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Kabarak University School of Law

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Foreword

Every industry player prides in contributing to the industry's core business. Such contribution reaffirms the player's relevance to the industry. For an academic institution, it is always a pleasure to release works of intellect for public consumption. It is against this background that the Kabarak Law School is pleased to release the third issue of the Kabarak Law School's *Journal of Law and Ethics*. The Journal is the flagship publication of Kabarak Law School managed and produced under the auspices of the Centre for Jurisprudence and Constitutional Studies (CJCS) in the Department of Public Law.

Kabarak Law School strives to carve out a niche for itself as a law school with an unparalleled publishing tradition. One of the defining features of the Journal of Law and Ethics is the scholarly debate that appears at the beginning of every edition. The first edition carried a debate on the horizontal application of rights. The second edition debated the place of administrative law in Kenya following the constitutional recognition of the right to fair administrative action. In this edition, we carry on the tradition through the debate between Walter Ochieng Khobe and Elisha Zebedee Ongoya on the contribution of the *jurisprudence* of the Court of Appeal in *Maina Kiai vs the Independent Electoral and Boundaries Commission* on the finality of declaration of election results in Kenya. These debates continue to ensure that academic writing is not myopic, but broad-based, facilitating discussion aimed at arriving at workable solutions.

As an editorial board, we trust that this scholarly menu will excite the intellectual appetite of our readers. In our subsequent editions, we shall include book reviews and case reviews, in addition to the debate and academic articles.

This edition is the product of over a year of peer reviewing, editorial work and engagement with various scholars to arrive at this collection. I would be remiss if I did not express my profound gratitude to the editorial team, which has dutifully and energetically pursued this laborious task for over a year to its fruitful conclusion.

The editorial team would also like to express its gratitude to the Dean, Dr Fancy Too, for her continued support towards entrenching a vibrant publishing tradition at Kabarak Law School. I would also like to express my gratitude to the Vice-Chancellor and the university management for their support in ensuring that we keep our publishing tradition alive.

Elisha Zebedee Ongoya

Editor-in-Chief

Editorial

Kabarak Law School continues to set the pace in the discourse on constitutionalism and governance in this country. Together with the Constitutionalism and Governance Expert Lecture Series, this journal contributes to the discourse on good governance in the region, with the aspiration of remaining the thought leader on the subject.

While the focus of the journal has remained true to good governance, the niche area of the school, the editorial team is pleased with the wide range of topics and the breadth of scholars from whom the articles carried in this edition are drawn. In addition to the debate this edition features diverse peer reviewed articles in the areas of public law.

The papers by Walter Khobe and Elisha Ongoya review the decisions of the Court of Appeal and the Supreme Court on the finality of the election result. They analyse the Court of Appeal decision in the *Maina Kiai* case seeking to protect the integrity of process of verification of presidential election results by the chairperson of the IEBC, and the Supreme Court dicta in the judgment and subsequent ruling to ascertain whether indeed the role of the chairperson as set out in the Constitution is clarified or further obfuscated by the decisions of the apex court.

Phoebe Oyugi discusses the Implementation of Article 12 of the Convention on the Rights of People with Disabilities (CRPD) in Kenya. While lauding the adoption of the CRPD, she expresses concern that the full realisation of the rights for persons with intellectual and/or psychosocial disabilities due to the conflation of legal capacity and mental capacity. She recommends measures that maybe implemented to safeguard the right to legal capacity for persons with intellectual and/or psychosocial disabilities in Kenya.

Walter Khobe Ochieng engages in a comparative study of Separation of Powers in Judicial Enforcement of Governmental Ethics in Kenya and South Africa. He analyses the judicial review of appointments by the executive branch

and reviews the separation and intertwining of powers between these two branches of government in the context of their respective roles in public appointments.

Professor Aderlardus Kilangi critiques Invocation of the Doctrine '*Lex Specialis Derogat Legi Generali*' with Reference to the Duty to Protect Life as he juxtaposes International Human Rights Law versus International Humanitarian Law in Situations of Armed Conflict. The paper questions the appropriateness of using the *lex specialis* doctrine where the sanctity of life is concerned, since the doctrine does not clarify the coordination that must exist between International Humanitarian Law and International Human Rights Law and it limits the protection of victims. The paper advocates for a substitution of the *lex specialis* doctrine with a more coherent theory, in line with the global trend of extending broader protection to victims and ensuring a broader respect for the protection of life.

Additionally, Rahab Wakuraya Mureithi examines Kenya's Protection from Domestic Violence Act 2015 and exposes the challenges in litigating under it. She opines that the law is practically ineffective in its daily applicability to victims of domestic violence due to limitations occasioned by the wording of the statute and conflicts with the prevailing procedural and constitutional realities in daily practice.

Irene Maithya makes a case for countering involvement of Kenyan children in terrosism through realization of their socio-economic rights. She makes a correlation between poverty and exposure of children to abuse, criminalization and subsequent conscription into terrorist activities. She expresses concern that this involvement will continue unless better education and employment opportunities are explored to result in poverty reduction. She sets out what she considers to be viable solutions in the fight against the involvement of children in terrorism.

The article by Ken Obura provides an interesting perspective on the question of citizenship by examining the socio-contractarian ideal of "We the People". It reviews constitutional provisions on citizenship and assesses whether there indeed exists a singular identity among Kenyan citizens. The paper espouses the idea that since the Preamble vests sovereign power on the people of Kenya, it creates the impression that there is a universality or equality of status and equality in the benefits and burdens attached to citizenship. Obura reviews the theoretical idea of citizenship and assesses whether the constitutional aspiration of citizenship is a reality or merely illusory.

This publication would not have been possible without the generous support of the fellows of the Centre for Jurisprudence and Constitutional Studies (CJCS)

and our peer reviewers. The peer review process ensures that the Journal maintains the highest standards of academic integrity and excellence. The editors would particularly like to convey their thanks to the following independent reviewers: Ms Petronella Mukaindo, Mr Walter Ochieng, Mr Benard Manani, Ms Emily Nyiva, Mr Norman Magaya, Mr Ibrahim Alubala and Mr Joseph Omolo.

The editorial team also remains grateful to the Editor-in-Chief, Mr Elisha Ongoya, and Mr Joseph Omolo for their support in the editorial process and their contribution towards strengthening the publishing tradition at Kabarak Law School. This edition is richer with their contribution.

Lucianna Thuo
Managing Editor

Protecting the Integrity of the Electoral Process: The Promise of the *Maina Kiai* Judgement

Walter Khobe Ochieng*

Abstract

This article interrogates the rationale and promise of the judgment by the Court of Appeal in the *Maina Kiai* judgment. It is argued that by the *Maina Kiai* court affirming the finality of results at the polling station, the *Maina Kiai* judgment has the impact of imbuing a positive perception on fairness of elections and the legitimacy of electoral outcomes. This has been achieved by doing away with the historic perception that electoral officials tamper with electoral results at the National Tallying Centre.

1.0 Introduction

Electoral reform was one of a large number of changes required in the transition to a post-authoritarian era in Kenya.[1] The necessity for electoral reform was borne by the fact that open, free, and fair elections are the *sine qua non* of democracy. The crucial place occupied by elections in consolidation of a democracy follows from the fact that the electoral regime affects democratic performance by influencing

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[1] G.M. Musila, 'Realizing the Transformative Promise of the 2010 Constitution and New Electoral Laws,' in G.M. Musila (ed.) *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence*, (Nairobi: Law Society of Kenya, 2013) 1.

popular perceptions of the political process, by shaping the party system, and by determining the composition of governing organs. Thus, elections are an integral part of democracies as instruments for delegation of authority from citizens to representatives.

A distinctive feature of the design of the electoral system in the 2010 Constitution is the constitutional entrenchment of an array of electoral principles that form the normative foundation for the conduct of elections in Kenya. Article 81 of the Constitution establishes the principle of "free and fair elections" as the cornerstone of the electoral system in Kenya. This provision constitutionalizes and describes the environment in which elections are to be conducted. The other constitutional provision with implication for the electoral system is Article 86 of the Constitution, which makes provision for the means through which elections are conducted on the voting day - whatever voting method is used, the system must be simple, accurate, verifiable, secure, accountable and transparent. These broad principles are aimed at protecting the integrity of the electoral process and are expected to shape and influence the rules, decisions, and institutions in the electoral process.

This paper interrogates the impact of these laudable principles and whether they have had the salutary effect of improving the integrity of the Kenyan electoral process through the looking glass of the decision by the Kenya Court of Appeal in the *Maina Kiai Case*.[2] By integrity of the electoral process, this paper speaks to electoral accountability, the sanctity of the vote, and the giving of effect to the will of the people in elections.

2.0 How the Court of Appeal Plotted its Course: The Case and the Determination

The Petitioners in the *Maina Kiai* Case moved the High Court for the Court to make declarations whose effect were: first, that the constituency presidential elections results once declared and announced by respective constituency returning officers are final results for the purposes of that election. Second, that constituency returning officers possess the mandate to announce and declare the final results of a presidential election at constituency level and that such declaration is final and is not subject to alteration, confirmation or adulteration by any person or authority,

[2] *Independent Electoral & Boundaries Commission v Maina Kiai & 5* Others [2017] eKLR (hereafter: *Maina Kiai* Case).

other than an election court, pursuant to Articles 86 and 138 (2) of the Constitution of Kenya. Third, that section 39(2) and (3) of the Elections Act and regulations 83(2) and 87(2) (c) made thereunder, to the extent that these granted the Electoral Commission powers to confirm, alter, vary and/or verify the presidential election results declared by the constituency returning officer in a particular constituency, were contrary to Articles 86 and 138(2) of the Constitution and were therefore null and void.

The High Court granted the three declarations as outlined and this prompted the Independent Electoral and Boundaries Commission (IEBC) to appeal this finding to the Court of Appeal. The Court of Appeal affirmed the findings by the High Court.

The Court of Appeal in affirming the findings by the High Court concluded that the determination of the electoral results at the polling station is final and cannot be altered at the National Tallying Centre by the Chairperson of the IEBC. To quote the Court:[3]

> It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth.

In coming to this conclusion, the Court of Appeal anchored its decision on two bases: textually-driven purposive interpretation of the Constitution, and the principles of the electoral system as entrenched in the Constitution.

On the first approach by the Court, textually-driven purposive interpretation of the Constitution, the Court of Appeal found support in Article 86(c) of the Constitution that enjoins the IEBC to ensure that "*the results from the polling stations are openly and accurately collated and promptly announced by the returning officer." The Court buttressed this position by invoking* Article 138(3)(c) of the Constitution which stipulates that "i*n a presidential election, after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result." The Court proceeded to hold that:*[4]

[3] *Maina Kiai* Case.
[4] *Maina Kiai* Case.

> Our interpretation of this Article is that the appellant, which is represented at all the polling stations, constituency and county tallying centres can only declare the **result** of the presidential vote at the constituency tallying centre after the process we have alluded to is complete, that is, after tallying and verification.

To support this textually-driven purposive conclusion, the Court of Appeal drew jurisprudential ballast from the decision by the Supreme Court in *Hassan Ali Joho & Another v. Suleiman Said Shabhal & 2 Others,*[5] *where the Supreme Court held that declaration of the electoral results takes place at every stage of tallying. For example, the first declaration takes place at the polling station; the second declaration at the Constituency tallying centre. The finality of the set of stages of declaration is depicted in the issuance of the certificate in Form 38 to the winner of the election. This marks the end of the electoral process by affirming and declaring the election results, which could not be altered or disturbed by any authority.*

What is at play in this argument by the Court of Appeal is that the Court is applying the text of the Constitution purposively to give expression to the commitment to free and fair elections contained in the Constitution. In adopting a purposive approach, while anchoring the same on textual pointers from the Constitution, the Court brought to the interpretive equation the animating idea that it should further the realization of the goal of a free and fair election regime. Thus, the emphasis on attainment of a free and fair electoral regime is not free-wheeling but is anchored on textual provisions of the Constitution, particularly articles 86(c) and 138(3)(c).

With respect to the second approach by the Court of Appeal, the Court drew from the values and principles of the Constitution, the Court of Appeal held that:[6]

> It is, in our view fallacious and flies in the face of the clear principles and values of the Constitution to claim that the chairperson of the appellant can alone, at the national tallying centre or wherever, purport to confirm, vary or verify the results arrived at through an open, transparent and participatory process as we have already set out…..It is our firm position that the purpose for which section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c) were promulgated or made have the effect of infringing constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability. ..To suggest that there is some law that empowers the chairperson of the appellant, as an individual to alone correct, vary, confirm, alter, modify or adjust the results electronically transmitted to the national tallying centre from the constituency tallying centres, is to donate an

[5] *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014]eKLR.
[6] *Maina Kiai* Case.

> illegitimate power. Such a suggestion would introduce opaqueness and arbitrariness to the electoral process - the very mischief the Constitution seeks to remedy.

As is evident from the except, the Court emphasized constitutional principles like transparency, impartiality, neutrality, efficiency, accuracy, and accountability as factors that compel its finding that the results declared at the polling station are final. The principle-based interpretive approach is, thus, used by the court to "excavate and give expression to the values which underpin particular constitutional guarantees".[7] As Ronald Dworkin puts it, "the process of interpretation is designed to discover the fundamental principles on which the character of society is predicated".[8] It is the constitutionally articulated values and principles which the Court of Appeal used to define the democratic basis of the post-2010 constitutional order.

3.0 The Ramifications of the Maina Kiai Case for Electoral Integrity in Kenya

The intervention by the High Court, and subsequently the Court of Appeal, in the *Maina Kiai* Case was normatively justified given that in a democratic system, courts are vested with the mandate to clear the channels of political change[9] and to ensure protection of minorities as envisaged in the Bill of Rights. John H. Ely famously developed the argument that the constitutional role of judges is defined by what he calls "representative –reinforcing". The judges should try to ensure that the democratic process functions as envisaged in the Constitution. Malfunctions occur, Ely says, when: "the elected representatives are choking off the channels of political change to ensure that they will stay in and the outs will stay out". [10] Thus, the judiciary ought to play an oversight role over the democratic process, by affirming the principles of the electoral system and sealing possible loophole

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[7] J. Kentridge and D. Spitz, 'Interpretation' in S. Woolman, *et al* (eds) *Constitutional Law of South Africa* (Cape Town: Juta, 1999) at 11-23.

[8] R. Dworkin, Life's Dominion (1993), quoted in D. Davis, 'Democracy - Its Influence on the Process of Constitutional Interpretation' (1994) 10 *South African Journal of Human Rights* 103 at 107.

[9] By "clearing the channels of political change", I mean: to fend off attempts to acquire/hold power by illegitimate means such as through opportunistic amendment of the constitution, amendment and replacement of electoral laws, gerrymandering, censorship, restriction of political rights, rigging of votes, e.t.c.

[10] J.H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980); See also S. Issacharoff, and R.H. Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process,' (1998) 50 *Stanford Law Review* 643, 668.

for rigging of elections. This role of the judiciary is particularly important in the context of a democracy that is still in transition from an authoritarian legacy like Kenya. Judges should in this view be viewed as the guardians of the democratic process.[11]

In constitutional democracies, the judiciary carries an important responsibility for securing the integrity of elections as the main channel of democratic change. They do so in two ways: by resolving disputes over the rules (that is, whether the legal framework creates an even playing field for the electoral contest) and by overseeing that the parties stick to the rules throughout the election process. When courts exercise the first function – *securing a level playing field – they are rule-evaluating. They decide whether the rules regulating the election process are in accordance with the superior norms and principles laid down in the constitution. When they exercise the second function – securing fair play – they are rule enforcing. They act as referees of the electoral competition with a mandate to decide complaints and sanction violations of laws and regulations in the course of the election process, and ultimately nullify the election results.* In the *Maina Kiai* Case, the courts were engaged in *rule evaluation*. This is so far as the High Court and the Court of Appeal were involved in the process of establishing the rules to regulate elections and also playing a role in the levelling of the electoral playing field.

Given that the quality and impartiality of electoral administration is central to whether an election is seen as a legitimate process for delegation of authority from citizens to representatives, the legal framework regulating the election process and the election administration structures tasked with organising the process and securing a level playing field for the contestants are crucial. This implicates the fairness and quality of the electoral rules, which are the centerpiece of electoral management. In the context of the *Maina Kiai* Case, the electoral rules on verification, variation, and alteration of results of presidential elections at the National Tallying Centre implicates the fairness of elections as well as perceptions of whether the election is free and fair and the outcome legitimate.

From a normative perspective, the *Maina Kiai* Case presented an opportunity for judicial intervention given the judicial role in policing the process of political representation. It should be underscored that, historically, disputes over presidential results in Kenya have always arisen at the point of tallying the results at the National Tallying Centre where allegations have arisen that the Commissioners

[11] See in this regard: C. Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1997).

of the Electoral Commission have varied the results that are submitted by the Constituency Returning Officers.[12] Taking into account this historical background, judges as the last and most fundamental protectors of the democratic process were under an obligation to scrutinize whether the old practice of verification, variation, and alteration of results at the National Tallying Centre hampers the realization of the constitutional goal of electoral integrity.

In affirming the finality of the results declared at the Polling Station and Constituency, the Court was alive to the participatory nature of counting of ballots at the polling stations. Generally, the counting of ballots at the polling station is expected to be transparent and participatory. The presiding officers at the polling stations show each ballot paper to the party agents, observers, polling clerks, and spectators (often voters) and announce the candidate whose name had been ticked off. Once the ballots have been sorted by candidate, each batch is counted and the results announced in the presence of party agents, observers, polling clerks, and voters. Allowing ballots to be reviewed and inspected publicly, permits voters to audit elections and determine if the election results are, in fact, as accurate as the election officials have declared them. Such measures increase public confidence in the election process.

After the counting process is completed and the relevant forms signed by the election officials, the party agents, the documents, and the ballot boxes with the ballots papers bundled inside them are then transported to the constituency tallying centres. In many places, voters and party agents escort these materials all the way to the constituency tallying centres. The tallying of the constituency results also involves verification of the results from the polling stations in the presence of party agents, and spectators (voters). Thus, the tallying and declaration of results at the constituency level is viewed to be impartial. The electoral officials are deemed to be fair at the polling station and constituency level given the open and transparent nature of the tallying and declaration of results as both party agents and the voters witness the tallying exercise. Moreover, the decentralization of declaration of results in the hands of many electoral officials has the effect of denying one group the advantage of manipulating the electoral results at the National Tallying Centre based on a desired voting pattern. As James Gardner argues, electoral decentralization can be argued to be a structural means of

[12] See generally F.A. Aywa, 'Kenya', in A. B. Makulilo, et al, (eds) *Election Management Bodies in East Africa: A Comparative Study of Electoral Commissions to the Strengthening of Democracy* (Johannesburg: Open Society Foundations, 2015) 67-125.

hindering a single set of partisan forces from gaining unified control over the electoral process.[13]

By affirming the finality of results at the polling station, the *Maina Kiai* judgment had the impact of imbuing a positive perception on fairness of elections and the legitimacy of electoral outcomes. This is so because, at the polling station and constituency levels, the voters witness and are involved in ensuring that the voting process proceeds in an unbiased manner, is transparent, and open to scrutiny. Having cast their votes, the voters ensure that each vote is counted, counted only once, that votes are counted for the alternatives they were intended and that no votes except those dropped in the ballot boxes were included in the tally. This participation by voters in the electoral process has the effect of constraining abuse of power by electoral officials. Such an oversight mechanism is lacking at the National Tallying Centre.

The role of the courts in *rule evaluation* imposes on the courts an obligation akin to the function by antitrust regulators in the economic market to ensure that the political market remains competitive. Incumbents must be prevented from self-interestedly frustrating the proper formation of democratic majorities or restricting the political power of minorities. The normative thrust of this approach is to ensure that incumbents are not able to insulate themselves from political and legal accountability. Accountability is preserved when political actors are prevented from reducing competition. It is arguable that the courts in the *Maina Kiai* Case were grappling with the problem of a manipulated democratic process, in this case, the historical claim that the Electoral Commissions in Kenya alter, vary, subvert, or rig elections in favour of the incumbent government at the National Tallying Centre. Thus, the courts were expected to grapple with the problem of an electoral system that works to the advantage of the incumbent regime and to reverse this legacy to the constitutionally-envisaged level electoral playing field.

It is arguable that by the *Maina Kiai* Court attributing an improper and unconstitutional purpose to sections 39(2) and (3) of the Elections Act and regulations 83(2) and 87(2)(c) of the Electoral Regulations, the court viewed these provisions as aimed at the diminishment of political accountability through the manipulation of elections laws. This follows from the fact that electoral accountability can exist only when effective political competition generates genuine political choices. To the extent that the impugned legislative provisions can be said

[13] J. A. Gardner, The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections, (2001)29 *Florida State University Law Review* 625, 651-58.

to have had an aim of distorting the democratic process, the *Maina Kiai* Court was justified in breaking up such distortion.[14]

4.0 Conclusion

Elections are at the core of the democratic process. Nevertheless, elections are vulnerable to errors, fraud, or perceptions thereof, because they involve massive mobilization and coordination of citizens, and because of their divisive nature and technical complexity. Having independent and efficient institutions to handle these troublesome situations becomes crucial for attaining people's trust in elections. The Judiciary as one such institution plays a crucial role in not only correcting problems in the elections but also providing a mechanism to keep political parties and electoral authorities accountable for their actions. The Court of Appeal in the *Maina Kiai* Case discharged its role of rule evaluation by ensuring that the electoral laws and rules in place are not used to distort the electoral process but are geared towards the realization of the constitutional aspiration of a free and fair electoral regime.

[14] See R. H. Pildes, 'Commentary, "The Theory of Political Competition"', (1999) 85(8) *Virginia Law Review* 1605 at 1619-22; E. C. Guy-Uriel, 'Democracy and Distortion' (2007) 92(4) *Cornell Law Review* 601 at 650-55; See also S. Issacharoff, *et al* (eds.), *The Law of Democracy: Legal Structure of the Political Process*, 5th ed., (St. Paul, MN: Foundation Press, 2016) 3.

Protecting the Integrity of the Electoral Process, or, Obfuscating the Electoral Process?

A Response to Walter Khobe Ochieng's "The Promise of the *Maina Kiai* Judgement" in Light of the Subsequent Supreme Court Jurisprudence in *Raila Amolo Odinga & another* v *Independent Electoral and Boundaries Commission Chairman (IEBC) & Others*

Elisha Zebedee Ongoya*

Abstract

This paper is a reply to Walter Khobe's article which interrogates the *Maina Kiai* judgment and its promise in relation to safeguarding the integrity of the presidential election result. Whereas Khobe holds the view that the *Maina Kiai* decision resulted in creating a positive perception on the fairness of the elections and the legitimacy of electoral outcomes, this paper questions this optimism and argues that rather that creating clarity on the role of the Chairman in verification of presidential election results, the Supreme Court succeeded in further obfuscating the law on this important issue.

1.0 Introduction

I have interrogated the challenges that confront courts that exercise jurisdiction over constitutional cases in a previous writing. In the said work titled *The Law, the*

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Procedures and trends in Jurisprudence in Constitutional and Fundamental Rights Litigation in Kenya, I make elaborate observations which are reproduced below:

Courts, in the course of addressing their judicial minds to controversies and disputes in Constitutional cases, face issues that are inescapably "political" in that they entail a choice between competing values and desires, a choice reflected in the legislative or executive action in question which the court must either condemn or condone[1].

When courts decide Constitutional cases, they do more than interpret a statute. The Constitution is a charter containing the pact that is the "social contract"[2] and therefore, by its very nature a political document. Controversies that rage over the proper canons of interpreting the Constitution, therefore, conceal vital ideological, socio-political and economic views[3].

In the words of Robert A Kagan,

> Decisions of Constitutional courts often are like volcanic eruptions, reshaping the landscape of political and administrative action, usually in small ways but occasionally in large ones…Constitutional litigation has also become a well-established form of political action… Political groups, having failed to get their way in legislatures or administrative agencies frequently ask courts to overturn legislative or administrative policies on the grounds that they violate principles inferred from Constitutional provisions. Judges sometimes agree and ask governments to take remedial measures.[4]

Professor Githu Muigai has captured the challenge of Constitutional interpretation in the words that:

> First, the fact that the Constitution is both a political charter and a legal document makes its interpretation a matter of great political significance, and sometimes controversy. Second, the court's interpretation of the Constitution by way of judicial review is equally condroversial as it is essentially counter-majoritarian.

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[1] Wechster,H., 1959/60. Towards Neutral Principles of Constitutional Law, Harvard Law Review Vol 73 p 15. See also Githu Muigai, The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication, in, The International Commission of Jurists, Constitutional Law Case Digest Vol II, Nairobi, 2005 P 159.

[2] For a detailed discussion of the social contractarian theory as a basis of the Constitution, see Kangu, JM., 2007. The Social Contractarian Conceptualization of the Theory and Institution of Governance, Moi University Law Journal Vol 1 No 2, p 1.

[3] Githu Muigai, supra note 1.

[4] Kagan, RA., Constitutional Litigation in the United States, in Rogowski , R., Gawron, T (Eds) Constitutional Courts in Comparison: The U.S Supreme Court and the German Federal Co bncnstitutional Court at pp 25, 26.

> A non-elected body reviewing and possibly overruling the express enactments and actions of the elected representatives of the people would raise the issue of legitimacy. Thirdly, however defined, the Constitution is an intricate web of text, values, doctrine, and institutional practice. It lends itself to different interpretations by different, equally well-meaning people. Fourthly, the Constitution contains conflicting or inconsistent provisions that the courts are called upon to reconcile, and at other times the Constitution implicitly creates a hierarchy of institutions or values and the courts are called upon to establish the order of importance. Fifthly, at times, the Constitution is vague or imprecise or has glaring lacunae and the courts are called upon to provide the unwritten part.[5]

The above character of the Constitution makes the jurisprudence of the courts that exercise jurisdiction over Constitutional matters, and, therefore, the interpretation of the Constitution, to be of specific concern to a student of the judiciary and the judicial process.

The capacity of courts to evolve a coherent and principled approach to the interpretation of the Constitution is essential for the legitimacy of the Constitutional democracy.[6] Some scholars have championed the application of "neutral principles" in Constitutional adjudication. This approach opines that courts, in exercising their power of invalidation of laws on Constitutional grounds do not decide cases on general grounds of public policy or legislative criteria of importance. Courts are subject to a discipline of reasoning to which legislators are not bound: the disposition of Constitutional questions must be formulable in terms of some Constitutional principle that transcends the case at hand and is applicable to all comparable cases. Decisions cannot be *ad hoc.* They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant fact situation.[7]

2.0 The *Maina Kiai* Case: Walter Khobe's dissection

In his article under reply, Walter Khobe in a nutshell, does three things. First, restates the overarching principles governing Kenya's electoral system. Thereafter, he identifies the role of the judiciary (the courts) in the electoral process which

[5] Muigai,G., 2004. Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation, East African Law Journal, Vol 1 p 1.

[6] See Generally Githu Muigai, ibid.

[7] See Wechsler,H., 1959. Towards Neutral Principles of Constitutional Law, Vol 73 Harvard Law Review p 1 . See also Richards, DAJ., 1977. Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication Georgia Law Review Vol 11 p 1069.

he presents as twofold, namely, *rule evaluation,* and, *rule enforcement*. Finally, he restates and gives a thumb of approval to the manner in which the High Court and the Court of Appeal discharged its *rule evaluation* role in the *Maina Kiai* case.

In this reply, I opine that Walter Khobe in his article is right in his re-statement of the overarching constitutional principles governing elections and the electoral process in Kenya. He is also right in his conceptual identification of the twin roles of the courts in the electoral process, namely rule evaluation and rule enforcement. It is the *unqualified* imprimatur of the manner in which the High Court and the Court of Appeal applied these principles that this response takes issue with. This article invites Walter Khobe to consider the practical challenges that were caused in the context of the subsequent elections, being the 2017 presidential elections in Kenya, in assessing the jurisprudential purity of the *Maina Kiai* decisions by the High Court and the Court of Appeal. A part of the tests for the jurisprudential soundness of a court's decision is its capacity for practical application in real *flesh and blood* situations.

3.0 The *Maina Kiai* case and *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & another* – the Nullification Decision

In annulling the presidential election outcome as declared by the Independent Electoral and Boundaries Commission in Supreme Court Presidential Election Petition Number 1 of 2017 following the August 8, 2017 general elections in Kenya, the Supreme Court had to interrogate the impact of the Court of Appeal decision in the *Maina Kiai* case to the process of tallying, verification and declaration of presidential election results. The court observed, and rightly so in my view as follows:

> Be that as it may, Mr. Nyamodi persistently argued that the conduct by the 1st and 2nd respondents, to wit; of declaring results solely based on Forms 34B without reference to Forms 34A; of not scanning all Forms 34A and simultaneously transmitting them to the NTC; of reconfiguring Form 34C to exclude the Form 34A tally and only include the Forms 34B tally; of introducing the language of "statistics" as opposed to "results"; that all these actions, were necessitated, nay, required by the decision of the Court of Appeal in the *Maina Kiai* decision.
>
> We were at pains to understand how the Court of Appeal decision in that case, could have provided a judicial justification for the conduct of the 1stand 2nd respondents. The Attorney General, appearing as amicus curiae, having been so

admitted, and despite having been clearly restrained from submitting on the so called impact of the *Maina Kiai* decision, also appeared to suggest, in his closing remarks that somehow, the Appellate Court's decision in that case, had changed the landscape of the conduct of elections in the Country.

…

Given this very clear elucidation of the law regarding the imperative for electronic transmission of results from the polling station to the NTC, how could the Court of Appeals' decision in *Maina Kiai* have provided a justification for declaring the results of the election of the president without reference to Forms 34A? How was it a basis for the reconfiguration of Form 34C so as to render Forms 34A irrelevant in the final computation of the results? But most critically, how did the Court of Appeal's decision relieve the 1st respondent from its statutory responsibility of electronically transmitting in the prescribed form, the tabulated results of an election for the president from a polling station to the CTC and to the NTC in accordance with Section 39(1C) of the Elections Act?

…

At the end of the day, neither the 1st nor the 2nd respondent had offered any plausible response to the question as to whether all Forms 34A had been electronically transmitted to the NTC as required by Section 39 (1C) of the Elections Act. What remained uncontroverted however, was the admission by Ezra Chiloba, that as of 14th August 2017, three days after the declaration of results, the 1st respondent was not in a position to supply the petitioner with all Forms 34A. Counsel for the 1st and 2nd respondents, by insisting that the presidential results were declared on the basis of Forms 34B, all of which were available, also implicitly admitted that not all Forms 34A were available by the time the 2nd respondent declared the "final results " for the election of the president

It is self-evident from the foregoing excerpt from the Supreme Court judgment that the Independent Electoral and Boundaries Commission misunderstood the dictates of the *Maina Kiai* decision in the process of conducting elections in a major way. In all fairness, the position taken by the IEBC before the Supreme Court in explaining its errors of omission while hiding under the shield of the jurisprudence in the *Maina Kiai* decision was, with respect, for dismissal.

4.0 The *Maina Kiai* case and *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & Others* – the Clarification of Judgment Ruling

Following the nullification of the results of the presidential elections conducted on August 8, 2017, and prior to the conduct of the fresh presidential elections on October 26, 2017, the Independent Electoral and Boundaries Commission moved the Supreme Court for clarifications on certain aspects of the practical applicability of the *Maina Kiai* case in tallying and declaration of presidential election results.

In determining the motion, the court discerned two questions for determination, namely: Which results as between the tallies contained in Forms 34B submitted by the Returning Officers to the National Tally Centre and the totals of Forms 34A as verified by 1st and 2nd respondents, the 2nd respondent should use in declaring the results of the presidential election as envisaged under Article 138 (10) (a) of the Constitution; and whether the Independent Electoral and Boundaries Commission and its Chairman can correct errors identified in the Constituency results declaration forms (Forms 34B) or amend the Forms 34B where the same differ with results contained in the relevant polling station results declaration forms (Forms 34A) after the verification exercise envisaged by Article 138 (3) (c) of the Constitution.

To the first question above, the court's response to this issue was as follows:

> [60] With due respect, we find this question as framed, either mischievous, or informed by an inexplicable lack of understanding of the Constitution, the Elections Act, and the Judgment of this Court, not to mention the Judgments of the Court of Appeal and the High Court regarding the duty of the 1st respondent to verify, accurately tally, and transmit the results of a presidential election coupled with the duty of the 2nd respondent to verify, accurately tally, and declare the results of the election of the President.
>
> [61] These stages and concomitant responsibilities are so elaborately explained in the Judgment of this Court, that it confounds the mind, that the 2nd respondent would pose such a question. The way in which the question is framed appears to be based on the assumption that the results in Forms 34A and those in Forms 34B are mutually exclusive. Is it not a rudimentary fact, that the latter, is the aggregate of the former" And if this is so, how would it be a matter of choice as to which results between Forms 34A and Forms 34B, the 2nd respondent is to declare" Who aggregates what into what" Again, is it not an established fact that the Constituency Returning Officer, aggregates Forms 34A from the polling stations into Form 34B" Before generating Form 34B, doesn't the Returning Officer verify the figures in

> Forms 34A" Is it not a fact that the 2nd respondent as the National Returning Officer aggregates the results from forms 34B into form 34C" Did this Court not categorically state that before declaring the final aggregated results in Form 34C, the 1st respondent on behalf of the 2nd respondent must verify the said results against those in the transmitted Forms 34A" Is this not why Form 34A is considered the "primary document" in the verification process" Is the verification exercise not meant to establish the accuracy or otherwise of the results, which is a basic tenet of the Constitution" ***If the 2nd respondent notices some inaccuracies as brought to his attention by the 1st respondent, what is his duty" Is he not supposed to simply bring those to the attention of the candidates, the public and election observers, even as he declares the final result as aggregated from Forms 34B" What did this Court say about the effect of inaccuracies that may be unearthed by the verification exercise on an election"***

To the second question the response by the Supreme Court was thus:

> … the answer is rather obvious. The issue was dealt with in the *Maina Kiai* decision by the Court of Appeal. But for whatever it may be worth, we hereby reiterate that the 1st and 2nd respondents cannot correct errors identified in Forms 34B or amend the Forms 34B where the same differ with the results contained in the relevant Forms 34A. ***Theirs, is to expose such discrepancies and leave the resolution of such issues to the election Court, in this case, the Supreme Court***.

There is no doubt that even with all the safeguards anticipated by the Constitution, the Elections Act and the Regulations, human errors may occur in the posting, computation, transmission and declaration of election results. Some errors may be deliberate and even criminal. Others may be genuine human errors which, nevertheless, impact the election outcome. There is also no doubt that these errors may be discovered at any stage of the electoral process. What the Motion by the Independent Electoral and Boundaries Commission and its Chairman to the Supreme Court identified was a situation where the duo discover discrepancies between the results as declared at the polling station on the one hand and the corresponding results as transposed, and declared, at the constituency tallying centre.

The Supreme Court's response to this challenge was not fully satisfactory. It was in the terms that "***theirs, is to expose such discrepancies and leave the resolution of such issues to the election Court, in this case, the Supreme Court***." Essentially, the Independent Electoral and Boundaries Commission will acknowledge existence of the errors, then proceed to *knowingly* declare the erroneous results and leave it to Supreme Court to resolve the issue.

It is noteworthy that Section 6 (a) of the Election Offences Act[8] makes it an offence for a member of the Commission, staff or other person having any duty to perform pursuant to any written law relating to any election to make, in any record, return or other document which they are required to keep or make under such written law, an entry which they know or have reasonable cause to believe to be false, or do not believe to be true.

It would follow that the Chairman of the Independent Electoral and Boundaries Commission, having received both forms 34A duly filled by the Presiding Officer and 34B filled by the Returning Officer, thereby proceeds to create form 34C.

In the *Maina Kiai* case, the Court of appeal declared that "It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth."

Where the Chairman of the Independent Electoral and Boundaries Commission posts in Form 34C results from Form 34B which are at variance with the results in form 34A (and these ones are clothed with finality) is simply illogical. It borders on binding the Chairman to commit a crime within the meaning of section 6(a) of the Election Offences Act.

Similarly, to tell the Chairman of the Independent Electoral and Boundaries Commission to expose discrepancies and leave it for the court to deal with them in a subsequent dispute where the said Chairman will be the respondent also presents an illogical scenario.

5.0 Conclusion

Electoral processes generate so much heat and dust. Election disputes are resolved within this environment of heat and dust. It can be a tricky environment for reasoned resolution of disputes. The *Maina Kiai* case was presented and resolved

[8] Act 37 of 2016.

by the High Court and the Court of Appeal as an abstraction. The case presented abstract questions on what should generally happen in the counting, tallying and declaration of election results. Whereas the court identified one facet of the problem and rendered answers to this facet, the court clearly did not have its attention on other facets of the same problem. The Raila Odinga case, on the other hand, was presented as a real case with actual occurrences. The facets of the problem that were unanticipated in the abstract *Maina Kiai* case presented themselves. The Supreme Court did not render fully satisfactory answers. There may be need to tamper with the absolutism of approach in the *Maina Kiai* jurisprudence to address the practical absurdities discernible from the *Raila Odinga* jurisprudence regarding verification, tallying and declaration of presidential election results.

The Implementation of Article 12 of the Convention on the Rights of People with Disabilities in Kenya

Phoebe Oyugi*

Abstract

Equality and non-discrimination before the law are fundamental human rights principles enshrined in both international and regional human rights instruments. However, earlier human rights instruments did not expressly protect persons with disabilities from discrimination and, therefore, they were regarded as objects of charity, rather than subjects of human rights. Through the years, the law has developed to provide better protection for persons with disabilities, culminating in the ratification of the Convention on the Rights of People with Disabilities (CRPD). Article 12 of the CRPD provides for the right to equal recognition before the law for persons with disabilities which entails the right to legal capacity. This provision reflects a long established and non-derogable human rights principle also enshrined, for example, in article 16, as read together with article 4 (2), of the International Covenant on Civil and Political Rights (ICCPR).

Despite the significant development of legal protection, the implementation of the right to legal capacity for persons with disabilities leaves a lot to be desired. Many jurisdictions conflate legal capacity with mental capacity, the latter of which is a controversial concept. The result of such conflation

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is that persons with disabilities are denied the right to make personal decisions and to participate in judicial proceedings, on the basis that they lack the requisite mental capacity. Such denial of the right to make decisions constitutes a violation of the long established and non-derogable right to legal capacity enshrined in article 12 of the CRPD.

The paper discusses the implementation of article 12 of the CRPD in Kenya. It examines the conflation of legal capacity and mental capacity for persons with disabilities and interrogates the approaches employed in the determination of mental capacity. Furthermore, the paper examines different Acts of Parliament in Kenya and discusses their level of compliance with article 12 of the CRPD. Lastly, the paper recommends measures that maybe implemented to safeguard the right to legal capacity for persons with intellectual and/or psychosocial disabilities in Kenya.

1.0 Introduction

Equality before the law is one of the most fundamental principles of human rights law and is enshrined in most of the major human rights instruments. For example, article 7 of the Universal Declaration of Human Rights (UDHR) provides that: 'All are equal before the law and are entitled without any discrimination to equal protection of the law.' This refers to equal treatment before the law without regard to gender, race, nationality, ethnicity, religion, colour and disability, among other criteria; and without discrimination, prejudice or bias. A similar provision is found in article 26 of the International Convention for Civil and Political Rights (ICCPR).[1]

Regionally, article 3 of the African Charter on Human and Peoples' Rights (African Charter), and article 3 of the American Convention on Human Rights also provide for equality before the law and non-discrimination generally. Other human rights instruments which provide for non-discrimination include the Convention

[1] Art 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. It also prohibits discrimination and guarantees protection from discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

on the Elimination of All Forms of Discrimination against Women (CEDAW),[2] the Convention on the Elimination of All Forms of Racial Discrimination[3] and the Convention on the Rights of Persons with Disabilities (CRPD).[4] Equality before the law is a universally accepted principle of human rights as evidenced by the fact that about 163 constitutions of countries all over the world contain provisions on equality before the law and non-discrimination.[5] However, its implementation remains challenging. Discrimination based on race, gender, nationality, religion, and disability persists. In the words of Quinn, the world seems content with 'professing one set of values and treating people in exactly the opposite manner.'[6]

This paper examines the implementation of article 12 of the CRPD in Kenya and will focus mainly on one aspect of equality before the law: the right to legal capacity as set out in Article 12 (3). Part one of the article, the current part, contains an introduction of the issue at hand. Part two deals with normative provisions of article 12 of CRPD and the interpretation of the same. Part three discusses the concept of mental capacity as is often conflated with legal capacity and the approaches for determining mental capacity and how these have been employed to the disadvantage of persons with disabilities. In this discussion, reference is made to various Kenyan Acts of Parliament containing provisions which seem to conflate mental capacity and legal capacity contrary to article 12 of the CRPD. Part 4 discusses mechanisms that may be adopted to safeguard the right to legal capacity of persons with disabilities in Kenya.

[2] Art 15.

[3] Arts 1, 2, 4 and 5.

[4] Arts 3, 4, 5 and 16.

[5] For example: Arts 6 and 8 of the Afghanistan Constitution 2004, Art 21 of the Constitution of Albania, Art 1998 (rev. 2012), Art 31 of the Constitution of Algeria 1989 (reinst. 1996, rev. 2008), Arts 1, 3, 6 and 10 of the Constitution of Andorra 1993, Arts 1, 12, 21 of the Constitution of Angola 2010, Art 75 of the Constitution of Argentina 1853 (reinst. 1983, rev. 1994), Art 7 of the Constitution of Austria 1920 (reinst. 1945, rev. 2013) and Arts 25 and 127 of the Constitution of Azerbaijan 1995 (rev. 2009), just to mention a few. The complete list of the 163 Constitutions containing provisions on equality can be viewed at: 'Read about "Equality" on Constitute' <https://www.constituteproject.org/search?lang=en&q=Equality> accessed 17 June 2017.

[6] Gerard Quinn, 'The United Nations Convention on the Rights of Persons with Disabilities – What Role for Philanthropy?' (2010) <http://www.nuigalway.ie/cdlp/staff/gerard_quinn.html> accessed 21 June 2017.

2.0 Normative Provisions and Interpretation of Article 12 of the CRPD

In 2006, at the end of the seventh session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on and Promotion of the Rights and Dignity of Persons with Disabilities, a paper containing this information was circulated among the delegates:

> Imagine if someone else was making decisions for you. They could decide to take you away, lock you up, not listen to you, give you medication, block you from doing your work and living your life with your body and mind the way they are. Would you want this to happen to you? Wouldn't you have the feeling that you have lost your dignity and want it back? Wouldn't you feel like your integrity has been violated? Wouldn't you want to have support in making decisions without being taken over and to ask for help without being seen any less for it? Wouldn't you want to maintain your inherent dignity and be supported to make your own decisions? Wouldn't you want to retain your integrity and continue to be you? Would you want a Convention that allows forced interventions and does not respect your inherent dignity as a person? The principles established in this convention are universal and will apply to all human beings as much to you as to me. Let us make a Convention for a world where we can all grow and develop with mutual support. Imagine a Convention for all.[7]

It is reported that these words made the delegates think about the plight of people with disability and paved the way for the adoption of article 12 of the CRPD.[8]

The *raison d'etre* of article 12 of the CRPD is to protect the dignity and integrity of persons with disabilities by ensuring they are treated equally before the law. It ensures that they are not denied the right to make decisions that affect their lives based on their disability. The article protects persons with disabilities from caregivers who may want to make decisions on behalf of persons with disabilities, and instead provides that the persons with disabilities should be supported, to the extent necessary, to make their own decisions and exercise their right to legal capacity. More importantly, the article provides for recognition before the law and equality of all persons with disabilities and stipulates that states should provide support, if required, to ensure that persons with disabilities exercise the right to legal capacity.

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[7] Lex Grandia, *Human Rights and Disability Advocacy* (Marianne Schulze and Maya Sabatello eds, University of Pennsylvania Press 2013) 154.

[8] Grandia (n 7) 155.

2.1 Right to Recognition before the Law

Article 12 (1) provides that persons with disabilities have the right to recognition everywhere as persons before the law. This reflects provisions in article 6 of the UDHR and article 16 of the ICCPR, both which provide that all persons have the right to be recognized as persons by law everywhere. The interpretation given to the word 'everywhere' in article 12 (1) is that: 'there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited.'[9] The right to recognition by the law is non-derogable.

2.2 Right to Legal Capacity

Article 12 (2) provides for the right to legal capacity for disabled persons, on an equal basis with others, in all aspects of their lives. The article obligates State Parties to recognise and take positive steps to guarantee the right to legal capacity. Legal capacity has two prongs: the first is the right to be recognized as a legal person before the law; and the second is the right to make legally binding decisions.[10] In other words, legal capacity involves both holding the right and acting on the right in a manner that is recognized by the law.

The first prong, holding the right, is less problematic because human rights instruments and most Constitutions in the world entitle all persons to equality before the law and to recognition as persons before the law. However, the second prong - the right to make legally binding decisions - is more problematic. This is partly because legal capacity is often conflated with mental capacity which is a controversial concept determined differently in various jurisdictions.[11]

There are three approaches for determining mental capacity: status approach, outcome approach and functional approach.[12] First, according to the status

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[9] UN Committee on the Rights of Persons with Disabilities, 'General Comment on the Convention on the Rights of Persons with Disabilities' (Committee on the Rights of Persons with Disabilities 2014) General comment No 1 (2014) CRPD/C/GC/1 para 5.

[10] Alison Douglass, 'Mental Capacity Updating New Zealand's Law and Practice' (*The Law Foundation New Zealand*) <http://www.aspenltd.co.nz/mc/1_A.html> accessed 17 June 2017.

[11] Douglass (n 10); Elizabeth Kamundia, 'How to Implement Article 12 Of Convention on the Rights of Persons with Disabilities Regarding Legal Capacity in Kenya: A Briefing Paper' (2013) The Kenya National Commission on Human Rights and The Open Society Initiative for Eastern Africa <http://www.knchr.org/Portals/0/GroupRightsReports/Briefing%20Paper%20on%20Legal%20Capacity-Disability%20Rights.pdf> accessed 18 June 2017.

[12] Dave Powell, 'Sexual Offences and Mental Capacity House of Lords' (2010) 74 Journal of Criminal Law 104, 106.

approach, a disabled person is considered to lack the cognitive ability to make their own decisions based on their disability.[13] Their very status as a disabled person is relied on to render them incapable of making legally binding decisions. This clearly violates article 12, which requires states to provide support for persons with disabilities which does not substitute their decision-making.

Second, in the outcome approach, the reasonableness or correctness of the decisions made by the person with disability is assessed to determine whether they are competent to make decisions.[14] This approach is discriminatory because it holds persons with disabilities to a high standard by not allowing them to make mistakes, or decisions that may be considered unreasonable or contrary to conventional thinking. This also goes against article 12 which provides that persons with disabilities should be supported in their decision-making, if necessary, in a manner that protects their wills and preferences.

Third, in the functional approach, the question asked is whether the person concerned is capable of making a specific decision at a specific time and in a particular context.[15] Therefore, their mental capacity is neither present nor absent but is dependent on the specific task at hand.[16] This approach is the one which is most in conformity with article 12 of the CRPD because a person's mental capacity is not permanently decided., Instead, the decision to provide support for the person is made on a case by case basis.

2.3 Support in Exercising Legal Capacity

Article 12 (3) requires State Parties to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Such support should not amount to substitute decision-making but must respect the will and preferences of the persons with disability.[17]

2.4 Safeguards to Prevent Abuse of Rights

Article 12 (4) requires State Parties to provide safeguards to prevent abuse during the exercise of the right to legal capacity of persons with disability. These

[13] Douglass (n 10).

[14] Eulen E Jang, 'Mental Capacity: Reevaluating the Standards Notes' (2014) 43 Georgia Journal of International and Comparative Law 531, 543.

[15] Kelly Purser, *Capacity Assessment and the Law: Problems and Solutions* (Springer 2017) 67.

[16] Purser (n 15) 67.

[17] General Comment No. 1 (n 9) para17.

safeguards should ensure that the rights, will and preferences of the affected persons are respected and that the exercise of the right is free of conflict of interest and undue influence. The right should be exercised in a manner that is proportional and tailored to the circumstances of the affected person. Such safeguards should apply within the shortest time possible and be subject to review by a competent and impartial authority or judicial body.[18]

Persons with disabilities are at a higher risk of suffering from pressure, violence, undue influence and other forms of abuse from other people, including their care providers. Therefore, States Parties should see to it that the support provided is not only proportional to the need but also takes into account the wills and preferences of the person.[19] In case of doubt, the focus should be on the will and preferences of the person instead of the best interest principle.[20]

2.5 Property Rights

Finally, article 12 (5) provides that States Parties shall take measures to ensure that persons with disabilities enjoy the equal rights to own or inherit property and are not arbitrarily deprived of their property. Under the same provision, persons with disabilities also have a right to control their own financial affairs and the right to equal access to bank loans, mortgages and other forms of financial credit. The right to legal capacity cannot be enjoyed by persons with disabilities if they are prevented from making financial decisions on an equal basis with others.

Article 12 encompasses all the general principles applicable to the CPRD as outlined under article 3 of the same.[21] These are: respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities. This right is non-derogable.[22] If the right to legal capacity is denied,

[18] Art 12 (4).

[19] Anna Nilsson and others, 'Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities' <https://works.bepress.com/anna_nilsson/1/> accessed 14 June 2017.

[20] Nilsson and others (n 19) 11.

[21] General Comment No. 1 (n 9) para 4.

[22] General Comment No. 1 (n 9) para 4.

other fundamental rights including: the right to vote, right to family, reproductive rights, consent to sexual intimacy, right to own and manage property, right to make decisions on medical treatment, and right to liberty - are also denied.[23]

3.0 Implementation of Article 12 of the CRPD in Kenya

3.1 The Position of the CRPD within the Laws of Kenya

The Kenyan Constitution 2010 (the Constitution) is the supreme law in Kenya.[24] Article 2 (6) of the Constitution provides that any treaty or convention ratified by Kenya forms part of the laws of the Republic. Kenya ratified the CRPD in 2008 and, therefore, it forms part of the laws of Kenya. However, in some cases, Kenyan Courts have shied away from interpreting the CRPD.[25] The exception occurred in the case of *Wilson Morara Siringi v Republic*[26] where the Court reaffirmed the position of the CRPD in the laws of Kenya. The circumstances were as follows: an appeal was lodged against a decision from the lower court convicting the Appellant of the rape of a person with disability. During the proceedings in the lower court, the Prosecution and the Magistrate referred to the complainant as a 'mentally retarded' person who was unable to consent to sex by virtue of her disability. Judge Majanja held that the use of that term 'mentally retarded' was against article 12 of the CRPD. He stated as follows:

> In conclusion I would be remiss if I did not mention that the approach taken by the prosecution and the learned magistrate is that the complainant is an object of social protection rather than a subject capable of having rights including the right to make the decision whether to have sexual intercourse. This approach is inconsistent with the provisions of Article 12 of the Convention on the Rights of Persons with Disabilities which requires State parties to recognise persons with disabilities as individuals before the law, possessing legal capacity to act, on an equal basis with others. Kenya ratified this Convention in 2008 and by dint of Article 2(6) of the Constitution it forms part of the law of Kenya.[27]

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[23] General Comment No. 1 (n 9) para 31.

[24] Art 2 of the Constitution.

[25] This is demonstrated for example in the cases of: *Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya) v Nation Media Group Limited exparte Cradle – Children Foundation (suing through Geoffrey Maganya)* [2012] eKLR and *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others* [2011] eKLR. In both cases, the Petitioners alleged violations of the CRPD, but the Court failed to deal with this issue in the judgments and instead limited itself to national law.

[26] *Wilson Morara Siringi v Republic* [2014] eKLR.

[27] *Wilson Morara Siringi v Republic* (n 26) [15].

In line with the CRPD, article 27 of the Constitution provides that: 'Every person is equal before the law and has the right to equal protection and equal benefit of the law'. It also provides for a right to be free from discrimination based on many criteria including disability. The Constitution also provides for special entitlements for persons with disabilities for example the right to: be treated with dignity and respect; to access educational institutions and to access places, public transport and information; to use braille, sign language and other forms of communication; and, to access other material which would enable them overcome constraints arising from disability.[28] Furthermore, the State is required to ensure that at least five percent of the persons in elective and appointive posts are persons with disabilities.[29] In addition to the Constitution, the Persons with Disabilities Act also provides for many guarantees to promote and protect the rights of persons with disabilities.[30]

In other words, Kenyan law provides for equality before the law, the right to legal capacity, and non-discrimination for persons with disabilities in conformity with article 12 (1) and (2) of the CRPD, and other human rights instruments. However, many laws in Kenya condition the exercise of legal capacity on being 'of sound mind'.[31] This is problematic for at least three reasons. First, the term 'unsound mind' is not defined anywhere in the laws of Kenya and therefore leaves it open to abuse.[32] Secondly, the laws of Kenya do not set objectively ascertainable criteria for determining whether a person is of unsound mind and there is no process for review or appeal of such decision.[33] Thirdly, many Acts in Kenya provide that people of unsound mind are incapable of making various legally binding decisions including getting married, which proves that the concepts of legal capacity and mental capacity are conflated.[34] This then leads to the denial of legal capacity based on disability in contravention with article 12 of the CRPD.

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[28] Art 54 (1).

[29] Art 54 (2).

[30] Persons with Disabilities Act 2003 (rev. 2016).

[31] United Disabled Persons of Kenya, 'Status of the Human Rights of Persons with Disabilities in Kenya: A Shadow Report to the Initial Report on the United Nations Convention on the Rights of Persons with Disabilities (CRPD) to the UN Committee on the Rights of Persons with Disabilities' (2015) 41 <http://www.globaldisabilityrightsnow.org/sites/default/files/related-files/260/United_Disabled_Persons_of_Kenya_Shadow_Report.pdf> accessed 4 October 2017.

[32] See discussions of the various applicable laws of Kenya in United Disabled Persons of Kenya (n 31) 36.

[33] See part 3.2 below.

[34] See for example the Marriage Act, the Law of Succession Act, the Penal Code, and the Criminal Procedure Code discussed in part 3.2 below.

3.2 Legal Capacity as Conflated with Mental Capacity in Kenyan Law

3.2.1 The Constitution

Although article 27 of the Constitution provides for equality before the law for all, including persons with disabilities, some articles in the Constitution seem to be in contravention with this principle. To begin with, article 38 of the Constitution states *inter alia* that every adult Kenyan citizen has a right, without unreasonable restrictions, to register as a voter, to vote and to be a candidate in an election and hold office upon election. The Constitution does not define the term 'unreasonable restrictions'. However, this article may be read together with article 25 of the ICCPR, which forms part of the laws of Kenya.[35] The Human Rights Committee, in its interpretation of article 25 of the ICCPR stated that it is unreasonable to restrict the right to vote on the basis of physical disability but does not mention mental or psychosocial disability.[36]

In this regard, article 83 (1) (b) states that a person qualifies to be registered as a voter if (s)he is not declared to be of unsound mind. On a positive note, section 29 of the Persons with Disabilities Act provides that persons with disabilities can be provided with support, upon request to enable them to participate in presidential, parliamentary and county elections. The section further provides that the person who provides support is to do so strictly in accordance with the instructions of the voter. This provision seems to conform to article 12 (3) of the CRPD.

However, the Constitution provides that a person is disqualified from being voted as president, governor, senator, member of parliament, or member of county assembly, if (s)he is of unsound mind.[37] These provisions are problematic on at least three levels. The first, as stated above, is that the term unsound mind is not defined in the Constitution or anywhere in the laws of Kenya.[38] Therefore, it is not clear what it means, the category of persons covered and whether the restriction is temporary or permanent. Secondly, the Constitution does not provide what

[35] Article 38 of the Constitution draws from article 25 of the ICCPR which forms part of the laws of Kenya by dint of article 2 of the Constitution.

[36] 'UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7' <http://www.refworld.org/docid/453883fc22.html>.

[37] Arts 99 (2) (e), 137, 180 and 193.

[38] Kamundia (n 11) 59.

criteria may be used to declare a person as being of unsound mind and whether such declaration may be subject to review or appeal as required by article 12 (4) of the CRPD. Thirdly, apart from the right to vote, it is not stated whether persons with mental/psychosocial disabilities may be supported to enjoy other civic rights under the Constitution. To deny a fundamental right of an adult citizen to hold office based on a disability, without providing a procedure for determining whether the disability affects one's cognitive abilities and if so to what extent, is to contravene article 12 of the CRPD. Furthermore, the United Nations High Commission recommended that laws that disenfranchise citizens and prevent them from holding elective posts based on disability should be abolished.[39]

3.2.2 The Marriage Act

The right to get married is a fundamental right under international and regional human rights principles and in the Constitution of Kenya.[40] However, the Marriage Act states that consent to get married is not freely given if the person who purports to give it 'is suffering from any mental condition whether permanent or temporary…so as not to appreciate the nature or purport of the ceremony.'[41] Furthermore, section 5 of the same Act provides that a person is not competent to act as a witness in a marriage ceremony if the person is 'otherwise not competent to enter into a contract because of mental disability rendering that person incapable of understanding what the parties are doing.' Lastly, the Act provides that a party to a marriage who proceeds with the ceremony knowing that the other party was suffering from mental disorder, whether permanent or temporary, would be liable to a three-year imprisonment, a hefty fine, or both.[42]

The Marriage Act fails to provide for circumstances under which people suffering from mental disability, whether temporary or permanent, may contract valid marriages. Furthermore, under Section 8 of the Matrimonial Causes Act, being of unsound mind is one of the grounds to petition for divorce. Once again there is no provision for support and both the Marriage Act and the Matrimonial

[39] 'Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities' (2009) Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General para 46 <http://www.un.org/disabilities/documents/reports/ohchr/A.HRC.10.48AEV.pdf> accessed 18 June 2017.

[40] The Constitution of Kenya 2010, Art 45.

[41] Marriage Act No. 4 of 2014, s 12 (2) (c).

[42] S 12.

Causes Act discriminate against persons with disabilities by denying them the legal capacity to contract valid marriages or act as witnesses to a marriage. Regardless of whether such disability is temporary or permanent, the disabled person is denied the legal capacity to contract a marriage in contravention of Article 12 of the CRPD.

3.2.3 The Law of Succession Act

The Law of Succession Act provides *inter alia* for disposal of property by way of wills and testaments and administration of property of persons who die intestate. Section 5 of the Law of Succession Act provides that persons of unsound mind do not have the legal capacity to dispose of their property by will. There is a presumption that the person making the will is of sound mind and the burden is on a person who alleges that the maker of the will was not of sound mind, at the time of making the will, to prove the same. According to this law, therefore, a person who is considered to be of unsound mind lacks the capacity to dispose of property. This is in contravention with article 12 (5) of the CRPD which provides for the right of persons with disabilities to own and inherit property.

3.2.4 Penal Code and Criminal Procedure Code

Section 12 of the Penal Code states that a person is not criminally responsible for a crime if at the time of commission, he was suffering from insanity rendering him/her incapable of understanding the nature of the act or omission constituting the crime. In Kenya, this is known as the insanity defence - where the accused person presents a defence claiming that he or she was insane at the time of the commission of the offense.[43] According to section 166 of the Criminal Procedure Code, an accused who presents the insanity defence must produce medical evidence to show that they were, indeed, suffering from a condition rendering them incapable of comprehending the act or omission.[44] The section further provides that if the Court is satisfied by the evidence presented, the Court will make a special finding that the accused is guilty but is not criminally responsible for the crime by reason of insanity.[45]

[43] Peter Kaimba, 'The Law Relating to Lunacy/ Insanity and other Incapacity in Relation to Criminal Liability in Kenya' <https://www.academia.edu/8468563/INSANITY_and_LUNACY_IN_CRIMINAL_LIABILITY_IN_KENYA> accessed 4 October 2017.

[44] Criminal Procedure Code CAP. 75 1930 s 166.

[45] S 166.

At first glance, it may seem that the insanity defence is an easy way to avoid liability. However, the practice in Kenya is that if this defence succeeds, the mentally ill person is committed to a mental institution, by a court order, where they have to undergo treatment.[46] This detention is indefinite and one may only be released at the pleasure of the President.[47] The defence of insanity is problematic when viewed under article 12 of the CRPD for many reasons among them the indefinite detention that follows.[48] This view has been upheld by Kenyan Courts in a number of decisions in Kenya,[49] the latest one of these was *Republic v S O M* rendered on 30 April 2018, which declared section 166 of the Criminal Procedure Code unconstitutional and against the rights and dignity of persons with disabilities.[50]

These decisions are in line with the position of the Human Rights Council on this issue which is that:

> In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability. Instead disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant. Procedural accommodations both during the pretrial and trial phase of the proceedings might be required in accordance with article 13 of the Convention and implementing norms must be adopted. [51]

3.2.5 The Sexual Offences Act

Unlike the statutes discussed above, the Sexual Offences Act contains provisions which seem to be in conformity with article 12 of the CRPD. To begin with, the Act defines mental disabilities to include disability, irrespective of the cause, whether temporary or permanent, which affects the person at the time of the

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[46] Kamundia (n 11) 64.

[47] Criminal Procedure Code CAP. 75 1930 s 166.

[48] See Kamundia (n 11) 64–65. where the pros and cons of the insanity defence are discussed. See also Dianne Chartres, To Investigate Supported Decision-Making Practices, Capacity Building Strategies and other Alternatives to Guardianship (2010 Churchill Fellowship) < https://www.churchilltrust.com.au/media/fellows/2010_Chartres_Dianne.pdf> accessed 18 April 2018.

[49] See for example *Hussan Hussein Yusuf v Republic [2016]eKLR*; *B K J v Republic [2016] eKLR*; *Joseph Melikino Katuta v Republic* [2016]eKLR (in all the three cases the Court held that the indeterminate incarceration of mentally disabled persons amounted to cruel, inhumane and degrading treatment which was against the Constitution and established human rights principles).

[50] *Republic v S O M* [2018] eKLR [12].

[51] 'Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities' (n 39) 47.

commission of the offence in question.[52] The disability has to be of a kind which: prevents the affected person from appreciating the nature and consequences of the act; makes them unable to resist the commission of the act; or makes them unable to communicate their unwillingness to participate in the act.

The same meaning is implied in sections 42 and 43 (4) of the Act which define consent. It is noteworthy that the Act limits the definition to the specific time of the commission of the offence which implies that as a rule, persons with mental disabilities can consent to sex and the exception is when the mental disability affects their ability to consent at the time of commission of the sexual act. This interpretation was indeed confirmed by the High Court in the case of *Wilson Morara Siringi* mentioned above. In this case, the Prosecution alleged that the accused person had sexual intercourse with the complainant who was unable to consent due to her mental illness. The Judge held *inter alia* that:

> The issue is not whether the complainant was mentally impaired generally but whether, 'at the time of commission of such act was the complainant mentally impaired.' …The inquiry is focused on whether the complainant exercised freedom and capacity to make the choice of having sexual intercourse and whether at the time the act took place the complainant was incapable of consenting by reason of mental impairment.[53]

The judge found that there was no evidence to show that the complainant had no capacity to consent at the time of commission.

On one hand, this interpretation is commendable since it considers persons with mental disabilities as subjects of the law, able to make their decisions, in conformity with article 12 of the CRPD. On the other hand, it seems to shift the presumption of consent, so that the Prosecution has to prove that the person was mentally impaired at the time of the commission, which can be very difficult to prove.

3.2.6 Other Relevant Acts of Parliament

There are many other Kenyan Acts of Parliament which deny persons with disability the right to make decisions due to their disability. Other examples include: Sale of Goods Act which provides that persons 'who by reason of mental incapacity

[52] Sexual offences Act No. 3 of 2006 s 2.
[53] *Wilson Morara Siringi v Republic* (n 26) [12].

are incompetent to contract' shall pay a reasonable sum for goods delivered.[54] This implies that people with disabilities would not have the legal capacity to enter into contracts to buy and sell goods. Secondly, the Traffic Act restricts the legal capacity of people with disabilities to receive driving licenses and makes it possible to revoke the license of a person with disability on that basis. [55]

4.0 Conclusion and Recommendations

Although the Constitution of Kenya provides for equality before the law, legal recognition and the right to legal capacity and non-discrimination, some laws of Kenya discussed above continue to restrict or limit legal capacity based on an amorphous concept of 'unsound mind'. As shown above, the legal capacity of persons with disability is restricted in relation to voting, vying for elective posts, marriage, disposal of property, contracting for the sale of goods, as well as acquiring driving licenses. This is in contravention of article 12 of the CRPD. The Courts in some instances mentioned above have endeavoured to rule such provisions as unconstitutional and to interpret the statutes in ways which uphold the rights of persons with disabilities; but more action needs to be taken.

One way to make the laws compliant with article 12 would be to institute mechanisms for supported decision-making and implement the safeguards provided for in article 12 (4) in dealing with the concept of 'unsound mind'. In other words, the concept of unsound mind in Kenya should be reviewed in accordance with article 12 (4) of the CRPD which requires that the action of State Parties meet the following standards: respect the rights, will and preferences of the person; are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances; apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body; and, are proportional to the degree to which such measures affect the person's rights and interests.

A practical way to implement this in the Kenyan context would be by providing a statutory definition of the concept of 'unsound mind'. This definition could entail what it means, as well as the scope, duration and other parameters. Secondly, once it is established that disability exists, there needs to be objective

[54] Sale of Goods Act CAP. 31 s 3.
[55] Traffic Act CAP. 403 s 31.

criteria for determining if the disability renders the affected person incapable of performing a specific task. The blanket statement of unsound mind should be abolished, and the determination of mental capacity should be done on a case by case basis using the functional approach discussed in part 2.3 above.

Lastly, there should be support for persons with disabilities to make their own decisions instead of substitute decision-making. Apart from providing support to enable persons with disabilities to vote, the Acts discussed above render persons of 'unsound mind' incapable of consenting to marriage, disposing of their property or vying for elective post. To fulfil its obligations under the CRPD, Kenya needs to enact legislation mandating the provision of support, if required, to persons with disabilities enabling them to exercise their legal capacity.

Separation of Powers in Judicial Enforcement of Governmental Ethics in Kenya and South Africa

Walter Khobe Ochieng*

Abstract

The Kenyan Constitution, 2010 and the 1996 South African Constitution prescribe eligibility criteria for appointment into public office. The courts in both countries have been vested with the role of policing the boundaries of constitutionality of the exercise of power by the other arms of government. This mandates courts to ascertain whether an appointment by the executive branch meets the constitutionally prescribed threshold. The power of judicial review of appointments by the executive branch has brought the question of separation of powers between the judiciary and the executive into sharp relief. This paper discusses the separation and intertwining of powers between these two branches of government in the context of their respective roles in public appointments.

1.0 Introduction

A core assumption of traditional constitutional thought is that constitutional issues are only a relatively small subset of all political issues. This is undergirded by

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an understanding that the legislature should be given the leeway to make policy.[1] However, the *leitmotif* of new constitutions, particularly in developing and post-authoritarian countries, eschews this limited conception of what constitutions do.[2] As Kim Lane Scheppele has noted, citizens of these countries tend to adopt "thick" constitutions, with large amount of material –socio-economic rights provisions, elaborate accountability principles, among others- that are normally left to ordinary legislation under traditional constitutional thought.[3] They also tend to regulate certain items in great detail.[4] This characteristic brings almost all issues of governance within the remit of constitutional problems.

Despite criticisms of these thick conception of constitutions as containing material unsuited for constitutional law,[5] their logic is understandable. Constitutions in developing countries are thoroughly transformative documents by necessity; no developing country wants to stay as it is.[6] There is a need to transform not merely society and the economy, but politics as well. The ordinary political order is generally viewed as flawed. Thick constitutionalisation is, thus, a signal that ordinary politics will not do as a solution to the country's problems.[7] To lay a solid foundation for promoting credible and effective governance, therefore, requires accountability mechanisms and institutions to be constitutionalised.[8]These mechanisms and institutions are designed to control and constrain government in order to prevent both anarchy and arbitrariness. This informs the high number

[1] *See* K L Scheppele, "Democracy by Judiciary: Or, Why Courts can be More Democratic than Parliaments", in A Czamota, *et al* (eds.) *Rethinking the Rule of Law after Communism,* Budapest, Central European University Press (2005), pp 37-38.

[2] *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012]eklr Advisory Opinion No. 2 of 2012 para 54.

[3] *See* Scheppele, *Supra* note 1, pp 37-38.

[4] K Rosenn, "Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society", 38 *American Journal of Comparative Law* (1990), p 773.

[5] *See, e. g.,* M Kugler, & H Rosenthal, *"Checks and Balances: An Assessment of the Institutional Separation of Political Powers in Colombia",* in A Alesina, *Institutional Reforms: The Case of Colombia,* Cambridge, MIT Press (2005), pp 75-76. One is therefore mindful of the advice of K C Wheare, *Modern Constitutions,* Oxford, Oxford University Press (1966), pp 33–34, that a constitution should contain 'the very minimum, and that minimum [should] be rules of law'. Or, as Chief Justice Marshall put it in the celebrated United States' case of *McCulloch v Maryland*, 4 Wheat 316, 407 (1819), a constitution by its very nature requires that only its 'great outlines' be marked and its 'important objects' designated, and that it not descend into the 'prolixity of a legal code'.

[6] *See* C Sunstein, *Designing Democracy: What Constitutions Do,* Oxford, Oxford University Press (2001) p 68.

[7] *See* Scheppele, *supra* note 1, pp 37-38.

[8] C Fombad, "The Constitution as a Source of Accountability: The Role of Constitutionalism", 2 *Speculum Juris* (2010) p 57.

of bodies (courts, constitutional commissions, among others) given constitutional control power in such new constitutions.[9]

At the centre of the transformative agenda of the Constitution of Kenya, 2010 is the entrenchment of principles on leadership and integrity that require consideration of ethical conduct of appointees to determine suitability of appointees for public office.[10] This is aimed at ameliorating the defects in the system of governance in the old dispensation which was deficient in terms of accountability principles and institutions.[11] Corruption in public service during the post-colonial era had become endemic thus compromising on service delivery.[12] The leadership and integrity provisions were, therefore, entrenched into the constitution with the hope that this would aid in checking the runaway bad governance and corruption in the country.

In 1994, South Africa emerged from a racially divided and oppressive past which disrespected human rights and the most basic tenets of the rule of law. Most state institutions had little or no credibility, were profoundly distrusted by the majority of the people and were not accountable in any credible manner, either to courts or to one another.[13] The negotiators of the 1996 Constitution, motivated by the need to transform South Africa from an intensely oppressive state into an open and democratic society, imposed ethical substantive constraint on the powers of the executive branch in appointments of persons into designated offices.

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[9] *See, e. g.,* C S Elmendorf, "Advisory Counterparts to Constitutional Courts", 56 *Duke Law Journal* (2007) p 953; T Pegram, "Accountability in Hostile Times: The Case of the Peruvian Human Rights Ombudsman 1996-2001", 51 *Journal of Latin American Studies* (2008), pp 51-82.

[10] Chapter six of the Constitution of Kenya, 2010 and made applicable to public officers through Leadership and Integrity Act, No. 19 of 2012. At section 52, the Act states that "pursuant to Article 80(c) of the Constitution, the provisions of Chapter Six of the Constitution and Part II of this Act except section 18 shall apply to all public officers as if they were State officers." See also *Evans Misati James & 8 others v Independent Electoral and Boundaries Commission & 2 others*, [2012] eKLR Petition 327 & 328 of 2012 para 55.

[11] P Wanyande, *et al* "Governance Issues in Kenya: An Overview", in P Wanyande, *et al* (eds.) *Governance and Transition Politics in Kenya,* Nairobi, Nairobi University Press (2007) p 2.

[12] Wanyande, *et al Ibid* pp 1-20; K Kibwana, *et al The Anatomy of Corruption in Kenya: Legal, Political and Socio-economic Perspectives,* Nairobi, Clarion (1996); P K Kidombo, *Targeting Corruption: The Booming Business*, Nairobi, Sino Printers and Publishers (2006); E M Mwenzwa, "Corruption in the Utilization of Constituencies Development Fund: Implications and Remedies", in E G Ontita, *et al* (eds.) *Themes in Contemporary Community Development in Africa: A Multi-disciplinary Perspective*, Pau, Delizon International Publishers (2013), pp 214-230.

[13] P de Vos, "Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy", in D Chirwa, & L Nijzink, (eds.) *Accountable Government in Africa: Perspectives from Public Law and Political Studies,* New York, United Nations University Press (2012), p 160.

The constitutionalisation of ethical values in both constitutions was born out of the need to ensure accountability to the public in service delivery. The aim of this endeavour is to cushion the public against malpractices especially by public officials in cahoots with individuals and institutions in the private sector. Governmental ethics obliges public officers to make objective and impartial decisions with unqualified integrity and honesty in order to bring honour and pride to the offices held. This is an attempt to institutionalise democratic ideals within the Kenyan and South African polity. In order to streamline the processes of appointment into public office, the Constitution of Kenya envisages that selection into public office should uphold the principles of personal integrity, competence and suitability.[14] The South African Constitution captures the same concern by providing that appointees to designated offices must be "fit and proper" for the job.[15]

Both the constitution of Kenya and South Africa grant courts powers to determine whether anything said to be done under the authority of the constitution or any other law is inconsistent with or in contravention of the constitution.[16] This gives constitutional *imprimatur* to the courts to ensure that appointments to public office conform to the values and principles on public appointments. The expansive judicial role under these constitutions is in sync with these constitutions' transformative vision for the Kenyan and South African societies. In essence, these constitutions attempt to create an ongoing, controlled, evolution by laying a legal architecture in which social, economic and political transformation could take place in a post-liberal democracy. It is this vision of a controlled evolution that the courts have deemed to confer upon them the sweeping jurisdiction to intervene in the domain of other arms of government.[17]

The marked rise of judicial power and influence has meant that there are few issues of political life in Kenya and South Africa with which the judiciary is not in some way involved.[18] It has been argued that courts in the two countries have

[14] Article 73(2) (a) of the Constitution of Kenya.

[15] For example, Section 174 (1) of the South African Constitution stipulates that appointees into judicial office must be fit and proper persons.

[16] Article 165(3)(d)(iii) of the Constitution of Kenya and Section 172 of the Constitution of South Africa.

[17] *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others* [2013] eKLR Advisory Opinion Reference 2 of 2013 para 53. See also *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) at para 100.

[18] X N Iraki, "Bloated Wage Bill: Finally, Kenya's Moment of Truth", 18th March 2014 *Standard* notes in this regard 'A careful analysis of the framers of the Constitution shows they were mostly lawyers with one

expanded their role in ways that intrude into domains textually committed to other branches of government.[19] Judicial oversight over the democratically elected branches of government: the executive and the legislature, has always raised concern of supplanting the choices of the people made through political processes with a juristocracy. In the Kenyan and South African context, the judicial enforcement of the principles on eligibility for public appointments have heightened concerns about the authority of judicial review and the counter-majoritarian consequences of constitutional challenge.[20]

The intervention by courts in questions of the legality of public appointments suggests a useful prism through which to view the expansion of judicial power and what it portends for separation of powers between the judiciary and the executive in Kenya and South Africa. The balancing of the competing obligations to forge a constitutional order that honours the intention of the framers and the anxiety not to be seen to usurp the mandate of the executive branch has seen the courts develop various strategic mechanisms for taming undue judicial interference with other arms of government. This paper investigates these strategies, which in essence are of judicial deference, as deployed by courts when faced with questions of eligibility of appointees into public office. The question posed in this critique is how judicial deference as a function of respect for separation of powers fits with the constitutional imperative that the courts should advance the transformative vision of the constitution.

2.0 Constitutionalisation of Governmental Ethics

From independence by African countries in the 1960s, the continent has been characterized by the degradation of governmental structures along with

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major objective: to ensure there shall never be another all-powerful President. But they seemed not sure of the replacement. They distributed power so much that no one seems to have any power except the courts.' http://www.standardmedia.co.ke/?articleID=2000107160&story_title=bloated-wage-bill-finally-kenya-s-moment-of-truth Last visited 1 May 2014. See also Pius Langa, "Transformative Constitutionalism" (2006)3 *Stellenbosch Law Review* 351.

[19] C Kanjama, "Legislative Autonomy Extends to Court Orders, This is Why", *Standard* 8th December 2013 . http://www.standardmedia.co.ke/mobile/?articleID=2000099627&story_title=legislative-autonomy-extends-to-court-orders-this-is-why Last visited 1 May 2014. See also Jacob Zuma "Judiciary must respect separation of powers" http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=264525&sn=Detail&pid=71616 Last visited 1 May 2014.

[20] A M Bickel, *The Least Dangerous Branch*: *The Supreme Court at the Bar of Politics* 2nd ed New Haven, Yale University Press (1986), pp 16-17.

corruption, repression and human rights abuses.[21] Since the 1990s, most African countries have embarked on a process of democratization marked by the quest to tame runaway abuses of power and strengthen governance systems through the enactment of new constitutions.[22] The contemporary surge in constitution making across the African continent has been motivated by the need to solve several problems, of both society and state. Yash Ghai argues that "[i]n particular they aim to promote values and framework of nation building as well as to restructure the state."[23] Constitutionalisation of ethical values has emerged as one of the options put forth as an attempt to put a break to a past plagued by mismanagement, misappropriation, nepotism and tribalism, abuse of power and impunity.[24]

The Constitution of Kenya entrenches principles of leadership and integrity in attempt to engender a political system in which governance is conferred on persons who believe in the common good of the people. To break away from the vicious circle of lack of integrity and unchecked powers, the framers of the constitution have laid out the characteristics of leadership under the new constitutional dispensation. [25] Integrity involves leaders consistently behaving in an honest, ethical and professional manner, promoting and advocating the highest standards of personal, professional and institutional behaviour during their tenure.[26] Leaders who fail to uphold this standard risk being removed from their leadership positions, while appointing authorities must be satisfied that prospective holders of public office meet the test of integrity. It aims to make the government accountable to the people – the source of all sovereign power. Public officials are to be in office to serve the people, observe high standards of integrity and avoid corruption and favouritism.[27]

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[21] E Ahmed, & K Appiagyei-Atua, "Human Rights in Africa-A New Perspective on Linking the Past to the Present," 41 *McGill Law Journal*, (1995-1996) p 822.

[22] L G Franceschi, *The African Human Rights Judicial System: Streamlining Structures and Domestication Mechanisms Viewed from the Foreign Affairs Power Perspective,* Cambridge, Cambridge Scholars Publishing, (2014), pp 121-122.

[23] Y Ghai, "Chimera of Constitutionalism: State, Economy, and Society in Africa" in S Deva, (ed) *Law and (In)equalities –Contemporary Perspectives,* Lucknow, Eastern Book Company (2010), p 327.

[24] P L O Lumumba, & LG Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary,* Nairobi, Strathmore University Press (2014), pp 297-298.

[25] Constitution of Kenya Review Commission (CKRC), *Final Draft*, Nairobi, Government Printers (2005), p 217.

[26] See generally K Obura, "Towards a Corruption Free Kenya: Demystifying the Concept of Corruption for the Post-2010 Anti-Corruption Agenda" in MK Mbondenyi, *et al* (eds) *Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal*, Pretoria, Pretoria University Law Press, (2015), p.239.

[27] Y P Ghai, & J C Ghai, *Kenya's Constitution: An Instrument for Change*, Nairobi, Katiba Institute (2011), p iii.

While not elaborate as the Kenyan scheme, South Africa's Constitution also regulates ethical conduct of public officials and demands that this should be one of the criteria for assessing the suitability of a candidate for designated public offices. Explicitly, the constitution demands that judicial appointments must take into account the consideration as to whether the candidate is "fit and proper".[28] Mokgoro notes that this provision and the open criteria with which the Judicial Service Commission is expected to carry out its functions is integral to the objective of transformation of South Africa's judiciary from its apartheid legacies.[29] A similar scheme is envisaged for the appointment of the National Director of Public Prosecutions (National Director). Section 179 of the South African Constitution requires the enactment of national legislation to ensure that the National Director is appropriately qualified.[30] This has been effected through sections 9 and 10 of the National Prosecuting Authority Act which requires that the National Director must be a person fit and proper for the job with due regard to his experience, conscientiousness and integrity.[31] Thus a legislative scheme complements and beefs up the constitutional demands for consideration of ethics in public appointments in the South African context.

3.0 Judicial Enforcement of Governmental Ethics and Separation of Powers

The modern understanding of separation of powers is based on a "trinity of branches" whose status stems from the constitution. Each one of the three branches is limited in its authority and powers. None of them is omnipotent. The legislative, the executive, and the judicial branch have no authority beyond that granted to them in and by the constitution. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and is not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way, each of the branches will be a check

[28] Section 174(1) of the Constitution of South Africa.

[29] Y Mokgoro, "Judicial Appointments", http://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp43-48.pdf Last visited 1 May 2014.

[30] Section 179(4) of the Constitution of South Africa.

[31] Act No 32 of 1998.

to the others and no single group of people will be able to control the machinery of the State.[32]

The importance of the principle of separation of powers is in the very connection between the branches and in the limitations they place on each other.[33] Indeed, the three branches are equal; each has its own unique character, and their equality is reflected even in those characters. Each one's unique character is balanced out by the others'. In this way, the internal harmony of the system is ensured. No branch has total power. The branches are connected and intertwined with each other. The modern principle of separation of powers is based on the concept of reciprocal relations between the different branches of power such that each branch checks and balances the other branches. The meaning of this modern principle is threefold: first, each branch of government has a function that is its major function. Its nucleus should not be impinged upon. Second, each branch should perform its function according to its outlook and its discretion. Third, balancing and review between the three branches is needed.

Separation of powers does not mean the absolutism of each branch within its zone. The principle of checks that characterizes the modern separation of powers is at work, according to which the judicial branch has the final authority, in cases of dispute, to determine the bounds of authority and the legality of the activity of the other branches. When the judiciary determines that the executive branch deviated from its authority or exercised it illegally and thus invalidates the action, it does not infringe upon executive authority and it does not violate the principle of separation of powers. On the contrary, the ones who violated the principle of separation of powers are those who deviated from their authority or acted illegally. A court that invalidates these actions preserves this principle and restores the balance that has been upset.[34]

Judicial review of executive power is an important requirement of constitutionalism in Africa because of a widespread recognition of a powerful executive branch in Africa.[35] An unrestrained executive branch would result in

[32] M J C Vile, Constitutionalism and the Separation of Power, Oxford, Clarendon Press (1967), p 14; however it should be noted that there exists a continuum of different models of systems of government and often times members of one branch can also sit in another branch. For example, in parliamentary systems of government, cabinet ministers are both members of the executive and the legislative branches of government.

[33] A Sajò, *Limiting Government: An Introduction to Constitutionalism,* Budapest, Central European University Press (1999), p 35.

[34] *M. v. Home Office* [1992] Q.B. 270, 314.

[35] E Nwauche, "Judicial Review of the Exercise of Presidential Power in Africa", 16 *University of Botswana Law Journal* (2013), p 3.

arbitrary exercise of power since courts would defer to their unfettered exercise of discretion. Whenever the executive branch exceeds the authority given to it, or if it exercises that authority unlawfully, the judiciary must exercise the power of review given to it by the constitution and statutes. The judiciary should use this power to determine the consequences of the executive's actions. Indeed, when the judiciary reviews the acts of the executive branch, it operates within the framework of its classic role in separation of powers and in accordance with its role of maintaining the rule of law. Rule of law implies that every person who has authority must exercise it lawfully, and if authority has been exercised unlawfully, it must be subject to judicial review.[36]

The area of judicial review of governmental ethics raises the question of separation of powers in a particularly stark fashion because of the traditional assumption that when it comes to appointments, the question of who gets appointed is a matter for the unfettered discretion of the executive branch. The assumptions here have much to do with the fact that the discretionary powers are direct descendants of what were once considered to be unreviewable or non-justiciable executive prerogatives.[37] To borrow from Gerhart Anschütz, Weimar's most distinguished constitutional lawyer, it might seem that in these areas, "public law stops short".[38] Put differently, the question of who should hold public office is a highly political area of official decision-making where some argue that the *writ* of the rule of law does not run, even though very important issues of governance are affected by these decisions. The idea that some areas of official decision-making can be sealed off from the rule of law is in tension with the idea of constitutionalism.[39]

The executive branch derives its powers from the constitution and statutes. Therefore, in making appointments into public service, the executive must act within the framework of the constitution and statutes. Constitutionalisation of governmental ethics implies certain standards into the exercise of public power of appointment vested in the executive branch. Judicial review ensures that courts are able to ensure fidelity to these standards.[40] Critics view this phenomenon as

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[36] A Barak, *The Judge in a Democracy,* Princeton, Princeton University Press (2006), p 241.

[37] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).

[38] Quoted by David Dyzenhaus in D Dyzenhaus, "Baker: The Unity of Public Law?", in D Dyzenhaus, (ed) *The Unity of Public Law,* Oxford, Hart Publishing (2004), p 2.

[39] J Waldron, "The Core of the Case Against Judicial Review", 115 *Yale Law Journal* (2006) p 1354.

[40] J Limbach, "The Role of the Federal Constitution Court," 53 *South Methodist University Law Review* (2000) p 429.

an increase in judicial power relative to the powers of the executive branch. This change, however, is merely a side effect of an attempt to entrench good governance into the polity of a state. The purpose of this development is not to increase the power of courts in a democracy but rather to increase the protection of the citizenry's interest in good governance. It is informed by the reality that democracy is based on the simultaneous existence of both the rule of the majority and the rule of values that characterize democracy.

Whenever issues of judicial enforcement of governmental ethics have arisen in Kenya and South Africa, the executive branch has argued that once the executive has decided upon the appointment, there is no basis for judicial intervention. The executive, it has been argued, balances various considerations, and after it has decided to make an appointment, courts should not intervene to supplant the executive's discretion with its own discretion. [41] This assertion by the executive branch in both countries raises several questions. What if the executive branch of government acts illegally? What if the executive branch deviates from the authority which the constitution grants it? What if the executive branch makes illegal use of its constitutionally assigned authority? The solution to these problems lies in the concept of checks that one branch has over another. In this context, it is important to emphasize that the principle of separation of powers does not mean that each branch may deviate from its authority or exercise it illegally without the other branches being allowed to intervene. Separation of powers means that each branch is independent within its zone, so long as it acts according to the law. It is not a license for the branches to violate the law.

Adjudication of governmental ethics must be flexible and take into account the needs of a modern democracy. A "monist" approach to authority should be prevented. While courts should recognize the interweaving between the branches in fulfilling the constitution's intent, judges must take care not to impinge on the essence of appointments as a function of the executive branch. It is also important to note that the executive branch of government should discharge the appointive function according to its own perspective and discretion without intervention from the judicial branch. Therefore, courts should not invalidate a decision by the executive branch that falls within the zone of legality, just because the court would have chosen a different person.[42] The choice between candidates is the function of

[41] See generally J Okoth, "The Leadership and Integrity Chapter of the 2010 Constitution of Kenya: The Elusive Threshold" in MK Mbondenyi, *et al* (eds) *Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal,* Pretoria, Pretoria University Law Press, (2015) p. 275.

[42] *The State ex rel. The Attorney General v Porter* 1Ala. 688; 1840 WL 243 (ALA.).

the executive branch, and there is no room for judicial intervention in that decision. According to the principle of separation of powers, if the executive branch operates within the framework of its authority, the judiciary should not intervene and should not change that decision. The authority to execute belongs to the executive branch, not the judiciary. The judiciary may not replace the discretion of the executive on whom to appoint with its own judicial discretion. Despite this recognition of the appointive power as a function of the executive branch, the principle of separation of powers recognises the need for checks and balances between the three branches. In the absence of checks and balances, the executive branch is likely to accumulate power in a way that is harmful to the aspirations of the constitution.[43]

4.0 Deference in Adjudication of Governmental Ethics as a Stratagem for Respect of Institutional Comity

Traditional constitutionalism has long viewed judicial power with suspicion.[44] Indeed, this notion underlies Bickel's "counter-majoritarian" difficulty - judicial review can be "undemocratic" because it "thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it".[45] These views also stress the inferior institutional capacities of courts to formulate policy and to check executive power.[46] Deep hostility to judges, means that delegation of power to judiciaries is viewed as a necessary evil. Since statutes do not interpret, apply, or enforce themselves, political rulers need courts; and judicial authority has been made more palatable through separation of powers doctrines. These doctrines seek to distinguish the political function (legislating and administering) from the judicial function (the resolution of legal disputes by a judge through application of the legislator's law). However, acceptance of judicial review means rejection of executive and legislative sovereignty and separation of powers means "checks and balances" among co-equal branches of government.

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[43] G O'Donnell, "Horizontal Accountability in New Democracies", in A Schedler, *et al.* (eds), *The Self-Restraining State: Power and Accountability in New Democracies,* Boulder, CO, Lynne Rienner (1999), pp 29–51.

[44] *See* Waldron s*upra* note 38 pp 1346, 1406; J H Ely, *Democracy and Distrust: A Theory of Judicial Review* Cambridge, Harvard University Press, (1980) p 87.

[45] *See* Bickel, *supra* note 20, pp 16-17.

[46] *See* A Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation,* Cambridge, Harvard University Press (2006), p 230; G R Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* Chicago, Chicago University Press (1991), pp 15-21; L Fuller, "The Forms and Limits of Adjudication", 92 *Harvard Law Review* (1978), pp 394-95 (arguing that courts are poorly suited to deal with complex, polycentric problems because of constraints on their institutional capacities).

The concept of judicial deference has been adopted to advance the argument that other arms of government have been bestowed upon a legitimate authority and thus deserve the leeway to implement their policies. Further, that most of the substance of the decisions made by other branches of government are not appropriate for judicial decision-making, particularly because of the polycentricism of the task and consequence.[47] Lastly, that courts lack the requisite expertise on the issues that are up for consideration. Judicial deference therefore implies that the judiciary must appreciate the legitimate and constitutionally-ordained province of the co-equal arms of government and accord their interpretations of fact and law due respect. This is the approach that Kenya's Court of Appeal and the Constitutional Court of South Africa have endorsed as the ideal judicial approach in adjudication of cases for eligibility of appointment into public office.

The Kenyan Court of Appeal rendered judgment in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (Mumo Matemu)*[48] where the Appellant appealed against the decision of the High Court which had upheld a petition questioning the constitutionality of his appointment by the President as the Chairperson of the Ethics and Anti-Corruption Commission. The Appellant's appointment had followed clearance by the National Assembly which did not make recommendations relating to his unfitness or unsuitability for the position as against the constitutional threshold of integrity. Following the appointment, the High Court was moved by the 1st Respondent to issue a declaration that among other things, the process and manner in which the Appellant had been appointed was unconstitutional.

The 1st Respondent contended that every person who was interested in the Chairmanship of the Commission had to meet the threshold set out in the Leadership and Integrity Chapter of the Constitution. It was its case that although the formalities for the appointment of the Chairperson were followed, the person who was appointed did not meet the criteria laid down in the Constitution. The 1st Respondent alleged corrupt dealings by the Appellant in the past when he held several senior positions at the Agricultural Finance Corporation (AFC). It questioned his integrity by stating that the Appellant swore an affidavit with false information on the amount of money that a company known as Rift Valley Agricultural Contractors Limited owed AFC, and secondly, that as Legal Officer at AFC, he

[47] Fuller, *Ibid*, pp 394-95 (arguing that courts are poorly suited to deal with complex, polycentric problems because of constraints on their institutional capacities).

[48] [2013] eKLR Civil Appeal 290 of 2012.

approved certain loans which had not been properly secured, and whose proceeds were paid out in fraudulent and unclear circumstances. The 1st Respondent further claimed that some of these allegations were the subject of criminal investigations by the Police and the Criminal Investigations Department but the investigations had never been completed. The 1st Respondent pointed out to the Court that the criminal investigations file was still open with a recommendation that the Appellant be interviewed. The 1st Respondent added that during the Appellant's tenure as Legal Officer at AFC, the company's governance record was characterized by mismanagement, dubious writing off of debts and loss of billions of shillings of tax payers' money.[49]

The Court of Appeal upheld the appeal reasoning that the High Court had failed to observe the limits of its mandate under the separation of powers doctrine. The Court of Appeal underscored the need for judicial deference in the following terms:

> It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function.[50]

The general architecture of the *Mumo Matemu* court's approach on deference is that courts should leave it to the other branches of government to make decisions on eligibility for appointment into public office.

In *Democratic Alliance v President of South Africa and Others (Democratic Alliance)*[51]the South African Constitutional Court was similarly called upon to address itself to the question of governmental ethics. The Court gave judgment on the question as to whether the appointment of Mr Simelane as the National Director of Public Prosecutions (NDPP) by the President of the Republic was constitutionally valid. In an application brought by the Democratic Alliance, the North Gauteng High Court had held that the President's decision was indeed valid, but the Supreme Court of Appeal set aside the decision as having been irrational.

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[49] *Mumo Matemu* paras 2-6.
[50] *Mumo Matemu* para 49.
[51] 2013 (1) SA 248 (CC).

The Minister for Justice and Constitutional Development (Minister) sought to appeal against this decision.[52]

Mr Simelane had given evidence before the Ginwala Commission of Enquiry concerning the conduct of the then NDPP, Mr Vusi Pikoli. The Report of the Ginwala Enquiry had severely criticised Mr Simelane's approach to and evidence before that Enquiry and the Public Service Commission (PSC) had recommended that disciplinary proceedings be instituted against him. The Minister rejected the recommendations of the PSC and advised the President to ignore the findings of the Enquiry and Mr Simelane's evidence before the Enquiry in the process of appointing Mr Simelane as NDPP. The President did not take these matters into account in making his decision to appoint Mr Simelane.[53]

In a unanimous judgment (subject to a qualification by Zondo AJ in relation to one paragraph of the judgment),[54] Yacoob ADCJ evaluated Mr Simelane's evidence at the Ginwala Enquiry and concluded that the evidence was contradictory and, on its face, indicative of Mr Simelane's dishonesty and raised serious questions about Mr Simelane's conscientiousness, integrity and credibility. The failure to take this into account would, absent acceptable reasons for not doing so, not be rationally related to the achievement of the purpose of appointing a person of conscientiousness and integrity as NDPP. The Constitutional Court held further that the reasons the Minister had provided for withholding this evidence from the President was insufficient. The Court held that the failure by the President to take into account this evidence without more was irrational in the sense of not being rationally related to and inconsistent with the purpose of appointing, as NDPP a fit and proper person with due regard to his conscientiousness and integrity. This led the Court to nullify Mr Simelane's appointment.

The *Mumo Matemu* court fleshed out its notion of deference to the executive branch as hinged on: First, an approach that judicial review should be a review of the process of appointment and not a substantive review. Second, that the appropriate standard of review of appointment process is that of means-end rationality and not a reasonableness review. On the other hand, the *Democratic Alliance* court expressed the opinion that both the decision and the process must be rational. On the appropriate standard of review, both courts are reading from

[52] *Democratic Alliance* para 1.

[53] *Democratic Alliance* para 4.

[54] Democratic Alliance paras 96-101. Zondo, AJ expresses the view that a statutory body such as the PSC is required to observe the *audi alteram partem* rule to a person facing allegations such as those Mr. Simalane faced.

the same page that the ideal standard of review should be a means-end rationality analysis. Thus, the courts part ways as to whether review entails a review of both the decision and the process. The subsequent sections of the paper will interrogate these two claims as propounded by the *Mumo Matemu* and the *Democratic Alliance* courts. The preferred approach being advanced in this paper is an approach where the courts remain involved in the resolution of the disputed eligibility issue in the form of setting the normative parameters within which any resolution must occur. This is based on the understanding that in transforming the juridical basis of the state, the normative logic of the constitutions of both countries limits executive and legislative sovereignty by recognizing substantive constraints and empowering the courts to enforce these constraints. A theory of judicial review hinged on an untamed deference gives the executive leeway to whittle away the normative values of governmental ethics without any meaningful check.

4.1 Judicial Review as a Process and not Substantive Review

The *Mumo Matemu* court justified the need for deference as motivated by the need for comity with other branches of government. Towards this deference lite approach, the court endorsed a procedural conception of review. It observed that:

> [w]e further reiterate that whereas the centrality of the Ethics and Anti-Corruption Commission as a vessel for enforcement of provisions on leadership and integrity under Chapter 6 of the Constitution warrants the heightened scrutiny of the legality of appointments thereto, that is neither a license for a court to constitute itself into a vetting body nor an ordination to substitute the Legislature's decision for its own choice. To do so would undermine the principle of separation of powers. It would also strain judicial competence and authority. Similarly, although the courts are expositors of what the law is, they cannot prescribe for the other branches of the government the manner of enforcement of Chapter 6 of the Constitution, where the function is vested elsewhere under our constitutional design.[55]

A process-based review often leads to a 'box-ticking' methodology of review. This whittles away the power of the court to assert its view of the state and society envisaged by the Constitution.

To its credit, the *Democratic Alliance* court avoided the folly of the distinction between process and substance review. The court embraced an approach that it is mandated to review both the process and the decision. It reasoned as follows:

[55] *Mumo Matemu* para 61.

> The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred.[56]

Kenya's post-colonial and apartheid South Africa's history of strong authoritarian executive branch justifies strong oversight from the other arms of government. Thus the constitutions of both countries embody significant limitations on the exercise of majoritarian political power. The question arises as to whether the courts can serve as a restraining influence on excessive consolidation of political power by the ruling elite. This becomes nuanced in the case of Kenya and South Africa, where the legislative oversight is not functioning as it should due to the dominance by the ruling party[57] and the ever looming possibility of members of parliament being compromised.[58]

Where legislative oversight is malfunctioning, the courts are left as the sole check on the prospect of relapse to unilateral executive power. Thus if the courts restrict themselves to intervene only on a narrow procedural limitation on governmental power, then the executive is afforded wide latitude for non-conformity to the values and principles that underlie the constitution. In such instances, as David Landau has argued in reference to Columbia, any judicial intervention has to draw upon a more deep-rooted conception of the reconstituted constitutional state after authoritarianism: "[t]he public sees the Court, rather than the legislature, as the best embodiment of the transformative project of the ...constitution."[59] Thus,

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[56] *Democratic Alliance* para 36; See also Z Yacoob "Separation of Powers in a Democratic South Africa: An Evolving Process" Paper Presented at the Second Stellenbosch Annual Seminar on Constitutionalism in Africa 17-19 September 2014 where he states thus: "But it is now settled that every decision by every public functionary in the legislature, the executive, .the public administration (indeed all organs of state) and the judiciary must comply with the rationality requirement.... Both the process by which the decision is made and the decision itself must be rational."

[57] S Choudhry, "'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy", 2 *Constitutional Court Review* (2009) p 1.

[58] Kenya's parliamentarians have been accused of engaging in 'oversight banditry' where members of parliament demand bribes and favours from state officials who are subject of inquiry by parliament. See P A Nyong'o, "Parliament's reputation at stake due to upsurge of 'oversight banditry'", https://www.standardmedia.co.ke/mobile/?articleID=2000108162&story_title=parliament-s-reputation-at-stake-due-to-upsurge-of-oversight-banditry Last visited 1 May 2014.

[59] D Landau, "Political Institutions and Judicial Role in Constitutional Law", 51 *Harvard Inter-*

the courts assert themselves as the guardian of a popularly accepted constitutional order to restrain the momentary desires of popular majorities, in favour of the pre-commitment to values and principles embodied in the constitution.[60]

In the context of constitutional adjudication, the litigation of questions of governmental ethics provided the courts with the opportunity to reassert the structural underpinnings of the constitution. Instead, the *Mumo Matemu* court retreated to a formalistic account of the Constitution as envisaging only procedural scrutiny of the other arms of government. The *Mumo Matemu* court notes that:

> In sum, this Court agrees with the High Court's dicta that procedural propriety cannot be based on mechanical compliance with procedural hoops. In our view, however, the applicable general principle is that there must be a showing that there were substantive defects in that procedure, or significant omissions as to render it unconstitutional. Absent such showing, or arbitrariness or absence of debate altogether, a judicial determination on the quality of the debate or its outcome is to overstep the demarcated boundaries of our constitutional enterprise. In our view, to conclude, as the High Court did, that there was no substantive debate is to cross the boundary.[61]

In short, the deference accorded to the other branches of government privileges their dealings against scrutiny by endorsing a limited procedural conception of review that falls substantially short of the broader constitutional vision.

The *Mumo Matemu* court failed to devise doctrines that may counteract the pernicious effects of corruption in public life and transform Kenya's governance system into the ideal envisaged by the Constitution. The court failed despite structural authority from the country's history and the text of the Constitution. The constitution is explicit in the demand for transparency and accountability in governance.[62] Central to the desired democratic restoration was the idea of constraint in the exercise of state authority. Authoritarian rule allowed the direct translation of political power into raw exercise of arbitrary and repressive governmental conduct. In response, the democratic revival envisaged in the Constitution sought both to restore limited government and to enshrine the primacy of a rule of law.[63]

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national Law Journal (2010), p 344.

[60] S Holmes, "Pre-commitment and the Paradox of Democracy", in J Elster, & R Slagstad, (eds) *Constitutionalism and Democracy* Cambridge, Cambridge University Press (1988), p 231.

[61] *Mumo Matemu* para 75.

[62] Article 10 and chapter 6 of the Constitution of Kenya.

[63] *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others*, *supra* note 17 para. 146.

The critical question to be asked is the role to be played by courts in the country during the country's re-construction in the aftermath of authoritarian rule. This should take into account the fact that Kenyan legal culture is highly formalistic and boasts of a strong positivist commitment to the application of the law as the command of the sovereign, not as reflecting normative aspirational claims.[64]The new constitutional order that emerged in 2010 was aspirational; a hope that state authority could be wrestled from elites that had ruined the country's post-independence structure. The *Mumo Matemu* court's approach fails to appreciate this by making the argument that courts are only qualified to undertake a procedural review. To the court, claims of procedural infirmities are the archetypal issues for judicial resolution. Courts have thus to defer to the other arms of government on substance, not process, due to the need to give the democratically elected branches of government latitude to discharge their mandate. This is underscored by the following observation:

> For the avoidance of doubt, we also reiterate that a court reviewing the procedure of a legislature is not a super-legislature, sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ. It has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover, the process cannot be wrong simply because another institution, for example the courts, would have conducted it differently.[65]

The insistence that courts cannot perform substantive review has little logical or conceptual grounding. It seems to be tied to a limited understanding of the proper role of the courts, and their reluctance explicitly to propound a normative vision that other branches of governance should adhere to in order to further the transformative project of the constitution. Unlike in policymaking which may require polycentric, informal efforts to further information and balance a range of options, the same problems do not arise with appointments.

The entrenchment of justiciable principles of governmental ethics has placed the courts in a difficult position. The courts bear the burden of being the guardians of the constitution which demands that the value of democracy and the principle of separation of powers be respected. Judicial deference in the *Mumo Matemu* incarnation requires reviewing courts to exercise restraint. However, it is the paper's position that courts should develop a pragmatic and functional approach that

[64] M Mutua, "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya", 23 *Human Rights Quarterly* (2001) pp 96-97.

[65] *Mumo Matemu* para 77.

provides an overarching or unifying theory for review of the substantive decisions of all manner of discharge of functions by other branches of government.

The limited scope of judicial review powers that the *Mumo Matemu* court claimed and the fear not to appear to interfere more broadly in the exercise of political power by other branches of government is largely contributed to by failure to break from Kenya's jurisprudential attachment to the Westminster tradition of parliamentary supremacy thus the concept of narrow procedural review of government action.[66]For all inherited traditions of Westminster, Kenya operates under a transformative written constitution which embodies certain articulated values and principles which must be upheld. A court cognisant of this will appreciate that a substantive doctrine of protection of the values and principles of the constitution mandates the court to break away from the relatively deferential role the *Mumo Matemu* court has carved for courts. The courts must have teeth if they are to serve as the guardians of constitutionalism. It is only in this way that courts can serve as bulwarks against excessive majoritarianism that threatens to overwhelm fragile state institutions. A substantive approach to review has the potential to provide a structural lever that accords the courts a deeper doctrinal foundation for discharging the role of being the custodian of the constitution. With respect to public appointments, it is essential for the courts, as the ultimate custodian of the constitution to enforce substantive constitutional principles and values, thus the court should assess whether an appointee meets the constitutionally stipulated threshold.

The jurisprudence advanced by the *Mumo Matemu* court creates the potential for the courts to abdicate their constitutional and judicial authority by relying on the pretext of adhering to the doctrine of separation of powers to claim inability to intrude into the domain of the executive. The problem with this jurisprudence is that it deals and is focused on the procedural aspects in relation to the manner of appointments rather than the interdependence of the process with the substantive nature of the principles of leadership and integrity. The interdependence of the procedural *vis-a-vis* the substantive aspects in analysing the manner in which public

[66] The courts' jurisprudence has been influenced by the conception of the proper remit of administrative law judicial review. Under this doctrine, there is a boundary of administrative discretion beyond which judicial supervision should not cross. Lord Brightman cautioned as follows in Chief Constable of the *North Wales Police v Evans* [1982] 3 All ER 141 at 154. 'Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will . . . under the guise of preventing the abuse of power, be itself guilty of usurping power.'

appointments are made could have provided a deeper insight on the adherence to the constitutional dictates on upholding integrity for public officials. The rule of law requires the judiciary to scrutinize the weighing process by the appointing authority and ensure that the appointment decision complies with both the formal and substantive requirements of the constitution. This approach acknowledges that the judiciary has a proper role to play in ensuring that executive decisions comply substantively with the rule of law, and this is not discharged by confining judicial review to a scrutiny of the process.

The procedural conception of review, which is the "formal conception" of judicial authority, is limited in its application because it does not go far enough to address the significance of judicial review. This is evident with the argument of the court in *Mumo Matemu* that courts cannot interfere with a decision simply because it disagrees with it or that it considers that the power was exercised inappropriately. The approach by the court is of great concern, because it is the courts that have been empowered to declare invalid any law or conduct which is inconsistent with the values and principles of the constitution. It is the courts that have to examine and review government conduct and evaluate it against the ethos and principles envisaged in the constitution. The relegation of substantive review to the domain of the executive undermines the values of the constitution. It relaxes the rules of constitutional interpretation and does not adequately address the courts' role in the maintenance of constitutional values and principles. It is incumbent upon courts to be decisive in matters of integrity and not let its adjudicative authority to whittle and thus fail to reconstruct the state and Kenyan society. It is the paper's position, that the *Mumo Matemu* court voluntarily abdicated its judicial function in total disregard of judicial independence and the distribution of state authority between itself and the executive.

Paine has argued that a constitution serves as the normative lodestar for the body politic.[67] At the core of the constitutional entrenchment of principles of leadership and integrity is a thick substantive idea: a set of principles that are both full of content and strongly foundational, respect for which is a prerequisite to the legitimacy of public office. Judicial review underscores enforcement of principles loaded with normative content. In fact it is arguable that these principles cannot mean anything and everything to any person and accord to every view. This is a matter of substance; it is recognition of a foundational norm of eligibility threshold that must be beyond debate. It is only when we recognise this fact that we can recognise that

[67] T Paine, *The Rights of Man,* Chicago, The University of Chicago Press (1988), p 29.

certain people meet the constitutional standard and others do not. The question as to eligibility is not answerable in procedural terms, but in substantive terms, by finding out whether the appointees actually meet the constitutional standards. The standards of fundamental-legal rightness cannot be left undecided, courts have to be authorised to decide and to construe from time to time the content of the constitution. The executive cannot be left to set standards for itself.

The Constitution of Kenya like that of South Africa institutes a culture of justification.[68] Its promulgation marked the substitution of a "culture of justification" for the old dispensation's "culture of authority".[69] Henceforth, no government official or body would be allowed to justify its own actions merely with reference to its own position within a hierarchical command structure.[70] Every state organ can now be called upon to justify its decisions with reference to reasons that are viewed as cogent in the light of democratic norms and values. The idea of law as justification demonstrates that courts can play a vital role in building a democratic culture of justification is helpful as to where to draw the line between legitimate exercises of the judicial review power, and the judicial usurpation of the legislative and/or executive function.

In developing the conception of a culture of justification, Mureinik has argued that it is not the function of judges to substitute their own views on substantive policy issues for those of state organs, but that they should rather inquire into the soundness of the process that went into the decision. That he did not, however, cling to a narrow conception of what counts as procedural grounds is evident from the following passage:

> It is suggested that a… decision cannot be taken to be justifiable unless (a) the decision maker has considered all the serious objections to the decision taken and has answers which plausibly meet them; (b) the decision maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons; and (c) there is a rational connection between premises and conclusion – between the information (evidence and argument) before the decision maker and the decision taken.[71]

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[68] *Samura Engineering Limited & 10 others v Kenya Revenue Authority* [2012] eKLR Petition 54 of 2011 para 77.

[69] See E Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights", 10 *South African Journal on Human Rights* 10 (1994); See also D Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture", 14 *South African Journal on Human Rights* (1998).

[70] *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others*, *supra* note 17, para 146.

[71] Mureinik, *supra* note 69, p 41.

Mureinik did not, in other words, advocate a value-neutral constitutional jurisprudence that is based upon a rigid separation between process and substance. He recognised that an inquiry into the soundness of the process that went into decisions requires judges to address certain substantive issues, for instance whether the reasons given for the decision are plausible, and whether such reasons in fact support the conclusion of the decision-maker.[72]

To say that a court should abstain from substituting its own views on substantive policy issues for the considered and rational decisions of the executive branch, does not therefore amount to an argument for the abdication of the power of judicial review in questions of substantive value. It is rather an acknowledgement that decision-makers are better equipped than judges to make certain decisions, and that their decisions should be respected, provided that they have considered all relevant factors and can justify their decisions with reference to plausible reasons. According to Allan, "[d]eference is not due to a… decision merely on the ground of its source or 'pedigree', but only in the sense (and to the extent) that it is supported by reasons that can withstand proper scrutiny."[73] Therefore, as the South African Constitutional Court has pointed out "[t]o pass constitutional muster....., the president's decision..... must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution."[74] This analytical framework is appropriate for the reason that courts weigh substantive aspects of the executive's conduct. The framework goes against the formalistic approach that has been adopted by the *Mumo Matemu* court.

It is noteworthy that rationality review envisages substantive review. Rationality is an objective standard and embodies the possibility of the co-existence of more than one view. It has to be determined within the context of the constitutional scheme that confers the discretion. Seen in this context, it is almost impossible to determine rationality without at the same time considering the substance of the decision. The court may not substitute its own decision for that of the executive, but this is not the same as saying that the court should completely leave the weighing of competing values to the executive without at least satisfying

[72] See L Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories", 89 *Yale Law Journal* (1980) for a critique of process based theory along these lines.

[73] T R S Allan, "Common Law Reason and the Limits of Judicial Deference", in D Dyzenhaus, (ed) *The Unity of Public Law,* Oxford, Hart Publishing (2004), p 288.

[74] *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC) para 62.

itself that due weight has been accorded to relevant interests and factors.[75] Hence, it is misleading for the *Mumo Matemu* court to endorse a rationality standard of review and yet characterise judicial review as concerning only the decision-making and not the decision itself.

The Kenyan and the South African constitutions have been described as transformative in that they embody a certain vision of the society they seek to construct.[76] This requires positive action by all branches of government toward the attainment of that vision. This transformative duty- the duty to work toward the achievement of the constitutional vision of society –imposes obligations on the courts. Courts must in the outcome they generate in their judgments and their reasoning or judicial method work towards the achievement of the society envisaged in the constitution.[77] One core promise of the society envisaged in both constitutions is the enhancement of accountability and adherence to integrity standards by public officials. This envisages a substantive rather than only procedural conception adherence to constitutional dictates. That means that state institutions should act in such a way that only persons who satisfy the integrity criteria occupy public office. These constitutions clearly posit the ideal- which is that public officials must be ethical. In order for that ideal to be attained, the executive must only select persons who meet the constitutional threshold.

However, that cannot be all that these constitutions requires. Integrity and accountability are in the thick sense envisaged by these constitutions a value system or a culture – a way of doing things. Thus a procedural understanding of the conception of integrity is an empty shell – it is the structure for integrity without the necessary content of accountability culture/practice. The transformative accountability ethos of these constitutions requires not only the creation of processes but also the fostering and maintenance of substantive principles of integrity. The duty to work toward the achievement of this conception of substantive values of integrity as a transformative goal rests on all state agencies, including the courts. The courts must therefore in terms of the outcomes they generate in their judgments and in the manner, in which those judgments are arrived at, be sensitive

[75] See *R (Daly) v Secretary of State for Home Department* [2001] 2 AC 532 p 547 per Lord Steyn.

[76] K Klare "Legal Culture and Transformative Constitutionalism", 14 *South African Journal of Human Rights* (1998), p 146.

[77] D Brand, "Judicial Deference and Democracy in Socio-Economic Rights cases in South Africa", 3 *Stellenbosch Law Review* (2011), pp 614, 622; See also K Klare "Self-Realisation, Human Rights, and Separation of Powers: A Democracy -Seeking Approach", 26 *Stellenbosch Law Review* (2015), p 445; D Moseneke "Separation of Powers, Democratic Ethos and Judicial Function" 24 *South African Journal on Human Rights* (2008), p 341- 351.

to the impact that their work might have on the achievement of this substantive conception of accountability.

4.2 Means-End Rationality instead of Reasonableness as Standard of Review

In enacting new constitutions, Kenyans and South Africans made an unambiguous choice to bring into being constitutional states in which the constitution is supreme.[78] The idea of the constitutional state presupposes judicial intervention and remedy when constitutional guarantees are desecrated. These constitutions speak directly to exercise of executive powers and the normative nature of governmental ethics in several provisions.[79] Moreover, the idea of constitutionalism is bolstered in both countries by the entrenchment of the rule of law as a national principle and value of governance of the Republic.[80] The rule of law embodies the principle of legality as a fundamental principle in both constitutions and it means that the executive and the legislature may only discharge their functions in accordance with the law.[81] The constitutional principle of legality therefore confers upon courts grounds to intrude upon what may at first blush seem to be areas reserved for the co-equal arms of government. This means that the political questions doctrine is inapplicable when questioning whether the legislature or the executive has discharged only powers and functions vested in them and in the manner prescribed by law. Thus all actions must be undertaken within the four corners of a lawful authorisation. Thus the exercise of public power is subject to the discipline of the rule of law.

The twin principles of rule of law and supremacy of the constitution are the basis for assertion of jurisdictional competence for courts to question the legality of the acts of other arms of government. Arbitrariness, by its very nature, is dissonant with these core concepts of constitutionalism. Despite this firm normative foundation for judicial intervention, the question has arisen as to what becomes the appropriate test for judicial determination of non-arbitrariness in the area of public appointments?

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[78] Article 2 of the Constitution of Kenya and Section 2 of the Constitution of South Africa.

[79] Article 10 and chapter six of the Constitution of Kenya and Sections 174 and 179 of the Constitution of South Africa.

[80] Article 10 of the Constitution of Kenya and Section 1 of the Constitution of South Africa.

[81] *Albert Lukoru Loduna & 2 others v Judicial Service Commission & 3 others* [2012]eKLR Petition 480 of 2012 para 23; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 32.

The *Mumo Matemu* court informed by the anxiety that courts should not appear to be "second-guessing" the other branches of government has rendered itself thus:

> In our view, the test is whether the means applied by the organs of appointment to meet their legal duty has been performed in compliance with the object and purpose of the Ethics and Anti-Corruption Act as construed in light of Article 79 of the Constitution of Kenya. Under this test, the courts will not be sitting in appeal over the opinion of the organ of appointment, but only examining whether relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the analysis turns on whether the process had a clear nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of mind of the decision makers. This in our view provides a fact-dependent objective test that is judicially administrable in such cases.[82]

By this formulation, the *Mumo Matemu* court appears anxious to allow the executive wide latitude in appointments as is evident from emphasise that courts should not substitute their own judgment for that of the appointing authority.

The court in the *Democratic Alliance* case also emphasized that the choice of standard of review is to be informed with the need for courts to avoid intruding in to the exclusive terrain of the executive in order to avoid breaching the separation of powers doctrine.[83] The court highlighted this concern as follows:

> I must next address a contention that this Court's upholding of the decision of the Supreme Court of Appeal that the decision of the President was irrational would amount to a violation of the principle of the separation of powers. The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large.[84]

The *Democratic Alliance* court pushes this point further and argues that:

> It is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions: it has been described by this Court as the "minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries".[85]

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[82] *Mumo Matemu* para 54.
[83] *Democratic Alliance* para 32.
[84] *Democratic Alliance* para 41.
[85] *Democratic Alliance* para 42.

The court in effect points out that the suitability of the rationality standard stems from the fact that the test is a relatively weak standard, which leaves a wide discretion to the President to choose a suitably qualified head of the NPA – as long as he does not act in a completely irrational manner.

That deference to other branches of government is the determinant factor in the choice of the ideal standard of review is evident when the *Mumo Matemu* court argues that:

> The question then becomes, what is the standard or the test of the review? It was the contention of the appellant that the standard of review must be deferential given that appointments are committed to the other organs of government. In view of our constitutional design and the institutional competences attendant to it, it seems to us that this view cannot and has not been seriously contended in principle by any of the respondents. Deference is multi-directional, and we are prepared to hold that in the same way the other branches are to defer to the jurisdiction of the courts, the courts must also defer to the other branches where the constitutional design so ordains. We hold that the standard of judicial review of appointments to State or Public Office should therefore be generally deferential, although courts will not hesitate to be searching where the circumstances of the case demand a heightened scrutiny provided that the courts do not purport to sit in appeal over the opinion of the other branches.[86]

Although the *Mumo Matemu* court acknowledges that questions of integrity should be subjected to an exacting review in some circumstances, it nevertheless endorses a deferential approach as the overall analytical framework that courts should apply when reviewing appointments.

The *Mumo Matemu* court develops precise doctrinal mooring for assessing whether the executive operates within the confines of the constitution by suggesting that:

> It is therefore our considered view, that the superior court below misapplied the doctrine of separation of powers in its standard of review. We are of the view that had the court applied the rationality test in light of the principle of separation of powers, its analysis no less its result would have been different. We note here that the rationality test is a judicial standard fashioned specifically to accommodate the doctrine of separation of powers, and its application must generally reflect that understanding.[87]

Justice Yacoob justifies this approach in the *Democratic Alliance* case as follows:

[86] *Mumo Matemu* para 56.
[87] *Mumo Matemu* para 58.

> It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not.[88]

Rationality review envisages that a court may invalidate a rule or action because it is not rationally related to a legitimate purpose.[89] The court should be ready to set aside a decision which has failed to give adequate weight to integrity. Such failure to give due weight to integrity would indeed be irrational. The *Mumo Matemu* and *Democratic Alliance* courts in endorsing the rationality standard rejected the reasonableness test. A decision is unreasonable when it "will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it".[90] Means-end rationality, therefore, forms part of reasonableness. Reasonableness amounts to a higher standard of review than rationality –it involves a stricter scrutiny.[91]

The rational relations standard of review provides a wide swath of governmental power without judicial intrusion.[92] Moreover, the standard begins with "a strong presumption of validity" for governmental decision-making.[93] The restrictive rationality review which has often been used in review of policy objectives which are properly the domain of parliament is ill suited as the standard for checking executive conduct in the context of appointments.

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[88] *Democratic Alliance* para 44.

[89] I M Rautenbach, "Means-End Rationality in Constitutional Court Judgments", 4 *TSAR* (2010), p 770.

[90] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* (2004 7 BCLR 687 (CC), 2004 4 SA 490 (CC) para 48.

[91] *Minister of Health v New Clicks South Africa (Pty) Ltd* (2006) 1 BCLR 1 (CC), 2006 2 SA 311 (CC) para 108.

[92] S Issacharoff, "The Democratic Risk to Democratic Transitions", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324861. (Last visited 1 May 2014)

[93] *Heller v. Doe*, 509 U.S. 312, 319 (1993).

The *Mumo Matemu* and the *Democratic Alliance* courts failed to adopt a more rigorous standard of scrutiny that is commensurate to the centrality of governmental ethics in governance. The courts must accept that the judicial branch has a proper role to play in ensuring the executive's compliance with the rule of law, and this role cannot be properly discharged without some encroachment into executive autonomy. After all, constitutionalism imposes some limits on the exercise of constitutional powers and acknowledges that the judiciary will have to interfere with executive decisions on merit in some cases. This calls for a more vigorous scrutiny to give effect to the rule of law. It is important to note that unlike in cases that involve broad policy decisions involving prioritisation and allocation of resources, for instance enforcement of social and economic rights claims, there is no principled justification to accord the executive a wide margin of discretion in scrutiny of eligibility for appointment.

Reasonableness means that one identifies the relevant considerations and then balances them according to their weight.[94] Indeed, reasonableness is an evaluative process, not a descriptive process. It is not a concept that is defined by deductive logic. It is not merely rationality. A decision is reasonable if it was made by weighing the necessary considerations, including fundamental values in a constitution.[95] The standard of reasonableness can be adopted to determine the relevant balance in reviewing the exercise of public appointments and whether the same upholds the principles of government ethics.[96] The Supreme Court of Israel has used the standard of reasonableness to hold that a minister and deputy minister indicted for serious offenses were obliged to resign;[97] indeed, it would have been unreasonable not to dismiss them. Similarly, the Supreme Court of Israel used the reasonableness standard to hold that a person with a significant criminal past cannot be appointed as director-general of a government ministry.[98]

Aharon Barak has justified this approach by the Supreme Court of Israel as follows:

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[94] M Atienza, "On the Reasonable in Law," 3 *Ratio Juris* (1990) p 148.

[95] J Jowell, "Courts and the Administration in Britain: Standards, Principles and Rights," 22 *Israel Law Review* 419 (1988) p 419; J Jowell & A Lester, "Beyond Wednesbury: Substantive Principles of Administrative Law," *Public Law* (1987) pp 370–71.

[96] See Barak *supra* note 36 p 250.

[97] H.C. 2533/97, *Movement for Quality Government v. Government of Israel*, 51(3) P.D. 46; H.C. 4267/93, *Amitai—Citizens for Proper Administration & Integrity v. Prime Minister of Israel*, 47(5) P.D. 441.

[98] H.C. 6163/92, *Eisenberg v. Minister of Housing,* 47(2) P.D. 229.

> Those same individuals who supported the use of the reasonableness test in the context of human rights strongly criticized its use in the government ethics context. I understand this criticism, but I disagree. It is appropriate to use the reasonableness test in reviewing executive actions, including issues of government ethics. Naturally, in countries where there is self-restraint in government, there may be no need to develop the principle of reasonableness in government ethics. But in countries where this self-restraint is lacking—and the concept of "it is not done" is insufficiently developed—it is proper to extend the principle of reasonableness to all government actions. I do not see any possibility of restricting reasonableness to one field. If the principle of reasonableness should be applied in protecting the freedom of the individual, it should also be applied to other kinds of protections involving government activity. Consistent application of this principle can strengthen public confidence in the government, which is fundamental to government's operation.[99]

Moreover, review of questions of governmental ethics on a reasonableness standard should not be a big deal in most common law jurisdictions. After all, Wednesbury unreasonableness as a ground for judicial review of executive discretion has been around since 1948, when Lord Greene MR said that, besides the traditional grounds for finding that there had been an abuse of discretion, an act of discretion is also unreasonable and thus invalid when it is "so absurd that no sensible person could ever dream that it lay within the powers of the authority".[100]

The paper's position is that courts must be searching in their interrogation of the integrity of an appointee. The quest for a more stringent standard of review is aimed at a more effective regime for the enforcement of the integrity principles. The envisaged system is judge-empowering in that courts can declare one ineligible for public appointment. This is informed by the central role played by courts in ensuring that the executive discretion cannot be exercised in a way that undermines the principles and values of governmental ethics. It emphasises that in judicial review of executive decisions, the court should require the decision-maker to accord due weight to integrity consideration and the judicial review is not confined to whether integrity considerations have been taken into account but also how they are taken into account. The proposed test requires the reviewing court to assess the balance that the decision maker has struck *vis-a-vis* the issues of integrity, not merely whether it is within the range of rational decisions. The court must also pay attention to the relative weight accorded to the questions of integrity by the appointing authority. The approach advanced is therefore more interventionist.

[99] Barak *supra* note 36 p 251.

[100] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228–9.

5.0 Conclusion

The Kenyan and South African constitutions envisage a dialogic conception of constitutional democracy. The three branches of government are constituted as distinct entities, but they are also interdependent and interrelated. The branches of government should, therefore, engage with each other in a manner which is open and respectful of the institutional strength and weaknesses of each other. Conceptually, the transformation project is a product of partnership between the courts and other arms of the government. What becomes important in assessing the task of courts when faced with invocation of the doctrine of separation of powers should, therefore, be on how a court works within the confines of the doctrine to promote a better dialogue between the arms of government.[101] "Third wave" constitutions assign to courts in nascent democracies a central role in the creation and maintenance of a democratic order.[102] The courts serve the purpose of ensuring the constitutional pedigree of the actions of the new political order, thus should not be encumbered with contestation over the source of authority for judicial review and the concern over counter-majoritarianism.[103]

The argument canvassed in the paper is that enforcement of governmental ethics is hindered by excessive deference to the executive by the judiciary. The argument is also envisaged in the realization that judicial deference reflects a conception of democracy at odds with the constitutional vision of a thick or empowered democracy[104] and therefore works against the construction of that constitutional vision of democracy –that is both a limited and an inappropriate response to the problem of democratic illegitimacy of review in public appointments cases.

The courts must be cognizant of the prevailing political atmosphere for appointments and the *Mumo Matemu* and *Democratic Alliance* courts should have

[101] D M Davis, "The Relationship Between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What about Separation of Powers?", 15 Potchefstroom Electronic Law Journal (2012), p 638; See also S Ngcobo "South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers", 22(1) *Stellenbosch Law Review* (2011), p 37-49.

[102] *Speaker of the Senate & Another v Hon. Attorney-General & Another & 3 Others*, *Supra* note 17 para. 62.

[103] S Issacharoff, "Constitutional Courts and Democratic Hedging", 99 *The Georgetown Law Journal* (2011), pp 961- 964.

[104] See D Brand, "Writing the Law Democratically: A Reply to Theunis Roux", in S Woolman, & M Bishop, (eds) *Constitutional Conversations*, Pretoria, Pretoria University Law Press(2008), p 97; T Roux, "Democracy", in S Woolman, T Roux, & M Bishop, (eds) *Constitutional Law of South Africa* 2nd ed. Cape Town, Juta & Co. (2006).

seen the need to be activist as the conditions of weakened legislative oversight warrant interventionist review. The courts must develop a thick construct of constitutional review to check executive power. It makes sense and would be productive under Kenya and South Africa's institutional framework for courts to infuse the spirit of the constitution into the appointment framework. A well-functioning legislature is probably the best option for checking executive action because of its democratic legitimacy. In these optimal conditions, an overly activist judiciary may be detrimental to the development of the political system. But where, as in Kenya and South Africa, a very weak oversight legislative oversight exists, a judiciary equipped with a modicum of democratic legitimacy may be the institution best-equipped to take on oversight functions. A very active judiciary, in other words, may be perverse under optimal conditions of legislative behaviour but desirable as second-best where, as in Kenya or South Africa, the legislature does not function well.[105]

Deference, therefore, undermines the widest possible powers that the court has in the enforcement of constitutional duties. It limits the essence of judicial review which is essential for the independence of the courts.[106] The strategy of deference amounts to a failure to the transformative duty on courts. This comes about because, the strategy of deference embodies a conception of separation of powers that is at odds with the checks and balances envisaged in the constitution. The argument advanced in the paper is that modern/transformative judicial review cannot always be adequately understood if seen through the traditional categories of the separation of powers. Courts do more than can be fitted into the domain allowed to courts exercising judicial function. Much of what courts do in "transformational societies" involves spreading the values set out in the constitution throughout their state and society.[107] It is this understanding that has informed Robertson's argument that constitutions are more than mere founding documents laying down the law of the land, but increasingly have become statements of the values and principles a society seeks to embody.[108] Judges, in turn, should see it as their mission to transform those values into political practice and push for state and society to live up to the ideals of the Constitution.

[105] See D Landau, & J D Lopez-Murcia, "Political Institutions and Judicial Role: An Approach in Context, The Case of the Colombian Constitutional Court", 119 *Viversitas* (2009), p 55.

[106] N Ntlama, "The 'Deference' of Judicial Authority to the State", 33 *Obiter* (2012), p 143.

[107] D Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review,* Princeton (NJ), Princeton University Press (2010), p 1.

[108] *Ibid.*

International Human Rights Law versus International Humanitarian Law in Situations of Armed Conflict:

A Critique of Invocation of the Doctrine '*Lex Specialis Derogat Legi Generali*' with Reference to the Duty to Protect Life

Aderlardus Kilangi*

Abstract

This paper examines the interplay between international human rights law and international humanitarian law especially in situations of armed conflict. When this overlap occurs, the general position in international law is that international human rights law shall apply in times of peace as *'lex generalis'*, or general law, while international humanitarian law shall apply in situations of armed conflict as *'lex specialis'*, or special law, thereby displacing or keeping in abeyance general law. The position is reliant on the doctrine *'lex specialis derogat legi generali'* meaning that special or specific law suspends general law.

The paper, therefore, examines the appropriateness of using the doctrine *'lex specialis derogat legi generali'* in situations of interplay between the

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two fields of international law, especially when it comes to the question of sanctity of life. With reference to the duty to protect life, the paper notes that, the doctrine of *'lex specialis'* does not adequately clarify the coordination which must desirably exist between the two fields of international law, and in any case it places limits on protection of victims.

The paper argues, therefore, that, a well-coordinated application of international human rights law and international humanitarian law is vital to ensuring adequate protection of victims during all situations of armed conflict, because the general trend in the world today is to move towards broader protection of victims, and not towards limitation. In conclusion, therefore, the paper advocates for the need to substitute the *'lex specialis'* doctrine with a more coherent theory which balances the reality of conflict with the respect for humanity and protection of life.

1.0 The Issue at Stake

The question of interplay between International Human Rights Law (IHRL) and International Humanitarian Law (IHL) generally has been a subject of much discussion,[1] because there are many areas of overlap between the two fields of international law. Many of the violations of humanitarian law principles are also violations of human rights laws, and *vice versa*. However, the general position in international law is that, while international human rights law applies in times of peace, international humanitarian law applies in situations of armed conflict.

This assertion is based on the doctrine of interpretation of legal principles emanating from Roman Law and which has become part of general principles of international law today, that: '*lex specialis derogat legi generali*', meaning that 'special

[1] See for example: Roberta Arnold, Noëlle N. R. Quénivet (2008), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, BRILL; Committee on Human Rights (2005), "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", Resolution No. 2005/35, U.N. Doc. E/CN.4/2005/ L. 10/Add. 11 (19 April 2005); Orna Ben-Naftali (2011), International *Humanitarian Law and International Human Rights Law*, Oxford University Press; Anthony E. Cassimatis. (2007), "International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law", *The International and Comparative Law Quarterly, 56*(3), 623-639; Moir, Lindsay (2003), "Decommissioned? International Humanitarian Law and the Inter-American Human Rights System". *Human Rights Quarterly, 25*(1), 182-212; Forsythe, D. (2006), "Human Rights and the Military: Legal Rules", *International Studies Review, 8*(3), 504-506.

law displaces or keeps in abeyance general law' when both are relevant and can be applied in the same situation. On the basis of this doctrine, then international human rights law is supposed to apply in times of peace as *lex generalis*, or general law, while international humanitarian law is supposed to apply in situations of armed conflict as *lex specialis*, or special or specific law, thereby displacing or keeping in abeyance general law.

However, while this remains the position at international law, an argument is developing to the effect that human rights cannot be suspended or kept in abeyance at any point in time, because they have achieved the status of *jus cogens*,[2] hence, regarded as part of peremptory norms of international law for which no derogation is permitted. This argument is especially stronger when it comes to the duty to protect life. It is cemented by the fact that many international armed conflicts are started under lame excuses, but end up in loss of so much life. Then perpetrators go unpunished simply because life was lost in the context of an armed conflict.

This fact calls for the need to re-examine the invocation of the doctrine '*lex specialis derogat legi generali*' to see if it is still appropriate in clarifying the coordination which must desirably exist between the two fields of international law, namely international human rights law and international humanitarian law. This re-examination should be in view of moving towards broadening rather than limiting protection.

[2] See: Roberta Arnold, Noëlle Quénivet (2008), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, BRILL, pp. 356-374; Aman Ullah (2011), "Derogation of Human Rights under the Covenant and their Suspension during Emergency and Civil Martial Law in India and Pakistan", *Research Journal of South Asian Studies*, Vol. 26, No. 1, January-June 2011, pp. 181-189; Dennis, Michael (2005), "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", *The American Journal of International Law, 99*(1), 119-141; Watkin, Keneth (2004), "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict", *The American Journal of International Law, 98*(1), 1-34; Hafner-Burton, E., Helfer, L., & Fariss, C. (2011), "Emergency and Escape: Explaining Derogations from Human Rights Treaties", *International Organization, 65*(4), 673-707; Gerd Oberleitner *(2015), Human Rights in Armed Conflict,* Cambridge University Press, pp. 168-171; Andrew Clapham, Paola Gaeta (2014), *The Oxford Handbook of International Law in Armed Conflict* , OUP Oxford, pp. 662-665; Louise Doswald-Beck (2011), Human Rights in Times of Conflict and Terrorism, OUP Oxford, pp. 100-102; Ingrid Detter (2016), The Law of War, Routledge pp. 180-181; Anders Henriksen (2017), International Law, Oxford University Press, pp. 93-195.

2.0 International Human Rights Law and International Humanitarian Law

2.1 International Human Rights Law

Human rights refer to the basic *rights* and *freedoms* to which all human beings are entitled.[3] A simple but elegant definition asserts human rights literally as the rights (or entitlements) that one has simply because one is a human being.[4] Thus, the holders of human rights are individuals, not other actors such as states or corporations.

Since human rights are enjoyed simply on the basis that individuals are human beings,[5] these rights are enjoyed equally by all humans beings, universally, and without regard to their national legal systems.

Human rights jurisprudence is built on some very fundamental concepts. These are: universality, equality and non-discrimination, indivisibility, and inter-dependence. All these four concepts are very fundamental to our discussion. Universality of human rights entails that certain moral and ethical values are shared by all peoples, in all the regions of the world, and apply in all life situations without regard to place or any other peculiarities. Equality and non-discrimination connotes that international human rights law affords the same protection equally to all people just by virtue of their humanity, regardless of gender, sex, nationality, race, ethnicity, culture, or position in life. Indivisibility entails that human rights should be addressed as an indivisible body, including civil, political, social, economic, cultural, and collective rights. Inter-dependence essentially follows the concept of indivisibility.

It entails that human rights should apply to all spheres of life: at home; at school; at workplace; in the courts; in the markets; everywhere! One right depends on the other, and a single act can result into several violations. For example, armed robbery can violate the right to security of person; the right to property; the right against torture; and the right to privacy. Thus, human rights violations

[3] Civil and political rights are enshrined in articles 3 to 21 of the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Civil and Political Rights (ICCPR). Economic, social and cultural rights are enshrined in articles 22 to 28 of the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR), and many other regional instruments.

[4] Donnelly J., (2003), Universal Human Rights in Theory and Practice, 2nd Ed., p. 17.

[5] Mackie J. L., (Jeremy Waldron, Ed.) (1984), "Can There be a Right-Based Moral Theory?" in: *Theories of Rights* Oxford: Oxford University Press, pp. 168 & 179.

are interconnected; loss of one's right detracts other rights. Similarly, protection of human rights in one area supports the protection in other areas.

The body of international human rights law is composed of many instruments whereby the key milestones include the Universal Declaration of Human Rights of 1948, followed by the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, both of 1966. Then, many other human rights instruments have been developed in various specific areas of protection or on specific groups or categories of people.[6]

2.2 International Humanitarian Law

International humanitarian law, on the other side, is premised around the need to have regard and care for humanity in the conduct of warfare. It is about conducting warfare while remaining humane. Obviously, this thinking sometimes appears as a 'contradiction in terms' and defeating the foundations of logic because war in any of its forms is an inhumane way of resolving conflicts. Thus, war is against the very foundations of any reasonable humanity. Therefore, one cannot speak about having regard to and care for humanity in a situation where human reason has clearly failed. In any case, war is sometimes difficult to avoid. As a result, humanitarian law has to deal with consequences and effects of armed conflict, not the root causes of it. Therefore, it sets in when the armed conflict will have started, which means when reason will have failed to prevail.

In any case, the fundamental rules of humanitarian law are closely linked to the survival of human beings, not only as individuals but as populations and the things that surround them. This includes: safeguarding cultural objects and places of worship,[7] and objects indispensable to the survival of the civilian population;[8] protecting medical establishments and units (both civilian and military), public works, and critical installations for the survival of a society (like dams, dikes, and

[6] These include: *International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; International Convention for the Protection of All Persons from Enforced Disappearance;* and *Convention on the Rights of Persons with Disabilities.*

[7] Convention of The Hague of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict is reaffirmed in Article 53.

[8] Article 43, Protocol I; Article 14, Protocol II.

nuclear power plants)[9]and the preservation of the natural environment.[10] By its very nature, humanitarian law aims, through acts of humanity, to preserve the survival of humankind to ensure that 'civilized life' is still possible, and to maintain the necessary conditions for a return to peace even during a continuation of conflict. As Denise Bindschedler-Robert, puts it, "the law of armed conflicts is certainly not a substitute for peace. Nevertheless, in the last analysis it preserves a certain sense of proportion and human solidarity as well as a sense of human values amid the outburst of unchained violence and passions which threaten these values".[11]

Humanitarian law may be expressed through the provision of bilateral treaties which can be concluded before hostilities begin, or during the continuance of hostilities in the form of truces and instruments of surrender, or at the end of conflict in the form of ceasefires and peace treaties. These would set out the treatment which ought to be given to civilians, prisoners, the sick and wounded, and neutral intermediaries.

Humanitarian law may also be formed through multilateral agreements which are usually concluded in reaction to or in the aftermath of a bloody conflict. For example, each of the set of humanitarian law codified in Geneva from 1864 to 1977 came after a war that shocked everyone. For example, the battle of Solferino (1859) between Austrian and French armies was the reason for the conclusion of the First Convention of 1864. The naval battle of Tsushima (1905) between Japanese and Russian fleets prompted adjustments to the Convention on War at Sea in 1907. World War I brought about the two 1929 Conventions, which include a much broader protection framework for prisoners of war. World War II led to the four 1949 Conventions and an extensive regulation of the treatment of civilians in occupied territories and internment. And decolonisation and the Vietnam War preceded the two 1977 Additional Protocols,[12] which introduced written rules for the protection of civilian persons and objects against hostilities.

The terminology used to refer to the body of law on humanitarian issues may vary between 'humanitarian law', 'international humanitarian law applicable in

[9] Article 56, Protocol I; Article 15, Protocol II.

[10] Article 55 of Protocol I.

[11] DENISE, Bindschedler-Robert, (1969) "A Reconsideration of the Law of Armed Conflicts", Report to the Conference on the Law of Armed Conflict, Carnegie Endowment, Geneva, 15-20 September 1969, p. 61; Keen, S., (1986), "Faces of the Enemy: Reflections on the Hostile Imagination: The Psychology of Enmity", Harper & Row, San Francisco, 1986, p. 181.

[12] Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

armed conflicts', 'laws of war', 'law of Geneva', 'Red Cross Conventions', 'Law of The Hague', or 'human rights in armed conflicts'. All these expressions subscribe to the same objective, namely, the quest to limit the use of violence in armed conflicts.

There are two types of situations in which international humanitarian law applies. The first is international armed conflict where the Geneva Conventions and Additional Protocol I apply. Then there is a non-international armed conflict where Article 3 common to the four Conventions and Additional Protocol II apply.

3.0 The Doctrine 'Lex Specialis Derogat Legi Generali'

3.1 An Overview

The doctrine '*lex specialis derogat legi generali',* in legal theory and practice, is a doctrine that emanates from Roman law relating to the interpretation of laws, and can apply both in domestic and international law contexts. The doctrine entails that, a specific law displaces, or misapplies, or suspends, or keeps in abeyance a general law when the two (specific law and general law) apply on the same matter in the same situation.

In international law, the doctrine has emerged in the context of existence of a number of specialized and autonomous rules of international law or rules pertaining to particular subject-areas such as: human rights, the environment, trade, international crimes, and so on, when applied *vis-a-vis* general principles of international law. This autonomy has sometimes led to conflicts between such specialized sets of rules and the general law as well as between different sets of specialized rules. Thus, analytically, it is possible to distinguish between two types of normative conflict, namely: between general law (*lex generalis*) and particular or special law (*lex specialis*), and between two types of particular or special laws.

The question of how to deal with specialized sets of rules in their relationship to general law and to each other is usually dealt with by two doctrines. The first, which exists in the Latin maxim, and which is the subject of this discussion is *lex specialis derogat legi generali*, meaning that a specific law keeps in abeyance the general law. The second is the doctrine of self-contained regimes. These are regimes of international law that are confined to a certain geographical space,[13] or to a certain subject matter.[14] In this paper we will confine ourselves to the first.

[13] For example the African human rights system is considered a self-contained regime.

[14] For further discussion see: Michael Runersten, (2008), *Defining 'Self-contained Regime: A*

3.2 Genesis and Context within which the Doctrine 'Lex Specialis Derogat Legi Generali' *Applies*

There are two ways in which law takes account of the relationship between a particular rule (*lex specialis*) and a general one (*lex generalis)*. *Lex generalis* is often termed a principle or a standard. A particular rule may be considered as directing as to how the general rule should apply in a given circumstance. That is to say, it may give instructions on what the general rule needs in order to apply in the case at hand. Alternatively, a particular rule may be conceived as an *exception* to the general rule. In this case, the particular rule derogates from the general rule. The maxim *lex specialis derogat legi generali* explains this phenomenon, and is usually dealt with as a conflict of laws situation, depicting the second situation as elaborated above.

As to whether every *lex specialis* will end up displacing *lex generalis*, it is a matter of context. That is why we have already observed that, some *leges speciales*[15] are just there to direct as to how the *lex generalis* is to apply, not to replace it altogether. In both cases, that is, either as a modality for application of, or an exception to the general law, the bottom-line and mainstay of the doctrine of *lex specialis* is to indicate as to which rule should be applied or how should a rule be applied. Thus, whether the special law shows how a general one ought to apply, or the special law replaces the general one, it is still a question of determination of which rule to apply given a certain situation.

The idea that a special or particular rule overrides a general rule has a long pedigree in international law jurisprudence. Its rationale is well expressed by Grotius as exemplified in the question: "What rules ought to be observed in such cases' [i.e. where parts of a document are in conflict], for which the answer is that special provisions are ordinarily more effective than general ones,[16] meaning that a special rule is more to the point (as it approaches more nearly to the subject matter at hand) than a general one and it regulates the matter more effectively than general ones do. This could also be expressed by saying that special rules are better able to take account of particular circumstances than general ones. The need to comply with them is felt more acutely than it is the case with general rules.

Case Study of the International Covenant on Civil and Political Rights, Master's Thesis, Faculty of Law University of Lund; Bruno Simma and Dirk Pulkowski (2006), "Planets and the Universe: Self-contained Regimes in International Law" , *The European Journal of International Law*, Vol. 17 no.3 , pp. 483–529; Bruno Simma, (1985), "Self-contained regimes", *Netherlands Yearbook of International Law*, Volume 16, pp. 111-136.

[15] The plural for '*lex specialis*'.

[16] Hugo Grotius, *De Jure belli ac pacis. Libri Tres*, Book II Sect. XXIX.

Specific rules have greater clarity and definitiveness and are thus often felt "harder" or more "binding" than general ones which may stay in the background and be applied only when no specific rules are there. It is, therefore, no wonder that legal literature generally accepts the *lex specialis* doctrine as a valid general principle of law, and, hence, one of the sources of international law as per article 38(1)(c) of the Statute of the International Court of Justice.[17] However, the question is whether every time there is interplay between *lex specialis* and *lex generalis*, then the latter is displaced. How about a situation in which the former only stipulates or guides as to how the latter ought to properly apply?

From practice, *lex specialis* (special law) may relate to *lex generalis* (general law) in three distinct ways: firstly, the *lex specialis* is expressly envisaged and foreseen by the relevant *lex generalis* either as a specific application of or an exception to it; secondly the *lex specialis* is expressly prohibited by the relevant *lex generalis*; and thirdly, the relevant *lex generalis* remains silent as regards any *lex specialis*.

In most cases, general international law does not, on the face of it, provide either for a specific authorization or a prohibition of the creation of special law on the same subject-matter. Thus, it remains a question of interpretation of the relevant specific law vis-a-vis the general law in question to determine the impact of the former on the latter and possibly to determine as to which is supposed to apply in a certain situation. This is the foundation of the logic in this paper when considering the interplay between international human rights law (hereby considered as *lex generalis*) and international humanitarian law (hereby considered *as lex specialis*).

4.0 Overlaps and Interplays between International Human Rights Law and International Humanitarian Law

4.1 A General Theoretical and Legal Framework

Overlaps between international human rights law and international humanitarian law typically occur when an act committed in the context of an international armed conflict, invokes the application of international humanitarian

[17] The principle is, in truth, a general principle of law recognized in all legal systems, and it was cited as an example of such in the drafting of Article 38 of the Statute of the Permanent Court of International Justice. It follows that if the *lex specialis* contains dispute settlement provisions applicable to its content, the *lex specialis* prevails over any dispute settlement provision in the *lex generalis*.", ITLOS, *Southern Bluefin Tuna* case, (27 August 1999), para 123.

law, and at the same time, it is also prohibited by international human rights law, and *vice versa*.

A typical example is genocide, which is usually accompanied with other heinous acts such as mass killings of civilians, torture, mass and systematic rape in detention centres and elsewhere; the creation of refugees, terrorization, and the calculated slaughter of males together with the systematic rape of women within a defined group as a means of altering the ethnic composition of a group or even preventing further births within that group. Thus, genocide, which is essentially a "deliberate and systematic destruction of a racial, political, or cultural group,"[18] is conceptually linked to crimes against humanity.[19] Article I[20] affirms that genocide, "whether committed in time of peace or in time of war, *is a crime under international law*" that ratifying parties must prevent and punish. On the other hand, article II[21], the substantive core of the Genocide Convention, defines "genocide" as a variety of acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group.[22] This is the case whether or not the acts associated with genocide are committed in time of peace or war.

Further, the acts of civilian killings, torture, mass and systematic rape in detention centres and elsewhere, the creation of refugees, terrorization, and the calculated slaughter of males together with the systematic rape of women within a defined group as a means of preventing further births within that group, which clearly fall within the list of genocide acts as set out in article II, are also acts of torture, cruel, inhuman and degrading treatment covered by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also known as the 'Torture Convention', which is typically an international human rights instrument. Torture is also considered an international crime, regardless of whether it is committed in time of war or peace. As such, it overlaps with the grave breaches provisions of the 1949 Geneva Conventions and

[18] Webster's Ninth New Collegiate Dictionary 511(1987).
[19] BARBARA Harff, *Genocide and Human Rights: International Legal and Political Issues* , at 11-12
[20] Of the Genocide Convention, 1948.
[21] *Ibid*.
[22] Art II, Convention on the Prevention and Punishment of the Crime of Genocide

the 1977 Additional Protocols.[23] The Torture Convention itself states that violent physical abuse becomes torture when it causes "severe pain and suffering, whether physical or mental" and is intentionally inflicted on a person to intimidate, coerce, or punish.[24]

The period of applicability of humanitarian rules is also subject to discussion because of a lot of overlaps in the process. Often, the actual hostilities are brief, and a lightning war gives way to a long period that no longer belongs to war, but is not yet peace. During this period, which may last for several years, victims and prisoners remain in detention years after the cessation of hostilities. This was the case in the Western Sahara conflict; the Iraq-Iran conflict; and the conflict between Iraq and Kuwait. So, civilian populations come under attack or remain under military occupation. So, what started as a humanitarian law issue ends typically as a human rights issue, and for a longer period of time.

There is also an overlap between human rights law and humanitarian law in providing the protection of certain individual rights. Both bodies of law guarantee the freedom from torture;[25] freedom of religion[26] and the fundamental guarantees enshrined in Common Article 3. Article 75 of Additional Protocol I and Articles 4-6 of Additional Protocol II is reinforced by their link to fundamental human rights. These guarantees, especially Common Article 3, apply both to international and internal armed conflicts, whereby the former attracts the application of international humanitarian law *per se* and the latter international human rights law *per se*. These guarantees reaffirm in categorical terms certain rights which are non-derogable under human rights treaties, such as the right to fair trial. Further, Articles 27 to 34 of the Geneva Convention IV include extensive references to basic human rights in armed conflict, including the right of individuals to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs; as well as prohibition of pillage, taking of hostages, and taking reprisals against civilians.

[23] U.N. Doc.A/CN.4/22/1950, *reprinted in* M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 222 (1992).

[24] Art. 1, Torture Convention.

[25] Article 7 ICCPR, Article 3 ECHR; Common Article 3 GCs, Article 75 I AP

[26] Article 18 ICCPR, Article 9 ECHR; Article 58 Geneva Convention IV

4.2 Invoking the Doctrine 'Lex Specialis Derogat Legi Generali' *in Every Situation of Overlap between Human Rights Law and Humanitarian Law*

It seems clear, at least in the absence of evidence to the contrary, that the laws of war must be regarded as *leges speciales* in relation to rules laying out the peace-time norms relating to the same subjects which it overrides.[27] From the adoption of the United Nations Charter in 1945 onwards, the interplay between international human rights law and international humanitarian law has been subject to many questions to which scholars, judges and institutions still struggle to provide clear answers. At present, there are a number of divergent stances on the parallel application of the disciplines, but they are generally elusive as to their exact methodology and supporting legal basis.

5.0 The Consequences of Applying Humanitarian Law to the Exclusion of Human Rights Law during Armed Conflict

5.1 Situating the Problem

The normative frameworks under which International Human Rights Law and International Humanitarian Law operate are sometimes in conflict with one another. Thus, despite the growing convergence of various protective trends, significant differences remain. Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage.[28]

Although the rights to life and to physical security are among those fundamental rights enjoyed by all human beings under any scheme of human rights,[29] the intentional killing of human beings during armed conflict is the condition *sine qua non* of international humanitarian law, the body of law that regulates the conduct of hostilities. As one commentator notes, "on a normative level, humanitarian law contemplates a starting point of death, violence, and destruction that is repugnant to the essence of human rights law."[30] While

[27] Jenks C.W (1953), *The Conflict of Law-Making Treaties*, XXX BYIL 446.

[28] J.D., New York University School of Law, 2003; B.S., B.A., University of Dayton, 1999

[29] Universal Declaration of Human Rights, G.A. Res. 217A (III), Art. 3 International Covenant on Civil and Political Rights, Art. 6.

[30] Audrey I. Benison (1999) *War Crimes: A Human Rights Approach to a Humanitarian Law Prob-*

contemporary international humanitarian law is rooted in statist conceptions of rights, human rights law requires any action to be justified in terms of individual rights, thus creating a tension between the two legal frameworks.

5.2 Problems Associated with Suspension and Derogation from Human Rights Law in Situations of Armed Conflict

The International Court of Justice in its Advisory Opinion on the *Legality of Threat or Use of Nuclear Weapons* case[31] decided to examine the relationship between Article 4 of the International Covenant on Civil and Political Rights and the laws applicable in armed conflict. Article 4(2)[32] establishes the right of an individual not to arbitrarily be deprived of life. This right, the Court pointed out, applies also in hostilities. However, the Court went on to say: "The test of what is an arbitrary deprivation of life falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities". This effectively implies that, while acknowledging application of human rights law in all situations, the Court nonetheless subjects its interpretation to the *lex specialis (*the law governing war), effectively watering down the impact of the general law. The finding of the Court, while affirming the right to life on one hand qualifies it by the other…"

Thus, although international human rights law stipulates the right to life, the right to be free from slavery, the right to be free from torture and the right to be free from retroactive application of penal laws as non-derogable rights, it also recognises that human rights can be limited or even pushed aside during times of national emergency,[33] although rights that have attained the level of *jus cogens* cannot be derogated from for reasons of national security alone.

However, in modern conflicts, such as the war that followed the 1994 genocide in Rwanda, armed conflict can occur alongside other atrocities.

Civilians may play a role in such atrocities, and a soldier encountering genocide being committed by a civilian would fully be justified in shooting the civilian if

lem at the International Criminal Court, 88 GEO, L.J. 141, 152.

[31] International Court of Justice advisory opinion on the Legality of the Threat or Use of Nuclear Weapons [1996] ICJ 2.

[32] Which refers to Article 6(1) of the same which provides that: "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

[33] The emergency must be actual, affect the whole population, and the threat must be to the very existence of the nation. The declaration of emergency must also be a last resort and a temporary measure.

doing so were the only way to stop the genocide.[34] Nevertheless, the above analysis suggests that there are some circumstances in which the intentional[35] killing of civilians may be justified, and even required from a human rights perspective. But how can we incorporate this concern without losing the simplicity of the rule barring any attack on non-combatants? Here we must examine the lawfulness of attacking combatants.

Under a human rights-based approach, combatants do not lose their right to life simply by donning uniforms or taking up arms. Violations of combatants' right to life, either by killing them or sending them to be killed, must be justified by an appeal to human rights. A typical example of this paradox is a situation where an insurgency kidnaps children or even adults, then forces them to put on uniforms and make them march towards their enemy's side. Do they immediately become a legitimate target just because they have put on uniforms? That is why the question for a human rights-based principle is whether there are some criteria grounded in human rights that would justify killing combatants as a class, simply based on their membership in the combatant class. To answer this question, we must examine the possible moral justifications for taking the life of a combatant, and see if these justifications are compatible with a human rights-based law of war.

The existing primary justification for allowing the loss of a combatant's life is proposed in the 'just war tradition'.[36] The roots of the just war tradition lie in the doctrine of 'protection of the innocent'. In this context 'the innocent' are defined not as the opposite of 'the guilty' but as 'the harmful'. In the just war approach, combatants are legitimate targets in war because they pose a threat, not just because they don uniforms.[37]

A modern version of this theory is described by Rawls in his imagining of a war between a well-ordered people and an outlaw state: "the reason why enemy combatants may be attacked directly is not that they are responsible for the war, but that well-ordered peoples have no other choice. They cannot defend themselves in any other way, and defend themselves they must."[38] In the human rights perspective, the threatened army is justified to take steps to safeguard the

[34] James F. Childress (1982), "Moral Responsibility in Conflicts", *Kennedy Institute of Ethics Journal*, pp. 63-94.

[35] The term "intentional" here is used in the sense that the deaths were part of the results forecast.

[36] Art 1 and 2, U.N. Charter; Article 4, International Covenant on Civil and Political Rights.

[37] Thomas Nagel (1972), War and Massacre in War and Moral Responsibility, *Philosophy and Public Affairs*, Vol. 1, No. 3.

[38] John Rawls (1999), *The Law of Peoples*, Harvard University Press, p. 96.

same right to life in a similar way a person is justified in killing an assailant who is bent on killing that person. Unfortunately, the just war tradition is rooted in a statist morality, which at times may be in direct conflict with the idea of human rights which focuses primarily on an individual.[39] Combatants could be considered a threat simply by being soldiers and a part of a military apparatus that poses a threat to another state's military forces, not because they pose threat to individuals.

6.0 Taking an Approach of Coordination of International Human Rights Law and International Humanitarian Law

6.1 The Essence and Basis of the Coordination Approach

In essence, both international human rights law and international humanitarian law protect individuals objectively, without regard to their nationality. International tribunals have repeatedly affirmed that humanitarian treaties have a specific objective character because they protect not the interests of contracting states but the fundamental rights of individuals or their groups. Thus, the norms of humanitarian law serve as a further elaboration of the parameters of the right to life in armed conflicts, and define circumstances in which deprivation of life is not arbitrary.

In addition, Article 57 of Additional Protocol I to the Geneva Conventions requires that the commanders who plan military attacks verify whether the respective attacks will bring about more civilian casualties than absolutely necessary for ensuring tangible military advantage, and if the answer is positive, then cancel the attacks. Furthermore, the independent relevance of the human rights provisions regarding the prohibition of arbitrary deprivation of life is increased in the context of military occupation where the considerations of military necessity are no longer as pressing as in the case of hostilities. In such situations, Article 6 of the International Covenant on Civil and Political Rights, together with other relevant human rights provisions, can directly determine the legality of the relevant actions of States or their armed forces.[40]

[39] Charles R. Beitz(1983), "Cosmopolitan Ideals and National Sentiment", 80 J. PHIL. Pp.591 and593

[40] Article 6(1) of the International Covenant on Civil and Political Rights states that; "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

In the Judgment of the Inter-American Court of Human Rights in *Las Palmeras Case,*[41] the Court refused to examine the compatibility of deprivations of life involved in that case from the perspective of Common Article 3 of the 1949 Geneva Conventions.[42] At the merits stage of the case, the Court concluded, through the use of human rights standards only, that the deprivation of life of the relevant persons contravened Article 4 of the Inter-American Convention on Human Rights. This approach confirms that human rights law can at times be self-sufficient in dealing with the relevant violations in situations of armed conflict, without needing assistance from humanitarian law. Such independent standing of human rights law is both understandable and indispensable because human rights law is designed to be able to respond to the situations it applies to in an autonomous way, if needed.

6.2 Actions under International Humanitarian Law to be in Conformity with International Human Rights Law: A Focus on the Power of Derogation from Human Rights

In the coordination thesis, actions taken in the realm of international humanitarian law should be in conformity with principles of international human rights law, especially the rules to do with derogation from human rights.

Under Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights, in time of public emergency which threatens the life of a nation and the existence of which is officially proclaimed, the States Parties may take measures derogating from their obligations under the relevant treaties to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law. In this way, certain basic rights in international human rights which are also fundamentally relevant from the viewpoint of humanitarian law, such as the right to life and freedom from torture, should be exempted from the power of derogation.

Derogation measures from other treaties, such as ICCPR, also have to be in accordance with the provisions of humanitarian law treaties, as well as other

[41] *Las Palmeras v. Colombia*, Inter-American Court of Human Rights, 2001. The case involved a situation where the army and police opened fire to students and teachers at Las Palmeras school and donned them on military uniforms to show that they were combatants fighting the government, hence legitimate targets.

[42] Las Palmeras, Judgment of February 4, Series C, No 67, para. 28

humanitarian law provisions, presumably of customary law status,[43]and the requirements of the latter body, especially its imperatives on the distinction between civilian and military targets, necessity and proportionality, and humane treatment of protected persons represents the bottom line below which the derogation from human rights treaties cannot justify the freedom of action of states. In other words, while derogations from human rights caused by states of emergency are possible, from humanitarian law point of view, these emergencies are only those which would, in the first place, justify the application of international humanitarian law itself, namely the breakout of armed conflict which threatens the survival of a nation and its people. In any case, for both human rights law and international humanitarian law the protection of human life is the primary goal. Article 6(1) of the International Covenant on Civil and Political Rights states that; "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." While accepting that combatants engaged in an armed conflict will be exposed to life-threatening situations, international humanitarian law seeks to limit harm to civilians by requiring that all parties to a conflict respect the principles of distinction and proportionality.

7.0 Observations and Conclusion

As we have noted right from the beginning, the intention of this Paper was to examine the interplay between international human rights law and international humanitarian law, especially in situations of armed conflict. As we have noted also, the general position in international law is that international human rights law shall apply in times of peace as general law, while international humanitarian law shall apply in situations of armed conflict as special law, thereby displacing or keeping in abeyance general law. The paper has examined the appropriateness of using the doctrine '*lex specialis derogat legi generali*' in situations of interplay between the two fields of international law.

The point of convergence for both international human rights and international humanitarian law is the protection of human life, which is the primary goal for both. However, there is also a point of variance in that, in international human rights law the right to life is absolute, even outside the judicial process, and cannot be derogated from in any way, while in international humanitarian law the right is

[43] Pieter van Dijk, et al.(2006), *Theory and Practice of the European Convention on Human Rights*, Intersentia, p. 1067.

not absolute in certain situations in the realm of armed conflict. Thus, there is the need to fall back to the application of international human rights law, especially on rules and principles relating to derogation from human rights, such that the exceptions created by international humanitarian law should be in consonance with the derogations permitted in international human rights law.

This paper puts forward an argument that human beings should not lose their right to life unless this sacrifice can be justified by an appeal to human rights. However, it does not suggest the premise that human rights automatically invalidate warfare on the grounds that armed conflict will always violate human rights. Penal and civil sanctions may serve important and essential roles in the implementation of a human rights-based law of war. For example, many of the rules of Additional Protocols I and II have been translated into rules of criminal law in Article 8 of the Statute of the International Criminal Court.[44]

Regarding the doctrine *lex specialis derogat legi generali,* one of the difficulties follows from the relative lack of clarity of the distinction between "general" and "specific". Every general rule is particular too, in the sense that it deals with some particular substance. This is reflected in the distinction made by many domestic laws between laws and acts. Generality and speciality are thus relational. A rule is never "general" or "special" in the abstract sense but in relation to some other rule. Thus, there may be a rule that is general in subject-matter but valid for only in a special relationship between a limited numbers. It follows, therefore, that no rule can be determined as general or special in abstract, without regard to the situations in which its application is sought. Thus, a rule may be applicable as general law in some respect while it may appear as a particular rule in other respects.

That is the reason why this paper suggests the need for a substitute doctrine which would insist that any armed conflict, pursued for whatever reason or justification, should be pursued consistent with human rights to remove any lame excuses through which human life is lost.

[44] Art 8, Rome Statute of the International Criminal Court; Art. 6(a), Charter of the International Military Tribunal, Aug. 8, 1945.

Challenges in Litigating under Kenya's Protection from Domestic Violence Act 2015

Rahab Wakuraya Mureithi*

Abstract

The Protection against Domestic Violence Act (2015) was enacted to specifically cater for the needs of the victims of domestic violence. It addresses all forms of domestic relationships and places the duty to ensure the protection of victims on the government. However, the law is practically ineffective in its daily applicability to victims of domestic violence. Some of the shortcomings of this Act are in the wording while others are in its conflicts with the prevailing procedural and constitutional realities in daily practice. This paper looks at some of these challenges from the point of view of a legal practitioner who has tried to use it in Kenya's Magistrates' Courts.

1.0 Introduction

Many human right scholars have categorized domestic violence as a specific human rights violation.[1] In order to locate it within the raft of violations of human

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[1] See Thomas D,Q , Beasly ,E,M. (1993) 'Domestic Violence as a Human Rights Issue' Human Rights Quarterly, Vol. 15, No. 1 (Feb., 1993), pp. 36-62, <www2.warwick.ac.uk/study/csde/gsp/eportfolio/directory/pg/archive/asrjac/research/thesis/762650.pdf> accessed on 1st December, 2016. See

rights, there are some scholars who have suggested that it compares, in terms of its gravity, with torture or terrorism.[2] The European Court of Human Rights has held states responsible for violation of the right to life in cases of domestic violence where state organs, such as the police, failed to act to effectively protect victims of domestic violence.[3] The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Committee has expounded that gender-based violence against women does not only amount to discrimination, but also violates the right to life, the right to be protected from torture and inhuman and degrading treatment, the right to equal protection of the law, the right to liberty and security of the person, the right to the highest attainable standards of mental and physical health among others.[4] If domestic violence is a violation of human rights, then, the state cannot escape its duty to protect, promote, and fulfil it just as it is obligated for other human rights.

In Kenya, this position has been upheld in the case of *CK and Others v Commissioner of Police and Others*[5] where the court found that the respondents, who were the police, the Director of Public Prosecutions and the state, to have breached their duty to protect vulnerable groups from gender based violence. The court specifically faulted the respondents for failing to ensure criminal consequence through proper and effective investigation and prosecution of crimes, thereby, creating a culture of impunity. The judge stated that "…this to me makes the respondents responsible for the physical and psychological harms inflicted by the perpetrators."[6]

Domestic violence is rampant in Kenya. According to Aura, about 39% of Kenyan women have experienced some form of sexual or gender-based violence since they were 15 years and that marital violence, which is part of domestic

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also Rafferty, Yvonne (2013). International Dimensions of Discrimination and Violence against Girls: A Human Rights Perspective, Journal Of International Women Studies,14(1) 1-23, <http://vc.bridgew.edu/cgi/viewcontent.cgi?article=1648&context=jiws> accessed on 1st December, 2016.

[2] Pain, R. 2014 'Everyday Terrorism : Connecting Domestic Violence And Global Terrorism.', *Journal on Progress in Human Geography*:. 38 (4).pp. 1-550,<http://dro.dur.ac.uk/12511/1/12511.pdf> accessed on 1st December, 2016.

[3] *Opuz v Turkey* and *Ketrova v Slovakia* are some of the cases which the European court has found respective states to have violated the right to life as enshrined in article 2 of the European Convention on human rights because of inadequate response by the police to reports of domestic violence. Full cases available at <http://hudoc.echr.coe.int/eng?i=001-92945 and http://hudoc.echr.coe.int/eng-press?i=003-2013708-2124711> respectively, accessed on 1st December, 2016.

[4] CEDAW Committee (1992) General Comment No. 19, <www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> accessed on 1st December, 2016.

[5] Petition No. 8 of 2012 [2013] eKLR.

[6] Justice J. A Makau in *CK and Others v Commissioner of Police and Others* [2013] eKLR.

violence, makes up the majority of the cases reported.[7] Adebayo posits that the forms of domestic violence are varied, ranging from physical violence, threats of physical violence, emotional and psychological abuse, sexual abuse and economic deprivation among others.[8] While studies have concentrated on domestic violence against women, many men also suffer domestic violence.[9] There have been quite a number of media reports of an increase in domestic violence against men in Kenya.[10]

The journey towards having a law addressing domestic violence in Kenya finally bore fruit through the enactment of the Protection against Domestic Violence Act (PDVA).[11] Efforts to get the bill through the legislative processes had started as far back as 2007 with successive parliaments failing to enact the law until 2015.

The coming into force of the PDVA is a major victory for those who fight for women's and children's rights in Kenya. Before it was passed, some instances of domestic violence were addressed through provisions of the Penal Code. Specifically, a victim of domestic violence had to report the matter to the police and the police would charge the alleged perpetrator with the penal provision most-suited to the facts of the case. For instance, many cases of physical violence would fall under assaults while other cases involving sexual violence would fall under the Sexual Offences Act (SOA).[12] This approach was found to be inadequate for many reasons.

Firstly, the Penal Code and the Sexual Offences Act did not provide for all the forms of domestic violence.[13] That meant that other harmful forms of domestic violence could not be prosecuted. Secondly, this approach was unsuccessful because

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[7] Aura R.A 'Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities' Kenya Law Review, <http://kenyalaw.org/kl/index.php?id=4512> accessed on 1st December, 2016.

[8] See Siemieniuk, R. A. C.; Krentz, H. B.; Gish, J. A.; Gill, M. J. (2010). "Domestic Violence Screening: Prevalence and Outcomes in a Canadian HIV Population". AIDS Patient Care and STDs 24(12): 763–770.

[9] Adebayo. A. A. 'Domestic Violence against Men: Balancing the Gender Issues in Nigeria' American Journal of Sociological Research 2014, 4(1): 14-19.

[10] See Thatiah J, 'Nairobi men suffer most domestic abuse as Western tops in violence against women' 2015, <www.nation.co.ke/newsplex/Nairobi-men-suffer-domestic-abuse/2718262-2815948-2bsxy8/index.html> accessed on 1st December, 2016.

[11] Act No. 2 of 2015. This Act was assented to by the president on the 14th of May 2015 and commenced on 4th June 2016.

[12] Section 250 of the Penal Code, Cap 63 Laws of Kenya and Sexual Offences Act, Cap 62A respectively.

[13] For instance, harassment, intimidation, verbal and psychological abuse and economic deprivation among others.

it did not account for the reality of the domestic context of domestic violence.[14] For married couples, the alternative way to deal with domestic violence was to use it as a ground for divorce.[15] While this may have catered for the married individuals who were willing to dissolve their marriages, it did not cater for the victims in other domestic relationships and was unavailable for those unwilling to dissolve the marriage relationship. The fact that the available ways to deal with domestic violence were so limited made them unsuitable for persons who had a desire to preserve the domestic relationships that they had with the perpetrators.[16] There are reports of many victims who withdrew their cases while they were still in court mainly because of pressure from other family members and sometimes because of a desire to repair the relationship especially where the domestic situation was one of spouses.[17] Thirdly, the existing law was ineffective in protecting the victim from the perpetrator. The offences were bailable so that sometimes the accused person would continue to cohabit with, or have easy access to the complainant as the case continued in court. There were no provisions for safe accommodation for victims of domestic violence or provisions for rehabilitation of perpetrators.

The attitude of law enforcement officers and the society at large towards domestic violence was also not conducive. There were reports of women being turned back at police stations "to resolve the family matter at home" when they went to report incidences of domestic violence.[18] A man who had been subjected to domestic violence would never dare to report the matter to the police because of the likelihood of stigmatization.[19] The high standard of proof required for criminal cases also posed a barrier in prosecuting perpetrators of domestic violence as in many cases, domestic violence happens in the most intimate of settings. In most cases, it would be the complainant's word against the accused person's.

The rationale behind the enactment of the PDVA was, therefore, to provide an alternative way to deal with domestic violence that recognizes the intricacies

[14] For instance, in the case of violence between spouses or close family members, the lack of protection order would expose the victim to the perpetrator even after charges have already been preferred.

[15] See Sections 66(2) (b), 69(b), 70(e) of the Marriage Act No.4 of 2014.

[16] Trochu- Grasso,C *et al* 'Situation of Violence against Women and Children in Kenya: Implementation of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Alternative report to the UN Committee Against Torture' (2009) World Organisation Against Torture (OMCT), www.omct.org/files/2005/09/3070/alt_report_on_violence_against_women_children_kenya.pdf accessed on 1st December, 2016.

[17] Ibid.

[18] Ibid.

[19] See Lewis A. and Saratakos, S. 'Domestic Violence and the Male Victim' *Nuance* no. 3, December 2001.

of the domestic relationship between the complainant and the accused person; addresses the attitude of public servants and the public at large; does not have criminal penalties except for instances of contempt; and which provided better remedies tailored to the needs of the victims. The PDVA has been lauded as having all these qualities. Over a year after its enactment, this paper takes a look at the first attempts at litigating under it drawing from the author's own experience and experiences of other advocates with an aim of establishing whether this law meets the ends it was meant for.

2.0 Kenya's Obligations with Respect to Domestic Violence

International jurisprudence has established the doctrine of due diligence in assessing state responsibility, especially, in regard to violence against women. The Declaration on the Elimination of Violence against Women urges states to 'exercise due diligence to prevent, investigate, and in accordance with national legislation, punish acts of violence against women, whether those acts are perpetuated by the state or by private persons.'[20] The CEDAW Committee in General Comment 19 stated that 'states may be held responsible for private acts if they fail to act with due diligence to prevent violation of human rights or to investigate and punish acts of violence.'[21] The due diligence standard, in a nutshell, requires that the states should prevent acts of violence, protect the victims of violence, investigate and prosecute instances of violence, punish perpetrators and provide redress for victims.[22] In *A. T v. Hungary*, [23] Hungary was ordered to provide reparation to A.T. proportionate to the physical and mental harm she had undergone and to the gravity of the violations of her rights because it failed to act with due diligence to prevent acts of violence or to investigate and punish and provide compensation. The due diligence standard has been applied by courts in Kenya. For instance, in *CK and Others v Commissioner of Police and Others* [24] the court declared that the inaction by the state to properly investigate and prosecute sexual offences against children amounted to violation of the petitioner's fundamental rights.[25]

[20] Article 4(c) Declaration on the Elimination of Violence Against Women, (1993).

[21] CEDAW General Recommendation 19, U.N. Doc. A/47/38 (1992).

[22] Special Rapporteur on Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, 35, U.N. Doc. E/CN.4/2006/61 (2006).

[23] *A.T. v. Hungary* (2003), CEDAW Committee Communication no.2/2003.

[24] [2013] eKLR.

[25] Supra Note 5.

The Constitution of Kenya (2010) has provided for a Bill of Rights that is quite elaborate. What is noteworthy about the bill of rights is that it not only recognizes the State as the duty-bearer for the rights and freedoms of Kenyans, but also individuals.[26] For that reason, both private individuals and State bodies are required to fulfil their part in upholding the bill of rights.[27] There are instances where individuals have been held liable for their own actions that violated the rights of other persons and consequently have been required to compensate the victims of the violations. In *Purity Kanana Kinoti v Republic*,[28] for instance, the court found that an accused person's rights had been violated by a police officer in his individual capacity. The police officer was compelled to compensate the victim.[29]

The concept of horizontal application of the bill of rights is one that has gained acceptance in Kenya's constitutional environment. It is now accepted by courts and a number of legal scholars that the 2010 constitution provides for horizontal application of human rights.[30] Courts have been increasingly making pronouncements affirming the horizontal application of the Bill of Rights.[31] Many courts feel that what now remains is to determine the extent to which horizontal application may apply and that this can only be determined on a case by case basis.[32]

The 2010 constitution makes it a 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.[33] Part of the state's duty is to protect right-holders from violations actions by third parties including individual natural persons.[34] This could be done by ensuring that there are adequate legal remedies available for victims of violations of human rights by private persons. In order to meet this obligation, legislation

[26] Article 20(1), Constitution of Kenya. 2010.

[27] Mbondenyi, M.K , Ambani J.O. *The New Constitutional Law of Kenya; Principles, Government and Human Rights*. 2012. Claripress. Nairobi.

[28] [2011] EKLR.

[29] Ibid.

[30] There are scholars however who do not agree with this position. See Okubasu, D. M. 'Rights Discourse Devoid of Foundation? Provoking Maurice Oduor(s) in Reply to Walter Khobe's Pontification on Horizontal Application' *The Kabarak University Journal of Law and Ethics* Vol 1(2014):91.

[31] There is an emerging trend of constitutional courts enforcing horizontal application of the bill of rights. Examples of these cases are *Isaac Ngugi v Nairobi Hospital and 3 others* [2013] eKLR, *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi* [2011] eKLR, *Mike Rubia and Another v Moses Mwangi and 2 Others* [2014] eKLR.

[32] See *Isaac Ngugi v Nairobi Hospital and 3 Others* [2013] eKLR, *Law Society of Kenya v Betty Sungura Nyabuto and Another*. Petition no. 21 of 2010.

[33] Article 21(1), Constitution of Kenya 2010.

[34] Chirwa, D.M. 'The Horizontal Application of Constitutional Rights in a Comparative Perspective' (2006) 10(2) *Law, Democracy and Development* 21-48.

put in place must be usable by the public and the judiciary to ensure effective remedies.[35]

The 2010 Constitution[36] gave all international instruments ratified by Kenya the force of law.[37] This means that Kenya is bound by the provisions of the Convention on the Elimination of all forms of Discrimination against women (CEDAW), the Declaration on the Elimination of Violence against Women, (DEVAW) and many other conventions and treaties which prohibit domestic violence.[38] This also means that the established due diligence standard is applicable in assessing and measuring the actions of the state in protecting victims of domestic violence, investigating and punishing perpetrators, and providing for compensation for the victims.[39] These standards provide an important tool for analysing the effectiveness of the PDVA in executing the state's responsibility with respect to domestic violence.

3.0 The Protection against Domestic Violence Act 2015

At this stage, it is important to provide an analysis of the PDVA. As stated before in this paper, the passing of the PDVA has been lauded as a definite step towards dealing effectively with domestic violence. The PDVA was a fulfilment of Kenya's obligation under international law to adopt a legislation that contains the widest possible definition of acts of violence and relationships within which domestic violence occurs. The legislation adopted under this obligation is also required to provide for a complaints mechanism and reliefs for those who make such complaints, as well as mechanisms for support for the victim, training of judicial officers and the police and also programmes for perpetrators.[40]

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[35] The decision of the Inter American Court *in Velázquez Rodriguez v Honduras, 1988.* Series C. no. 4, which has become of great influence for human rights discourse stated that 'when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognized it would be in clear violation of its obligation to protect the human rights of its citizens'.

[36] Article 2(6).

[37] Article 2(6) of the Constitution of Kenya states: 'Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this constitution'

[38] The Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, the International Convention on Economic Social and Cultural Rights, the Beijing Declaration and Platform for Action, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the African Charter on Human and People's Rights, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, the African Charter on the Rights of the Child are some of the treaties and conventions that bind Kenya and have an implication on some aspects of domestic violence and Kenya has ratified all these.

[39] Supra Note 20.

[40] Baraza, N 'An analysis of the 2015 Kenya's Protection Against Domestic violence Act(PDVA) 2015' *Kenya Law Review* Vol5:1 May 2016.

The PDVA is unique because it centralises the needs and requirements of the victims of domestic violence. Its preamble clearly states that it is enacted to "provide for the protection and relief of victims of domestic violence; to provide for the protection of a spouse and any children or other dependant persons and to provide for matters connected thereto or incidental therewith."[41] This being its main objective, it is safe to say that this Act can only be deemed to be effective if victims and dependants of victims of domestic violence can easily use it to obtain protection from perpetrators. It should be noted that this Act does not bar an applicant from instituting criminal proceedings against the perpetrator.[42]

3.1 The Meaning of Domestic Violence under the PDVA

The first part of the PDVA is dedicated to definitions. Of importance to any person who wishes to use this Act to get reliefs in court is the definition of domestic violence. The Act defines domestic violence in three parts. First, it defines violence, then, it defines domestic violence, and finally defines the term domestic relationship. The term violence is defined in section 3 of the PDVA to include abuse that include child marriage, female genital mutilation, forced marriage, forced wife inheritance, interference from widows, sexual violence within marriage, virginity testing and widow cleansing.[43] Through this provision, the PDVA clearly shows the desire of the drafters of the law to categorise harmful cultural practices, especially against women as domestic violence. It is, therefore, correct to state that this law is meant to provide protection against harmful cultural practices. While this is laudable, it presents some problems when it comes to litigation.

The PDVA also defines violence to include acts such as damage to property, defilement, hindering applicant access to facilities, economic abuse, emotional or psychological abuse, forcible entry, harassment, incest, intimidation, physical abuse, sexual abuse, verbal abuse and any other act that may cause harm to the safety, health and well-being of the person.[44] Domestic violence is defined as violence as described above, or the threat of such violence by a person who has or had a domestic relationship with the victim.[45] It is important to note that the Act

[41] Preamble, Protection Against Domestic Violence Act (2015).
[42] Section 15(2) PDVA.
[43] Protection Against Domestic Violence Act 2015, Section 3(1) (a)(i) to (viii).
[44] Ibid, Section 3(1) (b) to (n).
[45] Section 3(2).

recognizes both a single act and a pattern of behaviour, even when these acts when considered in isolation may appear to be minor or trivial.[46]

The third part of the definition of domestic violence involves the definition of the domestic relationship. This is crucial to litigations under the Act as it delineates who the potential perpetrator could be. It is the distinguishing factor between normal run–of-the-mill criminals and the special ones who fall under this Act. The perpetrators here must have at some point enjoyed a domestic relationship with the victim. According to the definition, a person is in a domestic relationship with another if these people are married, have previously been married, are living in the same household, are members of a family member, are engaged to be married or have previously been engaged, have a child together, or enjoy a close personal relationship.[47]

In the definition of the domestic relationship, the Act has provided guidance as to who may not be regarded as being in a domestic relationship with a complainant. These include persons who are connected to the complainant only through a landlord-tenant relationship, employer-employee relationship or simply because they occupy the same dwelling house.[48] This criterion is also used to describe who may not be considered as sharing a household for the purposes of creating a domestic relationship[49] or a close personal relationship.[50]

As to determining what a close personal relationship is, the drafters provided some guidance to the courts, which were in no way restrictive as to what to consider when determining that there exists a close personal relationship between the litigants before it. The court may consider the nature and intensity of the relationship, that is, the time spent together, the place or places where this time is spent and the manner in which the time is spent.[51]

The advocate who gets instructions to litigate on the PDVA meets his/her first challenge in this complex system of definitions of domestic violence. According to this law, domestic violence can be anything that causes harm to the safety, health and well-being of the complainant, and from anyone who has a close personal relationship with the complainant. This definition is wide enough to satisfy Kenya's

[46] Section 3(4).
[47] Section 4(1).
[48] Section 4(2)(b).
[49] Section 4(2) (a).
[50] Section 4(3).
[51] Section 4(4).

international obligations with respect to domestic violence but creates challenges for the victim of domestic violence who steps into an advocate's office for help.

The first challenge would be to show that 'violence' as envisioned in the PDVA did, in fact, occur. Domestic violence is one of those phenomena that are well known and identifiable when one comes across them but difficult to pinpoint and fit into a neat box that can be elucidated before a court of law. The nature of domestic violence is that it is so fluid that from a single set of facts, one complainant can have at least half of all the aspects of violence happening. Studies have shown that in a single case of domestic violence, there might exist, many of the specific aspects of violence described in section 3 of the PDVA. For instance, in one transaction of domestic violence, there can be instances of physical abuse, sexual abuse, psychological and emotional abuse, intimidation, harassment, and so on.

While the PDVA has specifically provided for the definition of domestic violence in section 3(2), this paper posits that this definition is complex because it is a combination of the definition of 'domestic relationship' and of 'violence.' The definitions of these two terms in the PDVA encompass a large number of specific actions and have included exemptions of certain relationships and actions. For example, an applicant may approach the court for protection orders against her boyfriend. The applicant will have to aver that the respondent is in a domestic relationship with her because he is her boyfriend. Since this kind of relationship is not certified by the government, the applicant will not have a document such as a marriage certificate which would have been *prima facie* evidence of a domestic relationship. For this reason, it is unlikely that the court would issue interim protection orders. It is expected that in response, the respondent may deny the domestic relationship. The applicant might have to call witnesses to convince the court that there exists a domestic relationship. The respondent will enjoy the same right. All these proceedings will only ascertain a portion of the definition of domestic violence. The applicant will still have to prove the aspect of violence.

Violence has been defined to include economic abuse. Economic abuse has been interpreted to include the unreasonable deprivation of economic or financial resources to which an applicant is entitled, or which the applicant requires.[52] This means that not only will the applicant be under an obligation to prove that they were entitled to the specific economic resource in issue, but they must also prove that the deprivation was unreasonable, and that the person who allegedly deprived them was not only in a domestic relationship with the applicant, but was also

[52] Section 2 Par 11(a).

under an obligation to satisfy the entitlement by the applicant. The court will also have to distinguish between a normal argument over money and unreasonable deprivation.

One of the best ways to do this would be to develop such a distinction through successive pronouncements of the courts. Unfortunately, this law is to be litigated before the Resident Magistrate's Courts.[53] On the one hand, this is a great advantage because of the accessibility of the Magistrate's Court as compared to superior courts.[54] On the other hand, this poses a big disadvantage because the Resident Magistrate's Courts are the lowest courts in the land and are, therefore, unable to make law through binding precedent. This means that the development of these definitions through interpretation by the courts of law would be stunted and would have to rely on the relatively few cases that might end up in the High Court by way of appeal.

Wide definitions are good for international instruments and constitutional provisions as these provide a framework within which laws may be made to ensure practical implementation of the aspirations of the constitutional provisions. A municipal law that is to be litigated at the lowest level of the judiciary cannot afford to be vague. Even if an action alleged by the applicant is not disputed, the applicant remains with the burden of proof to establish that the action amounts to domestic violence. The applicant has to show that the action is not only injurious to his or her health, safety and well-being, but also that the relationship with the respondent falls within a definition of a domestic relationship. This particular law is one that is meant to protect the victim from harm or threat of harm from a person who is very close to them both spatially and emotionally. An order of protection anchored on this law should be available as quickly as possible. With such a wide, fluid and complex definition, the possibility of success is threatened when the applicant shoulders the burden to prove numerous aspects of the basic definitions.

3.2 The Protection Order under the PDVA

The main relief available under the PDVA is the protection order. The protection order has been interpreted by the Act to be the final order made by the

[53] Section 24(1).

[54] Kenya has undergone an ambitious court expansion programme which has witnessed an increase in numbers of judicial officers and an increase in infrastructure. There are around 116 court stations in all the 47 counties in Kenya. See the breakdown at <www.judiciary.go.ke/portal/page/all-courts> accessed on 1st December, 2016.

court with respect to a domestic violence application. [55] There are two kinds of protection orders described in the Act. One of them is the final protection order under section 13 while the other is the interim protection order under section 12.[56] For one to qualify for the interim order, one must show, on a *prima facie,* basis that any delay that might be caused by proceedings on notice might result in a risk of harm or undue hardship to the applicant or child.[57] If the court is not satisfied that a *prima facie* case exists, the court is required to issue a notice to the respondent to show cause why a protection order should not be made against him or her.[58] An interim protection order once issued remains in force until it is replaced by a protection order or varied or revoked by a competent court.[59] An interim protection order contains the contents described in section 19.[60] Noncompliance with protection orders is considered an offence and attracts a fine of Ksh.100, 000 or a jail term of twelve months or both.[61]

According to section 19(1) of the PDVA, a protection order may direct a respondent not to physically or sexually abuse or threaten to abuse the applicant or the protected person, damage any property belonging to the applicant, engage in behaviour which constitutes verbal, emotional or psychological abuse of the applicant, engage in economic abuse of the protected person or engage in customary or cultural rights that constitute abuse to the protected person.[62] The Act envisions that the protection order shall have a condition that the respondent shall, unless with the express consent of the protected person be restrained from watching or loitering around the applicants' home or place of employment or business. The protection order is also supposed to restrain the respondent from stalking or accosting the protected person, entering or remaining in any land or building occupied by the protected person, or making any other contact with the protected person.[63]

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[55] Section 2 par 25 of the PDVA states as follows: "protection order" means the final order made by the court in a matter concerning domestic violence.

[56] Section 12(1) states: 'An interim protection order may be made on an application without notice and outside ordinary court hours or on a day which is not an ordinary court day, if the court is satisfied that delay would be caused by proceedings on notice or might entail —

(a) a risk of harm; or

(b) undue hardship to the applicant or child of the applicant's family.

[57] Ibid.

[58] Section 12(5) PDVA.

[59] Ibid.

[60] Section 12(3) PDVA.

[61] Section 22, PDVA.

[62] Section 19(1) (a) – (g) PDVA.

[63] Section 19(2) PDVA.

The protection order may also include orders excluding the respondent from premises shared with the protected person, regardless of the interest that the respondent may have in the property.[64] This is, obviously, a grievous affront to the fundamental right to property guaranteed under article 40(2) of the constitution[65] and limited only by the same constitution which has provided an exception to the right to property based on the mode of acquisition of the property. [66] The acquisition of a property must be determined to have been illegal by a competent court of law. As it is, Magistrate's Courts have no jurisdictions to determine land matters, not even if it is a question of access to land.[67]

Even though the Act specifically states that exclusion orders under the PDVA do not affect the interest in that land, this assurance is not enough to guarantee that the rights of the interest holder will not be violated because protection of the right to property includes the protection of both the interest and enjoyment of the property.[68] It should be noted, however, that the court is required to issue an exclusion order only as a last resort where there is no other way of securing the personal safety of the protected person and that this order may be revoked as soon as an alternative residence is availed.[69] These provisions are, nevertheless, likely to be successfully challenged because the Resident Magistrate's Courts do not have jurisdiction to handle matters related to land.

Other contents of protection orders include allowing access by the applicant to premises in order for them to pick their belongings, allowing access to the dwelling place and reasonable facilities and a direction that a respondent does or refrains from doing certain acts that the court may deem necessary or desirable for

[64] Section 19(3)(a) states "…grant to any protected person the right of exclusive occupation of the shared residence or specified part thereof by excluding the respondent from the shared residence or the specified part thereof, regardless of whether the shared residence is solely owned or leased by the respondent or jointly owned or leased by the parties.

[65] Article 40(2) of the constitution of Kenya states ' Parliament shall not enact a law that permits the state or any person-

a. To arbitrarily deprive a person of property of any description or any interest in or right over any property of any description; or
b. To limit, or in any way restrict the enjoyment of any right under this article on any of the grounds specified or contemplated in article 27(4).

[66] Article 40(6) of the constitution of Kenya states: 'the rights under this article do not extend to any property that has been found to have been unlawfully acquired'.

[67] Article 162 (2) (b) of the constitution establishes the Environment and Lands Court whose mandate is to hear and determine disputes relating to 'the environment and the use, occupation of, and title to land'.

[68] Section 19(6) of the PDVA.

[69] Ibid, Section 19(7).

the well-being of the applicant or a dependent of the applicant. In addition to the exclusion orders, the courts may also issue orders regarding maintenance of the applicant and any child of the respondent and also award temporary custody of any child or dependant of the respondent to any person or institution and regulate access by the respondent to such a child or dependent.[70]

It is clear from the contents of protection orders that they require a huge effort to enforce. The possibilities of the ingredients of each order are basically limitless in terms of what a court may direct. For instance, apart from pre-emptive arrest, how would orders which direct a respondent not to psychologically abuse an applicant be carried out, especially, where the parties share the same dwelling house? Because the protection orders envisioned in the PDVA purport to guide the conduct of personal relationships, they become impossible to police and enforce, much like orders for the restoration of conjugal rights, which are impossible to enforce. When the orders become impossible to enforce, then the law meant to protect the victims becomes useless.

Protection orders have serious repercussions for respondents, ranging from barring access to premises to severing contacts between the respondent and members of his family. For that reason, the experience of the author shows that courts are reluctant to issue interim protection orders without first hearing the respondents. Unfortunately, for some cases of domestic violence, failure to get interim orders in the first instance would render the whole exercise futile for the applicant.

In one of the cases attempted in Nakuru Law Courts, the applicant came to the author complaining of continuous physical, emotional and psychological abuse by her husband. The applicant and her husband were both members of the disciplined forces and shared a house. The respondent's violent tendencies had increased so much so that he was now confronting the applicant at her work station and physically assaulting her. Eventually, the applicant had to run away from her home and her work station leaving behind her young children and personal belongings.

She then instructed the author to specifically get an interim protection order to allow her to access her state-assigned house and her children, and to restrain her husband from entering their dwelling house or going to her workstation. This interim protection order would have enabled her to save her job. Unfortunately,

[70] See section 19(5) of the PDVA.

because of the fact that she ran away from her home, she did not have any concrete information about her children, her residence or work station. The magistrate could not issue interim orders without a *prima facie* case. He directed that the pleadings be served and gave a date for *inter partes* hearing. The client was so devastated by the failure to secure an interim relief that she abandoned the case and went back to work and her house where the violence continued. Eventually, the husband was transferred to a different station giving the applicant some relief.

The objective of the PDVA is to protect victims of domestic violence. The category of victims who seek an interim order under certificate of urgency usually would not have enough evidence to prove, on a *prima facie* basis, that, firstly, violence had occurred, secondly, that it was meted by the respondent and, thirdly, that the respondent is in a domestic relationship with the applicant. This is because, this category of victims leave their homes in circumstances that do not allow them to take along documents to support their cases. On the other hand, because of the potential adverse effects of a protection order on a respondent, the court cannot afford to compromise on the standards for a *prima facie* case in issuing interim protection orders. As such, this law that was meant to protect victims fails in this respect.

3.3 Procedural Challenges under the PDVA

From the very outset, it is important to note that the PDVA has not provided for any procedural guidelines in applying for a protection order with respect to the form of application. The only provision as to the procedure for application provides that an application for protection order should be lodged in court.[71] The finer details have been left to the Rules Committee that is established under Section 81 of the Civil Procedure Act[72] to provide for rules and timelines.[73] At present, more than a year after the coming into force of the PDVA, there are no rules that have been passed to guide the procedure for obtaining a protection order. Due to the novelty of this type of legislation, the lack of rules provides fertile ground for litigation on matters that are unrelated to the substance of the application. Article 159(2) of the Constitution guides judicial officers not to unnecessarily rely on

[71] Section 24(2) states: "An application for a protection order shall be lodged with the court and, where directed by the court shall — (a) be supported by the affidavit of any person who can depone to matters which are relevant to the application; and (b) require the police, a social worker, probation officer, medical practitioner, children officer or other appropriate person or authority to investigate the acts or omissions of the domestic violence and forward findings directly to court as may be directed by the Court".

[72] Civil Procedure Act, Cap 21 Laws of Kenya.

[73] Section 34 PDVA.

procedural technicalities when adjudicating matters and, therefore, provides some form of protection.[74] This protection, however, is only used in court when there is already a challenge to the procedure used by the applicant. It does not protect against litigation over technicalities, it only protects from adverse rulings and judgments based solely on technicalities. After all, decisions like *Raila Odinga v the IEBC and Others*[75]which interpreted article 159(2) seems to emphasise that this provision calls upon judicial officer to balance the need for proper procedures and the substance of the case.[76] As such, article 159(2) does not automatically waive adherence to procedural prescriptions. A court has to determine that it applies. This usually happens after some litigation.

In the cases handled by this author, she moved the court through a Miscellaneous Application under certificate of urgency. The application was in the nature of a Notice of Motion and on its face, the Motion prayed for both interim and final orders of protection. The application was supported by an affidavit sworn by the applicant. Opposing counsel in one of the cases bitterly opposed the chosen mode of moving the court insisting that there must be a Plaint accompanying the Notice of Motion. Had the applicant in the matter not chosen to abandon the cause of action, a lot of time would have been spent litigating on the correct form of application in the circumstances. This, of course, would not only divert judicial time to determinations of technicalities, but would also delay the determination of the application.

The PDVA is, however, not totally devoid of other aspects of procedure. The Act has provided for the person with locus to make an application. This includes the victim himself or through an advocate. If the person involved is a child or is incapable of making an application, the application may be made through a representative who may be court-appointed.[77] It has provided that an application for protection orders shall be made before a Resident Magistrate.[78] The hearing of the application is required to be in camera.[79] The court is given the power to call

[74] Article 159(2) of the constitution states "justice shall be administered without undue regard to procedural technicalities."

[75] [2013] eKLR.

[76] In *Raila Odinga vs. the I.E.B.C. & Others* (2013) eKLR, the Supreme Court said that article 159 (2) (d) of the constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court. See also *Joshua Mutoto Werunga v Joyce Namunyak - Returning Officer, Endebess & 2 Others* [2013] eKLR.

[77] Section 9.

[78] Section 24(1) of the PDVA.

[79] Section 28.

for evidence both during the hearing in the first instance and during an appeal.[80] Appeals lie to the High Court, and an appellant is required to file an appeal within 30 days.[81] The High Court or the court issuing the protection order may upon receiving an application, issue a stay pending the appeal.

3.4 Other Challenges for Users of the PDVA

The biggest challenge with this Act, indeed, is the unpreparedness of all actors involved to deal with it. There is a glaring lack of awareness of this law among the public, the courts and advocates. This is especially disadvantageous considering the fact that the Act imposes positive duties on agencies such as the police and the county governments. As a result, litigating on this law is especially frustrating for the applicant's advocate who sometimes has to deal with untenable situations. For instance, in one of the briefs handled by this author for protection orders, the court found that the application for interim protection orders did not meet the required threshold and, therefore, abstained from issuing the interim orders. The law clearly directs courts to issue a 'notice to show cause' why protection orders should not be issued upon determining that it cannot issue interim orders.[82] The court directed the applicant to serve the respondent with the pleadings. This, of course, presented more delays as the respondent prayed for time to put in his written response. A 'notice to show cause' would have ensured that the respondent appeared in court and made verbal or written representation.

Considering the high rates of domestic violence in the country, one would expect that this law would have been used more frequently by the public. The low uptake of the law may be an indication of a lack of awareness of what the Act entails.

Another challenge is the fact that this law demands quite a huge amount of resources to be fully implemented. These resources would go into building of shelters, training and awareness programs for the numerous duty-bearers including the public at large. The Act also provides for counselling services which would require the hiring of counsellors.[83]

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[80] Section 29.

[81] Section 30(1).

[82] This is provided for in section 12(5) of the PDVA which states: "Where an application is made under this section and the court is satisfied *prima facie* that the respondent has committed, is committing or threatening to commit an act of domestic violence but that the circumstances do not justify or require the issue of an interim protection order, the court may issue a notice requiring the respondent to show cause why a protection order should not be made.

[83] Counselling services are provided for under section 14 of the PDVA.

4.0 Conclusion and Recommendations

The Protection against Domestic Violence Act has the main objective of providing protection for victims of domestic violence. As domestic violence presents a danger to the life and health of the victim, it is important that the legislation be usable with the greatest ease. Unfortunately, this law is complex, vague, and presents a situation where obtaining an interim order is difficult. The law has too many points to be proved by the applicant that getting a final protection order can only come after protracted litigation. As it is, therefore, this is a law that presents more problems in litigation than the pre–existing legislative framework with little chances of obtaining the desired orders, especially at the interim stage.

It should be noted that this law, if fully implemented, has the potential of having an impact in the society in the fight against domestic violence. An analysis of countries where similar legislation exists showed a seven percent decrease in the likelihood of experiencing domestic violence compared to jurisdictions without such legislation.[84] The study also shows that each successive year that the law continues to be in place witnesses a 2 per cent decrease in prevalence of domestic violence.[85] These figures translate to thousands of lives per year being saved. It would be a tragedy if this law was rendered unusable especially for the victims.

The law, however, is designed to work best in a specific environment. This environment should have trained police and judicial staff, counselling and other support services, a simple and effective procedure and a public that is aware of the presence of the law. On the basis of the foregoing discussions, this paper makes the following recommendations:

Firstly, there is need for the state to invest in training of judicial officers, police and counsellors on this Act. This Act, for instance, has created positive duties for the police and how they are supposed to act when they receive a report.[86] Protection orders are different from other orders in terms of their content and, therefore, their enforcement has to be different. Proper training of the police would be important in enforcement of protection orders. Resident Magistrates also need to be trained on their duties and their roles as prescribed in this law. A domestic violence matter cannot be treated as any other civil matter. According to Justice

[84] Klugman, J., et al. 'Women's Voice & Agency: Empowering Women and Girls for Shared Prosperity' (2014),. Washington, DC: World Bank.

[85] Ibid.

[86] Section 6.

Makau, courts have a role to play in realizing the state's responsibility to eliminate violence against women.[87]

This role includes ensuring that human rights commitments are implemented, ensuring accountability for human rights violations, protection of vulnerable groups and informing the legal system's response to gender based violence.[88] Apart from these roles, the PDVA specifies other roles that are to be played by magistrates in certain circumstances such as when an application is made on behalf of victims who cannot make the application themselves.[89]It would be helpful, both to the magistrates and litigants if rules that are clear and simple are developed and publicized so that remedies under this law are accessible to victims of domestic violence even without legal representation.

This law is meant for the protection of victims. The state should invest heavily in public awareness so that those who need protection orders are able to apply for them. The more it is litigated and tested in court, the more it would be refined and fine-tuned and its effectiveness enhanced. It is also imperative that the state invests in the physical and institutional infrastructure and personnel prescribed by the law. This is because, as it is, there are certain kinds of orders that cannot be made simply because there are no facilities to implement them such as counselling services.

Public awareness on the PDVA is not enough, there is need to deal with the underlying causes of domestic violence. Public education should be targeted against the prevailing patriarchal beliefs that encourage and justify domestic violence. It should be noted that judicial officers, police and other actors are also people who may be under the influence of customary beliefs and may hold certain attitudes towards domestic violence. These attitudes may affect the implementation of the Act. It is important that the key actors prescribed by this Act are targeted for education on harmfulness of some traditional views. Harmful traditional practices, such as wife inheritance, female genital mutilation and others should also be discouraged and condemned.

[87] Makau, J. A 'Role of Judges in Realizing States' Responsibility to Eliminate Violence against Women: Perspectives from *CK and Others v Commissioner of Police and Others* Meru Petition No. 8 of 2012.' *Kenya Law Review* (2016) Vol 5(1) pp. 97.

[88] Ibid.

[89] See section 8 and 9, PDVA.

Countering Involvement of Kenyan Children in Terrorism through Realization of their Socio-Economic Rights

Irene Maithya*

Abstract

State and multinational efforts aimed at containing terrorism in Kenya have only yielded modest results despite the repressive nature of these efforts. The ranks of the foot soldiers of *Al Shabaab* fundamentalist sects continue to swell even in the face of the ferocious onslaught on their membership by state troops. Abandoned by the state, coupled with poverty, children become easy targets for radicalization and are subsequently recruited into terrorist groups. This article argues that poverty is the main cause that exposes children to abuse, criminalization and subsequent mobilization into terrorism. It argues that until the practices of rampant child abuse and state-neglect of children as a vulnerable group are addressed through better education, employment opportunities and poverty reduction, Kenya is likely to remain a breeding ground of violent conflicts and persistent attacks by the terrorists.

The realization of the socio-economic rights of children has only been given the priority it deserves by the human rights groups as a way forward

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for the country of Kenya to counter the involvement of children in the terror groups. This radicalization of children must get the support from all the spheres of the country. The government must put in place the required strategies to achieve this. The rate at which Kenya's youth are getting in the terror groups is alarming and the number is expected to rise if the realization of socio-economic rights of the youths is not urgently addressed by the state.

This article, therefore, focuses on this recent phenomenon of involvement of children in Kenya into terrorism activities. The article attempts to briefly explore the impacts of involvement of children in Kenya as a new challenge in relation to the discourse of child protection. With a view of mitigating the harm on the lives, well-being, survival and development of children in some parts of Kenya, the article sets outs viable solutions that should be considered in the fight against involvement of children in terrorism.

Part 1

1.1 Introduction

Recent trends in armed conflict have resulted in new challenges for the protection of children. Previously armed conflict involved confrontations between states, whereas currently intra-state conflicts are more frequent. As battle lines become blurred and fragmented, armed groups increasingly rely on improvised explosive devices and suicide missions, as well as the use of children to carry out attacks. Both boys and girls have been targeted for recruitment and use by such groups, which indoctrinate and manipulate in order to coerce or force children to participate in hostilities, including acts of extreme violence. Girls and boys are often unaware of the actions or consequences of the acts they are manipulated or coerced to commit, which explains the current situation in some parts of Kenya.

There has been a range of research done on the effects of global terrorism and its impact on Kenya and how that has quickly spread. Kenya is a compelling target of global terrorism because of a combination of several factors such as, regional, historical, political, economic, geographic, socio-cultural and historical factors. Economic imbalance is one of the factors that contribute to terrorism. In their analysis of terrorism in Africa, scholars acknowledge the roles marginalization and poverty play among the Muslims that invite sectarian and inter-ethnic strife, despair, and anti-Western resentment.[1]

Some of the gaps with regard to most research is that, there has been little research done on the involvement of children into acts of terrorism. What is the driving force for the children in joining terrorist activities in the recent days? Are the children encouraged by their religion (Islam) to become terrorists? To what extent does poverty induce Kenyan children (especially those of Islamic religion) to engage in terrorist activities? Researches done so far in Kenya seem to be more general at the policy level and Kenya in general and how global terror is affecting Africa.[2]

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[1] Kurt Campbell, Michele Flournoy, *To Prevail, an America Strategy for the Campaign against Terrorism.* (Washington, DC: Center for Africa Strategic Studies 2001) 255-256.

[2] Caroline Watheka, 'The Youth and The Potential For Involvement In Acts Of Terrorism: A Case Study Of The Eastleigh Suburb In Nairobi' Kenya (Unpublished Masters Thesis. United States International University, 2015).

This article is divided into the three parts. Part one is an introductory that sets out the background of the study. Part two sets out the problem statement and delves further into the impact of children's involvement in terrorism activities. Part three is the last part that sets out the conclusions and recommendations. Some of the solutions suggested include governance strategies that are geared towards the realization of children's socio-economic rights.

1.2 Problem Statement

There has been an increasing incidence of terrorism in Kenya. In 2016, Kenya ranked 19th globally at 6.578 (10 being highest), on the Global Terrorism Index.[3] Children involvement in terrorism in Kenya is a real threat with the target group for the militants varying in age. Terrorism is a term that is notoriously difficult to define.[4] One view is that it is imprecise, ambiguous and above all it serves no operative purpose.[5] Scholars in the fields of political science, law, history, psychology, theology have tried a definition, but it seems there is no single definition.[6]

There are reports that a swoop carried out in Mombasa's Musa Mosque by security agents rescued over 200 children as young as 12 years who were said to be undergoing radicalization.[7] A recent report by Regional News Service estimates that 255 persons have left to join the terrorist group since 2013. Other reports may however give an indication that this figure could be higher in Isiolo County in Eastern Kenya alone, an estimated 200 children were reported missing since 2014 and assumed to have crossed over to Somalia.[8] The target group for the recruiters are children and youth between ages of 15-30 and mostly boys.

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[3] United Nations Development Assistance Framework For Kenya: 2018-2022 Common Country Assessment Report. January 2018. <http://ke.one.un.org/content/dam/kenya/docs/unct/Kenya%20Common%20Country%20Assessment%20%202018_.pdf> [Accessed 24 July 2018].

[4] Myra Williamson, *Terrorism, War and International Law*. (Ashgate 2009) 38.

[5] Richard Baxter, 'A Skeptical Look at the Concept of Terrorism,' (1974) 7 Akron Law Review 380.

[6] There is no consensus on the bounds of terrorism; some observers define as terrorism nearly every act of disruptive violence and ignore violence by established regimes; some scholars want psychopaths and criminals to be examined and others do not; and there are those who, defending a cherished cause, deny that their patriots are terrorists….No one has a definition of terrorism.': Bower Bell, 'Trends in Terror: The Analysis of Political Violence' (World Politics 1977) 481.

[7] The African Committee of Experts on that the Rights and Welfare of the Child, 'Continental Study On The Impact of Armed Conflict On Children In Africa (2016) <www.acerwr.org> accessed 9 May 2017.

[8] Ibid.

Children and young people can be drawn into violence or they can be exposed to the messages of extremist groups through a range of means. Other jurisdictions such as Nigeria have dealt with this phenomenon of having their street children drawn into it.[9] These can include exposure through the influence of family members or friends and/or direct contact with extremist groups and organisations or, increasingly, through the internet. Children are easily vulnerable to exposure to, or involvement with, groups or individuals who advocate violence as a means to a political or ideological end.[10]

Looking at the case in Kenya, a number of interrelated social, political and economic factors are fuelling the radicalization of children. Geographically, the epicentre of involvement of children in terrorism appears to be the Northern province which is dominated by ethnic Somalis, and by most accounts, it is considered to be the most neglected part of the country by the state. According to a report by the International Crisis Group, the Northern Province has a history of insurgency, misrule and repression, chronic poverty, massive youth unemployment, high population growth, insecurity, poor infrastructure and lack of basic services, which resulted in the bleak socio-economic and political conditions.

The rate of poverty is significantly higher in the areas where radicalization of children is rampant, thus the vulnerability of children and young people being lured to join these groups. Moreover, the unfolding conflict in neighbouring Somalia has also had a largely negative effect on the province. Reports also reveal the existence of a high level of small arms flow across the Northern Kenya, which provides a conducive environment for the extremists to easily arm their recruits.

The Northern part of Kenya hosts the largest number of Somalis. However there are other regions in the country that host them as well. The other large group of Somalis is found in the Eastleigh suburb of Nairobi, which also hosts a large population of Somalis who sought refuge in Kenya from the civil strife that erupted after the 1991 collapse of the regime of Muhammad Siad Barre.There is another very important Muslim settlement in Kenya – the coastal region, which hosts about 30 per cent of the Kenyan Muslim population, is considered the 'gateway' between the Islamic faith in the Arab world and the Islamic faith in Kenya and the entire East and Central African region, and links Muslims in these regions to a rich

[9] Iro Aghedo, Surulola James Eke, 'From Alms to Arms: The *Almajiri* Phenomenon and Internal Security in Northern Nigeria' (2013) 28 The Korean Journal of Policy Studies, 97-123.

[10] Merton Camden Safeguarding Children Board, 'Guidance for Working with Children and Young People who are vulnerable to the messages of Radicalisation and Extremism' (London Borough of Merton 2015) <www.merton.gov.uk/mscb_prevent_guidance_final.pdf> [accessed 3 May 2017].

Islamic heritage that spans centuries.[11] These three regions are the most affected as far as children involvement in terrorism is concerned.

The most recent United Nations Country report on Kenya filed in January 2018 depicts that initial security threat posed by Somalia-based *Al-Shabaab* has spread into a web of regionally located terror cells, with partial alliances to terror groups beyond the region. This report notes that radicalisation and violent extremism are serious challenges in several Kenyan counties (especially Garissa, Isiolo, Kilifi, Kwale and Mombasa). Mandera, with its proximity to Somalia, is heavily affected. According to Armed Conflict Location and Event Data Project (ACLED), 34 per cent of Al Shabaab attacks in Kenya have occurred in Garissa, making it the most targeted region along with Nairobi. The report further notes that key drivers of violent extremism among youth are poor access to education, poverty, unemployment and lack of opportunities to earn an income as well as a feeling of marginalization and exclusion.[12] As a result, the incentive of monetary rewards is believed to have attracted many youths to extremist causes. Perceptions of long-standing regional or communal grievances over land and other resources have also been used to lure youth.

Radicalization and violent extremism are rooted in economic marginalization, social exclusion and poor governance, leading to mistrust in national values and institutions. It is argued that a successful response would promote inclusive human development, particularly in ungoverned spaces, by creating deeper democracy through devolved systems, promoting respect for human rights and social cohesion and the development of attractive and stable livelihood opportunities for youth.

This article argues that poor socioeconomic conditions play a crucial role in children's recruitment and involvement in terrorism. One example is the Kenyan village of Siyu on Pate Island in the coast province. Its population of approximately 1 500 people is extremely poor and without basic necessities, such as running water.[13] Consequently, this close-knit Islamic community welcomed Fazul Abdullah Mohammed, the leader of al-Qaeda's East African cell, as both a Muslim and a generous provider of money who brought some relief to their dire economic conditions. These credentials and activities enabled him, and others like

[11] Anneli Botha, Assessing, *The Vulnerability of Kenyan Youths To Radicalization And Extremism*(Institute for Security Studies 2013) 245..013

[12] Journey To Extremism In Africa: Drivers, Incentives And The Tipping Point For Recruitment Report http://journey-to-extremism.undp.org/content/downloads/UNDP-JourneyToExtremism-report-2017-english.pdf [Accessed 25 July 2018].

[13] ibid

him, to further embed himself within local society with a view to recruiting as many children as possible.

1.3 Impact of Children's Involvement in Terrorism Activities

Children's involvement in terrorism activities affects their lives negatively in many ways. It results in grave violations of children's rights including killing, sexual violence, displacement and denial of health services. Particularly, its impact on education has become a worrying trend as children are being denied the chance of going to school. There are indications that in some places schools are closed down for considerably long time as parents have stopped sending their children to school for fear of having their children recruited into *Al Shabaab*.[14] Further, there are wide-reaching implications for children there are pupils who have not reported to schools for a long time and no one seems to know their whereabouts. As captured in the continental study on the impact of armed conflict on children in Africa, by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), in Isiolo county of Eastern Kenya, at least 200 children had not reported to school in 2015.[15]

Besides its impact on education, there are alleged reports of detention of children suspected to be involved in terrorist activities. A Human Rights Watch report (2014) indicated there was strong evidence that Kenya's Anti-Terrorism Police Unit had carried out a series of extrajudicial killings and enforced disappearances.[16] In 2007 and 2008, Human Rights Watch and Muslim Human Rights Forum separately documented the involvement of the unit and other Kenyan security forces in the arbitrary detention and unlawful rendition of at least 85 people including 19 women and 15 children from Kenya to Somalia.[17]

Besides, during the raid of Masjid Mosque in Mombasa, reports indicate that at least 30 children who were rescued during this operation were detained and then placed in remand homes. This act of arbitrary detention is clearly contrary to international and national laws which prescribe every individual's rights to liberty and the security of his or her person.

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[14] Supra note 7.

[15] ibid

[16] Human Rights Watch, 'Kenya: Killings, Disappearances by Anti-Terror Police,' Human Rights Watch (August 18, 2014) <www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police> accessed 8 May 2017.

[17] ibid

Part II

2.1 An Analysis of Legal and Institutional Protection of Children's Socio-Economic Rights

The essence of economic and social rights consist of moral claims to secure access to the decencies of life, which can be summed up in the claim to a standard of life adequate for the health, well-being and human development of the person and his family.[18] In the present study, children's economic and social rights represent the interest of every child to have legally protected access to basic subsistence, health care, nutrition, education, housing, and more broadly standards of life adequate for the child's development. These claims to social and economic well being of children have been recognized by the international community of states as being so important as to justify the protection of the various apparatus of the international law.[19]

2.2 Protection of Children's Socio-Economic Rights in Kenya

2.2.1 Domestic Legal Status of International Human Rights Law

Before the 2010 Constitution was adopted, Kenya was a dualist state, requiring implementing legislation before any ratified treaty could have the force of law nationally. Kenya passed implementing legislation for some treaties notably the CRC through the Children's Act and the Rome statute though the International Crimes Act. The overall effect was lack of unification as any treaty could be implemented through a series of laws.[20]

The 2010 Constitution transformed Kenya from a dualist to a monist State by providing that all treaties ratified by Kenya would form part of the law

[18] UN Declaration of human rights capture these rights in Article 22-26.A list of the items that constitute the essential of package for social and economic rights is contained in the famous speech given by the US president Roosevelt in the State of the Union message on January 11, 1994. <www.american-rhetoric.cpm/speeches> accessed 9 May 2017.

[19] Douglas Hodgson, 'The Right of a Child to Life, Survival, And Development' (1994) 2 International Journal of Children's Right 369-380.

[20] Kenya National Commission on Human Rights Report to the Human Rights Committee to inform its Review of Kenya's Third Periodic Report on implementation of the Provisions of the International Covenant on Civil and Political Rights 2012 <www2.ohchr.org/english/bodies/hrc/docs/ngos/KNCHR_Kenya> accessed 11 September 2017.

of Kenya. This means that there is no longer need for implementing legislation and international treaties can now be invoked before the courts, tribunals and administrative authorities in the Republic. However, article 2(5) and 2(6) of the Constitution has to be given full effect and clarity through legislation. This is more so since article 21(4) of the Constitution requires the state to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. This means that where a treaty is non-self executing, requisite legislation has to be passed particularly for human rights treaties.[21]

2.2.2 Treaty Law

(i) 1966 International Covenant on Economic, Social and Cultural Rights

Article 6-15 of the Economic Covenant enacts its substantive rights provisions. Of specific importance is Article 10 which requires state parties to promulgate and enforce regulations for the kinds and terms of lawful child work and legitimate economic participation of children, minimum age for entry in employment, prohibition of child labour and redress for all forms of economic exploitation of children. Secondly it demands that all state parties take 'special measures of protection and assistance' on behalf of children and young persons without any discrimination. This article argues that the State is in blatant breach of its obligations under this treaty.

(ii) Children's Economic and Social Rights in the Convention on the Rights of the Child

The CRC is the major global instrument on children's rights.[22] It has been ratified by all countries except the U.S.[23] The CRC follows a holistic approach to children's rights, recognizing that the rights anchored in the Convention are indivisible and interrelated, and that equal importance must be attached to each and every right contained therein.[24] However, since the rights derived from the basic principles outlined above are multifaceted, they can be clustered into eight

[21] ibid, 3.

[22] Sharon Detrick, *A Commentary on The United Nations Convention On The Rights Of The Child* (The Hague: Kluwer Law International 1999) 14.

[23] As of May 2016, the Convention had not been ratified by the United States. <www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-> [accessed 30 May 2017].

[24] Oliver Ruppel 'The Protection Of Children's Rights Under International Law From A Namibian Perspective' (2012) 2 Namibia Law Journal Volume.

categories, namely: general measures of implementation, definition of child,[25] general principles, civil rights and freedoms, family environment, alternative care, basic health and welfare.[26]

Article 6 that commences the list of rights recognized in the Convention declares that every child has an inherent right to life and that it is the responsibility of state parties to ensure to the maximum extent possible the survival and development of the child.[27]Among 41 substantive articles, only one article will be analyzed in this article. Article 32 of the Child Convention binds state parties to protect the child from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health, physical, mental, spiritual, moral or social development.

This paper argues that Kenya is in serious breach of its obligations. The CRC Committee on the Rights of the Child in the most recent report of 2016 and for the first time addressed radicalisation of children in its concluding observations.[28] Kenya was called upon to put measures to mitigate but to date this is yet to take place.[29]

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[25] The definition of *child* as being a person under the age of 18 is contained in Article 1 of the CRC. However, this principle may be inapplicable where, under the law applicable to the child, majority is attained earlier.

[26] This classification is used by the Committee on the Rights of the Child for the reporting by and questioning of States Parties. It has to be noted, however, that the rights contained in the Convention have been categorized in a variety of ways. For instance one of the scholars has grouped the rights into "survival rights", "membership rights", "protection rights" and "empowerment rights" See Lawrence Leblanc, *The Convention On The Rights Of The Child: United Nations Lawmaking On Human Rights*. (Lincoln: University of Nebraska Press 1995) 65.

[27] Michael Wabwile, *Legal Protection of Social and Economic Rights of Children in Developing Countries; Reassessing International Co-operation and Responsibility* (Intersentia 2010).

[28] Compendium on Submissions to Committee on Child Rights CRC 2016. Child Concluding observations on the combined third to fifth periodic reports of Kenya, 2016. http://www.knchr.org/Portals/0/InternationalObligationsReports/CRC%20Book%20%20A4%20.pdf?ver=2016-08-18-115854-767 [accessed 20 July 2018].

[29] See above report at page 151 Children in armed conflicts
Paragraph 65. The Committee is concerned about the "radicalization" of children and their recruitment into non-State armed groups, mainly due to the social and economic marginalization of certain religious or ethnic groups. The Committee is also concerned about:
(a) Certain counter-terrorism and security measures, such as mass raids, which do not comply with international human rights standards, including the Convention, and which have caused family separation, arbitrary detentions of children, and negative psychological impacts on children affected by the measures, such as fear and feelings of collective punishment;
(b) Increased attacks on educational institutions and teachers by non-State armed groups, leading to mass deserting by teachers and the closing down of schools in the affected areas.
Paragraph 66. The Committee urges the State party to:
(a) Enhance its efforts to prevent radicalization of children by prioritizing efforts to eliminate

To date, no specific measures have been put in place to deal with radicalisation realities of radicalisation and children in conflict.

However, it is important to note that the state ratified the Optional Protocol on children in armed conflict on 28th January 2002. In this regard, it has put in place initiatives to protect children in areas prone to cattle rustling, militia activities in volatile borders, such as the Kenya/Somalia, Kenya/Sudan and Kenya/Ethiopia. Some of these initiatives include increasing security, disarmament programmes in cattle rustling areas, and peace and reconciliation initiatives.

(iii) 1990 African Charter on the Rights and Welfare of the Child

The ACRWC is the most comprehensive regional instrument on children's rights. The ACRWC was created as a response to CRC to represent an African concept of children's rights. The wording of ACRWC is designed to reflect virtues of the African civilization. It is 'Africa Sensitive'.[30] The ACRWC is said to be the most progressive of the treaties on the rights of the child. The most significant innovation empowers the monitoring committee to receive communications from any person, group or non-governmental organization recognized by the African Unity. So children have been empowered and can petition the Committee on alleged violation of their rights including economic, social and cultural rights.[31] Furthermore, unlike the CRC, the welfare of children is the primary consideration.

Article 15 of the ACRWC is of particular importance for the purpose of this study. This article expressly provides that every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development. In Addition to this article, the charter obligates State under its

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the social, economic and political marginalization of certain groups, in particular children and youth who belong to Muslim communities or to the Somali ethnic group;

(b) Ensure that counter-terrorism and security measures fully respect the rights of the child provided under the Convention and are sensitive to the potential negative impact on children who are affected by such measures. The Committee wishes to underline that measures that do not fully comply with human rights standards would be counterproductive and may contribute further to the radicalization of children;

(c) Implement the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict, as the State party pledged under the Safe Schools Declaration (2015).

[30] Manzierge Mpaka, 'The Prevention Of HIV Transmission From Mother-To-Child: The Obligations Of The South African Government In Terms Of National And International Laws (Unpublished LLM Dissertation, University Of South Africa, 2010)

[31] A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet' (2002) International Journal of Children's Rights 179.

article 22 to take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.

It is argued that the treaty body has not paid sufficient attention to radicalisation of children in the concluding observations. The most recent periodic report that highlighted Kenya's realization of its obligations under the ACRWC made broad remarks on terrorism. The Government pointed out that it had enacted the *Prevention of Terrorism Act No. 30 of 2012* which contains strict guidelines to be followed in any action to combat terrorism. However, the report noted that a large number of terrorist attacks had been carried out by radicalized Kenyan youth.[32] The State had not put specific measures to deal with radicalisation of children.

2.2.3 Soft Law

(i) Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa

These Principles and Guidelines were adopted by the African Commission on Human and Peoples' Rights during its 56th Ordinary Session in Banjul, Gambia in April 2015.[33] The Principles and Guidelines include a set of fourteen general principles, such as prohibition of arbitrary detention and guidance on specific issues that the Commission regarded as being particularly relevant to the protection of human rights while combating terrorism. It is argued that the guidelines could also be applied on matters related to children's rights accordingly.

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[32] http://www.achpr.org/files/activity-reports/40/actrep40_2016_eng.pdf [accessed 16 July 2018].

> See paragraph 294. Kenya has however faced challenges in promoting national security due to an upsurge of terrorism attacks. In October 2011, a coordinated operation between the Somali military and the Kenyan military, known as operation Linda Nchi, began against the Al-Shabaab group of insurgents in southern Somalia. The mission was officially led by the Somali army, with the Kenyan forces providing a support role. In early June 2012, Kenyan forces were formally integrated into African Union Mission in Somalia (AMISOM). Since then, a series of terrorist attacks, believed to have been retaliatory attacks by Al-Shabaab have rocked various areas in Kenya.
>
> Paragraph 295. Increasingly, a large number of terrorist attacks have been carried out by radicalized Kenyan youth. Unemployment, poverty and political marginalization are contributing to the Islamic radicalization of Kenya's youth, a situation which the government of Kenya is attempting to address through economic empowerment and inclusive policies.

[33] The Principles and Guidelines on Human and Peoples Rights while countering terrorism in Africa, African Commission on Human and Peoples Rights <www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf> accessed 9 May 2017.

2.2.4. United Nations Social Development Goals (SDGs)

On 1st January 2016, the 17 SDGs of the 2030 Agenda for Sustainable Development adopted by world leaders in September 2015 at an historic UN summit officially came into force. Over the next fifteen years, with these new Goals that universally apply to all, countries will mobilize efforts to end all forms of poverty, fight inequalities and tackle climate change, while ensuring that no one is left behind. The new Goals are unique in that they call for action by all countries, poor, rich and middle-income to promote prosperity while protecting the planet.

While the SDGs are not legally binding, governments are expected to take ownership and establish national frameworks for the achievement of the 17 Goals. Countries have the primary responsibility for follow-up and review of the progress made in implementing the Goals, which will require quality, accessible and timely data collection. Regional follow-up and review will be based on national-level analyses and contribute to follow-up and review at the global level. This study will focus on two of the goals.

(i) Goal 1- Poverty

Poverty eradication must go hand-in-hand with strategies that build economic growth and addresses a range of social needs including education, health, social protection and job opportunities. Currently, 836 million people still live in extreme poverty. About one in five persons in developing regions such as Kenya live on less than $1.25 per day. The overwhelming majority of people living on less than $1.25 a day belong to two regions: Southern Asia and sub-Saharan Africa

Poverty is more than the lack of income and resources to ensure a sustainable livelihood. Its manifestations include hunger and malnutrition, limited access to education and other basic services, social discrimination and exclusion as well as the lack of participation in decision-making. Economic growth must be inclusive to provide sustainable jobs and promote equality.

(ii) Goal 4 - Education

Enrolment in primary education in developing countries has reached 91 per cent but 57 million children remain out of school.[34] More than half of children that have not enrolled in school live in sub-Saharan Africa. An estimated 50 per

[34] Sustainable Development Goals <www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 9 May 2017.

cent of out-of-school children of primary school age live in conflict-affected areas. 103 million youth worldwide lack basic literacy skills, and more than 60 per cent of them are women. This study asserts that this demographic cohort provides a rich base of recruitment into terrorism activities as the money offered is "too good."

This goal has envisioned that by 2030, states will have put in place measures that substantially increase the number of youth and adults who have relevant skills, including technical and vocational skills, for employment, decent jobs and entrepreneurship.[35]

2.3 Domestic Legal Framework

2.3.1 The 2010 Constitution

The Constitution of Kenya, 2010 is a transformative document with unprecedented Bill of Rights.[36] It is worth noting that, socio-economic rights unlike other 'social' rights have elicited much debate and litigation to the extent of overshadowing other rights.[37] Article 29 (c) and Article 21, in entirety; bind all state organs to implement the Bill of Rights. Article 10(2) on the other hand enumerates human rights, protection of marginalised, equality and non-discrimination as part of national values and principles of governance in Kenya. It is however commendable to note that the judiciary has in the recent past crafted very innovative remedies with regard to enforcement of socio economic rights in order to ensure the state's commitment in ensuring access to justice.

The inclusion of human rights norms in the Constitution, particularly article 43 which provides for a number of socio-economic rights, offers a blueprint for the betterment of the plight and welfare of Kenyan society. This includes children who are further entitled under articles 53(1)*(a)* and *(c)* to the right to basic and compulsory education, basic nutrition, shelter and health care. Article 21(3) provides for the obligation of 'all state organs and public officers' to address the needs of 'vulnerable groups within society ... including children'.

[35] ibid

[36] Kalpana Rawal, The Immediate Realization of Women and Children's Rights: Lessons from the Kenyan Case of *C.K & 11 Others V Commissioner of Police/Inspector General of Police & 2 Others* (Petition No. 8 of 2012) <www.kenyalaw.org> accessed 11 May 2017.

[37] ibid

The Constitution provides for a number of general principles in relation to the interpretation of rights, including children's rights. Article 24 provides for the limitations clause requiring any limitation to any right under the Bill of Rights to be 'reasonable and justifiable'. Article 20 provides that the interpretation of the meaning and scope of human rights shall be with respect to the promotion of values such as those that underpin an open and democratic society and based on human dignity, equality, equity and freedom. Article 21(2) provides that the state shall take legislative, policy and other measures to ensure the progressive realisation of socio-economic rights provided for under article 43 of the Constitution. Article 20(5) provides that the state bears the burden of proving that it lacks resources to implement socio-economic rights, but calls on the state to ensure that the process of allocation of resources is done in light of 'prevailing circumstances ... including the vulnerability of particular groups and individuals', which under article 21(3) explicitly includes children.

It is instructive to note that the qualifications regarding the progressive nature of state obligations and availability of resources in relation to socio-economic rights under article 43[38] of the Constitution are not made with regard to children's rights under article 53, including the right to free and compulsory basic education and children's rights to nutrition, shelter and health care.[39] The implication is therefore that the legal obligations regarding children's socio-economic rights are of an immediate nature. Hence, in instances where the state is primarily obliged to provide for these rights, the state cannot claim that such an obligation is progressive over time and/or is subject to the availability of resources.

[38] Article 43 of the Constitution states as follows;
(1) Every person has the right—
(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
(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.
(2) A person shall not be denied emergency medical treatment.
(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

[39] Godfrey Odongo, 'Caught Between Progress, Stagnation And A Reversal Of Some Gains: Reflections On Kenya's Record In Implementing Children's Rights Norms' (2012) 12 African Human Rights Law Journal (AHRLJ).

2.3.2 The Prevention of Terrorism Act 2012

In Kenya, Terrorism is covered by the Prevention of Terrorism Act (Act 30 of 2012) which was promulgated on 24th October, 2012. It creates over 30 offences and provides for special powers of arrest, procedures to gather information and even limits certain rights when conducting investigations. It also provides compensation for terrorist victims, while the people involved in terrorist activities risk 30 years in jail if they commit a terrorism act or a life sentence if the act leads to death of another person and their properties seized. Those that assist terrorists risk 20 years in jail. Stiff penalties for joining a terrorist group are also provided.

It is important to note that the Act does not specifically single out the recruitment of children into terrorism activities as a serious offence. The Act provides a general provision on recruitment and it gives wide discretion to the judicial officer when sentencing as it states that once one is found guilty then a jail term not exceeding 30 years cannot be imposed.[40] This means that a guilty person can easily serve a one month jail term or less. This does not serve the deterrence purpose of a criminal justice system.

The judiciary is beginning to make bold interpretation of the offence of radicalisation. In 2016, a Muslim cleric was jailed 20 years for radicalizing school children to join *Al-Shabaab* terror group in the coastal city of Mombasa.[41]

2.3.3 The Children's Act

The Children's Act is the primary Kenyan law which sets forth legal obligations of all duty bearers - the government, parents, and civil society- to respect, protect and fulfil the rights of children.[42] It has been commended as it is the first example of a comprehensive enactment in Kenya which gives effect to any international human rights treaty to which the country is a party.[43]

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[40] Section 13 of the Act states:
Recruitment of members of a terrorist group
A person who knowingly recruits or facilitates the recruitment of another person—
(a) to be a member of a terrorist group; or
(b) to commit or participate in the commission of a terrorist act, commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years.

[41] Kenya's Islamic Cleric Jailed For 20 Years For Radicalizing Minors http://www.xinhuanet.com/english/2016-01/07/c_134987911.htm [accessed 19 July 2018].

[42] Children's Act 8 of 2001.The Children's Act aims to implement international law, by "[giving] effect to the principles of the CRC and the ACRWC <www.kenyalaw.org> accessed 12 January 2017.

[43] Michael Wabwile, *Rights Brought Home? Human Rights in Kenya's Children Act 2001* (A Bain-

With regard to children's socio economic rights, the government has made attempts on some of them. The government seems keen on realizing some of the rights enshrined in the Act. A good example is the modest effort the government has made in making Kenyan children's right to primary education a reality. The free primary education program although faced with challenges, stands out as the most significant development. This study argues that the political will is lacking in realization of this right in marginalized areas such as the northern and coastal regions where radicalization of children is more dominant.

Section 22 confers jurisdiction on the High Court to enforce any of the rights of the child and confers legal standing (*locus standi*) on any member of the public to institute action and approach the Court for such enforcement.[44] This is a positive step as it encourages socio economic rights litigation. Perceptions of children and childhood have often implicitly and/or explicitly influenced how courts have interpreted socio economic rights and applied such provisions.[45] For instance, in its *Advisory Opinion on the Juridical Condition of the Child*,[46] the Inter-American Court of Human Rights stated that education and care for the health of children require various measures of protection and are the key pillars to ensure enjoyment of a decent life by the children, who in view of their immaturity and vulnerability often lack adequate means to effectively defend their rights.[47]

The Court had previously commented in this decision that the best interests principle is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child.[48] Here, the Court specifically justified the paternalistic best interest principle in terms of, amongst other things, the need to develop the child's

haim, & B Rwezaura, B eds. The International Survey of Family Law Bristol: Jordan Publishing, 2005) 394. The author described the Act as 'historic' and as having 'broken new ground in Kenya's human rights law'

[44] This too is a landmark legal development since Kenyan courts have over the time restrictively interpreted *locus standi* in the sense that only those with a 'sufficient interest' in a matter may have the right to sue in court. This restricted interpretation has been a significant constraint to 'public interest litigation' even in constitutional and civil litigation cases which touch on enforcement of fundamental rights and freedoms

[45] Aoife Nolan, *The Child's Right to Health and the Courts* (J. Harrington & M Stuttaford (eds), Global Health and Human Rights: Legal and Philosophical Perspective London: Routledge 2010) 135-162.

[46] *Advisory Opinion OC-17/2002 on the Juridical Condition and Human Rights of the Child*, 28 August 2002.

[47] Ibid para 86.

[48] Nolan (n 45 above) 135-162.

potential – that is, to maximize the child's future capacity for autonomy. In the context of children's involvement in terrorism, litigation is a powerful tool as it will provide an opportunity to interpret the obligations of the state.

In certain respects however, the Act falls short of a full guarantee of the provisions of international law. In answering the question whether the Act really 'brings home' the rights of the child, scholars have argued that 'contrary to popular impressions, the legal framework falls far short of what is required to establish a credible children's rights .This view is motivated by the flaws in the Act and what these scholars describe as the absence of 'more radical and pragmatic reforms'.[49] For instance, the Act has failed to embody specific offences that protect children from being recruited into terrorist activities.

The Children Act is currently being reviewed and a zero draft generated by the National Council for Children Services has attempted a definition of" radicalisation", It will be interesting to see the final substantive provisions on radicalisation under this Act.

[49] ibid.

Part III

3.1 Conclusions and Recommendations

3.1.1 Conclusions: Slaying the Dragon

The issue of youth involvement in the in the terror groups in Kenya is a serious matter that the Kenyan government must address urgently. The most effective strategy is youth empowerment. This is the step in the right direction as it will raise their social and economic rights and in the long term mitigate poverty. From the above discussion it is clear that provision of education alone to the youths cannot solve the problem.

3.2 Recommendations

3.2.1 Governance Strategies

First is the issue of governance. As illustrated in the study most of the children recruited into the militia accept to do so for economic reasons. They are helpless. They do not see a bright future life ahead. They are disillusioned by how people access employment opportunities. Streamlining access to opportunities is perhaps a policy issue to pay attention to. It requires political and bureaucratic commitment. It requires political direction in the form of making a bold decision to punish the members of cartels that distribute 'public jobs' for a pay. But the cartels are usually very powerful. They have the ability to bring down anyone messing with their incomes. The answer to their powers and influence lies in commitment to the rule of law. This of course is a dream that may not be lived this soon.

The ongoing investment in infrastructure projects across the country by both the county and the national government is laudable as it is absorbing many of the unemployed youth. However its mainly focused in Nairobi and is yet to be felt in the marginalized parts of the country. The National Youth Service (NYS) projects are quite visible in some of the counties where they are doing feeder roads, opening drainage systems, and undertaking other public works. The numbers of youth involved in NYS and non-NYS related projects are many. It is suggested that efforts be made by the state to implement such projects in North eastern and coast province.

3.2.2 Inclusive Intelligence Structures

Fighting terrorism is a complex issue as the "enemy" is within and not easy to detect. As such it is suggested that NIS should consider adopting "informers" from the demographic cohort of children and youth.

3.2.3 Prosecution of insightful clerics and "recruiters"

The government should muster the required political will and bring sponsors of violence to book. Religious clerics who preach hatred and intolerance should be monitored and cautioned. If they persist in inciting the children and youth against the state and society, they should be tried openly and fairly in the courts and appropriate punishment meted out to them.

3.2.4 Harsh penalties for those found guilty of recruiting children

As a deterrent measure stiff penalties should be prescribed for those found guilty of radicalizing and recruiting children into terrorism activities.

3.2.5 Amendment of the Prevention of Terrorism Act, 2012

The Act should single out children as a vulnerable group and prescribe the offence of recruiting them into terrorism and set out harsh penalties.

We, the People of Kenya: The Bonds, Benefits, and Burdens of our Citizenship

Ken Obura*

'Citizenship in this Nation is a part of a cooperative affair.
Its citizenry is the country, and the country is its citizenry.'[1]

Abstract

The 2010 Constitution of Kenya declares in its preamble that it is a product of "We, the people of Kenya" and at Article 1 that the sovereign power rests on the people of Kenya. These provisions imply that there exists a singular identity among the holders of the Kenyan membership and an equality of status in the partaking of the benefits and burdens that accrue to that membership. This understanding resonates well with the very idea of citizenship, which envisages a universality or singularity of identity and equality of status among the citizenship holders within a given state. The question that arises is whether the theoretical idea of citizenship, which is also reflected in the aspiration of the 2010 Constitution, is, indeed, a reality in the Kenyan context or it is merely an illusion. This paper attempts to address this question by critically examining the citizenship framework operationalised under the 2010 Constitution.

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[1] *Afroyim v. Rusk* (1967) US Supreme Court.

1.0. Introduction

Citizenship, which is sometimes used interchangeably with nationality,[2] is a term used to connote membership to a political community, the state. This membership is characterised by a contractual relationship between the individual and the state, in which the two are bound together by reciprocal rights and obligations.[3] This understanding of citizenship as coterminous with the state has withstood criticism from those who argue for recognition of other communities, other than the state, as venues for elaborating citizenship.[4] The understanding is supported by international law, which recognises states as the entities with the sovereign power to set rules for acquisition, loss and change of citizenship.[5]

The reciprocal contractual relationship between individuals and the state, that forms the content of citizenship, is usually traced to the formation of the initial civilised state. While the social contract theory is not without criticism,[6] it remains a widely accepted explanation on the formation of the civilised state.[7] According to the theory, the state was formed by natural men out of the need to escape from the original state of nature, in which life is described as being "solitary, poor, nasty, short and brutish".[8] Life is uncertain and insecure in the state of nature because men are forced to compete for limited resources in an

[2] Both terms identify the legal status of an individual in terms of state membership. But citizenship is largely confined to the domestic dimension, while nationality refers to the international legal dimension in the context of an interstate system. See Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. See also International Court of Justice, *Nottebohm Case (Liechtenstein v. Guatemala)* ICJ Report 1955. For further discussion, see Sassen S "The Repositioning of Citizenship and Alienage: Emergent Subjects and Spaces for Politics" 2(1*) Globalizations* (2005) 79 at 81-83.

[3] Heywood A *Political Ideas and Concepts: An Introduction* New York, Saint Martin's Press, 1994, 155.

[4] But see Soysal YN *Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994) (discussing "transnational citizenship", which he describes as a distinct reality superseding the narrow national scope in terms not only of belonging but also of rights and obligations). See also Stewart F "Citizens of Planet Earth" , in Andrews G *Citizenship* (1991) 65-75 (seeking to validate the subnational or sub-state level as an arena of enacting citizenship, which he terms "democratic citizenship" defined by a "*common* membership of a *shared* and i*mminent* community").

[5] See, for example, Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.

[6] For criticism, see, for example, Pateman C *The problem of political obligation: A critical analysis of liberal theory* New York, John Wiley 1979.

[7] For a historical account of social contract theory see Ritchie DG "Contribution to the History of the Social Contract Theory" in Ritchie DG (ed) *Darwin and Hegel: and Other Philosophical Essays* London, Swan Sonnenschein, 1893, 196.

[8] Hobbes T *Leviathan* Indianapolis, (E Curley Ed) Hackett, 1994, 100.

environment full of distrust and lacking in an externally enforceable rule of engagement.[9]

It is this unpredictability of life in the state of nature that motivates natural men to make deals with one another and create a civilised state governed by enforceable common law.[10] In this new civilised state, natural men "collectively and reciprocally" agree to waive the rights they had against one another in the state of nature (the right to self-preservation and the right to punish);[11] and to endow some one person or assembly of persons (called the Sovereign/Government) with the authority and power to guarantee the waived rights and to ensure that the waiver in the first contract is not breached (is enforced).[12] In this way, society becomes possible because, whereas in the state of nature there was no authority to control the actions of individuals, now there is a conventionally created Sovereign that can overawe men to cooperate.[13] The contractual relationship between the individuals and their Sovereign (the body endowed with the authority of the state, also known as the government) in the form of reciprocal rights and obligations is what forms the core of the concept of citizenship.

It is to be noted, however, that not all individuals can relate with the Sovereign within the framework of citizenship. Only those individuals who have gained the status of citizens have this privilege. There is, therefore, an objective dimension of citizenship, which assigns citizenship status to individuals who qualify within a

[9] Even though, as John Locke points out, nature has provided enough for everybody and despite the fact that natural man is controlled in his actions by natural morality discoverable to human reason, given that this morality is not externally enforced, the self-interest of man can and do often take over thereby creating a state of anxiety in the State of Nature. For a fuller reading of Locke's argument, see Pogge T *World Poverty and Human Rights* Cambridge, Polity Press, 2008, chap 4. See also Hobbes T *Leviathan* (1994) (characterizing the natural condition of humankind as a mutually unprofitable state of war of every person against every other person).

[10] But see generally Riley P *Will and Political Legitimacy: a critical exposition of social contract theory in Hobbes, Lock, Rousseau, Kant and Hegel* Princeton, Princeton University Press, 1982, (arguing that the bedrock of social contract is voluntary consent and not on any other basis such as necessity, custom, convenience, theocracy, divine right, the natural superiority of one's betters, or psychological compulsion).

[11] Hobbes defines contract as "[t]he mutual transferring of Right". Hobbes T *Leviathan* (1994) 68.

[12] See Hobbes T *Leviathan* (1994) 89 ("[b]efore the names of just and unjust can have place there must be some coercive power to compel men equally to the performance of their covenants"). For criticism of Hobbes, see Pateman C *The problem of political obligation: A critical analysis of liberal theory* (1979) 53 (arguing that for Hobbes the "bonds of civil life rest on the sword, not on the individual's social capacities").

[13] See Hobbes T *Leviathan* (1994) 82 (noting that the motive for a contract, a mutual transference of rights to a sovereign, is "the security of man's person, in his life and in the means of so preserving his life as not to be weary of it").

given state. This objective dimension focuses on the legal bond that an individual has with a state and which entitles the state's sovereign to espouse claims on behalf of that individual and to assign benefits and duties to that individual. This dimension of citizenship is also sometimes referred to as formal or *de jure* citizenship. It not only assigns formal status to individuals but also legitimises the belonging/identity of citizens within a given state.

The objective citizenship, though important, is, however, on its own, inadequate in prescribing full citizenship. There is also a subjective dimension of citizenship, which assures a sense of loyalty and belonging, and which also needs to be fulfilled for full citizenship to be realised. This is because, as Heywood rightly notes, "members of groups that feel alienated from their state, perhaps because of social disadvantage or racial discrimination, cannot properly be thought of as 'full citizens', even though they may enjoy a range of formal entitlements".[14] This subjective dimension of citizenship is also sometimes referred to as empirical or *de facto* citizenship. It is characterised by inclusivity of all citizens in the partaking of the benefits and duties of citizenship.

The interaction between *de jure* and *de facto* citizenship is thus crucial. While the former allocates citizenship status to persons who have the requisite bond with the state, the latter imbues the legal citizen with the acceptance/belonging necessary for accessing the benefits and duties of citizenship. Thus, in analysing the citizenship framework of a given state it is imperative to consider both the *de jure* and *de facto* aspects in order to appreciate the entirety of the relationship between the citizens and the Sovereign implied in the idea of citizenship. Bearing this in mind, this paper explores the legal bonds, benefits and burdens of citizenship in Kenya with the aim of determining whether the citizenship framework meets the aspiration of universality in identity and equality of status for citizenship holders in Kenya.

To facilitate the discussion, the paper is divided into five sections. After this introductory section, the second section will delve into a discussion of the bonds that entitle one to a *de jure* citizenship status in Kenya. The third and fourth sections will analyse the *de facto* benefits and burdens that accrue to citizenship holders, and whether they apply equally to all citizens of Kenya. The fifth section will conclude on whether the current citizenship framework ensures universality in identity and equality of status to all Kenyan citizens. It is to be noted that while the

[14] Heywood A Political Ideas and Concepts: An Introduction (1994) 156.

analysis will mainly focus on the Kenyan law, where necessary effort will be made to make a comparison with the approach in international law.

2.0. The Bonds Entitling *de jure* Citizenship in Kenya

Fundamentally, *de jure* citizenship defines those who are, and who are not, citizens of a given state. Because of the contractual nature of the relationship espoused by citizenship, only those individuals who are privy/parties to the social contract (or those who have subsequently been accepted into the contract) can claim the benefits or be required to perform the obligations of citizenship. Indeed, in its historical context, from the ancient Greeks and Romans, via the Enlightenment, and the American and French Revolutions, citizenship has always been about exclusion and inclusion. For example, with regard to ancient Greece, one commentator has noted:

> To be a citizen meant one was an Athenian …. At the core of Athenian society, one's oikos, (family), determined membership. "A foreigner or non-Athenian could only become an Athenian by being accepted and entering into that descent group--into the oikos, phratry and deme, and tribe."[15]

The rigid exclusion in ancient Greek was relaxed in the ancient Rome as citizenship was expanded to include members of the conquered territories. But even in this expanded scope, individuals were still expected to meet certain conditions, including membership to the Roman polity or conquered states, for them to be included in the Roman citizenry. As Sherwin-White notes, "the Romans conferred Roman citizenship as a reward on towns which had supported them in their numerous military battles with rival powers".[16] Thus, despite the expanded membership of the Roman citizenry, in general, citizenship in ancient Greece and Rome (as well as in medieval cities that practiced polis citizenship) was exclusive to some and those who had it, had a much higher status than non-citizens.

This exclusivity of citizenship is still being practiced today. Indeed, international law does recognise states' sovereign power to set rules for acquisition of citizenship status within their territories. The majority of these rules require that an individual must have certain bonds with the concerned state for them to

[15] Lailas E *Dewey's Theory of Citizenship and Community in the Developing American Democracy as seen through the Philosophy of Pragmatism as a Public Administration Model for the Citizen's Role in Public Governance* (1998) at 83.

[16] See Sherwin-White AN *The Roman Citizenship* (1939) 170.

be bestowed with citizenship status.[17] This section discusses the framework for assigning *de jure* citizenship in Kenya in light of the international law entreaty on citizenship allocation.

2.1. The International Law Entreaty on de jure *Citizenship Allocation*

Under international law, the term nationality is used interchangeably for citizenship.[18] Traditionally, international law has regarded the grant of nationality as the exclusive preserve of states, a position affirmed by the Permanent Court of International Justice in the 1923 case of *Tunis and Morocco Nationality Decrees.*[19] However, with time, international human rights law has increasingly asserted limits to the state discretion in this area in order to avoid the danger of statelessness. Multiple legal instruments have been adopted at the international and regional levels to provide for the right to nationality and to place a duty on states to rationalise their citizenship laws to prevent cases of statelessness.

A stateless person is understood as one "who is not considered as a national by any State under the operation of its law".[20] Because they lack nationality, stateless persons are denied formal identity and can find themselves excluded from society. As one Nubian elder in Kenya has aptly noted, "[statelessness] is the worst possible thing to happen to a human being. It means you are a non-entity, you don't exist, you're not provided for, you count for nothing."[21] Thus, to minimize the risk of statelessness, the discretion of states in relation to their nationality practices, has been considerably restricted by developments in international human rights law.

The formal protection against statelessness can be traced back to the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality

[17] For an overview, see generally Weiss P *Nationality and Statelessness in International Law* (1979).

[18] Both terms identify the legal status of an individual in terms of state membership. But citizenship is largely confined to the domestic dimension, while nationality refers to the international legal dimension in the context of an interstate system. See Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. See also International Court of Justice, *Nottebohm Case (Liechtenstein v. Guatemala)* ICJ Report 1955. For further discussion, see Sassen S "The Repositioning of Citizenship and Alienage: Emergent Subjects and Spaces for Politics" 2(1*) Globalizations* (2005) 79 at 81-83.

[19] *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco (France v UK and Ireland)* PCIJ Ser.B., No. 4 (1923).

[20] See article 1(1), Convention Relating to the Status of Stateless Persons, 6 June 1960, 360 U.N.T.S. 117 (entered into force 6 June 1960).

[21] Remarks by a Nubian elder in Kenya quoted in UNHCR, 'Media Backgrounder: Millions Are Stateless, Living in Legal Limbo', 2011, http://www.unhcr.org/4e54ec469.html.

Laws.[22] In its preamble, the Convention noted that it was in the interest of the international community to ensure that all countries recognised that "every person should have a nationality."[23] Consequently, while acknowledging the sovereignty of each state to determine its own citizenship laws, the Convention notes that other states will recognise these laws only insofar as they are consistent with international conventions and customs:

> It is for each State to determine under its own laws who are its nationals. this law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.[24]

Unfortunately the Hague Convention never came into force as it failed to garner the requisite number of ratifications. Still, its vision to protect individuals against statelessness never died and was finally formalised in 1948 with the promulgation of the Universal Declaration of Human Rights ('UDHR').[25] The UDHR declares that every person shall be entitled to a 'nationality'. It further prohibits states from arbitrarily depriving any person of his or her nationality or denying such person the right to 'change' his or her nationality.[26]

Subsequent to the UDHR, other international and regional treaties have enacted provisions that seek to promote the realization of the entitlement to nationality. The International Covenant on Civil and Political Rights (ICCPR), for example, recognises the right of "[e]very child … to acquire a nationality."[27] Similarly, the Convention of the Rights of the Child (CRC) guarantees the right of every child to acquire a nationality and places a duty on the states to respect this right.[28] Likewise, the Convention on the rights of Persons with Disabilities ('CRPD') calls on States parties to recognize the rights of persons with disabilities

[22] Hague Convention on Certain Questions relating to the Conflict of nationality laws, 1930 (entered into force 1937) (Hague Convention).

[23] Preamble, Hague Convention.

[24] Article 1, Hague convention.

[25] Universal Declaration of Human Rights ('UDHR'), UNGA Res 217 A, GAOR, 3d Sess., 183 plen. Mtg., art 22 UN Doc. A/810 (1948).

[26] Article 15, Universal Declaration of Human Rights.

[27] Article 24, International Covenant on Civil and Political Rights ('every child has the right to a nationality').

[28] Article 7, Convention of the Rights of the Child (children have 'the right to acquire a nationality. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless').

to a nationality.[29] On their part, the Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Elimination of Discrimination against Women (CEDAW) prohibit state members from denying the right to nationality on discriminatory grounds. [30] At the regional level, the African Charter on the Rights and Welfare of the Child (ACRWC) also guarantees every child the right to nationality.[31]

These instruments have identified the right to a nationality to encompass change and retention of nationality as well as its acquisition.[32] The human rights instruments do not, however, expressly place a corresponding obligation on a state to grant nationality or a right to receive a nationality of one's choice.[33] Nevertheless, certain obligations to bestow or restore nationality have arisen as a consequence of developments in international human rights law. For example, "own country" under Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right not to "be arbitrarily deprived of the right to enter his own country", has been interpreted by UN Human Rights Committee (HRC) to extend beyond nationals to other people with 'special ties', including long-term residents who are stateless and have been arbitrarily deprived of the right to acquire that state's nationality.[34] Similarly, Article 24 of the ICCPR, which guarantees the right of every child to acquire a nationality has been interpreted by the Human Rights Committee to mean that:

States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.[35]

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[29] Article 18, Convention on the rights of Persons with Disabilities ('States parties shall recognize the rights of persons with disabilities to … a nationality …").

[30] Article 9, Convention on the Elimination of Discrimination against Women (CEDAW) ('granting women equal rights with men to acquire, change or retain nationality').

[31] See article 6, African Charter on the Rights and Welfare of the Child ('every child has the right to acquire a nationality').

[32] For example, Article 9, Convention on the Elimination of All Forms of Discrimination Against Women. See also UN Human Rights Council Resolution, A/HC/20/L.9, 28 June 2012.

[33] See International Law Commission, Articles on Nationality of Natural Persons in Relation to the Succession of States (With Commentaries), 3 April 1999, commentary to Article 1.

[34] See Human Rights Committee, General Comment No. 27 (Article 12, Freedom of Movement), 1999, CCPR/C/21/Rev.1/Add.9.

[35] CCPR General Comment no. 17: rights of the child (Article 24), 07 April 1989, para 8.

These human rights instruments thus limit state discretion over citizenship, by requiring measures to reduce statelessness, including the grant of nationality to children who would otherwise be stateless, and by prohibiting discrimination in granting citizenship and arbitrary deprivation of citizenship. These principles were confirmed by the Inter-American Court of Human Rights in the 2005 case of *Dilcia Yean and Violeta Bosico v. Dominican Republic* in the following words:

> Although the determination of who is a national of a particular state continues to fall within the ambit of state sovereignty, states' discretion must be limited by international human rights that exist to protect individuals against arbitrary state actions. States are particularly limited in their discretion … by their obligations to guarantee equal protection before the law and to prevent, avoid, and reduce statelessness.[36]

The jurisprudence of the African Commission on Human Rights also supports the qualified discretion of states in determining nationality despite the fact that the African Charter on Human and Peoples Rights (African Charter) fails to expressly provide for the right to nationality. For example, in the *Modise v. Botswana* case, the Commission held that Article 5, which guarantees individuals "the right to the respect of the dignity inherent in a human being and to the recognition of his legal status", applied to instances where a state attempts to denationalise individuals and render them stateless.[37] Similarly, in *Amnesty International v. Zambia*, the Commission held that forcing individuals to live as stateless persons under degrading circumstances was a violation of the African Charter, particularly the right to dignity under Article 5.[38] The Commission has also held in *Legal Resources Foundation v. Zambia* that a provision in the laws aimed at excluding a category of citizens from political participation was discriminatory. In the case at hand an amendment to the Zambian law, which required that a presidential candidate must prove that both parents were Zambians from birth (an amendment apparently aimed at preventing former president Kenneth Kaunda from running for president again), was found to be discriminatory and an affront to the right to political participation.[39]

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[36] *Dilcia Yean and Violeta Bosico v. Dominican Republic*, Inter-American Court of human rights Case no. 12.189, 8 September 2005.

[37] Communication 97/93, *Modise v. Botswana* (2000) African Human Rights Law Reports (Ahrlr) 30 (AChPr 2000), paragraph 91.

[38] Communication no. 212/98, *Amnesty International v. Zambia*, (2000) Ahrlr 325 (AChPr 1999), paragraph 50.

[39] Communication 211/98, *Legal Resources Foundation v. Zambia* (2001) Ahrlr 84 (AChPr 2001).

In addition to these human rights entreaties, the international community has also passed specific instruments to deal with the plight facing stateless persons, in particular the 1954 Stateless Persons Convention and the 1961 Convention on the Reduction of Statelessness.[40] Regional treaties, including the European Convention on Nationality[41] and Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession,[42] have also been developed to reinforce protection at the regional level. Collectively, these legal instruments seek to protect stateless persons, prevent new cases from arising and reduce their global population. The 1961 Convention on the Reduction of Statelessness, for example, makes it a duty of states to prevent statelessness in nationality laws and practices. Article 1 mandates that "A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless" while Article 8(1) directs that "A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless."

Whilst Kenya is not party to the 1954 Stateless Persons Convention and the 1961 Convention on the Reduction of Statelessness, it is party to the ACRWC,[43] CRC,[44] ICCPR,[45] CEDAW[46] and the African Charter.[47] The ratification of these treaties is an unequivocal commitment by the State of Kenya to promote and protect fundamental international human rights of its nationals and to rationalise its procedural aspects, particularly those surrounding definition of nationals and acquisition of nationality with international standards.

[40] Convention on the Reduction of Statelessness, 15 March 2006, C.E.T.S. 200.

[41] European Convention on Nationality, 6 November 1997, CETS No. 166 (entered into force 1 March 2000).

[42] Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, 30 August 1961, 989 U.N.T.S. 175 (entered into force 13 December 1975).

[43] Ratified 25 July 2000. See http://www1.umn.edu/humanrts/instree/afchildratifications.html on 26 October 2009.

[44] Ratified 30 July 1990. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en on 25 October 2009.

[45] Acceded 1 May 1972. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en on 25/10/2009.

[46] Acceded 9 March 1984. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY &mtdsg_ no=IV-8&chapter=4&lang=en on 25 October 2009.

[47] Ratified 23 January 1992. See http://www1.umn.edu/humanrts/instree/ratz1afchr.htm on 26 October 2009.

2.2. *The Bonds Entitling Acquisition of* de jure *Citizenship under International Law*

As noted above, *de jure* citizenship in law has the legal bond between the state and the individual at the core of its meaning. In this regard, international law, while allowing states to decide the construction of their populations through their nationality and immigration laws, however, requires that there exist a "genuine connection" between a person and the State for the bestowal of citizenship. As noted by the International Court of Justice in the 1955 *Nottebohm* case:

> According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.[48]

In general, there are four main bonds or connections recognized under the laws of nations that entitle a person to the membership of a given state: (1) the bond of birth on a state's territory or the territorial bond (*ius soli*); (2) the bond of ancestry (descent from a citizen parent(s)) or the biological bond (*ius sanguinis*); (3) the bond of residency or the transformative bond; and (4) the bond of marriage. Having one or a mixture of these bonds with a state will assure nationality, depending on the legislation of the state in question. As one author has concluded in his examination of citizenship laws of a number of countries:

The laws governing citizenship in most African countries—as in most countries in the world—reflect a compromise between two basic concepts: *jus soli* (literally, law or right of the soil), whereby an individual obtains citizenship because he or she was born in a particular country; and *jus sanguinis* (law or right of blood), where citizenship is based on descent from parents who themselves are or were citizens. In addition to these two principles based on birth, two other factors are influential in determining citizenship for adults: marital status, in that marriage to a citizen of another country can lead to the acquisition of the spouse's citizenship, and residence within a country's borders. [49]

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[48] *Liechtenstein v. Guatemala* ICJ Reports, 1955, 23. Liechtenstein sought a ruling that Guatemala should recognise Friedrich Nottebohm as a Liechtenstein national. See also Batchelor CA, "Statelessness and the Problem of Resolving Nationality Status," 10 (1)(2) *International Journal of Refugee Law* (1998), 159 -160.

[49] Manby B, *Citizenship Law in Africa A Comparative Study* (2010) at 2 http://www.unhcr.org/4cbc60ce6.pdf on 09 October 2015.

The bond of birth in the territory of the state (*ius soli*) links the individual to the territory in which they are born. The *ius soli* bond can take various forms, depending on the law of the state under consideration. In its pure form, children born in the State concerned become automatically citizens *at* birth. This form is immediate and non-discretionary. In its prospective form, children born in the State concerned become citizens automatically or by declaration *after* birth. In its retrospective form, children born in the State concerned acquire citizenship at birth on the basis of prior parental residence in the country. Finally, in its double form, the acquisition of citizenship at birth is made conditional on parents' birth in the country.[50] However, despite these various forms, it is to be noted that, unlike the bond of ancestry, the bond of birth is not dependent on the citizenship status of the parent. Thus, even in its most restrictive double form, the only requirement is that the parent should have been born in the state without necessarily requiring that the parent be a citizen of the concerned state.

The bond of ancestry (*ius sanguinis*) assigns citizenship at birth on the basis of blood relation to or inheritance from a citizen parent. In most case, the birth need not take place in the territory of the concerned state provided that one of the parents is a citizen of the state. Also, in most cases, the parents need not be a citizen by birth for them to transmit citizenship to their children; any form of citizenship would suffice. This bond is usually traced to ancient Greece and Rome, in which children could acquire citizenship at birth only if one of their parents was a citizen.[51]

The bond of residency creates a link beyond birth or subsequent to birth that allows a person to claim citizenship of a state. This bond allows a person born a foreigner to apply to become a citizen of the country in which he/she is not born. The claim could arise from residence in the State for a specified period of time, or the establishment of a permanent domicile in the State. The process of acquiring citizenship under this head is described as naturalisation. This process, as noted by the Inter-American Court of Human Rights in its Advisory Opinion on *Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, is based on a "voluntary act aimed at establishing a relationship with any given

[50] See Waldrauch H, "Methodology for comparing acquisition and loss of nationality," in Bauböck R, Ersbøll E, Groenendijk K and Waldrauch H (ed) *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries, Vol.1: Comparative Analyses* Amsterdam: Amsterdam University Press, 2006.

[51] Spiro PJ, "Interrogating birthright citizenship," in Sarat A (ed) *Who belongs?: immigration, citizenship, and the constitution of legality* Bingley: Emerald, 2013, 31.

political society, its culture, its way of life and its values".[52] The bond thus allows foreigners who have been granted entry into a State to apply for, and ultimately attain, that State's nationality upon fulfilling the prescribed conditions.

The bond of marriage recognises the special nature of the marriage institution, which brings together individuals from different backgrounds to form a single unit called the family. Because of the importance of the family unit in the structure of the state, the community of nations has come to accept the principle of dependent nationality, or the unity of nationality of spouses.[53] The initial application of this principle was to ensure that a woman who married a foreigner automatically acquired the nationality of her husband upon marriage at the expense of her own nationality. This was justified on the grounds: firstly, that the family, in most cases, was built in the husbands abode; secondly, that all members of a family should have the same nationality to ensure unified allegiance; and, thirdly, that important decision affecting the family should be made by the husband. This patriarchal approach has with time changed in most jurisdictions to allow the wife to also transmit citizenship to the husband in instances where the family is located at the wife's nation-state. This change has been influenced by the international human rights consensus on women's rights, which have introduced gender neutrality in many countries. The need for unified allegiance to one state, however, still remains as a justification for acquisition of citizenship under this heading.

The bond of birth and of descent usually assigns automatic citizenship to individuals from birth while the bond of marriage and of habitual residence requires an administrative process after birth such as naturalisation or registration before they can assign citizenship status.

2.3. De jure *Citizenship Bonds in Kenya*

In Kenya, the legal framework guiding the acquisition of *de jure* citizenship is to be found in the 2010 Constitution and the 2011 Kenyan Citizenship and Immigration Act.[54] The Kenyan Citizenship and Immigration Act was enacted with a view to synchronising the immigration laws that were in operation before the 2010

[52] Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Inter-American Court of Human Rights, Advisory Opinion, OC-4/84 of 19 January 1984. Inter-American Court of Human Rights, Series A, No. 4 (1984), para. 35.

[53] United Nations, Convention on the Nationality of Married Women: Historical Background and Commentary (United Nations doc. E/CN.6/389), Sales No. 62.IV.3, p. 2.

[54] Kenya Citizenship and Immigration Act No.12 of 2011.

Constitution with the 2010 Constitution. These statutes (The Kenya Citizenship Act, The Immigration Act and The Aliens Restriction Act) were effectively repealed under by the Kenya Citizenship and Immigration Act.[55] However, both the new Constitution and the Kenyan Citizenship and Immigration Act still recognise legal status of citizenship acquired under the repealed 1963 Constitutional order.[56] It is imperative therefore to analyse the framework in the 1963 and 2010 Constitution to have a complete understanding of the bonds to the state that entitle one to acquire *de jure* citizenship status in Kenya.

An examination of these frameworks reveals four bonds by which a person can obtain Kenyan citizenship, that is, the bond of birth in the territory of Kenya, the bond of descent from a Kenyan citizen, the bond of marriage to a Kenyan citizen, and the bond of habitual residence. The bond of birth and of descent assigns citizenship to individuals from birth while the bond of marriage and of habitual residence assigns citizenship after birth following prescribed administrative processes. The requirements of the law with regard to these bonds are discussed in detail below.

2.3.1. The Bond of Birth in the Territory of Kenya

Citizen by birth in the territory of Kenya apply at two levels: (1) to those who were born in Kenya prior to the date Kenya became a republic on 12 December, 1963; and (2) to those who were born in Kenya on or after 12 December, 1963. Those who were born in Kenya before Kenya became a republic are considered automatic citizens by birth while those who were born in Kenya after 12 December, 1963 have to issue from a Kenyan citizen for them to acquire automatic citizenship at birth. This means that citizen by birth in the territory of Kenya, in strict sense, is the preserve of those born in Kenya before Kenya emerged as a new state. As the repealed 1963 Constitution provided, "[e]very person who, having been born in Kenya, is on 11th December, 1963 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Kenya on 12th December, 1963".[57]

These persons represent those who the social contract theorists call the "original" citizens, that is, those members of the population existing at the time of

[55] Section 65, Kenya Citizenship and Immigration Act (2011).

[56] Article 13(1), Constitution of Kenya (2010) ("Every person who was a citizen immediately before the effective date retains the same citizenship status as of that date").

[57] Article 87, Constitution of Kenya (1963) (repealed).

the formation of the new state. On 12 December, 1963 Kenya gained the status of a state under international law. Before that it was merely a colony, an extension of the territory of the British Empire. Thus, those members of the population who had been born in Kenya by the time Kenya was gaining its republic status became automatic citizens of Kenya by birth. The only condition required was that at least one of the parents should have been born in Kenya.[58] In this regard, Kenya recognised the double form of *ius soli* bond where both the candidate for citizenship by birth and the parents (or one of the parents) are born in the territory of the country. However, in addition to the double form, Kenya also recognised the prospective form of *ius soli* as those candidates who were born in Kenya to parents born outside Kenya were given the opportunity to apply for registration as citizens by birth.[59] This variegated approach to citizenship acquisition at the time of Kenya becoming a republic was explained in the case of *Mahamud Muhumed Sirat v Ali Hassan Abdirahman & 2 Others*[60] in the following words:

At the time Kenya attained independence, certain category of persons who qualified to acquire Kenyan citizenship, and having the option of retaining British citizenship, were being subtly encouraged to decide whether they desired to be citizens of the newly independent Kenya or be subject of the United Kingdom and colonies.[61]

2.3.2 The Bond of Ancestry (Descent from Parents of Kenyan Citizenry)

Unlike the "original" citizens, those born after Kenya became a republic, though born in the territory of Kenya, could not automatically claim citizenship by birth under the repealed 1963 Constitution. They had to prove their descent from a Kenyan citizen to be granted automatic citizenship. This position in the repealed 1963 constitution has been re-enacted under the 2010 Constitution.[62] In this sense, these post-republic generations of citizens are more accurately identified as "citizens at birth by descent" and not as "citizens by birth" as they are described under the 2010 Constitution. This is because, as opposed to the double form of *ius soli,* which merely requires that at least one of the parents to have been born in Kenya, for post-republic generations born in Kenya, there is

[58] Article 87(1), Constitution of Kenya (1963) (repealed).
[59] Article 88(1), Constitution of Kenya (1963) (repealed).
[60] *Mahamud Muhumed Sirat v Ali Hassan Abdirahman & 2 Others* (2010) eKLR.
[61] *Mahamud Muhumed Sirat v Ali Hassan Abdirahman & 2 Others* (2010) eKLR.
[62] Articles 13(2) & 14(1), Constitution of Kenya (2010).

a mandatory requirement that at least one of the parents be a Kenyan *citizen*, a condition characteristic of citizenship by descent.

The bond of descent assigns automatic citizenship at birth to children born on or after Kenya gained its republic status on 12 December 1963 to citizens of Kenya, whether the birth takes place within the territory of Kenya or outside Kenya. According to the repealed 1963 Constitution, every person born in Kenya on or after 12 December 1963 became a citizen of Kenya if at the date of his birth one of his parents was a citizen of Kenya.[63] Additional requirements existed for those born to foreign fathers. In the first place, the person had to demonstrate that his or her father did not 'possess immunity from suit of legal process as is accorded to the envoy of a foreign state accredit[ed] to Kenya'.[64] Additionally, the applicant had to show that his or her father was not a citizen of a country which was at war with Kenya.[65]

As regards the persons born out of the country after independence, the repealed 1963 Constitution declared that only Kenyan fathers could transmit citizenship under this head. According to article 90, a person born outside Kenya on or after 12th December 1963 would become a citizen of Kenya at the date of his birth if at that date his father was a citizen of Kenya.[66] Similarly, a person born overseas before 12 December 1963 would also become a citizen, provided the person's fathers became, or would but for his death have become a citizen of Kenya at independence.[67] This meant that children born to Kenyan mothers overseas were ineligible for Kenyan citizenship at birth by descent.

This anomalous discrimination under the repealed 1963 Constitution has been addressed under the 2010 Constitution. It now matters not the gender of the parent with the Kenyan citizenship, either a Kenyan mother or Kenyan father can transmit citizenship to their child born within or outside Kenya.[68] This new rule has been made applicable not only to persons born after the new Constitution came into operation but also to persons born before the effective date of the new

[63] Section 89, Constitution of Kenya (1963) (repealed) provides that: 'Every person born in Kenya after 11th December, 1963 shall become a citizen of Kenya if at the date of his birth one of his parents is a citizen of Kenya.'

[64] Article 89, Constitution of Kenya (1963).

[65] Article 89, Constitution of Kenya (1963).

[66] Article 90, Constitution of Kenya (1963).

[67] Article 87(2), Constitution of Kenya (1963)

[68] Article 14(1), Constitution of Kenya (2010) ("A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen").

Constitution.[69] It is to be noted, however, that pursuant to Article 14(3) of the Constitution, which empowers parliament to limit the general application of citizenship at birth by descent to descendants born outside Kenya,[70] parliament enacted the Kenya Citizenship and Immigration Act, which provides that only mothers or fathers who are Kenyan citizens by birth (or by descent) can transmit citizenship to their children born outside Kenya.[71]

It is also noteworthy that under the 2010 Constitution, children below the age of 8 years whose nationality is unknown and who are found with the territory of Kenya are presumed to be citizens at birth by descent.[72] This is in line with international law which require states to amend its 'Constitutional legislation' to give effect to the principle that a child shall acquire the nationality of the state in which he or she is born, if at the time of birth the child is stateless.[73]

2.3.3 The Bond of Marriage

Foreigners married to Kenyans could register for citizenship under the repealed 1963 Constitution. However, the Constitution placed limits on this mode of gaining citizenship by providing that only women who were married to Kenyan nationals are eligible to apply,[74] meaning that foreign men married to Kenyan women could not apply for citizenship on this ground.

This discrimination was addressed in the 2010 Constitution. Unlike the repealed 1963 Constitution which only allowed men to pass citizenship to their foreign spouses, under the 2010 Constitution both Kenyan women and men are able to pass citizenship to their foreign spouses. It provides that a person who

[69] Article 14(2), Constitution of Kenya (2010) ("Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen").

[70] Article 14(3), Constitution of Kenya (2010) ("Parliament may enact legislation limiting the effect of clauses (1) and (2) on the descendants of Kenyan citizens who are born outside Kenya").

[71] Section 7, Kenya Citizenship and Immigration Act (2011) ("A person born outside Kenya shall be a citizen by birth if on the date of birth that person's mother or father was or is a citizen by birth"). Given the use of the term citizen by birth in the Constitution, this term would cover the original citizens by birth and citizen at birth by descent.

[72] Article 14(4), Constitution of Kenya (2010) read together with Section 9, Kenya Citizenship and Immigration Act (2011).

[73] See, for example, Article 6(4) of the African Charter on the Rights of Women and Children, which requires Kenyan to amend its 'Constitutional legislation' to give effect to the principle that a child shall acquire the nationality of the state in which he or she is born, if at the time of birth the child is stateless.

[74] Article 91, Constitution of Kenya (1963).

has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.[75] The **Kenya Citizenship and Immigration Act provides for the conditions to be met to be registered as Kenyan citizen out of marriage as: (1) the person must have been married to a Kenyan citizen for at least seven years; (2) the marriage must have been solemnized under a system of law recognised in Kenya; (3) the applicant must not have been declared a prohibited immigrant under any law; (4) the applicant must not have been convicted of an offence and sentenced to a term of three years or longer; (5) the marriage should not have been entered into for purpose of acquiring a status or privilege in relation to immigration or citizenship; and (6) the marriage must be subsisting at the time of the application.**[76] In interpreting this section, the Constitutional Court noted in *Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 others*,[77] that it requires no more than a literal interpretation, that is, that one can only be granted citizenship on account of marriage to a Kenyan Citizen if he/she meets the conditions inherent in the said section.[78]

It is also interesting to note that under the Constitution citizenship acquired through marriage is not lost upon dissolution of the marriage.[79] Furthermore, under the Kenya Citizenship and Immigration Act, a widow or widower who was married to a Kenyan citizen and who but for the death of the citizen would have been entitled, after a period of seven years, to be registered out of marriage, shall be deemed to be lawfully present in Kenya for the unexpired portion of the seven years and shall be eligible for registration as a citizen on application in the prescribed manner upon expiry of the seven year period.[80]

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[75] Article 15(1), Constitution of Kenya (2010) ("A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen").

[76] Section 11, The Kenya Citizenship and Immigration Act (2011).

[77] *Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 other [2015] eKLR.*

[78] *Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 other [2015] eKLR.*

[79] Article 13(3), Constitution of Kenya (2010) ("Citizenship is not lost through marriage or the dissolution of marriage").

[80] Section 12, The Kenya Citizenship and Immigration Act (2011) (the widower would still be required to meet the conditions set out in s 11 save for condition requiring subsistence of marriage at time of application).

2.3.4 The Bond of Lawful and Habitual Residence

Under the repealed 1963 Constitution, citizenship could be acquired by the bond of lawful and habitual residence. An applicant under this mode had to satisfy the Immigration Minister that he or she: (i) was at least 21 years old; (ii) had been ordinarily and lawfully resident in Kenya for the period of twelve months immediately preceding the lodgement of the application; (iii) has been ordinarily and lawfully resident in Kenya for a period of, or for periods amounting in the aggregate to, not less than four years; (iv) was of good character; (v) had an adequate knowledge of the Swahili language; and (vi) intended, if naturalized as a citizen of Kenya, to continue to reside in the country.[81]

These conditions have been incorporated with slight modification under the 2010 Constitutional framework. The Constitution read together with the Kenyan Citizenship and Immigration Act sets out the following conditions to be met by the applicant: (1) must be of majority age; (2) must have been residing in Kenya for not less than seven years under the lawful permit of the relevant authorities; (3) must have resided in Kenya throughout the period of twelve months immediately preceding the date of the application; (4) must have adequate knowledge of the rights and obligations of a Kenyan citizen; (5) must understand and speak Swahili or one local dialect; (6) must understand the nature of the application he is making; (6) must not have been convicted and sentenced for a period of three years or more; (7) must intend to stay in Kenya after registration; (8) must have made or must be capable of making a positive contribution to the development of Kenya; (9) must not be an adjudged bankrupt; and (10) the country in which the applicant is a citizen is not at war with Kenya.[82]

A child born to non-citizen parents, whose parents or one of the parents eventually acquire citizenship through habitual residence can also apply for citizenship out of habitual residence under the 2010 Constitution. In such cases, the application will be made by the parent or guardian and will be accompanied by: (1) documents conferring Kenyan citizenship to any of the parents; (2) birth certificate; and (3) proof of lawful residence.[83] The law does not however set out the duration of lawful residence.

[81] Article 93, Constitution of Kenya (1963).

[82] Article 15 (2), Constitution of Kenya (2010) and Section 13, Kenya Citizenship and Immigration Act (2011).

[83] Section 13(3), Kenya Citizenship and Immigration Act (2011).

With regard to adopted children, the Constitution read together with the Kenyan Citizenship and Immigration Act restricts the registration to children adopted by Kenyan citizens.[84] The Act also sets out that an application for registration of adopted children must be accompanied by (1) proof of Kenyan citizenship of adopting parent; (2) production of a valid adoption certificate issued in a reciprocating state or other jurisdiction whose orders, decrees are recognized in Kenya; and (3) proof of lawful residence of the child in Kenya.[85] The law does not, however, expressly set out the duration of residence required.

The new Constitutional framework also allows persons without nationality, the stateless, to apply for registration on the basis of lawful and habitual residence.[86] Though this avenue is restricted to persons who have resided in Kenya for a continuous period since 12th December, 1963, it does provide such category of persons the opportunity to gain citizenship status.[87] In addition to being in Kenya for a continuous period since 12th December 1963, the person must also meet the following conditions: a) must have adequate knowledge of Kiswahili or a local dialect; (b) must not have been convicted of an offence and sentenced to imprisonment for a term of three years or longer; (c) must intend upon registration as a citizen to continue to permanently reside in Kenya or to maintain a close and continuing association with Kenya; and (d) must understand the rights and duties of a citizen. The descendants of a registered stateless person or of a stateless person that would have qualified for registration had they been alive can also apply for registration once they attain the age of majority.[88]

Migrants, that is, "those persons who voluntarily migrated into Kenya before the 12th December, 1963, and have been continuously living in Kenya," are also eligible for registration as citizens under the bond of lawful and habitual residence.[89] They need to show that they: (a) do not hold a passport or an identification document of any other country; (b) have adequate knowledge of Kiswahili or a local dialect; (c) have not been convicted of an offence and sentenced to imprisonment for a term of three years or longer; (d) intend upon registration as citizen to continue to permanently reside in Kenya or to maintain a close and continuing association with Kenya; and (e) understand the rights and duties of a

[84] Article 15(3), Constitution of Kenya (2010); Section 14, Kenya Citizenship and Immigration Act (2011)

[85] Section 14, Kenya Citizenship and Immigration Act (2011).

[86] Section 15, Kenya Citizenship and Immigration Act (2011).

[87] Section 15, Kenya Citizenship and Immigration Act (2011).

[88] Section 17, Kenya Citizenship and Immigration Act (2011).

[89] Section 16, Kenya Citizenship and Immigration Act (2011).

citizen. The descendants of a registered migrant or of a migrant that would have qualified for registration had they been alive can also apply for registration once they attain the age of majority.[90]

3.0. From *de jure* to *de facto* Citizenship: An Analysis of the Benefits and Burdens of Citizenship in Kenya

Fulfilling the formal requirements established by the law for acquisition of formal (*de jure*) citizenship status entitles every-one who fulfils those requirements to a *de facto* relationship with the state. This relationship is characterised by reciprocal rights and obligations that are not held by non-citizens. Indeed citizenship, as traced from the ancient Greeks and Romans, via the Enlightenment, and the American and French Revolutions, is tied to the emergence of members of a polity with specified benefits and duties. To speak of a *de facto* citizen is thus to speak of individuals with distinct relationships to the state, along with the benefits and obligations these relationships imply.

According to the social contract theory, during the formation of the Nation State, natural men "collectively and reciprocally" agree to, first, waive the rights they had against one another in the State of Nature (the right to self-preservation and the right to punish);[91] and to, second, endow some one person or assembly of persons with the authority and power to ensure that the waiver in the first contract is not breached (is enforced).[92] To ensure that the sovereign state is able to function, the individuals voluntarily surrender to the sovereign person or assembly of persons the authority necessary to enforce peaceful co-existence among the individuals.[93]

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[90] Section 17, Kenya Citizenship and Immigration Act (2011).

[91] Two of the rights forfeited upon entering society are the right to do whatever is required for self-preservation and the right to punish violators of crimes committed in the state of nature. See Hobbes T *Leviathan* (1994) 158-59; see also Burke E "Reflections on the Revolution in France" in Burke E (ed) *The work of the right honourable Edmund Burke* (1871) 309 (a fundamental rule of civilized society is "that no man should be judge in his own cause"). But see Montesquieu's story of the Troglodytes to the import that savage men make no compacts or agreements and do not attach importance to promises. Montesquieu CLB "The Parable of the Troglodytes" in Montesquieu CLB *Persian Letters* (1721).

[92] See Hobbes *Leviathan* (1994) 89 ("[b]efore the names of just and unjust can have place there must be some coercive power to compel men equally to the performance of their covenants"). For criticism of Hobbes, see Pateman C *The problem of political obligation: A critical analysis of liberal theory* (1979) 53 (arguing that for Hobbes the "bonds of civil life rest on the sword, not on the individual's social capacities").

[93] Hobbes formulates the covenant by which the sovereign is instituted in these words: "I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner." Hobbes T *Leviathan* (1994) 87.

These include the power to make laws, judge and mete out punishment for breaches of the peaceful co-existence.[94] The individuals also agree to contribute resources and to give the sovereign control over communal resources to protect and use in the execution of its functions.[95] In addition, the individuals agree to abide by the decisions of the sovereign and where necessary to assist in effecting the same.[96] On its part, the sovereign must ensure that it protects and secures the individual members of the society and their individual and common interests in an impartial and just manner and that the resources entrusted in its care is used for the common good.[97] The individual interests requiring protection encompass those natural rights that remain with individuals at the formation of the sovereign state and that allows them to pursue their natural self-interests - interests that do not breach the common interest – without the interference from the sovereign or other members of the community.[98] The Constitutional Court has accepted in *Dr. Christopher Ndarathi Murungaru vs. The Standard Limited & Others* the mutual rights and responsibilities espoused by the social contract as a guiding pillar of the democratic society that is Kenya:

> Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that they are in line with Rousseau's version of the Social Contract theory. In brief the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the raison d'etre of the State is to facilitate and enhance the individual's self-fulfilment and advancement, recognising the individual's rights and freedoms as inherent in humanity. Protection of the

[94] According to Locke, men gain three things in the civil society which they lacked in the State of Nature: laws, judges to adjudicate laws, and the executive power necessary to enforce these laws. Locke J *Second treatise of government* (1980) para 97.

[95] For Locke, protection of property, including their property in their own bodies, is the primary motivation of the social contract. Locke J *Second treatise of government* (1980), para 124.

[96] Although Hobbes insists that 'all men equally, are by Nature Free', yet he treats authorization as limiting that freedom. Hobbes T *Leviathan* (1994) 111. He distinguishes two ways in which such a limitation might arise, either "from the expresse words, I Authorise all his Actions 'by which the subject places himself under the sovereign, or "from the Intention of him [the subject] that submitteth himself to his [the sovereign's] Power, (which Intention is to be understood by the End for which he so submitteth . . .)'. And this end, Hobbes goes on to say, is 'the Peace of the Subjects within themselves, and their Defence against a common Enemy'. Hobbes T *Leviathan* (1994) 111.

[97] As Rousseau urges, it is only on the 'basis of this common interest that society must be governed'. Rousseau JJ *The social contract and the first and second discourses* (2002) 25. According to Hobbes, the motive for a contract is 'the security of man's person, in his life and in the means of so preserving his life as not to be weary of it'. Hobbes T *Leviathan* (1994) chap 14 at 82. See also Locke J *Second treatise of government* (1980) para 97.

[98] For a discussion of the place of individual right in civil society, see, for example, Brett AS *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (2003).

> fundamental human rights therefore is a primary objective of every democratic Constitution, and as such is an essential characteristic of democracy.[99]

The catalogue of entitlements that an individual derives from being a member of a sovereign state are what constitute the benefits of citizenship while the obligations that the individuals owe to the sovereign state are what constitute the burdens of citizenship. These distinct catalogues of benefits and obligations of citizenship make citizens, unlike noncitizens, to be "full and formal members" of a given state. This section identifies the benefits and burdens whose possession is dependent on one being a citizen and that are not available to non-citizens in Kenya.

3.1. The Benefits of Citizenship

The Kenya Citizenship and Immigration Act lists the benefits that every citizen is entitled to. These include the right to enter, exist and remain in the country; the right to register as a voter; the right to vie for an elective post or to be appointed to a public office; the right to own land; and the entitlement to a document of citizenship registration.[100] However, not all these benefits are unique to citizens. For example, the right to exist the country is enjoyed by both citizens and non-citizens. Similarly, the right to own land is enjoyed by both citizens and non-citizens, though the non-citizens' right is limited to the owning of a leasehold interest in land.[101] Furthermore, the list of benefits under the Kenyan Citizenship and Immigration Act is not exhaustive as it leaves out other recognised benefits of citizenship such as the right to diplomatic protection under international law.

In reality, there are four categories of benefits that are intrinsically connected with citizenship: status protection benefits, benefits of entry and abode, benefits of protection, and political benefits. Each of these categories was recognised as fundamental in the very early configurations of the state–citizen relationship.[102] In addition, these categories have not lost relevance over time – their codification as express citizenship rights is very common internationally. These categories of rights are in contrast to most rights, which are not predicated upon possession of citizenship.

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[99] *Dr. Christopher Ndarathi Murungaru vs. The Standard Limited & Others* Nairobi HCCC (Civil Division) No. 513 of 2011.

[100] Section 22, Kenya Citizenship and Immigration Act (2011).

[101] Article 40, Constitution of Kenya (2010).

[102] For a historical description of the rights of citizenship, see, for example, Heater D, *A Brief History of Citizenship* Edinburgh University Press, 2004, 31–2; Kelly GP *A History of Exile in the Roman Republic* Cambridge University Press, 2012, 33.

3.1.1. Status Protection Benefits

Status protection benefits specify those who are entitled to hold the citizenship status and serve as a guarantee that the status will not be stripped from people who hold it. Under the 2010 Constitutional framework, there are two ways in which a person's citizenship may cease: (1) via a successful application to renounce citizenship; and (2) by ministerial revocation where certain criteria are met.

Citizenship by birth or at birth by descent can only be lost upon renunciation by the holder.[103] However, renunciation will not be accepted where it will render the person stateless or where it is not in the interest of Kenya.[104] The application for renunciation can also only be accepted after the person has been apprised of the implication of renunciation and where the responsible authority is clear on the new residence of the renouncing individual.[105] It is also noteworthy that mere acquisition of citizenship of another state is not enough to strip a citizen by birth or by descent of their citizenship.[106] This is in contrast to the 1963 Constitution which provided that a citizen of Kenya who acquired citizenship of some other country ceased to be a citizen of Kenya unless he renounced his citizenship of the other country and took an oath of allegiance to Kenya.[107]

Citizenship by marriage or residence can be lost through either renunciation by the holder or by ministerial revocation in clearly prescribed situations. The prescribed situations for ministerial revocation are listed under the 2010 Constitution as including situations where: (1) the citizenship was acquired by fraud or false representation; (2) the person has assisted an enemy in a war that Kenya was engaged in; (3) within five years after registration the person has been convicted of an offence and sentenced to imprisonment for a term of three years or longer; or (3) the person has, at any time after registration, been convicted of treason, or of an offence for which a penalty of seven or more years may be imposed.[108]

It is to be noted, however, that ministerial discretions to revoke citizenship are not broad, and there are statutory protections in place to protect against a loss

[103] Kenyan Citizenship and Immigration Act, s 19.
[104] Kenyan Citizenship and Immigration Act, s 19(4).
[105] Kenyan Citizenship and Immigration Act, s 19(2).
[106] Constitution of Kenya, 2010, Art 16 ("A citizen by birth does not lose citizenship by acquiring the citizenship of another country").
[107] Constitution of Kenya, 1963, Art 97.
[108] Article 17, Constitution of Kenya (2010).

of citizenship where statelessness would ensue.[109] In addition, under the Kenyan Citizenship and Immigration Act, a person who is aggrieved by the decision of a public officer regarding revocation of citizenship can apply for review or can appeal the decision to the High Court.[110]

3.1.2 Benefits of Entry and Abode

The broad category of "entry and abode benefits" encompasses two discrete types of rights: the right to come into Kenyan territory, and the right to remain in this territory. Under the 2010 Constitution[111] and the Kenyan Citizenship and Immigration Act 2011, the right to enter, remain in and reside anywhere in Kenya is inherently vested in Kenya citizens.[112] Non-citizens do not enjoy this right. This position has been upheld in the case of *Sebasyan Kryvskyy v Criminal Investigations Department Nairobi & 3 others*[113] where the Court noted that: "[Article 39(3) of the Constitution] is deliberate as it grants Kenyan citizens only, the right to enter, remain and to reside anywhere in Kenya. It deliberately denies other persons not citizens of the country that right".[114]

A non-citizen's entry, residence and their act of remaining in Kenya is a privilege which may or may not be granted. As provided under the Kenyan Citizen and Immigration Act, "A person who is not a citizen of Kenya or an asylum seeker shall not enter or remain in Kenya, unless she or he has a valid permit or pass".[115] This position has received support in the case of *Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & another*[116] where the court noted that:

> [T]he right to enter, remain in and reside in Kenya is restricted to citizens, both by the Constitution and under international law. While Article 39(1) and (2) with regard to freedom of movement and the right to leave Kenya are guaranteed to all persons, the right to enter, remain and reside anywhere in Kenya is the preserve of citizens. Thus, in my view, the petitioner, who has of his own volition come

[109] Section 21, Kenya Citizenship and Immigration Act (2011).

[110] Section 21(6), Kenya Citizenship and Immigration Act (2011).

[111] Article 39(3), Constitution of Kenya (2010) ("Every citizen has the right to enter, remain in and reside anywhere in Kenya").

[112] Section 22(1)(a), Kenya Citizenship and Immigration Act (2011) ("Every citizen is entitled to the rights …. (a) the right to enter, exit, or remain in and reside anywhere in Kenya").

[113] *Sebasyan Kryvskyy v Criminal Investigations Department Nairobi & 3 others* [2015] eKLR.

[114] *Sebasyan Kryvskyy v Criminal Investigations Department Nairobi & 3 others* [2015] eKLR.

[115] Section 34, Kenya Citizenship and Immigration Act (2011).

[116] *Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & another* [2013] eKLR.

> back from his country of origin, Pakistan, after being deported from Kenya, and been denied entry into Kenya at the airport, cannot demand that he be allowed entry and, upon denial thereof, allege violation of his right under Article 39 or the provisions of the international conventions…[117]

These provisions of Kenyan law are in accord with the provisions of international law and international human rights instruments. Under international law a person cannot be expelled from his or her country of citizenship, no matter what the destination.[118] The UDHR also accords everybody the freedom of movement within the border of a country but limits the right to entry and abode to the citizens of a country.[119] Similarly, the ICCPR protects the right of everybody to free movement and egress from a country but limits the protection of ingress and abode to citizens only.[120] Likewise, the ACHPR recognises every individual's right to free movement and egress from any country including his own but limit the right to return to and abode in a country to citizens only.[121]

To facilitate their movement across the borders of the state, citizens have also been given the right to be issued with travel documents such as the passport. According to the 2010 Constitution, every citizen is entitled to "a Kenyan passport and any document of registration or identification issued by the State to citizens".[122] This has, however, not always been the case. Historically, the British colonialist regarded the grant of travel documentation as a privilege that was within the "crown prerogative". The 1963 Constitution also did not clearly make travel documents an entitlement, resulting in early jurisprudence from the Court holding that its issuance was a privilege. For example, in the 1985 *Mwau* case, the High Court ruled that "in the absence of any statutory provisions … the issue and withdrawal of passports is the prerogative of the president."[123] This ruling was later

[117] *Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & another* [2013] eKLR, para 29.

[118] This prohibition is only excused in instances of extradition of a person to stand trial in another country in accordance with due process of law and on the basis of legal agreements between states.

[119] Article 13, Universal Declaration of Human Rights. At Article 13(2), it provides: "Everyone has the right to leave any country, including his own, and *to return to his country*" (emphasis added). See also, Article 12, International Covenant on Civil and Political Rights and Article 12 African Charter on Human and Peoples Rights.

[120] For example, at Article 12(4), International Covenant on Civil and Political Rights (ICCPR) provides that "No one shall be arbitrarily deprived of the right to enter his own country".

[121] Article 12(2), African Charter on Human and Peoples Rights (Emphasis added) provides: "Every individual shall have the right to leave any country including his own and *to return to his* country" (emphasis added).

[122] Article 12(1)(b), Constitution of Kenya (2010).

[123] In *re application by Mwau*, 1985, lrC (Const) 444.

overturned in the 2007 case of *Deepak Chamanlal Kamani v. Principal Immigration Officer and 2 Others*[124] where the Court held that in "In Kenya the right of travel is an expressed constitutional right, and its existence does not have to depend on a prerogative, inference or any implied authority."[125] This latter position is now firmly and expressly enshrined under the 2010 Constitution.[126]

3.1.3 Benefits of Protection

The phrase 'benefits of protection' refers broadly to state duties that may be invoked by citizens in need. There are three common ways in which such benefits are recognised. The first comes in the form of protection - either absolute or qualified - against the extradition of citizens to foreign countries. The second involves the existence of state obligations to extend diplomatic protection to citizens detained overseas or injured by foreign states. The third involves the protection from threats or injury to person or property committed within the territory of the state. This latter benefit is, however, available to non-citizens alike and is as such not an intrinsic citizenship right.

Extradition is understood as the delivery of a person suspected or convicted of a crime, by the state where he has taken refuge or taken asylum, to the state that asserts jurisdiction over him. In the Kenyan context, the extradition protection is not absolute; meaning that citizens who have committed crimes in other countries can be delivered to the jurisdiction of those countries. However, there are stringent conditions for extradition set out under Rendition and Extradition (Contiguous and Foreign Countries) Act[127] or Extradition (Commonwealth Countries) Act[128] that must be met before a citizen can be extradited. These conditions include: (1) existence of formal extradition treaty between Kenya and the requesting state; (2) honour of the terms of the extradition treaty by the requesting state; (3) the crime should not be political or religious; (4) existence of prima facie evidence of criminal involvement; (6) speciality rule (the requesting state can only prosecute the person for the crime requested for and not otherwise); and (5) double criminality (the act must be an

[124] *Deepak Chamanlal Kamani v. Principal Immigration Officer and 2 Others* [2007] eKlr.

[125] *Deepak Chamanlal Kamani v. Principal Immigration Officer and 2 Others* [2007] eKlr. see also Mwaura P, "Passport is a right for every citizen, not a privilege" *The Nation,* Nairobi, 7 July 2007.

[126] Article 12(1)(b), Constitution of Kenya (2010) ("Every citizen is entitled to a Kenyan passport and to any document of registration and identification issued by the State to citizens").

[127] Rendition and Extradition (Contiguous and Foreign Countries) Act, Chapter 76 of the Laws of Kenya.

[128] Extradition (Commonwealth Countries) Act, Chapter 77 of the Laws of Kenya.

offence both in Kenya and the requesting state). These conditions are in line with international law principles on extradition and can only be determined by a court of law, meaning that extradition can only be executed pursuant to a court order.

Diplomatic protection is an international law concept, which describes the protection states accord to their nationals for injuries occasioned by foreign states.[129] The basis of this protection arises from the limited standing individuals have under international law and the responsibility of states to protect their citizens from injuries attributable to other sovereign states. As noted by the Permanent Court of International Justice (PCIJ) in the *Panevezys-Saldutiskis Railways* Case: "In taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on its behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law."[130] This protection is only available to citizens of the state exercising diplomatic protection.[131]

3.1.4 Political Benefits

The sovereign power of the state rests with the citizens. This power is exercisable either directly or through political representatives and is protected under the category of political rights, which is only enjoyed by citizens. As Rubenstein has rightly noted, "membership of the political community is… determined by citizenship status".[132] The political rights are made up of two main components: the right to vote and the right to be voted or to be appointed into the state/public office. These two rights connect the citizens with the sovereign (the state) by clothing the citizens with the power to determine those who are to exercise the state power over them and the right to present themselves for election or appointment to state offices. As such, the category of political rights provides perhaps the strongest indication of the existence of reciprocal rights and obligations that flow from citizenship.

The 2010 Constitution protects political rights of citizens in Kenya.[133] It enshrines the right of every citizen to make free political choices including the right

[129] See ILC adopted Draft Articles on Diplomatic Protection, at Art 1.

[130] *Panevezys-Saldutiskis Railways* Case PCIJ Reports, Series A/B No 76 (1939) 4 at 16.

[131] See *Panevezys-Saldutiskis Railways* Case PCIJ Reports, Series A/B No 76 (1939); *Liechtenstein v. Guatemala* ICJ Reports, 1955.

[132] Rubenstein K, "The Lottery of Citizenship: The Changing Significance of Birthplace, Territory and Residence to the Australian Membership Prize" 22(2) *Law in Context* (2004) 45.

[133] Article 38, Constitution of Kenya (2010).

to form, participate in, and campaign for political parties.[134] It also entitles every citizen to contest in a free, fair, and regular election to any elective state office or political party in which they belong.[135] It further protects the right of every citizen to be registered as a voter and the right to vote in a free and fair election.[136] The elections are to be conducted under the principle of universal suffrage where each vote has equal weight.

It is to be noted, however, that not every class of citizens can enjoy the political rights. Citizens below the age of majority are, for example, precluded from voting or being voted into an elective public office.[137] Similarly, persons who have been citizens for a period of less than 10 years (targeting citizenship acquired by registration or naturalisation) cannot contest in a parliamentary election.[138] This provision was litigated and upheld in *Esposito Franco v Independent Electoral Boundaries Commission & Another*.[139] Furthermore, persons holding dual citizenship are precluded from holding state office.[140] The Court of Appeal has interpreted this provision in the case of *Donald Kisaka Mwawasi v Attorney General & 2 Others*[141] to mean that "a dual citizen is eligible to stand for election (for elective state offices) but upon election he cannot hold office unless and until he voluntarily and officially renounces citizenship of the other country according to the law".[142] This decision overturned the High Court reasoning that limitation on dual citizenship disqualifies the holder from not only holding but also from contesting in an elective public office.[143] The limitation on dual citizenship does not, however, apply: (1) to judges and members of commissions; and (2) to "any person who has been made a citizen of another country by operation of that country's law, without ability to opt out".[144]

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[134] Article 38(1), Constitution of Kenya (2010).

[135] Article 38(2), Constitution of Kenya (2010).

[136] Article 38(3), Constitution of Kenya (2010).

[137] Article 83(1)(a), Constitution of Kenya (2010) read together with Art 99(1)(a), Constitution of Kenya (2010).

[138] Article 99(2), Constitution of Kenya (2010).

[139] *Esposito Franco v Independent Electoral Boundaries Commission & Another* Nairobi Petition No. 78 of 2012 (Unreported).

[140] Article 78(2), Constitution of Kenya (2010) ("A State officer or a member of the defence forces shall not hold dual citizenship"). The same limitation applies with regard to the presidency and deputy presidency. See Articles 137 & 138, Constitution of Kenya (2010).

[141] *Donald Kisaka Mwawasi v Attorney General & 2 Others* [2014] eKLR.

[142] *Donald* Kisaka Mwawasi v Attorney General & 2 Others [2014] eKLR para 14.

[143] *Donald Kisaka Mwawasi v Attorney General & 2 Others* [2013] eKLR para 24.

[144] Article 78(3), Constitution of Kenya (1963) (repealed).

It is also noteworthy that the 2010 Constitution limits the candidature for presidency to citizens by birth or citizens by descent.[145] It goes further to provide that a person is not qualified for nomination as presidential candidate if the person, among other things, "owes allegiance to a foreign state".[146] This means that in addition to being a citizen by birth or citizen at birth by descent, a prospective candidate for the presidency must also not hold dual citizenship, otherwise they will be disqualified from contesting for the presidency. A similar limitation is placed on the office of the vice-presidency.[147]

The fact that political rights do not apply to all categories of citizens might make one to question the capacity to describe political rights as 'citizenship rights'. However, these differentiations should only be seen as confirming that in the realm of political rights - as in other arenas - not all citizens are equal. The differentiations do not detract from the fact that political rights are rights of citizens. This position is affirmed by the express use of the word "citizen" with respect to these rights in the 2010 Constitution.[148] The Court in the case of *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others*[149] has also reiterated that these rights are not available to non-citizens.[150]

In addition to the traditional political rights, there are also other facilitative rights such as the right of access to information and the freedom of (expression, assembly, association, religion) which are necessary for the enjoyment of political rights. As noted by the Court in the *Famy Care Limited* case,[151] the right of access to information is 'essential for the purpose of organising a democratic state'.[152] Similarly the freedom of (expression, assembly, association, religion) has been identified as the hallmark of a democratic state by the courts.[153] The freedom of (expression, assembly, association, religion) is enjoyed by all individuals including

[145] Art 137, Constitution of Kenya (2010).

[146] Art 137(2), Constitution of Kenya (2010).

[147] Art 148, Constitution of Kenya (2010).

[148] See, for example, Art 38, Constitution of Kenya (2010).

[149] *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others* [2012] eKLR.

[150] *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others* [2012] eKLR para 24.

[151] *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others* [2012] eKLR.

[152] *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others* [2012] eKLR para 25.

[153] See, for example, *Dr. Christopher Ndarathi Murungaru vs. The Standard Limited & Others* Nairobi HCCC (Civil Division) No. 513 of 2011.

citizens and non-citizens.[154] However, the right of access to information is limited to citizens. The 2010 Constitution provides that '*Every citizen* has the right of access to: (a) information held by the State; and (b) information held by another person….'[155] In interpreting this provision the Court in the *Famy Care Limited* case affirmed that '[t]he clear intent manifested (in the use of "Every citizen") is that the right of access to information under Article 35(1) is limited by reference to citizen.'[156]

3.2. Burdens of Citizenship

The Citizenship and Immigration Act lists the responsibilities of a citizen as: to obey the laws of Kenya; owe full allegiance to Kenya and the Constitution; pay taxes; protect and conserve the environment and ensure sustainable use of natural resources; cooperate with the state to ensure enforcement of the law; respect and promote the dignity and rights of others; respect and promote national unity and peaceful co-existence; promote the values and principles prescribed in the constitution.[157] However, not all these obligation are uniquely held by citizens. For example, all persons within Kenya are bound to obey Kenyan law, and a lack of citizenship does not protect a person against being asked to cooperate in the enforcement of the law. Payment of taxes, conservation of environment, respecting the rights of others, and promoting national unity is also the duty of all persons within Kenya, including non-citizens.

Thus, with the exception of allegiance to state and constitution, citizenship imposes no additional societal burdens not also shouldered by noncitizen residents. However, though some of these duties are shared by non-citizens, partaking in all the burdens is important as it helps ensure that the nation has good governance and that citizens continue to enjoy their rights. Allegiance is of particular importance to the well-being of the nation state. It requires citizens to support and defend the values, principles and provisions of the Constitution against all enemies, foreign and domestic; and to bear true faith and obedience to the same in all their dealings within and outside the country. In defending the Constitution, the individual can act indirectly through the institutions established in the Constitution or

[154] Art 33, Constitution of Kenya (2010).

[155] Article 35(1), Constitution of Kenya (2010) (Emphasis mine).

[156] *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others* [2012] eKLR para 25.

[157] Section 23, Kenya Citizenship and Immigration Act (2012).

directly outside these institutions, depending on the direness of the offence on the Constitution. The intra-institutional defence would involve the invocation of the Court's jurisdiction or other constitutional mechanisms to challenge an offending action by the Sovereign or individuals. The extra-institutional defence is of last resort and can only be resorted to if the normal mechanisms set out for resolving disputes in the Constitution have ceased to operate or have been rendered inoperable. These actions are supported by the Constitution, which places the ultimate sovereign authority on the people of Kenya.[158]

To address the challenge to allegiance that is wrought by dual citizenship, the Immigration and Citizenship Act provides that a dual citizen shall owe allegiance to Kenya and be subject to the laws of Kenya.[159] In fact, the Act emphasizes that the duty of allegiance is the duty of every holder of Kenyan citizenship.[160] This new approach repeals the past practice where the challenge to allegiance was dealt with by requiring the dual citizen to opt for one or the other citizenship.[161]

4.0. Conclusion

The preceding analysis lends itself to mixed conclusions. Firstly, while most rights and benefits in the Kenyan Constitution are not made contingent upon citizenship, in the four categories examined in this chapter, the benefits of citizens are materially different from those of non-citizens. Arguably, this gives some credence to the assertion that citizenship assigns "full and formal" membership status to those who hold it. But secondly, while the unique categories of benefits and duties discussed are largely a preserve of citizens, the analysis reveals that the extent of enjoyment of the range of benefits and duties of citizenship (*de facto* citizenship) is not uniform and is determined by the bond that assigns citizenship to the individual. In this regard, the assertion that citizenship implies a singular identity with equal status among its holders is at best dubious in the Kenyan context. This study confirms that the extent of enjoyment of the range of benefits and duties of citizenship (*de facto* citizenship) is determined by classes of citizenship, some of which are better protected than others. These findings suggest that the image painted by the Preamble and Article 1 of the Constitution of Kenyan citizenship as

[158] See, for example, Article 1, Constitution of Kenya, (2010).
[159] Section 8(7), Kenya Immigration and Citizenship Act, (2012).
[160] Section 23, Kenyan Immigration and Citizenship Act, (2012).
[161] Article 97, Constitution of Kenya (1963) (repealed).

a gateway to full and equal community membership, may well be illusory, at least in legal terms.

In addition to the legal barriers to the equal enjoyment of *de facto* citizenship, it is to be noted that there are other extra-legal factors that would determine the extent of enjoyment of citizenship. For example, even though the constitution is now gender neutral on the acquisition of citizenship and enjoyment of the rights and benefits that accrue to citizenship, in a largely patrilineal society like Kenya, it is not uncommon to find women still facing social barriers in accessing the benefits of citizenship. A case in point is *Mary Mwaki Masinde v County Government of Vihiga & Another*,[162] where a woman married to a man from another county was denied a chance to represent her people in her county of birth on the basis of her new marital status. Even though the Court overturned the decision of the county assembly, the case is illustrative of the social discrimination many women go through in attempting to access the benefits of their citizenship, despite the formal equality enacted in the law.

Studies have also revealed that the process of acquiring identity cards that enable citizens to access the benefits of citizenships have been mired by corruption and ethnic profiling thereby denying many *de jure* citizens their rightful share of membership to the Kenyan community.[163] The ethnic profiling obstacle to the acquisition of benefits of citizenship was litigated before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on behalf of Nubian children in Kenya in the case of *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative v Government of Kenya*,[164] where the ACERWC concluded that such practice was rampant in Kenya with respect to the Nubian community thereby denying the Nubian children the right to nationality protected under the African Charter on the Rights and Welfare of the Child.[165]

Uneven distribution of resources is another factor that would restrict the capacity of the marginalised to fully exercise their rights and duties of citizenship. As rightly noted by Graeme Gill in the context of democratic rights, '[t]he poor,

[162] *Mary Mwaki Masinde v County Government of Vihiga & another* (2015) eKLR.

[163] See, for example, Kenya National Commission on Human Rights and United Nations Commission on Refugees, *Out of the Shadows: Towards Ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya,* Kenya National Commission on Human Rights, 2010.

[164] *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative v Government of Kenya* Communication Number com/002/2009.

[165] *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative v Government of Kenya* Communication Number com/002/2009, para 36 – 54 (citing Article 6 of the African Charter on the Rights and Welfare of the Child).

totally preoccupied with the task of survival, neither become members of a civil society nor citizens, though formally they enjoy membership of both spheres.'[166] While this chapter was limited to analysing the legal framework in Kenya, the illustrated factors point to the need to also consider the extra-legal framework in order to fully answer the question whether the Kenyan citizenship guarantees the holders the universality of identity and equality of status envisaged in the idea of citizenship. However, even in its limited analysis, this chapter reveals that citizenship in Kenya, though assigning "full and formal" membership status to those who hold it, does not legally guarantee equality of status among its holders. More thus still need to be done both in the law and practice to guarantee the aspirations of equality of status of citizenship in Kenya.

[166] Gill G, *The Dynamics of Democratization: Elites, Civil Society and the Transition Process,* New York, MacMillan, 2000, 67.