or another of the many reliefs available under the constitution. The judicial review powers that were previously regulated by the common law to control the exercise of public power are now regulated by the Constitution. Even as judicial review is now built on constitutional principles which define the authority of each branch of government, their inter-relationship, the boundaries between them: scope, remain grey.

2. Sources of authority for Judicial Review in the Constitution

The doctrine of judicial review has numerous bases in the Constitution of Kenya 2010. Article 165(3) (d) sets out the express constitutional underpinning for judicial review of legislation,[7] executive conduct[8] and conduct of state organs in respect of counties.[9]Article 165(b) also empowers the High Court to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.[10]All these are constitutional provisions that expressly empower the judiciary to review legislation, executive conduct and matters bearing on devolution of government.

Judicial review authority also has a strong basis and can be construed from the text of the Constitution. First, Article 2 (1) the Supremacy Clause expressly states that a form of judicial review exists:

> This Constitution is the supreme *law* [emphasis] of the Republic and binds all persons and all State organs at both levels of government.

The Constitution by proclaiming itself law, invites and suggests that judges should interpret it. Second, the Constitution provides at article 2(4) that:

> Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

That suggests that only statutes consistent with the Constitution are law. Since judges have a role in determining that a statute conflicted with the constitution (as opposed to the alternative possibility that the parliament would have the exclusive power to make that determination), this provision although open to other interpretations, more significantly suggests that courts can review legislation to determine constitutionality.

Third are other openings for constitutional judicial review but which have not been the source of extensive analysis in Articles 22 and 258 of the Constitution.

The fourth is Article 47(1)(2) granting a right to fair administrative action and the right to be given written reasons for the action.

In terms of Article 22 (1) "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened." Such person may be acting in his own or in the interests of others or an association. In furtherance of this, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012 have been enacted.

In terms of Article 258 (1) "Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention." Such proceedings may be instituted by a person acting in his own or in the interest of others.

The three provisions confer on the High Court the jurisdiction to undertake judicial review of executive and legislative action by the government and its officers— it confers jurisdiction in respect of any matter arising under the Constitution or involving its interpretation and arising under the laws made by the Parliament and in particular, to ensure that such action is carried out within limits imposed by the Constitution and any valid statute.

3. Significance of judicial review

The principles of judicial review give effect to the Rule of Law and are important mainly because without it the Constitution would be nothing but a piece of paper. The Constitution states that it is the supreme law of the land and there has to be an authority to decide whether a particular law or conduct is constitutional or unconstitutional.[11] Judicial authority has always included the power to interpret laws and the Constitution has given the judicial branch the power over all cases arising under the Constitution and courts must be able to interpret both the Constitution and laws and to determine whether one prohibits the other.

The jurisdiction conferred on the High Court by Article 165(3) is also a crucial part of the doctrine of the separation of powers. Underlying this doctrine is the principle that a strict separation of power between the executive, legislative and judicial branches of government will help preserve democracy and protect citizens from any abuse of government power. The text of the Constitution reflects the separation of powers at a textual level, with provisions relating to the legislative branch in Chapter 8, provisions relating to the executive branch in Chapter 9, and provisions relating to the judicial branch in Chapter 10. This arrangement has been construed as requiring that judicial power be exercised only by courts vested with jurisdiction in accordance with Chapter 10. It is an exercise of judicial power finally to determine whether or not conduct of the executive branch is lawful. In this way the doctrine provides a constitutional basis for judicial review.

In Kenya, judicial review represents an important element in a comprehensive justice system. Within this scheme, judicial review has a number of important functions listed below.

3.1 An element of the rule of law

The Constitution at article 165 (3) underscores the significance of judicial review as an element of the rule of law.[12] The ability of the courts to judicially review executive conduct is an element of the rule of law.[13] The High Court has observed that the legitimacy of judicial review is based in the rule of law so that it becomes the primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law.[14] In *R. v. Committee of the Lords of the Judicial Committee of the Privy Council acting for the Visitor of the University of London, ex parte Vijayatunga (1987)*,[15]Judge Simon Brown said: "Judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law".[16] In Australia it has been stated that:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the

> executive by the law and the interests of the individual are protected accordingly.[17]

As also noted:

> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.[18]

In Singapore, judicial review as a check on executive power was noted by the Court of Appeal in *Chng Suan Tze*,[19] which held that all power given by law has legal limits and that "the rule of law demands that the courts should be able to examine the exercise of discretionary power".[20] This is further illustrated by *Law Society of Singapore v. Tan Guat Neo Phyllis (2008)*,[21] in which it was stated that prosecutorial discretion is subject to judicial review and may be curtailed where exercised in bad faith or for extraneous purposes, or is in contravention of constitutional rights.[22] It is the role of the courts generally to give litigants their rights, whilst simultaneously playing a supporting role in the promotion of good governance through the articulation of clear rules and principles by which the executive can conform with the rule of law.[23]

However, certain matters are regarded as not amenable to judicial review owing to limitations in the courts' institutional capacity. For example, courts are generally reluctant to get involved in affairs relating to national security, leaving this role to the executive. At the same time courts are committed to careful scrutiny of matters to decide whether they are indeed non-justiciable and generally exclude matters involving "high policy" from their purview after analysis to determine whether or not they truly fell within areas of executive immunity.[24]

3.2. An aid to accountability[25]

Judicial review of executive conduct is an important part of executive accountability. All public bodies and institutions are required to be transparent and accountable.[26] It ensures that decision makers are accountable for the decisions they make and that there is a mechanism in place to test the lawfulness of executive decisions.[27] It is a mechanism through which individuals are entitled to bring an action in the courts to enforce a right or protect an interest by stopping unlawful conduct of the government or its agents.[28] 'The most obvious benefit brought by judicial review is that it forces care in administrators and reviewers in their adjudicative process'.[29] Further:

> ...one by-product of judicial review as an accountability measure is that it can encourage independence and integrity. A decision-maker whose ruling is subject to curial oversight is less likely to toe a particular policy line or succumb to political pessure to decide cases in a particular way. The courts offer security to those who make a bona fide attempt to make findings on the facts and the law as presented and sanctions for those who choose to act on arbitrary or capricious considerations.[30]

The judiciary has the power through judicial review mechanisms to review executive conduct. This power encompasses the authority of the court both to review the constitutionality or validity of executive conduct and to pass upon their constitutionality or validity, and to disregard, or direct the disregard of such acts as are held to be unconstitutional.[31]

3.3 Consistency and precedent

Precedent viewed against passing time can serve to establish trends, thus indicating the next logical step in evolving interpretations of the law. Judicial review rulings of the courts are of precedential value and can provide direction on desirable executive conduct.[32] Article 20(3) on addressing itself to precedent in matters bearing on Human Rights also mandates that in applying a provision of the Bill of Rights a court should *'develop the law to the extent that it does not give effect to a right or fundamental freedom'*, and to 'adopt the interpretation that most favours the enforcement of a right or fundamental freedom." The Law Council of Australia in the context of its submission on the Migration (Judicial Review) Bill 1998 has also noted as follows:

The Refugee Review Tribunal...deals with complex legal issues...The courts provide interpretation of legislative provisions and on the relationship between old and new laws. Both the Refugee Review Tribunal and the Immigration Review Tribunal, like most tribunals, often see differences of opinion arise between the way particular members interpret the relevant legislation...court decisions are normative and binding on tribunal members. The fostering of consistency between members and the knowledge of the correct interpretation of a certain provision are benefits for all those involved in the immigration process, from applicants, departmental decision makers through to review officers.[33]

Although the rule of precedence promotes certainty and predictability and consistency in judicial decision making process, it has been criticised and rightly so, that the doctrine hinders originality and precedent setting, for the courts are unwilling to abandon their own creations and their own notions of good policy in favour of the statutory law.[34] It is precisely this certainty and predictability in the formalist traditional common-law based judicial review that the Constitution of Kenya 2010 hoped to overturn and install in its place a jurisprudence and process more in keeping with Article 47. Nevertheless, to be able to implement the

transformative Constitution, Kenyan courts in must boldly set out to implement the constitution rather than the old common law principles.

3.4 An individual right

Under Article 3(1) every person has an obligation to respect, uphold and defend the Constitution. In terms of Article 22(1) "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."[35] An individual's right to review of decisions in relation to executive conduct is as important as the entitlement to bring an action in the courts to enforce a right against a fellow citizen.[36] It has also been held in relation to judicial review that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed.[37] The procedure safeguards individual rights by allowing individuals to bring an action in the courts to enforce a right or protect an interest by stopping unconstitutional conduct of the government or its agents.

Similarly, section 7(2)(a)(i)(ii) and (iii) of the Fair Administrative Action Act, 2015 provides that a court or tribunal may review an administrative action or decision by way of judicial review if the person who made the decision denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case.

In summary:

> ...judicial review plays an important part, in a highly public way, of declaring, reasserting and supporting important standards necessary to the rule of law expressed in the delivery of administrative justice as well as addressing departures from those standards in individual cases.[38]

4. Factors relevant to scope of judicial review

4. 1 The structure of the Constitution

Judicial review in Kenya is very much the consequence of the structural regime established by Chapters 8, 9 and 10 of the Constitution, particularly the concept of the Separation of Powers. Considerations of constitutional structure define not only the significance of judicial review, but also its limits.

A very important consequence of the separation of powers for constitutional review system is that a court can exercise judicial power whereas in common law or statutory judicial review decisions it cannot. Statutory judicial review under the Law Reform Act is complementary to but distinct from Constitutional judicial review. Whereas the object of constitutional judicial review is to ensure that 'the

correct or preferable' decision is made on the material before the decision-maker, statutory judicial review is directed towards ensuring that the decision made was properly made within the legal limits of the relevant power.

In deference to separation of powers, the courts acknowledge the need to maintain the margins between statutory and constitutional judicial review. It has been argued that if the courts were in statutory judicial review to assume a jurisdiction to review acts or decisions which are unfair in the opinion of the court – not the product of procedural unfairness, but unfair on the merits – the courts would be assuming a jurisdiction to do the very thing which is to be done by the executive, namely, making policy. If judicial review were to trespass on the exercise of executive power, it would put its own legitimacy at risk.[39]

4.2. Parliament

Parliament is able to define the scope of judicial review. The first is Parliament's capacity to make laws expanding the availability of judicial review beyond that provided for in the Constitution. The second are the various mechanisms available to Parliament should it seek to remove or limit the scope of judicial review.

Under Article 23 (2) of the Constitution, Parliament is empowered to legislate to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This provision does not entrench any jurisdiction to undertake judicial review but does empower Parliament to confer jurisdiction in the broadest terms on subordinate courts to undertake judicial review of executive action.

Article 162(2) of the Constitution gives Parliament power to make laws defining the jurisdiction of any court with the status of High Court with respect to, among other things, employment, labour relations, the environment, the use and occupation of and title to land. Parliament can under sub Article (3) determine the jurisdiction and functions of the courts.

These provisions illustrate that the Parliament has significant legislative power to extend judicial review beyond what is expressed in the Constitution.

On the converse, Parliament has power to limit or remove any judicial review jurisdiction that it has created, so long as any limitation does not infringe the Constitution and so long as the limitation is sufficiently clearly expressed.

The High Court may also grant a constitutional remedy if an exercise of power by a member of the executive is such that he has failed to comply with a duty, the content of such duties—and, in fact, whether the duties exist at all—can be varied by Parliament (within the limits of the Constitution).

It is also open to Parliament to legislate in a particular context to contain the requirements of procedural fairness but laws of this kind simply limit the potential applicability of the grounds of review to a particular factual situation.

It is equally the case that Article 166(3) of the Constitution vests in the High Court a jurisdiction for judicial review that provides an irreducible minimum basis for challenging executive conduct; that is, Parliament does not have legislative power to remove this jurisdiction.

The foregoing discussion shows that there are a number of ways in which, if it chooses to do so, Parliament can expand or limit the scope of judicial review in the context of particular decision-making powers.

5. Scope of judicial Review: Limits

A development of profound constitutional significance for judicial review in Kenya was the promulgation of the Constitution of Kenya 2010. It enables citizens to vindicate the rights and liberties guaranteed by the Bill of Rights in courts.[40] It marks a shift to a rights based system. It requires judges to examine allegations of abuse of power from the perspective of what is necessary in a democratic society.[41] Articles 10 and 20 will contribute greatly to the constitutionalisation of our public law. It creates a new and higher legal order. It poses great challenges for the judiciary which must now apply constitutional methods of interpretation over a wide spectrum of cases.

Articles 10 and 20 imposes an interpretative obligation on courts requiring them to interpret all legislation, primary and subordinate, whenever enacted, in a way which is compatible with the Bill of Rights. The Articles enable the courts to take the Bill of Rights into account in resolving any ambiguity in a statute.

Unlike in the past when the search has been for the one true meaning of a statute, under the 2010 Constitution, the search will be for a possible meaning that would prevent the need for a declaration of inconsistency or contravention under Article 165(3). The questions that courts now have to ask will be: (1) What meanings are the words capable of yielding? (2) And, critically, can the words be made to yield a sense consistent with the Bill Rights?

The courts will now have to use new methods of solving problems. The cherished concept of Wednesbury unreasonableness no longer provides all the answers.[42] Now the important issue is whether an interference with a right is justified by a legitimate aim and 'is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors'.[43] Moreover, there will be no place for formalism and courts have to look behind the appearances and investigate the realities of the impact on individuals of a procedure, practice or decision which is under scrutiny. In order to filter

out insubstantial complaints courts must apply the principle that for conduct to constitute a breach of a provision of the Bill of Rights, it must attain a minimum level of severity for without it courts would be swamped with trivial complaints.

A core provision of the Constitution is Article 50, which contains the guarantee of a fair trial. It will be the prism through which diverse aspects of our justice system will have to be re-examined. The principal battleground will be the criminal courts. But the influence of the Bill of Rights will be general and pervasive. Often the values underlying the Bill of Rights will be in collision. *Isaiah Berlin* wrote:[44]

> Both liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted. . . . Equality may demand the restraint of the liberty of those who wish to dominate; liberty - without some modicum of which there is no choice and therefore no possibility of remaining human as we understand the word - may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice or fairness to be exercised.`

Courts will sometimes have to balance the protection of the fundamental rights of individuals against the general interest of the community. Individualized justice and the stability needed in any democratic society may be in contention. Often courts will have to choose between competing values and to make sophisticated judgements as to their relative weight.

5.1 Who and what may be reviewed?

A preliminary question in any judicial review application is usually whether a decision is capable of being judicially reviewed? This question has two quite distinct sub-questions:

1. Does the court have jurisdiction to review the particular decision?

2. Assuming the decision is reviewable, is the decision justiciable?

It is possible that courts may not see the distinction between these inquires or may fail to state whether their rationale for non-intervention is a jurisdictional or non-justiciability concern. Such questions of jurisdiction and justiciability whenever they arise have traditionally been explored through a matrix combining both institutional (decision-maker is public or private) and functional (decision is public or private) perspectives.[45]Interpretation is the third but less obvious device that courts use to determine the extent to which a given decision may be examined via judicial review. Jurisdiction, justiciability and interpretation are techniques

deployed by courts in order to establish the availability and appropriate intensity of review. The techniques provide answers to the question: Who and what may be reviewed?

It is significant to clarify that judicial review over administrative action under the Law Reform Act cap 16 operates under a statutory scheme and has evolved on the lines of common law doctrines such as 'proportionality', 'legitimate expectation', 'reasonableness' and principles of natural justice. Its parameters are well established. This paper is rather about the more novel constitutional review whose precise boundaries are not clearly defined because, unlike statutory decisions, there is not a source to define the limits of decision makers' powers save for constitutionality. Following is a look at jurisdiction, justiciability and interpretation techniques in an attempt to indicate a possible scope of judicial review.

5.2 Jurisdictional limits

The jurisdiction of any court provides the foundation for its exercise of judicial authority. As a general principle, where a court has no jurisdiction, it has no basis for judicial proceedings much less judicial decision or order. The applicable standard remains the statement of the Court of Appeal in *The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd*[46] where it was stated:

> "Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

The issue of the jurisdiction turns on the constitutional provision constituting and investing the Court with judicial authority. Kenya has a written Constitution and so it is possible to define jurisdiction by choosing words in the Constitution and attaching meaning to them that define limits.

The jurisdiction conferred under Article 165(3), for example, is broad enough as to allow the court to evaluate and assess whether conduct is in accordance with the law, fairness and justice. If for example, in the case of an appointment, the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot be argued that after the process is complete the Court has no jurisdiction to address the grievances raised by the parties. The jurisdiction of the Court is dependent on both the process and constitutionality of appointment. In this sense if a State Organ or officer does anything or omits to do something under the authority of the Constitution and which contravenes that Constitution, that act or omission when so proved before the High Court is invalid.[47]

From the wording of the Constitution, the scope of judicial review entails ensuring consistency with the Constitution while declaring contravention whenever it occurs. Beyond the Constitution, there is no statute that defines the appropriate scope of judicial review and the precise application of constitutional judicial review to exercises of non-statutory power remains unclear.

a. Article 23[48]

Under Article 23(1), the Constitution spells out the jurisdiction of the High Court, in accordance with Article 165 to uphold and enforce the Bill of Rights. To this extent, the court has jurisdiction to offer redress for "a denial, violation or infringement of, or threat to a right or fundamental freedom". Article 23(3)(f) permits the Court to grant any appropriate relief including an order for judicial review. The power of the High Court to enforce fundamental rights gives citizens the right to directly approach the High Court for seeking remedies against the violation of these fundamental rights.

This entitlement to constitutional remedies is itself a fundamental right and can be enforced in the form of court orders or by issuance of writs evolved in common law.[49]

b. Article 47[50]

Under Article 47, the Constitution expressly constitutionalizes administrative justice as a right and effectively removes it from the clutches of Common Law. The entitlement to administrative action is to "every person" and the right or fundamental freedom accrues where the person "has been or is likely" to be adversely affected. Article 47(3) enjoins parliament to enact legislation, in this case the Fair Administrative Action Act which is required to implement the Article 47.

c. Article 165(3)(b).[51]

Under Article 165(3) (b) the courts have 'jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;' and

> '(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
>
> (i) the question whether any law is inconsistent with or in contravention of this Constitution;
>
> (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;'

Under this Article, the High Court has the power in sub article (d) to rule on the constitutionality of legislative as well as administrative actions whereas under sub article (b) it has the power through judicial review to protect and enforce the fundamental rights guaranteed in Chapter Four of the Constitution.

Hence the scope of judicial review in the Constitution of Kenya is set to evolve in a number of directions – first, to ensure constitutionality of legislation,[52] second to ensure fairness in administrative action, third, to ensure constitutionality of conduct under any law or the constitution,[53] fourth to rule on questions of constitutional relationship between the central and the county governments,[54]and fifth to protect the constitutionally guaranteed fundamental rights of citizens.[55]

These three Articles have the effect of clarifying the exercise of public power using the traditional mechanism of judicial review rooted in the common law and those based on the Constitution. In a petition to enforce the Bill of Rights under Article 23 of the Constitution, the High Court can issue an order for Judicial Review. One can as well found a substantive suit challenging the exercise of administrative power under Article 47 of the Constitution or the Fair Administrative Action Act which is the statute enacted to perfect that Article.

5.3 Locus Standi

Locus standi is defined in *Black's Law Dictionary,*[56] as "the right to bring an action or to be heard in a given forum". Before promulgation of the Constitution in 2010 in the case of *Kenya Bankers Association v. Minister for Finance & Another*,[57] the High Court made a shift from the old narrow interpretation of *locus standi,*[58] holding that even though the applicant was not the directly-aggrieved party, it could represent the banks in a constitutional matter. A relevant consideration in that case was that the applicant had brought the matter in good faith, to uphold the supremacy of the Constitution. The Court further held that this was a case of public interest litigation, and the applicants were public-spirited persons acting *bona fide*.

The 2010 Constitution has enlarged the scope of *locus standi* by enabling people friendly procedures. Articles 22[59] and 258[60] have empowered *every person*, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general. In *John Wekesa Khaoya v. Attorney General,*[61] the High Court at paragraph 4 expressed the principle as follows:

...the *locus standi* to file judicial proceedings, representative or otherwise,

> has been greatly enlarged by the Constitution in Articles 22 and 258 of the Constitution which ensures unhindered access to justice...

The change takes the form of the effective dilution of the requirement of 'locus standi' for initiating proceedings. Since the intent of Article 48[62] is to improve access to justice for those who are otherwise too poor to move the courts or are unaware of their legal entitlements, the Constitution allows actions to be brought on their behalf by social activists and lawyers.[63]

5.4 The Public sphere

In common law, judicial review was only available against a public body in a public law matter.[64] In essence, two requirements need to be satisfied. First, the body under challenge must be a public body whose activities can be controlled by judicial review. Secondly, the subject matter of the challenge must involve claims based on public law principles not the enforcement of private law rights.[65]

There are, however, major difficulties with the public–private demarcation and there is need to record some caveats about the nature of the inquiry. It has been noted that[66] questions such as this raise the full gamut of contextual factors; the outcome will depend on "a careful analysis of the nature of the decision maker and of the subject matter (nature) and surrounding circumstances of the decision".[67] The outcome tends to depend on an overall evaluative judgment or assessment of these factors, not formalistic application of precedent.

Fundamental to the consideration of issues of jurisdiction or justiciability is the demarcation between the public and private sphere.[68] The question of what constitutes a public body is not an easy one to determine. This problem was recognized by the Court of Appeal in *Peter Okech Kadamas vs. Municipal Council of Kisumu,*[69] where Platt, JA expressed himself as follows:

> The order of judicial review is only available where an issue of "public law" is involved but the expressions "public law" and "private law" are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since the English Law traditionally fastens not so much upon principles as upon remedies. On the other hand to concentrate upon remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of certiorari might well be available if the health authority is in breach of a "public law" obligation but would not be if it is only in breach of a "private law" obligation.

In general terms, public functions were subject to public law standards and mechanisms; private activities were subject to private law expectations and remedies.

With the promulgation of the Constitution of Kenya 2010, the public –private divide in judicial review has had to fade. Articles 22 and 258 of the Constitution provide that *every person* has the right to institute proceedings claiming that the Constitution has been contravened; and "person" in this regard, *includes one who acts in the public interest*. Judicial review is now also available as relief to a claim of violation of the rights and freedoms guaranteed in the constitution. The constitution expressly grants the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is functionality i.e whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47(1)(2), the right to natural justice under Article 50, Article 165(6) and the Bill of Rights generally.[70]

However, in order to avoid frivolous suits, Courts have set out parameters to guide the filing of causes in the public interest. These include (i) the intended suit must be brought in good faith, and must be in the public interest; and (ii) the suit should not be aimed at giving any personal gain to the applicant.[71]

The rationale for this change from the common law approach is that under the constitution, it is anticipated the State will discharge many public law obligations via private law arrangements, so that where there is a breach of human rights, or other abuse of public power by private bodies, those responsible are will be subject to the same legal constraints as a public entity exercising such power.[72]

5.5 Justiciability

Justiciability concerns the limits upon legal issues over which a court can exercise its judicial authority.[73] A case must be capable of being decided by a court since not all cases brought before courts are accepted for their review. By justiciability it is meant a matter "proper to be examined in courts of justice" or "a question as may properly come before a tribunal for decision".[74] Essentially, justiciability in law seeks to address whether a court possesses the ability to provide adequate resolution of the dispute and where a court feels it cannot offer such a final determination, the matter is not justiciable.

Article 50(1) of the Constitution of Kenya under the heading 'Fair hearing', provides:

> 'Every person has the right to have any dispute that can be resolved *by the application of law* [emphasis mine] decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.'

This article requires that a dispute must be one that can be resolved by application of the law and legislation which prevents or inhibits judicial resolution of a dispute, or which constitutes an impediment to a person's constitutional right to have

disputes resolved, may be challenged in terms of this clause.

The concept of justiciability reflects the principle that the function of the courts is to resolve disputes between parties, not to decide academic questions of law. This is a principle to which our courts adhere, but one which is undergoing radical change.

A court has no jurisdiction to deal with academic, hypothetical and abstract issues as jurisdiction in interpreting the Constitution is not to be exercised in the absence of a real dispute. This was the holding in *John Harun Mwau & 3 Others v Attorney General and 2 Others* where the court stated thus;

> We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3)(d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.[75]

The High Court had occasion to deal with justiciability or the political question doctrine on several occasions. In *Trusted Society of Human Rights Alliance vs Attorney General & Others*[76] the Court differentiated a justiciable controversy (which is amenable to judicial review) and a policy decision by the political branches of government (which is a "political question" inappropriate for judicial review). The court stated thus;

> The justiciability doctrine expresses fundamental limits on judicial power in order to ensure that courts do not intrude into areas committed to the other branches of government. The arguments on this issue are based on the foundational doctrine of separation of powers and its application to the case at hand.[77]

In *Patrick Ouma Onyango & 12 others Vs Attorney General and 2 others*[78] the court asked whether it should interfere with a political or legislative process stated:

> The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters.[79]

The court in stating the above relied on *Blackburn vs Attorney General*[80] and particularly the decision of Salmon L.J; who stated that:

> Whilst I recognise the undoubted sincerity of Mr. Blackburn's views I

> deprecate litigation the purpose of which is to influence political decisions. Such decisions have nothing to do with the courts. These courts are concerned only with the effect of such decisions if and when they have been implemented by legislation. Nor have the courts any power to interfere with the treaty-making power of the sovereign. As to Parliament, in the present state of the law it can enact, amend and repeal any legislation it pleases. The role and power of the court is to decide and enforce what is the law and not what it should be now or in the future.[81]

The decisions above would only point to the fact that the court can only invoke its mandate to interpret the Constitution under Article 165 (3)(b) if there is a real issue in controversy and not in a hypothetical or academic situation. Before agreeing to hear a case, a court first examines its justiciability. This preliminary review does not address the actual merits of the case, but instead applies a number of tests based on judicial doctrines. At their simplest, the tests concern (1) the plaintiff, (2) the adversity between the parties, (3) the substance of the issues in the case, and (4) the timing of the case. For a case to be heard, it must survive this review.

Settled law requires that in order for a court to hear a case, several justiciability doctrines must be met: there must be standing; the case must be ripe; it must not be moot; and it must not present a political question.[82] The entire area of justiciability is a morass that confuses more than it clarifies and so many commentators have tended to concentrate on specific justiciability doctrines, and have lamented about their incoherence.[83]

The following sections examine the concept of justiciability and the extent to which the qualification of the right of access to justice by the requirement that there be a dispute which can be 'resolved by the application of the law' may present a procedural barrier to access to justice.

a) Ripeness

The courts will not adjudicate an issue that is not ripe and a successful plea by a party on that ground will be a bar to further litigation. Ripeness is the readiness of a case for litigation and "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[84]

The objective of pleading ripeness is to prevent premature adjudication by arguing that a dispute is insufficiently developed and that therefore any potential injury or stake is too speculative to warrant judicial action. It has been said that, "ripeness is peculiarly a question of timing,"[85] and it is essential to know the timing of the constitutional violation to determine the proper timing of judicial review.

One of the primary factors in the ripeness inquiry is "whether the courts would benefit from further factual development of the issues."[86] Whether or not a matter

is ripe will be entirely determined by who has violated the Constitution. If the legislature has violated the Constitution by making a law, all post-enactment facts should never matter to the merits of such a claim, because the constitutional violation is already complete.

The most recent Kenyan case that has comprehensively addressed the issue of ripeness is the *Security Laws (Amendment) Act*, No 19 of 2014 case ("SLAA").[87] Briefly, the facts of the case were that the Security Laws (Amendment) Bill was published on 11th December 2014. It was debated on 18th December 2014 and passed. It received Presidential assent on 19th December 2014. SLAA which came into force on 22nd December 2014 amended the provisions of twenty two other Acts of Parliament concerned with matters of national security. The petition challenged the constitutionality of SLAA and asked the court to determine inter alia the question of the scope of judicial power to inquire into the processes of the legislative arm of government.

On ripeness, the court observed that having regard to the provisions of Article 22, 165(3) (d) and 258 of the Constitution a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of the Constitution.[88]

The court took this view by reasoning that it could have been in vain that the drafters of the Constitution added "threat" to a right or fundamental freedom and "threatened ..... contravention" as one of the conditions entitling a person to approach the High Court for relief under Article 165(3) (b) and (d) (i).[89] The use of the words "indication", "approaching", "might" and "communicated intent" all go to show, in the context of Articles 22, 165(3) (d) and 258, that for relief to be granted, there must not be actual violation of either a fundamental right or of the Constitution but that indications of such violations are apparent.

Kenyan law on ripeness is quite generous in enabling litigation of constitutional disputes. In Kenya, a dispute where national security concerns are in issue is less likely to be successfully obstructed by an executive plea that the question at hand is not ripe for adjudication. This is a direct consequence of the deliberate choice of permissive words such as "threat", "threatened...contravention", "indication", "approaching", "might" and "communicated intent" in Articles 22, 165(3)(b) and (d)(i) and 258.

b) Mootness

The judiciary will not hear a controversy that is not alive but which has become moot. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law so that it has been deprived of practical significance or rendered purely academic. By way of

comparison, standing involves whether the plaintiff had suffered or is threatened with injury in fact at the time of the complaint, while mootness is concerned with whether events subsequent to the complaint have eliminated the controversy between the parties.

Generally, the burden of showing standing rests with the plaintiff, while the burden of demonstrating mootness lies with the defendant.[90] Like standing, because mootness implicates the court's jurisdiction, it can be raised at any time and cannot be resolved by stipulation.[91] Moreover, counsel for the plaintiff has a duty to bring to the court's attention facts which may raise an issue of mootness.[92]

Mootness issues can arise in cases in which the plaintiff challenges actions or policies which are temporary in nature, in which factual developments after the suit is filed resolve the harm alleged, and in which claims have been settled.

Generally, a case is not moot so long as the plaintiff continues to have an injury for which the court can award relief, even if entitlement to the primary relief has been mooted and what remains is small.[93] Put differently, the presence of a "collateral" injury is an exception to mootness.[94]

A controversy that involves litigation must be alive. Where the issues or events are beyond the reach of the law they are deprived of practical significance and become purely academic and dead. Since courts do not act in vain, the doctrine of mootness where pleaded becomes an effective and final bar to further adjudication by a claimant.

6. Conclusion

Looking at the doctrine of justiciability generally, it is inextricably intertwined with the right of access to justice and the reach of constitutional justice. Perhaps, conscious of this fact, the constitution deliberately expands the right to approach the court in cases involving violation of constitutional rights. Thus in terms of Article 22(1) every person has a right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 258 provides that every person has a right to institute court proceedings, claiming that the constitution has been contravened, or is threatened with contravention. Such a person can be acting either in his own interest or on behalf of another person who cannot act on their behalf, or as a member of a group or class of persons or in public interest on behalf of an association or it members.

Article 50(1) confers the right to everyone to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Consistent with the above provisions, it follows that the common law principles of justification, to the extent that they inhibit judicial resolution of a dispute or impede a persons' constitutional right to have a dispute resolved, may be challenged in terms of the access to court clauses. This factor has expanded the scope of who and what can be reviewed and with that effectively diluted the role of justiciability to be able to define the scope of judicial review.

Endnotes

* Lecturers, School of Law, University of Nairobi.

1 [1948] 1 KB 223, H.L

2 [2008] 2 EA 300

3 See JR No 112 of 2011, High Court, NBI, Seventh day Adventist church , applicant and PS Ministry of NBI Metropolitan Dev

4 Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998

5 Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya), Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J.

6 Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99, [Chaskalson P.]

7 Article 165 (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—(i) the question whether any law is inconsistent with or in contravention of this Constitution;

8 Article 165(d)(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

9 Article 165(d) (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;...

10 (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. See also Supreme Court in *Re Interim Independent Electoral Commission (Advisory Opinion) Constitutional Application 2 of 2011* where held that the provisions of Article 165 (3) entrust the High Court with the mandate to interpret the Constitution and hear Petitions arising from the interpretation of the Constitution in the first instance.

11 The High Court (W. K. Korir, J.) has held that the purpose of judicial review is to ensure that public bodies and officials perform their functions in good faith, without malice and in accordance with the law, and that once the court has clarified the law the public body may decide to retake the decision or abandon the decision altogether. *Republic v The Judicial Service Commission & another ex parte Joyce Manyasi* [2012] eKLR J. R. Application No. 299 of 2011 High Court of Kenya at Nairobi Weldon K. Korir, J. July 4, 2012.

12 See *Republic -vs- Principal Secretary Ministry of Industrialization & Enterprises & Another Ex-Parte Rishit Metals Limited* [NBI High Court Judicial Review Case No. 527 of 2016] where it was held that "Orders of judicial review are meant to assist in the enforcement of the rule of law".

13 Joseph Raz (1977), "The Rule of Law and Its Virtue", Law Quarterly Review 93: 195–211 at 201.

14 Sceneries Limited v National Land Commission [2017] eKLR.

15 [1988] Q.B. 322, High Court (Queen's Bench) (England & Wales).

16 *Ex parte Vijayatunga*, p. 343, cited in *R. (Cart) v. Upper Tribunal* [2010] EWCA Civ 859, [2011] Q.B. 120 at 137, para. 34, Court of Appeal (England and Wales).
17 *Church of Scientology v Woodward* (1982) 154 CLR 25, 71 per Brennan J.
18 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157 per Gaudron J.
19 *Chng Suan Tze v. Minister of Home Affairs* [1988] SGCA 16, [1988] 2 S.L.R.(R.) 525, Court of Appeal (Singapore).
20 *Chng Suan Tze*, p. 553, para. 86.
21 *Law Society of Singapore v. Tan Guat Neo Phyllis* [2007] SGHC 207, [2008] 2 S.L.R.(R.) 239, High Court (Singapore).
22 *Tan Guat Neo Phyllis*, pp. 312–313, paras. 148–149.
23 Chan Sek Keong (September 2010), "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (PDF), Singapore Academy of Law Journal 22: 469–489 at p. 485, para. 44.
24 *Lee Hsien Loong v. Review Publishing Co. Ltd.* [2007] 2 S.L.R.(R.) 224, H.C. (Singapore).
25 In our legal framework in Kenya three institutions have played major role in achieving a reasonable level of accountability in public institutions, namely the Courts through Constitutional enforcement and judicial review, Parliament through its committee systems including the Public Accounts Committee and the Executive itself by introducing the Rapid Results Initiative (RRI).
26 *Lemuguran Case Misc Civil Application No. 305 of 2004*
27 Also see *Kadamas v Municipality of Kisumu* (1985) KLR 954 where the High Court held that "Acts of a body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, are subject to judicial review whenever they act in excess of their legal authority".
28 *Electoral Commission Of Kenya v Attorney General & 2 Others* [2007] eKLR where the court observed that the fact that the ECK draws moneys from the Consolidated Fund comes with the responsibility to account for such funds because in a democracy all public entities notwithstanding their autonomy must have a responsibility to account.
29 Mary Crock, 'Privative Clauses and the Rule of Law: The Place of Judicial Review Within the Construct of Australian Democracy, in S Kneebone (ed) Administrative Law and the Rule of Law: Still Part of the Same Package?, Australian Institute of Administrative Law, 1999, 57, 80.
30 Ibid.
31 Paul Craig (2008) Administrative Law, Sweet & Maxwell, London; Peter Kaluma (2009) Judicial Review: Law Procedure and Practice LawAfrica Publisher, Nairobi ; F.P. Feliciano, "The application of law: some recurring aspects of the process of judicial review and decision making" 1992 American Journal of Jurisprudence 17-56, 19. See also Gichira Kibara (2011) "Reforming the Judiciary: Responsiveness and accountability of the Judiciary," A study under the auspices of the Friedrich Ebert Stiftung (FES) and University of Nairobi's Department of Political Science & Public Administration, Occasional Paper Series, Nairobi, presented at the FES and UoN workshop, Nairobi Safari Club, November 2011.
32 See decision of Court of Appeal in *City Chemist (Nbi) & other vs. Oriental Commercial Bank Ltd*, Civil Application No Nai 302 of 2008 (Ur. 192/2008) when it held that:- "The application of clear and unambiguous principles and precedents assist litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and

maintains stability in the law and its application."

33 Submission of the Law Council of Australia to the Senate Legal and Constitutional Legislation Committee Inquiry into the Migration Legislation Amendment Bill (No 2) 1998, Migration (Visa Application) Charge Amendment Bill 1998 and Migration (Judicial Review) Bill 1998, Submission No 5, 18 January 1998.

34 *Republic vs Public Procurement Administrative Review Board Ex-parte Syner- Chemie Limited* [2016] eKLR.

35 See *Franklin Mithika Linturi v Ethics and Anti – Corruption Commission & 3 others* [2018] eKLRwhere the court observed that "every person is pursuant to the provisions of Article 3 and 22 under an obligation to respect, uphold and defend the Constitution and a right to right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened…"

36 Former Chief Justice of Australia, Sir Anthony Mason AC KBE, 'The Importance of Administrative Action as a Safeguard of Individual Rights' (December 1994) 1(1) Australian Journal of Human Rights at p. 3.

37 This was the position adopted by Kasanga Mulwa, J in *Republic vs. Registrar of Companies ex parte* Githungo [2001] KLR 299,

38 Justice R S French, 'Judicial Review Rights' (March 2001) 28 AIAL Forum 30, 32.

39 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37-38 per Brennan J.

40 Article 22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

41 Article 10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them––

(a) applies or interprets this Constitution;
(b) enacts, applies or interprets any law; or
(c) makes or implements public policy decisions.

(2) 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.

See also Article 20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) 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.

42 *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223

43 See article 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.

44 The Crooked Timber of Humanity, Fontana Press, 1991,12-13.

45 Paul Radich and Jessica Hodgson, Public Law (NZLS, Wellington, August 2006) page 18; McGechan on Procedure (Brookers, Wellington, 1995-) para HR 622.Intro.07.

46 [1989] KLR 1.

47 *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR Civil Appeal No 290 of 2012.

48 23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

49 (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including––
(a) a declaration of rights;
(b) an injunction;
(c) a conservatory order;
(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
(e) an order for compensation; and
(f) an order of judicial review.

50 Article 47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

51 Article 165(3) Subject to clause (5), the High Court shall have—
(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

52 165(d)(i) the question whether any law is inconsistent with or in contravention of this Constitution;

53 165(d)(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

54 165(d)(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

55 165 (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

56 9th Edition (page 1026).

57 [2002] 1 KLR 61

58 In *Maathai v Kenya Times Media Trust Ltd* [1989] KLR 267, the High Court held that the plaintiff had not shown that she had a special interest in the matter in question, as opposed to a public-interest claim.

59 22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by––

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

60 258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

61 Petition No. 60 of 2012; [2013] eKLR

62 Article 48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

63 Article 22(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by––

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

64 Section 3(d) of the Interpretation and General Provisions Act defines a "public body" as follows: "any authority, board, commission, committee or other body whether paid or unpaid which is invested with or is performing, whether permanently or temporarily functions of a public nature". "Public interest" is defined in *Black's Law Dictionary,* 9th Edition (page 1350) as: *"the general welfare of the public that warrants recognition and protection"* or *"something in which the public as a whole has a stake, especially an interest that justifies governmental regulation"*.

65 Ssekaana Musa Public Law in East Africa (2009) LawAfrica Publishing, Nairobi, page 37.

66 *Ibid* at 18.

67 *Ibid* at 18.

68 See Mark Freedland, "The Evolving Approach to the Public/Private Distinction in English Law" in Mark Free1 and and Jean-Bernard Auby (eds) The Public Law/Private Law Divide (Hart Publishing, Oxford, 2006) 93. Also, see generally, the excellent collection of essays in Michael Taggart (ed), The Province of Administrative Law (Hart Publishing, Oxford, 1997).

69 Civil Appeal No 109 of 1984 [1985] KLR 954; [1986-1989] EA 194.
70 *Commission on Administrative Justice v Insurance Regulatory Authority & another* [2017] eKLR.
71 See *John Wekasa Khaoya v Attorney-General,* High Ct. Pet. No 60 of 2012 (para 18-20)
72 See *Ntaryamira v Gichuhi* [2015] eKLR where the High Court noted that Article 165(6) specifically granted the High Court supervisory jurisdiction over subordinate courts and over other persons, bodies or authorities with judicial or quasi-judicial functions. The judge further noted the wide definition of 'administrative action' as well as the application of the Act to both state and non-state agencies and therefore held that, judicial review orders can issue against the decisions of a private administrator.
73 May, Christopher N.; Ides, Allan (2007). Constitutional Law: National Power and Federalism (4th ed.). New York, NY: Aspen Publishers. pp. 97–99.
74 See *Black's Law Dictionary* 9th Ed,pp 943-944.
75 Petition No. 65 of 2011.
76 Petition No 229/2012.
77 Ibid.
78 Nairobi, High Court Misc. App. 677 of 2005 (OS) [2005] eKLR.
79 *Ibid.*
80 [1971] 1 WLR 1037.
81 Ibid
82 For a description of each of these doctrines see E Chemerinsky;, *Federal Jurisdiction* 37-145 (1989).
83 See e.g, J. Vining, Legal Identity 1 (1978) (it is impossible to read the standing decisions "without coming away with a sense of intellectual crisis. Judicial behaviour is erratic, even bizarre. The opinions and justifications do not illuminate."); Fletcher, The Structure of Standing, 98 Yale LJ. 221, 221 (1988) ("the structure of standing law in the federal courts has long been criticized as incoherent"); Winter, The Problem of Standing and the Metaphor of Self Governance, Vol 40 Stan L Rev. 1371, 1372 (1988) ("one of the traditional criticisms of standing law is that it is confusing and seemingly incoherent."); see also Bandes, The Idea of a Case 42 Stan L Rev.227,228 (1990) (analysis of justiciability has focused on individual doctrines).
84 *Texas v. United States,* 523 US 296 (1998), p 300, quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 US 568 (1985), p. 581 (quoting 13 AC Wright, A Miller, & E Cooper, *Federal Practice and Procedure* ss 3532, p. 112 (1984)).
85 *Blanchette v. Conn. Gen. Ins. Corp.* (Regional Rail Reorganization Act Cases), 419 US 102, 140 (1974).
86 *Ohio Forestry Ass'n v. Sierra Club,* 523 US 726, 733 (1998).
87 Nairobi High Court Petition No. 628 of 2014 consolidated with Petition No. 630 of 20154 and Petition No 12 of 2015.
88 *Supra* paragraph 112.
89 A "threat" has been defined in *Black's Dictionary*, 9th Edition as "an indication of an approaching menace e.g. threat of bankruptcy; a Person or a thing that might cause harm". The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another…"
90 See *Friends of the Earth v Laidlaw Environmental Services, Incorporated*, 528 US 167, 190 (2000).
91 *Arizonans for Official English v. Arizona,* 520 US 43, 68 n.23 (1997).
92 Ibid.
93 A case is moot when the court cannot give any "effectual" relief to the party seeking it.

See *Church of Scientology of California v. United States*, 506 US 9, 12 (1992); *Firefighter's Local 1784 v Stotts,* 467 US 561, 571 (1984); see also *Tory v Cochran*, 544 US 734, 736-37 (2005) (death of attorney Johnnie Cochran did not moot injunction enjoining plaintiff from defaming Cochran); *Gates v. Towery*, 430 F.3d 429, 432 (7th Cir. 2005) (case is not moot simply because defendant tenders all relief that it admits is due). A case can, of course, become moot when the Plaintiff has abandoned their claims, but such abandonment must be unequivocal. *Pacific Bell Telephone Company v. Linkline Communications,* 555 US 438, 446 (2009).

94 See, e.g., *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005).

A Case for Structural Interdicts in Enforcing Socio-Economic Rights in Kenya

By
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Abstract

This paper argues that the justiciability of socio-economic is only complete when there is a practical remedy system in place and that the absence of the same reduces human rights provisions to mere statements of legal rhetoric, therefore weakening the substantive rights protected. The crux of the argument of this paper is that constitutional protection of socio-economic rights does not necessarily lead to their enforcement. There is therefore, a need to craft appropriate judicial remedies in order to translate socio-economic provisions into a reality.This paper starts by conceptualizing socio-economic rights with the intention of understanding their historical background, nature, scope and their normative underpinning.

The paper conceptualizes and problematizes structural interdicts as a remedy in socio-economic litigation with the aim of making a proposal for the use of structural interdicts as a panacea to the inadequacies of the traditional remedies, such as damages, declarations, and common interdicts. The paper will interrogates the effectiveness of structural interdicts in responding to systematic violations of rights as a result of administrative negligence, abuse of discretion or the failure to comprehend the law, and the linkage between this remedy and the Constitutional principles of good governance, integrity, transparency and accountability. The paper will then delve into an analysis of the jurisprudence emanating from Kenyan and South African courts in regard to the use of structural interdicts with the objective of outlining the jurisprudential wars that have arisen from different courts and therefore leaving the plight of the poor in limbo. The paper concludes by making recommendations on pertinent norms and principles that will be used as the yardstick to ascertain when it's appropriate, just and equitable to issue structural interdicts.

1.0 Introduction

On 27 August 2010, Kenyans made the promulgation of the current constitution. The coming into force of the constitution ushered the country into an era of progressive constitutional dispensation, a new legal order that would entrench cardinal principles such as good governance, democracy, substantive equality and guarantee the protection of sacrosanct freedoms. The preamble of the Constitution of Kenya 2010 succinctly portrays that Kenyans were desirous of having a legal infrastructure that would capture the aspirations of all, to be governed by values

of human rights, equality, freedom, democracy, social justice and the rule of law.[1]

These pertinent values have also been entrenched in Article 10 of the Constitution in the national values and principles of governance which include: human dignity, equity, social justice, human rights and the protection of the marginalized; good governance, integrity, transparency and accountability; as well as sustainable development.[2] In pursuit of achieving an egalitarian distribution of resources, power, promotion of social welfare,[3] eradication of all forms of systematic economic subjugation and the eradication of poverty, the Constitution has adopted the concept of redistributive equality[4] and has provided for socio-economic rights.[5]

Although the recognition of economic, social and cultural rights in the constitutions of a plethora number of countries with varying levels of enforcement[6] and the international rhetoric of indivisibility and interdependence of the corpus of human rights,[7] socio-economic have been detained for questioning in intense debates on the justifiability and judicial enforcement of these rights .[8] However Louise Arbour, former UN Commissioner on Human Rights, posits that there is nothing inherently non-justiciable about economic, social and cultural rights,[9] and her postulation has received backing from the enactment of an Optional Protocol on Economic, Social and cultural rights outlining a communication procedure for violations of ESR.[10]

The litigation of these rights at the regional level and the jurisprudence emerging from the regional courts, including the African Commission on Human Rights,[11] the Inter-American Court of Human Rights,[12] the Inter-American Commission of Human Rights[13] and in the European Committee of Social Rights,[14] is indicative that the argument on non-justiciability is untenable. However arguments that are mostly preferred by the courts still, abound on limiting and restraining the scope of judicial oversight.[15]

Justiciability debate in Kenya is well settled by the entrenchment of SERs in the Bill of Rights.[16] This entrenchment gives incentives to aggrieved persons to have access to courts to enforce these rights whenever they feel that have been denied, violated, or infringed.[17] The High Court, by dint of article 23 as read with article 165, is constitutionally mandated to hear and determine whether there has been a violation, infringement or threat to a right or fundamental freedom contained in the Bill of Rights. The jurisprudence from our courts has also affirmed the justiciable nature of SERs.[18]

1.1 Conceptualizing Socio-Economic Rights

1.2 Historical Antecedents of Socio-economic Rights

The origin of socio-economic right dates back to the French revolution of 1789 which was brought about by societal inequalities and the shortage of bread and limited access to land.[19] The revolution led to the adoption of the *French declaration*

of the rights of man and citizens on 26th August 1789 that abolished feudalism and addressed inequalities.

The 1917 Russian revolution then followed the French revolution.[20] What fuelled the Russian revolution was the issues of unequal distribution of land, exploitation of workers and labour issues such as poor remuneration, deplorable working conditions, and labour exploitation.[21] Due to the revolution that ensued, there was the formulation of the International Labour Organisation in 1919 which was formed to deal with the issues of unfair labour practices and ensure that workers were better remunerated and treated humanely.[22]

After the horrors of World War 11, Governments met in San Francisco and committed to establishing the United Nations. The primary goal was to bolster international peace and the prevention of conflict. The aim was to ensure that never again in the history of humanity would anyone be arbitrarily denied life, nationality and such basic needs as food and shelter.[23] The call came from across the globe for human rights standards to protect citizens from abuses by their governments, standards against which nations could be held accountable for the treatment of those living within their borders.

Member states of the United Nations pledged to ensure the promotion of respect for the human rights of all. To advance this goal, the UN established a commission on Human Rights and charged with the task of drafting a document spelling the meaning of the fundamental rights and freedoms proclaimed in the Charter. Consequently, there was unanimous voting, though eight nations abstained, to adopt the Universal Declaration of Human Rights (UDHR) on December 10, 1948.[24]

The UN Commission on Human Rights with the aim of establishing a mechanism for the enforcement of the UNDHR drafted two treaties[25]: the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol, and the International Covenant on Economic, Social and Cultural Rights (ICESC). The ICESC focuses on issues like food, education, health, and shelter. Both covenants trumpet the extension of rights to all persons and prohibit discrimination[26]. The bifurcation of the International Bill of Human Rights into ICCPR and ICESC was a result of disagreements due to the recommendation that social and economic rights should be part of the draft document. Kenya ratified the ICESC convention on 1 May 1972.

1.3 Nature and Scope of Socio-economic Rights

The entrenchment of human rights, both the CPRs and SERs, in the Bill of Rights generates both negative and positive duties and obligation on the state for them to ensure their full realization. The African Commission on Human and Peoples' Rights in the case of *SERAC and another v Nigeria* acknowledged the same position.[27] The Commission acknowledged that a state in promoting these rights

undertakes to adhere to the duty to respect protects, promote and fulfill these rights. The Commission noted that these obligations universally apply to all rights and entail a combination of negative and positive duties.[28]

The obligation to respect is a negative one, and it calls for states forbearance from interfering with the rights and freedoms of the right holders and not to interfere with their enjoyment.[29] The obligation to protect is a positive one, and it entails creating a conducive environment for the enjoyment of the right. The realization of such enjoyment of rights can be through various means such as putting in place legislation that will protect these right holders from violations and provision of an adequate remedy in case of a violation by a third party.

The realization of socio-economic rights mainly requires states to fulfill an affirmative obligation. States are therefore to move their machinery and incur expenditures through the provision of basic needs such as food, education, social security, and healthcare. The realization of these rights involves a lot of budgetary and fiscal decisions. The positive nature of SERs calls for a progressive realization of these rights since they cannot be realized up front. The Kenyan Constitution obligates the state to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under article 43. [30]

2.0 Normative Underpinning of Socio-economic Rights

2.1 SERs under International Law

International and regional instruments of repute have accorded socio-economic rights recognition. These instruments by article 2(5) and 2 (6) form part and parcel of the Kenyan law. Article 2(5) provides that "the general rules of international law shall form part of the law of Kenya;"[31] while article 2(6) provides that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[32] The Constitution also provides for a plethora of labour rights such as the right to fair labour practices, fair remuneration, air working conditions, the formation of and participation in trade unions and the right to strike.[33]

The Kenyan domestic courts have also reiterated this position. For instance, the High Court in John *Kabui Mwai v Kenya National Examination Council* [34] the Court unequivocally stated that article 2(6) incorporates international conventions that Kenya has ratified. This position has been reiterated in *Okwanda v The Minister of Health and Medical Services*[35] and *Mitu-Bell Welfare Society v Attorney General*[36]. Also, the Supreme Court In *the Matter of the Principle of Gender Representation in the National Assembly and the Senate Supreme Court of Kenya*[37] where Mutunga (CJ) in his dissenting opinion held that the provisions of CEDAW are applicable in Kenya vide article 2(6) of the Constitution of Kenya.

Some of the conventions that Kenya has acceded to that provide for socio-economic rights include The International Covenant on Economic, Social and Cultural Rights (ICESCR),[38] Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)[39] and the Convention on the Rights of the Child (CRC).[40] Others are the Convention on the Rights of Persons with Disabilities (UNCRPD),[41] the African Charter on Human and Peoples' Rights[42] and the African Charter on the Rights and Welfare of the Child.[43]

2.2 SERs under the Kenyan Constitution 2010

The entrenchment of socio-economic rights is one of the gains realised and which will help in achieving an egalitarian society. The main provisions are article 21 (2) which espouse the standard of progressive realisation,[44] article 43 which enlist the rights to health, housing, food, water, social security, and education.[45] Under article 53(1), the Constitution provides for children's rights to free and compulsory education.[46]

2.3 Conceptualizing the Rhetoric

Albeit the constitutional recognition of socio-economic rights by the Kenyan constitution and other international instruments of repute, the role of the courts in the adjudication of these rights is muzzled by the language of legitimacy . This language presupposes that courts should not encroach the province of resource allocation which is an exclusive and absolute preserve of a nominally elected government. The demarcation of the role of the courts *vis-à-vis* that of the elected branches of government has led the vexed question of justiciability onto a more rugged and contested terrain, and the danger with this is that governments are not accountable when it comes to the adherence to these human rights norms. The result of such a measure is that the citizenry does not have another avenue to prosecute violations of these rights.

The language of legitimacy has led to weak judicial remedies with executive and the legislature hiding behind the veil of separation of powers. There has been an incessant objection to the adjudication of social and economic rights by the on the presupposition that this kind of adjudication is undemocratic and that it offends the principle that only nominally elected representatives of the people should be engaged in the economic and social policy. It is important to note here that there is more emphasis on policy concerns about the policy matters in social and economic rights as opposed to the civil and political rights. Further, the explanation given in this case is that social and economic rights cases are more resource intensive and decisions concerning them be the function of the executive or the legislature.

The justiciability of socio-economic is only complete when there is a practical remedy system place. A weak judicial remedy reduces human rights provisions to mere statements of legal rhetoric and therefore weakens the substantive

rights protected. The constitutional protection of socio-economic rights does not necessarily lead to their enforcement. There is, therefore, a need to craft appropriate judicial remedies in order to translate socio-economic provisions into a reality.

3.0 Use of Structural Interdicts as a Remedy for SERs Violations

The challenges facing the arena of affirmative obligations, regardless whether they are socio-economic or civil political, is not the proof of breach of the right. The problem comes in fashioning an appropriate remedy for the breach of the right.[47] The source of the problem is mainly where the breach is systematic, and the breakdown of the system occasions the breach, or it becomes invaded by lethargy.[48] The justiciability debate of socio-economic is now long overdue, and we should now have a seismic shift to the debate of crafting suitable remedies for their infringement and place less emphasis on the former. The Kenyan courts should now be concerned with remedies that will assist the actualization of socio-economic rights.

The Constitution of Kenya 2010 permits the High Court to be innovative and creative in the fashioning of a relief.[49] The Constitutions lists some of the remedies at the disposal of the court in the proceedings that involve the enforcement of Bill of Rights. Such remedies include; declarations of rights,[50] an injunction,[51] conservatory order,[52] a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom,[53] an order of compensation,[54] an order of judicial review.[55]

The wording of article 23(3)[56] of the Constitution shows that the highlighted remedies are not exhaustive. This article in gives the courts wide latitude to be creative, innovative and even adventurous enough to formulate other affirmative remedies such as reading -in, mandatory interdicts and structural interdicts.

For this research, we shall focus and narrowing down affirmative remedies as enshrined in Article 23(3). The first affirmative remedy provided is a declaration of rights, in this remedy, a court only sets out the content of the fundamental right involved and clarifies the existing legal position without changing it.[57] However, in socio-economic rights litigation where the state is required to take affirmative action, a mere declaration of rights does not constitute an adequate remedy for the violations.[58]

The second affirmative remedy available is a declaration of general invalidity in which the Court modifies the existing legal position by declaring the existing law invalid.[59] This remedy arises out of the supremacy nature of the constitution. However as illustrated by the Grootboom case, in socio-economic rights litigation, a declaration of general invalidity is not a sufficient remedy since it does not address the plight of the victims of violation. The third affirmative remedy is the award of damages in constitutional litigation, courts award damages to parties who have

experienced a violation of their rights but the challenge with this remedy comes in cases where the litigation involves a broad indeterminate segment of society.[60]

The fourth affirmative action available is the interdict or an injunction categorized into an interim interdict and final interdict. An interdict is an order of the court mandating a party to do something or refrain from doing a particular thing. An interim interdict is temporary, and its grant is at the discretion of the Court. In considering whether to grant an interim interdict the court considers where there is a prima facie right, an apprehension of suffering from irreparable harm if not granted, the balance of convenience and that there is no other remedy available to the applicant.

There is a grant of a final interdict if there is a definite right, an injury was committed, and there is an absence of an alternative remedy. These orders are in some instances known as prohibitory orders in instances in which they prevent a future course of action or mandatory interdicts when dealing with past wrongdoing.[61] The final affirmative remedies discussed in this chapter are structural interdicts, otherwise known as supervisory orders or post-judgment supervision.[62]

3.1 Nomenclature and Conceptualizing Structural Interdicts

Structural interdict, as a remedy, is one of the gains realised from the new constitutional dispensation. Courts have employed this remedy and in particular the Kenyan Court of Appeal,[63] stating that, if adequately crafted to avoid vagueness, this remedy is met under article 23(3). Other transformative constitutional dispensations such as South Africa,[64] India,[65] Canada,[66] and The United States have also embraced the same remedy.[67]

A structural interdict is a remedy that involves a continuous involvement of the court in the implementation of its orders. The critical feature in this remedy is the involvement of court supervision in order to rectify a fundamental breach. Upon rendering judgment, the court does not down its tools or relinquish the case but goes on to monitor the implementation of the orders handed down.[68] Structural interdicts enable the courts to assert their judicial authority beyond where prohibitory and mandatory can dare go.[69] In a structural interdict, the judge directs institutional reforms by dictating what action must be taken to eradicate unconstitutional conduct by engaging in continuous supervision until attainment of compliance.[70]

Structural interdicts have their origin in the in the United States leading case of *Brown v Board of Education*[71] a very instrumental case in the transformation of the racially base dual system of education into a unitary non-racial system. In order to achieve these schools were required to establish a new procedure, modify their curriculum and revise their transport routes in order to entrench social equity in the school system. There could be no realization of the requirements one-shot

remedies hence the court resorted to a structural interdict to ensure that the schools and the local authorities adhered to their orders.

3.2 Features of a Structural Interdict

The case of *Moi University v Council of Legal Education & another*[72] identifies five primary ingredients common to structural interdict. The first one is usually a court declaration of violation of a fundamental constitutional right by either the government or its agencies. The second instance involves the issuance of a court order to the government department to the effect that they should adhere to constitutional dictate. In the third phase, the government is mandated to come up with comprehensive reports for submissions before the court. The reports are made in ordinary parlance under oath and should outline the government's plan on how to redress the highlighted violations and give the respondents the liberty to choose a suitable mechanism of compliance instead of imposing a solution on them.[73]

The plan is then tied down to a schedule, and there is the setting of a fixed timeframe in which the Court can evaluate the milestones made. The fourth step involves the court evaluation of the report to see whether there has been a fulfillment of the constitutional obligations. As a result, there is a creation of an environment for a consultative process between the judiciary and the government after which the government makes presentations and the courts assess the legality of those plans. After the assessment, the court makes an appropriate order which should reflect the government plans and the amendments that were made by the Court. The fifth step involves ensuring that the government adheres to the plan and any deviation amounts to contempt of court.

3.3 A Case for Structural Interdict

The purpose of structural interdicts is to eliminate systematic violations by institutions and government agencies, and they are fundamentally different from other remedies.[74] Unlike other interdicts, such as damages, the structural interdicts do not serve the purpose of deterrence or compensation of past wrongs, but they seek to shape future behaviour.[75] There is a deliberate shaping of these remedies as opposed to being deductively made from the harm suffered.[76] Structural interdicts are not one shot in nature as opposed to other remedies but a complex of ongoing performance characterizes them.[77]

A structural interdict is a panacea to the inadequacies of the traditional remedies, such as damages, declarations, and common interdicts, because they are instrumental in responding to systematic violations of rights as a result of administrative negligence, abuse of discretion or the failure to comprehend the law.[78] Structural interdicts help in the elimination of the identified mischief and promote participation of the parties and also third parties in the remedy selection

process. Structural interdicts help the successful litigants avoid being at the mercy of a bureaucratic and lethargic governmental agency. This remedy empowers the courts, as the vindicators of a socially progressive Constitution, not to be passive observers as the rights of the vulnerable are trampled on.

Through structural interdicts, there is the upholding of the Constitutional principles of good governance, integrity, transparency, and accountability[79], since this remedy brings the courts, the civil society and the governmental agencies to an interactive forum. All these participants pull their expertise together to comment on the design and implementation of governmental programmers hence promoting the national values of public participation and democracy.[80]

3.4 A Case against Structural Interdicts

The use of structural interdicts has not been devoid of criticism from skeptics who claim that this remedy is somehow anti-democratic and that since judges are not democratically elected, they lack to the legitimacy to issue them.[81] Judges have criticized this remedy, a case in point by the South Africa Constitutional Court in *Minister of Health v Treatment Action Campaign*[82] where the Court termed the supervisory order by the trial judge to be impermissibly vague and that it violates the doctrine of separation of powers. *In Doucet-Boudreau v Nova Scotia* (Minister of Education)[83] the Canadian Supreme Court was sharply divided with the minority four judges out of nine issuing a strongly worded dissent that the trial judge's order was impermissibly vague, procedurally unfair and flouted the principle of separation of powers. The dissenting judges characterized the remedy as a political one, and that is inappropriate to be made by a judge.

Structural interdicts offend the legal doctrine of functus *officio* which requires that on making a final determination on a matter, it must run down its tools because its jurisdiction ceases and the case stands closed.[84] The *functus officio* provides that save as dictated by law, for instance in the revisionary jurisdiction or under the slip rule, a court transfers jurisdiction to an appellate court in the instance an appeal is allowed. Functus officio is one instance in which the court gives an expression of the principle of finality.[85]

The functus officio doctrine does not only apply to administrative law or only confined to civil law but it is wide and permeates and spreads its tentacles to the realms of public law, and it also encompasses judicial making process.[86] However if adequately crafted to avoid vagueness, structural interdicts can be profoundly democratizing and even promote the doctrine of separation of powers.[87] Through structural interdicts, the court can preserve the doctrine of separation of powers by giving the executive the latitude to come up with the most viable solution to address a constitutional violation, without muzzling its options.[88] The involvement of civil society and the court creates a space for dialogue hence public participation, and as a result promoting an essential element of democracy.[89]

4.0 The Court's Use of Structural Interdicts: The Kenyan and South Africa Approach.

The use of structural interdict to remedy socio-economic rights violations has a bracing of both the South African Constitutional Court and the Canadian Supreme Court. The South African Constitutional Court in *Minister of Health v Treatment Action Campaign*[90] and *Pretoria City Council v Walker*[91] identified structural interdict has an instrumental tool to remedy a breach of a socio-economic right. The Canadian Supreme Court in *Doucet-Boudreau v Nova Scotia*[92] also exercised a supervisory jurisdiction on the Canadian government and required it to report back to the court by way of affidavits on the progress of the building of the minority language schools.

The Canadian Charter greatly influenced the South African Bill of Rights with both documents providing for expansive powers to the courts.[93] The Canadian Charter under section 24(1) gives the courts powers to grant whatever remedies are appropriate and just in the circumstances. This section is in a significant way a mirror of section 38 and 172(1) (b) of the South African Constitution which also gives the Courts competency to award an appropriate, just and equitable remedy.

The Choice of South Africa as a case study has its premise on the ground that section 38 of the South African Constitution is mirrored in article 23(3) of the Constitution of Kenya and gives the courts latitude to grant appropriate relief in instances of violations of rights. The Kenyans jurisprudence on socio-economic rights enforcement should not be insular but should acknowledge other progressive jurisprudence like South Africa and Canada.

4.1 The Kenyan Approach

Article 162 of the Constitution of Kenya establishes the system of courts in Kenya. Under this system, the classification of the courts is either as superior courts or subordinate courts. Under the dichotomy of superior courts, there is the Supreme Court, the Court of Appeal, the High Court. Parliament is also enjoined to establish two courts, with the status of High Court, to adjudicate on matters relating to employment and labour relations and the environment, use and occupation of title to land.[94] These two also constitute the superior courts. The establishment of the subordinate courts is at article 169 of the Constitution which enlists them as the Magistrates courts, the Kadhis' court, the Courts Martial and any other court or local tribunal as may be established by an Act of Parliament other than courts established in article 162 (2).[95]

The constitution gives the High Court the jurisdiction under article 23 and article 165 to adjudicate on matters touching on the violation, infringement of, or threat to a right or fundamental freedom in the Bill of Rights. The Constitution also mandates the Parliament to enact legislation to give original jurisdiction to subordinate to

hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.[96]

The Constitution under article 22 has given wide latitude when it comes to the issue of *locus standi* before the courts in the matters involving the enforcement of Bill of Rights. Such includes a person acting on their interest,[97] acting on the interest of another,[98] representing a class of persons,[99] acting in public interest[100] and association acting in the interest of one or more of its members.[101] The Supreme Court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [102] held that by virtue of article 22 and 258, every person can institute proceedings in the instances where there has been contravention of the Constitution and that pursuant to article 260 it includes "a company, an association, or another body of persons be it incorporated or unincorporated"[103].

The Constitution has ensured that no fee is charged for commencing the proceedings on the enforcement of the Bill of Rights.[104] In these proceedings, it is imperative for the courts to observe the rules of natural justice and not to be subjected to unreasonable restrictions by procedural technicalities.[105] In applying the provisions of the Bill of Rights, the Constitution enjoins the court to interpret the Bill of Rights in a manner that most favours the enforcement of the right or the fundamental freedom[106] and promote values that underlie an open and democratic society based on human dignity, equality, equity, and freedom.[107] The Court is also mandated to exercise self-restraint and not to interfere with the decision of a state organ in matters of resource allocation solely on the basis it would have reached a different conclusion.[108]

The Courts in Kenya are taking the bold step of moving from the 'soft' declaratory remedy to the complex and controversial 'hard' remedy of a structural interdict. The Kenya courts have, however, not comprehensively espoused norms and principles that could determine the appropriate circumstance for the use of this remedy.

4.1.1 The Approach of the High Court of Kenya

The establishment of the Kenyan High Court is under article 165 of Kenyan Constitution 2010, and it is vested with jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.[109] This provision is also reiterated in Article 23 which enjoins the court to hear and determine applications for the redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.[110]

The Kenyan High Court in recent post-2010 decisions has issued structural interdicts under article 23(3) as an appropriate remedy about the enforcement of Bill of Rights. The use of structural in Kenya was first explained in the celebrated High Court of *Moi University v Council of Legal Education & another*.[111] The Court

identified the use of structural interdict as a tool for compelling government organs to adhere to constitutional obligations unpopular as they may be.

In *Satrose Ayuma & 11th others v The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme & 2 others*[112], the petitioner's rent accounts were closed, their utilities disconnected and given a 90 day to vacate the premises by the respondent. The respondents were desirous of using the land to develop a micro-metropolis with shopping malls, office blocks, petrol stations and high-class apartments. The Respondents began to demolish the Petitioner's dwelling before the end of the end of the 90-notice period, exposing the Petitioners to insecurity.

Justice Lenaola, in the application of the legal principles, in this case, found that the Respondents had violated the Petitioner's right to adequate housing. The court found out that the forced evictions were conducted recklessly in contravention of the UN Guidelines on forced evictions. The court found that the evictions were carried out without a proper plan and that the Respondents did not engage the evictees in the decision-making process.

To remedy this infringement, the judge issued a structural interdict, among other orders, that the 3rd Responded to file an affidavit laying existing or planned state policies and Legal framework on Forced Evictions and Demolitions in Kenya within 90 days. The court also directed a meeting to be convened by the Managing Trustees of Kenya Railways Staff Retirement Benefits Scheme together with the petitioners to design a programme of eviction within 21 days and the same be filed in the court within 60 days of the judgment.

The court in *Kepha Omondi Onjuro & others v Attorney General & 5 others*,[113] Justice Odunga also issued a structural interdict on an eviction. This was to the effect that the petitioner to be evicted with the full participation of stakeholders including segment committees, Pamoja Trust, the Social Economics and Geo-Spatial Engineers, Muungano wa Wanavijiji as well as Commissioners from the Kenya National Commission on Human Rights Commission. The respondents were directed to file quarterly reports in court on the progress of the project till further orders of the court.

Justice Odunga *in the Matter of Illegal Demolition of Residential Houses and Business Premises Erected on Ngara Open Air Market Nairobi and in the Matter of Francis N. Kiboro & 198 others* [114], ordered the petitioners to be evicted in the presence of representatives from the Kenya National Commission on Human Rights a civil society operating in Kenya.

In *Ndora Stephen v Minister for Education & 2 others*, the trial court directed the state to provide its policies and programs on the provision of shelter and access to housing for the marginalized groups so that students from the marginalized areas were not discriminated.

The High Court in Mitu-Bell Welfare Society v The Kenya Airports Authority [115], the petitioners, in this case, were the inhabitants of Mitumba Village, situated near Wilson Airport, Nairobi. The respondents placed a notice on the local daily newspaper giving the residents of Mitumba village seven days' notice to vacate the land. The notice also stated that upon the expiry of the 7-day notice there would be a demolition of any buildings, installations or erections therein which happened to leave the petitioners homeless and therefore violating the petitioner's dignity, right to housing and for discriminating against them.[116]

Upon finding that the forceful evictions and demolition without a relocation option was illegal, oppressive and violated the petitioner's rights, Justice Mumbi Ngugi ordered the respondents to compensate the evictees of Mitumba informal settlements which had hosted the 15,323 residents for more than 19 years. The court also ordered the respondent to provide by way of affidavit, the current policies, and programs on the provision of shelter and access to housing for the marginalized groups within 60 days of the judgment. The Respondents were also to furnish copies of such policies and programmes to the Petitioners, relevant state agencies, Pamoja Trust and other civil society organizations with expertise in the area of housing to analyze and comment on the policies and programs. These groups were also to identify an appropriate resolution to the petitioner's grievance and report back to the Court within 90 days of the judgment on the progress made.

This decision of the High Court has been applauded as a progressive one due to its ability to bring into fruition the enforcement of article 43 of the Kenyan Constitution, in particular, the purposive construction of the right to housing and the affirmation of justiciability of socio-economic rights.[117]

4.1.2 The Approach of Court of Appeal of Kenya

The Court of Appeal is established under Article 164 of the Constitution of Kenya 2010. This court is vested with the jurisdiction to hear appeals from the High Court and any other court or tribunal prescribed by an Act of Parliament.[118] The Court of Appeal while exercising its appellate role in *Kenya Airports Authority v Mitu-Bell Welfare Society and two others*[119] had an opportunity to consider the role of the courts in issuing structural interdicts and implementation of judgments.

The court took cognizant of the fact the Constitution enjoins the court to promote alternative dispute resolution including reconciliation, mediation, and arbitration.[120] The Court went on to emphasize that it is imperative that these alternative dispute resolution mechanisms be adopted and effectuated before the judgment.[121] The Court further reiterated that policy formulation is not a province of the courts but is best suited for the legislature and executive.

The Court of Appeal firmly stated that courts should not adjudicate matters that are exclusively political. The Court scolded the trial court for issuing the structural

interdict and termed them as vain orders which cannot be implemented, and they breached the principle of separation of powers. The Court in this instance was of the opinion that courts should exercise self-restraint and discipline when adjudicating on policy matters.

> "We opine that it is advisable for courts to practice self-restraint and discipline in adjudicating government or executive policy issues. This precautionary principle should be exercised before delving and wading into the political arena which is not the province of the courts. Limited to the facts of this case, post-judgment supervision of the implementation of judgments is not a function of a trial court. Implementation and execution of judgments are governed by specific rules, and it is to these rules that resort must be made."[122] (Emphasis added)

The court was not honest in opining that post-judgment supervision of the implementation of judgment is not a function of the trial court since in its obiter it goes on to give a comparative jurisprudence on structural interdict from other progressive constitutional order. The court indeed acknowledged that article 23 (3) gives the High Court the liberty to exercise creativity and innovativeness in formulating an appropriate relief on a case by case basis. The court concluded with the view that structural interdict can be made under Article 23(3) of the Constitution on Kenya 2010 if it is formulated in a manner that avoids vagueness.[123]

The Court of Appeal has since then been under heavy criticism for adopting a parsimonious approach and overturning the sound and progressive ruling from the High Court and thus taking the country back to the dark ages when the courts were only but toothless bulldogs.[124] Inconsistencies profoundly mar the ruling since the court stated that a structural interdict could be issued if adequately formulated to avoid vagueness and yet the basis of the court's rejection is that the remedy is strange and unknown to Kenya since it is not provided for in the Civil Procedure Act and rules. The Court of Appeal ironically castigates the High Court for borrowing the practice of structural interdicts from progressive jurisdictions such as South Africa, India, and Canada. This paper opines that the approach adopted by the Court of Appeal epitomizes the high noon of vagueness since it contemporaneously recognized that it can be issued in Kenya and its use amounts to a delegation of the judicial function.[125]

4.1.3 The Approach of the Supreme Court of Kenya

The Supreme Court is established under Article 163 of the Constitution of Kenya 2010 with the exclusive jurisdiction to hear and determine disputes relating to the elections of the office of President.[126] This Court also has appellate jurisdiction to hear and determine an appeal from the Court of Appeal or any other court or tribunal as prescribed by national legislation.[127] The Supreme Court may give an advisory opinion at the request of the national government, any State organ or

any county government concerning any matter concerning county government.[128] The Supreme Court decisions bind all courts except itself.[129]

The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [130] case concerning the Kenyan move from the analog to digital broadcasting. The petitioners comprising local media houses, Royal Media Services Limited, Nation Media Group Limited and Standard Media Group Limited challenged the legality and constitutionality of Communication Commission of Kenya (CCK) decision to allocate a Broadcast Signal Distribution ("BSD") license to Pan African Network Group Kenya Limited (PANG) a company wholly owned by foreigners.

In determining whether the denial of BSD license amounted to contravention of fundamental of the rights of the local media houses. The Court issued a structural interdict ordering the Communications Authority to consider the application for a BSD license within 90 days and in consultations with the parties to the suit, to set the timelines for the digital migration, pending the international Analogue Switch-off Date of 17th June 2015. CCK was further directed to notify the Court through the registry on the compliance of the court's orders.

4.2. The South African Approach

4.2.1 The Approach of the South African High Court

The South African High Court in *Grootboom v Oostenberg Municipality and others*[131] has identified the inadequacy of one-shot remedies such as declaratory orders and adopted structural interdicts as an appropriate relief as provided for in section 38 of the 1996 South African Constitution.

The High Court in *S v Zuba and 23 similar cases*[132] (*the Zuba* case) identified structural interdicts as the most appropriate remedy to deal with systemic and systematic failures when it comes to the compliance of constitutional obligations as opposed to one shot remedies such as mandamus and damages. These cases before the High Court demonstrated the government's recalcitrant in the sentence implementation of detained juvenile offenders in a reform institution, leading to them being kept under custody in prison and police cells for an unreasonably long time. According to *City of Cape Town v Rudolph and others,*[133] the Courts have resorted to using structural interdicts because they are usually up and against a negligent and recalcitrant government.

The use of structural interdicts by the South African High Court has been animated by the desire to guard the separation of powers doctrine jealously. The court achieves this by giving the executive a wide latitude and liberty to come up with the most appropriate remedy to address the violation.[134] As Mbazira notes, the High Court views the use of structural interdict as a mechanism for preserving

the doctrine of separation of powers.[135] Through the creation of a dialogue space between the Court, government and the civil society structural interdicts bring about accountability and therefore strengthens democracy.[136]

4.2.2 The Approach of the Constitutional Court of South Africa

The South African Constitutional Court identified structural interdict as a tool to remedy constitutional violations. The court stated in *Minister of Health v Treatment Action Campaign (No 2)*[137] that in order to ensure implementation of orders there is need to exercise the supervisory jurisdiction which is an extension of the power to grant a mandatory relief. The court also identified structural interdict *City Council of Pretoria v Walker*[138] as a pragmatic remedy which would ensure that constitutional obligations are adhered to. The Court identified this remedy as the most appropriate in instances where there is a dearth of information before the court and limited expertise on the part of the Court.

The Constitutional Court also identified that a structural interdict should be used in instances of government negligence and recalcitrance. This was held to be so in *Sibiya and others v DPP*[139] (*Sibiya* case) in which the process of substituting death sentences was held to have been unreasonably delayed. The court issued a structural interdict ordering the government to expeditiously take steps to set aside the death sentence and replace it with another appropriate sentence. The Court ordered the government to report back no later than 15 August 2005 on the progress made to comply with the order. This case illustrates the unwillingness of the Constitutional Court to entertain government lackadaisical and lethargic conduct.

In instances in which the government has not been able to act within the stipulated time, the court has shown the willingness to engage the government until full compliance is attained. For instance, in Sibiya case the government filed a report on 12 August instead of 15 August asking for an extension of the time till 15 September 2005. The Court allowed for other several extensions till 1st September 2006 when all the sentences were finally substituted. This illustrates that in order to implement a structural interdict, there is need to embrace consultations between the court and the government.

It is however notable that the Constitutional Court has shown a willingness to issue structural interdicts in civil and political rights compared to socio-economic rights case. The reluctance has been justified because the use of structural interdict could breach the doctrine of separation of powers. The reluctance has led to the setting aside of the decisions made in the Grootboom and TAC in which the High Court had granted structural interdicts. The parsimonious approach adopted by the Constitutional Court has been heavily criticized for curtailing the enforcement of socio-economic rights.[140] The Court has also been castigated for readily availing structural interdicts in civil, political rights and declining to do so in socio-economic rights.

5.0 Norms and Principles in SERs

The Kenyan Court of Appeal and the South African Constitutional Court have been heavily criticized and admonished because of the adoption of a parsimonious approach to the use of structural interdict. The reluctance to use this remedy has worsened the conditions of the poor leading to their further misery and impoverishment due to the inadequacy of declaratory relieves. The approach taken by the Kenyan Court of Appeal stands in sharp contrast with the High Court which has been magnanimous enough in availing this form of relief.

It is apparent that the High Court of Kenya and the South African High Court have adopted a similar jurisprudence in the enforcement of socio-economic rights whereas the Kenyan Court of Appeal and the South African Constitutional Court have occupied the other extreme of the beam balance. As a way of achieving a state of equilibrium and makes the scales balance, it is imperative that the use of structural interdict be dictated by some norms and principles that will be used as the yardstick to ascertain when they are appropriate, just and equitable. Having clear-cut principles and norms as a fulcrum upon which these scales rest will put into rest the jurisprudential wars between the courts and bring some uniformity that will ensure that the plight of the poor is not left in limbo.

One of the principles that should that the courts should employ is ensuring s takeholder participation by involving all those likely to be affected by the outcome of the litigation process. Due to the polycentric interest that characterizes socio-economic litigation, the decrees of the court should be quasi-negotiated by all parties in order to give legitimacy and viability to such decrees. In the case of the government as the defendant, participation will help in reconciling government concerns with its competencies in the provision of these services and secure collaboration with other government departments.[141] There should be a graduated manner in the utilization of structural interdict as a remedy of last resort where the government is given a chance to demonstrate its intended plan and report back to the court.[142]

Judges should also ensure that in the fashioning of structural interdicts the impartiality and the independence of the judiciary is jealously guarded. The concept of judicial independence connotes the conflict resolution by a neutral third party after considering only the facts and their relations to the relevant law.[143] According to Fiss, it includes party detachment and political insularity. Party detachment connotes the idea that disputes should be adjudicated by an umpire who has no relations with the litigants and has no direct interest in the outcome of the case.

On the other hand, political insularity is the notion that judges are not be used as instruments to further a political agenda and that the makeup of the courts should not be altered to engender a political agenda.[144]

Finally, there is a need for the Courts to ensure flexibility in the monitoring and supervision of its decrees. During the implementation stage, the Courts should be flexible enough to craft decrees that are fluid enough to take into account all the interest of stakeholders and allow easy adjustment where the need arises. The flexibility might entail allowing the government to explore other alternatives. This flexibility has been guaranteed in the Kenyan Constitution which prohibits the Court from interfering from the decision of the State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.[145] The detailed nature of structural interdicts makes it imperative that they be framed in a manner which they can be revised.

6.0 Conclusion

In order for the 2010 Constitution to fully realize its transformative nature, it will have to cure systematic and structural problems. This will call for the judges as the guardians of the constitution to deal with the problem of recalcitrance and government lethargy when it comes to compliance with court orders. Structural interdicts will come in hand to address the problem of government inaction and structural problems in the society.[146] This will be attained through ongoing supervision to ensure compliance with constitutional dictates which will put to an end to systematic violations and deter future violations.

As identified, the process of effectuating a structural interdicts involves; the issuance of an order that identifies the constitutional violations and defines the reform to be completed in terms of objectives, the court then calls for a presentation of a plan that would put an end to the violation and finally directing the state defendant to implement the finalized plan and report back to the Court within a prescribed deadline on the state's implementation.

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Constitution of Kenya 2010

General Comments

Preliminarily, the paper seems to be a good one. However, the author can revise and improve it further using the following comments before resubmission for publication:

1. First, you may need to familiarize yourself with the Kenya Law Review Journal editorial style and guidelines. It will help you on the general format of our journal article as well as things like citation of cases. Also the table of contents and bibliography is unnecessary.

2. Second, I am afraid that whereas the paper seems to set out to be discussing, "from rhetoric to reality: a case for structural interdicts in enforcing socio economic rights in Kenya"; by the end of reading the paper in its entirety a lot of questions remain unanswered on its novelty/ originality.

3. The reason for the above is because; it is hard to point out what are the main arguments of the reader. Put the other way round, very little can be attributed to the author. The author's voice is very silent. The reader fails to get what is the rhetoric and the reality from the authors perspective. Instead, the author overly quotes other authors who have written on the subject of socio economic rights and structural interdicts.

4. Third, Related to the above is that, the title of the paper seems to be missing out in tying the findings of the paper with the conclusions

Endnotes

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1. Constitution of Kenya 2010.
2. Ibid Art 10.
3. Ibid.
4. Ibid Art 10, 19(2), 20(4), 27 and 45(3).
5. Ibid Art 43.
6. Countries in which social and economic rights have been litigated and deemed justifiable and justifiable are *inter alia* South Africa, India, Argentina, Bangladesh, Latvia, the Philippines, Venezuela, Finland and Switzerland.See also Mary Ann Glendon, 'Rights in Twentieth-Century Constitutions' (1992) 59 The University of Chicago Law Review 519.
7. Afr. Charter Hum. Peoples' Rts., June 27, 1981, preamble., para. 8, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1982); Proclamation of Tehran, Final Act of the International Conference on Human Rights, May 13, 1968, art. 13, U.N.; see also THE LIMBURG PRINCIPLES ON THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, Jan. 8, 1987, princs. 2-3.
8. Deval Desai, 'Courting Legitimacy: Democratic Agency and the Justiciability of Economic and Social Rights' (2009) 4 Interdisciplinary Journal of Human Rights Law 25.
9. See United Nations Press Release 16th July 2007 available at http://www.unhchr.ch/huricane/huricane.nsf/view01/BAB7C795CD5D6F23C125731B004C4E7B?o> accessed on 10th September 2017.
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11. See, SERAC and CESR v. Nigeria African Commission on Human Rights, Case No. 155/96 and Purohit and Moore v. Gambia, Communication 241/200.
12. See Dilcia Yean and Violeta Bosica v. Dominican Republic, Inter-American Commission on Human Rights, Report 28/01, Case 12.189, 7 December 2005 (involving the rights of the child).
13. 14 Jorge Odir Miranda Cortez et al. v. El Salvador Inter-American Commission on Human Rights, Case 12.249, Report No. 29/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 284 (2000) (admissibility decision dealing with the economic, social and cultural standards enshrined in the OAS Charter).
14. *Autisme-Europe* v. *France*, Complaint No. 13/2002, 7 Nov. 2003, (dealing with the education rights of persons with autism)
15. n8 p 25.
16. Constitution of Kenya (n 1) Art 43.
17. Ibid Art 22.
18. See Ibrahim Songor Osman v Attorney General High Court Constitutional Petition No 2 of 2011 7, and Mitu-Bell Welfare Society V Attorney General High Court of Kenya at Nairobi Petition No 164 of 2011 20-21.

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20. 21 Christopher Mbazira, 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and People's Rights: Twenty Years of Redundancy, Progression and Significant Strides Focus: Twenty Years after the Entry into Force of the African Charter on Human and People's Rights' (2006) 6 African Human Rights Law Journal 333.
21. Ibid 41.
22. Steiner, J., Alston, P and Goodman, R., 2008. *International human rights international in context: law, politics, morals: text and materials*. Oxford University Press, USA.
23. The ideology of human rights gained prominence after the World War 11. The horrors of the war which included the extermination by the Nazi Germany of over six million Jews, Sinti and Romani (gypsies), homosexuals, and persons with disabilities horrified the world.
24. Adopted and proclaimed by General Assembly resolution 217A (III) of December 1948
25. This is because UDHR is not a treaty but a resolution of the assembly which is not subject to ratification
26. http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm
27. Social and Economic Rights Action Centre (SERAC) v Nigeria 2001 AHRLR 60 (ACHPR 2001) (SERAC case) para 44.
28. Ibid, see also Art 21 of the Constitution of Kenya which states that "is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights".
29. Supra 8 paras 45
30. Constitution of Kenya (n 1) Art 21(2).
31. Ibid Art 2(5).
32. Ibid Art 2(6).
33. Ibid Art 41.
34. Petition No 15 of 2011
35. Petition No 94 of 2012 para 12
36. Petition No 164 of 2011 para 15
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41. Convention on the Rights of Persons with Disabilities (2006) (UNCRPD). Signed by Kenya on 30 March 2007 and ratified on 19 May 2008
42. African Charter on Human and Peoples' Rights (1981). Ratified by Kenya on 23 January 1992
43. African Charter on the Rights and Welfare of the Child (1990). Ratified by Kenya on 25 July 2000.
44. Article 21 (2)" The State shall take legislative, policy and other measures, including the setting, to achieve the progressive realisation of the rights guaranteed under

Article "

45. Article 43 provides in a 43(1) that "Every person has the right – (a) to the highest attainable standard of health, which includes the right to healthcare services, including reproductive health; (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and, (f) to education". A 43(2) prohibits the denial of emergency medical treatment; and a 43(3) requires the State to provide social security to persons who are unable to support themselves and their dependants
46. Article 53 (1) Every child has the right (b) to free and compulsory education (c) to basic nutrition, shelter and healthcare
47. Mitra Ebadolahi, 'Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa Note' (2008) 83 New York University Law Review 1565, 2.
48. Ebadolahi (n 47).
49. Constitution of Kenya (n 1) Art 23(3).
50. Ibid Art 23(3)(a).
51. Ibid Art 23(3)(b).
52. Ibid Art 23(3)(c).
53. Ibid Art 23(3)(d).
54. Ibid Art 23(3)(e).
55. Ibid Art 23(3)(f).
56. In any proceedings brought under Article 22, a court may grant appropriate relief, including – (a)...(b)...(c)...(d)...(e)...(f)
57. Emily Ling, 'From Paper Promises to Real Remedies: The Need for the South African Constitutional Court to Adopt Structural Interdicts in Socioeconomic Rights Cases' (2015) 9 Hong Kong Journal of Legal Studies 51, 12.
58. Ebadolahi (n 47).
59. Jonathan Klaaren, 'Judicial Remedies' in Matthew Chaskalson (ed), *Constitutional Law of South Africa* (Juta & Co 1999) 9-2.
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62. Mia Swart, 'Left Out in the Cold - Crafting Constitutional Remedies for the Poorest of the Poor' (2005) 21 South African Journal on Human Rights 215, 13.
63. See Kenya airports authority v Mitu-bell welfare society and 2 others Civil Appeal No. 218 of 2014 at Par 112
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65. See The Supreme Court of India in the case Sheela Barse v Union of India (1988) AIR 2211 (SC) at 221).
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78. Ibid.
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80. Article 10(2) 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.
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82. (No 1) 2002 (5) SA 703 (CC)
83. [2003] 3 SCR 3
84. Ibid
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86. See Wade, H. and Forsyth, C., 2004. *Administrative La*w, 9* ed. P 192
87. Mbazira (n 75) 10.
88. Ibid
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90. 2002 (5) SA 721 (CC).
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94. Constitution of Kenya 2010 (n 1) Art 22(1).
95. Ibid Art 169(1).
96. Ibid Art 23(2).
97. Ibid Art 22(2).
98. Ibid (2)(a).
99. Ibid (2)(b).
100. Ibid (2)(c).
101. Ibid (2)(d).
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103. Constitution of Kenya (n 1) Art 260.
104. Constitution of Kenya 2010 (n 1) Art 22(3)(c).
105. Ibid Art 22(3)(d).
106. Ibid Art 20(3)(b).
107. Ibid Art 20(4)(a).
108. Ibid Art 20(5)(c).
109. Ibid Art 165 (3)(b).
110. Ibid Art 23(1).
111. Petition No 425 of 2015 par 211

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115. HCC Petition No 164 of 2011
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121. Supra 130 par 98.
122. Ibid para 100
123. Ibid para 112
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