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# From constitutional avoidance to the primacy of rights approach to adjudication in Kenya: A case study of the interplay between constitutional rights and the law of contract

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## Abstract

*The Constitution of Kenya of 2010 is a value-oriented normative document. It enshrines values, principles, and rights that are supposed to transform the Kenyan state and society into a democratic and egalitarian direction. Through Article 20(3), the Constitution envisages that all legal rules sourced from statutes, common law, or customary law will be developed to ensure conformity and consistency with its value order. This paper advances the argument that the obligation to develop the law to promote the vision of the Bill of Rights mandates a shift of adjudication and litigation strategy from an approach that places premium on the doctrine of constitutional avoidance to an embrace of a primacy of rights approach to adjudication.*

**Keywords:** constitutional rights, law of contract, constitutional avoidance, rights approach adjudication.

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## 1. Introduction

Hardwired into the DNA of constitutional adjudication and litigation of ‘thin’, regulatory and minimalist constitutions<sup>1</sup> is the notion that a court should not reach out to decide a constitutional issue if it can resolve a case by the application of a statute, the common law, or customary law.<sup>2</sup> The principle of avoidance in constitutional law denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be relied on only as the basis of litigation and adjudication where the lower level institution, norm, principle or remedy, is not available for the resolution of the dispute at hand.<sup>3</sup> Therefore, in the context of adjudication, where it is possible to decide a case without reaching a constitutional issue, courts and litigants ought not to invoke a constitutional norm or value in resolving a dispute.

The Supreme Court of Kenya, followed this traditional road and adopted the principle of constitutional avoidance in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* at paragraphs 256- 258 in the following terms:<sup>4</sup>

The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided *on another basis*. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court [Kentridge J], articulated the principle of avoidance in his minority judgment as follows [at paragraph 59]:

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<sup>1</sup> Lawrence Sager, *Justice in plainclothes: A theory of American constitutional practice*, Yale University Press, 2004, 84-92.

<sup>2</sup> *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another*, Civil Appeal 67 of 2015 Judgement of the Court of Appeal at Mombasa (2016) eKLR; *Ashwander v Tennessee Valley Authority*, 297 US 288 (1936), 345-348.

<sup>3</sup> *My Vote Counts NPC v Speaker of the National Assembly and others*, Judgment of the Constitutional Court of South Africa (CCT121/14) (2015) ZACC, 31; Andrew Nolan, ‘The doctrine of constitutional avoidance: A legal overview’, Congressional Research Service, 2014, 10.

<sup>4</sup> *Communication of Kenya & 5 others v Royal Media Services Limited & 5 others*, Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated) Judgment of the Supreme Court (2014) eKLR 256-258.

*'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'*

Similarly, the US Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936)).

From the foundation of principle well developed in the comparative practice, we hold that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

In effect, while the Constitution is the foundational source of norms and adjudicative co-ordinates, the doctrine of avoidance instructs that it influences the legal system indirectly. Its demand in the adjudication process is extracted from legislation, common law, and customary law. Thus, one must seek recourse in secondary norms first. These considerations yield the norm that a litigant cannot directly invoke the Constitution (through a constitutional petition) to extract a right he or she seeks to enforce without first either predicating the case on a legislation that is a normative derivative of the Constitution, or challenging the constitutionality of such a derivative statute. Once a derivative statute intended to fulfil the normative demands of a constitutional provision has been enacted, the Constitution is relegated to a background role and ceases to be the primary avenue of enforcement of constitutional aspirations and demands. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.

However, the application of this doctrine of constitutional avoidance in Kenya must take into account the Kenyan constitutional context. The 2010 Constitution through Article 20(3)(a) brought a new obligation upon judges when interpreting the Bill of Rights. This provision provides that: '[i]n applying the provision of the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fun-

damental freedom'.<sup>5</sup> The obligation to the courts to develop the law is not discretionary. The courts are under a general obligation to develop the law where it falls short of the standards in the Bill of Rights.<sup>6</sup> Meaning that where a law that is being applied to resolve a particular dispute does not guarantee an outcome reflecting the values embodied in the Bill of Rights, then the values that underpin the Bill of Rights ought to be integrated into the subject non-constitutional law intermediary norm and guide the development of the norm. Such a norm will thereafter be applied to resolve the dispute in a transformed form.

In effect, in contrast to the approach of constitutional avoidance that advises courts to refrain from applying constitutional values and norms in disputes, the commitment to constitutional justice in Article 20(3) of the Constitution encourages proactive invocation of the normative standards in the constitution in resolving legal disputes. This approach of primacy of rights to adjudication imposes an obligation on courts to actively or enthusiastically use the values of the Bill of Rights in the resolution of disputes.

It is the tension between the doctrine of constitutional avoidance and the primacy of a rights approach to adjudication as envisaged in Articles 20(3) of the Constitution that is the concern of this commentary. After this introductory section, the second section interrogates the application and limits of the doctrine of constitutional avoidance in Kenya. This section interrogates the implications of the primacy of rights approach envisaged by Article 20(3) to adjudication in Kenya. The third section is an empirical section that uses the interface of the law of contract and constitutional rights as the looking glass to analyse the implication of a primacy of rights approach to the doctrine of constitutional avoidance. The fourth section is a critical analysis of the emerging Kenyan jurisprudence in the post-2010 era on the application of the doctrine

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<sup>5</sup> Constitution of Kenya (2010), Article 20(3).

<sup>6</sup> Willy Mutunga, 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions', 1 *Speculum Juris* (2015) 6; Brian Sang, 'The reach of the bill of rights into personal legal relations in Kenyan constitutional law and jurisprudence' 16(2) *Oxford University Commonwealth Law Journal* (2016) 235-261.

of avoidance in disputes emerging from contractual relationships. The last section gives the conclusion and the lessons from the study.

## 2. Constitutional avoidance and its limits

Ian Currie argues that courts should avoid making pronouncements on the meaning of the Constitution where it is not necessary to do so, so as to leave space for the legislature to undertake its role of constitutional implementation from the prism of the institution's independent appreciation of the demands of the Constitution.<sup>7</sup> Once such a response finds expression in legislation, the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so. This reflects the principle's rationale, which is the cooperation that the courts, under the separation of powers, owe a fellow actor that is striving to give life to constitutional obligations. Given that the role of implementation of the aspirations and demands of the Constitution is a shared function, institutional comity requires the courts to respect the legislature's work in trying to bring constitutional aspirations to life. The legislature's constitutional implementation mandate through its legislative work must be treated with deference – and the courts should not, therefore, allow litigants to 'circumvent' or 'bypass' that legislation.

Thus the three-fold rationale of the doctrine of constitutional avoidance is that: First, allowing a litigant to invoke and premise his or her case on a constitutional provision directly, instead of the derivative statute would thwart the constitutional implementation function served by statutes. Second, institutional comity arising from the shared constitutional role of the legislature and the courts demands judicial deference to parliament's role in constitutional implementation. Third, allowing reliance directly on constitutional provisions, in defiance of their normative derivatives, would encourage the development of 'two parallel systems of law'.

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<sup>7</sup> Ian Currie, 'Judicious avoidance' 15(2) *South African Journal on Human Rights* (1999) 138-165.

However, it should be noted that the principle that constitutional issues should be avoided is not an absolute rule. It does not require that litigants may only invoke the Constitution as a last resort. Just like all legal principles, context is a key imperative and circumstances of the case at hand will dictate the applicability of the doctrine of avoidance. In instances where a palpable, direct and clear violation of the Constitution is evident, and non-constitutional relief is not readily apparent, the dispute ought to be resolved through the direct application of constitutional norms. An overly cautious attitude, comfortable with directing most litigants to statutory remedies, might abdicate the court's obligation to protect and promote the values that underpin the Bill of Rights.

On its face, this salutary rule of constitutional avoidance seems unobjectionable. However, misgivings have been expressed as to the propriety of a full-blown deployment of this approach with some scholars arguing that it 'wastes away rights'. Stu Woolman, for instance, has argued that the avoidance approach has deleterious consequences as it undermines the bill of rights and the rule of law.<sup>8</sup> Woolman notes that a muscular maximalist approach could play the role of infusing the values that underpin the bill of rights in the legal system.

Similarly, Karl Klare calls for caution in adoption of the avoidance approach as it relies upon the deceptively simple but under-examined and ambiguous notion of a statute 'giving effect' to a constitutional right. When parliament 'gives effect' to a constitutional right, it may task itself with giving the right an enforceable floor of protections and implementations.<sup>9</sup> In practice, 'it may also erect a ceiling and walls around the right'. At a certain point, 'giving effect' to a constitutional right slides into defining the right by setting out its metes and bounds. The 'effect giving' statute may water down the nature of the right as envisaged in the Constitution. Avoidance thus raises the question of whether and to what extent the courts are confined within the houses that parliament

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<sup>8</sup> Stu Woolman, 'The amazing, vanishing bill of rights' 124 *South African Law Journal* (2007) 762-794.

<sup>9</sup> Karl Klare 'Legal subsidiarity and constitutional rights: A reply to AJ van der Walt' 1 *Constitutional Court Review* (2008) 129-154.

builds. Consequently, the constitutional adequacy of the relief afforded by an 'effect giving' statute is a constitutional law problem that courts must decide. Therefore, a litigant can attack the legislation saying that it falls short of a standard embodied in the Constitution itself. That, indeed, is the essence of constitutionalism: it allows all legislation to be subjected to constitutional scrutiny. Meaning that a litigant is free to test whether a derivative legislation meets the constitutional implementation obligation imposed on the legislature.

In cases where deficient 'effect giving' laws cannot be developed to give effect to the Bill of Rights then courts should not invoke the avoidance approach. Thus, a court should adopt the avoidance approach only where referring a litigant to statutory or common law remedies is outcome - neutral *vis-à-vis* the Constitution. On outcome-neutrality, Robert Alexy notes that two juridical constructions are outcome-neutral if every outcome which could be achieved in the context of one could also be achieved in the context of the other.<sup>10</sup>

## 2.1 The 2010 Constitution as a 'total' constitution: Primacy of rights approach to adjudication

The 2010 Constitution has been described as a 'thick' Constitution that is impregnated with values and principles beyond constitutional rules.<sup>11</sup> It creates a value system (order) that must inform and guide all state and societal actions. This implies that the value order created by the Constitution and (the Bill of Rights) provides the general normative standards - even if stated in terms of abstract principles and values - for the resolution of all legal and political conflicts that occur within the constitutional system. The Constitution has a 'pervasive' reach to all areas of legal conflict.

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<sup>10</sup> Robert Alexy and Julian Rivers, *A theory of constitutional rights*, Oxford University Press, 2002, 357.

<sup>11</sup> Walter Khobe, 'The jurisdictional remit of the Supreme Court over questions involving the interpretation and application of the Constitution' 5(1) *Kabarak Journal of Law and Ethics* (2020) 3-5.

Justice JB Ojwang poignantly captured this expectation in *Luka Kitumbi and 8 Others vs Commissioner of Mines and Geology and Another* thus:

...the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralised (presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary. It will not be possible, I think, for the Judiciary to determine causes such as the instant one, without beginning from the pillars erected by the Constitution of Kenya, 2010.<sup>12</sup>

This approach underscores the difference between seeing a constitution as a value-impregnated document representing a society's core values as is expected by the 2010 Constitution rather than as a formal delineation of authority and power relationships as it was under the earlier constitutions or constitutions in other jurisdictions. Value-oriented adjudication responds to legal claims in a way fitting the overall ethical aspiration instantiated in the constitution. This is in contrast to a classical liberal or textual reading which applies a minimalist textual approach.

Crucial to the question of application of the Constitution in the Kenyan context is the revolution in adjudication envisaged in Article 20(3) of the Constitution. The provision is the 'golden key' for unlocking the transformation of Kenya's legal system, although it has gone relatively unnoticed and unexamined by the courts – with a few outliers as will be shown in section three of this study. Article 20(3) of the Constitution demands that constitutional rights norms 'radiate' into all areas of the legal system.<sup>13</sup> The obligation imposed by Article 20(3)(a) encompasses

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<sup>12</sup> *Luka Kitumbi and 8 Others v Commissioner of Mines and Geology and Another*, Civil Case 190 of 2010, Judgment of the High Court at Mombasa, eKLR (2010); German Federal Constitutional Court in *Lüth Decision* BVerfGE 7, 198 I. Senate (1 BvR 400/51); *Carmichele v Minister of Safety and Security*, Judgment of the Constitutional Court of South African, (CCT 48/00) 2001 (4) SA 938 (CC).

<sup>13</sup> Willy Mutunga, 'Human rights states and societies: A reflection from Kenya', 2 *Transnational Human Rights Review* (2015) 63, 82.

two branches of inquiry. One inquiry involves considering whether the existing laws (common, statutory and customary) match up to constitutional objectives. The other inquiry involves a determination of how the law is to be developed to meet constitutional objectives, if it falls short of them.<sup>14</sup> Thus, the central inquiry in adjudication in the post-2010 dispensation is this: whether the outcome that results from an application of the law as it stands is consistent with the demands of the Constitution. If that outcome is at odds with the constitutional scheme, then the law must be developed.

Following from this, for example, in any tort action requiring an assessment of 'negligence', a court must determine what is 'negligent' by reference to the overall scheme of the Bill of Rights. In the context of the tort of defamation, freedom of expression, for example, is not just a right of an individual against the state, but a value or principle that gives impulses and provides guidelines to all areas of law to which it is relevant. As such, it has implications for such questions as whether an individual can recover tort damages against another for having been subject to defamation. Another example would be in the area of the law of contracts. Courts are expected to use the traditional common law vehicle of public policy to import the egalitarian values of the Constitution. When a court is considering whether a particular contractual provision is contrary to public policy, this must be informed by the value order envisaged in the Bill of Rights as demanded by Article 20(3) of the Constitution. Similarly, when a court is faced with having to interpret a particular piece of legislation, it is mandated to give that legislation an interpretation which is consistent with constitutional values. The point being canvassed is that judges in all cases stand at all times under active obligation to consider whether claims and defences pleaded before

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<sup>14</sup> Walter Khobe, 'Separation of powers in judicial enforcement of governmental ethics in Kenya and South Africa' 1 *Kabarak Journal of Law and Ethics* (2018) 37-63; Drucilla Cornell and Nick Friedman, *The mandate of dignity: Ronald Dworkin, revolutionary constitutionalism and the claims of justice*, Fordham University Press, 2016, 49; Frank Michelman, 'The Bill of Rights, the common law, and the freedom-friendly state' 58 *University of Miami Law Review* (2003) 421.

them would, indeed, be authorised by legal doctrine if duly ‘developed’ in the manner called for by Article 20(3) of the Constitution.

In essence, to borrow from Ernst Forsthoff, a value-oriented constitution ‘functions as a kind of juridical genome that contains the DNA for the development of the whole legal system’.<sup>15</sup> In simple terms, Article 20(3) of the Constitution demands that judges radiate the values and principles of the Constitution to all disputes including private law disputes: the Constitution thus has a total reach to the whole legal system.

The Kenyan courts’ reluctance to deploy Article 20(3) of the Constitution to develop the law is illustrated by the difference between the majority judges of the Supreme Court and Chief Justice (retired) Willy Mutunga in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*.<sup>16</sup> In that case, the majority of the Supreme Court judges held that they could use the common law doctrine of judicial notice and the provisions of the Evidence Act to adjudicate on a concern by a party that had been brought to the attention of the Court through a letter addressed to the Chief Justice after the close of the hearing when the court had retired to write the judgment. However, Chief Justice Mutunga held that given that parties had not addressed the Court on the subject concerns, it would violate the right to equality and fair hearing to adjudicate on the subject concern brought to the attention of the Court by one party to the dispute. In pushing back on the majority’s use of the common law doctrine of judicial notice and the Evidence Act as the justification for their approach, Chief Justice Mutunga observed thus:<sup>17</sup>

By invoking the rule of common law of judicial notice and the provisions of the Evidence Act, the Bench majority failed to develop both the principle and the provisions of a statute to the extent that both do not give effect to the Articles of the Constitution stated. The provisions of Article 20(3)(a) and (b) have, indeed,

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<sup>15</sup> Mattias Kumm, ‘Who’s afraid of the total constitution?’ in Agustín J Menéndez and Erik O Eriksen (eds) *Arguing fundamental rights*, 2006, 113-115.

<sup>16</sup> *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, Application 16 of 2014, Ruling of the Supreme Court eKLR (2015).

<sup>17</sup> *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, Application 16 of 2014, Ruling of the Supreme Court eKLR (2015), para 87.

torn away the last shreds of that perhaps comforting illusion, especially in the context of human rights, that judges in the common law system do not make law. As I read these provisions they mean that if any existing rule of common law does not adequately comply with the Bill of Rights, the court has the obligation to develop the rule so that it does comply. Additionally, the court has the obligation to interpret statute in a way that also complies with the Bill of Rights.

The import of the obligation to develop the law in Article 20(3) of the Constitution is that it imposes an obligation on judges to develop the law (statutory, common and customary) in the general direction indicated by the transforming goals set out in the Constitution whenever courts vindicate rights under 'effect giving' statutes, common law, or customary law.<sup>18</sup> The Constitution envisages that all law must undergo correction under the constitutional lash. To ensure the speedy uptake of its transformative purposes, the Constitution places a duty on each judge to consider whether the law he or she is applying is constitutionally compliant, whether compliance is specifically raised by the parties or not.<sup>19</sup> That is the radical and powerful moment of Article 20(3) of the Constitution that judges must embrace.

It is Article 20(3) of the Constitution that reposes the promise of transformative adjudication in the transformative dispensation. Far from avoiding constitutional issues whenever possible, this provision demands that virtually all legal issues – including the interpretation and application of legislation and the common law and customary law – are, ultimately, constitutional. This is so because the Constitution's rights and values give shape and colour to all law. The Constitution embodies a direction-giving purpose: different value systems are recognised (as embodied in the common, customary and statutory law), but they all work towards an open society built on democracy, social justice, accountability and fundamental rights to human dignity, equality and freedom. In effect, the Constitution 'applies indirectly to all disputes'

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<sup>18</sup> Roux, 'Continuity and change in a transforming legal order: The impact of Section 26(3) of the Constitution on South African law' 121 *South African Law Journal* (2004) 466.

<sup>19</sup> Edwin Cameron, 'The transition to democracy: Constitutional norms and constitutional reasoning in legal and judicial practice' 2(1) *South African Judicial Education Journal* (2019) 12.

be they disputes based on the common law or statutory law by dint of Article 20(3) of the Constitution thus the trump of primacy of constitutional rights approach over constitutional avoidance approach in the transformative era.

One of the institutional consequences of Article 20(3) mandate is that the allegiance that judges owe to the new legal order and the new mandate that recognises that constitutional values maintain hegemony over prior common law norms, means that on occasion, High Court judges have the mandate to overrule appellate court precedent where these common law precedent were enunciated in the pre-2010 dispensation, or where in enunciating the same in the post-2010 era, the higher courts did not take into account or grapple with constitutional values. Justice JB Ojwang' in *Luka Kitumbi and 8 Others v Commissioner of Mines and Geology and Another*,<sup>20</sup> made this point thus:

It is not, however, apparent today, that such provisions can be said to be an exception to the principles of good governance ordained by the new Constitution – even though they be endorsed by case law of the past (for instance, *Kasigau Ranching Ltd v John Gitonga Kihara and four others*, Civil Application No 105 of 1998). The fact of there being existing authority endorsing the 'pre-Constitution' apprehension of the law, will dictate that a dependable professional establishment should begin to collate all decisions of the superior courts, particularly those of the Court of Appeal, for the purpose of reconsideration and new directions, in view of the functioning of the law relating to precedent.

That is to say if the spirit, purport, and objects of the Bill of Rights and the basic values underlying the Constitution are in conflict with the public policy expressed and applied in precedent, then the values underlying the Constitution must prevail – thus lower courts must overrule them.<sup>21</sup>

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<sup>20</sup> *Luka Kitumbi and 8 Others v Commissioner of Mines and Geology and Another*, Civil Case 190 of 2010, Judgment of the High Court at Mombasa, eKLR (2010).

<sup>21</sup> Ziona Tanzer, 'Social norms and constitutional transformation: Tracing the decline of the application distinction in South Africa' 9(3) *Washington University Global Studies Law Review* (2010) 478.

### **3. A case study of the interplay between the law of contract and the Bill of Rights**

This section interrogates the approach adopted by the High Court in four cases where it was alleged that the substratum of the suits were contractual disputes suitable for resolution through the interpretation and application of statutes and the common law. These are cases where Kenyan courts have embraced the primacy of rights approach to adjudication and declined to follow an approach of constitutional avoidance.

#### **3.1 *CIS v Directors, Crawford International School & 3 others*<sup>22</sup>**

The 1<sup>st</sup> and 2<sup>nd</sup> respondents introduced an e-learning programme following closure of schools by the Government as a result of the Covid-19 pandemic. The petitioners alleged violation of their constitutional rights and those of their children through the introduction of the e-learning programme arguing, among others, that at the time of admission of their children, there were various subjects and activities that were non-examinable, such as sports, which were not included in the e-learning program yet the 1<sup>st</sup> and 2<sup>nd</sup> respondents continued to levy full fees and that the charging of full fees was unfair, unconscionable and unlawful and contravened their consumer rights protected under Article 46 of the Constitution. They also alleged that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had irredeemably failed to offer educational services with reasonable care and skill.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the petition arguing that it was incompetent, given that the petitioners' claim was premised on alleged breach of contract and they had failed to demonstrate that overriding constitutional questions arose in the dispute beyond the contractual questions which to them were commercial law issues. The 3<sup>rd</sup> respondent opposed the petition on grounds that issues raised in the petition

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<sup>22</sup> *CIS v Directors, Crawford International School & 3 others*, Petition 162 of 2020, Judgment of the High Court at Nairobi (2020) eKLR.

arose from contractual obligations between private parties and formed a subject matter for litigation in an ordinary civil suit.

The High Court (Weldon Korir J) held that it is true that litigants ought to be discouraged from using constitutional petitions to prosecute matters which could be pursued through other statutory procedures. The Constitution was to be resorted to only when it was necessary to do so. Otherwise, disputes ought to be decided within the boundaries of the procedures provided by the statutes applicable to those disputes.<sup>23</sup>

However, the High Court held that despite the fact that at the core of the instant matter was the claim by the petitioners that the 1<sup>st</sup> and 2<sup>nd</sup> respondents breached the contracts entered between the 2<sup>nd</sup> respondent and petitioners for provision of education services, the matter would not be fully resolved by the determination of the contractual dispute. This was so given that the petitioners had also alleged violation of their consumer rights by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. In the Court's view, both statutory and constitutional remedies were applicable to the questions arising in the suit.<sup>24</sup> This was more so given the centrality of allegations around the violation of the right to education and the constitutional principle of the best interests of the child. Crucially, the Court found that although the issues placed before the Court arose from contractual relationships, they also called for the interpretation of the Constitution.

The High Court also pointed out that the question of 'outcome neutrality' was important in deciding whether the Court would decline jurisdiction. In the Court's view, the petition also raised the question as to whether state agencies had failed to discharge constitutional and statutory responsibilities. The orders sought against the state agencies could only be pursued through a constitutional petition.<sup>25</sup> Thus, the matter was one of those cases in which the court was required to handle the matter as a constitutional petition since the other available remedies

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<sup>23</sup> *CIS v Directors, Crawford International School & 3 others*, para 92-93.

<sup>24</sup> *CIS v Directors, Crawford International School & 3 others*, para 94; *BPA v Directors, Brookhouse Schools & 3 others; DPGT (Proposed Interested Party)*, Petition 143 of 2020, Judgment of the High Court at Nairobi (2020) eKLR para 146.

<sup>25</sup> *CIS v Directors, Crawford International School & 3 others*, para 95-96.

could not be adequate. It was thus held that courts ought not sheath the constitutional sword if the other available remedies were inadequate. A litigant was not to be cast into the wilderness and left bereft of remedy. Given the constitutional command that adjudication ought to be focused on rendering substantive justice, litigants should not be sent empty handed from the seat of justice. A contrary approach would in the court's view thwart the constitutional command that courts ought to render justice to litigants. In the circumstances, there was no basis established to warrant the declining of jurisdiction by the court.

In addition, the High Court observed that the rights of consumers found firm root in Article 46 of the Constitution. This provision had a wide reach that imposed obligations on both private persons and public entities offering goods and services to consumers. The implication is that the Constitution regulated and had direct ramification for contractual relations between private persons. Moreover, in the Court's view, there were certain situations where courts would interfere with a bargain between parties. In the interest of justice and fairness, constitutional values needed to be infused into such transactions between private individuals in such circumstances. The strong party in a contractual relationship ought not be allowed to steamroll over the weaker party. That was in line with the 'prevailing jurisprudential trajectory that required constitutional values to be infused into contracts'.<sup>26</sup> In essence, the arrival of the 2010 Constitution had shifted the ground as seen from the prism of constitutional entrenchment of Article 46 of the Constitution and enactment of the derivative statute the Consumer Protection Act.

The High Court proceeded to find that courts had authority to infuse fairness in unconscionable contracts. All contractual agreements between private parties were governed by the principle of *pacta sunt servanda*, unless they offended public policy. Where it was alleged that constitutional values or rights were implicated, public policy had to be determined by reference to the values embedded in the Constitution, including notions of fairness, justice and reasonableness. The application of public policy in determining the unconscionableness of contractual

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<sup>26</sup> *CIS v Directors, Crawford International School & 3 others*, para 107.

terms and their enforcement had, where constitutional values or rights were implicated, be done in accordance with notions of fairness, justice and equity, and reasonableness could not be separated from public policy. Public policy took into consideration the necessity to do simple justice between individuals. What public policy was, and whether a term in a contract was contrary to public policy, had to be determined by reference to constitutional values.<sup>27</sup> That left space for enforcing agreed bargains (*pacta sunt seroanda*), but at the same time allowed courts to decline to enforce particular contractual terms that were in conflict with public policy, as informed by constitutional values, even though the parties would have consented to them.

### 3.2 *OAPA v Oshwal Education Relief Board & 2 others*<sup>28</sup>

The petitioners were parents and guardians of student minors schooling at Oshwal Academy. They moved to court to challenge on-line classes introduced by the 1<sup>st</sup> respondent, following the closure of Kenyan schools in March 2020 as a result of the Covid-19 pandemic. The petitioners complained that the e-learning programme imposed additional costs on parents or guardians, required constant supervision of students by parents or guardians, thus was financially burdensome. They also complained that the 1<sup>st</sup> respondent unilaterally shifted to e-learning without conducting the requisite consultations and obtaining the concurrence of stakeholders. Lastly, the petitioners complained that the 1<sup>st</sup> respondent continued to impose the school fee that was applicable for the in-person physical schooling and had unreasonably failed or refused to reduce the school fees.

The petitioners moved to the High Court alleging that the 1<sup>st</sup> respondent had violated the contractual relationship that existed between the parents/guardians and the school. They alleged that the 1<sup>st</sup> respondent-

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<sup>27</sup> *CIS v Directors, Crawford International School & 3 others*, para 109-111.

<sup>28</sup> *OAPA (suing as parents and/or guardians of student minors currently schooling at Oshwal Academy) v Oshwal Education Relief Board & 2 others*, Petition 158 of 2020, Judgment of the High Court at Nairobi (2020) eKLR.

ent had violated their consumer rights. This was so, they argued, owing to the existence of a contractual relationship, which the 1<sup>st</sup> respondent had violated by failing to give them the information they needed in order to make informed decisions. In their view, the contract between the parties was binding on both parties and any changes, such as changes in the teaching method, would need the express consent of the parents.

As would be expected, the respondents objected to the competence of the suit contending that the underlying dispute concerned an alleged breach of private contracts, which is not a constitutional issue and ought to be litigated and resolved in the commercial court in an ordinary civil suit. It was the respondents' contention that due to the existence of contractual relationships for provision of education and related services between the petitioners and the 1<sup>st</sup> respondent, the issues fell within the realm of private service contracts capable of being determined under the alternative existing mechanism for redress in civil law. They asserted that a contractual relationship, like the one between the petitioners and Oshwal Academy, is governed by the Law of Contract Act, the Consumer Protection Act and other statutory provisions. They therefore urged the Court to dismiss the petition on the ground that it was not fit for resolution through a constitutional petition due to the doctrine of constitutional avoidance.

The High Court (Weldon Korir J) in resolving the question as to whether it had jurisdiction to decide the petition as a constitutional cause in view of the doctrine of constitutional avoidance, held that it was in agreement with the respondents that the core issue in the petition was the alleged breach of the contracts entered between the 1<sup>st</sup> respondent and the petitioners for the provision of education services at a fee. However, the Court declined to abdicate jurisdiction in the matter given that in its view, the matter would not be resolved without considering the merit of the claim that the petitioners' consumer rights and the right to basic education for the petitioners' children had been violated.<sup>29</sup> Moreover, given that the petitioners had alleged that the impugned decision of the 1<sup>st</sup> respondent negated the declaration by the Constitution

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<sup>29</sup> *OAPA v Oshwal Education Relief Board & 2 others*, para 12 & 54.

that a child's best interests are of paramount importance in every matter concerning the child, the Court was of the view that constitutional issues raised in their petition took a higher pedestal as the Court is called upon to apply and interpret the Constitution.<sup>30</sup> Crucially, the Court invoked the 'outcome neutrality' argument to argue that redress through other litigation processes may not provide an adequate remedy, if any, to the petitioners.<sup>31</sup> The objection by the respondents to the petition on the grounds that it did not raise constitutional issues therefore failed.

The Court proceeded to find that a sense of fairness should be infused into transactions between private persons. The strong party in a contractual relationship should not be allowed to steamroll over the weaker party. This approach is faithful to the constitutional obligation to infuse constitutional values into contractual relations.<sup>32</sup>

### **3.3 *GAM & 2 others v Registered Trustees of the Shree Cutch Satsang Swaminarayan Temple Charitable Trust & another*<sup>33</sup>**

The petitioners were parents of pupils who were learners at the 2<sup>nd</sup> respondent, an educational institution. The 1<sup>st</sup> respondent was a registered trustee that owns and manages the 2<sup>nd</sup> respondent. The petitioners' case was that following the outbreak of the Covid-19 pandemic, the government of Kenya ordered the closure of all educational institutions for in-person learning in March 2020. In response to the ban on in-person learning, the respondents shifted to home-based e-learning. However, this shift in mode of learning led to agitation by a section of parents who demanded for a reduction in school fees by 50% on the basis that the pandemic had led to job losses by parents, the e-learning experience was not of the same quality as the in-person

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<sup>30</sup> *OAPA v Oshwal Education Relief Board & 2 others*, para 55.

<sup>31</sup> *OAPA v Oshwal Education Relief Board & 2 others*, para 55.

<sup>32</sup> *OAPA v Oshwal Education Relief Board & 2 others*, para 63.

<sup>33</sup> *GAM & 2 others v Registered Trustees of the Shree Cutch Satsang Swaminarayan Temple Charitable Trust & another*, Constitutional Petition 41 of 2010, Judgment of the High Court at Mombasa, (2020) eKLR.

physical learning, and that the process leading to the adoption of the e-learning method of instruction had not been consultative.

As the parties were unable to resolve their differences, the petitioners moved to court alleging violation of their rights by the respondents. The gist of the petition was to the effect that the respondents had unprocedurally commenced offering education services through a platform not contemplated by the consumer agreements between the parties, and had unilaterally altered the consumer agreements between them and the petitioners to the latter's detriment. The petitioners alleged the violation of their consumer rights, right to fair administrative action, equality and freedom from discrimination, human dignity, and economic and social rights.

It was the respondents' case that the question of fees and terms of engagement between the school and parents for the provision of educational services to the children is a contractual matter and one, which falls outside the ambit of a constitutional petition in the nature before the Court. Moreover, they argued that the court could not re-write contracts between parties as sought by the petitioners. The respondents argued that the petitioners had acknowledged the nature of relationship between the parties as being contractual. Thus the said acknowledgment itself removes the matter from the constitutional perspective to contractual or commercial realm, in which case, the court lacks the requisite jurisdiction to entertain the matter as a constitutional matter.

The High Court (Eric Ogolla J) held that by virtue of Article 165(3) (d) of the Constitution, the High Court had the jurisdiction to determine all matters where it could be argued that there was a risk of right or fundamental freedom being violated. The Court observed that it is merely required to weigh the probability of such eventuality happening for it to assume jurisdiction.<sup>34</sup> It emphasised that the fact that the matter was based on contractual relationship had no bite as to whether the court should assume jurisdiction or not.<sup>35</sup> Based on this reasoning the court

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<sup>34</sup> *GAM & 2 others v Registered Trustees of the Shree Cutch Satsang Swaminarayan Temple*, para 51.

<sup>35</sup> *GAM & 2 others v Registered Trustees of the Shree Cutch Satsang Swaminarayan Temple*, para 52.

assumed the jurisdiction to determine the merit of the alleged infringement of fundamental rights and freedoms.

#### 2.4 *Alan E Donovan v Kenya Power and Lighting Company*<sup>36</sup>

The petitioner filed a constitutional petition alleging that the respondent had demanded payment of electric power bills that were inflated and erroneous. He claimed that the respondent's demand for settlement of the impugned electricity bills and subsequent disconnection of power supply to his premises for non-payment of the disputed bills amounted to a violation of his constitutional right to goods and services of reasonable quality as protected by Article 46 of the Constitution on consumer rights.<sup>37</sup>

As would be expected, the respondent raised a constitutional avoidance doctrine objection to the High Court's assumption of jurisdiction over the petition.<sup>38</sup> It argued that the dispute did not raise a 'purely' constitutional issue that would clothe the High Court with the jurisdiction to determine the dispute. It proceeded to contend that pursuant to doctrine of constitutional avoidance, the dispute ought to have been resolved under the statutory regime governing the billing of electric power supply. It was the respondent's position that the dispute did not raise any constitutional issues that would warrant the invocation of the Bill of Rights to resolve.

The High Court (James Makau J) dismissed the objection to the court's assumption of jurisdiction in the petition.<sup>39</sup> The Court was of the view that given that Article 46 of the Constitution guaranteed consumers 'the right to goods and services of reasonable quality and to gain full benefit from goods and services', the Court had the duty to determine an allegation that these rights were infringed. Pointedly, the Court not-

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<sup>36</sup> *Alan E Donovan v Kenya Power & Lighting Company*, Petition 309 of 2018, Judgment of the High Court at Nairobi, (2021) eKLR.

<sup>37</sup> *Alan E Donovan v Kenya Power & Lighting Company*, para 4-6.

<sup>38</sup> *Alan E Donovan v Kenya Power & Lighting Company*, para 10-13.

<sup>39</sup> *Alan E Donovan v Kenya Power & Lighting Company*, para 14-16.

ed that the values and principles of national governance enshrined in Article 10 of the Constitution, like rule of law, human rights, human dignity, transparency, and accountability, bind the respondent as it was a dominant market player. Thus, the Court had a duty to enforce them.<sup>40</sup> In addition, the Court was of the view that pursuant to Article 20(3) of the Constitution it had the obligation to develop and interpret the law in a manner that infuses the values that underpin the Bill of Rights in all disputes hence the doctrine of avoidance was inapplicable in the dispute.<sup>41</sup> This provided the foundation for the High Court to determine the petition on merit.

#### **4. Critical analysis of the emerging approach to the doctrine of constitutional avoidance in contractual disputes**

The High Court in the four cases under study indicates that constitutional rights and values are crucial in determining questions as to the enforceability and breach of contracts in the post-2010 dispensation. Thus, in applying and interpreting the law of contract, courts should take into account constitutional values and rights. The point is that the Constitution and particularly the Bill of Rights have an expansive reach to the private sphere including contractual relationships. An approach that eschews engagement with constitutional rights through an emphasis on the doctrine of constitutional avoidance will result in courts not infusing constitutional values and rights in contractual relationships.

In the pre-2010 dispensation, Kenyan courts adhered to the doctrine of constitutional avoidance and did not see it as part of their duty to apply constitutional rights to disputes they deemed to fall within the realm of private law.<sup>42</sup> For example, in *Kenya Bus Services Ltd & 2 others*

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<sup>40</sup> *Alan E Donovan v Kenya Power & Lighting Company*, para 35-36.

<sup>41</sup> *Alan E Donovan v Kenya Power & Lighting Company*, para 38.

<sup>42</sup> Jill Cottrell Ghai, 'Kenya: Constitution, common law and statute in vindication of rights' in Ekaterina Aristova, and Uglješa Grušić (eds) *Civil remedies and human rights in flux*, 2022, 225-244.

*v Attorney General & 2 others*<sup>43</sup> the High Court held that the petitioners could not invoke constitutional rights in a dispute with creditors given that in the Court's view, such matters fall exclusively within the realm of private law. This approach would work against the goal of imbuing the legal system with the ideals and aspirations that underpin the Bill of Rights. It would mean that the realm of private relations, like contractual relations, are immunised from the conforming to the normative standards articulated in the Bill of Rights.

In contractual relationships, constitutional values and rights ought to play a role similar to that traditionally recognised under the common law where courts had the mandate to interfere with contractual agreements where such contracts were deemed to go against public policy or were either borne out of unconscionable bargains or inequality of bargaining power. For example, the English case of *Fry v Lane*,<sup>44</sup> which involved sales by 'poor and ignorant' persons at considerable undervalued rates and without independent advice is a foundational case examining unconscionable bargains and inequality of bargaining power. In this case, Kay J held that a court of equity could set aside the sale in those circumstances. He said:

The result of the decision is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction... The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was 'fair, just, and reasonable.'<sup>45</sup>

Lord Denning succinctly laid down the proposition in the case of *Lloyds Bank Ltd v Bundy*<sup>46</sup> when he said that:

... the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously

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<sup>43</sup> *Kenya Bus Services Ltd & 2 others v Attorney General & 2 others*, Misc Civil Suit 413 of 2005, Ruling of the High Court at Nairobi (2005) eKLR.

<sup>44</sup> *Fry v Lane* [1885] 40 ChD 312.

<sup>45</sup> *Fry v Lane*.

<sup>46</sup> *Lloyds Bank Ltd v Bundy* [1975] QB 326.

impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.<sup>47</sup>

In a similar fashion, *Clifford Davis Management Ltd v Wea Records Ltd*<sup>48</sup> held that there is a presumption of invalidity where an agreement, bargained between parties with unequal bargaining power and no independent legal advice, has terms that are manifestly unfair. This is the rule in many common law jurisdictions.<sup>49</sup>

Kenyan courts have also set similar requirements for a claimant to succeed on the basis of unconscionable bargains or inequality of bargaining powers. In *LTI Kisii Safari Inns Ltd and Others v Deutsche Investitions-Und Entwicklungsgesellschaft ('Deg') and Others*,<sup>50</sup> the Court of Appeal of Kenya stated that:

This is also an equitable doctrine. There are at least three prerequisites to the application of a doctrine, firstly, that the bargain must be oppressive to the extent that the very terms of the bargain reveals conduct which shocks the conscience of the court. Secondly, that the victim must have been suffering from certain types of bargaining weakness, and, thirdly, the stronger party must have acted unconscionably in the sense of having knowingly taken advantage of the victim to the extent that behaviour of the stronger party is morally reprehensible.<sup>51</sup>

The change brought by the 2010 Constitution is that Article 20(3) envisages that that the Bill of Rights applies to the statutory and common law contract law and development of contract law by the courts must promote and give effect to the value order that underpins the Bill of Rights. Thus, while in the past courts could use public policy or change in circumstances to revise and reconsider common law contractual principles and rules, in the post-2010 dispensation that obligation springs

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<sup>47</sup> *Lloyds Bank Ltd v Bundy*.

<sup>48</sup> *Clifford Davis Management Ltd v Wea Records Ltd and Another* [1975] 1 WLR 61.

<sup>49</sup> *Saugstad v McGillivray* (1995) 51 ACWS 3d 550; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

<sup>50</sup> *LTI Kisii Safari Inns Ltd and Others v Deutsche Investitions-Und Entwicklungsgesellschaft ('Deg') and others*, Civil Appeal 72 of 2008, Judgment of the Court of Appeal at Nairobi (2011) eKLR.

<sup>51</sup> *LTI Kisii Safari Inns Ltd and Others v Deutsche Investitions*, para 52.

from the need to align common law and statutory principles with the Constitution's value order. In addition, the constitutional entrenchment of consumer rights in Article 46(1) provides a catalyst for the constitutionalisation of contractual relationships given that this provision seeks to regulate and to establish normative standards that are applicable to the supply of goods and services.

In the context of the doctrine of constitutional avoidance, adopting an approach that contractual disputes are to be determined exclusively on the basis of statutory and common-law principles and rules will undermine the constitutional instruction in Article 20(3) that courts should adopt a rights and value based analysis to give effect to the value order that underpins the Constitution generally and the Bill of Rights specifically. Such an approach of constitutional avoidance undermines the constitutional intention to ensure that the entire legal system is informed by the ethos of the Constitution and the Bill of Rights.

As discussed in part two of this paper, in instances where a palpable, direct and clear violation of the Constitution is evident, and non-constitutional relief is not readily apparent, the dispute ought to be resolved through the direct application of constitutional norms. However, as will be shown, in some decisions emanating from the Court of Appeal and the High Court sampled in the rest of this part of the paper, this approach has not been embraced.

In *Kenya Breweries Limited & another v Bia Tosha Limited & 5 others*,<sup>52</sup> before the Court of Appeal, the dispute turned on whether the High Court had the jurisdiction to hear and determine a constitutional petition that sought to bar the appellants from interfering with distributorship areas to which the 1<sup>st</sup> respondent claimed exclusive control and ownership. The 1<sup>st</sup> respondent also alleged that the appellants had engaged in unfair trade practices due to their refusal to refund monies paid as distributorship goodwill. The 1<sup>st</sup> respondent anchored their petition on alleged violation of the right to property as protected in Article

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<sup>52</sup> *Kenya Breweries Limited & another v Bia Tosha Limited & 5 others*, Civil Appeal 163 of 2016, Judgment of the Court of Appeal at Nairobi (2020) eKLR.

40 of the Constitution. This was informed by their view that they had a proprietary interest in the goodwill that the appellants could not arbitrarily take back. In addition, they alleged that some of the terms of the contract between the parties were unconstitutional and therefore were unenforceable. The High Court found that the dispute raised constitutional questions and granted an interim conservatory order pending the hearing and determination of the petition. This led to an appeal to the Court of Appeal challenging the High Court's assumption of jurisdiction in the matter on the ground that the dispute was a 'pure' contractual dispute without any colour of constitutional character. Thus, the High Court ought to have adopted the doctrine of avoidance and declined jurisdiction in the matter.

On Appeal, the Court of Appeal allowed the appeal and affirmed the traditional view that parties are bound by the terms of their contractual agreements and court cannot rewrite the terms of a contract.<sup>53</sup> This led the Court to hold that the High Court had improperly assumed jurisdiction in the matter. This conclusion by the Court of Appeal would mean that the allegations that some terms of contract were unconstitutional could not be adjudicated as such terms were enforceable in the view of the Court of Appeal as long as there was no ambiguity in the contract. Such an approach whittles the Constitution's normative force as it carves out enclaves in the realm of contractual relations that are beyond the reach of the Constitution.

In *Gulf Energy Limited v Rubis Energy Kenya plc*,<sup>54</sup> the High Court made a preliminary ruling declining jurisdiction in a dispute where the respondent had purchased specific portions of the petitioner's business through a share purchase agreement. Subsequent to the purchase of the business, the respondent alleged that with the assistance of data recovery specialists, it had recovered financial services information relating to the purchased business from the server and reformatted laptops that

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<sup>53</sup> *Kenya Breweries Limited & another v Bia Tosha Limited & 5 others*, para 46.

<sup>54</sup> *Gulf Energy Limited v Rubis Energy Kenya PLC*, Petition E084 of 2021, Ruling of the High Court at Nairobi (2021) eKLR.

showed alleged overstatement of the value of the shares sold to the respondent by the petitioner. The respondent therefore demanded from the petitioner a sum of at least USD 41 million being the alleged overstatement of the value of the shares it had bought.

This led the petitioner to move to the High Court through a constitutional petition alleging that the documents obtained by the respondent through data mining from the reformatted laptops and the server formed part of its private and confidential information that was not part of contractual transaction between the parties. The petitioner alleged that the respondent's unauthorised access to its private and confidential information constituted a breach of its right to privacy as protected under Article 31 of the Constitution.<sup>55</sup> This led to a preliminary objection to the petition by the respondent on the basis that the dispute was a commercial transaction that had no constitutional underpinning.<sup>56</sup>

The High Court in upholding the preliminary objection held that given that the dispute arose from the contractual relations between the parties, the Court would be guided by the binding nature of contractual agreements and parties' autonomy.<sup>57</sup> The Court therefore declined to seize jurisdiction to determine the question was to whether the petitioner's right to privacy had been violated as this was in the court's view a question to be resolved under the contract.<sup>58</sup> By declining to interrogate whether the petitioner's right to privacy had been violated, the High Court gave a nod to an approach that places contractual agreements beyond the reach of the Bill of Rights.

The approach adopted by the Court of Appeal in the *Bia Tosha Ltd* case and the High Court in the *Gulf Energy Ltd* case show an embrace of a free-wheeling approach that dogmatically adheres to the doctrine of avoidance. This is evident when instead of adopting a nuanced approach that foregrounds the notion of 'outcome neutrality' in the inquiry, the courts have embraced a simplistic approach in which the mere fact that

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<sup>55</sup> *Gulf Energy Limited v Rubis Energy Kenya plc*, para 7-10.

<sup>56</sup> *Gulf Energy Limited v Rubis Energy Kenya plc*, para 31.

<sup>57</sup> *Gulf Energy Limited v Rubis Energy Kenya plc*, para 36.

<sup>58</sup> *Gulf Energy Limited v Rubis Energy Kenya plc*, para 34 and 41.

a dispute emanates from a contractual relationship is dispositive as to the applicability of the doctrine of avoidance.

The end result of a dogmatic commitment to the doctrine of constitutional avoidance would be to leave contract law largely intact and unaffected by the Bill of Rights, with results that are inimical to the transformative aspirations of the Constitution. In adopting such an approach, the courts would fail to take sufficient cognisance of the significantly altered legal context of post-2010 Kenya, with the result that Kenya's established body of contract law would be non-responsive to the substantively progressive and transformative socio-economic goals of the Bill of Rights. In effect, the argument against the doctrine of constitutional avoidance is that the adoption of a statutory or common-law-centred approach to contract law avoids substantive engagement with the fundamental rights enumerated in the Constitution, with the result that the values which underpin them, including the foundational constitutional values, will fail to significantly to impact on the law of contract.

Articulated further, the approach adopted by the High Court entails a rights-based and values-based analysis. It envisages the gradual evolving of contract law into an integrated, constitutionalised body of modern contract law. Ultimately, this approach ensures that the entire body of law (including contract law), must reverberate with, and give effect to, (or at the very least, be consistent with), the value system of the Bill of Rights.

In sum, the lesson from the High Court in declining to adopt the doctrine of constitutional avoidance in the four contractual disputes under study in section three of this study is that embrace of a statute or common law centred approach avoids substantive engagement with the fundamental rights enumerated in the Constitution, with the result that the values which underpin them, including foundational constitutional values, fail significantly to impact on the law of contract. In essence, the Bill of Rights mandates a tearing down of the impenetrable brick wall advocated by the doctrine of constitutional avoidance between constitutional law and other subsidiary legal orders (that is, statutory, common law, and customary law), in order to initiate the constitutionalisation

process of Kenya's legal system. Further, it contemplates the wall's replacement, simultaneously, with a more permeable wire-mesh fence, which has to 'translate' to the application of the foundational constitutional values, and applicable substantive rights, to other subsidiary legal orders in a manner that befits the particular factual context in a given case.

#### **4. Conclusion**

Article 20(3) of the Constitution is an outstanding example of the Constitution's transformative agenda. It recognises that the Constitution brought into operation in one fell swoop, a completely new and different set of legal norms, and in these circumstances the courts must remain vigilant and should not hesitate to ensure that legal rules are developed to reflect the value order envisaged in the Bill of Rights. It is important to note that while courts have not adopted a primacy of rights approach to indirectly apply and 'radiate' the values of the Bill of Rights in adjudication and application of statutory and common law rules in disputes, the case studies in part three of this study on the law of contract offer glimmer of hope that courts are beginning to lift the veil of the doctrine of constitutional avoidance to give effect to the values embodied in the Bill of Rights in contractual relationships. Such an approach should be embraced in other areas of private law, for example tort, property, commercial, employment law regime amongst others.



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