KABARAK JOURNAL OF LAW AND ETHICS

KABARAK JOURNAL OF LAW AND ETHICS

Volume 6 (2022)

KABARAK
UNIVERSITY PRESS
publishing excellence · academic rigour · biblical perspective

Editorial Board

Sam Ngure – Editor-in-Chief
Sandra Soi
Joseph Agutu Omolo
Jentrix Wanyama
Humphrey Sipalla

Graduate editorial assistants

Samson Muchiri Amboka
Sharon Amwama
Sidney Tambasi
Arnold Nciko wa Nciko

Student editorial assistants

Grace Jelimo Kipkulei
Hilda Chebet
Laureen Mukami Nyamu
Brenda Nakope
Lorraine Chemutai Koskei

Typesetting and artwork

John Agutu,
Email: agutujo@gmail.com

ISSN 2707-1596
eISSN 2789-9187

Printed in Nairobi

Contents

Publisher's Note vii

Foreword xi

Editorial xiii

A critique of the Supreme Court's pronouncements on international law and the right to housing in Kenya in *Mitu-Bell Welfare Society*

Ian Mwiti Mathenge 1

Setting the record straight in socio-economic rights adjudication: The *Mitu-Bell Welfare Society* Supreme Court of Kenya judgment

Victoria Miyandazi 33

Mitu-Bell Welfare Society redux: A note on the strengths and weaknesses of the Supreme Court judgement

Maurice Oduor 57

Between universalism and cultural relativism: The dilemma of consent to female genital mutilation in the *Tatu Kamau case*

Caroline Omari Lichuma 67

The duty to give reasons under Kenya's Fair Administrative Action Act, 2015 in Kenya: Seven years later

Seth Wekesa and Nelson Otieno 99

The normative and constitutional requirements of contractual transparency: Reflections on Kenya's infrastructure projects with China and the United States of America

Khalil Badbess and Cecil Abungu 123

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

Walter Khobe Ochieng 159

CASENOTES; BOOK REVIEW; SPEECH

Accommodation as an expression of the right to equality: A case note on *Fugicha v Methodist Church of Kenya*

Samuel Ngure.. 189

Update on Kenya's implementation of the decision in the *Nubian minor's* case

Julie Ingrid Lugulu... 205

Book Review: *The struggle for land and justice in Kenya* by Ambreena Manji

Joseph Agutu Omolo 217

Keynote address by Hon Justice Martha Koome, EGH, Chief Justice and President of the Supreme Court of Kenya, during the launch of Attorney General Emeritus, Prof Githu Muigai's book, *Power, politics & law: Dynamics of constitutional change in Kenya, 1887-2022* 15th July 2022 223

Publisher's Note

It is a great blessing and privilege to write this introductory note.

It comes as we complete our first year of the existence. Kabarak University Press was established on 1 September 2021 by the Vice Chancellor of Kabarak University, Prof Henry Kiplangat. It has been a few months of intense activity and we are deeply thankful for God's favour on our endeavours.

We are a new and rather unwieldy creature for the university set-up; indeed any university press is a strange and unwieldy creature.

Yes, this sounds counter-intuitive, but as I will demonstrate in my reflections here, the counter-intuitive is to be welcomed for its insights.

The term 'university press' is beguiling, as there is very little in a university press that prepares it to 'naturally' fit in the university. A university press is at once, an academic department and an income-generating project. Its heart is deeply and irrevocably imbedded in the epistemic community that is the university; imbued, soaked and irretrievably riveted to scholarly discourses, abstractions, painful hair splitting academics. Its heart rests in epistemic meadows where silence and reflection provide the ambience for insight, introspection, theorisation, rigorous research and writing, and ultimately, new knowledge production. Scholarship, like hunting, abhors noise. Like hunting, it is attracted to the comforting chill of the late night and early morn, and even though amenable to group work, is fundamentally personal, individual, almost lonely. Scholarship, like hunting, is subliminal. It is the twilight where, I believe, the individual accesses a glimpse, however fleeting, or their *imago Dei*. Sublime.

Yet, a university press is also very much a part of the busy, restless, cantankerous business world. We must sell books. So we must produce 'sellable' books. Imprests. Invoices. Quotations. Local Purchases Orders. Memos. Business Plans. Delivery Notes. Value added – or is it deducted – taxes. Taxes. Royalties. Contracts. Arbitrations. More record keeping. Agh!

Business is like hunting. The coarse shavings and teeth-irritating shrills of spear sharpening, the bloody and fecal-filled evisceration of felled prey, the discarding of useless body parts. The university press must be precise in its mechanistic alter-ego tasks, ruthless in its selection, and brutally efficient in this customer obsessed, patience bereft world.

So while the name suggests an organisational creature that easily fits in its milieu, the university press is at best a duck-billed platypus – egg laying, nipple-less mammals! The university press is at its core, counter-intuitive. It should not, by logic, exist.

Yet, a university press cannot possibly *not* exist. As an academic department, it teaches, but its classes are borderless, boundless, global. It educates future generations, lays the foundations for future thought, records past insights, orders present theorisation. Its produce is eminently scholarly. Instructional. In fact, should any weight be accorded the reflections of Professor Justice Willy Mutunga in his inaugural lecture – incidentally, this was the first publication of Kabarak University Press – where he wonders loudly how to create and maintain a transformative pedagogical tradition, then the university press, by sheer design, is the one truly interdisciplinary academic department a university *can* have. Other departments may have trans-disciplinary activities, like teaching company law to Bachelor of Commerce students, or traditional performance artists critiquing the lack of legal framework for acknowledging collectively generated traditional art. But interdisciplinary. It would seem that the natural home is the university press, which must at once, serve each disciplinary self-interest, yet unite the sciences.

Yet again, a university press is political. In its gate keeping function, any editorial institution, from daily newspaper to biannual schol-

arly journal, selects, distinguishes and affirms. Elsewhere, I have, along the lines of the Mamdanian critique of neo-liberalism in higher education in East Africa, wondered how the university can survive, not the business efficiency of extreme capitalism that neo-liberalism brings, but the breakdown of social structures within the epistemic community that neo-liberalism harkens.

I hasten to clarify. The counter-intuition here is in that, at once, the university press gatekeeps as a necessary function of editorial rigour, but also exists in a socio-political reality that defines the contours of its action, including indicating the horizons that cannot be breached. It is therefore both a mover and accident of the political. But this should not surprise us. Politics – the regulation of human affairs – logically covers all human affairs. Its just conduct, therefore, is the aim of the progressive social actor, as a university press ought be.

I repeat, the term 'university press' is beguiling. Oxymoronic. It suggests a natural component of an institution of higher education. And in fact, because a few of these have become so ubiquitous, familiarity has bred contempt for its complexity, has obscured the inherent peculiarity of such an institution. It is aimed at selling, in discrete components, what is actually sublime, abstract. We sell components, packages of knowledge. And we teach without classes or exams. We are profit-making, selling what ought be a public good. A university press is at best, a duck-billed platypus.

But if done well, its products are the repository of a society's collective culture, it is itself the custodian of late night lonely labours and deeply harboured dreams of individual scholars.

It is to consummate intellectuals like the authors of the articles published in the sixth volume of the *Kabarak Journal of Law and Ethics* that a university press relies on to find meaning in inherent incongruity. Such intellectuals, who show us that the continuing duty of an intellectual is to teach, to nurture thought, to stir insightful controversy, to advance human development, to celebrate justice.

And so it is with such unwieldy words that this duck billed platypus is nurtured into its first year. God's favour has seen us inaugurate

excellent publications in our first year. I would be remiss if I failed to thank the two professors of law, Willy Mutunga and Githu Muigai who first trusted Kabarak University Press with their intellectual labours: Prof Mutunga with his Inaugural lecture – published as an occasional paper, and Prof Muigai with our first book length publication, his magnum opus, *Power, politics and law: Dynamics of constitutional change in Kenya, 1887-2022*.

God's favour has also seen it that we join and participate in the story of one of Kenya's longest running extant law periodicals, the *Kabarak Journal of Law and Ethics,* which began in 2014 and is now in its sixth volume. I thank the *KJLE* Editorial Board, and its Editor-in-Chief, Samuel Ngure, and the Dean of Law at Kabarak, Prof J Osogo Ambani, for letting us into this journey, in welcoming and embracing this partnership.

A scholarly press has a unique duty to facilitate the preservation of scholarly periodicals and we take this duty with great commitment and passion to academic rigour. We look forward to cementing the legacy of *KJLE* as repository of vibrant legal debate on the hottest legal questions of the day in our jurisdiction.

I hope you truly enjoy this issue and the many more to come!

Allow me to end with the words of President Milton Obote from a speech delivered at the Makerere Arts Festival, November 1968

> … it is not often realised that with regard to the achievement of, for instance, a statesman and those of a man of letters, it is the works of the latter which are remembered and preserved for generations. A study of history shows most clearly that between statesmen and men of letters, it is the latter, once more, who have always won unquestioning recognition for generations… As is often said, there is no exact measure of the greatness of a statesman. But a man of arts – be he a poet, dramatist, composer, painter or sculptor – is judged in the main by definite and specific achievements: achievements over ignorance and prejudice, and in the fields of joy and enlightenment which he brought to the consciousness of generations…

I salute here the men and women of letters that we so far have and aim to publish in the future!

Humphrey Sipalla
Editor-in-Chief, Kabarak University Press
Kabarak, September 2022

Foreword

We still do not have a 'book of records' for law journals in Kenya. Had such a record existed, the *Kabarak Journal of Law and Ethics (KJLE)* would have entered its pages as the first such periodical in recent memory in Kenya to run six issues and remain strong. Therefore, the basic fact of publishing the sixth issue of KJLE should be celebrated – even without more.

But there is more! We have rebranded the KJLE. We have invested much more rigour in the editorial processes, and enhanced its aesthetics. Our peer reviews and edits have gotten tougher and the design of the product itself softer. KJLE is now clad in a more captivating cover while the inside pages read like companions. It is friendlier I tell you!

Even more, Volume 6 comes at a time when the newly established Kabarak University Press (KABU Press) is taking its rightful place in our University and probably in the East African region, being the only university press still afloat. In this sense, Volume 6 is the first fruit of the fresh union between KJLE and its new publisher, KABU Press, and deserves some attention.

I am not celebrating KJLE for nothing. I do so because my School (and University) stands for cutting edge research and its dissemination, and collaborations with members of the epistemic community. KJLE represents all these just by opening itself up to all academics writing on its areas of focus, and also by availing itself to all and sundry as an open source journal. It is a typical case of academic ubuntu.

KJLE hits many birds in our radar quite literally. Which is why I am grateful to Sam Ngure, Editor-in-Chief, KJLE and his colleagues at the

Editorial Board and Humphrey Sipalla, Editor-in-Chief, KUP, for being excellent 'gynaes' responsible for the rebirth of the rigorous but beautiful Volume 6 before our eyes; all the authors and peer reviewers for gifting us with knowledge, and Prof Henry Kiplangat (our Vice Chancellor) for setting up KABU Press and providing a conducive environment for academic work. *Pamoja*.

J Osogo Ambani,
Associate Professor of Public Law, and
Dean, Kabarak Law School
September 2022

Editorial

A man's life from birth to death was a series of transition rites which brought him nearer and nearer to his ancestors. Chinua Achebe, *Things fall apart*

The editorial team of the *Kabarak Journal of Law and Ethics* is pleased to usher in our latest issue. Volume 6 of the KJLE was due in December 2021. And as the world was rocking under the uncertainty of a pandemic, the editorial team was itself experiencing transition in the strangest of times. A new editorial team was appointed in 2021, with the immediate former editorial team taking up the reigns in the sister periodicals at Kabarak Law School, *African Journal of Commercial Law* (AJCL) (JA Omolo) and the *East African Community Law Journal* (Edmond Shikoli).

A further welcome change was happening in the substratum – Kabarak University Press has become the home of the Kabarak law journals, under the hawkish and tenacious gaze of Humphrey Sipalla. All these changes led to teething problems, and this was exacerbated by the strange working conditions that lockdowns and physical separation brought.

The one thing that has not been affected is the appetite for scholarship that the KJLE arouses. When the call for papers was issued in mid-2021, submissions poured in. This issue contains the most excellent submissions received, reflecting the place of law in turbulent times.

As the tempestuous winds hawed and hemmed outside, a venerable team kept the ship aright. It is this editorial team that has led to the safe arrival of this edition of the journal. Our reviewers – the familiar and seasoned Lucianna Thuo, JA Omolo, Edmond Shikoli, Ra-

hab Wakuraya, Ronald Ong'udi, Jared Gekombe, Ruth Juliet Gachanja amongst many other friends were our anchors and our ports of first call. And yet, many more answered the call to assist to bring the ship to berth. Aderomola Adeola, Edmund Foley, Maxwell Miyawa, Roseline Njogu, Smith Ouma, Augustus Mutemi Mbila amongst others enabled us to achieve our standard of having every article double blind peer reviewed twice. A fantastic team of editorial assistants, including Sharon Amwama, Sidney Tambasi, Arnold Nciko and Samson Muchiri, enabled us to copy edit and experiment on a new citation standard that should form the basis for easily readable scholarship in future volumes: the new Kabarak Legal Citation (KALCI) Guide. To this veritably steadfast team, we owe a debt of gratitude.

The articles in this issue are sterling, and embody the theme of the law in times of turbulence. In the established tradition of the *KJLE*, we begin with a debate. Here, we see how the law can cause turbulence in society – forcing society out of inertia. *Is the law the stirring of the winds of change?* The guilty provision here is Article 43 of the Constitution that introduces justiciable socioeconomic rights to water, health and notably housing. The Supreme Court of Kenya decision in the *Mitu-Bell* case sets the stage for debate. A case in which the Supreme Court deals with the rights of the wretched of the earth – the landless, and the Constitution's attempt at substantive dignity through the provisions of social safety nets.

Ian Mwiti issues a sound and in-depth investigation of how, while seeking to enforce the justiciable right, a court can inadvertently muddle another area of law. His article, a must read, provides an invaluable investigation of the application of the international law in Kenya under Article 2(5) and (6) of the Constitution. He asks two central questions reflecting his expertise in the area: first, in a question that he finds the Supreme Court fell woefully short of answering: are there 'general rules of international law'– a phraseology introduced Article 2(5) of the Constitution, or should we be referring to international law including 'general principles of law recognised by civilised nations?' This may seem to be an innocuous question, but the author shows his mettle in expos-

ing a weighty question that if mishandled would lead to a haphazard choice of which international laws apply under the article. Secondly, he conducts a masterful examination of how courts have grappled with the hierarchy of laws under Article 2 of the Constitution, and the lack of consistency thereof. He suggests that the *Mitu-Bell* decision, while attempting to investigate the import of international instruments in interpreting Article 43 of the Constitution, did not provide any clarity to this question.

Victoria Miyandazi is the Supreme Court's knight in shining armour. Her article highlights the saving grace of the Supreme Court's recognition of the rights to housing of landless persons. She shows how, after the Court of Appeal decisions in *Sartrose Ayuma* and *Mitu-Bell*, Article 43 was on life support. The Court of Appeal had so enfeebled the obligations of the government to respect, uphold, protect, and provide for socioeconomic rights as to make the provisions ineffectual. The author's investigation of the jurisprudence of the Supreme Court in this area gives hope that the aspirational language of Article 43 can give rise to justiciable rights to development of the poorest and most vulnerable parts of society.

Maurice Oduor provides a *redux*. He balances the arguments in the two preceding articles. His article provides a guide, and a useful summary of the potential and pitfalls of the *Mitu-Bell* judgment. In what direction do his scales fall? What value will *Mitu-Bell* hold for the future – will it be a trailblazer, or will it be irrelevant?

Caroline Lichuma rounds out the theme of law as the instrument that stirs the winds of change. Here, she investigates the collision that transformational law has with the cultural rocks of ages. She picks a particularly thorny arena – female genital mutilation (FGM) and the ability of an adult to consent to a cultural rite that has been condemned by the law. Here, she explores the themes of universalism and cultural relativism. How far can law with arguably Eurocentric origins be used to defeat African cultural rites? Is law the new arena of neocolonialism? Even more surprising, a very strong feminist debate arises here. Is 'liberating' law paternalistic, denying women their agency?

The deftness with which the author grapples with these questions is laudable.

From here, the theme of Volume 6 changes – we begin to look at *law as an anchor in turbulent times*. Can the law keep the ship steady when all about is tumult?

Seth Wekesa and Nelson Otieno are the calm before the storm. They explore Article 47 of the Constitution of Kenya, providing for the right to fair administrative action and the concomitant Fair Administration Action Act (FAAA). They explore the provisions of this Act, and the duties that arise thereof. Their article sets the stage for the next two articles.

Khalil Badbess and Cecil Abungu explore whether contracts for mega infrastructure projects are fairly administered. This is especially in view of the need for transparency as constitutional imprimatur. Their study is quite eye opening and novel in legal scholarship in Kenya. They explore the right to access to information under Article 35 in what may be a groundbreaking introduction of the 2010 Constitution – the administration of public funds. The authors choice of infrastructure project here is deliberate and enlightening – they explore the opaqueness of information in projects that cost most to the taxpayer – the Standard Gauge Railway (SGR) Project and one of the biggest road projects in Kenya (the Mombasa-Nairobi Highway Expansion). Another aspect that makes their article delectable is the fact that the contracts that buttress these projects involve government agencies doing business through private companies with great incentives to maximise profit in the construction of a public good.

Walter Khobe provides us with an important exploration of the courts' jurisprudence during the COVID-19 pandemic. Again, like all other authors, his topic choice is quintessential – horizontal application of constitutional rights in the arena of private contracts. Can courts interfere with the freedom of contracting to obligate private parties to provide constitutional rights? Some serendipity arises here: like the anchoring debate on *Mitu-Bell*, the cases explored by the author concern Article 43 rights – specifically the socioeconomic right to education. When a

pandemic strikes, can courts interfere with private bargains under the guise of enforcement of fundamental rights? Can private individuals be obligated to provide for socioeconomic rights?

Volume 6 of the *KJLE* is rounded out with three update pieces – two case notes and a book review. The first case note explores the introduction of accommodation as an obligation to the provision of the protection from discrimination under Article 27 of the Constitution of Kenya. The second deals with marginalisation of groups through the denial of citizenship and documents of citizenship – an abrogation of Article 27. The review of Ambreena Manji's book *The struggle for land and justice in Kenya* looks at the success or otherwise of the attempt to constitutionalise land justice reforms under Chapter 5 of the Constitution.

It is our hope as the editorial team that Volume 6 of the *KJLE* will herald an important step in the journey of the *KJLE* – one that will cement the *KJLE* as the premier legal journal in Kenya. We stand on the shoulders of giants – our founding editors Elisha Ongoya and Lucianna Thuo, and supported by an eminent editorial advisory board. Under the auspices of the Kabarak University Press, we can say no more: onwards and upwards!

Samuel Ngure Ndung'u
Editor-in-Chief, Kabarak Journal of Law and Ethics
Kabarak, September 2022

A critique of the Supreme Court's pronouncements on international law and the right to housing in Kenya in *Mitu-Bell Welfare Society*

Ian Mwiti Mathenge*

Abstract

Kenyan courts have long grappled with questions surrounding the place of international law in the legal landscape particularly after the promulgation of the 2010 Constitution. Moreover, socio-economic realities have created conditions such as poor and inadequate housing for portions of society, a significant number resultantly having to reside in informal settlements all over the country. Unregulated demolitions of these settlements have left thousands of these already precarious slum dwellers homeless and destitute. In light of these issues, the case of Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae) *was expected to bring about clarity on the application of international law to issues such as human rights, as well as provide a definitive interpretation of the right to housing that would help mitigate injustices in this area. This paper analyses the Supreme Court of Kenya's decision in* Mitu-Bell Welfare Society, *canvassing how the court addressed the applicability of international law and the interpretation of the right to housing.*

Keywords: Mitu-Bell Welfare Society, monism, dualism, adequate housing, human rights, Supreme Court of Kenya, international law

---

* LLB (Catholic University of East Africa); PGDL (Kenya School of Law); LLM (University of Pretoria); LLM (Harvard Law School).

1. Introduction

It was expected to be Kenya's *Irene Grootboom case* both on jurisprudence and significance in society. However, the Supreme Court squandered the opportunity to address the perverse social injustice prevalent in Kenya. In the wake of the senseless demolition of houses in slums,[1] the Supreme Court was given a chance to say what it thinks the right to housing means. In a lukewarm decision, the Supreme Court failed to play its part sufficiently in defining the right to adequate housing. When asked about the applicability of international law in Kenya, the Supreme Court got it wrong, leaving the country in a state of judicial heresy.

Admittedly, it would be disingenuous for this piece to argue that applications of international law and economic, social, and cultural rights are easy issues to navigate.[2] Even the most acclaimed economic, social, and cultural rights courts have had lapse moments.[3] However, the *Mitu-Bell decision* has been celebrated in some quotas as a correct decision,[4] which this piece highly contests by terming some aspects of the decision as constitutional heresy. The basic argument is that the Supreme Court failed to seize the moment and interpret the Constitution. Had the Court interpreted the Constitution, several themes would have emerged, especially Kenya's approach to economic, social, and cultural rights. There is a tendency of the courts to jump the interpretation stage to the application as if the interpretive question is settled. This piece calls the attention of the Court to the interpretive questions and asks it to boldly express its 'voice' by seriously thinking about the Constitution.

---

1 Ella Duncan, 'Justifying and resisting evictions in Kenya: The discourse of demolition during a pandemic', World Peace Foundation, 21 September 2020.

2 David Bilchitz, 'Giving socio-economic rights teeth: The minimum core and its importance' 3 *South African Law Journal* (2002) 484-501.

3 Paul O'Connell, 'The death of socio-economic rights' 74(4) *Modern Law Review* (2011) 532-554.

4 Emily Kinama, 'Mitu-Bell Welfare Society case: Landmark judgment by Supreme Court' *The Star* 30 January 2021. Also see KELIN KENYA, 'Mitu-Bell Welfare Society Supreme Court decision recognises structural remedies as a means of human rights protection in Petition No 3 of 2018 (decision delivered on 11 January 2021)', 13 January 2021.

This paper reviews the Supreme Court's approach to interpreting the right to housing, and to international law in Kenya. Courts below the Supreme Court have struggled with locating the place of international law and interpretation of economic, social, and cultural rights, and it was expected that the apex court would clear the air by providing a well-reasoned direction. Admittedly, the Supreme Court was correct on the issue of structural interdicts and in setting aside some problematic Court of Appeal findings on defining the general principles of international law. Although the major purpose of this paper is to critique the Supreme Court decision, it makes several normative arguments that have not been previously explored.

In the first part, this piece considers the question of the hierarchy of international law and goes on to propose an approach it calls 'constitutional anchor and value-based approach'. Second, this piece addresses the suggestion that international law applies to fill a gap when there is no domestic law. It also deals with the monism and dualism debate and the definition of 'general rules of international law'. This article argues that the Kenyan Constitution differs from South Africa and other transformative constitutions in dealing with economic, social, and cultural rights. Instead, it contends that Kenya adopted a 'rights priority approach', which shifts the focus from minimum essentials of rights to the maximum levels based on available resources.

The paper argues that this constitutional metamorphosis is not merely rhetorical, but it introduces a game-changer in economic, social, and cultural rights. The third part deals with the finding that the right to housing accrues by being a citizen of Kenya. It also discusses the failure of the Supreme Court to take an approach that gives the right to housing material content and the failure to interpret the meaning of the right to accessible and adequate housing. Additionally, it discusses the finding that 'illegal' occupation of the private land cannot create prescriptive rights. Also, it canvasses the proposition that the right to shelter over public land crystallised by a long period of occupation by people who established homes and raised families. Lastly, the paper deals with the prayers granted by the Supreme Court.

2. Erroneous findings on international law

2.1 Ranking of international law below statutes and final judicial pronouncements

The Supreme Court found that international law is applicable when it is relevant and not in conflict with the Constitution, statutes, or a final judicial pronouncement. While the Supreme Court's finding sounds correct, it has several problems.[5] The Court was wrong in creating a hierarchy of laws where international law falls below statutes and final judicial pronouncement.[6] First, this categorisation was made without explanation of how the Court arrived at this hierarchy of laws. For instance, one cannot establish why statutes and judicial opinions supersede international law.

The question of which law is superior between municipal and international law is best answered from two points of view: the international plane, and the domestic plane.[7] At the international level, domestic law is not a source of law.[8] It is viewed as facts to either establish customary international law or general principles of law.[9] This position has been captured in Articles 27 and 46 of the Vienna Convention on the Law of Treaties and Article 2 of the International Law Commission's (ILC) Draft Articles on State Responsibility. Andre Nollkaemper argues that the efficacy of international law would be undermined if domestic law supersedes it. The author goes on to summarise the position of international law in the following words:

---

5 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)* Petition 3 of 2018, Judgement of the Supreme Court of 11 January 2021, eKLR, para 132.

6 Nicholas Wasonga, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' 13(2) *African Human Rights Law Journal* (2013) 420.

7 Gheorghe Popescu and Anca Mihaela Barbu, 'Relationship between international law and domestic law' 2 *Public Security Studies* (2013) 233.

8 Peter Malanczuk and Michael Barton, *Akehurst's modern introduction to international law* Routledge, 1997, 64.

9 Luljeta Kodra, 'The relationship between international law and national law' 6 *Global Journal of Politics and Law Research* (2017) 1-11.

> In general terms, the principle of supremacy of international law seeks to subordinate the sovereignty of states to international law. One of its specific manifestations is that international law is supreme over and takes precedence in the international legal over national law. In the event of a conflict between international law and domestic law, international law will have to prevail in the international legal order, domestic law being considered a fact from the standpoint of international law. This aspect is at the heart of the law of treaties and the law of international responsibility.[10]

The place of international law in the domestic legal system is wholly dependent on the municipal legal system.[11] However, one theme largely dominates the discourse by holding that domestic law expresses the sovereignty of the state.[12] As such, international law cannot supersede the entire domestic legal system. Therefore, the place of the constitution in most legal systems is uncontroversial because they are usually the founding documents.[13] This is ordinarily the case where there is a written constitution. The constitution, therefore, becomes the supreme law, and all other laws, including international law, flow from that stature of the constitution. This position arises from Kelsen's theory of the grundnorm as the basis of the entirely legal system.[14] However, the Dutch Constitution is an exception to the supremacy of the Constitution over international law.[15] The Dutch Constitution provides that international law binds all persons and is supreme to domestic law, including the Constitution.[16] This position has presented some problems which this piece does not intend to delve into.

---

10 Andre Nollkaemper, 'Rethinking the supremacy of international law' Amsterdam Center for International Law Working Paper, 2009. < http://dx.doi.org/10.2139/ssrn.1336946> on 22 February 2021.

11 Malanczuk and Akehurst, *Akehurst's modern introduction to international law* 65.

12 William W Burke-White and Anne-Marie Slaughter, 'The future of international law is domestic' *Harvard International Law Journal* (2006) 323.

13 Anne Peters, 'Supremacy lost: International law meets domestic constitutional law' 3 *Vienna Online Journal on International Constitutional Law* (2009) 170.

14 Kwamena Ahwoi, 'Kelsen, the grundnorm and the 1979 Constitution' 15 *University of Ghana Law Journal* (1978) 139.

15 Joseph Fleuren, 'The application of public international law by Dutch courts' 2 *Netherlands International Law Review* (2010) 245-266.

16 Jonkheer HF van Panhuys, 'The Netherlands Constitution and international law' 47 *American Journal of International Law* (1953) 537.

The tussle arises whenever international law is pitted against statutes, judicial opinions, regulations, and common law. This struggle is always compounded by the failure of most constitutions to provide for a hierarchy of laws between international law and other domestic laws. In Kenya, the High Court has struggled with this question of the hierarchy of laws since the inception of the Constitution without much coherence. In the *Re The Matter of Zipporah Wambui Mathara*[17] Lady Justice Koome (as she then was) was of the view that the International Covenant on Civil and Political Rights (ICCPR), which prohibits committal to civil jail, supersedes the Civil Procedure Act, which allows for execution through civil jail. In *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa,*[18] Justice Njagi argued that treaties rank together with statutes. In *Beatrice Wanjiku & another v Attorney General & another,*[19] Majanja J was not too clear on what is the status of international treaties as against statutes. At some point, he found that the Constitution did not intend international treaties to be superior to local legislation.[20] Later he held that the Constitution does not create any hierarchy of laws.[21] The judge held that the question of applicability of international law should be determined by the nature of the subject matter of the case and whether there is legislation on the issue.[22] At the end of Justice Majanja's decision, there is more confusion than clarity.

Despite the confusion on the ranking between international law and statutes, the Supreme Court in *Mitu-Bell* failed to provide a reasoned decision to settle this issue. It opted for an easy way out of concluding without much engagement on the subject. In a contentious issue such as the ranking between international and domestic law, the Supreme Court had a duty to make a reasoned decision. Therefore, the Court

17 *Re The Matter of Zipporah Wambui Mathara*, Bankruptcy Cause 19 of 2010, Ruling of the High Court at Nairobi (2010) eKLR.

18 *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa,* Civil Case No 70 of 2002, Ruling of the High Court at Nairobi (2010) eKLR.

19 *Beatrice Wanjiku & another v Attorney General & another*, Petition No 190 of 2011, Judgement of the High Court at Nairobi (2012) eKLR.

20 *Beatrice Wanjiku & another v Attorney General & another*, para 20.

21 *Beatrice Wanjiku & another v Attorney General & another*, para 21.

22 *Beatrice Wanjiku & another v Attorney General & another*, para 23.

left the question of the hierarchy of laws to an outdated Judicature Act, which does not take into account the constitutional provisions.

Second, the Constitution only indicates that international law forms part of the law of Kenya *under this Constitution*.[23] The phrase under this Constitution has two meanings: first, that international law is part of the law of Kenya as regulated by the Constitution, and second, that international law is subordinate to the Constitution.[24] Neither of the two meanings accords with the hierarchy that the Supreme Court created.

At first, this piece was at pains to understand the origin or rationale of the phrase 'as long as it is not inconsistent with enacted statutes and finally declared decisions of courts and tribunals' until it came across the exact phrase in the Supreme Court citation of *Chung Chi Cheung v The King*,[25] a court decision from the United Kingdom. Even more revealing, the Supreme Court underlined the above quotation and put in parenthesis 'emphasis added'.[26] Clearly, the categorisation was borrowed hook, line, and sinker from the UK case.

Although it is acceptable for courts to borrow phrases from foreign court decisions, it is unacceptable to borrow a hierarchy of laws from other jurisdictions, especially from an irrelevant jurisdiction on international law. Unlike Kenya, the UK is the outlier because of the doctrine of the sovereignty of parliament, which translates to the superiority of statutes.[27] The hierarchy of laws should originate from hard municipal laws such as the Constitution and statutes. Kenya's Constitution does not specify which one is superior between statutes and international law.[28] Instead, it gives leeway for judges to read all laws holistically. In case of conflict, the solution is to refer to the principles in the Constitution and examine which between statutes and international law will

23 Constitution of Kenya (2010), Article 2(5), (6).

24 *Beatrice Wanjiku & another v Attorney General & another*, para 20.

25 *Chung Chi Cheung v The King* (1939) AC, 160.

26 *Mitu-Bell Welfare Society v Kenya Airports Authority,* Supreme Court, para 129.

27 Mark Elliott, 'United Kingdom: Parliamentary sovereignty under pressure' 2 *International Journal of Constitutional Law* (2004) 552.

28 *Beatrice Wanjiku & another v Attorney General & another*, para 21.

advance the constitutional principles in Article 10 and other parts of the Constitution.

2.2 Constitutional anchor and value-based approach: The solution to the question of the ranking between international law and domestic law

It is generally accepted that the Constitution of Kenya is a value-oriented document.[29] Even sceptics of the value-laden approach contest the legitimacy of values, not existence.[30] It is these values and principles that are supposed to form the bedrock of the society that the Constitution envisions.[31] The entire Constitution is obsessed with values.

This piece contends that where a question of what is superior between a statute and international law arises, the answer should be on what advances the values and provisions of the Constitution the most.[32] The Constitution is the reference point and the anchor in settling the question of the hierarchy. The methodology of reaching the correct decision has two parts. First is the constitutional provision that directly deals with the issue at hand, if any.[33] In case there is no such provision, the second consideration below would suffice. Second, the content and function of relevant values and principles in the Constitution.[34] This second analysis encompasses examining the value stated under Article 10 of the Constitution to determine whether upholding either treaty or statute will advance the Constitution. There are three arguments to support this approach of the constitutional anchor.

[29] *Pharmaceutical Society of Kenya v National Assembly & 3 others,* Judgement of the High Court at Nairobi (2017) eKLR 96.

[30] Kenyatta University, 'Annual public debate on national values and principles of governance', 25 March 2021, <https://www.youtube.com/watch?v=WePwf40qIuY >.

[31] Jiri Přibáň, 'Constitutional values as the normalisation of societal power: From a moral transvaluation to a systemic self-valuation' 11 *Hague Journal on the Rule of Law* (2019) 451-459.

[32] Constitution of Kenya (2010), Article 10(1)(b).

[33] Walter Murphy, 'Constitutional interpretation: Text, values, and processes' in John Hart Ely, *Reviews in American history*, The John Hopkins University Press, 1981, 8.

[34] Murphy 'Constitutional interpretation: text, values, and processes' 10.

First, when it comes to treaties, the wording of Article 2(6) of the Constitution demonstrates a relationship between the Constitution and treaties.[35] Article 2(6) of the Constitution provides that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya *under this Constitution'* (emphasis mine). 'Under this Constitution', as used in Article 2(6) of the Constitution, signifies a relationship between the two legal instruments. Apart from showing that treaties are subject to the Constitution, the phrase under this Constitution shows a connection. The word 'under' is both a preposition and an adverb.[36] As a preposition, it shows the place of the international treaties as being below the Constitution. As an adverb, it modifies the Constitution by showing the relationship between treaties and the Constitution. This adverbial phrase acts to signify the unity between treaties and the Constitution. Ratified treaties do not belong to a different legal regime that must be transformed into Kenyan law, as is the case in a dualist state. Based on this connection, the interpretation and application of treaties should not be disjointed from the constitutional framework.

Second, the Constitution establishes a constitutional order in which treaties and statutes form part of the norms containing the material Constitution. Yash Ghai describes a constitutional order as 'a fundamental commitment to the principles and procedures of the constitution and therefore, emphasises behaviour, practice, and internalisation of norms.'[37] The constitutional order, also referred to as the 'small c constitution,' goes beyond the constitutional text, also referred to as the 'capital C constitution,' to establish a constitutional regime enabled by statutes, case law, practices, and other norms.[38] The concept of constitutional order encompasses an aggregate of norms and principles that are key to giving the Constitution its material content. Therefore, most international law

---

35 *Revital Health (EPZ) Limited v Public Procurement Oversight Authority & 6 others*, Constitutional Petition 75 of 2012, Judgement of the High Court at Mombasa (2015) eKLR para 28.

36 *Oxford Advanced Learner's Dictionary*, Oxford University Press, 2021, 10ed.

37 Yash Ghai, 'Decreeing and establishing a constitutional order: Challenges facing Kenya' Oxford Transitional Justice Research Working Paper Series (2009) 2.

38 William Eskridge, 'America's statutory constitution' 41 *UC Davis Law Review* (2007) 1.

norms are part of the constitutional order. Hence they are directly linked with the Constitution. This arises from the understanding that a constitution only contains a framework that is supposed to be supplemented with enabling legislation and norms.[39] Together with the international treaties, especially on human rights, they are part of the constitutional order expressed under chapter four of the Constitution.[40]

Third, the Constitution enjoins all persons to use the national values and principles whenever they are applying any law.[41] The act of deciding which law should rank higher between international law and statutes can be termed an application of the law. This means that whenever such a decision is being made, the anchor and reference point should be the Constitution and, in particular, the national values. To this end, the value-oriented approach seeks to provide harmony on this bedevilling question of the hierarchy of laws between international law and statutes.[42] The basic question is what advances most of the national values and principles contained in the Constitution.[43] This finding aligns with the aims of the national values and principles, which seek to establish a society founded on national values. Admittedly, the meaning and scope of the national values are imprecise and ubiquitous. Despite the nature of the national values, they offer a basis for the resolution of this quagmire of the hierarchy of laws.

While the question of what is superior between local legislation, common law, regulations, and international law is not routine, when it presents itself, it is a difficult one. This piece has offered an approach that centralises the Constitution, in particular national values, in decid-

---

39 Adam Chilton and Mila Versteeg, 'Small-c constitutional rights' Virginia Public Law and Legal Theory Research Paper No 2019-67, 2020, 20.

40 Kuo Ming-Sung, 'Taming governance with legality? Critical reflections upon global administrative law as small-c global constitutionalism' 44 *New York University Journal of International Law and Politics* (2011) 55.

41 Constitution of Kenya (2010), Article 10(1).

42 Francois Venter, 'Utilizing constitutional values in constitutional comparison' 1 *Potchefstroom Electronic Law Journal* (2001) 6.

43 Anton Fagan, 'Dignity and unfair discrimination: A value misplaced and a right misunderstood' 14(2) *South African Journal on Human Rights* (1998) 220.

ing this question. With the advent of value-oriented constitutions, almost all interpretive and application activities must take into account these values. They provide a system of standards of what is a good society according to the Constitution.[44] These values permeate each level of exercise of public powers.[45] Therefore, in deciding the question of the hierarchy of laws, the constitutional provisions and values become the anchor.

2.3 Whether international law applies to fill the gap where there is no domestic law

The Supreme Court's expression that '[the Constitution] requires Kenyan courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same is relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement' implies that international law applies only to fill the gap in the municipal legal system.[46] Even more affirming, the Court goes on to illustrate that international law applies where the elements of a case require the application of international law because there is no domestic law or there is a lacuna in the law. The Supreme Court's holding is problematic because it subordinates international law to municipal law. This negates the constitutional provision that international law forms part of the law of Kenya since international law applies as a secondary source of law to fill the gap. In a true sense, international law then is not applicable in Kenya unless when there is a gap in the law. This raises the question of how a part of Kenya's laws can be merely a gap filler. Does international law form part of Kenya's legal order? If yes, what bars international law from applying in all situations? The Supreme Court holding has no constitutional backing since international law forms part of the laws of Kenya.

---

[44] Hiroshi Nishihara, 'The significance of constitutional values' 4(1) *Potchefstroom Electronic Law* (2001) 15.

[45] Dire Tladi, 'Breathing constitutional values into the law of contract: Freedom of contract and the Constitution' 35 *De Jure* (2002) 306.

[46] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 132.

2.4 The finding that Article 2(5) and (6) of the Constitution has nothing to do with monism and dualism

While the question of whether Kenya is a dualist or monist state is debatable, Article 2(5) and (6) of the Constitution has weighed on this debate.[47] However, the Supreme Court fails to see the effect of Articles 2(5) and 2(6) of the Constitution by holding that the provisions have nothing or little to do with monism or dualism. To make matters worse, the Supreme Court goes ahead to make a far-reaching conclusion on the applicability of international law in Kenya. It states that 'shall form part of the law of Kenya,' as used in the article, does not transform Kenya from a dualist to a monist state as understood in international discourse.[48] The Supreme Court fails to justify why Kenya remained a dualist state even after Articles 2(5) and 2(6) of the Constitution.

The debate on the relationship between international law and municipal law has dominated the reasoning of municipal courts on international law. This debate has been even more relevant with the proliferation of statutes as the dominant mode of creating laws. Monism provides that international law and domestic law are part of one legal order.[49] Thus, treaties ratified by states form part of the domestic laws. It follows that international law may be applied directly in national courts without domestication through an Act of Parliament. Dualism holds that international law and national law are independent.[50] Therefore, international law does not apply automatically and must be transformed into domestic law through the domestication process.

The Supreme Court interpreted the words 'shall form part of the law of Kenya' in Articles 2(5) and 2(6) of the Constitution in isolation

---

47 Mwagiru Makumi, 'From dualism to monism: The structure of revolution in Kenya's constitutional treaty practice' 3(1) *Journal of Language, Technology & Entrepreneurship in Africa* (2011) 144-155.

48 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 133.

49 Carolyn Dubay, 'General principles of international law: Monism and dualism winter' *The International Judicial Academy* (2014).

50 Turley Jonathan, 'Dualistic values in the age of international legisprudence' 44 *Hastings Law Journal* (1993) 185.

from the entire sentence and forgot keywords such as 'ratified' as opposed to using 'not domesticated.' Article 2(6) of the Constitution provides that '[a]ny treaty or convention *ratified by* Kenya shall form part of the law of Kenya under this Constitution.' Treaties need not be transformed into statutes for them to form part of the laws of Kenya. Indeed, the only requirement for a treaty to apply is ratification. The Court of Appeal has been more pronounced on the question of monism and dualism. In the case of *Karen Njeri Kandie v Alassane Ba & another*[51] Ouko, Kiage & M'Inoti JJ.A held thus:

> There can be no doubt, therefore, that by constitutional fiat, Kenya converted itself from a dualist country to a monist one with the effect that a treaty or convention, once ratified, is adopted or automatically incorporated into our laws without the necessity of a domesticating statute.

Justice Odek in *Dennis Mogambi Mong'are v Attorney General & 3 others*[52] made a distinction between Article 2(5) and Article 2(6) of the Constitution. The judge argued that Article 2(6) on the application of treaties shows that Kenya is a monist state, and Article 2(5) demonstrates that it is dualist. The Court's conclusion was that Kenya was partly monist and partly dualist. The learned judge failed to justify the distinction, especially because from the text of the Constitution, the difference is not apparent. A different bench of Justices Koome, Mwera, Sichale, Odek, and Kantai in *Mukazitoni Josephine v Attorney General Republic of Kenya*[53] concluded that 'Kenya is now a monist state'. This decision appears to have been based on the text of Articles 2(5) and 2(6) of the Constitution.

One of the arguments that are made improperly is that since there is a requirement for parliamentary approval in the ratification process, then Kenya is not purely monist.[54] The concepts of monism and dual-

---

51 *Karen Njeri Kandie v Alassane Ba & another*, Civil Appeal No 20 of 2013, Judgement of the Court of Appeal at Nairobi (2015) eKLR.

52 *Dennis Mogambi Mong'are v Attorney General & 3 others*, Civil Appeal 123 of 2012, Judgement of the Court of Appeal at Nairobi (2014) eKLR 23.

53 *Mukazitoni Josephine v Attorney General Republic of Kenya*, Criminal Appeal 128 of 2009, Judgement of the Court of Appeal at Nairobi (2015) eKLR 44.

54 David Maraga, 'The legal implications of Article 2(6) of the Constitution of Kenya 2010' LLM Dissertation, University of Nairobi, 2012, 85.

ism are not concerned with the process of ratification.[55] Instead, they address the applicability of international law after ratification. The Constitution and the Treaty Making and Ratification Act No 45 of 2012 do not demand that for international law to apply, it must be transformed into laws of Kenya.[56] If Kenya were a dualist state, it would mean that ratification would not be enough for international law to apply. Put differently, the Constitution does not demand the domestication of international law.

Some have argued that while the Constitution provides that Kenya is a monist state, the practice in the legislation points to Kenya being a dualist state.[57] To cement this argument is the controversy surrounding the Kenya-UK trade agreement 2021 and parliament's insistence that it has the right to amend the agreement.[58] To answer this question, this piece examines the scope of the Treaty Making and Ratification Act 2012and argues that the role of parliament is not to domesticate the treaty. Second, in the alternative, the Constitution is the supreme law. Therefore, if parliament provides for a procedure that is contrary to the Constitution, that procedure will subvert the constitutionally decreed practice. [59]

First, the scope and content of the Treaty Making and Ratification Act 2012 do not indicate that it covers the domestication of treaties as described in the long title thus:

> [a]n act of parliament to give effect to the provisions of Article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties and connected purposes[60]

---

55 Maraga 'The legal implications of Article 2(6) of the Constitution of Kenya 2010' 86.

56 Duncan Okubasu 'Implementation and interpretation of international human rights norms by Kenyan courts' in Stefan Kadelbach and others (eds) *Judging international human rights*, Springer International Publishing, 2019, 561.

57 Maraga, 'The legal implications of Article 2(6) of the Constitution of Kenya 2010' 65.

58 Samuel Owino, 'Kenya, UK trade agreement faces approval setback in parliament' *Business Daily,* 9 March 2021.

59 *Law Society of Kenya v Attorney General & 2 others,* Constitutional Petition No 3 of 2016, Judgement of the High Court at Nairobi, (2016) eKLR para 63.

60 Treaty Making and Ratification Act (No 45 of 2012).

This legislation, therefore, does not deal with the issue of domestication of international law. Its scope is limited to making and ratifying treaties that do not deal with the application of the treaty. Moreover, Section 4 of the Treaty Making and Ratification Act 2012 places the responsibility 'for initiating the treaty-making process, negotiating and ratifying treaties' on the national executive. Under Section 8 of the Treaty Making and Ratification Act 2012, parliament has a role in approving the ratification of treaties. This piece argues that the role of parliament in treaty-making in Kenya does not point to Kenya being a dualist state. All that parliament does is approve ratification by the executive, which does not amount to the domestication of the treaty. As an alternative to the above argument, the treaty practice is contained in the supremacy clause of the Constitution, which means that any practice that contradicts the Constitution is void.

The other argument proffered to show that Kenya is not a monist state is based on Article 21(4) of the Constitution, which provides that [t]he state shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.[61] This argument is based on confusion between applicability and implementation of international law. A distinction must be drawn between the application of international law, which is concerned with monism and dualism and implementation. Failure of a state to enact legislation to fulfil international obligations does not mean that the obligations are not enforceable in domestic courts. Rather, it means that international law is applicable, but for full realisation, more entailments should be provided in the legislation. In any case, Article 21(4) of the Constitution does not make the legislation a precondition for the applicability of international law.

[61] Joseph Maina, 'Do Articles 2(5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?' 30 September 2013, *SSRN*.

2.5 Defining 'general rules of international law' without including the general principles of law recognised by civilised nations

The Supreme Court was wrong in defining general rules of international law to mean customary international law rules, including *jus cogens*. Such a definition leaves out other sources of international law, in particular, general principles of law. [62] The phrase 'general rules of international law' is foreign to international law parlance. What comes close to the use of the phrase 'general rules of international law' is general principles of law.[63] Article 38(1)(c) of the Statute of the International Court of Justice provides for 'the general principles of law recognised by civilised nations.' According to the International Law Commission (ILC) report on general principles of law, they have two potential sources.[64] First, the general principles are delivered from national legal systems. Second, the general principles of law are formed within the international legal system.

The general principles of law are distinct from customary international law and *jus cogens*.[65] As a category of the source of international law, they have their own elements. The ILC Special Rapporteur identifies the right of passage over the territory of another state, good faith obligation, clean hands doctrine, and the obligation to make full reparation as some of the general principles of law recognised by states. [66]

Going by the Supreme Court's reasoning on what general rules of international law means, Kenya has fewer sources of international law than the generally available ones. There is no constitutional justification

---

62 Friedmann Wolfgang, 'The uses of "general principles" in the development of international law' 57(2) *American Journal of International Law* (1973) 279-299.

63 Rudolf Schlesinger, 'Research on the general principles of law recognized by civilized nations' 51(4) *The American Journal of International Law* (1957) 734-753.

64 International Law Commission, 'Seventy-first Session Geneva, 29 April-7 June and 8 July-9 August 2019 First report on general principles of law' 2019.

65 Gerald Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law' 92 *Collected Courses of the Hague Academy of International Law* (1957) 3.

66 Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law' 5.

why the general principles of law as a source of international law are not included as part of general principles of international law under Article 2(5) of the Constitution of Kenya. If the Constitution wished to only provide for customary international law as a source of law, it would not have used an encompassing phrase such as 'general principles of international law'. Therefore, the Supreme Court erred in restricting general principles of law to customary international law and *jus cogens*.

3. The interpretation of economic, social, and cultural rights

This case was the first Supreme Court decision to grapple with the interpretation of economic, social, and cultural rights. While it will not be the last, it has established several findings that are antithetical to human rights. Although some of these findings were less explicit and intentional, nevertheless, they remain the findings of the Supreme Court. These findings are likely to be applied by lower courts in the hierarchy because Article 163(7) of the Constitution provides that the decisions of the Supreme Court are binding on all other courts. For instance, it is unclear whether the Supreme Court wanted to hold that the economic, social, and cultural rights belong to citizens or whether this was an inadvertent mistake. This part will analyse the finding on economic, social, and cultural rights.

3.1 The finding that the right to housing accrues by being a citizen of Kenya

As a general rule, human rights apply to all persons, both citizens, and non-citizens. However, the Supreme Court upset this longstanding understanding by holding that the right to housing accrues only to citizens. The Court was of the view that:

> [f]rom the foregoing, the question as to when the right to housing accrues, in our view, is not dependent upon its progressive realisation. The right accrues to every individual or family by virtue of being a citizen of this country. [67]

[67] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 149.

What about refugees, asylum-seekers, stateless persons, migrant workers, and victims of international trafficking? Can they be subjected to undignified living that violates economic, social, and cultural rights? Even more disturbing is that the Supreme Court did not justify its statement.

Despite Article 43 of the Constitution guaranteeing the economic, social, and cultural rights 'to everyone,' the Supreme Court conflated this with citizens. The Supreme Court's holding is contrary to the text of the Constitution, which is cautious about making a difference. In rare cases where a constitutional right is granted to a citizen, the Constitution expressly refers to citizenship as an object of the right. This is the case in Article 35 on the right to information and Article 38 on political rights.

The Constitutional Court of South Africa has grappled with this distinction in the case of *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development.*[68] This case concerned the accessibility of social security since Section 59 of the Social Assistance Act of 1992 limited social security only to South Africans. Upon judicial interrogation, the legislation failed the constitutional muster of Section 27(1) of the Constitution, which provides 'that everyone has the right to have access to – (c) social security. The Court was of the view that:

> in the absence of any indication that Section 27(1) of the constitutional right is to be restricted to citizens as in other provisions in the Bill of Rights, the word 'everyone' in this section cannot be construed as referring only to 'citizens'.

A similar stance was adopted by the Kenyan Court of Appeal in the case *Attorney General v Kituo Cha Sheria & 7 others,*[69] which affirmed that the freedom of movement applies to everyone, including non-citizens.

Similarly, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) grants the right to housing to everyone within the jurisdiction of the state party. Beyond the text, the entire outlook of IC-

---

[68] (CCT 13/03, CCT 12/03) [2004] ZACC 11.

[69] *Attorney General v Kituo Cha Sheria & 7 others*, Civil Appeal 108 of 2014, Judgement of the Court of Appeal at Nairobi (2017) eKLR.

ESCR is extraterritorial.[70] Article 2 of ICESCR provides for international cooperation in realising the rights in the covenant.[71] This position has been clarified by the UN Committee on Economic, Social, and Cultural Rights (CESCR) which has interpreted the obligation of states to include international cooperation and assistance of other countries.[72]

Moreover, the ICESCR provides that the rights contained in the covenant should be fulfilled without discrimination on the basis of race, nationality, or social origin, among others.[73] Non-nationals such as the refugees are even entitled to more protection because they are in a vulnerable position.[74] For instance, a refugee would be in more need of housing. Similarly, minimum core fulfilment of the economic, social, and cultural rights of the refugees requires the provision of basic rights.[75]

The CESR Committee has articulated the obligations of the state in the following terms:

> [t]he ground of nationality should not bar access to Covenant rights, eg, all children within a State, including those with undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone, including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.[76]

The Supreme Court finding was at odds with the international hu-

---

70 Thomas Pogge, 'Severe poverty as a human rights violation,' in Thomas Pogge (ed) *Freedom from poverty as a human right,* Oxford University Press and UNESCO, 2007, 11.

71 Wouter Vandenhole, 'Beyond territoriality: The Maastricht principles on extraterritorial obligations in the area of economic, social and cultural rights' *Netherlands Quarterly of Human Rights* (2011) 429-433.

72 CESCR, General Comment No 3: Article 2 on the nature of states parties' obligations, 14 December 1990, E/199/123, para 13.

73 International Covenant on Economic, Social, and Cultural Rights, 3 January 1976, UN/TS/993, Article 2.

74 Nathalia Berkowitz, 'Refugees and ESC rights using module 7 in a training program' Economic, Social & Cultural Rights Activism: A Training Resource, 2000.

75 Fatma Marouf and Deborah Anker, 'Socio-economic rights and refugee status: deepening the dialogue between human rights and refugee law' *The American Journal of International Law* (2009) 793.

76 CESCR, General Comment No 20: Non-discrimination in economic, social and cultural rights, 2 July 2009, E/C.12/GC/20, para 30.

man rights law norm of non-discrimination in the enjoyment of human rights.[77] Although this piece appreciates that the question before the Court did not directly deal with the issue of nationality, it argues the Supreme Court made a far-reaching and potentially dangerous finding.

3.2 Failing to take an approach that gives the right to housing material content and a case for rights priority approach

One of the roles of an apex court is to develop the law by shaping the jurisprudence of the country on crucial matters.[78] This function is strongest in Kenya because of Article 259 of the Constitution and Section 3 of the Supreme Court Act. Despite the legal foundations, the Supreme Court abdicated its function by interpreting socio-economic and cultural rights without jurisprudential progress. The biggest problem started with framing the issue as follows '[t]he crucial question we must consider is; when does the right to accessible and adequate housing accrue?'[79] First, the Court did not use the language of human rights; instead, it opted for rather a strange language such as 'accrual of the right to housing.' Second, the Court approached the right to housing from only an individualistic right as opposed to a structural point of view. The framing of this issue was unhelpful to the case because deciding the question of when the right to housing accrues is irrelevant. Everyone has the right to housing all the time in one form or another.

---

77 Magdalena Sepúlveda and María Magdalena, 'The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights', School of Human Rights Research Series, 2003, 274.

78 Oscar Vilhena Vieira 'Descriptive overview of the Brazilian Constitution and Supreme Court' in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa*, Pretoria University Law Press, 2013, 95-98.

79 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 146.

3.2.1 Failing to discern an interpretive approach from rights language

The scope of the obligation of states to realise economic, social, and cultural rights is a daunting question in human rights discourse. Some of the terms that have emerged to understand the obligation of states are 'respect, protect, and fulfil'.[80] The Supreme Court failed to interpret the right to housing using the prism of Article 21 of the Constitution, which enshrines the state's obligation to respect, protect, and fulfil human rights. The obligation to respect requires states not to take actions that would interfere with the enjoyment of human rights. [81]While the obligation to protect enjoins states to ensure that third parties do not interfere with the enjoyment of human rights.[82] Lastly, the obligation to fulfil requires the state to take positive measures to ensure that human rights are realised. This language of human rights would have assisted courts in approaching economic, social, and cultural rights from a solid doctrinal point of view.

Even if the Court was not willing to do the hard work of discerning the Kenyan approach to economic and social rights, the Supreme Court would have copied from other courts which have developed coherent doctrines. The Constitutional Court of South Africa has come up with a 'reasonableness doctrine.'[83] While the United Nations Committee on Economic, Social, and Cultural Rights has articulated the 'minimum core obligation doctrine.'[84] These two doctrines represent the leading legal thoughts on the realisation of economic, social, and cultural rights.

---

[80] Inga Winkler, 'Respect, protect, fulfil: The implementation of the human right to water in South Africa' Workshop on legal aspects of water sector reforms, International Environmental Law Research Centre, Geneva, 2007.

[81] Christof Heyns and Danie Brand, 'Introduction to socio-economic rights in the South African Constitution' 2(2) *Law, Democracy and Development* (1998) 158.

[82] Heyns and Brand, 'Introduction to socio-economic rights in the South African Constitution' 158.

[83] Trilsch Mirja, 'What's the use of socio-economic rights in a constitution? Taking a look at the South African experience' *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia, and Latin America* (2009) 552-575.

[84] CESCR, General Comment No 3, para 13.

The South African Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others*[85] developed the 'reasonableness doctrine', which requires the state to adopt reasonable programmes to realise social-economic rights. For a programme to be reasonable, it must:

> allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available. (b) The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. (c)The programme must also be reasonably implemented. (d) The programme must be balanced and flexible. (f) It must make appropriate provisions for attention to housing crises and to short, medium, and long-term needs. (g) A programme must not exclude a segment of society. (h) It must address the degree and extent of the denial of the right they endeavour to realise. (i) It must cater to those whose needs are the most urgent and whose ability to enjoy all rights, therefore, is most in peril.[86]

Unlike the Supreme Court of Kenya, the Constitutional Court of South Africa gave material content to the right to housing. Through the interpretation of the constitutional standard of 'reasonable measures,' the South African Constitutional Court set concrete goals of the appropriateness of a programme, equality, and non-discrimination.[87] The Court addressed the structural way of solving the housing menace while taking into account the emergencies such as eviction.

Although the minimum core obligation doctrine has its weaknesses, it represents a concrete approach to realising economic, social, and cultural rights. The minimum core obligation provides that states have 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party.'[88] The state must use all available resources to realise

---

85 (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46.

86 *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para 39-44.

87 David Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine' 3 *International Journal of Constitutional Law* (2014) 710-739.

88 Katharine Young, 'The minimum core of economic and social rights: A concept in search of content' 33 *The Yale International Law Journal* (2008) 113.

the minimum obligation. This obligation is realisable immediately as a matter of priority. This has some semblance with the approach articulated in Article 20(5) of the Constitution. Yet, the Supreme Court did not consider the minimum core of the right to housing. It also failed to develop a coherent approach based on constitutional provisions. The Supreme Court did not even interpret what is meant by the words 'accessible and adequate housing'. In effect, the Court's decision lacked a solid jurisprudential foundation on what the realisation of the right to housing means in concrete terms in Kenya.

3.2.2 Rights priority approach; the Kenyan approach to economic, social, and cultural rights

Kenya embraced a drastic shift from the existing human rights language on economic, social, and cultural rights. At the core of this language is Article 20(5) of the Constitution, which establishes the 'rights priority approach'. This constitutional provision articulates the obligation of the state in allocating resources to give priority to ensuring the widest enjoyment of rights. Additionally, Article 20(2) of the Constitution provides that everyone shall enjoy rights to the greatest extent.

Several themes emerge from the constitutional text on economic, social, and cultural rights. First, the state is required to prioritise economic, social, and cultural rights in its policy conceptualisation and realisation. Second, the goal of prioritising is to ensure the widest enjoyment of human rights. Of course, this maximalist orientation is subject to available resources. Third, everyone has the right to enjoy economic, social, and cultural rights to the greatest extent possible.

While the Constitution takes a naively idealistic approach to economic, social, and cultural rights, this provision has rhetorical power to shape how state officials think about human rights. However, it is not surprising for the Constitution to take such an idealistic approach, especially because of the premium it gives to human rights to the point of embodying them as national values.

Therefore, in assessing whether the government has violated economic, social, and cultural rights, the test is two-pronged. First, the test examines whether the state has allocated resources to ensure the widest enjoyment of rights. This has to be balanced with other competing states' obligations. Second, the test examines whether the state has given priority to economic, social, and cultural rights. Importantly, this has structural and ad hoc dimensions. For instance, the structural dimension looks at the programmes to implement these rights, while the ad hoc dimension deals with individual cases such as emergency situations. Kenya's provision is more progressive than the minimum core obligation doctrine.

3.2.3 Failure to interpret the meaning of the right to accessible and adequate housing

Despite the ubiquity of the phrase 'adequate housing', the Supreme Court failed to engage with it. In fact, although the Supreme Court was invited to interpret Article 43(1)(c) of the Constitution, it did not elucidate the text, even tangentially. What then remained was an interpretation of the constitutional right to housing without referring to the constitutional text. How can the Court apply the right to housing without interpreting it?

The phrase 'adequate housing' is borrowed from the international human rights instruments. For example, the ICESCR provides that state parties 'recognise the right of everyone to an adequate standard of living for himself and his family, including housing, and to the continuous improvement of living conditions.'[89] The CESCR has extensively interpreted Article 11 of ICESR.[90] At the core of the interpretation is the phrase 'adequate housing'. The Constitution of Kenya uses two qualifying words 'adequate and accessible'.[91] housing while the CESCR incor-

---

[89] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 993, Article 11.

[90] International Covenant on Economic, Social and Cultural Rights, Article 11.

[91] Constitution of Kenya (2010), Article 43(1)(c).

porates the concept of accessible housing into adequate housing.[92] The General Comment on the right to housing has warned against interpreting the right to housing narrowly to mean only shelter.[93]

The task of giving meaning to 'adequate housing' is not an easy one. However, the CESCR has come up with certain non-exhaustive aspects that entail adequate housing. These aspects are:[94]

(i) Legal security of tenure — this requires states to give some degree of protection which will guarantee peaceful possession against forced evictions and harassment. The General Comment is progressive since it includes informal settlements as a form of security of tenure.[95] This is because, especially in Kenya, there is the temptation of seeing tenure from the point of view of title only.[96]

(ii) Availability of services, materials, facilities, and infrastructure — again, here, the CESCR considered the right to housing holistically together with other social aspects supporting housing. Therefore, adequate housing must contain core facilities such as 'health, security, comfort, and nutrition'.[97] More specifically, water, energy, lighting, disposals, drainage, and emergency services such as the availability of an ambulance.[98]

(iii) Affordability – the prices of housing should not threaten the realisation of other basic needs. The state has two-fold obligations to ensure affordability of housing; (i) regulation of the market to ensure fair processes, that is, to regulate rent increase and amounts, and (ii) provision of subsidies.[99]

---

92 CESCR General Comment No 4.

93 CESCR General Comment 4, para 7.

94 CESCR General Comment 4, para 8.

95 CESCR General Comment 4, para 8.

96 CESCR General Comment 4, para 8.

97 CESCR General Comment 4, para 8.

98 CESCR General Comment 4, para 8.

99 CESCR General Comment 4, para 8.

(iv) Habitability – the houses should have enough space and 'protect [users] from cold, damp, heat, rain, wind or other threats to health, structural hazards, disease vectors, and physical insecurities.'[100]

(v) Accessibility – barriers to adequate housing must be removed by the state. In particular, houses must be readily available to all persons, including disadvantaged groups. The CESCR has stated that the elderly, physically disabled, and other vulnerable groups should be given priority.[101] States have an obligation to craft policies that will ensure increased access to land for the poor and landless. The policy should also ensure that houses are readily available and fairly distributed across the country.[102]

(vi) Location – there is an obligation to ensure housing is near social facilities.[103] The location should be near to employment places and healthcare, among others. Additionally, housing should not be located near pollution sources. The environment must be clean.[104]

(vii) Cultural adequacy – housing should express cultural identity and diversity. Policies seeking modernisation or uniform design should respect the cultural preferences of residents.[105]

The Supreme Court could have assessed whether Kenya had violated its constitutional obligation under the prism of adequate and accessible housing, which has received extensive interpretation. This way, the Court could have developed the content of the right to housing. The Court missed an opportunity to reaffirm economic, social, and cultural rights, which are often viewed as lofty aspirations.[106]

---

[100] CESCR General Comment 4, para 8.

[101] CESCR General Comment 4, para 8.

[102] CESCR General Comment 4, para 8.

[103] CESCR General Comment 4, para 8.

[104] CESCR General Comment 4, para 8.

[105] CESCR General Comment 4, para 8.

[106] Jackbeth Mapulanga, 'Examining the justiciability of economic, social and cultural rights' 6(4) *The International Journal of Human Rights* (2002) 29-48.

3.3 The finding that 'illegal' occupation of the private land cannot create prescriptive rights

The Supreme Court held that 'an illegal occupation of private land cannot create prescriptive rights over that land in favour of the occupants.'[107] First, the case before the Court was not dealing with prescriptive rights. Prescriptive rights are distinct from human rights, such as the right to housing – the former deals with rights enjoyed over the land of another for a long time.[108] They originate from common law and, in some cases, statutes, for example, easements and adverse possession.[109] These rights arise from the need to align the actual rights with legal rights, that is, people who enjoy a right over land, as a matter of fact, will get legal protection.[110] The Supreme Court was wrong in conflating these two rights because human rights are not pegged on the years that a person has occupied land.

Moreover, the Supreme Court was wrong in elevating the property rights of private landowners over those of settlers. While it might be difficult to make a case for a positive obligation of private landowners, there exists a negative obligation not to interfere with the right to housing. This was articulated by the Constitutional Court of South Africa in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another.*[111] As follows:

> of course, a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances, an owner may have to be *patient and accept that the right to occupation may be temporarily restricted.*

---

[107] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 151.

[108] *Esther Wanjiku Mwangi & 3 others v Wambui Ngarachu (sued as the legal representative of the estate of Ngarachu Chege - deceased)* Environment and Land Case 422 of 2017, Judgement of the Environment and Land Court at Murang'a (2019) eKLR para 38.

[109] *Winterburn v Bennett* [2016] EWCA Civ 482.

[110] Lina Mattsson, 'Who has to prove what? Prescriptive rights and evidential presumptions', *Property Litigation Association,* August 2017.

[111] (CC) [2011] ZACC 33.

Ultimately, the obligation to provide housing rests with the state. However, settlers should be allowed to occupy the land pending the provision of alternative housing by the government.[112] In return, the government should either compulsorily acquire the private land or, in some cases, relocate the landless. The Court failed to consider and nuance the issue of owners of large bare pieces of land and ranches in light of equitable access to land. [113]

The tension between the right to property and the right to housing has occupied the land rights discourse.[114] The Constitution of Kenya recognises both rights as part of the bill of rights. What would be the solution in cases of conflict between these two rights? The CESCR has clarified this tension by providing that the right to housing should be distinguished from the right to property.[115] Indeed, the right to housing is a much broader right that is not limited to legal titles. This right enjoins the state to not only focus on property rights but also to balance competing claims. While the CESCR solution offers a direct answer, the question is much broader and more complex. The notion of private property has taken centre stage as a core obligation of the state. For instance, John Locke argues that the primary role of the state is to protect property, life, and liberties.[116] This understanding runs deep in the liberal and neoliberal conception of society. The neoliberals argue that the state should not interfere with markets and private property.[117] Therefore, under the neoliberal view, the right to housing can be considered as being in direct conflict with property rights.

112 Jacqueline Cole and Philip Lynch, 'Homelessness and human rights: Regarding and responding to homelessness as a human rights violation' 4(1) *Melbourne Journal of International Law* (2003) 139-176.

113 Kenya Human Rights Commission 'Redress for historical land injustices in Kenya: A brief on proposed legislation for historical land injustices' 2018, 7.

114 Nicholas Blomley, 'Homelessness, rights, and the delusions of property' 30(6) *Urban Geography* (2009) 580.

115 CESCR General Comment 4, para 8.

116 Henry John, 'John Locke, property rights, and economic theory' 33(3) *Journal of Economic Issues* (1999) 609-624.

117 Becky Mansfield, 'Neoliberalism in the oceans: "Rationalization," property rights, and the commons question' 35(3) *Geoforum* (2004) 313.

What happens when settlers occupy the land of a private person? On the one hand, the private person has the right to property protected by the Constitution and guaranteed by the state through legal protections such as titles.[118] At the same time, the settlers have a right to housing, which is also protected by the Constitution. This tension between the two rights was not properly addressed by the Supreme Court. As argued elsewhere in this paper, even the private individual landowner has human rights obligations regarding housing. The Bill of Rights applies vertically and horizontally.[119] The extent of the obligation is what is up for debate. This piece argues that the obligation depends on the circumstances of the case. At the core of this obligation is that no person should be rendered homeless.[120] Therefore, the state should develop a policy on how to compensate the private owner or relocate the settlers.[121]

Lastly, the framing of the issues where the settlers' occupation of the land is called 'illegal occupation' is not in alignment with human rights language. This amounts to branding and condemning victims of human rights violations.

3.4 The right to housing over public land crystallised during a long period of occupation by people who established homes and raised families

The finding that the right to housing only crystallises through long periods of occupation is an affront to human rights. Does this mean a

---

[118] Wahi Namita, 'The tension between property rights and social and economic rights: a case study of India' in Helena Alviar and others (eds) *Social and economic rights in theory and practice*, Routledge, 2014, 140.

[119] Chirwa Danwood Mzikenge, 'The horizontal application of constitutional rights in a comparative perspective' 10(2) *Law, Democracy & Development* (2006). For the Kenyan case, see Brian YK Sang, 'Horizontal application of constitutional rights in Kenya' 26(1) *African Journal of International and Comparative Law* (2018) 1-27; and Walter Khobe 'The horizontal application of the bill of rights and the development of the law to give effect to rights and fundamental freedoms' 1 *Journal of Law and Ethics* (2014) 77-90.

[120] United Nations General Assembly, 'Guidelines for the implementation of the right to adequate housing' 26 December 2019, A/HRC/43/43.

[121] CESCR General Comment 4, para 15.

person who has not occupied public land for a long period does not have the right to housing? Who decides what a long period of occupation is? This interpretation of the right to housing is restrictive and does not advance human rights.[122] Under Article 20(3)(b) of the Constitution, courts are under an obligation to adopt the interpretation that most favours the enforcement of human rights. The Supreme Court also failed to consider that crystallisation of rights is an issue to be determined based on the circumstances of the case. The Court's interpretation does not account for other factors such as emergency cases.[123] For example, if there is displacement as a result of floods, the victims' right to housing accrues immediately.

3.5 Faulting the High Court for issuing conservatory orders since the settlers had been evicted

Admittedly, crafting appropriate remedies in economic, social, and cultural rights cases is a difficult task.[124] In this case, the Supreme Court faulted High Court on what would be an appropriate remedy where settlers had been evicted.[125] According to the Supreme Court, the appropriate remedy ought to have been compensated. Although the High Court remedies did not adequately address the plight of homeless people, the reason the Supreme Court faulted the High Court was inappropriate. Going by the Supreme Court reasoning, for a person to defeat the housing right, all that is needed is to evict people, and then the case will drag in court on issues of compensation. Meanwhile, while the case drags in court, the homeless people suffer without alternative housing.

[122] Jessie Hohmann, 'The right to housing' in Marcus Moos (ed) *A research agenda for housing*, Edward Elgar Publishing, 2019.

[123] Rebecca Barber, 'Protecting the right to housing in the aftermath of natural disaster: Standards in international human rights law' 20(3) *International Journal of Refugee Law* (2008) 432.

[124] Kent Roach, 'The challenges of crafting remedies for violations of socio-economic rights' 89 *Harvard Law Review* (1989) 1281-1316.

[125] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 155.

This paper suggests that even if an eviction has happened if the homeless have no alternative housing, they should stay on the land pending the provision of alternative housing by the government.[126] In making its determination, the Court failed to take into account the difficulty in getting compensation from the government; hence compensation alone is an ineffective remedy.

Under Article 23 of the Constitution, the Court has the discretion to issue appropriate remedies. These remedies are not limited in scope and nature; hence eviction is not a bar to issuing the conservatory orders or any other appropriate remedies.[127] The major consideration is the preservation of the constitutional values through the remedies.[128] In this case, the remedy that would be appropriate is the one that will avert settlers being rendered homeless pending the hearing and determination of the case. [129]

4. Conclusion

Traditionally, economic, social, and cultural rights have faced two major difficulties to wit implementation and justiciability. Luckily for Kenya, these rights have been enshrined in the 2010 Constitution; therefore, the question of justiciability does not arise. While the right to housing is enshrined in the Constitution, its meaning and scope remain unclear. Broadly, it is this question of the meaning and scope of the right to housing that was posed in this case, together with international

[126] Lilian Chen, 'A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and others v City of Johannesburg and others*' 2 *Constitutional Court Review* (2009) 371.

[127] *David Ndii & others v Attorney General &* others, Petition E282, 397, E400, E401, E402, E416 & E426 of 2020 & Petition 2 of 2021, Judgement of the Supreme Court (2022) eKLR, para 545.

[128] *Gatineau Peter Munya v Dickson Mwenda Kithinji & 2 others,* Petition No 2 of 2014, Judgement of the Supreme Court (2014) eKLR, para 86.

[129] Thomas Byrne and Dennis Culhane, 'The right to housing: An effective means for addressing homelessness' 14 *University of Pennsylvania Journal of Law and Social Change* (2011) 379.

law-related questions. In an inconclusive and erroneous judgment, the Supreme Court missed an opportunity to pronounce itself strongly on these twin questions of international law and economic, social, and cultural rights.

This piece has discussed some of the major errors that the Supreme Court made, and they include failure to interpret what is adequate housing, among others. In turn, it has offered solutions on how the Supreme Court ought to have interpreted the right to housing and international law questions. Mainly, this piece has offered two approaches and theories to deal with some of the crucial questions facing the Supreme Court. To start, it has argued for a constitutionally-anchored approach to resolving the hierarchy between international law and statutes. It has also argued for the 'rights priority doctrine' in assessing whether economic, social, and cultural rights have been violated. This doctrine is a departure from the minimum core obligation approach. In sum, the judgment of the Supreme Court is inconclusive because it does not resolve major questions such as what adequate housing is. Indeed, it does not even engage with the primary provision of Article 43(1)(c) of the Constitution that it was supposed to interpret.

Setting the record straight in socio-economic rights adjudication: The *Mitu-Bell Welfare Society* Supreme Court of Kenya judgment

Victoria Miyandazi*

Abstract

A leading criticism of the Mitu-Bell Welfare Society decision *in the Supreme Court of Kenya is that it fell short of achieving the transformative effects expected similar to South Africa's* Irene Grootboom. *One such critique has been provided by Ian Mwiti Mathenge in his paper which this article responds to by asserting that the Court addressed relevant issues to Kenya's jurisprudential needs. Specifically, the Court clearly affirmed evictees' rights to seek redress including compensation, adequate notice, dignified treatment and even the provision of alternative land for resettlement. The analysis of the case also acknowledges the Court's interpretation on the place of international law in Kenya, and areas for future research and development.*

Keywords: Mitu-Bell, right to housing, socio-economic rights, international law, Constitution of Kenya

---

* LLB (Kenyatta University School of Law); BCL (University of Oxford); MPhil (University of Oxford); PhD (University of Oxford).

1. Introduction

The *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others* Kenyan Supreme Court case concerned the unlawful eviction and demolition of the homes of over 3,000 families residing in an informal settlement on public land known as *Mitumba* Village, located near Wilson Airport in Nairobi city.[1] The informal settlers had lived there for over 19 years. The forced eviction took place without due notice and despite a court order prohibiting government authorities from conducting the evictions pending hearing of an application with respect to the matter. The trial court's decision was positive as it recognised that forced evictions without relocation or compensation negatively affects the equal enjoyment of the right to housing by vulnerable groups.[2] However, for largely procedural reasons, the Court of Appeal overturned the High Court's entire decision without stating much about the unlawfully evicted informal settlers who were left without an appropriate remedy.[3] Aggrieved by the lack of a remedy, despite the Court of Appeal acknowledging their grievances – mainly the illegal forceful eviction and demolition of the informal settlers' homes and other facilities including schools, without compensation or relocation – the claimants appealed to the Supreme Court.

This article gives an analysis of the Supreme Court's decision in *Mitu-Bell*, its ground-breaking aspects, as well as the unclear and problematic standpoints the Court took. The analysis will also include a critique of the lead article by Ian Mwiti Mathenge, particularly his view that the Supreme Court's *Mitu-Bell* judgment was expected to be the

1 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae*) Petition 3 of 2018, Judgement of the Supreme Court of 11 January 2021 (eKLR). This article will also include excerpts from my book, Victoria Miyandazi, *Equality in Kenya's 2010 Constitution: Understanding the competing and interrelated conceptions* Hart Publishing, 2021, on some of my analysis of the *Mitu-Bell* case at the High Court and Court of Appeal, as well as discussions of applicable principles.

2 Victoria Miyandazi, 'Forced evictions and demolition of informal settlements in Kenya' *OxHRH Blog,* 19 November 2015.

3 Alvin Attalo 'Turning back the clock on socio-economic rights: Kenya's Court of Appeal decision in the Mitu-Bell Case' *OxHRH Blog,* 13 September 2016.

Kenyan version of the South African Constitutional Court's *Irene Grootboom* decision.[4] This argument, as will be explained, is misleading as Mrs Grootboom died 8 years after the decision without a house, despite 'winning' the case. The *Grootboom* decision has been lauded and criticised in equal measure. Nevertheless, I agree that the *Grootboom* case raises important questions about the need for an adequate remedy in socio-economic rights cases so that such rights do not end up becoming mere pipedreams. The Supreme Court's *Mitu-Bell* decision is then presented as a step in the right direction in terms of the remedy given. Of course, this author is alive to the fact that the *Mitu-Bell* case was initially filed in 2011, which means that the community has been tied up in litigation for over 10 years. This raises the question of whether such delayed justice is justice at all, especially if the *Mitu-Bell* community never received an interim remedy as the case progressed.

2. Issues the Supreme Court judgment sought to clarify

The Supreme Court's decision focused on three key issues that remained murky and contested after the Court of Appeal's judgment on the matter. The first was on the place of structural interdicts, as a form of relief in human rights litigation, under the Kenyan Constitution. The second issue was on the applicability of international law in Kenya, as Articles 2(5) and 2(6) of the Constitution respectively provide that general rules of international law, and treaties or conventions ratified by Kenya 'shall form part of the law of Kenya'. The final matter is in relation to the right to housing under Article 43(1) of the Constitution.

2.1 Structural interdicts

A structural interdict is simply 'a remedy in terms of which the court orders an organ of state to perform its constitutional obligations

4 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) [99].

and to report to the court on its progress in doing so'.[5] A court can also give a time frame within which the order should be complied with. For this reason, structural interdicts have been argued to be an important approach in the judicial implementation of socio-economic rights, specifically in cases involving 'poor litigants who may not have the resources to institute another suit in case of non-conformity by the defendant [or respondent]'.[6] While the High Court expressed no doubt as to the applicability of structural interdicts in Kenya, the Court of Appeal took a completely opposite view that such were 'unknown to Kenyan law'.

The structural interdict applied by the High Court required a report to be filed in the form of an affidavit in relation to current State policies and guidelines on how shelter and housing is to be provided to marginalised groups within 60 days.[7] The Court also made an order for meaningful engagement between the parties and relevant stakeholders towards an agreed resolution of the applicant's grievance within 90 days.[8] By this, the High Court applied a 'report back to court' structural interdict model whereby, according to Mbazira, 'the defendant [or respondent] is required to report back to the court with a plan on how he or she intends to remedy the violation' and a fixed date is given to that effect.[9] This is a better way of holding the State accountable without intruding into polycentric issues of policymaking and resource allocation that lie within the proper mandate of the executive and legislature, as the structural interdict deferred to government the policy and resource-allocation duties. It gave the State flexibility in deciding how it would meet the claimants' housing needs while also enabling the High Court to keep a watchful eye over the protection of the informal settlers' right to housing. This was meant to ensure that former residents of *Mi-*

[5] RJ de Beer and S Vettori, 'The enforcement of socio-economic rights' 10(3) *Potchefstroom Electronic Law Journal* 1 (2007) 10.

[6] Christopher Mbazira, *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice,* PULP, 2009, 182-183.

[7] *Mitu-Bell Welfare Society v Attorney General & 2 others*, Petition 164 of 2011, Ruling of the High Court in Nairobi, 13 June 2012, eKLR, para 79.

[8] *Mitu-Bell Welfare Society v Attorney General & 2 others,* Ruling of the High Court, para 79.

[9] Mbazira, *Litigating socio-economic rights in South Africa,* 189.

tumba village did not end up with a nominal remedy without actual enforcement. Such an approach both respects the separation of powers and 'shields the court from accusations that it has usurped functions reserved for the other organs of state'.[10]

Roach and Budlender rightly note that structural interdicts are particularly effective in tackling governmental non-compliance in situations where it exudes 'incompetence, inattentiveness and intransigence'.[11] In *Mitu-Bell*, the State had already shown its intransigence by defying an earlier court order restraining it from evicting the informal settlers.[12] Also, the government only indicated the applicable Guidelines on Settlement and Evictions in an affidavit to the High Court, when seeking to comply with Mumbi Ngugi J's orders in the *Mitu-Bell* High Court decision requiring it to do so within 60 days from the day of the judgment.[13] This shows the positive impact the structural interdict applied by the High Court had in bringing to the government's attention the urgent need for such guidelines.

Moving on to the Court of Appeal's position, the judges of appeal rejected the application of structural interdicts and retention of supervisory jurisdiction and held that, once a case is closed, no further orders can be given (*functus officio* doctrine). However, even in this holding, the Court seemed to have contradicted itself. This contradiction can be seen in three key rulings and observations made in the judgment. First, the Court of Appeal made contradictory statements as to the meaning and applicability of structural interdicts. A reading of the Court of Appeal's reasoning reveals that, in one breath, the Court rejects the application of structural interdicts in Kenya as well as the retention of supervisory jurisdiction by a court over its orders. In this regard, the Court held that

---

10 Mbazira, *Litigating socio-economic rights in South Africa* 189.

11 Kent Roach and Geoff Budlender, 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' 122 *South African Law Journal* (2005) 325, 345.

12 *Mitu-Bell Welfare Society v Attorney General & 2 others*, Ruling of the High Court; and *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Civil Appeal 218 of 2014, Court of Appeal (2016) eKLR para. 6.

13 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others,* Court of Appeal, para 12 and 13.

'In the instant case, the trial court erred in delivering a judgment and then reserving outstanding matters to be dealt with by the court. Save as authorised by law, upon delivery of judgment, a court becomes *functus officio*'.[14] It then proceeded to hold that the application of supervisory orders is 'unknown to Kenyan law'.[15]

Simultaneously, the Court, in contradiction with the position it had taken earlier and the eventual determination, held that, 'a supervisory order can be made pursuant to the provisions of Article 23 (3) of the 2010 Kenya Constitution'.[16] This provision gives courts wide discretion to grant appropriate relief. The resulting judgment failed to recognise that the uniqueness of supervisory orders, like structural interdicts, is the capacity of the court to retain jurisdiction to compel the State or a State organ to fulfil its obligations to a successful litigant. Such orders particularly compel the State 'to engage with the plaintiffs in meaningful dialogue because of the knowledge that the doors of the court are open to the plaintiffs'.[17]

The Court of Appeal thus fundamentally misconstrued what a structural interdict, and supervisory orders in general, do – they are not meant to vary the court's judgment but to supervise the implementation of the court's orders.

Second, the Court of Appeal's rejection of the applicability of structural interdicts was contradictory because it ignored their use by the Supreme Court. As the Court of Appeal noted, the Kenyan Supreme Court had previously applied structural interdicts, for example in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*.[18] In the case, the Supreme Court ordered the first appellant to consider the respondents' application for licences and to notify the

---

14 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 72 and 142.

15 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 71.

16 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 112, 141 (c) and (d).

17 Mbazira, *Litigating socio-economic rights in South Africa,* 182.

18 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, Petition 14 of 2014, Ruling of the Supreme Court (2014) eKLR.

Court's registry within 90 days on the fulfilment of the Court's orders.[19] The rejection of courts' retention of supervisory jurisdiction by the Court of Appeal thus seemed to be an attempt to overrule the practice of the Supreme Court whose judgments hold the overall precedential value. Hence, the Court arguably overstepped its mandate. Such confusion in the handling of socio-economic rights cases that have an impact on vulnerable groups has the effect of reinforcing inequality and marginalisation.

Setting the record straight, the Supreme Court upheld the applicability of structural interdicts in Kenya by restating its holding in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* that Article 23(3) of the Constitution, listing the appropriate reliefs a court may grant, uses the word 'including', which means that the reliefs listed therein are non-exhaustive.[20] Therefore, a court can issue orders other than those listed as it deemed fit. The Supreme Court judges observed that the Court of Appeal's position on the matter disregarded its signal in cases like the *Communications Commission of Kenya* on interim reliefs a Court can give in human rights and other constitutional litigation to redress violations of fundamental rights. The bench held that despite the continued validity of the *functus officio* doctrine in the majority of cases, a court can issue orders other than those listed as it deems fit, to be decided on a case-by-case basis.[21]

Indeed, as earlier argued, in socio-economic rights adjudication, structural interdicts are a good way of navigating the distinction between illegitimate intrusion into the work of State organs and holding them accountable. They also respect the provisions of Article 20(5)(c) of the Constitution which sets out the need for courts not to 'interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different con-

19 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, para 415.

20 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, para 415.

21 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 120-122.

clusion'. This is because a structural interdict does not prescribe to the State what it needs to do but mainly requires it to draw up a plan which the court would then be responsible for to ensure that it accords with the constitutional requirements and is implemented.

This analysis rebuts the stance taken in Ian Mathenge's article casting doubt on the usefulness of the Supreme Court's *Mitu-Bell* decision in affirming the place of structural interdicts in Kenya. As discussed, the Supreme Court acknowledged that it had used structural interdicts before in cases like *Communications Commission of Kenya,* which decision was made two years prior to the Court of Appeal's decision in *Mitu-Bell*. That the Supreme Court reprimanded the Court of Appeal for failing to recognise this precedent setting decision is, in itself, a strong indication of the Supreme Court's affirmation of the applicability of structural interdicts in Kenya.

In addition to the confirmation of the applicability of structural interdicts in Kenya, the Supreme Court importantly observed that, where necessary, structural interdicts should be given as interim orders, with a court signalling to the parties that 'the final judgment shall await the crystallisation of certain actions'.[22] I agree with this observation as in this way, courts can better supervise State organs' compliance or deal with their intransigence in doing what they are mandated to do.

2.2 Applicability of international law in Kenya

The second issue the Supreme Court addressed is on the applicability of international law in Kenya under Articles 2(5) and 2(6) of the Constitution, stating that general rules of international law, and treaties or conventions ratified by Kenya 'shall form part of the law of Kenya'. This was based on the trial Court's reliance on the UN Guidelines on evictions,[23] which the Court of Appeal had taken issue with stating that

[22] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 122.

[23] CESCR, General Comment No 7: Article 11.1 On the right to adequate housing, forced evictions, 20 May 1997, E/1998/22. Mumbi Ngugi J had relied on paragraphs 15 and 16 of the Guidelines on evictions. Paragraph 15 effectively provides for meaningful

only 'customary international law and peremptory norms (*jus cogens*)' are applicable.[24] The Supreme Court clarified that the general rules of international law, strictly viewed, refer to customary international law. This clarifies the long-standing confusion brought about by the words 'general principles of international law' as used in Article 2(5) of the 2010 Constitution. Various commentators on the place of international law in Kenya, such as Maurice Oduor, found the wording unclear because it is rarely used, if at all, in global discussions about the hierarchy of international law norms.[25] According to Oduor, the often used phraseology in international law that is closest to it is 'general principles of law recognised by civilised nations'.[26] However, it would seem baffling that the drafters of the 2010 Constitution would skip the recognition of customary international law and instead recognise the general principles of law recognised by civilised nations, the former being way higher in the hierarchy of the binding and authoritative nature of international law norms than the latter. This is as according to the list of sources of international law set out in Article 38 of the Statute of the International Court of Justice that puts international customary law above the general principles recognised by civilised nations, hierarchically.[27] The Supreme Court's clarification that 'general principles of international law' refer to customary international law thus finally settles the perennial debates on the matter.

Further the Supreme Court held that Kenyan courts, when determining disputes before them, should apply relevant international law

engagement between the state and those to be evicted, the giving of adequate notice and the following of proper procedures for evictions. Paragraph 16 then provides that 'Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights'.

24 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 116.

25 Maurice Oduor, 'The status of international law in Kenya' 2(2) *Africa Nazarene University Law Journal* (2014) 97-98; Morris Mbondenyi and J Osogo Ambani, *The new constitutional law of Kenya: Principles, government and human rights*, LawAfrica Publishing, 2012, 24; *Kituo cha Sheria and 8 others v Attorney General*, Petition 19 and 115 of 2013, Ruling of the High Court at Nairobi (2013) eKLR.

26 Oduor, 'The status of international law in Kenya', 98.

27 United Nations, Statute of the International Court of Justice, 18 April 1946.

(both customary and treaty law) that are not in conflict with the Constitution, local statutes, or a final judicial pronouncement. This latter holding, however, conflicts with the Court's observation that Kenya is bound by its obligations under customary international law and its undertakings under treaties and conventions, and 'it may not invoke provisions of its Constitution, or its laws as an excuse for failure to performing this duty'.[28] This left open the much-needed inquiry on whether the 2010 Constitution creates a hierarchy of laws and clarification on what happens when a local statute, final judicial pronouncement or even a provision in the Constitution is at odds with binding international obligations. This is particularly in relation to cases where a clear injustice would be occasioned to a litigant where, for instance, a local statutory provision is applied as opposed to an international treaty the country has ratified, which takes a different viewpoint on a matter at issue. How should such a choice be made? What should be the guiding principles? The Supreme Court's decision on the applicability of international law offers us little guidance on this.

To this extent, I agree with the criticisms of the Supreme Court's failure to appreciate the effects of Article 2(5) and 2(6) of the Constitution in Ian Mathenge's article. Particularly noteworthy is Mathenge's discussion of the phrase 'under this Constitution' which he argues suggests the subordination of international law to the Constitution, similarly highlighting a need for further guidance on the matter.

The questions raised here cannot be addressed without going into a discussion of the monist and dualist theories in international law that have been developed to explain the relationship between international and municipal laws. Yet, the Supreme Court in *Mitu-Bell* short-sightedly held that 'Article 2(5) and 2(6) of the Constitution has nothing or little of significance to do with the *monist-dualist* categorisation' and that 'the expression '*shall form part of the law of Kenya*' as used in the Article does not transform Kenya from a dualist to a monist state as understood in

[28] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others,* Supreme Court, para 126-133. See also, Vienna Convention on the Law of Treaties, 23 May 1969, Article 27; International Law Commission's Declaration of Rights and Duties of States, 1949, Article 13.

international discourse'.[29] The decision therefore leaves open the question whether international customary law and treaties and conventions that Kenya has ratified on the one hand, and the Constitution, local statutes and judicial pronouncements, at the other end of the spectrum, are one in the same (monist approach) or separate legal orders (dualist approach). The former only taking primacy in international courts and tribunals, and the latter reigning supreme in domestic decision-making.

Such a finding – that international customary law and treaties and conventions the country has ratified can only be applicable when they do not conflict with existing municipal laws – was mostly made in cases considering the applicability of international law in Kenya before the coming into force of the 2010 Constitution.[30] At the time, the predominant view was that, under the previous Constitution, Kenya was a dualist state whereby, international treaties and conventions the country was a party to had to be specifically incorporated into national laws, either by a new legislation or vide an amendment of an existing legislation for them to be considered part of national law – what is termed as the process of domestication.

However, as observed in the apt decision of the Court of Appeal in *Karen Njeri Kandie v Alassane Ba & Another*, this position changed with the promulgation of the 2010 Constitution.[31] The learned judges of appeal held that the 2010 Constitution converted Kenya 'from a dualist country to a monist one with the effect that a treaty or convention once ratified is adopted or automatically incorporated into our laws without the necessity of a domesticating statute', a position which I agree with.[32] The Court of Appeal continued to observe that 'the listing of the laws in Article 2 of the Constitution does not denote prioritisation'. That the fact that Article

29 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 133.

30 *Rono v Rono*, Civil Appeal 66 of 2002, Ruling of the Court of Appeal at Eldoret (2005) eKLR; *Rose Moraa & Another v Attorney General,* Civil Case No 1351 of 2002, Ruling of the High Court (2006) eKLR; *Re Estate of Lerionka Ole Ntutu (Deceased)* Succession Cause 1263 of 2000, Ruling of the High Court at Nairobi, (2008) eKLR.

31 *Karen Njeri Kandie v Alassane Ba & another,* Civil Appeal 20 of 2013, Judgement of the Court of Appeal of 13 February 2015, eKLR.

32 *Karen Njeri Kandie v Alassane Ba & another,* Court of Appeal.

2(6) provides that treaties and conventions the country has ratified are part of the laws of Kenya means that they 'are at least at par with other laws enacted by Parliament'.[33] It is hoped that, in the likely event that the Supreme Court has another opportunity to consider the applicability of international law in Kenya, it would be guided by this Court of Appeal decision and clarify the pending questions highlighted here.

As much as a door has been left open for the further development of guidelines on the applicability of international law in the country, it is important to note that the Supreme Court has previously affirmed reference to international human rights instruments ratified by Kenya in interpretation of the 2010 Constitution which it notes, generously adopts the language of these instruments.[34] Other courts adjudicating on socio-economic rights claims have also made a similar affirmation.[35] Indeed, most of the values, principles and rights guaranteed in the 2010 Constitution are essentially cut from the international human rights cloth. The extensive use of international human rights principles in the Constitution can, therefore, offer a path out of the thicket of confusion in avoiding injustices in cases where local statutes and international treaties and conventions that Kenya has ratified conflict. In such scenarios, focusing on relevant constitutional norms as the guiding light can be an effective temporary band-aid.

On a more positive note, the Supreme Court added that where there's a lacuna in domestic law on a matter that can be filled by reference to international law (customary or treaty law), the Court should apply such as, according to Articles 2(5) and 2(6) of the Constitution, these form *'part of the laws of Kenya'*. The same was held to apply in aiding the interpretation or clarification of a constitutional provision.[36]

---

33 *Karen Njeri Kandie v Alassane Ba & another,* Court of Appeal.

34 *In the matter of the principle of gender representation in the National Assembly and the Senate*, Advisory Opinion No 2 of 2012, Ruling of the Supreme Court, para 52.

35 *John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others,* Petition 15 of 2011, Judgement of the High Court at Nairobi (2011) eKLR and *Mitu-Bell Welfare Society v Attorney General & 2 others,* Petition 164 of 2011, Judgement of the High Court at Nairobi, 11 April 2013, eKLR, para 15.

36 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 130-132.

On the role of UN Guidelines in the interpretation and clarification of the Bill of rights, the Supreme Court held that these constitute international jurisprudence or *soft law.* Thus, they are only of persuasive value, and not of binding force, as interpretive tools aimed at breathing life to constitutional provisions like Article 43 on socio-economic rights in the determination of a case. However, the Court importantly noted that such Declarations or Resolutions could in time ripen into norms of customary international law like the Universal Declaration of Human Rights. The ripening process mostly involves two processes: the consistent and general State practice of a norm, and the acceptance by States of such a practice being binding in law (*opinio juris*).[37] Having clarified this, the Supreme Court then proceeded to consider the trial Court's reference to the UN Guidelines on evictions, which the Court of Appeal had taken issue with. It held that the trial judge was right to refer to the Guidelines 'as an aid in fashioning appropriate reliefs during the eviction of the appellants'. This was because the Guidelines filled a lacuna in the law on how the government is to conduct evictions and do not offend the Constitution, such being non-binding aids providing directions to State Parties to a treaty to help them implement the treaty or fulfil the obligations thereunder.[38]

2.3 The right to housing under Article 43(1)(b) of the Constitution

Before delving into the Supreme Court's observations and holding on the right to housing in its *Mitu-Bell* decision, particularly in the context of forced evictions, this article will first give a legal and contextual background of the right to housing and forced evictions in Kenya. This will provide the necessary context to my analysis of the Supreme Court's determination on the right to housing in *Mitu-Bell*.

[37] *Military and paramilitary activities in and against Nicaragua* (*Nicaragua v USA*), ICJ Rep. 1986, 180-190; *Lotus case (France v Turkey),* PCIJ Reports, Series. A, No 10 (1927); *The North Sea Continental Shelf cases (Federal Republic of Germany (FRG) v Denmark; FRG v The Netherlands),* ICJ Rep. 1969, 3.

[38] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others,* Supreme Court, para 141-143.

2.3.1 Legal and contextual background of the right to housing and forced evictions in Kenya

Article 43(1)(b) of the Constitution guarantees every person in Kenya the right 'to accessible and adequate housing'. However, the right to housing is not absolute and is subject to limitations. The main limitation we will discuss here is the one found in Article 21(2) of the Constitution which provides that: 'the State shall take legislative, policy and other measures, including the setting of standards, to achieve the *progressive realisation* of the rights guaranteed under Article 43'.[39] This standard of progressive realisation is relatively new to Kenyan jurisprudence. Hence, attempts to give it meaning and develop it further have mostly referred to the understandings of it given by the Committee on Economic Social and Cultural Rights (CESCR) in relation to the similarly worded but non-identical provisions in Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This requires each state party to the Covenant to take steps 'to the *maximum of its available resources*, *with a view to achieving progressively the full realisation of the rights* recognised in the present Covenant'.[40]

Basing on the earlier discussion on the applicability of international law in Kenya, the ICESCR, being an international covenant that Kenya has ratified, complements provisions on socio-economic rights entrenched in the Constitution. Further, the CESCR's General Comments amount to *soft law* that are of persuasive value 'as interpretive tools aimed at breathing life to constitutional provisions like Article 43 on socio-economic rights'.[41] Hence, because constitutionally entrenched socio-economic rights are new in Kenyan legal discourse, the aforesaid international laws have been and continue to be instrumental in fleshing out the content of these rights.

On the inclusion of progressive realisation in Article 2(1) of the ICESCR, the CESCR explains that this standard was adopted in recog-

---

39 Emphasis added.

40 Emphasis added.

41 Victoria Miyandazi, 'Setting the record straight on socio-economic rights adjudication: Kenya Supreme Court's judgment in the Mitu-Bell Case' *OxHRH Blog,* 1 February 2021.

nition of the fact that full realisation of socio-economic rights cannot be achieved within a short period of time due to resource constraints in many countries that are parties to the Covenant.[42] However, progressive realisation has come to be seen as an excuse by States for the non-implementation of indeterminate rights, in particular socio-economic rights. These rights, which mostly give rise to positive duties, are usually viewed as requiring progressive realisation, stagnating their implementation because of the recognition that the state might not have all the available resources to immediately realise the right in full.

It is important to note that, like most socio-economic rights, the right to housing imposes both negative and positive duties.[43] Negative duties 'protect individuals against intrusion by the State' and are said to be 'determinate, immediately realisable, and resource free'.[44] They are thus relatively easier to enforce. On the other hand, positive duties require 'protection by the State from want or need' and are regarded as being 'indeterminate, programmatic, and resource intensive'.[45] Due to their indeterminate nature and resource implications, positive duties are more difficult to enforce, and this is why they are said to require progressive realisation.[46]

Nevertheless, the CESCR has noted that the standard of progressive realisation does not leave a socio-economic right devoid of any meaningful content.[47] As such, the whole obligation is not postponed. First, the state has the immediate obligation to take deliberate, concrete and targeted steps towards the realisation of socio-economic rights and not to take any retrogressive measures.[48] The duty not to take retrogressive measures means that the right to housing also consists of the

---

42 CESCR, General Comment No 3: Article 2 on the nature of States parties' obligations, 1990, E/1991/23 para 9.

43 Sandra Fredman, *Human rights transformed: Positive rights and positive duties*, Oxford University Press, 2008, 68.

44 Fredman, *Human rights transformed,* 66 and 70.

45 Fredman, *Human rights transformed,* 66 and 70.

46 Fredman, *Human rights transformed*, 70.

47 CESCR, General Comment No 3, para 9.

48 CESCR, General Comment No 3, para 2.

negative duty not to unjustly deprive people of their right to housing through illegal evictions, leaving them homeless and without alternative housing or compensation. This is an immediate negative obligation.

Second, there is an immediate obligation of non-discrimination, meaning that the provision of socio-economic rights like housing should not be done in a discriminatory manner.[49] An equality element is included in Article 43 through the use of the term 'every person' in stipulating who should benefit from socio-economic rights. This means the State should extend these rights to those who are unjustly excluded where they are provided to some and not others who are similarly situated. It also obliges the State to make reasonable accommodation, say in provision of housing, to ensure that all persons, including those with disabilities have equitable access to such a right. For example, through the construction of ramps to ensure that physically disabled persons on wheelchairs can access public housing structures.

Third, the CESCR has stated that within the standard of progressive realisation, there is a minimum core obligation placed upon every state party 'to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights' in the ICESCR. It further recognises the essential nature of this obligation by stating that: 'if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être'.[50]

These three points flowing from the standard of progressive realisation under Article 2(1) of the ICESCR can thus be said to also apply to the progressive realisation standard for the implementation of socio-economic rights like housing in Article 21(2) of the Kenyan Constitution.

The ICESCR's Article 2(1) 'maximum available resources' requirement acknowledges that resources may be limited at various stages of

49 CESCR, General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, para 7 provides that 'Non-discrimination is an immediate and cross-cutting obligation in the Covenant'.

50 CESCR, General Comment No 3, para 10.

implementing socio-economic rights, and hence the more reason these rights should be progressively realised. In close relation to this requirement, the Kenyan Constitution similarly recognises that resources for implementing socio-economic rights may be limited. However, it goes further than the ICESCR in providing express guidelines that the State should follow in supporting a claim that it has limited resources to implement a socio-economic right at a given point. These guidelines are encapsulated in Article 20(5). This provision explicitly includes a status-based equality element to how socio-economic rights are implemented. Article 20(5) requires that:

> In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles –
>
> (a) it is the responsibility of the State to show that the resources are not available;
>
> (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; *and*
>
> (c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion (emphasis added).

By requiring the State to give priority to vulnerable groups and individuals, Article 20(5)(b) adds an equality component to the implementation of socio-economic rights. This point is also emphasised in Article 21(3) of the Constitution providing that all State organs and public officers have a duty to address the needs of vulnerable groups.[51] It lists vulnerable groups in Kenya as including, but not limited to, 'women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities'. The word 'vulnerable' is understood here to stand for the effects of

[51] This is in relation to the application of all rights and fundamental freedoms in the Bill of Rights and not just SERs.

discrimination and the resultant disadvantage occasioned to a group because of possession of a particular status.

Arguably, prioritisation of the socio-economic needs of vulnerable groups in Article 20(5)(b) coincides with the minimum core obligation which the CESCR has argued attaches to the standard of progressive realisation. This is particularly evident when we consider the understanding of the minimum core obligation as requiring reasonable priority setting in provision of basic essential levels of each socio-economic right to the most vulnerable and in desperate need.[52]

What amounts to a minimum core obligation for various socio-economic rights is a contentious issue that remains unresolved. Nevertheless, by Article 20(5)(b) of the Constitution explicitly requiring the prioritisation of vulnerable individuals and groups in implementation of socio-economic rights, it is clear that the State is to be held to account for failing to cater for the urgent needs of the most disadvantaged. The Kenyan Constitution thus extinguishes the need to dwell on a discussion of the contentious nature of a minimum core obligation. This is because a tangible provision already exists which performs the essential task of requiring priority setting for those in urgent need – the key point from the minimum core obligation discussion this article aims to highlight.

The need for priority-setting argument brings us to the question of why this is important in scenarios similar to that in *Mitu-Bell*. Like *Mitu-Bell,* in most, if not all, instances of unlawful evictions of informal settlers in Kenya, the rights to equality and non-discrimination are implicated as many of those afflicted and to be left homeless are poor and from vulnerable groups. Notably, the involvement of the right to equality and non-discrimination in eviction cases gives rise to an immediate positive obligation not to discriminate by providing the right to housing to vulnerable informal settlers who would be left homeless when evicted. We find this argument in the Supreme Court's acknowledgement in *Mitu-Bell* of the plight, in terms of land rights and access

52 David Bilchitz, *Poverty and fundamental rights: The justification and enforcement of socio-economic rights*, Oxford University Press, 2007, 208.

to housing, faced by informal settlers, a particularly vulnerable group in Kenya. According to the Supreme Court, for such informal settlers, 'however decrepit' their accommodation may be, living precariously has become their lived reality and such settlements 'home to their existence, their aspirations, and their very humanity'.[53] Such precarious living is further compounded by the ever-increasing unlawful forced evictions of informal settlers, and the fact that most residents of informal settlements are poor (most of them being daily wage earners[54]), women, children, persons with disabilities and the elderly. Such unlawful and inhumane evictions exacerbate the dire conditions of these groups and further pushes them to the margins of society.

The Supreme Court in *Mitu-Bell* rightly observed that such a state of affairs is perpetuated by 'the fact that our society is incredulously unequal, with the majority of the population condemned to grinding poverty, [such that] the right to accessible and adequate housing remains a pipe-dream for many'.[55] The Court points out that one of the causes of landlessness in the country is the inability of many Kenyans to 'own' land and have title deeds that would give them an outright right to safeguard their right to housing on the said land. The situation is further worsened by the failure of successive governments to effectively provide access to housing for the more than 40 per cent of Kenyans who are considered poor under the defence of lack of resources.[56]

Poverty, landlessness and lack of adequate State intervention to ensure accessible and adequate housing for Kenyans, especially those who are poor, does not do away with the fact that individuals and families need a roof over their heads to 'eke their daily living'.[57] This conse-

[53] Bilchitz, *Poverty and fundamental rights,* 144.

[54] Nita Bhalla, 'Forced evictions leave 5,000 Kenyan slum dwellers at risk of coronavirus' *Reuters* 6 May 2020.

[55] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 149-150.

[56] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others,* Supreme Court, para 149. See also Kenya National Bureau of Statistics, *Basic report on well-being in Kenya: Based on the 2015/2016 Kenya Integrated Household Budget Survey (KIHBS)* (2018) 44–45.

[57] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 150.

quently leads to the mushrooming of informal settlements to house the landless and those who move to big cities and towns for work to earn a wage and sustain their various needs. This point reiterates the Indian Supreme Court's holding in *Olga Tellis & Others v Bombay Municipal Corporation & Others* on the eviction of pavement dwellers, which linked the right to housing with the right to life and to a livelihood.[58] The Court agreed with the petitioners that the eviction of pavement dwellers from their habitat amounts to deprivation of their right to livelihood as comprehended in the right to life. On this, it rightly held that the right to livelihood is an important facet of the right to life as 'no person can live without the means of living' and 'the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood'.[59]

That the Kenyan Supreme Court's *Mitu-Bell* decision takes cognisance of these issues is an indication of its implicit awareness of the obligation set in Article 20(5)(b) and 21(3) to prioritise the need to address the needs of vulnerable groups. This is coupled with an appreciation of the rights to accessible and adequate housing, right to equality and a right to life coupled with its resultant right, the right to livelihood. It is from this background that I now turn to an analysis of the various aspects of the Supreme Court's judgment on the right to housing in *Mitu-Bell.*

2.3.2 The Supreme Court's decision on the right to housing in Mitu-Bell

Having first recognised the access to housing challenges faced by informal settlers like the Mitu-Bell community, the Supreme Court held that the land tenure system in the country has radically been transformed by the 2010 Constitution due to its declaration that '*all land in Kenya belongs [to] the people of Kenya collectively as a nation, communities and individuals*'. This was said to mean that 'every individual as part of the collectivity of the Kenyan nation has an interest ... in *public land*'.[60]

[58] *Olga Tellis & Others v Bombay Municipal Corporation & others,* 1986 AIR 180, 1985 SCR Supl. (2) 51.

[59] *Olga Tellis & Others v Bombay Municipal Corporation & others*, para 71-80.

[60] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 151.

Based on this observation, the Court proceeded to hold that a long period of occupation by a group of people crystallises their right to housing over *public land*. This holding is ground-breaking in that under the long-existing corpus of land laws in Kenya, it was unclear and difficult to claim prescriptive rights over public land by virtue of a long period of occupation. That long-term occupation of a parcel of land could lead to rights over the same, has only been clear in the context of adverse possession of private land. This is whereby, a non-owner of land gains title to the land by operation of law when he or she has been in exclusive possession of another's private land for an open and uninterrupted period of over 12 years without the owner or his or her agents' opposition.[61]

However, the Supreme Court held that, in contrast to public land, 'illegal occupation of private land cannot create prescriptive rights over land in favour of occupants'.[62] This position on private land is unclear owing to the existence of the doctrine of adverse possession of private land, which as stated above, is applicable in Kenya. My take is that adverse possession of another's private land is akin to the creation of prescriptive rights over another's private land through long-term uninterrupted exclusive possession of the same for over 12 years. Hence the reason why I find the Supreme Court's differentiation of private and public land in creation of prescriptive rights over land ambiguous. The Supreme Court's position on private land is also criticised by Gautam Bhatia who avers that, 'if indeed there is a democratic principle that all land belongs to the people, then the Court's distinction between "public land" (where these principles apply) and "private land" (where they do not) is unsustainable'.[63]

Crucially, the Court held that when 'Faced with an eviction on grounds of public interest, such potential evictees have a right to pe-

[61] See Sections 7, 13, 17, 37 and 38(1) and (2) of the Limitation of Actions Act, Chapter 22, Laws of Kenya; *Wilson Njoroge Kamau v Nganga Muceru Kamau* (2020) eKLR.

[62] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 151.

[63] Gautam Bhatia, 'Notes from a foreign field: The Kenyan Supreme Court on housing evictions, and the right to land', available at <https://indconlawphil.wordpress.com/2021/01/14/notes-from-a-foreign-field-the-kenyan-supreme-court-on-housing-evictions-and-the-right-to-land/> accessed on 15 January 2021.

tition the Court for protection' and, if an eviction is warranted in the public interest, by virtue of Article 23(3) of the Constitution, the Court can craft orders such as compensation, requirement of adequate notice, observance of humane conditions during eviction and the provision of alternative land for settlement, to protect the evictees' right to housing.[64] The Court also acknowledged that the evictions of the appellants took place in contravention of a court order and led to the destruction of homes, property and even schools, entitling the appellants to relief.[65] The Supreme Court then proceeded to remit the case back to the Trial Court for the crafting and granting of appropriate remedies in accordance with its judgment and appellants' pleadings at the High Court.

In coming up with appropriate remedies in the case, the High Court will certainly be guided by the Supreme Court's observations on the orders that can be granted, as well as the losses suffered by the appellants that the Court stated would require a remedy. Thus, the Supreme Court did not leave the appellants' claim unremedied. This is the reason why I disagree with Ian Mathenge's view that the Supreme Court's *Mitu-Bell* decision was a missed opportunity to be Kenya's *Irene Grootboom* case. Notably, in *Government of the Republic of South Africa v Grootboom*, the South African Constitutional Court only gave a declaratory order that the State should devise and implement within its available resources, a comprehensive housing programme that included reasonable measures to ensure that the rights of the poor and especially those in desperate need are guaranteed. [66]

The *Grootboom* judgment has fittingly been lauded as being the first time that the South African Court enforced the constitutionality of a socio-economic right. However, the declaratory order that the State should take appropriate steps to cater for the rights of *all* those without adequate access to housing left Mrs Grootboom and those in the same urgent situation as her, without an immediate relief and she died homeless eight

---

64 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others,* Supreme Court, para 151-153.

65 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others,* Supreme Court, para 156.

66 *Government of the Republic of South Africa v Grootboom,* para 99.

years later. It is for this reason that Davis argues that '[a] failure by successful litigants to benefit from constitutional litigation of this kind can only contribute to the long-term illegitimacy of the very constitutional enterprise'. This is because the lack of a tangible benefit for successful litigants in desperate need renders such rights illusionary.[67] Indeed, an all-inclusive contextual approach that considers *all* those deprived of their right to housing is a good approach in guaranteeing fairness and avoiding 'queue jumping' by those who can access court as opposed to those who do not have the means or capability to litigate. However, such an approach should not be applied to defeat a valid and urgently needed individual socio-economic rights claim, especially since –using the example of *Grootboom* – despite 'winning' the case, Mrs Grootboom and thousands of other South Africans died without a home. The best description of this danger is elucidated in Talib Kweli's apt statement that, 'if we say our house is on fire and you say "all houses matter," well that may be true, but all houses aren't on fire now, my house is'.[68] As much as there is still an injustice in the fact that the Mitu-Bell community had to wait for over 10 years for their grievance to be resolved, it is laudable at least that the Supreme Court judgment, however imperfect, does not leave them without a remedy.

3. Conclusion

This article has shown that, the *Mitu-Bell* Supreme Court decision, though imperfect, has made it clear that, even when an eviction is legitimate and warranted, this is to be conducted in accordance with the law. It has clarified some of the confusing points on the application of international law in Kenya under Article 2(5) and Article 2(6) of the Constitution. This is particularly with regards to the meaning of 'general rules of international law' and the persuasive nature of international juris-

67 Dennis Davis, 'Socio-economic rights in South Africa: The record after ten years' (2004) 2 *New Zealand Journal of Public and International Law*, 56.

68 Interview with Talib Kweli on the Black Lives Matter movement, *MTVNews* on Twitter 9 July 2016.

prudence as guiding aids when there is a lacuna in the law. The Court has proclaimed in ringing terms that evictees have a right to approach the court to seek compensation, enforcement of the requirement of adequate notice and observance of humane conditions during eviction, and the provision of alternative land for settlement. The judgment will thus be instrumental and a positive guiding light in right to housing and eviction cases as unlawful evictions continue to be conducted in total disregard of the law.[69] Landlessness is also an issue of perennial debate, and it will be interesting to see how the Court's pronouncement that long-term occupation of public land can lead to prescriptive rights plays out in future litigation.

69 See OHCHR, 'COVID-19 crisis: Kenya urged to stop all evictions and protect housing rights defenders' Press Release 2020/05, 22 May 2022, Siago Cece, 'Kariobangi demolition victims sue State, want CSs fired' *The Nation,* Nairobi, 8 June 2020; 'Court stops State from evicting 8000 families' *People Daily,* 4 May 2020

Mitu-Bell Welfare Society redux: A note on the strengths and weaknesses of the Supreme Court judgement

Maurice Oduor*

Abstract

This note reviews the case of Mitu-Bell Welfare Society *in view of the concerns raised over the Supreme Court judgment, as well as points raised in its support. It argues that on one hand, the court laid down foundations for future interpretation that will help courts better address violations of socio-economic rights in Kenya. Importantly, the court addressed the rights of persons facing evictions in informal settlements and the 'bare minimum' standards that should be applied in such situations. On the other hand, the note agrees with those who have found issue with how the court canvassed the place of international law in Kenya.*

Keywords: international law; 'bare minimum' standards; socioeconomic rights; hierarchy of laws in Kenya; illegal/informal settlements; public land

* LLB (Moi University); LLM (University of Pittsburgh); LLD (University of Pretoria).

1. Introduction

This note argues that the Supreme Court's decision in *Mitu-Bell Welfare Society*[1] which overturned the Court of Appeal's decision[2] in the same matter not only salvages the jurisprudence on structural interdicts but also offers some light on two other broader issues: the place of international law in Kenya's constitutional structure; and the practical implications of socio-economic rights, in this case, the right to housing, in the face of competing (property) claims. Contrary to the assertions by Ian Mwiti Mathenge in his lead paper in this debate that the Supreme Court failed to give effect to the transformative vision of the Constitution of Kenya 2010, this note argues that to a large extent the Court's reasoning is in line with the ethos and spirit of the Constitution save for some isolated statements that will be alluded to. The note begins by analysing the Court's ruling on structural interdicts, followed by the application of international law in Kenya and finally on the right to housing as is guaranteed by the Constitution.

2. On structural interdicts

The Court of Appeal had set off on a completely misinformed tangent when it held that the remedy of structural interdicts was unknown to Kenyan law. The Supreme Court held that the Court of Appeal had simply chosen to disregard the Supreme Court's own view of the matter where the Supreme Court had itself ordered interim reliefs similar to what was being challenged at the Court of Appeal. The Court of Appeal had also chosen to not engage in analysis of previous High Court jurisprudence on the use of structural interdicts. In affirming the applicability of structural interdicts in Kenya's constitutional framework, the Supreme Court rendered itself thus:

1 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)*, Petition No 3 of 2018, Judgement of the Supreme Court, 11 January 2021 (eKLR).

2 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Civil Appeal No 218 of 2014, Judgement of the Court of Appeal at Nairobi, 1 July 2016 (eKLR).

> '…Article 23 (3) of the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right.'[3]

Effectively, the Supreme Court has put to rest the question as to whether interim remedies such as structural interdicts are available in Kenya's constitutional rights redress mechanisms.[4] The justification proffered by the Supreme Court included the need to spur the development of court-sanctioned enforcement of human rights.

The Supreme Court qualified its position in a number of ways. First, the remedy must be 'carefully and judicially crafted'.[5] Secondly, interim reliefs, structural interdicts, supervisory orders or any other orders of similar nature '…have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other state agency vested with a constitutional or statutory mandate to enforce the order.'[6] Thirdly, and according to the Court, most importantly, 'the Court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy.'[7] Fourthly, the 'orders should not be couched in general terms, nor should they be addressed to third parties who have no Constitutional or statutory mandate to enforce them.'[8]

Finally, 'where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallisation of certain actions.'[9] While the exact implications of these requirements will only be seen in future litigation, one sees that the Supreme Court goes beyond merely affirming the propriety of interim reliefs in constitutional litigation but also delineates some guidelines for the lower courts to follow when considering the remedies. This is one of the strongest points of the Supreme Court decision in this case.

---

3 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 121.

4 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 121.

5 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 121.

6 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 122.

7 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 122.

8 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 122.

9 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 122.

One hopes that lower courts will expound and expand on this list to make interim reliefs more robust remedies in constitutional matters in Kenya.

3. On applicability of international law under Articles 2(5) and 2(6) of the Constitution

The Supreme Court also had the opportunity to provide clarity on the vexing question of the place of international law in Kenya today. Article 2(5) of the Constitution allows that: 'the general rules of international law shall form part of the law of Kenya,' while Article 2(6) states that: 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'[10] So far, jurisprudence on these two provisions has been far from clear.

On the one hand there are judges who have suggested that international law trumps contradicting municipal laws, for instance in the *Zipporah Wambui Mathara* case.[11] The case involved a debtor who was committed to serve jail term for failing to pay back what was owed to the receiver. The right in contention was of the International Covenant on Civil and Political rights that provides that an individual should not be imprisoned merely because of failure to fulfil a contractual obligation.[12] The civil procedure in contrast provides that in the event the debtor fails to execute a decree than they may be arrested and detained in Prison.[13] In this case Lady Justice Koome (as she was then) held that holding a debtor in prison goes against the provisions of the ICCPR.[14]

10 Constitution of Kenya (2010), Article 2(5) and 2(6).

11 *Re The Matter of Zipporah Wambui Mathara,* Bankruptcy Cause 19 of 2010, Ruling of the High Court (2010) eKLR.

12 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 11.

13 Civil Procedure Act (No 21 of 2010), Section 38.

14 *Re Zipporah Wambui Mathara,* para 10.

On the other hand, there are judges who have deemed the problem as not being one of interpretation rather than of hierarchy. Justice Majanja held in the case of *Beatrice Wanjiku and Another v Attorney General and 2 others*[15] that international legal provisions are first of all 'subordinate to and ought to be in compliance with the Constitution',[16] and secondly, such international conventions did not trump local statute.[17] As such, Article 2(5) and 2(6) did not necessarily call upon courts to rank international law against either the Constitution or Acts of Parliament but to determine which amongst those laws is applicable at any given moment, an exercise that is an act of interpretation. In the circumstances the judge took the view that since international law did not trump the Constitution, the latter would always control the application of the former. In the case of contradictions between local statute and international law, then the fact that both ranked the same would require the differences to be resolved through ordinary rules of statutory interpretation.[18]

The foregoing debate on the true place of international law in Kenya is merely a distilled form of the argument on whether Kenya has abandoned her dualist ideals and embraced monism in the application of international law. This is a question that has not benefitted from clear path-making jurisprudence by the courts that have handled it. While the *Mathara case* certainly seems to suggest that international law has a direct effect in Kenyan jurisprudence, the *Beatrice Wanjiku case* seems to suggest otherwise. While engaging with this issue in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, the Court of Appeal signalled its concurrence with the Majanja view by stating that 'the supreme law in Kenya is the Constitution and if any general rule of international law or treaty ratified by Kenya is inconsistent with the Constitution, the Constitution prevails.'[19]

15 *Beatrice Wanjiku & another v Attorney General and others*, Petition 190 of 2012, Judgement of the High Court (2012) eKLR, para 20.

16 *Beatrice Wanjiku & another v Attorney General and others*, para 20.

17 *Beatrice Wanjiku & another v Attorney General and others*, para 20.

18 *Beatrice Wanjiku & another v Attorney General and others*, para 21-23.

19 *Kenya Airports Authority v Mitu-Bell Welfare Society &2 others*, Court of Appeal, para 115.

The Court of Appeal canvassed the concept of 'general rules of international law' and concluded that general rules of international law amounted to customary international law, *jus cogens*, and therefore are binding without room for derogation.[20] This decision – that international law, even of a peremptory nature, such as general rules of international law (which the Court equated to customary international law), would be subservient to contrary local norms – is one that ran against the flow of the Court's own reasoning. That finding created a lot of conceptual and practical difficulties which the Supreme Court ought to have clarified.

The Supreme Court failed to pick up that responsibility and took a simplistic way out of it. On ranking, the Supreme Court affirms the Majanja position that international law only applies as a gap-filler, where no local guidance exists, that is, international law kicks in if no constitutional, statutory, or judicial pronouncement exists on the issue.[21] In other words, international law is subservient to all contrary local law. However, in the event the discord exists with reference to statute then a court has to apply maxims of judicial interpretation to determine the applicable law.[22]

The Supreme Court sees the monist/dualist dichotomy as being of no use, terming it as increasingly sterile, in a manner to suggest that a norm-elimination game is more useful than a value-based analysis of international law.[23] One would have expected the Supreme Court to engage more robustly with the import of the inelegantly drafted Articles 2(5) and 2(6) with a view to smoothing out the jurisprudential pitfalls those provisions have so far engendered. As it stands, the place of international law in Kenya's legal system is infirm and prone to judicial headwinds, some of which may blow it far away from what Kenyans had intended when they included it in their normative framework.

20 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 116.

21 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 132.

22 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 132.

23 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 133.

The Supreme Court failed to reconcile its decision on the one hand that 'general rules of international law' refer to customary international law, with its view that international law is a secondary source of law, on the other hand. The Supreme Court rendered itself thus:[24]

> where it has been used, as in the judicial pronouncements above, the expression *"part of our law"* means that domestic courts of law, in determining a dispute before them, have to take cognisance of rules of international law, *to the extent that the same are relevant, and not in conflict with the Constitution, statutes, or a final judicial pronouncement*. The phrase *rules of international law*, viewed restrictively, and at any rate, in the context in which it was used in the American and English cases quoted above, refer to customary international law. It is already clear that in our context, *Article 2(5) and (6) of the Constitution embraces both international custom and treaty law.* This provision can be said to be both outward, and inward looking. The Article is outward looking in that, it commits Kenya-the State, to conduct its international relations in accordance with its obligations under international law. In this sense, the Article can be considered to be stating the obvious, in view of the fact that, as a member of the international community, Kenya is bound by its obligations under customary international law and its undertakings under the treaties and conventions, to which it is a party. Yet, reference to international law by a domestic Constitution is evidence of its progressive nature. On the other hand, Article 2(5) and 2(6) is inward looking in that, it requires Kenyan courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, *as long as the same are relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement*. Where for example, a court of law is faced with a dispute, the elements of which, require the application of a rule of international law, *due to the fact that, there is no domestic law on the same, or there is a lacuna in the law, which may be filled by reference to international law, the court must apply the latter*, because, *it forms part of the law of Kenya.* In other words, Article 2(5) and 2(6) of the Constitution, recognises international law (both customary and treaty law) as *a source of law* in Kenya. By the same token, a court of law is at liberty, to refer to a norm of international law, as an aid in interpreting or clarifying a constitutional provision (see for example, *In the matter of the principle of gender representation in the National Assembly and the Senate;* SC Advisory Opinion No 2 of 2012, [2012] eKLR

While considering the meaning of the term 'general rules of international law', the Supreme Court held that it refers to the 'whole corpus of customary international norms', including *jus cogens*.[25] There appears

---

24 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 130-132.

25 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 140.

to be an attempt to categorise customary international law into those that are peremptory (*jus cogens*) and those that are not. Is this classification useful? Are there rules of customary international law that are not binding? Can a court choose which customary international law rule binds and which one does not? Can domestic law be a basis for holding that a rule of customary international law is inapplicable in Kenya? May a court uphold a statute overturning the rules of diplomatic immunity that have evolved into custom? May the customary rules defining crimes under international law be modified by local law, including the Constitution and statute and if so, is a court in Kenya at liberty to enforce that law? The 'free will theory' that the Supreme Court affirmed with respect to international law generally and international custom in particular is not supported by law.

Perplexingly, the Supreme Court holds that general guidelines and declarations such as soft law may 'ripen into a norm or norms of customary international law, depending on their nature and history leading to their adoption.' In such cases they become *binding* as general customary international law/general rule of international law.[26] But despite their binding nature, and following the court's logic above, courts can only apply them if there is no local constitutional or statutory rule governing the issue in dispute. Nothing could be more contradictory.

4. On Article 43 (socioeconomic) rights

One criticism courts in Kenya have faced is that they have been unable to conceptualise and contextualise Article 43 rights. Courts have exhibited the tendency to determine disputes over social and economic rights without following the imperatives under Article 20(5) of the Constitution. That Article provides as that:[27]

---

[26] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 142 and 143.

[27] Constitution of Kenya (2010), Article 20(5).

> in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles – (a) it is the responsibility of the State to show that the resources are not available; (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and (c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

In effect, Article 43 rights require a closer 'stepwise' analysis that involves an examination of several factors set out in the Constitution and subject to meeting the core obligations, the law provides an opportunity for courts to clarify the obligations involved in the context of socio-economic rights. Indeed, the Supreme Court is alive to this role that a court is required to play when it states that: 'Article 20(5) clearly empowers a court or tribunal, presiding over a dispute, in which the petitioners are claiming that the State, has either neglected, or failed in its responsibility to effectuate a socio-economic right, to demand evidence that would exonerate the latter from liability.'[28] This understanding of a court's obligation under Article 43 has been less appreciated in many decisions and the fact that the Supreme Court picks it out must be taken as a positive development.

5. On the right to housing

The Supreme Court must be commended for its acute appreciation of the context of the problem of illegal evictions in Kenya particularly with respect to informal settlements erected on public land. However, the Court's mention of prescriptive rights over private property appears to be tangential and little ought to be made out of it. Instead, the breadth of the Supreme Court's pronouncement is limited to the realm of non-authorised (illegal) occupation of public lands by the landless. While such occupants do not necessarily acquire an interest that is anal-

28 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 148.

ogous to ownership, they acquire a procedural right to be notified of intended eviction and provision of alternative accommodation, at the very least. It does not seem that the Supreme Court was suggesting that the State has an obligation to provide shelter, and even if the Court does not develop the argument in the context of the obligation to respect and the obligation to protect the right to housing, the Court cannot be faulted for requiring authorities to be orderly and respectful when dealing with occupants of informal settlements particularly in a society characterised by grinding poverty and inequality. Perhaps the Supreme Court would have gone out on a limb and defined the concept of adequate housing, perhaps this was not the case for undertaking such task. It is hoped that the foundation blocks laid down by the Supreme Court will now afford an opportunity for latter High Court decisions to build the jurisprudence on the particular aspect of the right to housing.

6. Conclusion

While the Supreme Court failed to provide clear pathways for application of international law in Kenya, the decision is a critical affirmation of the powers of the High Court to fashion constitutional remedies to suit disputes. The Supreme Court also listed criteria that should help courts in responding to claims of rights violations. The Supreme Court laid out what appears to be bare minimums of the right to housing/ shelter in the context of unauthorised/illegal informal settlements on public land, which include the right to be involved in the process of eviction either through notification and/or the decision on alternatives. There is always an opportunity to develop substantive prescriptions on the right to housing, perhaps the *Mitu-Bell* case was not one of those. Besides, the decision allows room for evolution of jurisprudence from the ground up.

Between universalism and cultural relativism: The dilemma of consent to female genital mutilation in the *Tatu Kamau case*

Caroline Omari Lichuma*

Abstract

To date, almost 74 years since the adoption of the Universal Declaration of Human Rights (the UDHR), the tensions between universalism and cultural relativism in the field of human rights, whose provenance can be traced back to the debates surrounding the drafting and adoption of the UDHR, still linger on, playing out on the national stage in countries such as Kenya. At its core, universalism argues that all human rights inhere in all individuals without distinction, and that they must stand even when in when in opposition to established cultural practices. In contrast, cultural relativism holds that no particular culture is superior to another, and centers on the need for forbearance and respect towards each culture to avoid imperialist tendencies of imposing beliefs. This paper argues that these binary ideological viewpoints are magnified in the context of female genital mutilation. Through an analysis of the case of Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (amicus curiae) [2021] eKLR, *it is proposed that a cultural approach is needed in addition to legal measures in place to combat the practice.*

Keywords: female genital mutilation (FGM), right to health, right to human dignity, right to culture, consent, Kenya

* LLB (University of Nairobi); LLM (New York University); PhD Candidate (University of Göttingen).

1. Introduction

The term 'female genital mutilation' (FGM), sometimes referred to as female genital cutting (FGC), or less commonly now as female circumcision, is the collective name given to several different traditional procedures involving partial or total removal of the external female genitalia, as well as injury to the female genital organs for non-medical reasons.[1] Kenya outlawed FGM in 2011 when the Prohibition of Female Genital Mutilation Act was passed.[2] However, this practice still persists in some communities. While the enactment of legislation alone is never enough to change undesirable social behaviour, it is certainly an important starting point in the journey to reduce and eventually eliminate harmful traditional practices such as FGM.

On the 17th March 2021 the High Court of Kenya sitting in Nairobi handed down its much-awaited judgment in the *Tatu Kamau Case*.[3] The case involved an adult female who challenged the constitutionality of the Prohibition of FGM Act as well as the Anti-Female Genital Mutilation Board created by the Act. The petitioner averred that certain provisions of this Act were unconstitutional primarily because they limited the right of adult women to exercise free choice or to give consent, and to enjoy their cultural rights.[4] It is an interesting case to ponder. How should the law (and the courts) deal with the situation of an adult woman (a doctor no less!) who, with full knowledge of the health risks and negative effects accompanying FGM, nevertheless demands the right to freely choose whether or not to undergo the practice, arguing that it holds importance to her cultural and personal identity as was the case here?

---

[1] Anika Rahman and Nahid Toubia (eds) *Female genital mutilation: A practical guide to worldwide law,* Zed Books, 2000, 3.

[2] Prohibition of Female Genital Mutilation (FGM) Act (No 32 of 2011).

[3] *Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae),* Constitutional Petition 244 of 2019, Judgment of the High Court (2021) eKLR.

[4] *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 1.

This first of its kind case raises novel questions about what consent truly means in the context of harmful traditional practices, and how far consent should, as a normative matter, be allowed to go. In other words, whose consent should hold sway in cases such as these? Should it be the consent of the adult woman, who wants the freedom to choose whether or not to undergo FGM? Or rather should it be the consent (or lack thereof) of other actors such as lawmakers and judges, who will make decisions that impact the autonomy of such an adult woman? As the nuanced analysis in this paper will show, these are difficult questions that have no straightforward answers.

Nevertheless, despite these difficulties, and using this seminal judgment as a foundation, this paper will analyse the inherent tension between the right to participate in and enjoy one's cultural life,[5] on the one hand, and the right to health,[6] on the other, in the context of a harmful traditional practice such as FGM. As regards the former, this will involve an interrogation of the complex mix of cultural, religious, social, and other factors that underpin the desire by a woman, such as the petitioner, to undergo FGM. For 'outsiders,' FGM holds no value for the women who undergo it, but for 'insiders,' FGM may be seen as an important rite of passage that 'holds meaning not only for the woman who receives it, but also for the woman who performs it'.[7] As regards the latter, subsequent sections of this paper will show that FGM has clear right to health implications for those who undergo it. Ultimately, the paper will seek to identify what role, if any, consent should be allowed to play in the mediation of this tension between right to culture and right to health.

In navigating these concerns the paper is divided into six sections including this introduction. Section II sets the stage for the discussion by briefly explaining what FGM is and why it is considered to be a harmful traditional practice. Section III summarises the pertinent facts of the

5 Constitution of Kenya (2010), Article 44.

6 Constitution of Kenya (2010), Article 43.

7 Anne Gibeau, 'Female genital mutilation: When a cultural practice generates clinical and ethical dilemmas' 27(1) *JOGNN Clinical Issues* (1998) 87.

Tatu Kamau case as well as the High Court's judgement. Section IV focuses on the right to health, and the right to human dignity as well as their implications for consent in the context of FGM. The penultimate section analyses the interplay of cultural rights and human rights more generally, paying particular attention to the questions of cultural relativism and universalism. A brief conclusion will complete the article in Section VI.

2. Setting the stage: Explaining FGM

2.1 What's in a name: Female genital mutilation, female genital cutting or female circumcision?

To foreshadow this paper's position on FGM as a harmful traditional practice that should not be countenanced by either law or society, a small caveat on the choice of terminology is necessary to begin with. The importance of terminology cannot be overstated. This paper deliberately makes sole utilisation of the term FGM, rather than female genital cutting (FGC) or female circumcision.

For a long time, the term female circumcision was acceptable in the international discourse, as an analogous term to male circumcision, even though the two practices are not the same in both definition and effect as will be elaborated upon in section 1.2 below. This use of the term 'female circumcision' rather than FGM may have been mistakenly prompted by the desire to be sensitive to and respectful of the practices of the communities which carry out FGM, since the use of the term FGM was found to be 'offensive or even shocking to women who have never considered the practice a mutilation.'[8] As the argument goes, 'although FGM is a more scientifically correct term, the implications of the word profoundly confer a moralising tone that hastily concluded negative implications before an explanation is offered.'[9] As is already apparent,

[8] Rahman and Toubia (eds), *Female genital mutilation*, 5.

[9] Sandra Danial 'Cultural relativism vs. universalism: Female genital mutilation, pragmatic remedies' 2(1) *Prandium - The Journal of Historical Studies* (Spring, 2013), 4.

the tension between universalism and cultural relativism arises even in the context of the choice of terminology. Arguably, a cultural relativist approach, with its insistence on respect and tolerance of other cultures, would foreseeably prefer a morally neutral term such as FGC, or even circumcision. But are all cultural practices deserving of such respect and tolerance? This paper takes the position that FGM is a harmful cultural practice.[10]

However, the use of the term female circumcision was for the most part abandoned when numerous feminist activists and international bodies started opting for the terms FGM and FGC instead. Given this migration of the apprehensions surrounding FGM from the national sphere to the international one, 'the local has become a global concern, "female circumcision" has become "female genital mutilation" and a "traditional practice" has become a "human rights violation".'[11] Consequently in light of this internationalised concern against the practice, the term FGM was formally adopted in 1990 at the third conference of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children. In 1991, the WHO recommended that the United Nations adopt this terminology as well, which it did, and since then FGM and FGC rather than female circumcision have become the acceptable way to frame this harmful cultural practice.[12] The less loaded term FGC is 'intended to reflect the importance of using non-judgmental terminology with practicing communities'[13] and is used to avoid alienating and 'demonising cultures under cover of condemning practices harmful to women and the girl child.'[14] The then Special Rapporteur on tradi-

10 Yasmin Rafaat, 'Sugar-coating female genital mutilation in United Nations documents in English and Arabic: A diachronic study of lexical variations' 2 *International Journal of Linguistics, Literature and Translation* (2019) 5.

11 Bettina Shell-Duncan and Ylva Hernlund (eds), '*Female "circumcision" in Africa: Culture, controversy, and change'*, Lynne Rienner Publishers, 2001, 1.

12 UNICEF, *Changing a harmful social convention: Female genital mutilation/cutting,* 2005, 2.

13 UNICEF, *Changing a harmful social convention.*

14 Halima Embarek Warzazi, UN Special Rapporteur on traditional practices affecting the health of women and the girl child, *Third report on the situation regarding the elimination of traditional practices affecting the health of women and the girl child* (July 1999) E.CN.4/Sub.2/199/14, 78.

tional practices affecting the health of women and the girl child justified this preference for the use of the term FGC as opposed to the more judgmental FGM arguing that 'it is easy for the media, particularly in the West, and even when they believe they are defending the victims, to resort to racist imagery and demonise cultures, religions and entire communities.'[15]

The terminological choice currently rests between either FGM or FGC. It is noteworthy that the impugned Prohibition of FGM Act makes use of the term FGM. This could be seen as a testament to the gravity with which this practice is regarded in the Kenyan legal order. In light of the above background, this paper deliberately uses the term FGM for two reasons. Firstly, the more legalistic reason. The term FGM is relied upon in order to be consistent with the formulation adopted in both the Act, as well as in the *Tatu Kamau Case*, both of which reference FGM rather than FGC. Secondly, on a more personal level, this is a choice justified by the author's intention to emphasise the deleterious health effects, mutilation as it were, of FGM on the victims upon whom it is inflicted.

2.2 The question of definition: What is FGM?

Cases of FGM have been reported all over the world, but this practice is most prevalent in 'the western, eastern, and north-eastern regions of Africa, some countries in Asia and the Middle East and among certain immigrant communities in North America and Europe.'[16] Globally, it is estimated that at least 200 million girls and women alive today have undergone FGM in 30 countries, including in Kenya, Ethiopia, Somalia, Tanzania and Uganda.[17] It is even more troubling that in all of these countries, FGM will usually be carried out on young girls rather than

15 Warzazi, *Third report on the situation regarding the elimination of traditional practices affecting the health of women and the girl child*, 78.

16 WHO, *Eliminating female genital mutilation: An interagency statement - OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM*, WHO, 2008, 1

17 UNPF, *Beyond the crossing: Female genital mutilation across borders, Ethiopia, Kenya, Somalia, Tanzania and Uganda'*, 2019, 4.

on consenting adult women. In Kenya for example, victims 'are less exposed to FGM before age 7 and most of them are subjected to FGM at the beginning of their adolescence between the ages of 8 to 15 years of age.'[18] FGM is likely to be performed by traditional practitioners, although in some cases and to a much lesser extent medical personnel may also be responsible for the practice.[19] This latter practice is referred to as medicalisation of FGM and is rationalised on the false premise that health care providers are more likely to be more cautious, hygienic and knowledgeable. However, 'medicalized FGM is not necessarily safer and still ignores the long-term sexual, psychological and obstetrical complications of the practice.'[20]

Within the East African region Kenya has been lauded for being one of the champions in the fight against FGM, especially considering the enactment of the Prohibition of FGM Act in 2011. Article 2 of this Act provides an insightful definition of FGM as comprising:

> [a]ll procedures involving partial or total removal of the female genitalia or other injury to the female genital organs, or any harmful procedure to the female genitalia, for non-medical reasons, and includes— (a) clitoridectomy, which is the partial or total removal of the clitoris or the prepuce; (b) excision, which is the partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora; (c) infibulation, which is the narrowing of the vaginal orifice with the creation of a covering seal by cutting and appositioning the labia minora or the labia majora, with or without excision of the clitoris, but does not include a sexual reassignment procedure or a medical procedure that has a genuine therapeutic purpose.

With the exception of its failure to include Type 4 FGM (as explained below), the definition in the Prohibition of FGM Act is broadly similar to and modelled upon the WHO's 2008 definition which classifies FGM into four major types as follows:[21]

---

18 UNPF, *Beyond the crossing: Female genital mutilation across borders,* 12.

19 UNICEF, *A profile of female genital mutilation in Kenya*, 2020, 9.

20 UNPF, *Beyond the crossing: Female genital mutilation across borders,* 24.

21 WHO, *Female genital mutilation factsheet* (January 2018); WHO, *Eliminating female genital mutilation: An interagency statement,* 4.

I. Type 1: Often referred to as clitoridectomy, this is the partial or total removal of the clitoris – a small, sensitive and erectile part of the female genitals, and in very rare cases, only the prepuce – the fold of skin surrounding the clitoris.

II. Type 2: Often referred to as excision, this is the partial or total removal of the clitoris and the labia minora – the inner folds of the vulva, with or without excision of the labia majora – the outer folds of skin of the vulva.

III. Type 3: Often referred to as infibulation, this is the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris.

IV. Type 4: This includes all other harmful procedures to the female genitalia for non-medical purposes, for instance, pricking, piercing, incising, scraping and cauterising the genital area.

This failure to include Type 4 FGM within the ambit of the definition found in the FGM Act can be argued to be deliberate rather than accidental. Unlike the other 3 categories which are fairly specific, Type 4 is an 'umbrella term'[22] for all other harmful procedures to the female genitalia for non-medical purposes. This potentially encompasses such a wide range of procedures, that for the sake of legislative clarity and legal certainty, the drafters of the FGM law felt it would be better to exclude it.[23]

The above definitions already give an indication of the pain and harm that accompanies FGM, hence its description as a harmful cultural practice that infringes the rights of women and girls, and that deserves the strictest censure not just nationally, but internationally as well. In the

---

[22] Anna Wahlberg and others, 'Factors associated with the support of pricking (female genital cutting Type IV) among Somali immigrants – A cross sectional study in Sweden' 14 *Reproductive Health* (2017) 94.

[23] *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 105.

communities where it persists, it is a 'manifestation of gender inequality that is deeply entrenched in social, economic and political structures.'[24] For instance, in certain highly unequal societies, girls and women must remain virgins to be considered as marriageable or even socially acceptable. FGM is one of the ways to achieve this goal.[25] In addition, FGM is carried out to, *inter alia*, ensure 'women's chastity and monogamy in marriage.' In contrast, no such expectations of chastity or monogamy are placed on men. In fact, this kind of 'monogamy power' has been argued to be 'the most eloquent expression of patriarchy,' privileging men while subjugating women.[26]

To be clear, FGM is not the same as male circumcision. The latter is a minor intervention that might even confer health benefits, whereas FGM is a drastic intervention with no health benefits,[27] and that only causes harm as will be elaborated upon more fully in Section 2 below. To further contextualise this distinction between FGM and male circumcision, it is indicative of the health benefits of male circumcision (as compared to the non-existent health benefits of FGM) that while the WHO calls for elimination of FGM, it strongly advocates for male circumcision because male circumcision is thought to help prevent the spread of HIV/AIDS.[28] As one study observes in this regard, 'it is absurd to equate the simple removal of the male foreskin for health reasons to the barbaric amputation of the female clitoris for the sole purpose of preventing the woman from experiencing pleasure during sex.'[29] While I agree with the senti-

24 WHO*, Eliminating female genital mutilation: An interagency statement,* 1.

25 Rajat Khosla and others, 'Gender equality and human rights approaches to female genital mutilation: A review of international human rights norms and standards' 13 *Reproductive Health* (2017) 61.

26 Roseline K Njogu, 'Decolonizing sex: Fifty shades of rape' 3 *South African Journal of Policy and Development* (2016) 20.

27 WHO, 'Female Genital Mutilation' 2014; Alexandra Abott, 'An analysis of male vs. female circumcision' 2 *Kwantlen Psychology Student Journal* (2020) 1.

28 WHO, 'Information package on male circumcision and HIV prevention: Insert 4' (2007) <www.who.int/hiv/pub/malecircumcision/infopack/en/index.html> on 24 April 2021; Helen A Weiss 1, Kim E Dickson, Kawango Agot and Catherine A Hankins, 'Male circumcision for HIV prevention: Research and programmatic issues' 24 *AIDS* (2010) 1.

29 Elizabeth A Piontek and Justin M Albani, 'Male circumcision: The clinical implications are more than skin deep' 116 *Missouri Medicine* (2019) 35.

ment expressed in this study, about the severe harm that FGM causes to women as compared to the minimal harm that male circumcision causes to men, a note of caution is necessary. It is one thing to critique a cultural practice such as FGM on the ground that it causes unacceptable harm to women and girls, and quite another to invoke terms such as 'barbaric' and 'uncivilised' when critiquing such practices.

These latter modes of framing fan the flames of the very concerns than animate cultural relativism ideologies, by using a western gaze to pass moral judgement on non-western cultural traditions. Seen in this light, such critiques may seem to come from a 'saviour' – the white knight, relying upon universal human rights; to save 'the victim' – the women and girls who are forced to undergo practices such as FGM; from the clutches of the 'savage' – which evokes images of barbarism.[30] This is problematic, given the fundamentally eurocentric bias of a supposedly universal human rights corpus, and even more damning, for its consideration of the communities who practice FGM as savages and victims, in total disregard of their agency and autonomy. Consequently, even while critiquing FGM from a right to health perspective, this paper nevertheless straddles a delicate balance, by acknowledging (though ultimately disagreeing with), the agency of women such as the petitioner in this case, who want the right to choose whether or not to undergo the practice in light of the deep cultural connections that the practice holds for them.

2.3 FGM is a harmful cultural practice

Traditional cultural practices are an embodiment of the values and beliefs held by members of a particular community for periods often spanning generations. Every social grouping in the world has its own specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others are harmful to a specific group, such as women. Not all cultural practices are harmful and should be done

[30] Makau Mutua, 'Savages, victims and saviors: The metaphor of human rights' 42 *Harvard International Law Journal* (2001) 202-204.

away with. Only harmful cultural practices deserve this kind of scrutiny, censure and eradication. This begs the question; how do we determine what a harmful cultural practice is?

I opine that harmful cultural practices are enduring traditions that are grounded in a historically discriminatory social and patriarchal structure that discriminates on the basis of, *inter alia*, sex, gender and age, and are often justified by invoking socio-cultural and religious customs and values. The Maputo Protocol defines harmful practices as, 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.'[31]As both the Committee on the Elimination of Discrimination against Women (CEDAW) and the United Nations Committee on the Rights of the Child (UNCRC) have noted, 'harmful practices are often associated with serious forms of violence or are themselves a form of violence against women and children.'[32] Examples of such harmful practices include FGM, forced feeding of women, early marriage, the various taboos or practices which prevent women from controlling their own fertility, nutritional taboos and traditional birth practices, son preference and its implications for the status of the girl child, female infanticide, early pregnancy and dowry. Despite their harmful nature such practices persist in certain communities to date.[33]

More specifically, the following criteria are useful for the determination of what constitutes a harmful practice:

a) They constitute a denial of the dignity and/or integrity of the individual and a violation of the human rights and fundamental freedoms enshrined in the two Conventions;

[31] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2000 (Maputo Protocol), Article 1(g).

[32] CEDAW and UNCRC, Joint General Recommendation/General Comment No 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on Harmful Practices, para 6.

[33] OHCHR, Fact Sheet No 23: Harmful traditional practices affecting the health of women and children', August 1995, para 1.

b) They constitute discrimination against women or children and are harmful insofar as they result in negative consequences for them as individuals or groups, including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential;

c) They are traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children, on the basis of sex, gender, age and other intersecting factors;

d) They are imposed on women and children by family members, community members or society at large, regardless of *whether the victim provides, or is able to provide, full, free and informed consent*.[34]

It is germane that FGM is acknowledged to be a harmful cultural practice.[35] This harmful-cultural duality manifests itself in two ways. On the one hand, those who continue to practice FGM do so out of a complex mix of socio-cultural factors, associated with traditional understandings of gender, sexuality and religion. For these adherents FGM may be perceived as necessary for 'spiritual cleanliness, for family honour and to maintain premarital virginity and marital fidelity […] FGM may also be a rite of passage, a transition from childhood to womanhood.'[36] Thus, FGM may be seen to be intricately tied to the cultural beliefs of the communities that practice it. On the other hand, and as section 3 of this paper will more fully highlight, FGM causes both severe

---

34 CEDAW and UNCRC, Joint General Recommendation/General Comment No 31, para 15. [emphasis added]

35 CEDAW and UNCRC, Joint General Recommendation/General Comment No 31, para 16; Camilla Yusuf, 'Female genital mutilation as a human rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania' *African Human Rights Law Journal* (2013) 13.

36 Nesrin Varol and Others, 'Female genital mutilation/cutting: Towards abandonment of a harmful cultural practice' 54 *Australian and New Zealand Journal of Obstetrics and Gynaecology* (2014) 402.

physical as well as mental harm to its victims. As one scholar observes in this regard:

> FGM procedures are mutilation because they intentionally alter or injure the female genital organs for non-medical reasons. FGM has no health benefits for girls and women. It involves removing and damaging healthy and normal female genital tissue, and interferes with the natural functions of girls' and women's bodies […] No good can come of this procedure as it only entails substantial health complications and risks.[37]

Ultimately, even while acknowledging the cultural implications that are one side of the harmful-cultural duality of FGM, this paper ultimately centres the harm dimension in support of the case against FGM.

3. The case: *Tatu Kamau v Attorney General and 2 Others*

2.1 The main arguments raised by the petitioner

The petitioner took issue with sections 2 (the interpretation section which defines *inter alia* FGM), 5 (which outlines the functions of the Anti-FGM Board), 19 (which defines the offence of FGM), 20 (which describes the offence of aiding and abetting FGM) and 21 (which defines the offence of procuring a person to perform FGM in another country) of the Prohibition of FGM Act arguing that they contravened certain provisions of the Constitution.

More specifically, she founded her claim on Articles 19 (on rights and fundamental freedoms in the Bill of Rights), 27 (on equality and freedom from discrimination), 32 (on freedom of conscience, religion, belief and opinion) and 44 (on the right to culture) of the Constitution of Kenya. She also argued that by forbidding qualified medical practitioners from performing 'female circumcision', adult women were consequently denied access to the highest attainable standard of health and healthcare as provided for under Article 43(1)(a) of the Constitution.

[37] Danial, 'Cultural relativism vs universalism', 5.

Rehashing the arguments raised by cultural relativists, she also opined that the FGM Act is an 'imperialist imposition from another culture that holds a different set of beliefs or norms.'[38] One key contention stressed by the petitioner was the alleged unconstitutionality of prohibiting adult woman from exercising their right to choose to undergo the practice[39] thus diminishing their agency and personal autonomy in the cultural and religious spheres of their lives.[40] Related to this was the argument that the impugned Act mistakenly conflates the rights of adult women with those of the girl child.

This issue of consent by an adult woman was the crux of the petitioner's argument and will be discussed at length in Section 3 of this article.

3.2 Pertinent sections of the High Court's decision

The Court identified a number of issues for determination.[41] Relevant to the present discussion were the questions whether FGM is a harmful cultural practice and whether the rights of women to uphold and respect their culture and identity were violated by the Act.

Acknowledging the importance of balancing competing rights,[42] the Court stressed that fundamental rights may be limited where the limitation is reasonable and justifiable. The Court noted that FGM is harmful to girls and women due to the removal of healthy genital parts, and results into numerous adverse physical and psychological effects both in the short term as well as in the long term.[43] As a result, it was held that the constitutional rights claimed by the petitioner 'can be limited due to the nature of the harm resulting from FGM/C to the individual's health and well-being.'[44]

38 *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 3.
39 *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 12.
40 *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 51.
41 *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 71.
42 *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 148.
43 *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 145 and 149.
44 *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 153.

On the question of culture, the Court reiterated that while the Constitution grants rights holders the freedom to exercise one's culture, this exercise must be in line with other constitutional provisions. Thus, despite the fact that FGM used to be central to the culture of some communities in Kenya, it is reasonable to limit this right in light of the negative short-term and long-term effects of FGM/C on women's health.[45]

On the issue of consent, the Court was emphatic that no one can choose to undergo a harmful practice. Even though 'our Constitution has a general underlying value of freedom, this value of freedom is subject to limitation which is reasonable and justifiable.' There is thus no 'freedom to inflict harm on one's self in the exercise of these [constitutional] freedoms.'[46] The Court further stressed that the petitioner's argument made it seem as though any woman above the age of 18 would undergo FGM voluntarily. However, this is not the case in reality:

> … especially for women who belong to communities where the practice is strongly supported. The context within which FGM/C is practiced is relevant as there is social pressure and punitive sanctions. From the evidence, it is clear that those who undergo the cut are involved in a cycle of social pressure from the family, clan and community… Women are thus as vulnerable as children due to social pressure and may still be subjected to the practice without their valid consent.[47]

In conclusion, the Court ruled against the petitioner on all counts, although it asked the Attorney General to forward proposals to the National Assembly to consider amending Article 19 of the Prohibition of FGM Act in order to include Type IV FGM as defined by the WHO. While I agree with the Court's decision in this case, it is necessary to point out that the judgement could be seen as giving with one hand and taking with the other. While the Court rules against the petitioner on the grounds of, *inter alia*, the harmful effects of FGM, the language used in this regard that characterises women as being as vulnerable as children, is problematic because this kind of infantilisation of women is a gendered practice linked to patriarchal structures that situate men

---

45 *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 215.

46 *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 211.

47 *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 135.

in the default position of power, while reinforcing the subordination of women, alongside children.[48] Thus, a proper recognition of the dignity and autonomy of women as human beings with social agency and authority, just like men, necessitates avoidance of such infantilising characterisations, even where the intentions of doing so are avowedly good.

4. A right to health and a right to human dignity analysis of FGM: Arguments against 'the cut'

4.1 The true cost of FGM: How does FGM infringe upon the right to health?

Article 43 of the Constitution catalogues several economic and social rights (ESRs) such as, 'the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.'[49] The petitioner tried to rely on this provision arguing that by forbidding qualified medical practitioners from performing the practice, Section 19(1) of the FGM Act affected the right of adult women to access health care services. In contrast, this paper takes the position that even if carried out by qualified medical practitioners, FGM is still an unjustifiable infringement of women's right to health. In this regard, the WHO has stressed that this kind of 'medicalisation' is never acceptable because it 'violates medical ethics since (i) FGM is a harmful practice; (ii) medicalisation perpetuates FGM; and (iii) the risks of the procedure outweigh any perceived benefit.'[50]

As section 1.3. highlighted, any attempt to properly understand FGM must be situated within the broader context of its harmful-cultural duality. This is to say, on the one hand, FGM causes harm to the women and girls who undergo it, as will be expounded upon in detail in this

[48] Sophie Namy and others, 'Towards a feminist understanding of intersecting violence against women and children in the family' 184 *Social Science and Medicine* (2017) 40.

[49] Constitution of Kenya (2010), Article 43(1)(b).

[50] WHO, 'Guidelines on the management of health complications from female genital mutilation' 2016.

section, but on the other hand, FGM has strong cultural implications both for the communities that practice it. A nuanced analysis of FGM requires an acknowledgement of this duality.

FGM is deeply embedded in the culture and traditions of those who practice it. For the women and girls who choose to undergo it, the practice is likely to have both a socio-cultural as well as religious dimensions. It is considered to be a rite of passage that prepares girls for the transition into womanhood, and subsequently into marriage and motherhood.[51] In addition, FGM is argued to maintain and promote chastity while simultaneously preventing promiscuity, which allegedly enhances the suitability of girls and women for marriage.[52] Consequently, for women who would choose to undergo FGM, this choice may be driven by the desire to be seen as suitable in the eyes of their communities to which they belong, which has ramifications for their sense of belonging as well as the safety, security and even resources that would follow such acceptance.[53] Relatedly, parents who allow their girls to go through FGM in such communities 'do not believe that it is harmful, rather they are ensuring a safe and dignified place in society for their daughters by following cultural norms. Additionally, they believe that individuals outside of the culture are dictating changes in their customs, which, at the very least is insulting to them, and at the very worst, seeks to annihilate their cultural norms and values.'[54] The picture painted by this brief discussion has elucidated upon one aspect of the harmful-cultural duality of FGM. The rest of this section will now devote its attention to the other side of the coin, that is, an exposition of the harm dimension of FGM.

FGM is an egregious violation of women and girls' rights that results in severe health complications, including but not limited to death, disability, miscarriage, stillbirth, shock, haemorrhage, sepsis, sexual

51 Giles Clark, 'Changing culture to end FGM' *The Lancet* (2018) 401.

52 Kathleen Monahan, 'Cultural beliefs, human rights violations, and female genital cutting' 5(3) *Journal of Immigrant & Refugee Studies* (2007), 24-25.

53 Monahan, 'Cultural beliefs, human rights violations, and female genital cutting', 27.

54 Monahan, 'Cultural beliefs, human rights violations, and female genital cutting', 27.

dysfunction and post-traumatic stress disorder.[55] The WHO has catalogued a number of short-term and long-term effects of FGM on the victims.[56] These are briefly outlined below and include both physical and psychological effects.

In the short term, the immediate complications of FGM include the following: severe pain because of the cutting of nerve ends and sensitive genital tissue; excessive bleeding or haemorrhaging which can result if the clitoral artery or other blood vessel is cut during the procedure; shock which can be caused by a combination of factors including pain, infection and/or excessive bleeding; genital tissue swelling as a result of inflammation or infections; infections which may be caused by the use of contaminated instruments; human immunodeficiency virus (HIV) which may occurred through the cutting of genital tissues with the same surgical instrument used on a HIV positive person without sterilisation; urination problems including urinary retention and pain passing urine; impaired wound healing which can lead to pain, infections and abnormal scarring. In some cases, death may occur as a result of a combination of factors; the psychological consequences of FGM cannot be understated. The pain, shock and the use of physical force by those performing the procedure have a traumatic effect on the victims.[57]

Over the longer term, the consequences of FGM could include the following: chronic pain as a result of tissue damage and scarring; chronic genital and urinary tract infections, vaginal discharge and itching; painful urination due to obstruction of the urethra and recurrent urinary tract infections; menstrual problems resulting from the obstruction of the vaginal opening leading to painful menstruation (dysmenorrhea), irregular menses and difficulty in passing menstrual blood, particularly among women with Type III FGM; compromised female sexual health

55 Rajat Khosla and others, 'Gender equality and human rights approaches to female genital mutilation: A review of international human rights norms and standards' 14 *Reproductive Health* 59 (2017), 1.

56 WHO, 'Health risks of female genital mutilation' <https://www.who.int/teams/sexual-and-reproductive-health-and-research/areas-of-work/female-genital-mutilation/health-risks-of-female-genital-mutilation> on 27 April 2021.

57 WHO, 'Health risks of female genital mutilation'.

and sexual problems such as decreased sexual desire and pleasure, pain during sex, difficulty during penetration, decreased lubrication during intercourse, reduced frequency or absence of orgasm (anorgasmia); complications during childbirth are also likely to occur which also increases the risks of infant mortality as a result of complications; psychological consequences such as post-traumatic stress disorder (PTSD), anxiety disorders and depression may also be experienced.[58]

As the above examples show, there is no doubt that FGM has serious negative effects on the health of the women and girls who are subjected to it, regardless of whether they consent or not. In fact, even the Committee on Economic, Social and Cultural Rights (CESCR) has acknowledged that the realisation of the right to health requires states to '…undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms…'[59] The High Court agreed with this wide interpretation of the right to health together with the corresponding obligations on the state.[60]

A particularly interesting, and less obvious, dimension of the impact of FGM to the right to health is its fiscal or budgetary consequences. FGM increases the cost of healthcare provision in several ways, which could in turn make it more onerous for the state to meet its obligations as regards access to health facilities. Caring for girls and women living with FGM requires knowledgeable health-care providers, adequately trained to identify, treat or refer clients who may present with a range of health complications due to different types of FGM. One noteworthy study showed that 83% of women who had undergone FGM would require medical attention at some point in their lives for a condition or complication resulting from the procedure.[61] This implies an increase in costs of healthcare provision, an additional fiscal burden on countries

[58] WHO, 'Health risks of female genital mutilation'.

[59] UNCESCR, General Comment No 14: The right to the highest attainable standard of health (Art. 12), 11 August 2000, E/C.12/2000/4, para 21.

[60] *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 175.

[61] Fran Hosken, *The Hosken report: Genital and sexual mutilation of females,* Lexington, 1994, 48.

like Kenya which are already struggling to provide basic healthcare to their citizenry.

A study carried out in a number of countries including Kenya, revealed that as much as 1% of government expenditure is spent on the health of women in the reproductive age group as a result of FGM related obstetric complications annually.[62] When the financial burden that FGM imposes on the health system is measured, it becomes obvious that caring for women who have undergone this procedure imposes an even greater economic burden and that the cost of efforts to prevent FGM can be wholly or partially offset by the savings generated when complications are prevented.[63]

From the foregoing, it is apparent that FGM is a costly practice that affects the physical and psychological health of its victims and that has the potential of negatively impacting the financial health of the state as well. As outlined above, both in the short-term as well as in the long-term, there are very grave physical and psychological costs borne by women and girls who are subjected to FGM. In addition, there are also budgetary implications for states that do not try to minimise and eliminate this harmful cultural practice.

4.2 The dilemma of choice: Can one consent to a practice that harms their health?

The arguments raised by the petitioner and rejected by the Court on the issue of consent by an adult woman to the practice of FGM provide some food for further thought. To begin with, it is necessary to understand what consent means. 'Consent is defined in *Black's Law Dictionary* as the agreement, approval, or permission as to some act or purpose

[62] David Bishai, Yung-Ting Bonnenfant, Manal Darwish, Taghreed Adam, Heli Bathija, Elise Johansen and Dale Huntington for the FGM cost study group of the World Health Organization, 'Estimating the obstetric costs of female genital mutilation in six African countries' 88(4) *World Health Organization Bulletin* (2010) 281, 282.

[63] Bishai and others, 'Estimating the obstetric costs of female genital mutilation,' 283.

especially given voluntarily by a competent person.'[64] Unfortunately, the Prohibition of FGM Act does not define the term consent. However, recourse can be had to the Sexual Offences Act which defines consent in the following terms. 'A person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.'[65]

Section 19 (6) of the Prohibition of FGM Act places this discussion on the potential role of consent in sharp focus. It provides that it '… is no defence to a charge under this section that the person on whom the act involving female genital mutilation was performed consented to that act, or that the person charged believed that such consent had been given.' For the petitioner, this provision amounts to an unconstitutional violation of an adult woman's right to personal autonomy and freedom to exercise free choice. This contention raises some serious concerns. Is the right to personal autonomy an absolute right? How do we reconcile the tension between the exercise of this right by an adult woman and other fundamental rights such as the right to health, or the right to dignity within the context of FGM?

To begin with, it is important to acknowledge that the law is not completely blind to the possibility of consent playing a role in certain limited instances in order to distribute liability between parties in a dispute, or even to absolve one party from liability entirely. For instance, every bright eyed first-year law student is familiar with the *volenti non fit injuria* principle – voluntary assumption of risk, a common law doctrine which provides that where someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result but nevertheless accepting this risk, they are not able to bring a claim against the other party in tort.[66] However, this is not to say that such a principle of consent can or even more importantly, should, be capable of traveling from the realm of tort to that of criminal law,

[64] Winifred Kamau, 'Legal treatment of consent in sexual offenses in Kenya' (2013) University of Nairobi <http://theequalityeffect.org/pdfs/ConsentPaperKenya.pdf> on 27 April 2021.

[65] Sexual Offences Act (No 3 of 2006), Section 42.

[66] AJE Jaffey, '*Volenti non fit injuria*' 44(1) *Cambridge Law Journal* (1985) 1.

or that of fundamental rights – specifically, the prohibition of practices such as FGM. This begs the question, why does consent negate criminal harm in some but not all cases? When should consensual injury be legitimate? Numerous scholars have argued that in answering these difficult questions we must resort to a balancing between consent and human dignity. In this regard, one such scholar observes:

> making legal rights and duties contingent on consent usually serves human dignity. This is not to say, however, that the two concepts are coextensive. A consenting person, after all, gets what she happens to want. But there are persuasive arguments that legal doctrines should not invariably or uncritically serve a person's subjective desires. Human dignity is the more fundamental value.[67]

Considering this subliminal tension between human dignity and consent, and the special significance of human dignity as a fundamental right and ideal, 'in any cases of conflict between legally valid consent and dignity, the former ought to yield.'[68] This implies that there are two normative consequences to the giving of consent. In the first paradigm, consent could be a defence (whether partial or full) in cases of violation of rights. For instance, in the *volenti non fit injuria* defence I referenced above. However, in the second paradigm consent alone should not be capable of justifying bodily harm. To qualify as an acceptable defence the consenting party would have to show that the act consented to did not impinge upon the human dignity of the consentor.[69] Given the normative reality that fundamental rights and freedoms 'belong to each individual and are not granted by the State'[70] and are 'subject only to the limitations contemplated in this Constitution.'[71] Consent is not one of the acceptable limitations in this regard. When a cultural practice such as FGM is prohibited and punished under law, this means that the practice is of concern to the state or to society in general. 'In other words, it

---

67 R George Wright, 'Consenting adults: The problem of enhancing human dignity non-coercively' 75 *Boston University Law Review* (1995) 1398.

68 Wright, 'Consenting adults', 1399.

69 Vera Bergelson, 'The right to be hurt: Testing the boundaries of consent', *Rutgers Law School Faculty Papers*, Paper No 37, 2007, 7.

70 Constitution of Kenya (2010), Article 19(3)(a).

71 Constitution of Kenya (2010), Article 19(3)(c).

is against public policy.'[72] In such instances, it is doubtful whether the victim's consent is (as a descriptive matter) or ought to be (as a normative matter) enough to render such a frowned upon practice acceptable or lawful, thus cloaking it with the shield of legitimacy.

One could argue that by leaving no room for the exercise of personal autonomy by adult women, the FGM Act is similar to other legal frameworks that limit the agency of women, such as laws prohibiting abortion. In turn, this would raise serious concerns about the patriarchal ideologies and paternalistic power structures that underlie such legal regimes, causing women's bodies to become a critical site for power struggles.[73] While these concerns are cogent and persuasive, they are beyond this paper's scope of analysis, given its already articulated focus on the harm dimension of FGM, and its overriding of any such consent. Nevertheless, a limited rebuttal to these concerns will suffice for the purposes of the present discussion. Whereas legalising abortion would allow women to exercise their agency to get safe abortions that do not threaten their lives, the converse cannot be said to be true for FGM. Its legalisation and/or medicalisation would still result into severe health consequences, even for consenting adult women.[74] Thus, even while acknowledging the insidiousness of patriarchal laws, and agreeing with the clarion calls to infiltrate and reconstruct such laws in order to more properly reflect women's experiences,[75] ultimately these arguments have limited purchase in the very different context of a harmful practice such as FGM.

In addressing this issue of consent, the High Court emphatically observed that 'FGM/C cannot be rendered lawful because the person

[72] Jean-Gabriel Castel, 'Nature and effects of consent with respect to the right to life and the right to physical and medical integrity in the medical field: Criminal and private law aspects' 16 *Alberta Law Review* (1978) 293.

[73] Tamara Braam and Leila Hessini, 'The power dynamics perpetuating unsafe abortion in Africa: A feminist perspective' 8(1) *African Journal of Reproductive Health* (2004) 44.

[74] Els Leye and Others, 'Debating medicalization of female genital mutilation/cutting (FGM/C): Learning from (policy) experiences across countries', 6 *Reproductive Health* (2019) 158, 162-163.

[75] Njogu, 'Decolonizing sex: Fifty shades of rape', 24.

on whom the act was performed consented to that act. No person can license another to perform a crime. The consent or lack thereof of the person on whom the act is performed has no bearing on a charge under the Act.'[76] In addition, the Court emphasised that as regards the practice of FGM, the consent of an adult woman *in this specific context*, was incapable of being valid consent for two reasons. Firstly, the Court expressed scepticism about whether victims of FGM can really consent to the practice considering the extreme societal pressure to undergo the practice in the communities that practice it.[77]

Secondly, the Court was not persuaded that one can consent to undergoing a harmful practice. This paper finds the court's conclusion in this regard persuasive. The harmful effects of FGM on women and girls who undergo the practice, whether willingly or unwillingly, completely outweigh any arguments that could be made about the importance of personal agency and autonomy in this instance. There would be a profound philosophical incoherence in arguing for FGM in terms of the rights of women to control their own bodies, while simultaneously critiquing FGM for being a traditional practice steeped in patriarchy, which it is. An adult woman's consent to a patriarchal practice does not negate the need to dismantle these harmful cultural practices that contribute to the subjugation of women.

A useful way to reframe this decision in order to bolster our understanding is to consider the role played by the right to human dignity in the Court's analysis, and to balance this right to human dignity against the right to consent or to exercise personal autonomy and agency. The Court noted that 'Article 28 provides for the right to inherent dignity and the right to have that dignity respected and protected.'[78] Whereas the Constitution does not define the word 'dignity' the role and importance of human dignity as a foundational constitutional and human rights value is uncontested in both national and international discourse. However, this begs the question, doesn't the right to human dignity

[76] *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 161.

[77] *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 167.

[78] *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 199.

necessarily imply allowing an adult woman to make decisions about her own body without state interference? This paper argues that no, this is not the case. The issue of consent relates to personal autonomy, rather than human dignity. It is therefore necessary to understand the exercise of such personal autonomy within this proper context, and analysing whether personal autonomy trumps human dignity.

The argument made by the petitioner sought to allow adult women to consent to the harmful practice that is FGM. However, this argument does not pass constitutional muster because the right to consent is not absolute. 'Consent protects personal autonomy, but it does not allow a person to degrade or destroy the human dignity of the consenting party.'[79] Consequently, while theoretically speaking, an adult woman may exercise her personal autonomy to consent to a harmful practice, the exercise of this personal autonomy must necessarily be limited in order to protect the inherent human dignity of the consenting woman. Personal autonomy must therefore give way to human dignity. Framed in another sense, one cannot consent to actions that would violate the very core of what it means to be human. 'A person can forfeit or alienate her personal autonomy, but she cannot alienate her human dignity.'[80]

In summary, this article agrees that there are instances where an adult individual may exercise their personal autonomy to forfeit certain rights, or to undergo certain practices (the example of getting a tattoo comes to mind here), without state interference. However, an individual cannot exercise this right to personal autonomy in instances where the result would be a serious loss of their human dignity, which is precisely the case with FGM. This is therefore a threshold question, and as a result 'consent is a valid defence unless the harm crosses the threshold of degrading the human dignity of the consenter to a serious degree.'[81]

[79] Dennis J Baker, 'The moral limits of consent as a defense in the criminal law', 12(1) *New Criminal Law Review: An International and Interdisciplinary Journal* (2009) 98.

[80] Baker, 'The moral limits of consent as a defense in the criminal law', 98.

[81] Baker, 'The moral limits of consent as a defense in the criminal law', 99.

5. Burying the past: Balancing cultural rights against other fundamental freedoms

5.1 Limiting rights: A right to culture but not to suffer harmful cultural practices

The Constitution recognises the importance of culture 'as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation'[82] and mandates the state to promote all forms of national and cultural expression through inter alia traditional celebrations.[83] Additionally, Article 44 confers upon each person the right to participate in the cultural life of that person's choice. Specifically, 'a person belonging to a cultural or linguistic community has the right, with other members of that community (a) to enjoy the person's culture and use the person's language'[84] with the caveat that 'a person shall not compel another person to perform, observe or undergo any cultural practice or rite.'[85] Despite these mostly positive references to culture, the Constitution also recognises that some cultural practices may be harmful. However, it confers a right only on children,[86] and on youth,[87] (and not on adult women) to be protected from such practices.

As the Court pointed out, 'the petitioner's case is that there is a clash of cultures, and that circumcising communities are discriminated upon and forced to adopt the culture of non-circumcising communities.'[88] The Court disagreed with this argument however and instead framed the matter as one involving 'the balancing of competing rights'[89] since 'the right to enjoy one's culture, religion and belief as envisaged in

82 Constitution of Kenya (2010), Article 11(1).
83 Constitution of Kenya (2010), Article 11(2)(a).
84 Constitution of Kenya (2010), Article 44(2)(a).
85 Constitution of Kenya (2010), Article 44(3).
86 Constitution of Kenya (2010), Article 44(3).
87 Constitution of Kenya (2010), Article 55(d).
88 *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 108.
89 *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 148.

Articles 11, 32 and 44 are derogable.'[90] Consequently, the Court found that the right to culture 'can be limited due to the nature of the harm resulting from FMG/C to the individual's health and well-being.'[91]

Seen in this light, 'traditional cultural practice is not a disease to be eradicated. Indeed, many forms of cultural distinctiveness offer valuable contributions that preserve the very essence of humanity. Cultural practices are not the target – harmful practices are.'[92] Thus, the struggle that exists is finding a way to balance the right to culture against the need to protect vulnerable persons in the society from harmful cultural practices.

5.2 A clash of cultures: The tension between universalism and cultural relativism in the area of FGM

It is an undeniable fact that cultural rites and practices vary across the different ethnic communities that make up a diverse country such as Kenya. For the communities that practice FGM, this practice is seen as a part of their cultural heritage. For many other communities both within Kenya and even outside of Kenya for that matter, which do not share a similar cultural view, the practice may seem confounding and completely unacceptable as being a violation of women's human rights. On the one hand therefore, there are cultural practices that are limited in their acceptance and application to the communities that believe in them, while on the other hand however, there are fundamental human rights that inhere in all human beings without distinction on the basis of which community they hail from.

When the international spotlight was first shined on FGM in the late 1970s,[93] 'the revelation that girls have their genitals excised as part

[90] *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 149.

[91] *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 153 and 210.

[92] Brittany Kühn, 'Universal human rights vs. traditional rights', *Topical Review Digest: Human rights in Sub-Saharan Africa* (2009) 15.

[93] Rhoda Howard, 'Women's rights in English speaking Sub-Saharan Africa' in Claude Welch and Ronald Meltzer (eds) *Human rights and development in Africa* SUNY Press, 1984, 44.

of an ancient cultural practice shocked and angered many in the West who learned about this practice for the first time.'[94] Subsequent efforts at the international level to combat FGM sparked an extensive debate about the appropriateness of using human rights and the United Nations treaty system to criticise the long-standing cultural practices of certain communities when these practices conflict with established human rights. Clearly, as evinced by the arguments made by the petitioner in the *Tatu Kamau case*, these concerns have not been laid to rest.

As already alluded to in preceding parts of this paper, in seeking to reconcile such contested cultural practices with human rights more generally, there are two distinctly separate positions that could inform the debate, 'the universal human rights argument backed strongly by universal feminists to eradicate FGM on the one hand, and the cultural relativism narrative which argues that all cultures are valid and thus FGM should be lent cultural validity.'[95] What is the difference between cultural relativists and universalists in this regard?

Cultural relativists would criticise the international human rights system because, in labelling certain practices as potential human rights violations, this system looks at (and even more troubling – exercises a moral judgement over) cultural practices which have been accepted as a way of life for centuries by the communities which engage in them. For such cultural relativists, these kinds of cultural practices have a legitimate function indigenous to the culture and judging these practices according to international norms imposes outside values upon the community involved.

In response to this critique the human rights proponents, the universalists, would in turn argue that their evaluation of such contested cultural practices is based on universally accepted norms and, therefore, does not impose the views of outsiders. After all, for these universalists

---

[94] Katherine Brennan, 'The influence of cultural relativism on international human rights law: Female circumcision as a case study' 7 *Law and Inequality* (1988) 367.

[95] Foluke I Ipinyomi, 'Where the rubber hits the road: The limitations of the universalism vs cultural relativism debate impacting FGM control in Nigeria' *NIALS Journal of Law and Gender* (2015) 3.

'the function of human rights norms, with respect to cultural practices, is to propose a set of values to guide behaviour in all societies.'[96] Universalism in this context 'which draws from the natural law tradition in Western jurisprudence, is the theory that there exists some set of standards which all cultures espouse. These universal principles transcend cultural differences and serve as the authority for adopting international human rights.'[97]

Is there a right or wrong side in this debate? How would cultural relativists reconcile their support for the validity of different cultural practices with the injuries occasioned by some harmful cultural practices such as FGM? For the universalists, how are these universal human rights principles determined or identified? Do we have consensus on which norms are universal and which ones are not? Whose consensus is relied upon for these purposes? As these questions illustrate, this discussion is not black or white – there are numerous shades of grey. The question is how to navigate all these valid concerns in order to begin to resolve the tensions raised.

Perhaps a useful alternative to the highlighted critiques against universalism here would be the 'positivist' response. 'Human rights are guaranteed by numerous acts of positive law – constitutions, covenants, acts of parliament, international declarations.'[98] These international human rights norms which eventually make their way into the national domain whether through constitutionalisation or even legislation represent a certain level of agreement by ratifying states to work towards certain common goals. This means that since states have accepted to be bound by certain human rights norms, their agreement justifies to some extent the application of these norms within their territories. Within the national context an additional dimension in this regard would be the fact that in Kenya just like in most other countries, the Constitution is the supreme law, and any disputed act must be measured against the Consti-

96 Brennan, 'The influence of cultural relativism on international human rights law, 369.

97 Brennan, 'The influence of cultural relativism on international human rights law, 369.

98 Kalikst Nagel, 'Human rights and the law of human rights: A positive legal regulation of an ontic reality' *Adam Mickiewicz University Law Review* (2014) 213.

tution for (in)consistency. As Article 2(4) provides, 'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.' In assessing contested customary practices such as FGM therefore, a positivist inquiry would take us right to the Constitution, and such harmful customary practices found wanting by dint of their violation of fundamental rights as already elaborated upon more fully in Section 2 above.

Ultimately therefore, this paper argues that in resolving complex questions such as the present question of the role of consent in the potential legitimation of harmful cultural practices, in addition to the right to health as well as right to dignity arguments already elucidated upon in preceding parts of this paper, we should also resort to a positivist constitutional inquiry in order to attenuate the tension between universalism and cultural relativism as it relates to FGM.

6. The way forward: Some final thoughts

Despite the progress made in the quest to eradicate FGM in the communities that practice it, the battle is clearly far from won. Even though in general there has been a national decline in prevalence, '[FGM] is still high in such communities as the Somali at 94 per cent, Samburu at 86 per cent, Kisii at 84 per cent and Maasai at 78 per cent.'[99] The law may have changed, but not all the practicing communities have changed in tune. Some of these communities proudly continue to carry out the practice despite the existing legal prohibition and moral condemnation. For instance, just last year, almost 2,800 girls from the Kuria community in south-western Kenya underwent FGM and were subsequently paraded in the region's main urban areas and showered with gifts to

[99] Government of Kenya, 'Sessional Paper No 3 of 2019: On national policy for the eradication of female genital mutilation' (2019) 4.

'congratulate them for this milestone.'[100] Admittedly therefore, the law is not a panacea.

As this paper has endeavoured to illuminate, the reasons for the continued practice of FGM vary from community to community with punitive measures for non-conformance. To recap, some of the drivers of FGM include its designation by practicing communities as a rite to passage from childhood to womanhood, that prepares girls for marriage. For other communities FGM is carried out for family pride, prestige and community acceptance. Sometimes FGM brings monetary gains for the circumcisers and elders as well as bride price for the victims.[101] For those who undergo the practice, continuation of FGM is thus motivated by a complex mix of socio-cultural factors, of social acceptance, peer pressure, fear of exclusion from resources and opportunities as a young woman and marriageability.[102]

In this regard, it may therefore be necessary to combine legal approaches to dealing with FGM, with other locally led approaches geared towards addressing the underlying root factors contributing to the prevalence of this practice. The combination of alternative ritualistic practices (ARPs) in tandem with intensive sensitisation of the health effects of FGM could be one such avenue with the potential to help achieve the necessary attitudinal and behavioural changes that need to accompany the law outlawing FGM, if things are really to change not just in the books, but in action as well. For instance, one example of an ARP that has shown promise within the context of the Meru community is '*ntanira na migambo*' or 'circumcision through words,' which involve training of girls organised during school holidays and geared towards eliminating the need for FGM.[103]

---

[100] Peter Muiruri, 'Kenyan efforts to end FGM suffer blow as victims paraded in "open defiance"' *The Guardian*, September 2020.

[101] Government of Kenya, 'Sessional Paper No 3 of 2019', 13.

[102] Nesrin Varol and others, 'Female genital mutilation/cutting: Towards abandonment of a harmful cultural practice' 54 *Australian and New Zealand Journal of Obstetrics and Gynaecology* (2014) 5, para 405.

[103] Purity Mwendwa and others, 'Promote locally led initiatives to fight female genital mutilation/cutting (FGM/C): Lessons from anti-FGM/C advocates in rural Kenya' 17 *Reproductive Health* (2020) 30, para 11.

Clearly this is not a practice that can be expected to disappear overnight. Nonetheless, this article concludes on a rather optimistic note. Decisions such as the one in the *Tatu Kamau case* paint a rather positive picture. FGM and other harmful practices will one day – hopefully soon, – be buried in the past.

The duty to give reasons under Kenya's Fair Administrative Action Act, 2015: Seven years later

Seth Wekesa* and Nelson Otieno**

Abstract

Article 47 of the Constitution of Kenya 2010 has constitutionalised the right to be given written reasons for administrative actions and decisions. The same has been set out in Sections 4 and 6 of the Fair Administrative Action Act 2015. Based on the amber light and public administration theories, this paper argues that the right to be given reasons for decisions taken by administrative authorities has not only been used as a tool to offer legal protection to individuals adversely affected by administrative action but also helps in enhancing good public administration in Kenya. On the one hand, courts of law have considered the right to be given written reasons both as a constitutional ground for judicial review of administrative action under Article 47 of the Constitution and as a remedy available in judicial review as stated in Section 11 of the Fair Administrative Action Act. It has provided affected individuals with a basis to challenge an administrative action and decision through a judicial review process that not only preserves but also develops and progresses relevant common law principles. On the other hand, courts of law have viewed the right to be given written reasons as a tool aimed

* LLB (University of Nairobi); PGDL (Kenya School of Law); LLM (University of Nairobi); LLM (University of Pretoria); LLD (University of Pretoria).

** LLB, (Kenyatta University); PGDL (Kenya School of Law); LLM Candidate (University of Dar es Salaam).

at enhancing public administration by ensuring that public administrators reflect on the lawfulness, quality, rationality, and fairness of their actions. However, the objective of Section 6 of the Fair Administrative Action Act may not be fully achieved because it does not expressly require public administrators to give adequate reasons to persons whose rights have been adversely affected by administrative action. Besides, it does not provide the criterion to be used to determine when the departure from the requirement to provide reasons for administrative actions is reasonable and justifiable.

Keywords: fair administrative action, public administration, Constitution of Kenya

1. Introduction

The law gives authority to administrative agencies to take administrative actions when implementing government policies and programmes. This authority is drawn from the Constitution, Acts of Parliament, delegated legislation and executive directives. The administrative agencies are managed by public administrators or public officers who make decisions that affect the rights and interests of individuals. In the process of making administrative decisions, the law requires public administrators to make decisions that are not only lawful, reasonable, efficient, expeditious and procedurally fair but also requires them to explain or justify their decisions by providing written reasons to the affected individuals.[1] In Kenya, it is a constitutional and statutory requirement that public administrators justify their administrative actions.[2] Public administrators need to provide reasons for their decisions because it enhances public confidence in the decision-making process as well as cushioning them from exposure to legal challenges for making unlawful decisions.[3]

This paper assesses the right to be given reasons under the Fair Administrative Action Act, 2015. It examines the duty to give reasons as a rule of natural justice under common law and how it was applied in Kenya before the 2010 Constitution was enacted. It further examines the contribution of the right to be given reasons under Article 47 of the 2010 Constitution and Section 6 of the Fair Administrative Action Act so far. Finally, it looks at the weaknesses of Section 6 of the Fair Administrative Action Act and makes appropriate recommendations to strengthen the Act for it to fully achieve its purpose of ensuring effective public administration and promotion of access to administrative justice in Kenya.

---

1 Constitution of Kenya (2010), Article 47.

2 Constitution of Kenya (2010), Article 47; Fair Administrative Action Act (No 4 of 2015), Section 6.

3 Migai Akech, *Administrative law*, Strathmore University Press, 2016, 41.

2. Duty to give reasons: From a common law principle to a constitutional right

This section examines the right to be given reasons during the pre and post-2010 Constitution eras in Kenya. It analyses the development of the duty to give reasons from a common law principle to a constitutional right. It examines the application of the principle of duty to give reasons under common law in Kenya. This is followed by a discussion on the transformative nature of Article 47 of the 2010 Constitution that elevated the principle of duty to give reasons to a constitutional right. Lastly, it assesses the right to be given written reasons under Section 6 of the Fair Administrative Action Act.

2.1 Pre-2010 Constitution: The common law position

The duty to give reasons for administrative decisions that adversely affect an individual was first recognised as one of the rules of natural justice under common law.[4] Natural justice refers to the rule against bias as well as a fair hearing.[5] The principles of natural justice require that parties to every case must be given adequate notice, afforded a fair hearing, presumed innocent and be subject to decisions and decision-making processes that are free from bias.[6]

Before 1964, common law did not recognise the duty to give reasons as a principle that binds administrative agencies. The principle was strictly applied to the activities of the judicial bodies.[7] With time, the requirement of natural justice developed to have broad limbs of fair

---

4 Jamela A Ali, 'Duty to give reasons: The way forward' 2(1) *The New Guyana Bar Review* (2008) 1.

5 RJ Garland, 'The application and exclusion of natural justice: A review of some recent developments' 4(2) *The Law Teacher* (1970) 72.

6 Garland, 'The application and exclusion of natural justice' 72.

7 HL Kushner, 'The right to reasons in administrative law' 24(2) *Alberta Law Review* (1986) 309: For more information, see *Pure Spring Co. Ltd. v Ministry of National Revenue* (1947) IDLR 501 (Ex. Ct) and *Canadian Arsenals Limited v Can. Lab. Reins. Bd.37* that are cited by Kushner.

hearing before an unbiased tribunal. In 1964, the case of *Ridge v Baldwin*[8] marked a major shift from the previous position. For the first time, the House of Lords held that the principles of natural justice could be applied to administrative bodies thus extending it beyond the traditional subject of judicial power excesses. In the case of *Ridge v Baldwin,*[9] the House of Lords sets the test that if an administrative body exercises a public power with the potential of ripping someone's right to liberty or property, the exercise must be judicial, judicious and in tandem with the rules of natural justice.[10]

In 1994, it was recognised in the English Court of Appeal case of *R v Higher Education Funding Council ex parte Institute of Surgery*[11] that the duty to give reasons arises from the principles of natural justice. This duty was not general but depended on circumstances. In this case, the court noted that courts would consider the nature of the interest at stake, nature of the process as well as individual circumstances of each case.

The duty to give written reasons for administrative actions arises from a legal theory of good public administration.[12] The theory argues that there is a contract between the citizen and the domestic administrative bodies whose implied term is that administrators must exercise their discretion fairly.

In the pre-2010 Constitution era,[13] the application of the principle of duty to give reasons in Kenya was based on the provisions of the Judicature Act[14] which commenced operating in Kenya from 1st August 1967.

8 *Ridge v Baldwin* (1964) AC 40.

9 *Ridge v Baldwin* (1964) AC 40.

10 *Ridge v Baldwin* (1964) AC 40; JAG Griffith, 'Requirements of natural justice' 1(1) *Kashmir University Law Review* (1968) 37.

11 *R v Higher Education Funding Council ex parte Institute of Surgery* (1994) 1 WLR 242.

12 See dissenting judgment of Denning J in *Breen v Amalgamated Engineering Union* (1971)2 QB 175.

13 This is an era where there was neither Article 47 of the Constitution nor the Fair Administrative Action Act. Review of administrative action was guided by common law, Law Reform Act and Civil Procedure Rules.

14 Judicature Act (Cap 8).

The Act allows the application of substance of common law in areas to which the written laws did not apply. The proviso under Section 3 of the Act was that the application was to the extent that circumstances and the inhabitants permit or otherwise render necessary.

Kenyan courts had an opportunity to consider instances where public administrators took administrative action without providing reasons for them. The approach taken in applying the principle of duty to give reasons for administrative action was not consistent. There were cases where it was disregarded. Besides, in instances where the courts recognised the duty to give reasons, it did not specify the form in which administrators should provide reasons to affected individuals. In some instances, the courts only enforced the duty in situations where the procedures recognised it. The authors attribute the phenomenon of inconsistency to two reasons. First, there was no constitutional stipulation for the right to fair administrative action under the Independence Constitution (now repealed). Secondly, the Judicature Act[15] ranked the principles of common law lower than the statutory law in the hierarchy of laws in Kenya's legal system. These reasons gave judges more room to interpret the law regarding what would be considered to be natural justice on a case-by-case basis. The deviations were possible for the judiciary that largely operated under a comparatively authoritarian pre-2002 regime of the Kenyan Government.

For instance, in the case of *Charles Kanyingi Karina v Transport Licensing Board,*[16] the Transport and Licensing Board suspended the driving licence of the applicant. The reason for the suspension was that the fitted speed governor was faulty. The applicant made an application for an order of *certiorari*. The court, in refusing to grant the orders, noted that the duty to give reasons was not automatic and orders of *certiorari* are discretionary. Similarly, in the case of *Doshi Ironmongers Ltd v Commissioner Customs & Another*[17] where the applicant sought the order of

15 Judicature Act (Cap 8).

16 Miscellaneous Civil Application 1214 of 2004, Ruling of the High Court at Nairobi (2004) eKLR.

17 Miscellaneous Civil Application 1016 of 2007, Judgement of the High Court at Nairobi (2007) eKLR.

certiorari in respect of demand notice for duties and taxes issued on 17 July 2007 by the Kenya Revenue Authority (KRA). One ground upon which the application was made was that KRA failed to provide reasons for uplifting of duties and taxes contrary to Section 122(2) of the East African Community Customs that imposed the duty to give reasons on KRA. The court admitted that a reason was given despite conceding that the same was given late. In so doing, the court also affirmed that the orders of *certiorari* are discretionary.

2.2 The transformative nature of Article 47 of the Constitution of Kenya 2010

Before the constitutional reform process that led to the enactment of the Constitution of Kenya 2010, public administration was viewed as a promoter of abuse of government authority. Post-independence regimes especially under former presidents Jomo Kenyatta and Moi regimes were condemned for abuse of government power.[18] They were also accused of interfering with avenues established to review administrative actions.[19] Administrative agencies had the tendencies of expanding and abusing statutory and discretionary powers.[20] The legislative process was utilised to increase discretionary powers for public officials and limit the scope of judicial review of administrative actions.[21] Thus, courts were not able to effectively check governmental power due to interference from the executive.[22] In addition, there were instances where the executive disregarded court decisions.[23] These attributes

18 JB Ojwang, 'Government and constitutional development in Kenya, 1895-1995' in Bethwell A Ogot and William Robert Ochieng' (eds), *Kenya: The making of a nation: A hundred years of Kenya's history, 1885-1995,* Institute of Research and Postgraduate Studies, Maseno University, 2000, 148-157.

19 Patricia Kameri-Mbote and Migai Akech, *Kenya: Justice sector and the rule of law,* Open Society Foundations, 2011, 7-8.

20 Kameri-Mbote and Akech, *Kenya: Justice sector and the rule of law,* 7-8.

21 James Thuo Gathii, *The contested empowerment of Kenya's judiciary, 2010-2015: A historical institutional analysis,* Sheria Publishing House 2016, 201-202.

22 Akech, *Administrative law*, 433.

23 Kameri-Mbote and Akech, *Kenya: Justice sector and the rule of law,* 61.

undermined tenets of constitutional democracy such as protection of fundamental rights and freedoms and promotion of the rule of law in the country. It was against this backdrop that the constitutional reform process considered reforms relating to administrative law in Kenya to restore the independence of the judiciary and protect the judicial review process from interference from parliament and the executive.[24] This was achieved through the establishment of a constitutional right to fair administrative action under Article 47.

The Constitution elevated the duty to act fairly from a statutorily recognised common law principle under the Judicature Act to constitutional status. Article 47 provides that every person has a right to an administrative action that is expeditious, efficient, reasonable, lawful and procedurally fair.[25] Such recognition means that the provisions of Article 47 gain the supremacy of the constitution, thus, any law which contravenes the provisions is null and void to the extent of its inconsistency as envisaged under Article 2 of the Constitution.[26]

Article 47(1) provides for constitutional grounds for subjecting administrative action to judicial review.[27] It introduces new grounds for judicial review such as expedition and efficiency which were not recognised as grounds for judicial review under common law.[28] These two grounds were not recognised at common law. Expedition and efficiency are important grounds for judicial review because they ensure administrative actions are undertaken within a reasonable time and without delay. Article 47(1) also modifies some common law grounds for judicial review. It provides for lawfulness as a ground which was borrowed from illegality under common law. Lawfulness as a ground ensures public power is exercised within the scope of the enabling statutory provision. Other common-law grounds that have been constitutionalised include reasonableness and procedural fairness. Procedural

[24] Peter Kaluma, *Judicial Review: Law, procedure and practice*, LawAfrica, 2012, 16.

[25] Constitution of Kenya (2010), Article 47(1).

[26] Constitution of Kenya (2010), Article 2(4).

[27] Constitution of Kenya (2010), Article 47(1).

[28] Thuo, *The contested empowerment of Kenya's judiciary, 2010-2015*, 35.

fairness was borrowed from the common law rules of natural justice. These rules of natural justice include the right to a fair hearing and the rule against bias.

Article 47(2) provides for the right to give written reasons for administrative action. It gives everyone who has been or is likely to be adversely affected by administrative action to be given written reasons for the action.[29] The requirement for reasons to be given in a written form is a significant improvement from the position under common law where oral reasons sufficed. Article 47(2) places an obligation to persons exercising public power to justify their administrative actions with written reasons to affected parties. The right to be given written reasons also borders on the provisions of Article 10 on values of transparency, accountability and good governance in the exercise of the administrative duties, which are mandatory national values and principles of governance that govern all public and state officers when they apply and implement the Constitution.[30]

Additionally, Article 47(2) has created a new constitutional ground for judicial review of administrative decisions. Courts and tribunals in Kenya have relied on this provision to review the decisions of public bodies. Further, courts have made it clear that the reasons provided have to be specific and clear for two reasons: first, it will promote the right to procedural fairness by enabling the affected individual to know what response to give. In *Geothermal Development Company Ltd v Attorney General,*[31] the High Court stated that the duty to give reasons forms an important component of administrative action and that information concerning administrative proceedings should be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be.[32]

29 Constitution of Kenya (2010), Article 47(2).

30 Constitution of Kenya (2010), Article 10(2)(c).

31 Petition 352 of 2012, Judgement of the High Court at Nairobi (2013) eKLR.

32 *Geothermal Development Company Ltd v Attorney General,* Petition 352 of 2012, Judgement of the High Court at Nairobi (2013) eKLR para 30.

Second, it ensures public officials observe their duty to give adequate reasons for their administrative actions. As a result of the constitutional elevation, Kenyan courts have insisted that public administrators should provide written reasons to affected parties as a matter of right. For instance, in the case of *Priscilla Wanjiku Kihara v Kenya National Examination Council,*[33] the High Court stated that failure to provide reasons for administrative action may affect the outcome of a judicial review of administrative action.[34] Similarly in the case of *Judicial Service Commission v Mbalu Mutava & another,*[35] the Court stated that Article 47(2) of the Constitution intended that the reasons for the administrative decision be given as a matter of right. This means that it binds all administrative agencies whether taking a facilitative or active role in an administrative action

The provisions of Article 47 do not abolish the common law position. The common law view of the duty to act fairly is encompassed as one aspect of a fair administrative action under Article 47.[36] In the *Mbalu Mutava* case, Justice William Ouko found that the provisions of Article 47 are complementary to the common law provisions. The complementariness, therefore, invites courts and other decision-making bodies to consider the common law position when interpreting Article 47.[37]

Similarly, in the case of *Republic v National Police Service Commission ex parte Daniel Chacha Chacha*,[38] the High Court recognised that the constitutional right to written reasons was derived from common law. In this case, the applicant (Daniel Chacha Chacha) was declared as lacking integrity when he appeared before the National Police Service Commis-

[33] Judicial Review Application 413 of 2016, High Court at Nairobi (2016) eKLR.

[34] *Priscilla Wanjiku Kihara v Kenya National Examination Council,* Judicial Review Application 413 of 2016 Judgement of the High Court at Nairobi (2016) eKLR para 19 and 21.

[35] *Judicial Service Commission v Mbalu Mutava & another,* Civil Appeal 52 of 2014, Judgement of the Court of Appeal at Nairobi (2015) eKLR.

[36] Constitution of Kenya (2010), Article 47(1).

[37] *Judicial Service Commission v Mbalu Mutava & another,* Civil Appeal 52 of 2014, Judgement of the Court of Appeal at Nairobi (2015) eKLR para 23; Constitution of Kenya (2010) Article 47(1); Judicature Act (Cap 8).

[38] Miscellaneous Application 36 of 2016, Judgement of the High Court at Nairobi (2016) eKLR.

sion (NPSC) without being afforded the specifics of such a finding by NPSC. The applicant also applied for a review of the decision by NPSC but the review was summarily dismissed without affording him any reasons for the same. The Court stated that the right to fair administrative action, which includes the right to be given written reasons, is a constitutional requirement.[39]

Despite the integration of the common law principles with Article 47 guarantees, the common law as a source of administrative law supplements the Constitution.[40] In the case of *Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others*,[41] Justice John Mativo considered the petition against deportation of certain Chinese nationals. He supported the position that the judicial review of public power has been subsumed under the Constitution as posited in the cases of *Daniel Chacha Chacha* and *Mbalu Mutava*. The judge also went further to explain the extent of the relationship between the two sources of law. The judge underscored that the incorporation of the common law principles such as reasonableness, lawful and procedurally fair under Article 47 is only to the extent to which they continue to be relevant to the circumstances and situations in Kenya.[42] The Court further explained that as regards the fair administrative action, there are no longer two systems of law but only one system which is shaped by the Constitution as the supreme law with the common law applying by deriving from it.[43]

Lastly, Article 47(3) places the obligation on the Parliament to enact legislation to give effect to the right to written reasons.[44] The legislation should be aimed at promoting efficiency in public administration and

---

[39] *Republic v National Police Service Commission ex parte Daniel Chacha Chacha,* Miscellaneous Application 36 of 2016, Ruling of the High Court at Nairobi (2016) eKLR para 47.

[40] The Constitution is the supreme law of Kenya. Constitution of Kenya (2010), Article 2; Judicature Act (Cap. 8), Section 3(1)(a).

[41] Petition 354 of 2016, Ruling of the High Court at Nairobi (2017) eKLR.

[42] *Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others,* Petition 354 of 2016, Ruling of the High Court at Nairobi (2017) eKLR.

[43] *Li Wen Jie & 2 others*, Ruling of the High Court at Nairobi eKLR.

[44] Constitution of Kenya (2010), Article 47(3).

providing for the review of administrative actions by court or impartial tribunal.[45]

From the above analysis, Article 47 has been transformative in the provision for the right to be given reasons for administrative action in three main ways. First, the right is stated in the Kenyan Constitution which is the supreme law of the land. This is an improvement from the Independence Constitution (now repealed) that lacked provisions on fair administrative action. Secondly, is the fact that the provision of Article 47 is part of Kenya's Bill of rights and is therefore justiciable upon either actual or threatened breach or violation. Thirdly, the provision is an improvement on the common law principle of adequate reasons by imposing an obligation on the administrative bodies to ensure that the reasons are provided in a written form.

The First Schedule to the Constitution stipulated a time specification of four (4) years for the enactment of the contemplated legislation. In compliance with this constitutional obligation, Parliament enacted the Fair Administration Action Act No 4 of 2015.[46] Significantly, the Fair Administrative Action Act supports the complementariness of the common law position and the 2010 Constitution. Section 12 of the Fair Administrative Action Act states that the provisions of the Fair Administrative Action Act are an addition to and not a derogation from general principles of common law and rules of natural justice.[47]

The next section offers a critical review of the provisions of the Fair Administrative Action Act on the duty to give reasons, which elaborate on the right to be given reasons under Article 47.

[45] Constitution of Kenya (2010), Article 47(3)(a)-(b).

[46] The Act commenced on 17 June 2015 with an objective of giving effect to Article 47 of the Constitution of Kenya.

[47] Fair Administrative Action Act (2015), Section 12.

2.3 Assessment of the duty to give reasons under the Fair Administrative Action Act

The Fair Administrative Action Act was enacted to give effect to the provisions of Article 47 of the 2010 Constitution. The purpose of the Act is to provide for review of administrative action by court or impartial tribunal and promote effective public administration. The Act borrowed heavily from the South African Promotion of Administrative Justice Act which was enacted to give effect to Section 33 of the South African Constitution. Section 33 of the South African Constitution is similar to Article 47 of the 2010 Constitution.[48] In the analysis of some of the provisions on duty to give reasons under the Fair Administrative Action Act, the Promotion of Administrative Justice Act of South Africa will be used as a comparator because the Fair Administrative Action Act has borrowed heavily from the Promotion of Administrative Justice Act and South Africa has similarly constitutionalised the right to administrative justice.

In general, the Fair Administrative Action Act has introduced six aspects that are important in enhancing access to administrative justice in Kenya. First, Section 3(1) has expanded the scope of judicial review to include the action of public and private bodies. This implies that it is not only the actions of public bodies that are subjected to judicial review but also actions of private actors that may be subjected to judicial review where they violate the rights or interests of affected individuals. Second, the Act has expounded on the constitutional grounds for judicial review and codified the grounds for judicial review under common law such as *ultra vires*, procedural fairness and reasonableness. Section 7(2) of the Act provides for the grounds upon which a court or tribunal may review an administrative action or decision.

Third, Section 9 of the Act outlines the procedure for judicial review. Under Section 9(2), an application for judicial review would be allowed only after exhausting all remedies available within the internal dispute resolution mechanisms. Fourth, the Act has given effect to the

[48] Constitution of South Africa (1996), Section 33.

right to access information relating to administrative action or decision. This helps in the realisation of the right to access information under Article 35 of the Constitution.

Fifth, under Part IV of the Act (titled 'Miscellaneous'), it is stated that the provisions of the Fair Administrative Action Act are additional to and not derogations from the rules of common law and natural justice.[49] The acknowledgment of common law principles in review of administrative action has a significant impact on how Article 47 of the Constitution should be interpreted.[50] Courts that interpreted the Fair Administrative Action Act have continued to appreciate and apply the principles of common law in the post-2015 jurisprudence. Courts have further interpreted Article 47 and the Fair Administrative Action Act in a way that ensures common law principles and rules of natural justice are further developed.[51] Lastly, the Act has elaborated the right to be given written reasons for administrative action.

The requirement to give reasons for administrative action under the Fair Administrative Action Act has both substantive and procedural aspects. Substantively, Section 4(2) of the Fair Administrative Action Act recognises that every person has a right to be given written reasons for any administrative action that is taken against him/her.[52] This provision gives the court power to review administrative actions. This position was clearly stated in the case of *Suchan Investment Limited v Ministry of National Heritage and Culture,*[53] where the Court found that its power to statutorily review administrative action no longer flows directly from the common law, but *inter alia* from the constitutionally mandated Fair Administrative Action Act and Article 47 of the Constitution of Kenya 2010.

---

49 Fair Administrative Action Act (No 4 of 2015), Section 12.

50 The fact that the provision of the complementariness between the Fair Administrative Action Act and the common law appears in the miscellaneous part of the Act does not mean that is less weighty at least from jurisprudence.

51 See *Li Wen Jie & 2 others*, Ruling of the High Court at Nairobi, and *Judicial Service Commission v Mbalu Mutava & another,* Civil Appeal 52 of 2014 in Court of Appeal at Nairobi Court (2015) eKLR.

52 Fair Administrative Action Act (No 4 of 2015), Section 4(2).

53 Civil Appeal 46 of 2012, Ruling of the Court of Appeal at Nairobi (2016) eKLR.

Procedurally, the Fair Administrative Action Act expounds on how a request for reasons for administrative action can be made, modes of enforcing the right to be given reasons and the remedies that accrue for breach of the right. Section 6(1) of the Fair Administrative Action Act allows an individual adversely affected by administrative action to request certain information from public administrators to facilitate his/her application for review of that administrative action in court. The information requested includes reasons for the administrative action taken and any other relevant documents relating to the decision.

Section 6(3) of the Fair Administrative Action Act gives a public administrator thirty (30) days to provide written reasons after receiving a request for the same. Reasons provided orally would not suffice. Written reasons are more likely to be adequate because the administrator would have had sufficient time to properly consider the issues by taking into account relevant factors to enable him to justify his decision. This may not be the case if the administrator was allowed to provide reasons orally at the point of making the decision. The timeframe of 30 days looks reasonable because it gives an administrator sufficient time to properly consider the issues and take into account relevant factors and provide written reasons for administrative action. Comparatively, Section 5(2) of the Promotion of Administrative Justice Act of South Africa provides for ninety (90) days which may be viewed as too long and may undermine the right to enforce the duty to give reasons since the target activity may be overtaken by events.[54]

The test of adequate reasons which has been adopted in Kenya is that the reasons for the administrative action must be capable of informing the other person.[55] The purpose of the duty to give a reason is to justify the administrative action – to explain to the affected person why a particular action was taken. This makes the requirement for *adequate* reasons to be given to be important. The question of the adequacy of

[54] Promotion of Administrative Justice Act (No 3 of 2000), Section 5(2).

[55] Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259, relied on in *J N N, (a minor) M N M, suing as next friend v Naisula Holdings Limited t/a N School,* Constitutional Petition 198 of 2017, Judgement of the High Court at Nairobi (2018) eKLR.

reasons given should be assessed from the point of view of the affected person rather than that of the public administrator.[56] When evaluating the adequacy of reasons given for administrative action, courts should ensure the reasons are unambiguous and intelligible to the person affected. They should be precise to enable the affected person to understand why and how the decision was reached. In the English case of *Re Posyer and Mills Arbitration*,[57] Megaw J stated that proper and adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible but will deal with substantive points that have been raised.[58] Migai Akech rightfully argues that the decision in *Re Posyer case* means that the reasons provided must not only be both adequate and intelligible but also rationally relate to the evidence and be comprehensible.[59]

The requirement to provide adequate reasons for administrative action is significant to public administration in two ways. First, it illustrates that proper consideration of the matter took place.[60] Second, adequate reasons help in setting standards that may serve as guidelines to be applied in treating similar administrative action in the future, thus enhancing consistency in the decision-making process.

The objective of Section 6(1) of the Fair Administrative Action Act appears to fall short of fully aligning to the test for two main reasons. Section 6 of the Fair Administrative Action Act does not expressly require public administrators to give adequate reasons to persons whose rights have been adversely affected by administrative action. Though Section 6(2) of the Fair Administrative Action Act appears to militate against this possible mischief, it does not provide clear assurance since the obligation of the administrators to provide reasons for their action is not couched in mandatory terms.[61] This legislative position has in-

56 DJ Brynard 'Reasons for administrative action: What are the implications on public officials' 44(3) *Journal of Public Administration* (2009) 643.

57 [1963] 1 All ER 612.

58 *Re Posyer and Mills Arbitration* [1963] 1 All ER 612.

59 Akech, *Administrative law*, 41.

60 Brynard, 'Reasons for administrative action,' 643.

61 Fair Administrative Action Act (No 4 of 2015) Section 6(2) (unlike Section 6(3)) which used the word 'may include' and not 'shall'.

fluenced the decision of courts to exercise restraint in finding fault for administrative decisions which fail to analyse evidence.[62] Overall, the manner in which Section 6(1) is couched has given courts leeway to apply the pre-2015 standards and test of adequate reasons and thus fail to be progressive in cases of the automatic right to be given reasons.

Further, though Section 6(3) of the Fair Administrative Action Act provides glimpses of hope as to the provision of reasons, it does not serve the purpose which it sought to further since the mandatory duty to give reasons only arises in cases where requests are made.

Also, although Section 6(5) of the Fair Administrative Action Act allows public administrators to depart from the requirement to provide reasons if it is reasonable and justifiable in the circumstances and immediately inform the affected person of this deviation, FAAA fails to provide criteria for determining which circumstances are reasonable and justifiable to allow an administrator to deviate from this requirement. It leaves this open-ended and flexible for interpretation. Such failure to provide criteria may lead to administrators abusing this discretion to depart from the requirement to provide adequate reasons in writing for their administrative actions.

As a constitutional and a statutory right, the breach of the right to be given written reasons have various modes of enforcing it including internal dispute resolution mechanisms, constitutional petitions, lodging a petition with the Commission on Administrative Justice (CAJ) and the most notorious under the Fair Administrative Action Act, judicial review.

An aggrieved person who is not provided with written reasons for an administrative action can use internal mechanisms to address the grievance. Section 9(2) of the Act requires the aggrieved individual to exhaust all remedies available within the internal dispute resolution mechanisms before applying to court or tribunal for a review of administrative action.

62 *J N N, M N M, v Naisula Holdings Limited*, Ruling of the High Court at Nairobi.

The Fair Administrative Action Act recognises the original jurisdiction of subordinate courts, conferred in Article 22(3) to determine petitions on the enforcement of the Bill of Rights, such as Article 47. Therefore, any violation, threat, infringement or denial of the right to fair administrative action can be enforced through the institution of court proceedings in the form of a constitutional petition under Article 22 of the Constitution. Such proceedings are ordinarily instituted in the constitutional division of the High Court of Kenya. Article 23 of the Constitution mandates the constitutional court to offer the following remedies: a declaration of rights, injunction, conservatory orders, declaration of invalidity, compensation and order for judicial review.

Section 5 (2) of the Fair Administrative Action Act recognises the right of an aggrieved person to challenge any administrative action or decision in accordance with the procedure set out under the Commission on Administrative Justice Act, 2011.[63] Any person who is aggrieved by lack of written reasons for an administrative action taken by a public officer, state corporation or other body or agency of the state[64] can complain to the Commission on Administrative Justice personally or through a representative.[65] This can be done orally or in writing through the Secretary to the Commission.[66] The Commission shall then proceed to investigate or launch an inquiry into such a complaint of abuse of power according to its powers under Section 8(2) of the Commission on Administrative Justice Act. The Commission may then issue the summons, require statements to be given under oath and conduct a hearing.[67] The Commission has powers to recommend judicial redress, refer the complaint to a relevant agency or refer the matter to the Director of Public Prosecutions if the maladministration gives rise to the commission of the criminal offence.[68]

---

63 Fair Administrative Action Act (No 4 of 2015), Section 5(2)(a).

64 Commission on Administrative Justice Act (No 23 of 2011), Section 29.

65 Commission on Administrative Justice Act, Section 32.

66 Commission on Administrative Justice Act, Section 33.

67 Commission on Administrative Justice Act, Section 26.

68 Commission on Administrative Justice Act, Section 41.

Section 7 of the Fair Administrative Action Act envisages the institution of judicial review proceedings as a remedy for breach of the right to be given written reasons.[69] The proceedings can be instituted before a court or a tribunal.[70] The High Court has the jurisdiction to hear the proceedings. In some circumstances, unlike the scenario in the pre-Fair Administrative Action Act regime, a magistrate may have the power to hear the judicial review applications.[71]

Generally, following judicial review proceedings, the court, according to Section 11 of the Fair Administrative Action Act, can grant myriads of orders (remedies), including the declaration of rights, restraining orders, and compelling orders, quashing orders, temporary interdict and award of costs.[72] From the remedies under Section 11 coupled with those in Article 23(3) of the Constitution, the most pertinent remedies available for a breach of the right to be given written reasons are those which set aside the administrative decision for lack of adequate and written reasons and those which direct the administrator to give reasons for the administrative action or decisions. Section 11(1)(e) of the Fair Administrative Action Act provides for a quashing order (order of *certiorari*) that has the effect of invalidating an administrative decision and remitting the matter to the administrator for reconsideration. Section 11(1)(c) of the Fair Administrative Action Act is an embodiment of the second school of thought which allows the court to direct the administrator to give reasons for an administrative decision where there was none.

Courts have recognised these two schools of thought in remedying the breach of the right to be given adequate and written reasons. The rationale for the first school of thought has been provided by courts in the cases of *County Government of Nyeri & Governor, Nyeri County v Cecilia Wangeci Ndungu*[73] and *K Mberia & Partners Advocates v Property Realty*

[69] Fair Administrative Action Act, Section 7.

[70] Fair Administrative Action Act, Section 7.

[71] Fair Administrative Action Act, Section 9(1).

[72] Fair Administrative Action Act, Section 11.

[73] Civil Appeal 2 of 2015, Ruling of the Court of Appeal (2015) eKLR.

Limited.[74] The rationale was that the matter of failure to give reasons was a breach of a constitutional provision provided in Article 47 of the Constitution. This touched on the supremacy of the constitution as the document which binds all persons and all state organs in the course of performing their duties. The Court of Appeal in particular noted that such a failure compromises the rule of law and the integral value of the Bill of Rights to Kenya's democratic space.[75] According to the courts, the first school of thought draws heavily from the elevation of the right to be given written reasons to both as a constitutional right and a constitutional principle.[76]

One convincing reason to take the second school of thought is that some administrative decisions are borne out of the huge investment of human and financial capital and overturning them for lack of reasons alone, when in fact the reasons would have been sufficiently given, maybe self-defeatist resource-wise. However, this approach has its fair share of challenges since it will mean loss of precious judicial time because courts will need to reconsider the reasons given by the administrative body and ensure that they meet the rationality and reasonableness tests as well as the procedural test should they be challenged again.

3. Conclusion

This paper assessed the right to be given reasons under the Fair Administrative Action Act. It examined the duty to give reasons as a common law principle and rule of natural justice and how it was applied in Kenya before the 2010 Constitution was enacted. It further examined the contribution of the right to be given reasons under Article 47 of the 2010 Constitution and Section 6 of the Fair Administrative Action

[74] Reference Application 1 of 2018, Ruling of the High Court at Kajiado (2018) eKLR.

[75] *County Government of Nyeri & another v Cecilia Wangechi Ndungu*, Civil Appeal 2 of 2015, Ruling of the Court of Appeal (2015) eKLR para 33, 34 and 43.

[76] *K Mberia & Partners Advocates v Property Reality Limited*, Reference Application 1 of 2018, Ruling of the High Court at Kajiado (2018) eKLR.

Act. It also looked at the weaknesses of Section 6 of the Fair Administrative Action Act and made appropriate recommendations to strengthen the Act for it to fully achieve its purpose.

The right to be given reasons was recognised as part of the rules of natural justice under common law. It was elevated to a constitutional and statutory right by the 2010 Constitution and the Fair Administrative Action Act respectively.

The paper concludes that the right to be given reasons for administrative action has not only been used as a tool to offer legal protection to individuals adversely affected by administrative action but also helps in enhancing good public administration in Kenya. Courts have considered the right to be given written reasons both as a constitutional ground for judicial review of administrative action under Article 47 of the 2010 Constitution as well as a remedy available in judicial review as stated in Section 11 of the Fair Administrative Action Act. The right to be given reasons as a constitutional ground for judicial review has provided affected individuals with a basis to challenge an administrative action through a judicial review process. Courts have also considered the right to be given written reasons as a tool aimed at enhancing public administration by ensuring that public administrators reflect on the lawfulness, quality, rationality and fairness of their actions taken.

However, the paper has noted two challenges relating to Section 6 of the Fair Administrative Action Act. First, Section 6(3) of the Fair Administrative Action Act does not expressly require public administrators to give adequate reasons to persons whose rights have been adversely affected by administrative action. It only requires public administrators to give written reasons to affected individuals. The requirement to provide adequate reasons for administrative action is significant to public administration because it illustrates that proper consideration of the matter took place thus enhancing public confidence in the decision-making process. Second, Section 6(5) of the Fair Administrative Action Act fails to provide a criterion to be used in determining whether circumstances are reasonable and justifiable to allow an administrator to deviate from the requirement to provide reasons for

administrative actions. This may lead to administrators abusing this discretion to depart from the requirement to provide reasons in writing for their administrative actions.

The paper also noted that judicial decisions handed down after the Fair Administrative Action Act was enacted in 2015 showed that the Kenyan courts have under-utilised the remedy provided in Section 11(1)(c) of the Fair Administrative Action Act which allows the court to direct the administrator to give reasons for an administrative decision where there was none. This may be attributed to the two factors. First, it is the fact that most litigants do not make pleadings in respect of the enforcement of Section 11(1)(c) of the Fair Administrative Action Act. Secondly, advocates and litigants still prepare pleadings that focus on the traditional common law orders of *certiorari,* prohibition and *mandamus*. The majority of court decisions relating to the right to be given reasons have utilised the remedy provided in Section 11(1)(e) of the Fair Administrative Action Act which allows the court to issue a quashing order (order of *certiorari*) that has the effect of invalidating an administrative decision and remitting the matter to the administrator for reconsideration.

The paper makes specific recommendations to citizens, public administrators, lawyers, judiciary and parliament. To the citizens, the paper recommends that they develop and maintain the culture of requesting public administrators to explain or justify their administrative action by providing adequate and written reasons for their actions. This will facilitate an individual's application for review of an administrative decision by court or tribunal. It will also enhance transparency in the decision-making process by enabling citizens to evaluate, discuss and criticise government action.

The paper recommends that public administrators adapt to changes introduced by the 2010 Constitution and the Fair Administrative Action Act by providing reasons for their administrative action because it is an inherent constitutional and statutory requirement. This may protect them from legal challenges in court because the affected individuals are likely to accept a decision if they clearly understand why and how it

was taken. It will also enhance public confidence in the decision-making process.

Courts play a significant role in interpreting and giving appropriate meaning to the provisions of the 2010 Constitution and the Fair Administrative Action Act. When interpreting the meaning of adequacy, the paper recommends that courts assess the adequacy of the reasons given from the point of view of the recipient of the reasons rather than that of the public administrator. Courts should invalidate administrative decisions if the reasons given are ambiguous and unintelligible to the person requiring the reasons and the reasons given fails to provide the affected person a clear understanding of why and how the reason was arrived at including the factors that were taken into account in making the decision. However, where the public administrators fail to provide reasons for their administrative action, the paper recommends that courts should embrace the provisions of Section 11(1)(c) of the Fair Administrative Action Act, whenever it is pleaded, to allow administrators to give reasons for an administrative decision and thus facilitate effective public administration and to mark a transition from the pre-2015 focus on the prohibition of negative practices.

Before Parliament amends Section 6(5) of the Fair Administrative Action Act as proposed below, courts should also clarify the criterion to be used to determine an appropriate departure from the requirement to provide adequate reasons reasonable and justifiable. This will make the departure of public administrators from this requirement difficult to justify to promote an effective public administration and good governance as well as stronger legal protection of individuals adversely affected by administrative actions.

For lawyers, the paper recommends that they should appreciate and embrace the transformation introduced under Article 47 of 2010 Constitution and Section 6 of the Fair Administrative Action Act and advise their clients appropriately on the requirement to furnish written reasons for administrative actions to minimise exposure to adverse legal risks that may prove costly to administrative agencies in terms of legal fees paid to external counsels to represent them in court proceedings.

Also, lawyers should advise their clients and consider preparing pleadings that exploit the enforcement of Section 11(1)(c) of Fair Administrative Action Act.

The paper also recommends that Section 6 of the Fair Administrative Action Act be amended to expressly require public administrators to provide adequate and written reasons for administrative actions as well as set out the criterion to be used to determine when is the departure from the requirement to provide adequate reasons reasonable and justifiable. This will enable the Fair Administrative Action Act to achieve its purpose of requiring public administrators to provide reasons for administrative actions.

The normative and constitutional requirements of contractual transparency: Reflections on Kenya's infrastructure projects with China and the United States of America

Khalil Badbess* and Cecil Abungu**

Abstract

There exists overwhelming evidence that transparency is meant to be an important value in the Constitution of Kenya. The explicit constitutional enshrinement of transparency is heavily informed by Kenya's history, where previous political regimes have functioned within a secretive government. This paper focuses specifically on contractual transparency in two major Kenyan infrastructural projects involving the governments of the Republic of China and the United States of America. Respectively, these are the Standard Gauge Railway Project and the Nairobi Mombasa Expressway (Bechtel project). In examining these projects, this paper conceptualises the normative content of government transparency and its contextualisation to a government's contractual relations. We deploy the normative qualities of contractual transparency and the normative relevance of transparency in Kenya's constitutional context to argue that aspects of Kenya's engagement

* LLB (Strathmore Law School).
** LLB (Strathmore Law School); LLM (Harvard Law School).

in both projects fall below the acceptable standards of contractual transparency. In sum, there is a constitutional obligation on the Kenyan government to ensure better transparency outcomes in the contracts that these projects gave rise to. In response to this argument, the authors close by making specialised recommendations focused on regulating the types of arrangements that gave rise to the projects and influencing the popular understanding of contractual transparency.

Keywords: contractual transparency, US-Kenya relations, US-China relations, Constitution of Kenya 2010, procurement, Standard Gauge Railway Project (SGR), Bechtel project.

1. Introduction

Contractual transparency drives the openness and availability of information in the contractual relations of a government with other entities.[1] In practical terms, contractual transparency translates into greater availability of contractual terms, open publication of data related to government contracts and informational disclosure during processes such as procurement.[2] Contractual transparency has especially unique implications for a government's accountability to its citizens who sustain the development efforts of the state.[3]

As the People's Republic of China (China) has grown over the last two decades, it has become apparent that contractual transparency in its cross-border economic engagements is often limited. For instance, China inconsistently avails data on its cross-border lending and cross-border agreements.[4] Examining the procurement process in China's Belt and Road Initiative, the World Bank also found that although Chinese companies account for the majority of Chinese-funded projects, very little information is available on how these contracts are awarded.[5]

Cross-border engagements of the United States of America (the United States or the US) are somewhat different. Laws in the USA require that data on financial assistance (for example, loans) by US government departments must be made public.[6] As a result, various agen-

1 Peter Rosenblum and Susan Maples, *Contracts confidential: Ending secret deals in the extractive industries*, National Resource Governance Institute, 2009, 15-17.

2 Working Group on Commercial Transparency in Procurement Contracts, 'The principles on commercial transparency in procurement contracts', Centre for Global Development, 2019, 2-3.

3 Global Partnership for Effective Development Co-operation, 'Making development co-operation more effective: 2016 progress report', Organisation for Economic Development and Cooperation, 100.

4 John Hurley, Scott Morris, and Gailyn Portelance, 'Examining the debt implications of the Belt and Road Initiative from a policy perspective' Centre for Global Development Policy Paper 121, March 2018, 8-10.

5 Tania Ghossein, Bernard Hoekman and Anirudh Shinga, 'Public procurement in the belt and road initiative' World Bank MTI Global Practice Paper No 10, December 2018, 28-31.

6 Foreign Aid Transparency and Accountability Act (Public Law 114-191-15, 2016), Sec-

cies in the US openly avail information on economic engagements with other countries and data on federal spending is disclosed.[7]

As part of its Belt and Road Initiative, [8] China has played a prominent role in Kenya's infrastructure sector like in other African countries.[9] In the last two decades and mostly through the Chinese Export-Import Bank (China EXIM Bank), it has financed a number of infrastructural projects with Chinese companies being awarded most of the contracts for these projects.[10] The most significant of these is Kenya's Standard Gauge Railway which was awarded to the China Road and Bridge Corporation (CRBC). With the first phase alone estimated to be at around a cost of 3.6 billion United States Dollars (USD), it is considered the largest infrastructural project since Kenya's independence.[11]

The US, though not nearly as dominant, has recently shown an interest in financing and facilitating infrastructure projects in Africa.[12] For example, in 2018, the US government enacted the Better Utilisation of Investments Leading to Development (BUILD) Act which established the International Development Finance Corporation.[13] It is strongly

tion 4; See also US Agency for International Development (USAID), 'US overseas loans and grants (Greenbook) – Data,' Last updated 19 March 2020 <https://catalog.data.gov/dataset/u-s-overseas-loans-and-grants-greenbook-data> on 10 April 2020.

7 See, for example, the Foreign Assistance Website; Foreign Aid Explorer; the official USA Spending Explorer. Other US government agencies that engage in cross-border transactions such as export credits also avail detailed datasets. See for example United States Export-Import Bank, 'Authorizations from 10/01/2006 thru' 12/31/2019', 29 April 2020.

8 Nancy Muthoni Githaiga and Wang Bing, 'Belt and Road Initiative in Africa: The impact of standard gauge railway in Africa' 55(3) *China Report* (2019) 220.

9 Apurva Singh and Dylan Johnson, 'Deal or no deal: Strictly business for China in Kenya?' World Bank Group, Macroeconomics and Fiscal Management Global Practice Group Policy Research Working Paper 7614, 2016 23.

10 For a list of projects, see the following data-set: William & Mary College, China's Global Official Finance Dataset AidData Research Lab, 2000-2014.

11 Cynthia Olotch, 'Kenya's new railway and the emergence of the "government-to-government procurement" method' *World Bank Blogs,* 27 July 2017.

12 J O'Brien, 'US' new Africa policy will increase competition to fund infrastructure', *Financial Times,* 18 December 2018; See also the following report: Baker-Mckenzie, 'A changing world: New trends in emerging market infrastructure finance', 2018.

13 115th Congress (2017-2018): Better Utilization of Investments Leading to Development

believed that the Act was passed to directly compete with China's infrastructural presence in Africa.[14] Policy makers hope that the Corporation, for example, will 'facilitate market-based private sector development and inclusive economic growth in less developed countries' which might translate to greater financing of infrastructure projects in Africa.[15]

With specific regard to Kenya, the US government signed a Memorandum of Understanding with the Government of Kenya in 2015 on greater collaboration in Kenya's strategic infrastructure projects.[16] In 2017, the Government of Kenya settled on a reportedly 3 billion USD (a figure roughly similar to that of the first phase of SGR) commercial agreement with US company Bechtel International to build Kenya's first expressway between Nairobi and Mombasa (the Bechtel project).[17] The agreement was largely facilitated by US agencies and while the final contractual terms on financing are still not close to being concluded, financing through US government agencies has been considered.[18]

In this article and focusing specifically on procurement contracts and agreements extending credit to the Kenyan government, we compare and contrast contractual transparency in the SGR and Bechtel projects against Kenya's constitutional obligations for transparency. The idea of transparency is stressed numerous times in Kenya's Constitution.[19] Transparency is in fact listed as a national value that binds 'all state organs, state officers, public officers, and all persons in Kenya' whenever they apply or interpret the Constitution.[20] There is also an

(BUILD) Act (2018), Section 2463.

14 Patricia Zengerle, 'Congress, eyeing China, votes to overhaul development finance' *Reuters*, 3 October 2018.

15 BUILD Act (2018), Section 1411.

16 Memorandum of Understanding between the Government of the United States of America and the Government of Kenya concerning the development and implementation of strategic infrastructure priority projects in Kenya, 2015.

17 Kenya National Highways Authority, 'Press release: Contract signing for the Nairobi-Mombasa (A8) Expressway', 5 August 2017.

18 Tom Wadlow, 'Bechtel and Kenyan government to discuss financing of $3bn highway project', *Construction digital.com*, 16 May 2020.

19 Constitution of Kenya (2010), Articles 10, 60, 81, 82, 86, 172, 225, 226, 227, 230, 232, 244.

20 Constitution of Kenya (2010), Article 10.

explicit requirement for transparency in matters of public finance and where a state organ or any other public entity in Kenya contracts for goods or services.[21] These latter provisions have direct bearing on contractual transparency in the two projects and the contracts this study focuses on.

While the two projects are different, the transparency outcomes they individually present are worth comparing for the following reasons. The SGR Project can be considered the height of Chinese-financed infrastructural projects in Kenya. Meanwhile, the Bechtel project, especially in light of the US' increased interests in facilitating infrastructure projects in Africa, could conversely lay the foundation of greater infrastructural engagement between Kenya and the US in coming years. The lessons to be drawn from contractual transparency trends in the SGR project, a major culmination of years of infrastructural engagements between Kenya and China, can therefore be contrasted with the Bechtel project which could forecast trends in future infrastructural engagements between Kenya and the US. This comparison is especially apt because, as elaborated in Part III of this article, both projects have also been pursued under a similar 'government-to-government' model. Moreover, due to the similarity in models and because contractual negotiations for the Bechtel project are also at an early stage, the undesirable trends drawn from both projects could be prevented as the Bechtel project continues to materialise. After all, the Bechtel project is expected to be at a scale comparable to that of the first phase of the SGR where many transparency issues have been identified.

Overall, we contribute to the existing literature by firstly, considering the contractual relations these two projects gave rise to or might give rise to against the substantive normative content of transparency in government and its contextual requirements in a government's contractual relations and, secondly, by emphasising the normative relevance of government transparency in these projects against Kenya's historical and constitutional context. Our overall thesis is that when evaluated against the idea of transparency, its associated standards and its consti-

21 Constitution of Kenya (2010), Articles 201 and 227.

tutional enshrinement, elements of contractual relations in both projects fall short of what is required. Though there has certainly been some criticism over a lack of contractual transparency in the SGR project,[22] this conceptual approach and the contextual links it makes has not been substantially explored in China's infrastructural engagements with Kenya or in writing that looks at Kenya's future infrastructural engagements with the US. Finally, we also contribute to the existing body of knowledge by proposing specialised recommendations that may improve contractual transparency outcomes in future projects of this nature.

To reiterate, we limit ourselves to procurement contracts and contracts extending credit to the Kenyan government. Furthermore, due to the scope of this article, we also mostly limit ourselves to the issues arising from the first phase of the SGR project. The rest of the article is structured as follows. In Part II, we discuss the foundations of transparency in government and its requirements in a government's contractual relations with other entities. We also explore transparency as conceptualised in the Constitution of Kenya and in light of the country's history. In Part III we compare contractual transparency in the SGR project with contractual transparency in the Bechtel project. In Part IV, we make specific recommendations regarding the way forward and in Part V, we conclude.

[22] Joseph Onjala, 'China's development loans and the threat of debt crisis in Kenya' 36 *Development Policy Review* (2018) 725; Uwe Wissenbach and Yuan Wang, 'African politics meets Chinese engineers: The Chinese-built Standard Gauge Railway Project in Kenya and East Africa', Working Paper No 13, Volume 13, China-Africa Research Initiative, 2017, 12-13, 23; Ying Xia, 'Influence through infrastructure: Contesting the Chinese-built Standard Gauge Railway in Kenya' *China Law and Development*, Research Brief No 9 of 2019, 25 September 2019, 2-3.

2. The idea of transparency in government

The term 'contractual transparency' implies a contextualisation of transparency to the particular circumstances of a government's contractual relations. In recognition of this, we will first briefly establish the general normative qualities of transparency in government. Thereafter, we will contextualise the transparency to a government's contractual relations and focus on two types of contracts involving government: contracts arising from procurement and contracts extending credit to a recipient government. We will then consider the normative relevance of government transparency in Kenya's constitutional setting and argue that its position is annealed by Kenya's history.

2.1 The broader concept of transparency in government and its application to a government's contractual relations

2.1.1 Conceptualising transparency in government

Backer writes that transparency in institutions manifests itself as both a technique and a collection of norms. In its technique form, transparency refers to the methods of availing information that are used in managing relationships while as a collection of norms, transparency denotes standards of proper conduct and interaction. The norms of transparency 'embody the ends' for which they also 'provide the means'. [23]

Though this distinction is useful to infer the necessary relationship between practice and purpose, it raises the question of whether the norms of transparency have an objective quality and if so, whether its techniques assume a similar character. According to Fung *et al*, the unifying goal of transparency systems is to rectify perceived information asymmetries that characterise market and political processes.[24] In other

23 Larry Catta Backer, 'Transparency and Business in International law' in Andrea Bianchi and Anne Peters (eds) *Transparency in international law*, Cambridge University Press, 2013, 478-479.

24 Archon Fung, David Weil, Mary Graham and Elena Fagotto, 'The political economy of transparency: What makes disclosure policies effective?' Ash Institute for Democratic Governance and Innovation, 2004, 1-2.

words, the core normative quality of a transparency system is that it provides factual information to relevant stakeholders.

Consequently, the core character of transparency is informational openness and availability, with the underlying expectation that the information being availed is both accurate and clear.[25] Still, transparency is at the same time a 'highly contextual and contingent' value.[26] Intervention to require the disclosure of information by various parties – whether on a national or international level – is done in pursuance of contingent political and economic objectives.[27]

The same is true for government and its agencies where transparency is, in the words of Pozen, a 'legal and administrative norm'.[28] This understanding of open government shares its assumptions with liberal democratic theory which places a duty on the state to present itself before the public and to justify its conduct to the individual and community.[29] While it is true that transparency in government should not be sacralised at the expense of other equally important administrative norms,[30] it is also true that a public that is more aware of its government conduct is in a better position to measure that conduct against the government's assigned mandates.[31]

In light of this, government transparency is often conceived with certain ends. The first is the enhancement of democracy through informed public decision-making; the second, an increase in trust and legitimacy of government; the third, an improvement in the quality of

25 William Mock, 'On the centrality of information law: A rational choice discussion of information law and transparency' XVII *John Marshall Journal of Information Computer* (1991) 1079-1081.

26 Fredrick Schauer, 'Transparency in three dimensions' 4 *University of Illinois Law Review* (2011) 1356.

27 Fung, Weil, Graham and Fagotto, 'The political economy of transparency', 1-2.

28 David E Pozen, 'Transparency's ideological drift' 128(1) *Yale Law Journal* (2018) 104.

29 Mark Fenster, 'The opacity of transparency' 91(3) *Iowa Law Review* (2006) 895-899.

30 Pozen, 'Transparency's ideological drift', 161.

31 Ana Bellver and Daniel Kaufman, 'Transparenting transparency: Initial empirics and policy applications', IMF Conference on Transparency and Integrity, held on 6 to 7 July 2005, 4-5.

governance due to less secrecy and greater accountability; the fourth, an improvement in market and economic performance because relevant political and economic actors make more informed decisions; and finally, the realisation of individual rights stemming from information showing government interference with individual rights.[32]

2.2 Transparency in a government's contractual relations

We argue that transparency in a government's contractual relations is encompassed under this wider notion of transparency in government. Indeed, as Buize writes, 'different emanations of the principle of transparency are in fact part of one and the same phenomenon.'[33] As will be seen below, there are therefore clear derivations from the general idea of transparency in government that can be inferred.

Applying the normative characteristics established prior, contractual transparency is taken to mean the availability of information on the contractual terms that a state is bound by and in respect of contractual relationships that it has established or seeks to establish. In recent years, contractual transparency has been greatly emphasised in contracts involving states and their natural resources.[34] The application of transparency in these contracts and its rationale provides this study with some parallels on what contractual transparency in procurement and lending agreements entail.

In natural resource contracts, the state is a custodian of these resources and the citizens, as the 'true owners',[35] must be informed on any projects, regardless of whether the contract is awarded to foreign or

---

32 Anoeska Buijze, 'The six faces of transparency' 9(3) *Ultrecht Law Review* (2013) 5-8.

33 Buijze, 'The six faces of transparency', 4.

34 See generally Open Government Partnership Openness in Natural Resources Working Group, 'Disclosing contracts in the natural resource sector', Natural Resource Governance Institute, Open Government Partnership and World Resources Institute, Issue Brief, 2016.

35 UN General Assembly Resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources', 6.

domestic companies.[36] An important belief that guides this requirement of transparency is that contracts on natural resources *contain laws on the management of a public resource project*.[37] Since a fundamental principle of the rule of law is that all laws must be publicly available,[38] then all contracts on natural resources must also be publicly available. Because the rule of law envisions a government of laws and not men,[39] transparency enables one to 'know' government conduct and thereby lays the foundation for the rule of law.[40]

This same sentiment can be extended to public procurement contracts by government, even where they are not concerned with natural resources. This is because governments use public funds to secure goods and services through the process of procurement. At least in Kenya's constitutional context, public money must be used prudently.[41] There is no way to assess prudence in public funds without knowing how those funds have been used. This harkens to a wider principle-agency relationship between government officials and citizens and the implications that limited disclosure creates. Where an agent (officials) has a monopoly of information, then they can exploit that information to their personal benefit and to the detriment of the principal (citizens).[42] Asymmetries in information that would allow the agent to engage in this conduct must therefore be minimised.[43]

Transparency in procurement contracts is thus aimed at minimising corruption and irresponsible use of public funds by providing legitimate criteria to enter contractual relations with a given provider.[44]

36 Rosenblum and Maples, 'Contracts confidential', 1-2.

37 Rosenblum and Maples, 'Contracts confidential', 16.

38 Rosenblum and Maples, 'Contracts confidential', 16.

39 Brian Z Tamanaha, *On the rule of law: History, politics, theory*, Cambridge University Press, 2004, 122-123.

40 Steven D Jamar, 'The human right of access to information' 1(2) *Global Jurist* (2001) 1-3.

41 Constitution of Kenya (2010), Article 201.

42 Kofi Osei-Afoakwa, 'How relevant is the principle of transparency in public procurement' 4(6) *Developing Country Studies (IISTE)* 2014, 142.

43 Michael Jensen and William Meckling, 'Theory of the firm: Managerial behaviour, agency costs and ownership structure' 3(4) *Journal of Financial Economics* (1976) 305-360.

44 Megan A Kinsey, 'Transparency in government procurement: An international consensus', 34(1) *Procurement contract Law Journal* (2004) 159.

There must therefore be 'access by the public to timely and reliable information on decisions and performance in the public sector including and concerning access to the law, policies, regulations and practice of procurement by government agencies.'[45] This ensures a fair and open selection process. In this way, informational openness in procurement contracts also enhances competition thereby facilitating efficient resource allocation.[46]

Another important type of contract requiring transparency are agreements that involve lending or sovereign borrowing. Relevant contractual information in these contracts involve the monetary value of the loan, the terms of repayment and the purpose of financial support.[47] Many of the justifications provided for transparency in procurement contracts also apply to transparency by recipient states in lending contracts. The domestic justification of revealing potential government mismanagement is especially relevant, perhaps even more so because of the successive manner in which government debt operates.

As Busscheit *et al* have explained it, although 'moral instinct' would excuse citizens from repaying a loan borrowed under a corrupt government, international law does not.[48] Thus, a guiding principle of sovereign borrowing is that governments have the responsibility to protect the interests of their citizens on an inter-generational level.[49] This only makes sense since the debt is passed on to future generations who nec-

45 Elia Armstrong, 'Integrity, transparency and accountability in public administration: Recent trends, regional and international developments and emerging issues', Economics and Social Affairs, 2005, 2.

46 Martin Burgi, 'Specifications' in Martin Trybus, Roberto Caranta and Gunilla Edelstam (eds) *EU public contract law: Public procurement and beyond*, Bruylant, 2013, 162.

47 See commonly agreed standards in Organisation for Economic Co-operation and Development, Arrangement on Untied ODA Credits Transparency, 2004; See also Organisation for Economic Co-operation and Development, Arrangement on Officially Supported Export Credits, 2005. Both are available at <https://one.oecd.org/document/TD/PG(2005)8/en/pdf> on 3 May 2022.

48 Lee C Bucheit, Mitu Gulati and Robert B Thompson, 'The dilemma of odious debts' 56(5) *Duke Law Journal* (2016) 1201-1206.

49 United Nations Conference on Trade and Development, 'Principles on promoting sovereign lending and borrowing', 2012, 8.

essarily have to repay it.[50] As with expenditure in public procurement, when borrowing, governments therefore act as agents of the state.[51]

Citizens in recipient countries have an *ab initio* right to know on the basis that they are the principal in these transactions and on the basis that they secure and sustain the borrowing efforts of a government. From a practical standpoint, contractual transparency in the context of sovereign loans also allows citizens to know the inconsistencies between the amount received and the amount that has been spent for the purpose it was availed.[52]

2.3 Normative relevance of transparency in Kenya's historical and constitutional context

Having conceptualised the idea of transparency and its application to a government's contractual relations, this article will now emphasise the normative relevance of transparency in Kenya's constitutional and historical context. Our underlying claim is that the Government of Kenya's obligation for contractual transparency in the projects under study is underpinned by the historic enshrinement of transparency in the Constitution.

The constitution-making process that led up to the Constitution of Kenya was people-driven.[53] Indeed, the inclusion of transparency in these different ambits of government is reflective of the public sentiment at the time. In the Constitution of Kenya Review Commission's (CKRC) Final Report, the Commission noted that it was a popular grievance that the 'government of the day' failed to achieve transparency in governance, resource-based decisions such as expenditure and public projects.[54]

50 Anna Gelpern, 'Bankruptcy, backwards: The problem of quasi-sovereign debt' 121(4) *Yale Law Journal* (2012) 907.

51 United Nations, 'Principles on promoting sovereign lending and borrowing', 8.

52 Lee C Buchheit and Mitu Gulati, 'Responsible sovereign lending and borrowing' 73(4) *Law and Contemporary Problems* (2010) 70-71.

53 Constitution of Kenya Review Commission, Final Report of the CKRC, 2005, 62-67; See also Constitution of Kenya Review Commission, Working Draft of the Final Report of the CKRC: Chapter 1-18, 2004, 92-94.

54 Constitution of Kenya Review Commission, Final Report of the CKRC, 69.

As the Commission noted, this state of affairs was rooted in colonial laws and a tradition of secrecy that the Kenyan government inherited at independence.[55] That situation for a long time persisted at the expense of public knowledge of government conduct.[56] In furtherance of this view, Holmsquist and Githinji argue that in 1963, Kenya inherited four pillars of the political economy that had a severe impact on transparency and accountability.[57] The first pillar was the top-down colonial style administration with the president at the top and the various levels of provincial administration below him.[58] Information therefore trickled down an established and closeted hierarchy.

Secondly, since the colonial administration limited political organisation in Kenya to ethnically defined districts, the national political parties that emerged leading up to independence were 'coalitions of ethnic and regionally based leaders for the purpose of competing in national elections.'[59] Politics were therefore national only in the instance of elections; ethno-regional interests, necessary to secure political power, trumped national accountability, transparency and other values incidental to the exercise of that power.[60]

Thirdly, the anti-colonialist struggle did not produce a national dialogue of what would replace the colonial system. The focus became filling in the blanks of political power by using the methods and instruments of colonial administration.[61] This perhaps explains the inherited tradition of secrecy. Fourthly and related to this third pillar, the African elite's idea of reversing the extreme social and economic inequality caused by colonialism was to take the place of their colonial predecessors.[62] Though at first these elite represented the ethnic spectrum in

55 Constitution of Kenya Review Commission, Final Report of the CKRC, 124.
56 Constitution of Kenya Review Commission, Final Report of the CKRC, 124.
57 Mwangi wa Githinji and Frank Holmsquist, 'Reform and political impunity in Kenya: Transparency without accountability', 55(1) *African Studies Review* (2012) 57-59.
58 Githinji and Holmsquist, 'Reform and political impunity in Kenya', 58.
59 Githinji and Holmsquist, 'Reform and political impunity in Kenya', 58.
60 Githinji and Holmsquist, 'Reform and political impunity in Kenya', 58.
61 Githinji and Holmsquist, 'Reform and political impunity in Kenya', 58.
62 Githinji and Holmsquist, 'Reform and political impunity in Kenya', 59.

Kenya, President Jomo Kenyatta's administration quickly became centred on his ethnic community. Those in government presumably did not have in mind a duty of disclosure to the general citizenry because they conceptualised an ethnic hierarchy of citizens with different rights and privileges.[63] As Okoth-Ogendo observes, the African elite was in awe at the effectiveness with which colonial administration was able to transform the national economy into a sort of 'private estate'.[64] The African elite thus personalised the state and its instruments and assumedly saw little need for openness. [65]

The effect of these four pillars was to cement a highly centralised government structure with a monopoly of power and therefore information.[66] All of these legacies affected various aspects of government conduct over the years. For instance, there has been a historic secrecy and abuse in revenue management and public finance, corruption in public projects, and unexplained irregularities in resource allocation.[67]

Reflecting this history, the Constitution of Kenya contains three measures that impact transparency in government and contractual transparency specifically. The first measure is the enshrinement of transparency in the Constitution as an organising principle in various ambits of government. As a national value in Article 10, transparency binds anyone who acts under the authority of the Constitution. Public policy decisions must adhere to the values in Article 10 as a matter of law.[68] There are other substantive constitutional provisions supporting transparency's specific application to the contracts under study. For

63 Githinji and Holmsquist, 'Reform and political impunity in Kenya', 59.

64 HWO Okoth-Ogendo, 'Constitutions without constitutionalism: Reflections on African political paradox' in Douglas Greenberg, Stanley N Kartz, Melanie Beth Oliviero and Steven C Wheatley (eds), *Constitutionalism and democracy: Transitions in the contemporary world*, Oxford University Press, 1993, 71.

65 Odhiambo Mbai, 'Public service accountability and governance in Kenya since independence' 8(1) *Africa Journal of Political Science* 2003, 120.

66 Githinji and Holmsquist, 'Reform and political impunity in Kenya', 59.

67 Njeru Kirira, 'Public finance under Kenya's new Constitution', Constitution Working Paper Number 5, Society for International Press, 2011, 2-4.

68 Migai Akech, 'Institutional reform in the New Constitution of Kenya', International Centre for Transitional Justice, 2010, 20.

example, likely in response to a history of the opposite, the Constitution requires openness in all financial matters.[69] If one were to read this provision together with Article 10 which binds all state officers making public policy decisions, then all state officers involved in lending contracts (which would fall under the broader aspect of public finance) must maintain contractual transparency. The same argument can be made for public procurement contracts since the Constitution also has an explicit requirement for transparency in these types of contracts.[70]

Secondly (and significantly), every citizen has an explicit right to access information under Article 35 of the Constitution.[71] This was specifically incorporated to counter the Kenyan government's tradition of secrecy. In the words of the court in *Farah Abdinoor Ahmed v National Land Commission and 2 others*, the drafters created a right to 'request information and a concomitant duty to provide for the information requested.'[72] The Access to Information Act expounds on the right and its surrounding requirements.[73] In the context of contractual transparency and as we later discuss, this right has direct bearing on contractual documents.

The third measure is a decentralised government structure. Ben Sihanya makes some pertinent observations in relation to the relatively de-emphasised role of the president in the 2010 Constitution. He writes that the Constitution contains a negotiated presidency that is limited by a bicameral parliament, a devolved system of government, an independent judiciary and several independent offices and institutions.[74] In essence 'checks and balances' have been thoroughly contemplated in the Constitution.[75] The closeted top-down channel of information is in this way mitigated.

---

[69] Constitution of Kenya (2010), Article 201.

[70] Constitution of Kenya (2010), Article 227.

[71] Constitution of Kenya (2010), Article 35.

[72] Constitution of Kenya Review Commission, Final Report of the CKRC, 120.

[73] Access to information Act (No 31 of 2016).

[74] Ben Sihanya, 'The presidency and the public authority in Kenya's new constitutional order', *Constitution Working Paper Number 2*, Society for International Press 16-17.

[75] John Osogo Ambani, Morris Kiwinda Mbondenyi, *The new constitutional law of Kenya: Principles, government and human rights*, LawAfrica, 2012, 69.

3. Comparing contractual transparency in Kenya's engagement with China and the United States

3.1 China-Kenya contractual relations in the Standard Gauge Railway project

The first phase of the SGR project was completed in 2017 at a reported cost of 3.75 billion USD. Around 90 percent of the financing came from the Export Import Bank of China.[76] China's EXIM Bank has financed numerous infrastructure projects in Kenya and Chinese companies have played a substantial role in Kenya's infrastructure sector.[77] Accordingly, though we use the SGR project as a case study, we attempt to contextualise key issues relating to contractual transparency in this study to wider trends in procurement and lending contracts arising from Chinese-funded infrastructure projects in Kenya.

The first area that has been mired by issues of transparency is the pre-procurement feasibility study undertaken for the SGR project. The GoK and the China Road and Bridge Corporation (CRBC) signed a memorandum of understanding where the CRBC would carry out the feasibility study for the Mombasa-Nairobi section of the SGR project, provided that *the report could only be used by Government/Kenya Railways Corporation (KRC) and CRBC*. The feasibility could therefore not be publicly disclosed. Conflict of interest was not difficult to spot given that the CRBC was eventually awarded the contract. [78]

---

[76] Kenya Railways Corporation, 'SGR implementation: Financing Mombasa-Nairobi Section' <http://krc.co.ke/?page_id=1546> on 10 April 2020. See also Walter Nyaga, Annabel Munga, Lucy Kinyua, Kathy Gathu and Weldon Ng'eno, 'Kenya China relations: Portrait of economic cooperation in the new millennium' 5(3) *International Journal of Social Science and Humanities Research* (2017) 260-261.

[77] For a list of projects, see the following data-set: William & Mary College, China's Global Official Finance Dataset AidData Research Lab, 2000-2014 <http://aiddata.org/data/chinese-global-official-finance-dataset> on 10 April 2020.

[78] Public Investments Committee, 'Special report on the procurement and financing of the construction of Standard Gauge Railway from Mombasa to Nairobi (Phase I)', Eleventh Parliament Second Session, 29 April 2014, 8-9.

The Government of Kenya defended this secrecy on the basis that 'it was standard requirement for Chinese funded projects to establish the feasibility themselves before involving their Treasury and banks.' This suggests, given the existence of other Chinese-funded infrastructure projects in Kenya, that it is not a novel practice. Indeed, it could be indicative of wider transparency trends. As Joseph Onjala argues, loans for Chinese-funded projects in Kenya are often arranged and mediated by Chinese construction companies on behalf of the Kenyan government. Chinese contractors sign memoranda of understanding, conduct their own feasibility studies and a commercial contract is signed with the contractor to approach a financing entity on the government's behalf.[79]

This falls below the standards of transparency and specifically contractual transparency for two reasons. Firstly, since the feasibility report is confidential, it means that cost valuation information in the SGR project and other similar projects in Kenya is closed to the public. As we argued in the previous section, contractual transparency in public procurement should allow the public to assess whether public funds are being spent prudently. While the general cost of the project is public knowledge, cost valuation information present in the feasibility report would allow the public to scrutinise the modalities and criteria upon which this general cost was reached. This would be particularly valuable to Kenyans because in the case of the SGR, the World Bank noted that of all alternatives the SGR project was the least economically viable.[80]

Secondly, even if the feasibility report could not be disclosed, where a contractor is aware that they will secure funding, then cost-inflation is a possibility. Information presented to the public on cost valuation could therefore be inaccurate. Certainly, it has been noted that an independent feasibility study conducted alongside the CRBC's might have

[79] Joseph Onjala, 'China's development loans and the threat of debt crisis in Kenya' 36 *Development Policy Review* (2018) 725.

[80] See generally World Bank-Africa Transportation Unit, 'The economics of rail gauge in the East Africa Community', World Bank, 2013.

had positive implications for cost control.[81] There is an underlying and fundamental assumption that the information disclosed by government is accurate [82] and if it not, then this limits the effectiveness of transparency as a norm that facilitates the evaluation of government conduct. Notably, and as we discuss later in this section, Kenyan courts have had the opportunity to pronounce themselves on the right to access information and the feasibility study report but this has not yielded much.

The second area of concern for contractual transparency lies in the selection process and the model that it was conducted under. A report by the Public Investment Committee on the process of procurement for the first phase shows that initially, the CRBC was awarded a tender by the KRC under Section 74(2)(a) of the Public Procurement and Asset Disposal Act, 2005 (2005 PPDA) (now repealed).[83] This provision allows for direct contracting where there is no reasonable alternative or substitute for the goods or services being contracted.

The award was later withdrawn and the Corporation was instead awarded the contracts using the statutory exception of a 'government-to-government' contract. The GoK averred that a financing agreement between it and the China EXIM Bank made it a requirement for CRBC to be selected.[84] This was justified using Section 6 of the 2005 PPDA which grounds single-source procurement where it is made under a negotiated loan.[85] Pointedly, Ying Xia writes that 'this "shopping" of applicable rules of law raises as many questions about the neutrality of the regulatory agency as about the authority of the PPDA in ensuring transparency and competitiveness in public procurement.'[86] This

[81] Uwe Wissenbach and Yuan Wang, 'African politics meets Chinese engineers: The Chinese-built Standard Gauge Railway Project in Kenya and East Africa', Working Paper No 13, China-Africa Research Initiative, 2017, 23.

[82] World Bank, 'The economics of rail gauge in the East Africa Community'.

[83] Public Investments Committee, Special Report', 30.

[84] Public Investments Committee, Special Report', 30; See also Public Procurement and Asset Disposal Act (Cap 412C Act No 171 of 2006), Section 6.

[85] See also Public Procurement and Asset Disposal Act (Cap 412C Act No 171 of 2006), Section 6.

[86] Ying Xia, 'Influence through infrastructure: Contesting the Chinese-built Standard Gauge Railway in Kenya', China Law and Development, Research Brief No 9 of 2019, 3.

critique on a lack of transparency in selecting Chinese contractors has generally been made against Chinese-financed infrastructure projects in Kenya.[87]

However, in 2020, the Court of Appeal concluded that the government-to-government exception did not apply because a contract was entered into with the CRBC before an agreement was even reached.[88] This means that the criteria that the GoK justified its entry into contractual relations with the CRBC for the last 7 years has been inaccurate. In public procurement, contractual transparency demands the disclosure of clear and accurate information regarding the basis and criteria upon which governments enter into contractual relations with other entities.[89] Considered alongside the general 'shopping of applicable rules', the malleable approach of the GoK falls below this standard.

The third key issue relating to transparency in the SGR project has been the disclosure of actual contractual documents, both related to procurement and the loans financing the project. While there have been some determinations on the issue, it is currently unclear whether the right to access information applies to the primary contractual documents related to the SGR.[90] Regarding procurement documents, in 2014 a petition was filed in the High Court of Kenya by Okiya Omtatah, a Kenyan activist, challenging the SGR selection process for the first phase.[91] Mr Omtatah produced the feasibility report and other procurement documents without going through formal access to information channels. The Court ruled that the evidence was illegally obtained and stated that and that before resorting to 'self-help' by accessing the information from

[87] Onjala, 'China's development loans and the threat of debt crisis in Kenya', 725.

[88] *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others,* Civil Appeal 13 of 2015, Judgement of the Court of Appeal at Nairobi (2020) eKLR.

[89] Kinsey, 'Transparency in government procurement', 159.

[90] *Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others*, Constitutional and Human Rights Petition No 58 of 2014, Judgement of the High Court at Nairobi (2014) eKLR; *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others,* Civil Appeal 13 of 2015, Judgement of the Court of Appeal at Nairobi (2020) eKLR.

[91] *Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others*, Constitutional and Human Rights Petition No 58 of 2014, Judgement of the High Court at Nairobi (2014) eKLR.

an anonymous employee, the petitioner could compel the KRC to issue the relevant documents through Article 35 of the Constitution.[92]

A year after this, Mr Omtatah filed a separate petition claiming that the procurement process in the second phase was also marred by irregularities. He claimed that his request to access these documents was not met and he sought to have the court enforce his right to access the requested information. The Court declared itself *res judicata* on the procurement issue because the contractual award to the CRBC applied to both phases.[93] On the issue of the contractual documents, it invoked the principle of *sub judice* since the petitioner had appealed the earlier decision given by the High Court in the Court of Appeal. [94]

The matter was therefore struck out and the petitioner was urged to continue pursuing his case in the petition that he had already instituted.[95] As Ying Xia notes, there is however a flaw in the reasoning of this second decision because Phase 2 of the SGR was governed by separate contractual documents and so the doctrine of *res judicata* does not seem appropriate.[96] Additionally, requests for information in Kenya are often ignored or declined altogether which appears to have been Mr Omtatah's predicament.[97] This was therefore a missed opportunity to clarify whether the right to access information applies to primary contractual documents connected to the SGR.

92 *Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others*, Constitutional and Human Rights Petition No 58 of 2014, Judgement of the High Court at Nairobi (2014) eKLR; See also the appellate case where the Court of Appeal reached the same verdict: *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others,* Civil Appeal 13 of 2015, Judgement of the Court of Appeal at Nairobi (2020) eKLR.

93 *Okiya Omtatah Okoiti & another v Ministry of Transport & Infrastructure & 4 others,* Constitutional & Human Rights Division Petition No 548 of 2015, Ruling on Preliminary Objection of the High Court at Nairobi, (2016) eKLR.

94 *Okiya Omtatah Okoiti & another v Ministry of Transport & Infrastructure & 4 others*, Constitutional & Human Rights Division Petition No 548 of 2015, Ruling on Preliminary Objection of the High Court at Nairobi, (2016) eKLR.

95 *Okiya Omtatah Okoiti & another v Ministry of Transport & Infrastructure & 4 others*, Constitutional & Human Rights Division Petition No 548 of 2015, Ruling on Preliminary Objection of the High Court at Nairobi, (2016) eKLR para 30.

96 Xia, 'Influence through infrastructure', 2-3.

97 Vincent Ng'ethe, 'GUIDE: How to use your right to government information in Kenya', *Africa Check,* 23 July 2018.

Perhaps the contractual documents that have caused the most public controversy are those related to the loans financing the project. In 2019, arguing that they had a right to access the information, Kenyan civil society members threatened to sue the Government of Kenya if they did not disclose all contractual documents.[98] In that same year, a media leak of the SGR project's alleged lending terms was revealed, stirring some level of public attention. It allegedly stated that no information contained in the contract could be revealed without 'the written consent of the lender' and that Kenya and its assets are not 'entitled to any right of immunity on the grounds of sovereignty or otherwise from arbitration'.[99]

Officials disclaimed the leak and added that there was nothing preventing them from public disclosure of contractual documents and terms.[100] No such disclosure has been made at the time of writing and it is likely that the Government of Kenya is bound by a confidentiality clause not to disclose the loan agreement.[101] It was previously argued that one of the anticipated ends of transparency in government is to enhance the trust and legitimacy of the public in that government.[102] The failure by the Government of Kenya to disclose these documents despite the assertion that it is willing to do so, acts in stark opposition to this end. Since a commitment to transparency is primarily evidenced by informational disclosure, there is a disparity between what the Government of Kenya has communicated in this instance and the actions it must actually take. It must be conceded, however, that there is a measure of disclosure when it comes to the general lending terms surrounding the project such as the total cost, the grace period, interest rates and the type and number of loans.[103]

---

98 Joackim Bwana, 'Groups to sue over non-disclosure of SGR contract, BBI expenditure', *Standard Media*, 21 December 2019.

99 Edwin Okoth, 'SGR pact with China a risk to Kenyan sovereignty, assets', *Daily Nation*, 12 January 2019.

100 Okoth, 'SGR pact with China a risk to Kenyan sovereignty, assets'.

101 A similar situation to Kenya's was for example witnessed in the Philippines: Leila B Salaverria, 'Confidentiality clause raises more questions about China deal', *Philippine Daily Inquirer*, 6 March 2019.

102 Buijze, 'The six faces of transparency', 5-6.

103 Public Investments Committee, 'Special Report', 48-49; Departmental Committee on

It might be argued that there are some general statutory exceptions to the right to access information that the Government of Kenya could use to justify this secrecy where a request for information as per the Access to Information Act is made. For instance, information that substantially prejudices the commercial interests of a third party (the CRBC) from whom the information was obtained is exempted from disclosure – this might for example apply where the feasibility report that was discussed before contains trade secrets.[104] Additionally, information that causes substantial harm to the ability of the Government of Kenya to manage the economy of Kenya is also exempted.[105]

Nonetheless, exemptions such as this are limited in the Act where a court determines that the public interest outweighs the harm to protected interests.[106] Such a determination must consider the need to promote accountability and promoting informed debate on issues of public interest.[107] As stated prior, in terms of its cost, the SGR project is the largest infrastructural project Kenya has undertaken since independence. Given the history of secrecy and resultant mismanagement of resources in public projects, the scale of the SGR and its impact across generations demands greater scrutiny of the issues it presents. The public interest in this case arguably outweighs hypothetical protected interests.

3.2 United States-Kenya contractual relations in the Bechtel project

One difficulty that arises in comparing transparency between China-Kenya contractual engagements with those of the United States' lies in the fundamental differences in how the two countries involve

Transport, Public Works and Housing, 'Report of the Departmental Committee on Transport, Public Works and Housing on the statement sought by Hon Hezron Awiti, MP, on the tendering and construction of the Standard Gauge Railway from Mombasa to Malaba', Eleventh Parliament Second Session, 2014, 37; See also the External Debt Register published by the Government of Kenya.

104 Access to Information Act (No 31 of 2016), Section 6.

105 Access to Information Act (No 31 of 2016), Section 6.

106 Access to Information Act (No 31 of 2016), Section 6.

107 Access to Information Act (No 31 of 2016), Section 6.

themselves in African-government backed projects. China favours a government-to-government approach where loans are extended directly to the host government.[108] The US, meanwhile, has favoured a 'government-to-business' approach in its bilateral relations with Africa 'whereby money flows from the US government to third parties – either companies through development finance or non-profit organizations.'[109] The Bechtel project is significant for its resemblance to the SGR project in its nature and scale and the fact that US financing has been explored as an option. There are therefore notable similarities with the SGR project's 'government-to-government' approach.

In August 2017, the Kenya National Highways Authority announced that a commercial agreement had been signed with Bechtel International Inc. to build Kenya's first ever expressway between Nairobi and Mombasa.[110] Estimates place the value of the commercial agreement at around 3 billion USD, roughly similar to that of the first phase of SGR.[111] The Export-Import Bank, US's key export credit agency which is also expected to provide financing, reportedly played a key role in pushing for the project.[112] The other intended funding agency, the Overseas Private Investment Corporation (OPIC) which has now been subsumed under the International Development Finance Corporation through the BUILD Act, also signed a letter of interest with the Government of Kenya a year prior to the contractual award. [113]

Differing from the feasibility study done by the CRBC, the feasibility study in the Bechtel project was commendably undertaken by an inde-

[108] Aubrey Hruby, 'Deconstructing the dragon: China's commercial expansion in Africa', Atlantic Council Africa Centre, Issue Brief, July 2019, 7-9.

[109] Hruby, 'Deconstructing the dragon', 3; Jon Greenberg, 'Most US foreign aid flows through US organizations', PolitiFact (Poynter Institute), 8 March 2017.

[110] Kenya National Highways Authority, 'Press release', 2017.

[111] Kenneth Mwenda, 'Kenya to sign deal for the US $3bn Nairobi-Mombasa expressway project' *Construction Review Online*, 27 November 2019.

[112] Miriam Nkirote, 'Battle for road tenders hots up as US giant opens Nairobi office', *Construction Kenya*, 11 July 2017.

[113] Antony Kiganda, 'US construction firm shows interest in funding Kenya's six-lane highway' *Construction Review Online*, 28 September 2016.

pendent company, Price Waterhouse Coopers.[114] However, the selection process for the project was still immediately likened to the 'secretive' tendering of the SGR project.[115] To this, the then acting Director-General of the Kenya National Highways Authority responded that the contract with Bechtel arises from a 2015 agreement on infrastructural development and financing between the USA and Kenya.[116] The agreement being referred to is a Memorandum of Understanding between the US government and the Government of Kenya 'concerning the development and implementation of strategic infrastructure priority projects in Kenya.'[117] Procurement law in Kenya does allow for single-source procurement under the current Public Procurement and Asset Disposal Act, 2015 (2015 PPDA) where this is done under an agreement entered into by the Government of Kenya with any foreign government, agency or entity.[118] This is an extension of the repealed 2005 PPDA's 'negotiated loan agreement' exception that was seen in the SGR project. Our interpretation is that this section requires an agreement to state that a certain contract must be awarded to an identifiable supplier. We do not believe this applies to the 2015 Memorandum.

The provision that would most closely anchor a single-source procurement is the following:

> the Government of Kenya intends to develop strategic infrastructure projects in Kenya in a manner that promotes collaboration between Kenyan and U.S public and private sector institutions with an aim to promote capacity building in Kenya.[119]

---

114 Dalton Nyabundi, 'Why US is yet to break ground for Sh300 billion Nairobi-Mombasa expressway' *The Standard*, 26 March 2018.

115 Paul Wafula, 'Kenya's Sh300b "thank you gift" road project to the US sparks fresh tender wars' *The Standard*, 12 September 2017.

116 Jose Scalabrino, 'US rejects Kenyan press criticism of $3bn Bechtel roads deal' *Global Construction Review*, 25 September 2017.

117 Memorandum of Understanding between the Government of the United States of America and the Government of Kenya.

118 Public Procurement and Asset Disposal Act (No 33 of 2015), Section 6.

119 Memorandum of Understanding between the Government of the United States of America and the Government of Kenya, 3.

Firstly, the excerpt above from the Memorandum does not actually require contracts in US government-backed infrastructure projects to be awarded to a US contractor. The promotion of capacity building could mean any number of things such as technology or knowledge transfer. As a whole, the Memorandum mostly expresses 'intentions' rather than 'obligations.' The two governments express their intentions to share information with the US private sector on any infrastructure projects arising from Kenya's Vision 2030 strategic framework. Further, the US states that will strive to provide potential financing in projects involving the US private sector. Not much in the way of an obligation can be inferred here.

Secondly, it is stated in the Memorandum that it is not an international agreement and does not create any rights or obligations for the two governments.[120] Even if the capacity-building was interpreted to justify single-sourcing to a US contractor, the Government of Kenya is still not any under any obligation to do so. Since there is no requirement for single-sourcing in the Memorandum and since no other statutory justification has been provided by the Government of Kenya, then the contract should have been secured through an open tender.[121]

To reiterate, one aspect of contractual transparency in public procurement involves providing the public with the criteria that a government institution has used to enter into contractual relations with a given provider. This information, as with transparency in any other aspect of government, must be accurate. The justification that the contractual award is grounded by an agreement is untrue and thus falls below what is required. One may instead argue that the commercial agreement between Bechtel and the GoK is the 'agreement' that would exempt the procurement from the 2015 PPDA. Certainly, the 2015 PPDA's provisions are so broad that an agreement between the Government of Kenya with 'any entity' suffices. However, as of now, it is not clear whether the commercial agreement was the basis for the selection.

[120] Memorandum of Understanding between the Government of the United States of America and the Government of Kenya, 4.

[121] Public Procurement and Asset Disposal Act (No 33 of 2015), Section 91.

At the time of writing and despite the GoK opting for Bechtel to return its investment through tolling charges, Bechtel has been clear that its preferred financing method for the project is through the US government.[122] Though the Memorandum of Understanding does not justify the single-source procurement that has been seen, the US government makes it clear that its agencies 'have an interest' in financing Kenyan infrastructural projects that involve the US private sector.[123] Taking this into account, even if the US EXIM Bank and the International Development Finance Corporation (formerly OPIC), do not fund the immediate project, this assessment forecasts possible transparency outcomes in any future infrastructural projects that they finance in Kenya. What would notably distinguish US-Kenya contractual relations from China-Kenya relations would be the greater commitment to contractual transparency by these US agencies.

As a result of an executive directive on transparency, the US EXIM Bank contains an Open Government plan stating its strategic transparency goals through open data and consistent disclosure.[124] In line with this commitment, the US EXIM bank releases datasets showing authorisations it has made over the years. At the time of writing, the most recent of these is the 2006-2019 data-set. The disclosed information includes the fiscal year of the transaction, the type of transaction (for example, loan, guarantee or direct loan) the amount approved or declined, and the applicable loan interest rate.[125] Like the US EXIM Bank, the Finance Corporation has also made public a data-set of projects as at 30 September 2018 which contains similarly detailed information on specific transactions.[126] Importantly, the Finance Corporation is required by US

[122] Wadlow, 'Bechtel and Kenyan government to discuss financing of $3bn highway project'.

[123] Memorandum of Understanding between the Government of the United States of America and the Government of Kenya.

[124] Export-Import Bank of the United States, Open Government Plan V3.0, 2014.

[125] United States Export-Import Bank, 'Authorizations from 10/01/2006 thru' 12/31/2019', 29 April 2020.

[126] International Development Finance Corporation, OPIC portfolio as at 30 September 2018, last updated 19 March 2019.

law to ensure that any financing methods it uses for projects overseas are transparent.[127]

The commitment by these institutions to contractual transparency in these areas differs from that of Chinese institutions like the China EXIM Bank which often rank poorly in transparency metrics for cross-border infrastructural engagements with other countries.[128] These realities have two strong implications for overall transparency outcomes in the Bechtel project that may be largely different from Kenya-China contractual engagements. Firstly, where there are inconsistencies or there is limited disclosure by the Government of Kenya in US-Kenya contracts, information disclosed by the US-government may help fill such gaps. Secondly, where satisfactory disclosure by the Government of Kenya does exist, it may be possible to measure contractual information disclosed by the Government of Kenya against information made public by the US government to provide more detail or infer any discrepancies.

Despite this, the obligation to make project-level information available by the Government of Kenya would still persist. Not only because it owes this obligation to Kenyans, but because overreliance on US data has its limitations. It is not always the case that all material terms on loans involving a US government institution or a borrower may be included. This has special relevance for loan guarantees given by the US-EXIM Bank where, for example, the Bank only discloses the lender against whom it guarantees the borrower's debt and not the interest rates between that lender and borrower. The data sets only provide interest rates for direct loans given by the US-EXIM Bank.[129] Alternatively, information on a particular loan agreement may not be available or may not sufficiently describe the nature of the project.[130]

127 BUILD Act (2018), Section 1411.

128 Michael Baltensprger and Uri Dadush, 'The Belt and Road turns five', Bruegel, Policy Contribution Issue 1, 1 January 2019, 12.

129 United States Export-Import Bank, 'EXIM minimum CIRR rates for all direct loans including nuclear power, renewable energies, and water', 15 July 2020-14 August 2020.

130 For instance, a number of recorded loans given to Kenya by other US agencies such as USAID have no project descriptor and the only information is the value of the loan. Even where it is possible to match resource flows, additional detail is not guaranteed.

It is also worth noting that concerns related to the disclosure of contractual documents from the SGR project may also translate to the Bechtel project. Even if there might not be a confidentiality requirement as there likely is in the SGR project, Kenyan public institutions have been lethargic in meeting requests for information.[131] Where this occurs, it will be up to the courts to give adequate effect to the right to access information in Kenya. Thus, while the greater level of disclosure by US government institutions bodes well for contractual transparency in Kenyan infrastructural projects financed by the USA, it does not absolve the GoK of its constitutional obligation to be transparent in these infrastructural engagements.

4. Reorienting contractual transparency in Kenya

Transparency in Kenya's contractual relations with the US and China in large scale infrastructure projects could therefore be improved. To enhance transparency outcomes, we propose that government-to-government agreements and other agreements of this nature that are excluded from the Public Procurement and Disposal Act (PPDA), be better regulated. Secondly, the perception and understanding of contractual transparency must be influenced so that the Kenyan people are more inclined to demand openness where it is necessary.

4.1 More robust regulation for procurements arising from international agreements by the Government of Kenya

To reiterate, any procurement pursued under an agreement by the Government of Kenya with any government, agency or entity is excluded from the provisions of the 2015 PPDA. Further, any such agreement prevails where there is a conflict between it and the PPDA.[132] Previous-

See, for example, the 1983 to 1990 records of US assistance to Kenya. Foreign Aid Explorer.

131 Ng'ethe, 'GUIDE'.

132 Public Procurement and Asset Disposal Act (No 33 of 2015), Sections 4 and 6.

ly, under the 2005 PPDA, only procurements that were specified in 'negotiated loan agreements' would lead to that agreement superseding the provisions of the Act.[133] The exception has therefore been unduly extended and there is very little guidance on how procurements of this nature should take place.

To understand why this is an issue, there have been numerous secretive and corrupt procurement scandals in Kenya even after the 2010 Constitution of Kenya has been promulgated.[134] Most of these incidents did not concern procurements made under an agreement and were therefore governed by the PPDA. If these procurements were largely regulated and yet they became subject to such scandal, then the unregulated model evident in the SGR and Bechtel projects presents some cause for concern.

Our overall recommendation is to first, remove the wholescale exemption of these types of procurements from the application of the Act and secondly, to balance obligations in international agreements with obligations in the Act instead of merely proclaiming that the former supersedes the latter.

One limitation with the current model is that there are some practices that the Act does not anticipate. As earlier stated, Chinese contractors like the CRBC tend to perform their own feasibility studies which bears some negative implications for contractual transparency. Efforts by the GoK to inject Public Investment Management Assessment Guidelines to introduce more transparent and standardised templates for appraisal and feasibility of projects that fall outside the standard procurement framework are far from being fully realised.[135] To respond to this problem, lessons can be drawn from the Philippines Official Development Assistance Act. The manner in which the Act handles projects financed by development assistance is very instructive. The Act requires that for

133 Public Procurement and Asset Disposal Act (No 33 of 2015), Section 6.

134 Ian Omondi, 'Multi-billion scandals that have rocked Kenya in 2018,' *Citizen Digital*, 28 December 2018.

135 International Monetary Fund, *Fiscal transparency evaluation update*, IMF Country Report No 20/2, 2020, 43.

all such projects, 'consultants for the feasibility and design aspects of [a] project may not participate, directly or indirectly, in any subsequent phase of project implementation'.[136] At the very least, a mandatory requirement for an independent feasibility study alongside the feasibility study of an implementing entity ought to be adopted. This would mitigate some of the transparency risks associated with the current practice.

Secondly, the exception as currently phrased, has harmful nullifying effects on a key provision in the 2015 PPDA that guarantees transparency. Section 138 requires a procuring entity to publish and publicise all contractual awards and report all these awards to the Public Procurement Regulatory Authority which publishes these reports on its website.[137] However, because procurements arising from agreements entered into by the GoK supersede the Act, the obligation to publish or publicise any such contractual awards may be compromised. This has strong implications for procurement done in any infrastructural project with the US or China and any general procurement that arises from such agreements. We recommend that the Act specifies that the requirement of publication present in Section 138 extend to contractual awards made under this type of procurement.

Thirdly, since the PPDA's provisions do not apply, there is minimal oversight from the Public Procurement Regulatory Authority. In the SGR project, the KRC refused to agree to a request by the Authority to review information related to the project because they argued that it was a procurement falling outside of the Authority's mandate.[138] Some of the Authority's key functions are to monitor and review the public procurement system to ensure that its respects the national values and other provisions of the Constitution and to create a central repository of information related to procurement that may be useful to the public.[139] These provisions have a strong connection to contractual transparency

[136] [Philippine] Official Development Assistance Act (1996), Section 11.

[137] Public Procurement and Asset Disposal Act (No 33 of 2015), Section 138.

[138] Public Investments Committee, 'Special report on the procurement and financing of the construction of Standard Gauge Railway from Mombasa to Nairobi (Phase I)', Eleventh Parliament Second Session, 29 April 2014, 29-30.

[139] Public Procurement and Asset Disposal Act (No 33 of 2015), Section 9.

in procurement contracts. The potential for secrecy in an environment where there is minimal oversight is, at the very least, disconcerting. Oversight measures must be improved by entrenching the Authority's role in procurements arising from government-to-government agreements.

4.2 Orienting the perception of transparency as a norm with its intended ends

At this point, we find it useful to return to the discussion of transparency as an idea with certain normative ends. The general intended ends of transparency as a constitutional value have been implied at some length in chapter II of this study. Drawing from that discussion, it is argued that transparency under the Constitution of Kenya was intended to avert arbitrary action, ensure accountability and to limit 'asymmetries of power' by mitigating 'asymmetries of information'.[140] Indeed, during the constitutional review process leading up to the Constitution of Kenya 2010, it was a popular grievance that the government of the day failed to achieve transparency in 'running public affairs, decision-making, use of national resources, expenditure, tendering and management of public projects, running of government bodies, elections, administration of justice and law enforcement'.[141] The people suggested that transparency should be enshrined as a democratic value.[142]

It was the Kenyan people who wished for a less secretive government. While regulatory change may therefore have a role to play, the people's role in agitating for greater contractual transparency should be given due attention. But contractual transparency's success in this regard must also depend on the people's perception of it as a norm worth agitating for. Individuals may know the content and reason behind the

[140] We borrow these two terms from Pozen, 'Transparency's ideological drift', 163.

[141] Constitution of Kenya Review Commission, Final Report of the CKRC, 69.

[142] Constitution of Kenya Review Commission, Final Report of the CKRC, 45, 69, 87, 135, 218, 398,

existence of a norm, but this does not necessarily mean that they perceive it as necessary enough to register in the realm of action.[143]

It is suggested that certain steps be taken so that the people see contractual transparency in these projects as more typical. Or more accurately, so that they consider its non-adherence as undesirable and worth acting against. This means that more must be done to orient the perception and popular understanding of contractual transparency as a norm to its intended significance. For instance, while there has been some public scrutiny of the failure to disclose contractual documents, stronger movements based on the right to access information might bring more clarity to this issue. We offer some examples to address this by using established methods of norm-perception change.

The first method by which norm-perception change can occur is through providing strategic normative information about an individual's group. Summarised information about an individual's reference group is presented to create the psychological impression that a certain course of conduct is desirable or undesirable to that group.[144] For example, this could be through adverts on how often a reference group recycles or even physical signs on how often a person's reference group reuses towels in a hotel.[145] The same could be true of conduct related to contractual transparency in these kinds of projects. For example: Every request for information made to the Government to provide contractual documents related to the SGR project has failed.

[143] Individuals tend to prioritise norms even where they understand their content. This is especially the case where they feel that certain norms apply more or less to them due to their belonging in a certain reference group. For example, a study by Perkins shows that though a group of college students understood that their parents did not want them to overdrink, they were instead more likely to follow drinking habit norms that they observed in their fellow college students. H Wesley Perkins, 'Social norms and the prevention of alcohol misuse in collegiate contexts' *Journal of Studies on Alcohol*, Supplement 14, 164-172.

[144] Margaret Tankard and Elizabeth Paluck, 'Norm perception as a vehicle for social change' 10(1) *Social Issues and Policy Review* (2015) 14-16.

[145] Noah J Goldstein, Robert B Cialdini, Vladas Griskevicius, 'A room with a viewpoint: Using social norms to motivate environmental conservation in hotels' 35(3) *Journal of Consumer Research* (2008) 472-482; Tankard and Paluck, 'Norm perception as a vehicle for social change', 14-16.

This example may appear somewhat abstract but it is merely provided as an illustration. It must also be noted that there are also other strong factors that must be taken into account for any norm-change perception to occur.[146] For instance, descriptions of undesirable behaviour that one wishes to draw attention to must be made with care because it may normalise the conduct being described.[147] Descriptions of an undesirable norm and its frequency of occurrence must therefore be presented in a certain context. This follows the fact that changing social meaning can be largely dependent on changing context; it is context that gives an act its meaning.[148] Presenting normative information on contractual transparency in a context that is likely to mobilise the people will therefore be prudent.

Of course, the question regarding this method is by whom such information should be presented, since the Government of Kenya is unlikely to engage with such an endeavour. This role will likely fall upon civil society and other persons with a vested interest in ensuring contractual transparency in these projects.

Secondly, alongside the above efforts to influence the popular perception and understanding of transparency, it would be preferable if civil society and persons with vested interests compile and disclose project-level data on Kenya's contractual relations in large scale infrastructural projects financed by China and the US and in the coming years. In this way, such information might act as a 'nudge' where necessary. A nudge is a 'liberty-preserving approach to steer people in particular directions, but that also allows them to go their own way.'[149] In sum, Kenyans might demand greater contractual transparency if it is meaningfully brought to their attention that disclosure gaps exist.

In the immediate context, this might work to move public atten-

---

[146] See Beniamino Cislaghi and Lori Heise, 'Theory and practice of social norms interventions: eight common pitfalls' 14 *Globalization and Health* (2018) 3-7.

[147] Tankard, Paluck, 'Norm perception as a vehicle for social change', 32-33.

[148] Lawrence Lessig, 'The regulation of social meaning' 62 *University of Chicago Law Review* (1995) 958.

[149] Cass Sunstein, 'Nudging: A very short guide' 37 *Consumer Policy* (2014) 1, 5.

tion towards the issue of contractual transparency in Kenya. This is because greater levels of data disclosure to the public is a way to promote public understanding and 'help produce solutions by informing people of current practices.'[150] Though foreign datasets exist, domestic movements are likely to be accessible and more easily publicised to Kenyans. This might also aid efforts to influence transparency's perception since norm-change is more likely to succeed where it co-occurs with local movements.[151]

The third method we wish to focus on touches on how individuals' perception of norms can be influenced through institutional decisions and innovations. An institution's 'decisions and innovations can signal which behaviours or opinions are common or desirable in a group.'[152] Institutions are more likely to be successful to change perception of a particular norm if they are legitimate. Legitimacy, as Tyler and Jackson have put it, exists where the institution has the people's authorisation to 'dictate appropriate behaviour' and where it has the people's trust that they are acting in their interests.[153]

Centres of learning and education appear, at least to some extent, to be such institutions in Kenya. A survey showed that apart from the home environment, the school environment constituted a major source of value transmission for Kenyans. Though this relationship was more marked in ages 18 and below, it existed even at the university level.[154] Emphasis should not merely be for contractual transparency but for general transparency in government. As Lawrence Lessig argues, education is about inculcating certain cultural minimums that are presented as essential to its subject.[155] Its worth in creating social meanings cannot

150 Cass Sunstein, *Simpler: The future of government*, Simon and Schuster, 2013, 95-96.

151 Cislaghi, Heise, 'Theory and practice of social norms interventions', 7.

152 Tankard, Paluck, 'Norm perception as a vehicle for social change', 20-21.

153 Tom Tyler and Jonathan Jackson, 'Popular legitimacy and the exercise of legal authority: Motivating compliance, cooperation, and engagement' 20(1) *Psychology, Public Policy, and Law* (2014) 2-3.

154 Kenya Institute for Public Policy Research and Analysis, 'Special report: The status of national values and principles of governance', 2015, 21-22.

155 Lessig, 'The regulation of social meaning', 974-975.

therefore be understated. Since contractual transparency is an idea with legal significance, it would be especially suitable if changes could be made to legal education to emphasise its political valence. This general inculcation of the value of transparency might yield positive outcomes in the contractual transparency context.

5. Conclusion

For different reasons, contractual relations in the case studies examined fail to pass the muster of transparency. Contractual transparency in such contexts – an offshoot of transparency in government – requires necessary disclosure of contractual information, terms, processes and general progress. Kenya's constitutional history particularly warrants transparency. Reform must be implemented at the domestic level for the threshold of transparency to be met in Kenya's contractual relations with these and other international partners. In the absence of such efforts, the Government of Kenya will fall short of its constitutional obligation

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

Walter Khobe Ochieng*

Abstract

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

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

* LLB (Moi University); LLM (University of Pretoria); PGDL (Kenya School of Law).

1. Introduction

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

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

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

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

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

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

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

> *'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'*
>
> Similarly, the US Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936)).
>
> From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

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

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

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

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

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

5 Constitution of Kenya (2010), Article 20(3).

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

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

2. Constitutional avoidance and its limits

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

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

[7] Ian Currie, 'Judicious avoidance' 15(2) *South African Journal on Human Rights* (1999) 138-165.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

3.1 *CIS v Directors, Crawford International School & 3 others*[22]

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

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

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

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

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

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

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

---

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

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

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

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

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

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

26 *CIS v Directors, Crawford International School & 3 others*, para 107.

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

3.2 *OAPA v Oshwal Education Relief Board & 2 others*[28]

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

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

[27] *CIS v Directors, Crawford International School & 3 others,* para 109-111.

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

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

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

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

[29] *OAPA v Oshwal Education Relief Board & 2 others*, para 12 & 54.

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

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

3.3 *GAM & 2 others v Registered Trustees of the Shree Cutch Satsang Swaminarayan Temple Charitable Trust & another*[33]

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

30 *OAPA v Oshwal Education Relief Board & 2 others*, para 55.

31 *OAPA v Oshwal Education Relief Board & 2 others*, para 55.

32 *OAPA v Oshwal Education Relief Board & 2 others*, para 63.

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

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

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

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

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

[34] *GAM & 2 others v Registered Trustees of the Shree Cutch Satsang Swaminarayan Temple*, para 51.

[35] *GAM & 2 others v Registered Trustees of the Shree Cutch Satsang Swaminarayan Temple*, para 52.

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

2.4 *Alan E Donovan v Kenya Power and Lighting Company*[36]

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

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

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

---

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

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

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

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

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

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

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

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

---

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

41 *Alan E Donovan v Kenya Power & Lighting Company*, para 38.

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

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

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

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

Lord Denning succinctly laid down the proposition in the case of *Lloyds Bank Ltd v Bundy*[46] when he said that:

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

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

44 *Fry v Lane* [1885] 40 ChD 312.

45 *Fry v Lane*.

46 *Lloyds Bank Ltd v Bundy* [1975] QB 326.

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

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

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

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

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

---

47 *Lloyds Bank Ltd v Bundy.*

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

[55] *Gulf Energy Limited v Rubis Energy Kenya plc*, para 7-10.

[56] *Gulf Energy Limited v Rubis Energy Kenya plc*, para 31.

[57] *Gulf Energy Limited v Rubis Energy Kenya plc*, para 36.

[58] *Gulf Energy Limited v Rubis Energy Kenya plc*, para 34 and 41.

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

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

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

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

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

4. Conclusion

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

CASENOTES, BOOK REVIEW; SPEECH

Accommodation as an expression of the right to equality: A case note on *Fugicha v Methodist Church of Kenya*

Samuel Ngure*

Abstract

The question of religious freedom in institutions of learning has been canvassed by Kenyan courts over the past decade in a number of cases. One of the common issues in most of these cases has been that of mandatory uniformity of dress and activity alike, which has been argued to be discriminatory. In the case of Fugicha*, the Court of Appeal found that reasonable accommodation of various beliefs is a requirement under the right to equality. This finding was set aside upon appeal to the Supreme Court which ruled that the issue of inequality had been introduced improperly into the case, and that the court could therefore not decide on the matter. In March 2022, the Ministry of Education issued a circular on violation of religious freedoms in schools, seemingly based on the Court of Appeal judgements in* Alliance High School *and* Fugicha*. This note reviews* Fugicha *in light of the circular, arguing that the circular gives effect to the Court of Appeal finding despite the Supreme Court having set aside that judgement.*

* LLB (University of Nairobi); LLM (Cornell University).

1. Introduction

1.1 Uniformity in schools or discrimination?

On 4 March 2022, the Permanent Secretary on the Ministry of Education in Kenya issued a circular setting out a number of 'violations of religious rights of learners' often carried out by schools.[1] As per the circular, these violations included:

a. Prohibition from wearing religious attire like hijab and turbans;

b. Forcing students to take Islamic Religious Education (IRE), Christian Religious Education (CRE), Hindu Religious Education (HRE) subjects;

c. Denying learners an opportunity to observe religious rites and prayers;

d. Failure to allocate worship rooms or spaces; and,

e. Forcing learners to participate in religious rites and activities that are contrary to their beliefs.[2]

This circular is reasonably understood – as it does not expressly state it – to be moving to implement the decisions of the Kenyan courts on the various cases that been decided on the rights and obligations of Kenyan school authorities and their students to express their religion through differential dressing in schools.

The decisions that have canvassed this question in one form or another include: at the High Court – *R v Kenya High School ex parte SMY*

---

1 Ministry of Education, 'Violation of religious rights in schools', MOE.HQS/3/10/18, 4 March 2022.

2 Ministry of Education, 'Violation of religious rights in schools'.

(*Kenya High* case),[3] *Nyakamba Gerara v AG,*[4] *J.K. v Rusinga School*[5] (*Rusinga* case) *Seventh Day Adventist Church v Minister for Education*[6] *(Alliance High School HC Case)* and *Methodist Church v TSC* (*Fugicha* HC case).[7] Of these cases, those appealed to the Court of Appeal were *Seventh Day Adventist Church v Minister of Education*[8] *(Alliance High School* case) and *Fugicha v Methodist Church in Kenya*[9] (*Fugicha* case). Since then, *Fugicha* is the one case that has been appealed to the Supreme Court.[10]

The rules on school uniform, and other rules in schools requiring uniformity are usually aimed at creating a conducive learning environment in schools.[11] They also create a feeling that every student is equal, no matter their race, social class, even physical or mental ability.[12] However, are there situations where the strict and unbending enforcement of rules on school uniforms may produce discriminatory effects? This was the question in the case of *Fugicha*, which was decided by the Court of Appeal in 2016. The facts of this case, as per the record of the Court of Appeal judgment, present a very contentious situation where indelicate treatment of school rules can foment disputes.

---

3 *Republic v Head Teacher Kenya High School & another ex-parte SMY,* Miscellaneous Civil Application 318 of 2010, Judgement of the High Court at Nairobi (2012) eKLR.

4 *Nyakamba Gekara v Attorney General & 2 others*, Petition 82 of 2012, Judgement of the High Court at Nairobi (2013) eKLR.

5 *JK (suing on behalf of CK) v Board of Directors of Rusinga School & another,* Petition 540 of 2014, Judgement of the High Court at Nairobi (2014) eKLR.

6 *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 Others,* Civil Appeal 172 of 2014, Judgement of the Court of Appeal at Nairobi (2014) eKLR.

7 *Methodist Church (suing through its registered trustees) v Teachers Service Commission & 2 others* (2015) eKLR.

8 *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others,* Civil Appeal 172 of 2014, Judgement of the Court of Appeal at Nairobi (2017) eKLR.

9 *Mohamed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 others*, Civil Appeal 22 of 2015, Judgement of the Court of Appeal at Nyeri (2016) eKLR.

10 *Mohamed Fugicha v Methodist Church in Kenya (through its registered trustees) & 3 others,* Civil Application 4 of 2019, Ruling of the Supreme Court (2020) eKLR.

11 *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*, Civil Appeal 172 of 2014, Judgement of the Court of Appeal at Nairobi (2017) eKLR para 18.

12 *Republic v Head Teacher Kenya High School & another (ex parte SMY),* Miscellaneous Civil Application 318 of 2010, Judgement of the High Court at Nairobi (2012) eKLR.

Here, it seems external interference by county education officials and a deputy governor sought to force the hand of the administration of a school sponsored by the Methodist Church to allow Muslim students in the school to wear a hijab under their school uniform. The Methodist School, not to be undone, adopted a hard-line stance against the ham-fisted request. Some student unrest ensued, and dialogue between the two recalcitrant sides failed. The county education official once again resulted to bullying tactics, issuing a directive requiring the school to allow students to wear hijabs.

The school, at first instance, filed suit at the High Court in Meru against the county education official, among others, claiming that the rule to give special treatment to some students was discriminatory against other students. A parent countersued the school, seeking a determination that it was the school's rules on uniformity that were discriminatory. The High Court ruled in favour of the school. Dissatisfied, the parent appealed to the Court of Appeal. The Court of Appeal in its consideration took the opportunity to provide the most thorough examination so far of the rules as regards school uniform.

We surmise that the thoroughness of the Court of Appeal's examination may have been incentivised by the fact that at the time of examination, various high courts in Kenya had determined matters relating to religion and uniformity in schools in Kenya. For example, in the earlier cited cases, the restrictions promoting uniformity were upheld in the *Kenya High, Rusinga,* and *Nyakamba Gerara* cases, notably at the High Court, while the Court of Appeal struck down these restrictions in the *Alliance High School* case and in *Fugicha*. Some scholars had already opined that some variance in determination had been exposed by the various High Court pronouncements. For example, Mukami Wangai has theorised that the varying decisions reflect a struggle in establishing the type of secularism that Kenya aspires to in the 2010 Constitution.[13]

[13] Mukami Wangai, 'Religious pluralism in practice: defining secularism in Kenya's headscarf cases', 3 *Strathmore Law Journal* (2017) 177, 183.

For reasons that will be apparent (the maxim *res ipsa loqitur* applies here), the Supreme Court's judgment will be parsed later. The majority Supreme Court's judgment, in view of the policy direction by the Ministry of Education – which we surmise is clearly influenced by the Court of Appeal judgment in *Fugicha* – becomes superfluous in light of its apparent reticence. While this piece does not seek to take an in-depth analysis of the Supreme Court judgment, Walter Khobe's critique of the position taken by the majority Supreme Court bench as 'formalism' is enlightening, and arguably, spot on.[14] This piece will instead shine a light on an important proposition in law adopted by the Court of Appeal in *Fugicha* – that of accommodation as an expression of equality under Article 27 of the Constitution of Kenya.

2. *Fugicha* at the Court of Appeal

The Court of Appeal's examination in *Fugicha* is outlined below and answers the following questions:

a) Does differential treatment automatically constitute discrimination?

b) Can neutral rules produce disparate impacts?

c) Is reasonable accommodation a legal requirement or a matter of choice?

d) In what circumstances, if any, is reasonable accommodation required?

Lastly, and most interestingly, below I outline how despite successful appeal in the Supreme Court against the Court of Appeal's decision in *Fugicha,* the pronouncements of the Court of Appeal still represent the current law on rules of uniformity. This has been shown through other courts upholding the same position, and the *Fugicha* approach when it comes to constitutional imperatives as to equality and non-discrimination becoming the dominant position in law.

[14] Walter Khobe, 'Justice JB Ojwang' and the case of the hijab: A celebration of a dissent', *The Platform*, 28 January 2019.

2.1 Differential treatment does not constitute discrimination

The mere fact that students are treated differently does not, in and of itself, mean that there is unconstitutional discrimination. Here, the Court of Appeal rejected the arguments that making even slight accommodations for some students is in effect discriminating against all other students. In *Fugicha*, the Court of Appeal approved a 2011 statement by the High Court that '…mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause.'[15] The 'equal protection clause' referred to here is Article 27 of the Constitution, which prohibits discrimination of all forms.

The Court of Appeal further hearkened to the words of Justice Albie Sachs, one of the most respected African jurists, in a 1998 South African case that stated that 'equality should not be confused with uniformity, in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across differences.'[16] In the South African case, a raft of laws criminalising sodomy were declared unconstitutional. Justice Sachs interpreted the laws criminalising sodomy to rules requiring sameness. While the South African case seems to be far removed from the cases on school uniform, the Court of Appeal seems to agree with the South African Court that rules that require sameness are patently discriminating – in effect, *uniformity* is not *equality*.

2.2 Neutral rules may produce disparate effects

The Court of Appeal in *Fugicha* appreciated the importance of rules on uniformity in creating governable schools. In fact, the Court of Appeal warned that in no way should it be considered to be advocating for a 'free-for-all' through the complete abolition of rules that created uniformity in schools. 'It is not every fanciful, capricious or whimsical

---

15 *Federation of Women Lawyers FIDA Kenya & 5 Others v Attorney General & another*, Petition 102 of 2011, Judgement of the High Court at Nairobi (2011) eKLR.

16 *National Coalition for Gay and Lesbian Equality v Minister for Justice* [1998] ZAAC 15.

request for exemption that will be countenanced or granted.' In fact, the Court found that school uniforms, in particular, frequently were the perfect representation of equality in schools.

However, in limited circumstances, the Court of Appeal noted that even where rules are applied equally across all who are governed by them, they may in fact result in discrimination. In reaching this conclusion, the case of *Sarika*[17], decided by the Queen's Bench, was heavily relied on. A Welsh Girls High School had excluded a student who wore a bangle that symbolised her Sikh faith. The school's contention was that the bangle violated the school's uniform policy as regards jewellery. The school's policy was that 'jewellery often poses a health and safety hazard to school activities.'[18] The Queen's Bench here cited, with approval, the South African Constitutional Court's in the case of *Pillay.*[19] Here, a rule that was interpreted to restrict a girl from wearing a nose ring, despite the ring's significance to her Tamil-Hindi culture was held to be discriminatory, rejecting contentions that it was necessary for 'uniformity and acceptable convention among students.'

The Queen's Bench in *Sarika* then went further and looked at the concept of disparate impact. Here, it found that those whose culture was not affected by the requirement for uniformity would have no interest in the affording of a particular interest for a small group. They remain unaffected, whether the advantage is granted or not. In essence, the granting of reasonable, limited exemptions to school uniform rules for people to whom it is essential for religious or cultural purposes, does not affect the status quo of the majority of the student population. Conversely, the Queen's Bench found that the denial of the exemption would have an inordinately high impact to the person who does not get to enjoy their religious or cultural expression, even if only in a limited fashion.

---

17 *Watkins-Singh, R (on the application of) v Aberdare Girls High School & Anor* [2008] EWHC 1865 (Admin).

18 *Watkins-Singh, R (on the application of) v Aberdare Girls High School & Anor* [2008] EWHC 1865 (Admin) para 11.

19 *MEC for Kwazulu-Natal, School Liaison Officer and others v Pillay* CCT 51/06 [2007] ZACC.

The Court of Appeal in *Fugicha* found that the same approach was to be appreciated in the Kenyan context. While students who are not affected by a school uniform exemption that is reasonable and limited on the basis of faith or culture, those who would be denied such an exemption suffer an odiously disproportionate impact.

2.3 Accommodation is the essence of the respect for equality

The Court in *Fugicha* expressed concern on the lack of appreciation for other faiths expressed by the school sponsors – the Methodist Church. Here, what could be only described as loose and unsupported statements about the effects of granting exemptions were especially troubling to the Court. The Court was far from persuaded that the granting of small, reasonable exemptions, such as the wearing of *additional* clothing or items would result in chaos and in ungovernable schools. It was similarly concerned by statements suggesting that the freedom of commerce and choice of school – *if you don't like it, go somewhere that would give you the freedom you desire* – or simply stating that it was impossible to cater to everyone's desires, were overly dismissive, callous, and in blatant disregard of a school's function.

This is especially in view of the fact that religious observances were unlike mere choices of style that were not inexorably linked to someone's spiritual wellbeing. In saying this, the Court of Appeal in *Fugicha* distinguished its holdings from the holdings of the lower court (the High Court), in the *Rusinga* dreadlocks case, where, while the parents were stated to be adherents of the Rastafari religion, the child in question – in the view of the Court hearing the matter – was never claimed to be an adherent.[20]

Once again, as a starting point, the Court of Appeal relied on holdings from the Queen's Bench in *Sarika*. In *Sarika*, the Court found that such statements arose out of a disregard for what level of importance

[20] *JK (suing on Behalf of CK) v Board of Directors of Rusinga School & Another*, Petition 450 of 2014, Judgement of the High Court at Nairobi (2014) eKLR.

someone seeking an exemption may have for the religious observance. Secondly, the English Court found that such statements also reflect a surreptitious lack of respect for religious observances of people of other faiths.

This was particularly worrying when one considers that a school has an obligation to ensure that its students are taught the value of tolerance of other people's religious beliefs and cultures, and secondly, that they respect those religious beliefs and cultures.[21] The Kenyan Court of Appeal on its part related this obligation to particular requirements in the Basic Education Act. Particular to sponsor schools, as in the case of *Fugicha*, the Basic Education Act sets out that a sponsor should oversee 'spiritual development while safeguarding the denominations or religious adherence of others.'[22]

In view of the Court's dismissal of the arguments on freedom of choice and commerce above, it is important to note at this time that this view would almost certainly apply to private schools. In addition, the Court held that in view of the competitive nature of securing placement of a child in institutions of basic education, it would be 'impractical and fanciful to expect that a parent… will have a meaningful opportunity to engage in a negotiation, pre-admission, of whatever exemptions be it in uniform or other activities, that they may need for religious reasons.' As such, the Court rubbished the arguments that a parent who has signed a pre-admission contract with the school, should raise such issues of exemptions prior to admission of a student.

Other obligations of the Basic Education Act, as noted by the Court of Appeal, are more general. Of note, Section 4 of the Act requires the 'promotion of peace, integration, cohesion, tolerance and inclusion as an objective in the provision of basic education.'[23] In addition, the Court of Appeal applied the constitutional imperative, 'binding on all persons whenever any of them makes or implements public policy decisions'

[21] See *Watkins-Singh v Aberdare Girls' School (Sarika* case) para 89.

[22] Basic Education Act (No 14 of 2013), Section 27.

[23] Basic Education Act (No 14 of 2013), Section 4 (i).

(such as being licensed to deliver basic education in Kenya), to uphold the national values of '…inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.'

The Court of Appeal then stated, emphatically so, that accommodation – reasonable accommodation – is the embodiment of the respect for equality and non-discrimination. A lack of reasonable accommodation, and hence a callous disregard for the importance held by others of their faiths and cultures, will inculcate in students a culture of intolerance and contempt for the 'other'. As such, the Court also rejected (and in effect, overruled) the holding of in the *Kenya High* case that reasonable accommodation would lead to students 'arriving in a mosaic of colour' as an unjustifiably fearful and unrealistic diagnosis.

3. The Supreme Court in *Fugicha:* Throwing out the baby with the bath water

The holding of the Court of Appeal in *Fugicha* was overturned by the Supreme Court on a technicality. This was done by a judgment in 2019.[24] The issue in the Supreme Court was whether the issues raised in a cross petition by the parent of the child were in the proper format. The Court of Appeal and the High Court found that the format, though inelegant, was acceptable and raised very important issues. On this basis, the two lower courts proceeded to decide on the merits. The Supreme Court found that the Court of Appeal took the issue of the form of cross petition too lightly. It therefore decided that the Court of Appeal should never have considered the arguments of the parent, and decided, without looking into the merits of the appeal before it, that technically, the decision of the Court of Appeal was totally defective.

The Supreme Court's determination was, to put it lightly, underwhelming. The Court chose to ignore the long-held adage that procedure is the handmaid, and not the mistress, of justice. As Collins MR so-

[24] *Methodist Church in Kenya v Mohamed Fugicha & 3 others,* Petition 16 of 2016, Judgement of the Supreme Court (2019) eKLR.

phistically continued to state, '…the Court ought not to be so far bound and tied by rules, which are after all intended as general rules of procedure, as to be compelled to do what will cause injustice in a particular case.'[25]

The Supreme Court disregarded a dispute that had been materially argued before the trial court by all parties because it had not been properly introduced.[26] The argument on discrimination was introduced into this case by an interested party, a parent, through a 'cross-petition' in the interested parties' affidavit. The use of the word 'cross petition' was an unfortunate, and ultimately innocuous choice. However, the Supreme Court pounced on this wording, stated that it created a new dispute that was not contemplated by the original parties, and stated that argumentation on discrimination could not form the substratum of the well-reasoned decisions of the two lower courts:

> [51] The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution. It is on this basis that he cross-petitioned at paragraph 34 of his replying affidavit, for the Muslim students to be allowed to wear the hijab, in accordance with Articles 27 (5) and 32 of the Constitution.
>
> [52] The cross-petition was expressed in straight terms: 'I am swearing this affidavit in opposition to the petition herein for it to be dismissed with costs, and … I am also cross-petitioning that Muslim Students be allowed to wear a limited form of hijab (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya, and their right to equal protection and equal benefit of the law under Article 27 (5) of the Constitution.'
>
> [53] '… We did remark, in *Francis Karioki Muruatetu & Another v Republic & 5 others*, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):
>
>> …. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court.

25 *In re Coles* [1907] 1KB para 1 and 4.

26 *In re Coles* [1907] 1KB para 54-59.

> That stake cannot take the form of an altogether a new issue to be introduced before the Court [emphasis supplied].[27]

This last part of the Supreme Court judgment is particularly gruesome. The issue of discrimination was raised by the Methodist Church, which averred in its petition in the High Court that the accommodation of the Muslim students constituted discrimination:

> The Christian students at the school have felt that the school has accorded Muslim students special or preferential treatment and discriminated against them contrary to Article 27 of the Constitution of Kenya, 2010.[28]

This is a damning fact: the Supreme Court here essentially created its own reality in which discrimination under Article 27 was not a material dispute. Discrimination was in fact the crux of the dispute for both sides of those in dispute. The interested party in response only argued that it was not the Petitioners who were being discriminated as the Petitioners claimed, but the Muslim students who were being discriminated by the lack of accommodation.

How the Supreme Court decided that this was an introduction of a completely new dispute is unfathomable. That a single, misplaced word in an affidavit would be the basis for the avoidance of duty by the Supreme Court is worrying. What one hopes is that this will not be a trend, where the Supreme Court shirks, what in its own words, is 'an important national issue, that will provide a jurisprudential moment for this Court to pronounce itself in the future'[29] will use what can only be pedantic technicalities to avoid providing jurisprudence to the country.

The Supreme Court decision therefore left the statements on whether rules on uniformity in schools were unconstitutional or not completely unsettled, as the Supreme Court did not bother to reconcile the positions taken by the lower courts. The dissatisfaction with this position even led to the dissent of Justice Prof JB Ojwang, who felt that

---

27 *In re Coles* [1907] 1KB para 51-53.

28 *Methodist Church (suing through its Registered Trustees) v Teachers Service Commission, County Director of Education, Isiolo County & District Education Officer Isiolo Sub-County*, Petition 30 of 2014, Judgement of the High Court at Meru (2015) eKLR para 13.

29 *Methodist Church v Teachers Service Commission and 2 others*, para 59.

the approach of the rest of the bench muddied the water when it came to such an important area of law. Justice Ojwang noted that the Court's insistence of on the words 'cross petition' were mere technicality drawn from the fact that affidavit was 'inelegant'.[30] Justice Ojwang's dissent provides a scathing criticism of the Court's manipulation of facts to avoid constitutional duty, as he describes how the Court closes it eyes to Article 159(2)(d) of the Constitution, and to the central issue in the dispute, argued at all levels in the lower courts – the issue of the hijab.[31] Walter Khobe's highly instructive celebration of JB Ojwang's dissent is ultimately vindicated due to the developments in law that have happened since, and provides a better and more focused criticism of the formalistic approach of the majority's judgment.[32]

4. The legacy of *Fugicha* as the current state of law

One would think that this would revert the status quo to before. This is not true, due to a rather surprising development. In the intervening time between the decision of the Court of Appeal in *Fugicha* and the technical decision of the Supreme Court, its positions were upheld in another case decided by the Court of Appeal.

In the *Alliance High School* case, rules requiring students professing Seventh Day Adventist faith to attend church on Sunday were held to be unconstitutional.[33] The Court of Appeal in *Alliance High School* upheld every principle that it had held in *Fugicha*, namely that '*equality must not be confused with uniformity*'. The Court of Appeal in *Alliance High School* also upheld the holdings to the effect that neutrality of rules could result in discriminatory effect, even citing the case of *Pillay* that was cited with approval in *Fugicha*.

30 *Methodist Church v Teachers Service Commission and 2 others*, para 86.

31 *Methodist Church v Teachers Service Commission and 2 others*, para 81.

32 Khobe, 'Justice JB Ojwang' and the case of the hijab'.

33 *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*, Civil Appeal 172 of 2014, Judgement of the Court of Appeal at Nairobi (2017) eKLR.

Third, the Court in *Alliance High School* was again emphatic on the principle of accommodation as the fulfilment of the principle of equality in such situations. Fourth, the Court of Appeal in the *Alliance High School* case upheld the interpretations of the Court in *Fugicha* on the Basic Education Act, and its requirements that constitutional and legislative imperatives required a school to inculcate in its students, tolerance and respect for other students' cultures and religions. The imperative to inculcate tolerance and respect would, for example, advocate for students learning about each other's religions, without giving primacy to one or the other.

The decision in the *Alliance High School* case was not appealed, and the Supreme Court has not pronounced itself on the merits of rules requiring uniformity in schools as a result. As such, the principles enunciated in the *Fugicha* case remain alive and well through their translation in the *Alliance High School* case, which remains the highest-ranking decision in the Kenyan courts on the issue of rules of uniformity in schools. As such, it binds all lower courts and has enjoyed deference in the Court of Appeal.

The *Alliance High School* case was especially instructive as the Court of Appeal directed the Cabinet Secretary Education to issue an appropriate circular or regulations within one year of the judgment of the Court of Appeal, which was issued on 3 March 2017. It seems that the Ministry of Education circular on violation of religious rights is buttressed on this judgment, though many years late.

The distinctions that exemptions must be reasonably required for religious or cultural observances in *Fugicha* have also been upheld. For example, in the *St Joseph's Ganjala* case, a claimant sought orders against rules requiring short hair for students[34] The claimant was unsuccessful because they were unable to show that their Christian faith required the keeping of long hair for women.

---

[34] *Republic v Secretary Board of Management St Joseph Ganjala Secondary School & another; Samia Sub County Parents Association (Interested Party) & another*, Judicial Review 1 of 2019, Judgement of the High Court at Busia (2019) eKLR.

5. Conclusion

The long and short of the foregoing is that there is now a circular from the Permanent Secretary, Basic Education, requiring reasonable accommodation for students who require it for religious reasons when it comes to rules requiring uniformity. This is based on directions of the Court of Appeal in the *Alliance High School* case, which preserved the well-reasoned decision of the same court in *Fugicha*. The requirement for reasonable accommodation is well grounded in the Constitution and in the Basic Education Act, and binds both private and public institutions which are required to inculcate in their students the values of inclusivity, tolerance and respect for other people's faiths and cultures.

Update on Kenya's implementation of the decision in the *Nubian minors'* case

Julie Ingrid Lugulu*

Abstract

This paper provides an update on the Nubian minors' case after the decision in the Institute for Human Rights and Development in Africa (IHRDA) and another, v Kenya (Nubian minors' case) *Through a communication to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the Nubian minors alleged, first, the violation of their right to a name and nationality. Secondly, they claimed breach of the principle of non-discrimination by the Kenyan government which they stated had denied them equal access to education and health facilities. Lastly, the Nubian minors complained of a lengthy vetting process when applying for Kenyan identity documents which they alleged put them at risk of becoming stateless. The ACERWC found the Government of Kenya in violation of the rights; to a name and nationality, health and education and recommended that Kenya takes measures to ensure that Nubian minors acquire nationality and proof of such at birth and to implement birth registration in a non-discriminatory manner. Previous work has failed to address the extent of Kenya's adherence to the* Nubian minors' *decision post the* Nubian minors' *case. This paper provides a follow up after the* Nubian minors' *case by examining Kenya's reforms to comply with the decision in the* Nubian minors' *case and highlights the challenges hindering Kenya's full compliance with the decision.*

* LLB (Moi University); LLM (University of Cape Town).

1. Introduction

Every person is entitled to a nationality under international law. Fokala and Chenwi argue that nationality is the foundation of the enjoyment of other rights.[1] It is the 'right to have rights.' The lack of nationality results in the deprivation of all other human rights.[2] Nationality refers to the place of birth of an individual which results into membership to a community; while citizenship denotes the legal status granted by a state to an individual once he or she complies with the legal formalities.[3] Under international law, citizenship and nationality have been used synonymously to mean state membership, while nationality creates rights and duties under international law, citizenship mainly focuses on the relationship between a state and an individual and the social and political rights attached to the state membership.[4] Therefore, nationality or citizenship is a legal bond between an individual and a state which confers rights to the individual while creating obligations between the individual and the state.[5] In this paper, citizenship and nationality will be used synonymously to mean membership to a state which results in the enjoyment of rights and freedoms while requiring allegiance to the state and the fulfilment of citizens' obligations.

Nationality can be acquired through either birth on the territory (*jus soli*), descent (*jus sanguinis*), marriage, adoption or through habitual residence. An individual who lacks a legal identity with any state

1 Elvis Fokala and Lilian Chenwi, 'Statelessness and rights: Protecting the rights of Nubian children in Kenya through the African Children's Committee,' 6 *African Journal of Legal Studies* (2013) 361.

2 Hannah Arendt, *The origin of totalitarianism*, Meridian Books, 1958, 264.

3 Nelli Piattoeva, 'Citizenship and nationality' in John Stone and others (eds), *The Wiley Blackwell Encyclopedia of Race, Ethnicity and Nationalism*, Wiley Blackwell Publishers, 2016, 1.

4 Michelle Foster and Hélène Lambert, *International refugee law and the protection of stateless persons,* Oxford University Press, 2019, 54.

5 Alice Edwards, 'The meaning of nationality in international law in the era of human rights. Procedural and substantive aspects', in Alice Edwards and Laura van Waas (eds), *Nationality and statelessness under international law*, Cambridge University Press, 2014, 11, 13. See *Nottebohm Case (Liechtenstein v Guatemala); Second Phase*, International Court of Justice (ICJ), 6 April 1955.

becomes stateless. Therefore, a stateless person is an individual who is not legally considered as a national of any state under the operation of its law.[6] Statelessness is a major global concern – approximately ten million people around the world do not possess a nationality.[7] Statelessness may be caused by discrimination on the basis of gender, religious or ethnic component, conflict in nationality laws and creation of new states.[8]

Statelessness affects adults and children alike. According to the Office of the United Nations High Commissioner for Refugees (UNHCR), one third of stateless person are children.[9] Children born to stateless parents inherit the lack of a nationality from their parents resulting into childhood statelessness. Therefore, stateless children are not considered as nationals of any state under the operation of its laws.[10] Discrimination, inadequate safeguards in citizenship laws which do not fully protect children from statelessness and non-functional civil registration systems are some of the causes of childhood statelessness.[11] Children with a nationality have better access to education, educational scholarships, health care, social welfare, economic and social facilities compared to stateless children.[12] Consequently, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has observed that statelessness is antithesis to the best interests of the child.[13]

6 Convention Relating to the Status of Stateless Persons, 28 September 1954, 360 UNTS 117, Article 1(1).

7 UNHCR 'Global action plan to end statelessness 2014-2024', 2014.

8 UNHCR 'This is our home: Stateless minorities and their search for citizenship', 3 November 2017.

9 UNHCR 'Statelessness around the world' <https://www.unhcr.org/statelessness-around-the-world.html> on 10 July 2021.

10 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v Kenya* (2011), Comm No 002/2009. Also see Amal de Chickera and Deidre Brennan, *The girl who lost her country*, Wolf Legal Publishers, 2011.

11 African Committee of Experts on the Rights and Welfare of the Child, General Comment No 2: Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality, 16 April 2014, ACERWC/GC/02.

12 Jacqueline Bhabha, 'The importance of nationality for children' in Institute on Statelessness and Inclusion (ISI), *The world's stateless children*, Wolf Legal Publishers, 2017, 112-118.

13 *Children of Nubian descent in Kenya v Kenya*.

This case commentary focuses on childhood statelessness among the Nubians and provides an update after the decision in the *Institute for Human Rights and Development in Africa (IHRDA) and another v Kenya* (*Nubian minors'* case). The case commentary proceeds as follows; section II discusses statelessness in Kenya while Section III provides an update on the *Nubian minors' case* and Kenya's reforms to comply with the decision in the *Nubian minors' case*. Section IV examines the extent of Kenya's compliance post the *Nubian minors' decision*. Lastly, section V provides concluding remarks.

2. Statelessness in Kenya

Members of the Nubian community, coastal Arabs and border populations undergo discriminatory vetting procedures before being granted identity documents (IDs) which puts them at the risk of becoming stateless.[14] The vetting process is provided under the Registration of Persons Act where it requires persons residing in border areas or cosmopolitan areas who apply for an ID to undergo vetting to prove their links to Kenya. A vetting committee comprises of a deputy county commissioner, civil registration officer, registration officer, elders from the Nubian community and chiefs or assistant chiefs. The applicant upon turning 18 years if belonging to a community resident in the border or a cosmopolitan area is required to provide; their parents IDs, birth certificate or immunisation card, primary or secondary school certificate, the chief's and the elder's introduction letters.[15] The applicant presents the documents to the Registrar who then issues a date for the applicant to appear before the vetting committee. On the granted date, the applicant appears before the vetting committee accompanied with his or her parent together with the originals documents earlier mentioned.[16] The vet-

[14] African Committee of Experts on the Rights and Welfare of the Child, 'Written comments on implementation: *Institute for Human Rights and Development in Africa and Open Society Justice Initiative v Kenya* (Kenyan Nubian Children, Case No 02/2009) 2017, 6.

[15] National Assembly, 'Report on the public petition no 023 of 2021 regarding accessing national identity cards by the Nubian community', 2021, 19.

[16] National Assembly, 'Report on the public petition no. 023 of 2021', 19.

ting committee ascertains whether the applicant has genuine links with Kenya, if such is ascertained the applicant is granted with a Kenyan ID.

Nubians, Kenyan Somalis and coastal Arabs are at risk of becoming stateless because they experience discriminatory practices when applying for IDs.[17] Similarly, minors from non-indigenous communities like the Pemba, Waata, Shirazi, Galje'el[18] (a sub clan of the Kenyan Somalis) and persons from the Congolese, Burundian, Rwandese communities face challenges proving their links with Kenya.[19] Children from these communities face discriminatory practices when applying for IDs. [20] Without IDs persons from these communities are put at risk of becoming statelessness because they are unable to prove their links to Kenya.

3. Update on Nubian minors' case and Kenya's reforms to comply with the decision

Kenyan Nubians were originally from the Nuba Mountains in Sudan. They were forcibly conscripted into war by the British colonial government and demobilised in Kenya.[21] The colonial government re-

[17] Open Society Justice Initiative, 'Citizenship discrimination and the right to a nationality in Kenya' 2017, 4. See also Nikeeta Louise Joan, 'Statelessness and the rights of children in Kenya and South Africa: A human rights perspective' Unpublished LLM thesis, University of Western Cape, 2018, 44.

[18] The Galje'el community which is Somali sub clan was stripped off their citizenship by the Kenyan government.

[19] The UN Refugee Agency, 'Stateless persons' <https://www.unhcr.org/ke/stateless-persons> on 18 April 2021. See also, United Nations High Commissioner for Refugees, 'Integrated but undocumented: A study into the nationality status of the Amakonde community in Kenya' 2015. See also Brownen Manby, *Struggles for citizenship in Africa,* Open Society Institute, 2009, 19.

[20] Open Society Justice Initiative, 'Citizenship discrimination and the right to a nationality in Kenya' <https://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/OSJI_UPR_KEN_S08_2010_OpenSocietyJusticeInitiative.pdf> on 12 April 2019. See also Louise Joan Nikeeta, 'Statelessness and the rights of children' 44. The Makonde used to be stateless until 2016 when they were granted citizenship status by President Uhuru Kenyatta. Similarly, Kenyans of Indian descent were at risk of becoming stateless, but they were recognised as the 43rd tribe in Kenya in 2017.

[21] Johan Victor Adriaan de Smedt, 'The Nubis of Kibera: A social history of the Nubians and Kibera slums' Unpublished PhD thesis, Leiden University, 2011, 30. See also Aigel-

fused to repatriate them to Sudan, while successive post-independence governments denied them citizenship, limiting their access to human rights.[22]

The Nubian minors through a communication to the ACERWC alleged multiple violations of the African Children's Charter which Kenya is a party to. The complainants alleged violation of the right to have their births registered and acquire nationality at birth (contrary to Article 6(2), (3) and (4) of the African Children's Charter) which resulted in unfair discrimination (in contravention of Article 3 of the African Children's Charter) and violated the Nubian minors' equal access to education and healthcare (breaching Articles 11(3) and 14 of The African Children's Charter).[23]

The complaint also alleged violation of the Nubian minors' right to a name and nationality contrary to Article 6(2), (3) and (4) of the African Children's Charter[24] because the Nubian minors' parents faced challenges when registering for the birth of their children born in public hospitals. Since most public health officials refused to grant the Nubian minors' parents birth notifications which are a mandatory requirement when registering the birth of a child.[25]

gel K Murbe, 'Rights of minorities: A case study of Nubians in Kenya' Unpublished Master of Arts thesis, University of Nairobi, 2011, 50. See also Adam Hussein Adam, 'Kenyan Nubians: Standing up to statelessness' *Forced Migration Review* (2009) 19.

22 Ebenezer Durojaye and Edmund Amarkwei Foley 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian Children communication' 12(2) *African Human Rights Law Journal* (2012) 564, 566.

23 *Children of Nubian descent in Kenya v Kenya*, para 34.

24 Article 6, African Charter on the Rights and Welfare of the Child, provides that:
'1. Every child shall have the right from his birth to a name; 2. Every child shall be registered immediately after birth; 3. Every child has the right to acquire a nationality; 4. States Parties to the present Charter shall undertake to ensure that their constitutional legislation recognises the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.'

25 *Children of Nubian descent in Kenya v Kenya*, para 38.

Additionally, the complainants claimed that Kenya had violated Article 3 of the African Children's Charter[26] on non-discrimination because their children did not have a legitimate expectation of acquiring citizenship when they reached adulthood. Upon attaining adulthood, the Nubian minors were subjected to a discriminatory vetting process when applying for IDs which required them to prove their grandparents nationality and their eligibility for Kenyan citizenship before a vetting committee.[27] Lastly, the complaint alleged that Nubian minors had lesser access to basic education and health facilities compared to other children resulting in violation of Articles 11(3) [28] and 14 [29] of the African Children's Charter.[30]

The ACERWC found that Kenya was in violation of Articles 6(2), (3) and (4) (name and nationality), Articles 3 (non-discrimination), 14 (2) (b) and (c) and (g) (health and health services) and 11(3) (education) of the African Children's Charter.[31] The ACERWC recommended for Kenya to take legislative, administrative and other measures to ensure that first, children of Nubian descent in Kenya, who are otherwise stateless, acquire Kenyan nationality and the proof of such a nationality at birth.[32] Secondly, the ACERWC recommended that Kenya take measures to ensure that Nubian children without nationality are given priority in benefiting from the new measures.[33] The ACERWC also recommended that Kenya implements birth registration in a non-discriminatory manner and to ensure that children of Nubian descent are registered immediate-

26 Article 3 of the ACRWC states: 'Every child shall be entitled to the enjoyment of the rights and freedoms … irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.'

27 *Children of Nubian descent in Kenya v Kenya*, para 55.

28 Article 11(3) of the ACRWC provides that; 'State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of …: (a) provide free and compulsory basic education.'

29 Article 14 of the ACRWC states, 'Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.'

30 *Children of Nubian descent in Kenya v Kenya*, para 62 and 65.

31 *Children of Nubian descent in Kenya v Kenya*, para 69.

32 *Children of Nubian descent in Kenya v Kenya*, para 69(1).

33 *Children of Nubian descent in Kenya v Kenya*, para 69(2).

ly after birth.[34] In addition, it recommended Kenya to adopt measures to ensure the fulfilment of the right to health and education in consultation with the affected communities.[35] Lastly, it recommended that Kenya reports on the implementation of the recommendations within six months from the date of the decision.[36]

4. The extent of Kenya's compliance with the Nubian minors' decision

Before discussing the extent of the Government of Kenya's (GoK) compliance with the *Nubian minors'* decision, it is worth noting that Nubians are now recognised as Kenyan citizens after the passing of the Constitution of Kenya, 2010 and were recognised as the 43rd tribe in Kenya. Nonetheless, the Nubians still face challenges regarding nationality which affects their access to education and health, more so they still have to undergo mandatory vetting.

As mentioned above, the ACERWC found the GoK in violation of the right to a name and nationality. The GOK also failed to apply the principle of non-discrimination and violated the right to health and education. The ACERWC recommended the GoK to take measures to ensure that first, children without nationality benefit from the said measures. Secondly, that the GoK implements birth registration in a non-discriminatory manner, and that Nubian minors are registered immediately after birth to ensure the fulfilment of the right to education and health.

4.1 Nationality

The Nubian community complained of the challenges faced when registering for the births of their children. Birth registration details in-

[34] *Children of Nubian descent in Kenya v Kenya*, para 69(3).

[35] *Children of Nubian descent in Kenya v Kenya*, para 69(4).

[36] *Children of Nubian descent in Kenya v Kenya*, para 69(5).

formation such as where a child was born and the date of birth, this information is crucial in providing a link between a person and a country and thus establishing nationality.[37] Consequently, registration of births is the first step in preventing childhood statelessness.[38] The GoK has taken measures to improve birth registration and the acquisition of birth certificates. The GoK through the Department of Civil Registration Services and the Ministry of Health has partnered with UNHCR and other entities to provide mobile registration systems in remote areas where stateless persons reside to provide registration of births. The initiative has increased accessibility of registration of births. Also, the births are registered free of charge to those who are unable to afford the fees for late registration. The GoK has trained its registration officials on the importance of registration of births and how it prevents statelessness.[39] Attaining birth certificates improves children's access to human rights and shields them from exploitation and abuse.[40] This initiative has increased the accessibility of the right to acquire citizenship by stateless communities including the Nubian minors' which has in turn prevented and reduced childhood statelessness in Kenya.

The GoK has put efforts into improving birth registration and ensuring that children from stateless communities have access to birth registration and acquire birth certificates. The exact effect of the acquisition of a birth certificate in formalising citizenship is, however, unclear. This is because while a birth certificate is an entitlement of citizenship,[41] it is unclear if it is definitive proof of citizenship as the registration of births

[37] Bronwen Manby, '"Legal identity for all" and childhood statelessness' in Institute on Statelessness and Inclusion (ISI), *The world's stateless children,* Wolf Legal Publishers, 2017, 313, 322. See also, UNICEF and ISI, *The child's right to nationality and childhood statelessness: Texts and materials*, 73.

[38] Caroline Opile 'Birth registration drive combats statelessness among Kenya's coastal Pemba community' UNHCR Kenya, 6 November 2017 <https://www.unhcr.org/ke/12681-birth-registration-drive-combats-statelessness-among-kenyas-coastal-pemba-community.html> on 14 July 2020.

[39] UNHCR, 'Ending statelessness within 10 years. Ensuring birth registration for the prevention of statelessness – Good practices paper Action 7' 1 November 2017.

[40] Simon Heap and Claire Cody 'The Universal Birth Registration campaign' *Forced Migration Review* (2009) 20.

[41] Kenya Citizenship and Immigration Act (No 12 of 2011), Section 22.

in Kenya is not by law limited to the birth of Kenyan citizens.[42] At the least, the acquisition of a birth certificate would make it easier to have one's citizenship recognised.

4.2 Non discrimination

As pointed out earlier, the complaint decried the denial of the legitimate expectation of acquiring Kenyan citizenship upon attaining adulthood due to the discriminatory vetting process. After the Nubian minors' decision, the Security Law (Amendment 2014)[43] amended the Registration of Persons Act to establish identification committees whose function is to perform vetting. As earlier mentioned, the applicant is required to provide documentation to prove their links to Kenya failure to which results in lengthy delays and the registration officials have been accused of soliciting bribes to manipulate the outcome of the vetting process.[44]

A recent public petition presented by the Kibra Member of the National Assembly shed light on these difficulties, especially the discrimination of the Nubian community in accessing IDs.[45] The Petitioner recommended for the Cabinet Secretary for Interior and Coordination of National Government to issue guidelines to ensure that the vetting

[42] Section 7 (1) of the Births and Deaths Registration Act, Cap 149, states: 'It shall be the duty of every registrar to keep a register of births and a register of deaths and to enter therein, respectively, the prescribed particulars of every birth and death notified to him.'

[43] Security Laws (Amendment) Act, 2014, Section 24.

[44] Abraham Sing'oei, 'Promoting citizenship in Kenya: The Nubian case' in Brad Blitz and Michael Lynch (eds), *Statelessness and the benefits of citizenship: A comparative study*, Oxford Brookes University, 2009, 37, 38. See also Samantha Balaton-Chrimes, 'Citizens minus: Rights, recognition and the Nubians of Kenya', unpublished PhD thesis, Monash University, 2012, 86; Kenya National Commission on Human Rights, 'An identity crisis: A study on the issuance of national identity documents in Kenya' 2007, 10. See also Ben Oppenheim and Brenna Powell, 'Legal identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya' Policy Paper, Open Society, 2015, 4 - < https://www.justiceinitiative.org/uploads/0a6472de-a975-4a3b-b3ad-2b979891d645/legal-identity-2030-agenda-lessons-kibera-kenya-2051216.pdf> on 14 July 2021.

[45] National Assembly, *Report on the Public Petition No 023 of 2021*, 5.

process is transparent and non-discriminatory.[46] This indicates that the *Nubian minors' decision* to grant the Nubians citizenship has not been fully implemented by the GoK.

4.3 Health and health services

Although the GoK granted Nubians Kenyan citizenship, as of the year 2021, the Nubian community Public Petition Number 023 of 2021, claimed that the GoK is yet to fully take affirmative action to ensure that they have access to water, health and education.[47] Therefore, it seems that GoK is yet to fully comply with the *Nubian minors' decision* regarding the access to health and services for the Nubian community.

4.4 Education

The *Nubian minors' case* stated that Nubian minors had lesser access to basic education compared to other children in Kenya. It is commendable that the GoK has made positive strides to ensure that children from stateless communities are registered. Consequently, the acquisition of a birth certificate by these children increases their chances of accessing basic education. Birth certificates area prerequisite to all learners to join primary schools and also sit for the national examinations. Therefore, the GOK has made efforts to implement access to basic education for Nubian minors.

However, Nubian minors faced difficulties assessing higher learning because they are unable to access government scholarships, Higher Education Loans Board (HELB) loans which affects their access to higher learning.[48] Consequently, vetting has resulted in the delay of the acquisition of IDs which has negatively impacted the Nubian minors' access to higher education.

46 National Assembly, *Report on the Public Petition No 023 of 2021*, 17.

47 National Assembly, *Report on the Public Petition No 023 of 2021*, 6.

48 National Assembly, *Report on the Public Petition No 023 of 2021*, 6.

5. Conclusion

The Kenyan government has made positive strides in adopting legislative measures with the aim of complying with the decision in the *Nubian minors' case*. However, the GOK has not fully implemented the decision in the *Nubian minors' case*. Although some minorities and non-indigenous communities have registered the births of their children, they are still put at risk of becoming stateless because acquisition of a birth certificate is not definitive proof of Kenyan citizenship.

More so, minorities and non-indigenous communities have to undergo lengthy vetting processes before identification committees pursuant to the provisions of the Registration of Persons Act which puts them at risk of becoming stateless. Access to birth certificates for Nubian minors has increased their access to basic education. However, they can only access basic education, because they require IDs to advance their education, the lengthy vetting process may impede their right for further education.

The GoK could consider amending the Registration of Persons Act to provide for a clear procedure on vetting and specify the documents required to acquire Kenyan citizenship in order to influence better administrative practices and eliminate discrimination in the vetting process. As shown above, the denial of citizenship leads to the denial of social goods – health (as they cannot acquire health insurance) and education (inability to acquire student financing through HELB and bursaries). The ramifications of the denial of documents of citizenship run deep, and it is incumbent upon the GoK to increase its efforts to better include this marginalised community.

Book Review:
The struggle for land and justice in Kenya by Ambreena Manji

Omolo Joseph Agutu*

Ambreena Manji's *The struggle for land and justice in Kenya,* James Currey, 2020, aims to provide a socio-legal approach to understanding developments in the land domain in Kenya between 2010 and 2020. Specifically, the book studies land accumulation by dispossession and the struggles against exploitation through a justice framework. The book is divided into 8 chapters.

The struggle for land and justice in Kenya makes for a depressing read on the land question in Kenya. Manji clearly outlines the unjust nature of Kenya's property system and hopes to excite a discourse through a justice prism. She seeks to reignite debate on the land question in a way not contemplated by the Constitution and the land legislations (and perhaps, interestingly, possibly unlawful according to the National Cohesion and Integration Act)[1] and this would be its greatest contribution. It

* LLB (Moi University), LLM (New York University & National University of Singapore); Lecturer, Kabarak University School of Law.

1 As part of the legal reforms that followed the 2007/2008 post-election violence, Parliament enacted the National Cohesion and Integration Act (No 12 of 2008) whose purpose was to encourage national cohesion and integration. Section 13 of the Act introduced the offence of 'hate speech' which prohibits words or behaviour that is 'threatening, abusive or insulting' and is intended or is likely to stir up ethnic hatred. Given the ethnic angle to the unjust allocation of land in Kenya, this provision has been invoked in a number of instances in an attempt to stifle debates on land injustices. For instance, in the 2013 campaigns, the police warned candidates against rais-

implores us to unbind ourselves and open our eyes to the inequities of our society in ways that defy imagination.

In *The struggle for land and justice in Kenya,* the author takes the reader through a historical journey on the struggles on land relations. She begins the journey in pre-colonial Africa where societies viewed land as a trans-generational asset vested in communities and not capable of individual exclusive ownership. Access and use of land represented a person's culture, heritage and means of both individual and communal daily survival. With the advent of colonisation, a new and alien vision of land ownership was introduced that defined land as a commodity: a factor of production capable of individual and exclusive ownership. The original sin in this regard began with the introduction of the Foreign Jurisdiction Act of 1890 which engineered the translocation of the radical title from the commons to the Crown in what the author describes as the radical title's 'kinetic history'.[2] In an 1899 advisory opinion by Law Officers of the Crown, they interpreted the effect of the 1890 Act as 'bestow[ing] upon the "sovereign" the power of control and disposition over waste and unoccupied land in protectorates where there was no settled form of government.'[3] This position was affirmed in *Wainaina v Murito*[4] which clarified that 'all native rights in such reserved land… disappeared and the natives in occupation of such Crown Land became tenants at will of the Crown.'

Thus, by colonial occupation and fiat, the 'defective' informal and non-market-oriented property system of African societies was unilaterally replaced by the 'superior' formal and secure English property system managed by Britain. This anchored the settler economy in Ken-

ing the land question. (See Julia Sigei, 'Land question divides experts and politicians right down the middle', *Daily Nation*, 7 February 2013.) Similarly, some journalists have been targeted by authorities for covering politically sensitive topics like land (See Human Rights Watch, 'Not worth the risk: Threats to free expression ahead of Kenya's 2017 elections' 30 May 2017. https://www.hrw.org/report/2017/05/30/not-worth-risk/threats-free-expression-ahead-kenyas-2017-elections on 16 March 2021.

2 Ambreena Manji, *The struggle for land and justice in Kenya*, James Currey, 2020, 5.

3 HWO Okoth-Ogendo, 'Property theory and land use analysis: an essay in the political economy of ideas' 1 *Journal of Eastern African Research and Development* (1975) 37-53.

4 (1922) 9 KLR 102.

ya where land was allocated/distributed based on race at the expense of indigenous communities who were condemned to live in native reserves and to support the settler economy through provision of cheap labour. At independence, racial privilege as a basis for land alienation was replaced with ethnic privilege, plunder and theft. The basic and unjust structure for land relations remained, fundamentally, the same. The political class failed to recognise the trauma caused by the colonial property system and as such made no deliberate efforts to offer any form of meaningful therapy to ameliorate the condition of the patient. As Chinua Achebe aptly put it:[5]

> We had all been in the rain together until yesterday. Then a handful of us – the smart and the lucky and hardly ever the best – had scrambled for the one shelter our former rulers left, and had taken it over and barricaded themselves in. And from within they sought to persuade the rest through numerous loudspeakers, that the first phase of the struggle had been won and the next phase – the extension of the house – was even more important and called for new and original tactics; it required that all argument should cease and the whole people speak with one voice and that any dissent and argument outside the door of shelter would subvert and bring down the whole house.

Thus, the hitherto unjust, unfair and evil system of government under white rulers immediately became virtuous and useful for the successors of the colonial state. In this neo-colonial state, the political class has presided over (and in certain instances, used the law to sanction) a system where there is no big difference between what is legitimate and what is unlawful.

From the author's point of view, paradoxically, ten years since the transformative 2010 Constitution was promulgated with its high-sounding promises, no fundamental change in the structure of land relations has occurred. Indeed, the book raises doubts about the efficacy of the prescription contained in the Constitution – the introduction of independent and strong land governance institutions – to resolve the land question at the expense of other remedies like redistribution of land or retribution for past and present wrongful acts.[6] There has been a pre-

5 Chinua Achebe, *A man of the people*, Penguin Classics, 2001, 33.

6 Manji, *The struggle for land and justice in Kenya*, 12.

occupation with the desire to get the institutions right without concomitant reforms in the control and ownership of land. In the author's opinion, the 2010 Constitution, viewed through the lenses of just and fair land relations, was low on ambition. With its focus on reforming land governance *institutions*, it sought to sanction and anchor a market for sanitising illegal and illegitimate past and present conduct in land relations.

According to Manji, scholarship and public policy discourses on land have been dominated by a private law model of land law. In this sense, the law has a limited role, that is, to 'facilitate the market and to guarantee the rights of the individual to own and control land.'[7] The author argues for an expansion of the scope of the discourse to include public law aspects of land relations which consider and protect interests that may not necessarily be market/commerce-oriented.[8] Specifically, she advocates applying administrative law principles in managing public and community land.[9]

True to her suggestion of unsettling the outdated ideas dominating Kenya's property regime, the author analyses land reform issues from a broad perspective. Manji adopts a multidisciplinary approach which incorporates law, history, political science, literary studies and economics. Further, she links the land question in Kenya to policy and legal developments at the regional and international levels and shows how these impacted local discourses in Kenya on land. This approach provides the readers with a rare comprehensive toolkit for unmasking and understanding the complex and multifarious question of land, which festers in Kenya and other African countries many decades after the end of colonial rule.

In an attempt to highlight and refocus the spotlight on the role of the state in the (mis)management of land relations, *The struggle for land and justice in Kenya,* looks at the land question through a justice lens that

7 Manji, *The struggle for land and justice in Kenya*, 17.

8 Manji, *The struggle for land and justice in Kenya*, 17.

9 Manji, *The struggle for land and justice in Kenya*, 17.

asserts the public law attributes of land affairs. In so doing, the author has sought to document the evolution of attempts to frame land issues in Kenya using a justice and fairness framework. This framework brings into question the very foundation of property institutions, rules, norms and, indeed, the political economy in Kenya. It nudges us towards the reality of our society. This reality, we seem to have chosen to turn a blind eye to as was illustrated by a colleague's wry comment on the title of Manji's book that '…in Kenya, we do not struggle for land, we simply need to work hard, make enough money and then use the money to acquire as much land as we want.'

Although the book is a valuable contribution to the scholarship on land relations in Kenya, a few weak points can be identified. First, the author is right in criticising the narrow approach of reforming land laws and land governance institutions post 2010 as providing legal answers to 'political and social problems relating to land'. However, the author shies away from clearly highlighting how we should get out of this undesirable situation. Thus, while the book is forthright in its diagnosis of the problem, the reader has to contend only with hints for prescription.

Second, in arguing for the adoption of a composite private and public law model, the author seems to argue more strongly for the application of this model only in relation to public land and community land. In reality, principles of administrative law like fair hearing, legality and rule of law would also find utility in relation to the management and administration of private land. For instance, in dealing with an application to register or remove a caution or a restriction, the registrar is required to issue notices to the affected parties and to grant them an opportunity to be heard.[10]

Third, in chapter 3, while the book provides a comprehensive analysis of various official reports documenting land problems in Kenya,[11]

[10] Land Registration Act (No 3 of 2012), Section 71, 72, 73 and 76.

[11] The chapter discusses the reports of the following official bodies: the Presidential Commission of Inquiry into Land Law System of Kenya (Njonjo Commission, established in 1999); the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land (Ndung'u Commission, established in 2003); the Commission of Inquiry

it is odd that it does not include the report of the Judicial Commission of Inquiry into Tribal Clashes[12] (Akiwumi Commission), established in 1998. The Commission was created with the mandate to investigate the tribal clashes that occurred in various parts of Kenya since 1991 and to specifically report on the origin and underlying causes of the clashes; the nature of intervention by law enforcement; and the status of preparedness on the part of law enforcement agencies to respond to and prevent tribal clashes. While this commission's mandate did not specifically relate to land, some of its findings identified dissatisfaction with land ownership and use as one of the factors that sparked the violence. The findings of this commission showed, quite early in time, how politicians used the land question to plant discord among neighbours and its contribution in providing fodder for the land reform debate would have deserved recognition alongside the other reports mentioned in chapter 3 of the book. The findings of the report showed the connection between land injustices, politics and human rights abuses. Additionally, the report provided the context for understanding the emergence of the land question in the post-election violence that was investigated by the Waki Commission in 2008.

into Post-Election Violence (Waki Commission, established in 2008); the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (Mutua Task Force, established in 2003); and the Truth, Justice and Reconciliation Commission, established in 2008.

12 Republic of Kenya, Report of the Judicial Commission of Inquiry into Tribal Clashes, 1999.

Keynote address by Hon Justice Martha Koome, EGH,
Chief Justice and President of the Supreme Court of Kenya,
during the launch of Attorney General Emeritus,
Prof Githu Muigai's book, 15th July 2022

Book title: *Power, politics & law: Dynamics of constitutional change in Kenya, 1887-2022*

Hon Prof Willy Mutunga, Chief Justice emeritus of the Republic of Kenya, Prof Githu Muigai, Attorney General emeritus of the Republic of Kenya, colleague judges, retired judges and judicial officers, Senior Counsel present, members of the academic community, distinguished guests, ladies and gentlemen, good evening!

I thank Prof Githu Muigai, and the publisher of the book – Kabarak University Press, for the honour of inviting me to witness and give the keynote address during the launch of this timely book: *Power, politics & law: Dynamics of constitutional change in Kenya, 1887-2022.*

I welcome this timely contribution by Prof Githu Muigai, our Attorney General emeritus. This book, *Power, politics and law: Dynamics of constitutional change in Kenya, 1887-2022*, is more than one thing. It serves multiple roles. Firstly, it is a record of history. Few texts have traced our constitutional history to the founding of the Imperial British East Africa Administration, and I believe this is the only scholarly work to cover an analysis of the proposed constitutional amendments in the post-2010 era. This contribution to our country's history is important.

Secondly, this book is a study in political science. In tracing the powers and politics that have influenced our country's constitutional change, it is a worthy reference text for students of political science in Kenya. Thirdly, it is a primary text for the study of constitutional law. Not only does it describe the constitutional changes, both proposed and

effected in our country, it presents the analysis of their legal effect and how the practice of constitutional law was shaped by our country's politics. In these instances, this book is interdisciplinary.

In addition, the book shows a keen appreciation of a rarely acknowledged reality that the process of constitutional amendment straddles 'law and politics'. A constitutional amendment process by its nature often involves political maneuvering, bargaining and negotiations and the political positions, agreements and disagreements between groups and leaders come to the fore. It will always involve the 'ins' who are favoured with the existing state of affairs wanting to keep their advantage; and the 'outs' who feel excluded by the existing Constitution trying to get access to the table through new constitutional provisions that reflect their viewpoint.

Given these realities, the most important consideration to be taken into account by constitutional drafters in my view is to have constitutional amendment provisions that are 'deeply participatory, deliberative and inclusive' as done in Chapter Sixteen of the 2010 Constitution. This ensures that the Constitution always remains the 'people's Constitution', not a constitution for political elites, legal elites, or judicial elites. The point is that the ultimate fate of the Constitution must always lie with citizens.

The book also, I believe inadvertently, records the growth of the independence of the Judiciary in Kenya. It is an interesting point that no cases determined by Kenyan courts are responsible for or otherwise connected to any constitutional change for the first seven decades, from 1887 to the 1970s. However, from the mid-90s, the involvement of courts in the politics of constitutional change has increased, and in the last 20 years it has intensified. This aspect of Prof Muigai's book indeed explains something important about our country's constitutional history – that for the first seven decades, administrators and then later, politicians were the architects of our Constitution.

In a sense, the book tells the story of the growth of Kenya's democracy. Such contributions are important for the cultural life of a society. The intellectual life of a country matures when experienced State offi-

cials begin to discuss the intellectual questions that have marked their lives in public service, the professions and the academy.

I happily note that in the last 10 or so years, there has been an increase in such reflections by Kenyan senior officials including Prof Justice Willy Mutunga who since retirement from the Judiciary made a notable re-entry into the academy by delivering and publishing an inaugural lecture, *In search and defence of radical legal education: A personal footnote*. That Prof Muigai has contributed to this cultural heritage is commendable. We laud you Professor, for the good work.

Prof Muigai's book also contributes to the vibrancy of legal scholarship in Kenya. The practice of law in Kenya, and, in particular, judicial practice, is nourished by the vibrancy of legal research. In recognition of this, my office has embraced the importance of, and shown interest in, the intellectual growth of judicial officers, particularly through the Kenya Judiciary Academy. Such works by distinguished scholars, like Prof Muigai, will not only be useful reference points for judges adjudicating over related disputes, but will also inspire our intellectual growth, which is the very essence of the Judiciary Academy in the first place.

As I conclude, I wish to reiterate that the great tradition where senior government officials retiring from public service share their reflections with the greater public should be praised and emulated. Against this backdrop, I congratulate Prof Muigai for the job well done. I also congratulate Kabarak University through its publisher, Kabarak University Press, for publishing this book, and excellently so. I also honour all of you who have taken your time out of very busy schedules to come and witness this momentous occasion.

Thank you for your kind attention.

Hon Justice Martha Koome, EGH
Chief Justice, and President of the Supreme Court of Kenya