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Contents

Foreword

I joined Kabarak University as professor of public law in October 2021. For the first few months, one question raged in my mind, 'What can Kabarak Law School do in search and defence of radical legal education?' The answer to this question is reflected in my Inaugural Lecture, which is published in the Kabarak Law School Occasional Paper Series in January 2022. It is my hope that the reflections in the lecture were considered by students, faculty, and the administration in the University.

One of the principal ways of inculcating a culture of radical legal education, I argued, was for embedding a culture of intellectual critique among the student body. Students should be able to study great thinkers and debate the great ideas of their time with knowledge and confidence.

Student journals are mechanisms that facilitate legal radicalism. They are based on legal educational success that is traced back to educational systems. I trace my legal education from my childhood community all the way to the University of Dar where I did my undergraduate and masters degree in law. I particularly liked the Socratic method of teaching that tended to be student centred and required serious reading. In Dar, it is the students that championed legal radicalism as they took part in discussions and in writing scholarly articles.

While doing my Master of Laws in Dar, I attended classes where we were required to read and reflect on critical articles. This helped us establish an intellectual and ideological foundation for studying, researching and publishing scholarly articles. The law is neither perfect nor static. Law does not exist in a vacuum. It develops over time and so do the gaps in it. Development of law has historically been a site of societal struggles. Universities are the suitable platforms for engender-

ing seeds of radical change to address the stagnancies and inadequacies of the law. This noble objective of producing excellence, as Mahmood Mamdani puts it, does not rule out democracy in intellectual settings.[1]

From my years as a lecturer at the University of Nairobi, I recall my experience affirming that participation and critique of students not only enriches their legal and intellectual development but also that of their teachers. In this context, the critical analyses of and recommendations expounded in student journals such as this offer scholars, practitioners and policy makers a pool of options to pick from in addressing the law and its implementation.

In this inaugural issue of the *Kabarak Law Review* are papers that advance legal radicalism, addressing questions holding both public and private authorities accountable, and advocating revolutionary approaches to human rights and constitutional implementation. The *Review* in many of its papers, reminds us of the need for intellectual leadership and the benefits of counter-intellectual hegemonies.

Kabarak University School of Law is known for its legal scholarship in various publications including: *Kabarak Journal of Law and Ethics*, *African Journal of Commercial Law*, *East African Community Law Journal* and most recently *Kabarak Law School Occasional Paper Series*, which I am pleased to have contributed to. Most of these publications are based on articles submitted by legal scholars in universities across Kenya and beyond.

What can Kabarak Law School do in search and defence of radical legal education?

It is our duty as university law teachers to train and mentor our students to become great researchers, authors and philosophers. To mentor them just as we were mentored in the institutions we were in and even better. This can be done through publishing articles written by students. This can be effected through among other means; editing and publishing their dissertations, choosing the best class research assign-

[1] Mahmood Mamdani, 'Is African studies to be turned into a new home for Bantu education at UCT?' 24(2) *Social Dynamics* (1998), 73.

ments to be featured in the journals and having writing competitions among students. Additionally, mentorship can be done through a call for papers directed to students. In such processes, the faculty trainers are able to assist them in their pursuit.

As one of my teachers, mentor, a revolutionary intellectual, Issa Shivji teaches us, 'One of the most important sites in the struggle for ideas is the university….The University of Dar es Salaam became known far and wide for researching our concrete reality, for critical analysis and relevant theorising.'[2]

With the publication of *Kabarak Law Review,* I can happily say that Kabarak Law School and its student community is precisely on the path described above. I am therefore pleased to write this Foreword for the first issue of the *Kabarak Law Review*, and look forward to many more regular issues.

Professor Willy Mutunga, CJ,
Kabarak, December 2022

[2] Issa Shivji, *Liberating democracy and democratising liberation: Distinguished Nyerere lecture, 2021* Mkuki na Nyota, Dar-es-Salaam, 2022, 31, 33.

Foreword

Nothing excites a teacher beyond the success of their students. It is also known that journals and other academic works stimulate an academic the same way toys stir children. Being an academic work of my students, this inaugural issue of *Kabarak Law Review* (KLR) must surely enliven me greatly.

KLR represents what my Law School aims for – to impact the world through excellent legal education, cutting-edge legal and interdisciplinary research, and devoted community service; all from ethical and Christian Biblical perspectives. The launch of KLR demonstrates that we are on the path to occupying our rightful place as the think-tank for Africans. But also that the art of thinking, writing and sharing ideas is not the preserve of the usually older, ugly and aloof academics. That the students can reflect, pen and publish their own ideas. What a milestone!

Looking at the range and relevance of subjects covered, the young KLR is already getting several things right. Discrimination is an all-time concern, same as lack of integrity in governance, environmental degradation, and inadequate judicial remedies and so on. The inaugural edition of KLR addresses these concerns, and quite innovatively.

Just when I was settling down to my new assignment as Dean, Kabarak Law School, we lost our beloved student, Emmanuel Mutura Ndwiga, and his brother Benson Njiiru Ndwiga, to what remains a sad, mad and bad case of police brutality. Obviously, the evil police officers were pre-occupied by the individual and physical mortality of the young brothers. Unbeknown to them, the collective efforts of the students' body and the never dying intellectual platform that KLR is a part of would immortalise the good brothers and revisit the subject of

policing. What is more promising is that KLR, working together with Amnesty Kenya, has promised to dedicate a section in future issues of the journal to promote police accountability as a way of remembering the Ndwigas. What a contribution!

Thank you very much Sharon Amwama and your team of exceptional editors for bringing this journal to light. Thank you Humphrey Sipalla, Editor-in-Chief, Kabarak University Press, for guiding the young academics well. And thank you very much Prof Henry Kiplangat, our Vice Chancellor, for creating and supporting an environment where innovation is possible. Long live KLR. Long live Kabarak.

Prof J Osogo Ambani, LLD
Associate Professor of Public Law, and Dean,
Kabarak Law School

Publisher's Foreword

A teacher's greatest pride, and most valuable compensation, is to see their students grow into maturity, competence, responsibility and resilience. For one's students to make great citizens of their community and reliable professionals in their fields brings us teachers the greatest of joys. With this first issue of the *Kabarak Law Review,* our students at Kabarak University School of Law have so honoured us, their teachers.

Academic publishing, like all crafts, is only truly learnt through apprenticeship. Abstract studies have no use for the learning of a craft. And our dear nation, in order to preserve its cultural heritage and advance in its aspirations for prosperity and innovation, needs to grow more academic publishing professionals. We are not nearly enough to serve the fast growing needs of scholarly publishing in Kenya.

And yet Kenya, like most other countries in the world, also suffers from the plague of predatory academic publishing. With the demand from tertiary education regulators that post graduate students publish their theses before graduation, the demand for easy solutions to an unnecessary problem has created the grounds for an unfortunate market.

That young undergraduate students can take up, with such vigour and commitment, the long and exacting journey towards the profession of academic editorship presents a great hope for the future. This journey towards a profession that praises the humble pedant – if ever such oxymoron exists – and extols the rigorous, self-doubting, triple checking clerk, sometimes seems to be to be poorly conceived to attract interest from a generation that has grown up with the convenience and 'instant coffee' mentality of the information age. Again, our students today have happily proven me wrong.

This profession also lends itself to the slow thoughtful, wide reading, sceptical book worm. It requires that one loves to not merely read but have a knack for questioning what does not seem right. Most importantly, it requires a generous heart, a willingness to serve, a pride in improving others. Here, again, our students have admirably risen to the task.

This first issue comes at the tail end of a tedious 12 months of reaching out to prospective authors, identifying editors, numerous fights, even more training sessions, and late-night ultimatums for deadlines to be met.

I salute the very first group of students who attempted the rudiments of an editorial board: Ida Kandi Mwadilo, Fidel Tekin, and George Gor, together with the vibrant political team at the Kabarak University Law Students Association (KULSA), Linus Nyerere, David Tiema, Sharon Amwama, Grace Jelimo and Truphosa Kezia. This group laid the ground for the 2021-22 editorial team that has brought this issue to completion: Sharon Amwama, Linus Nyerere, Onesmus Musungu, Samson Muchiri Amboka and Grace Jelimo Kipkulei.

I am also deeply glad that the editorial team for 2022-23 has been meeting and undertaking a rigorous training programme directed by Nciko wa Nciko. This team led by Laureen Mukami Nyamu, and board mates, Patricia Cheruiyot, Lorraine Chemutai, Alex Tamei, King David Arita, Caleb Sadala, Nadya Rashid and Carson Kiburo, are all set to take the *Kabarak Law Review* to even greater heights.

The vision of the *Kabarak Law Review* is to ensure that incipient scholarship among students is nurtured, and that students practice the culture of generosity and service to the epistemic community. I am confident that the example of these law students will inspire other students at Kabarak University to follow the path of scholarly rigour as well.

We anticipate, with the coming issue, to upgrade the *Kabarak Law Review* to a fully double-blind peer reviewed main section so that it may take its place among the list of rigorous reputable scholarly journals in Kenya.

I am deeply thankful to our Dean of Law, Prof J Osogo Ambani, for his steadfast commitment to the mentoring of students and in particular to the establishment of a student-run reputable law journal at Kabarak. I am also deeply thankful to our Vice Chancellor, Prof Henry Kiplangat for his continued support, encouragement and belief in the projects of the University Press. With such support, we are confident that we will continue to breach horizons and create the best scholarly environment for tertiary study and knowledge production in Kenya.

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

Editorial

'Our history should be written by us otherwise it will be written by others'

Professor Githu Muigai[1]

'We must also solve our problems ourselves'

Hon CJ Martha Koome[2]

In effecting the vision of Kabarak University, 'To become a centre of academic excellence…' Kabarak University Law School presents to you the very first issue of the *Kabarak Law Review*. This journal is set as a revival of the *Kabarak Students' Law Review* which dates back to 2014. The journey towards this revival started as a dream whose reality is seen today. It has been my aim and that of the Kabarak University Law Students Association 2020-2021 to realise this dream and we cannot be prouder of this accomplishment.

Kabarak Law Review is a student run, peer-reviewed scholarly publication that includes full articles, case and book reviews to be published annually. This review has undergone a single blind peer-review, however, we aim to advance to double blind peer-review in the subsequent issues. In order to promote academic rigour among students, the *Kabarak Law Review* is primarily based on articles published by LLB undergraduate students as well as Kabarak graduates undertaking advocate

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1 From his speech given at the launch of his book, *Power, politics, and law: Dynamics of constitutional change in Kenya,* Kabarak University Press, 2022, on 15 July 2022.

2 From her keynote address given at the launch of Githu Muigai, *Power, politics, and law: Dynamics of constitutional change in Kenya,* Kabarak University Press, 2022, on 15 July 2022.

training in the Kenya School of Law. It also welcomes scholarly articles from students in universities in Kenya, Africa and beyond.

Kabarak Law Review is founded upon the principle of academic integrity. In times such as these, when authorship and legal writing is ridden with intellectual laziness in the form of misquotations, plagiarism and redundancy, the place of thorough legal research and sincere critique cannot be gainsaid. This journal aims to cultivate a reading, researching, analysing and writing culture among students, to create an avenue for those interested in legal research and writing to further their passion. It also aims to encourage the identification of gaps on various aspects of law and making recommendations on them. In the writing and submission of articles for this publication, students will appreciate the works of other authors that they rely on. That they give to Caesar what belongs to Caesar. That readers may be able to rely on information provided in a student run published article, journal or book. That the understanding be so clear as to prevent misquotes that display intellectual laziness. That they be aware of the purpose of legal research and writing and that failure to adhere to the principle of academic integrity results in intellectual laziness. It is for this reason that student journals such as this ought to be encouraged for producing scholarly material in academic rigour.

This Issue has ten articles in total ranging from various themes of law. It covers topics on: discrimination of people with albinism; leadership and integrity in the Kenyan Constitution; bilateral investment treaties and class action suits in DRC; and the right to health and fight against corruption in Kenya; Legal arts of artistic law: Interdisciplinary reflections of law and other disciplines; and Structural interdicts of constitutional law. Aside from the above it contains an article which officially lauches a section of the Review which will focus written in commemoration of one of Kenya's greatest scholars Professor FX Njenga's contribution on the Law of the Sea. This article officially brings to life a section in the review termed 'Honour Your Elders'. This section will be based on research and writings of African Scholars. We aim to ensure that there be a section within the *review* on 'Honour your elders' where students will research and write about great African scholars.

The last three articles are written in memory of our fallen brothers Benson Njiru Ndwiga, a student at Embu University, and Emmanuel Mutura Ndwiga who was our fellow law student at Kabarak University whose lives were lost in the hands of Kenya Police on 1 August 2021. It has been more than a year since the two young citizens lost their lives and there has been no conclusive report on the pursuit of justice for our brothers and their family. As grieving colleagues and law students, the authors have responded to this tragedy by analysing the areas of law related to the injustice that our brothers suffered. They include: policing in Kenya during Covid-19 containment measures; the inefficient response of Kenya's criminal justice system to deaths in custody; and the reparation system for deaths in custody. The articles propose solutions for the aforementioned issues with the hope that they will be used to advance future research and implementation of the proposals. It has been a whole years since this journal was set in motion. Therefore, as we launch this final product, I would like to begin by thanking God Almighty for taking us through. It has been a challenging experience for the authors and the team that put their best foot forward to ensure this reality. And in light of such success, we do not take it for granted. Rather, we thank God for this wonderful treasure that he has accorded to Kabarak University School of Law without measure. We hope that this Review's future is like that of the mustard seed.

I would like to recognise and sincerely thank the editorial team of 2021-2022 students who put in their very best efforts to ensure the success of this publication. Additionally, as an interim editorial board we have been able to formulate a manuscript submission form, image rights and consent form, an editorial policy as well as develop the Kabarak Legal Citation (KALCI) Guide that has been adopted as the editorial policy and guideline for the *Kabarak Law Review*. Special thanks goes to my team mates, Samson Muchiri Amboka, Onesmus Musungu, Linus Nyerere and Grace Jelimo Kipkulei as well as our external editor Sidney Tambasi for ensuring the success of this publication.

We also thank Professor Chief Justice Willy Mutunga who has graced *Kabarak Law Review's* first publication with a foreword. He has

mentored, advised and taken time to listen to students of Kabarak University School of Law and noted our efforts as the leaders of tomorrow. We hope to follow in his footsteps.

We also appreciate the efforts of the 2022-2023 Editor-in-Chief of *Kabarak Law Review,* Laureen Nyamu who has also supported this agenda. We take this opportunity to welcome the Editorial Team *Kabarak Law Review* 2022-2023. We are confident that the *Review* could not have been placed in safer hands.

Finally, we wish to extend our gratitude to our mentors; Professor John Osogo Ambani (our Dean), Mr. Humphrey Sipalla (Editor-in-Chief, Kabarak University Press) and Mr. Sam Ngure (Editor-in-Chief of the Kabarak Journal of Law and Ethics Volume 6 of 2022) for their immense support in making this publication a success.

With this step, we hope that Kabarak University will not only be known for successes in student moot court and debate competitions but also student legal writing and research publications. We hope that this first issue has laid a strong foundation for the publication of many more student scholarly publications that aims to benefit students, researchers and writers, and the society as a whole.

Sharon Moraa Amwama
2021-2022 Editor-in-Chief, *Kabarak Law Review*
December 2022, Kabarak

Different in colour, equal in rights: Discrimination as a link to the violation of other rights of persons with albinism

*Linus Nyerere**

Abstract

Whereas it can be argued that generally, in Kenya, there exists cogent laws that guarantee all persons the enjoyment and protection of inherent fundamental rights and freedoms, this article submits that it is not a lived reality for persons with albinism. The article focuses on the freedom from discrimination where it argues that ignorance among members of Kenyan society is the main recipe for discrimination against persons with albinism. As will be evidenced in this article, such discrimination is cross cutting and it affects the enjoyment of the rights to dignity, education and employment. This article also discusses the gains and shortfalls of the legal regime under which the rights of such persons are anchored by making reference to; the Constitution of Kenya 2010, statutes such as the Persons with Disabilities Act, case law, and international instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities

* The author is an LLB graduate from Kabarak University Law School, & is currently enrolled in the Advocates Training Program at the Kenya School of Law. He expresses his utmost gratitude to his colleagues, peers and mentors for their meaningful support & advice in the writing of this paper. He notes that this work was inspired by an earlier essay submission to commemorate the Albinism Awareness Day 2021, organised by the Kenya National Commission on Human Rights where said paper was ranked second best essay overall.

in Africa, the Convention on the Rights of Persons with Disabilities among others. Moreover, it proposes measures to curb violations of the rights of persons with albinism such as efficient and widespread public education through the creation of awareness of the rights of persons with albinism.

Keywords; albinism, colour, disabilities, discrimination, ignorance, rights, obligations; public education

1. Introduction

A quick reading of the international and national body of laws that give provisions regarding persons living with disabilities leads to the conclusion that persons with albinism fall within the category and definition of persons living with disabilities. The Convention on the Rights of Persons with Disabilities (CRPD), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa and the Persons with Disabilities Act of Kenya, substantiate this point. The Persons with Disabilities Act defines a disability as any physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which adversely impacts on social, economic or environmental participation.[1] On its part, the CRPD recognises disability as an evolving concept which results from the interaction between persons with impairments, and attitudinal and environmental barriers that hinder their full and effective participation in society.[2]

Kenyan courts have also rendered definitions of disability. In *Kinyua Felix v Ministry of Education* the Employment and Labour Relations Court adopted the following definition of disability:

> a permanent physical or other impairment or condition that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day to day activities.[3]

Albinism, which is the centre of focus in this paper, is defined as a rare non-contagious genetically inherited difference present at birth that results in the lack of pigmentation (melanin) in the hair, skin and eyes,

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1 Persons with Disabilities Act (No 14 of 2003), Section 2.

2 Convention on the Rights of Persons with Disabilities and Optional Protocol, Preamble.

3 *Kinyua Felix v Ministry of Education and 2 others* (2021) eKLR. See also Public Service Commission Regulations 2020, see also *Margaret Martha Byama v Alice A Otwala and 3 others* (2016) eKLR para 15, *Macharia v Safaricom plc* (Petition 434 of 2019) [2021] KEHC 462 (KLR) (Constitutional and Human Rights) (8 July 2021) (Judgment). These authorities reinforce the above definition.

thus causing vulnerability to the sun and bright light.[4] The condition affects people worldwide regardless of race or ethnicity,[5] and is incurable.[6] The CRPD defines discrimination on the basis of disability as

> any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.[7]

The definition adopted by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa is similar to the CRPD definition in form and context.[8]

Against this backdrop, the CRPD calls for the mainstreaming of disability issues as an integral part of relevant strategies of sustainable development.[9] Disability mainstreaming is a strategy through which concerns, needs and experiences of persons with disability are made an integral part or dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and social spheres so that persons with disability benefit equally and inequality is not perpetuated.[10]

A holistic approach to the reading of the Persons with Disabilities Act, the CPRD and the Protocol to the African Charter on Human

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4 This is as defined by the Human Rights Council Report A/HRC/24/57, para 10.

5 International Bar Association, *Waiting to disappear: International and regional standards for the protection and promotion of the human rights of persons with albinism*, June 2017.

6 Under the Same Sun, *Children with albinism and the right to health: Summary report on Tanzania with implication for other parts of sub-Saharan Africa*, 31 August 2021, 2.

7 Convention on the Rights of Persons with Disabilities, 13 December 2006, Article 2.

8 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, 29 January 2018, Article 1.

9 Convention on the Rights of Persons with Disabilities, Preamble. See also, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 4. Persons with Disabilities Act, Amendment Bill 2020, Section 2.

10 Ministry of Labour and Social Protection, 'National Disability Mainstreaming Strategy (2018-2022); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities on 27 April 2022.

and Peoples' Rights on the Rights of Persons with Disabilities in Africa makes it clear that individuals with albinism are indeed persons with disabilities. Therefore, any form of discrimination meted on them on the basis of their skin colour constitutes discrimination since it is based on their disability. To this end, the International Bar Association reports that there is a correlation between discrimination and the relative contrast in skin pigmentation of persons with albinism to that of the general community.[11]

Part I of this article is the introduction that defines discrimination as well as discrimination based on disability. Part II entails the various national and international laws that provide for rights of persons with disabilities and discusses the rights to dignity, freedom from discrimination, education, and employment. Part III evaluates the connection between ignorance and discrimination as factors that lead to the violation of other fundamental rights and freedoms of persons with albinism. Part IV of this article discusses how discrimination due to ignorance and stereotypes denies persons with albinism the enjoyment of the rights to human dignity, education and employment. Part V of this paper illustrates the position regarding the protection of the rights of persons with albinism in Kenya, and goes ahead to discuss steps taken by the government and the relevant agencies. Part VI makes recommendations, and proposes the way forward while Part VII gives a conclusion.

Given the limited availability of data and in-depth studies based on field research on the topic,[12] this paper does not aim to provide a final analysis of the issue but rather, it seeks to be indicative by presenting plausible root causes based on available data, and their analysis in order to facilitate subsequent conclusive work on the subject. It is important to note that throughout this article, persons with albinism are considered part of persons with disabilities.

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11 International Bar Association, *Waiting to disappear: International and regional standards for the protection and promotion of the human rights of persons with albinism*, June 2017.

12 International Labour Organisation, 'Inclusion of people with disabilities in Kenya', October 2009.

2. The domestic and international legal framework on the rights of persons with disabilities

2.1 The right to human dignity

The right to human dignity stipulates that one is worthy or deserving of respect by virtue of being human.[13] Dignity is intrinsic to each person, and it comprises of the deeply personal understanding we have of ourselves and our worth as individuals in our material and social context.[14] Aloy Ojilere and Muhammad Saleh observe that a meaningful life is well lived with dignity and when dignity is lost, human life becomes virtually worthless.[15] Under the Constitution, every person including a person with albinism has inherent dignity and the right to have their dignity respected and protected.[16] Notably, human dignity is a principle that must be taken into consideration while interpreting the Bill of Rights,[17] and in limiting the enjoyment of all other rights and fundamental freedoms.[18]

The right to inherent human dignity is a very important right since under the 2010 Constitution; the purpose of recognising and protecting human rights and fundamental freedoms is preserving the human dignity of individuals.[19] This undoubtedly applies to persons with albinism. Pursuant to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, state parties have an obligation to take all appropriate and effective measures, including policy, legislative, administrative, institutional and budgetary

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13 Jack Donelly, 'Human dignity and human rights: Swiss initiative to commemorate the 60th anniversary of the UDHR,' June 2009.

14 Edwin Cameron, 'Dignity and disgrace; Moral citizenship and constitutional protection', Concourt.org.za, 28 June 2012,

15 A Ojilere, Musa M Saleh, 'Violation of dignity and life: Challenges and prospects for women and girls with albinism in Sub-Saharan Africa' 1(1) *Journal of Human Rights and Social Work* (2019).

16 Constitution of Kenya (2010), Article 28.

17 Constitution of Kenya (2010), Article 20(4).

18 Constitution of Kenya (2010), Article 24(1).

19 Constitution of Kenya (2010), Article 19(2).

steps, to ensure the respect, promotion, protection and fulfilment of the rights and dignity of persons with disabilities.[20]

Article 15 of the CRPD also speaks against the degrading treatment of persons with disabilities. It asserts that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.[21] Besides the two authorities discussed above, the Universal Declaration of Human Rights (UDHR) calls upon all human beings to act towards one another in the spirit of brotherhood since all human beings are born free and equal in dignity and rights.[22] The UDHR obligates the state and the international community to promote the realisation of rights that are indispensable to a person with disability's dignity and the free development of their personality.[23]

2.2 Freedom from discrimination

When it comes to persons with albinism, the Constitution of Kenya, 2010 (2010 Constitution) provides that no person shall discriminate against another directly or indirectly on any ground including colour or disability.[24] Article 27 of the Constitution further affirms that equality includes the full and equal enjoyment of all rights and fundamental freedoms by all persons including those living with albinism.[25] The 2010 Constitution, the UDHR, the African Charter on Human and Peoples' Rights, the CRPD, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa provide for the freedom from non-discrimination on any ground including colour and disability.[26]

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20 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 4.

21 Convention on the Rights of Persons with Disabilities, Article 15.

22 Universal Declaration of Human Rights 1948, Article 1.

23 Universal Declaration of Human Rights, Article 22.

24 Constitution of Kenya (2010), Article 27(4), (5).

25 Constitution of Kenya (2010), Article 27. See Universal Declaration of Human Rights, Article 2.

26 Constitution of Kenya (2010), Article 10(2)(b), see Convention on the Rights of Persons with Disabilities, Article 3; see also Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 3.

According to the CRPD, discrimination based on disability is a violation of the inherent human dignity and worth of the person living with albinism.[27] The African Charter on Human and Peoples' Rights props up this right since it prohibits discrimination based on colour when it comes to persons with albinism.[28] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa provides that every person living with a disability shall be entitled to the enjoyment of rights and freedoms without distinction of any kind on any ground including colour or any status.[29] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa further proffers that discrimination based on disability includes the denial of reasonable accommodation.[30] One outstanding feature of the UDHR is that it reiterates protection against discrimination, and any incitement to such discrimination.[31]

The CRPD in Article 4 lists the obligation of states when it comes to promoting the full realisation and enjoyment of all human rights by persons with albinism without discrimination on the basis of disabilities. These obligations include: the adoption of appropriate measures in administration and legislation to ensure the protection of all rights of persons living with disabilities, adoption of all appropriate measures to end discrimination by modifying or abolishing existing laws, regulations, or customs and practices that promote discrimination on the basis of disability. The obligations also include: taking into account the protection and promotion of all rights of persons with disabilities in all policy and programmes on development, promoting the training of professionals and staff in the rights of persons with disabilities to provide better assistance and services to them, and promoting the availability and use of new technologies including information on mobility aids,

27 Preamble of the Convention on Persons with Disabilities.

28 African Charter on Human and Peoples' Rights, Article 2, 5.

29 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 5(1).

30 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 1.

31 United Declaration of Human Rights, Article 7.

devices and assistive technologies, suitable for persons with disabilities while giving priority to technology at an affordable cost.[32]

The Convention further submits that an individual has a responsibility to strive for promotion of human rights for all persons.[33]

2.3 The right to education

The right to education is a globally recognised overarching right.[34] Various instruments encompass the right to education. At the domestic level, the 2010 Constitution, the Basic Education Act No 14 of 2013, the Children Act No 29 of 2022; and at the international level, the CRPD and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa. Kenya is party to both international instruments and is therefore under obligation to adhere to their provisions.

Under the 2010 Constitution, all persons including those living with albinism have a right to free and compulsory basic education.[35] Article 54 of the 2010 Constitution entitles persons with albinism to the right to access educational institutions for persons with disabilities that are integrated in society.[36] The Constitution mandates the state to take measures that guarantee the youth living with albinism the right to education through the access of relevant education and training.[37] The Constitution further reiterates that everyone shall enjoy the rights guar-

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32 Convention on the Rights of Persons Living with Disabilities, Article 4.

33 Preamble of the Convention on the Rights of Persons with Disabilities.

34 T Mwoma, 'Education for children with special needs in Kenya: A review of related literature' 8(28) *Journal of Education and Practice* (2017) 188-200. See also Malasi Nyali Maghuwa Flora, Samuel Wanyonyi Juma 'The role of educational assessment resource centres in promoting inclusive education in Kenya' 7(1) *International Journal of Science and Research*, 885-889.

35 Constitution of Kenya (2010), Article 43(1)(f), Article 53(b).

36 Constitution of Kenya (2010), Article 54(1)(b).

37 Constitution of Kenya (2010), Article 55(a), see Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 29(2).

anteed in the Bill of Rights to the greatest extent,[38] and such rights shall not be limited except through the law.[39]

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa also affirms that persons with disabilities have the right to education.[40] According to the Protocol, this right also encompasses free, quality and compulsory basic (primary) and secondary education, and access to general tertiary education, vocational training, adult education and lifelong learning by persons with disabilities.[41] The CRPD also recognises the right to education of persons with disabilities and goes ahead to provide that the education system should ensure the development of persons with disabilities in terms of their personality, talents, creativity as well as mental and physical abilities, to their fullest potential.[42] Undoubtedly, these guarantees also cover persons with albinism.

On its part, besides reiterating the right of every child including those living with disabilities to free and compulsory education, the Basic Education Act adds that persons with disabilities should not be denied admission to education institutions due to their disability.[43] Importantly, the Persons with Disabilities Act underscores the right of persons with disabilities to acquire substantial learning in any course provided they have the ability.[44]

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38 Constitution of Kenya (2010), Article 20(2).

39 Constitution of Kenya (2010), Article 24.

40 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 16(1),(2).

41 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 16(3)(a),(b).

42 Convention on the Rights of Persons with Disabilities, Article 24(1)(b).

43 Basic Education Act, Section 34(2), Persons with Disabilities Act (No 14 of 2003), Section 18(1).

44 Persons with Disabilities Act (No 14 of 2003), Section 18(1). See also, Convention on the Rights of Persons with Disabilities, Article 24(2)(a); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 16. The right to free and compulsory education is also provided under the Constitution and the Persons with Disabilities Act.

The state also has an obligation of ensuring that persons with disabilities can access inclusive, quality and free primary and secondary education in the communities in which they live.[45] This obligation comes with the need to support them through the provision of materials and support necessary for study. In line with this, the Basic Education Act points out that the national government should provide infrastructure, learning and teaching equipment, and appropriate financial resources to facilitate the right to education by students with disability.[46]

Under state responsibility, the cabinet secretary in charge of education should provide every learning institution with special needs learners with appropriately trained teachers, infrastructure, learning materials and equipment suitable for them.[47] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa adds that the state responsibility encompasses the obligation of training education professionals and service providers on how to educate and interact with children with specific learning needs.[48] The CPRD also adopts this position and confers the state with the obligation of employing teachers, including teachers with disabilities who are qualified in sign language and braille.[49]

In support of the above discussion, the CPRD places an obligation on the state to ensure the provision of reasonable accommodation to facilitate enjoyment of the right to education by persons with disabilities.[50] Reasonable accommodation is any means necessary or any appropriate modifications needed in a particular case to ensure that persons with disabilities enjoy or exercise their human rights and freedoms on

45 Convention on the Rights of Persons with Disabilities, Article 24(2)(b).

46 Basic Education Act (No 14 of 2013), Section 39(e).

47 Basic Education Act (No 14 of 2013), Section 44(4); see also, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 16(h).

48 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 16(i).

49 Convention on the Rights of Persons with Disabilities, Article 24(4).

50 Convention on the Rights of Persons with Disabilities, Article 24(2)(c).

an equal basis with others.[51] Such modifications include enlarging print of reading materials, allowing students to use assistive technology or allowing a student more time to write tests and exams.[52]

In addition to providing support to facilitate the right to education of persons with disabilities, among whom include persons with albinism, the cabinet secretary in charge of education may establish special and integrated schools for learners living with albinism upon consultation with both the national and county education boards.[53] In cases where there are no special schools for such learners, educational institutions should take into account the special needs of persons with disability by considering the entry requirements, pass marks, curriculum examinations, class schedules, use of school facilities, and physical education requirements.[54] To underscore the foregoing, the cabinet secretary in charge of education should establish regulations that guarantee the learning and progression of learners with disabilities through the education system.[55] According to the Basic Education Act, learners with special needs include those with visual impairment therefore, learners with albinism fall under this category.[56]

Unlike the other authorities discussed above, the Basic Education Act also extends the obligation to guarantee the right to education of persons with disabilities to parents or guardians of such learners. In particular, it states that the parents or guardians of such learners shall ensure they present them to school for admission[57] and ensure that their children attend school regularly as pupils or learners.[58] Those who fail, commit an offence and are liable to a fine not exceeding Kshs 100,000,

51 Convention on the Rights of Persons with Disabilities, Article 2.

52 UNICEF, 'Inclusive education: Understanding Article 24 of the Convention on the Rights of Persons with Disabilities', September 2017.

53 Basic Education Act (No 14 of 2013), Section 28(1)(d).

54 Persons with Disabilities Act (No 14 of 2013), Section 18(2).

55 Basic Education Act (No 14 of 2013), Section 45(b).

56 Basic Education Act (No 14 of 2013), Section 44(3).

57 Basic Education Act (No 14 of 2013), Section 31(1).

58 Basic Education Act (No 14 of 2013), Section 30(1).

imprisonment for one year or both.[59] Finally, the statute reiterates that learners should not be denied admission to public schools.[60]

2.4 The right to employment

The 2010 Constitution entitles every person to the right to fair labour practices.[61] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa tenders that this right includes the right to decent, just and favourable conditions of work, protection against unemployment, protection against exploitation and protection from forced or compulsory labour.[62] The Persons with Disabilities Act stipulates that persons with disabilities who qualify as employees are entitled to the same terms, conditions, privileges, benefits, compensation, fringe benefits, incentives, and allowances as those enjoyed by qualified able-bodied employees.[63] This statute is also clear in prohibiting discrimination against persons with disabilities by employers. In particular, it encompasses instances under which an employer should not discriminate against a person with disability. These instances include: in the advertisement and recruitment of persons for employment, the recruitment for employment, the creation, classification or abolition of posts, the determination or allocation of wages, salaries, pensions, accommodation, leave or other benefits, the choice of persons for posts, training, advancement, apprenticeships, transfer, promotion or retrenchment and in the provision of facilities connected or related to employment.[64]

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59 Basic Education Act (No 14 of 2013), Section 30(2),(3).

60 Basic Education Act (No 14 of 2013), Section 34(5).

61 Constitution of Kenya (2010), Article 41.

62 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 19(1).

63 Persons with Disabilities Act (No 14 of 2003), Section 12(2).

64 Persons with Disabilities Act (No 14 of 2003), Section 15. See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 19(2)(a).

One other notable feature of the Persons with Disabilities Act is that it grants the person with disability the right to seek redress for any acts of discrimination meted out on them by the employer.[65]

The Employment Act also cements the right to employment and fair labour practices of persons with albinism. Under the Act, no employer shall discriminate against an employee or prospective employee who is a person with disability on any ground including colour and disability.[66] The Act also defines employees to include those applying for employment.[67] Of particular importance is that the Employment Act defines disability as any impairment that impacts adversely on a person's social and economic participation,[68] and goes ahead to reiterate that such a person shall not be denied access to opportunities for suitable employment.[69] However, the statute notes that any affirmative action taken to promote equality and eliminate discrimination will not amount to discrimination.[70]

Courts have also addressed the right to employment. For instance, in *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Association for the Physically Disabled of Kenya*,[71] while addressing the right to work and seek employment by persons with disabilities, the Court reiterated that the State has an obligation to safeguard and promote the realisation of the rights of persons with disabilities. Additionally, in *Fredrick Gitau Kimani v Attorney General & 2 Others*,[72] the petitioner being a person with disabilities also successfully challenged the violation of his labour rights by the State in accordance with the Constitution and the Persons with Disabilities Act. In this case, the Respondent had forced the Petitioner into early retirement at the age of

65 Persons with Disabilities Act (No 14 of 2003), Section 15(3).

66 Employment Act (2007), Section 5(3).

67 Employment Act (2007), Section 5(7).

68 Employment Act (2007), Section 2.

69 Employment Act (2007), Section 2.

70 Employment Act (2007), Section 5(4).

71 *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Association for the Physically Disabled of Kenya* (2015) eKLR.

72 *Fredrick Gitau Kimani v Attorney General and 2 others* (2012) eKLR.

55 years, instead of the age of 60 years as Section 15(6) of the Persons with Disabilities Act provides. Upon the determination of the matter, the Court agreed that the petitioner had been discriminated on the basis of disability and went ahead to grant him compensation.

Aside from the legislations relied on above, courts have also been at the forefront in addressing issues regarding persons with disabilities. Courts have ruled that for one to benefit and be recognised as a person with disability, they must be registered with the National Council for Persons with Disabilities. In the case of *Esau Rodgers Mumia v Central Bank of Kenya*, the Petitioner, a person with disability was subjected to early retirement at the age of 55 years instead of the stipulated retirement at the age of 60 years as is provided by statute. While addressing the rights of the Petitioner the Employment and Labour Relations Court held that for one to benefit from the rights and privileges under the Persons with Disabilities Act, then they ought to register with the National Council for Persons with Disabilities as provided by Section 7 of the Persons with Disabilities Act.[73] The Employment and Labour Relations Court further went on to add that disability as defined in the Persons with Disabilities Act is not an internal matter between an employee and their employer.[74]

In the matter of *Suleman Angolo & another v Executive Officer Teachers Service Commission*, the Court stated that persons with disabilities enjoy certain rights such as tax exemption as provided in the Persons with Disabilities (Income Tax Deductions and Exemptions) Order.[75] The Court reiterated that one must register with the National Council for Persons with Disabilities to enjoy such benefits.[76]

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73 *Esau Rodgers Mumia v Central Bank of Kenya* (2017) eKLR.

74 *Esau Rodgers Mumia v Central Bank of Kenya*.

75 *Suleman Angolo and another v Executive Officer Teachers Service Commission* (2015) eKLR.

76 *Suleman Angolo and another v Executive Officer Teachers Service Commission*.

3. The interplay between discrimination and ignorance

In many cases discrimination results from negative attitudes, perception, misconception, misunderstanding and lack of awareness.[77] A persistent lack of awareness and ignorance about the condition has contributed immensely to stigmatisation, stereotyping and prejudice against persons with albinism.[78] The myths and misconceptions that arise from ignorance provide a rationale for discriminating against them.[79] According to the Albinism Society of Kenya, ignorance by law and policy makers, the public, and the community about albinism also sustains discrimination against person with albinism.[80]

The Kenya National Commission on Human Rights submits that the Kenyan government recognises that discrimination against persons with disabilities is entrenched in stereotypes prevailing in Kenyan society.[81] Such stereotypes and ignorance are said to lead to cases in which other persons with disabilities develop perceptions that those with albinism are not disabled enough to be covered in their programmes, pushing persons with albinism into a dilemma of ability against disability.[82]

The UN Independent Expert on the enjoyment of human rights by persons with albinism agrees that lack of public education on albinism is closely linked to widespread myths regarding the condition.[83] The Independent Expert adds that there is need to establish initiatives for

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77 United Nations, 'Introducing the United Nations Convention on the Rights of Persons with Disabilities: Toolkit on disability in Africa', *United Nations. Org*, 2 May 2022.

78 Ikponwosa Ero, Samer Muscati, Anne-Rachelle Boulanger and India Annamanthadoo, *People with albinism worldwide: A human rights perspective*, 2021, 24.

79 UN Independent Expert on the Enjoyment of Human Rights by Persons with Albinism, *Applicable international human rights standards and related obligations addressing the issues faced by persons with albinism*. UN Doc A/72/131, 14 July 2017.

80 Albinism Society of Kenya, *Albinism Report 2019*, 4.

81 Kenya National Commission on Human Rights, *Compendium on Convention on the Rights of Persons with Disabilities*, 2016.

82 Albinism Society of Kenya, *Albinism report 2019*, 4.

83 Report of the Independent Expert on the Enjoyment of Human Rights by Persons with Albinism, *A preliminary survey on the root causes of attacks and discrimination against persons with albinism*, A/71/255, 29 July 2016.

sustained awareness raising among the public.[84] Even where the laws address disability rights, a lack of societal awareness about albinism renders these guarantees ineffective or meaningless despite the existence of cogent laws that guarantee all persons the enjoyment of fundamental rights and freedoms.[85]

The lack of understanding, misinformation and myths on albinism fuels discrimination against children with albinism. Ikponwosa Ero posits that in some cases, the parents of children with albinism may have difficulty accepting them or fully embracing them as their children.[86] In addition, adults fuel the exclusion of children with albinism by warning their children not to interact with them.[87] In other cases, boys with albinism are expected to tolerate bullying and discrimination 'as men'.[88]

The Albinism Society of Kenya notes that ignorance and lack of awareness about albinism has led to the emergence of myths in some communities in Kenya such as the Maasai and the Luhya. These communities believe that women who give birth to children with albinism are unfaithful and have children out of wedlock with white men.[89] Grace Nzomo, a young person living with albinism and a psychology graduate, supports this claim and adds that it is common for children with albinism in such communities to end up in single parent families, as the father disowns the mother alleging that the wife had been unfaithful with a white man.[90]

From the above conceptualisation, it is necessary to point out that discrimination and ignorance are intertwining factors. It is necessary to take steps to root out ignorance and existing stereotypes in society in order to give effect to the freedom from discrimination.

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84 UN Independent Expert on the Enjoyment of Human Rights by Persons with Albinism, *Applicable international human rights standards and related obligations addressing the issues faced by persons with albinism*.

85 Ero, Muscati, Boulanger and Annamanthadoo, *People with albinism worldwide*.

86 Ero, Muscati, Boulanger and Annamanthadoo, *People with albinism worldwide*.

87 Ero, Muscati, Boulanger and Annamanthadoo, *People with albinism worldwide*, 25.

88 Ero, Muscati, Boulanger and Annamanthadoo, *People with albinism worldwide*, 25.

89 Albinism Society of Kenya, *Albinism Report 2019*.

90 Aidex Voices, 'Living positively with albinism in Kenya: Grace's story,' 14 June 2018.

4. Discrimination as a plausible link to the violation of other fundamental rights and freedoms

Black's Law Dictionary defines the term 'violation' as an infraction or breach of law, or the contravention of a right or duty.[91] Lawrence Mute asserts that persons living with disabilities contend that it is society rather than their bodies that makes them disabled. To them, it is not the disabled person that bears the pathology nor is it the diseased ear, eye, leg or mind that disables but rather, it is society that carries the pathology and disables by its stigma, prejudice and discrimination.[92] The Albinism Society of Kenya agrees in its 2019 report that indeed, persons with albinism in Kenya continue to face stigma, discrimination, abuse, dehumanisation and brutal killings. This is despite significant progress in the development of a progressive legislative and policy framework to address the economic, social, cultural, political and civil rights of persons with disabilities.[93]

4.1 The right to human dignity

The claim of human dignity is that simply being human makes one worthy or deserving of respect.[94] According to the Kenya National Commission on Human Rights, even the persons with albinism who manage to beat the odds in society are not spared from public derision.[95] Not even those in prominent political positions are spared! For instance, former nominated Senator Isaac Mwaura who is a person with albinism is one such victim who experienced the violation of his right to inherent dignity because of his different skin colour. In 2021, he was verbally attacked by fellow legislator Mr Junet Mohammed in a statement made at

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91 *Black's Law Dictionary*, 8th edition.

92 Lawrence M Mute, 'Difference and distinct identities: Are constitutional provisions for persons with disabilities being implemented?' *The Elephant.info*, 20 August 2020.

93 B Rohwerder, *Disability inclusive development: Kenya situational analysis, June 2020 update,* Inclusive Futures/Institute of Development Studies, 2020.

94 Donelly, 'Human dignity and human rights'.

95 KNCHR and others, 'The human rights of persons with albinism in Kenya. A report submitted to the UN Office of the High Commissioner for Human Rights', 2014, para 26.

a political rally, where the legislator claimed that Senator Mwaura had bleached his skin in order to be nominated to Parliament (to represent persons with disability).[96] The Kenya National Commission on Human Rights condemned the comments that elicited public outcry stating that the comments not only ridiculed Senator Mwaura's albinism but are also the epitome of the stigmatisation of disability.[97] The Commission was quick to note that such comments indeed violated Article 54 of the Constitution of Kenya, 2010 that requires the treatment of persons with disabilities with dignity and respect and requires them to be addressed and referred to in a manner that is not demeaning.[98]

The Commission also reiterated the fact that leaders have a crucial role in ending stigma and discrimination, and that it was very unfortunate that a person in a position of power could perpetuate such vices against persons living with disabilities. It also added that such negative utterances could evoke dehumanisation, negative attitudes, and violence against these individuals.[99] Through a press statement, the Commission condemned the discriminatory remarks by the legislator and added that such remarks were not only an affront to the person and character of Senator Mwaura but also an abuse on the dignity of all persons living with disabilities.[100]

Following the outcry elicited by his comments, Mr Mohammed apologised to all persons with albinism but still went ahead to state that his comments were directed at the rotten character of Isaac Mwaura who he said exploited his disability for personal gain and the incitement of violence.[101]

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96 Mercy Asamba, 'Suna East MP Junet criticised over remarks against Senator Mwaura' *The Standard*, 7 February 2021.

97 Kenya National Commission on Human Rights (KNCHR), 'Press statement in response to Hon MP Junet Mohamed's disability comments against Senator Dr Isaac Mwaura', 9 February 2021.

98 KNCHR, 'Press statement in response to Hon MP Junet Mohamed'.

99 KNCHR, 'Press statement in response to Hon MP Junet Mohamed'.

100 KNCHR, 'Press statement in response to Hon MP Junet Mohamed'.

101 Star Reporter, 'Junet under fire over derogatory remark on Isaac Mwaura' *The Star*, 7 February 2021.

In the same year 2021, KTN NEWS featured former Jubilee Party Vice Chairman Mr David Murathe, on live television claiming that albinism was not a disability and it should not be exploited for political gain.[102] Mr Murathe stated that they will look into the legal definition of persons living with disability in future.[103] Following this statement, the Albinism Society of Kenya called out Mr Murathe and stated that Senator Mwaura is a role model and mentor to many persons with disabilities and questioning his disability subsequently questions the disability of all persons with albinism and those that he identifies with and represents.[104]Although the above cases show that influential persons in the society are among the most ignorant persons when it comes to rights of persons with albinism, the society has made some effort in calling out such cases.

In addition to the above cases, persons with albinism have been subjected to attacks that have deprived them of their dignity as human beings. To substantiate this point, the Expert on the enjoyment of human rights by persons with albinism, Ms Ero observes that there is need for protection measures in some parts of Kenya such as Migori, Taita Taveta and other border counties where attacks on persons with albinism remain high.[105] The Expert added that in rural areas stereotypes have intensified the attacks.[106] In light of the observations by the Independent Expert, the Albinism Foundation of East Africa, the Kenya National Commission on Human Rights and other albinism rights advocacy groups, in a joint statement note that that several attacks against persons with albinism have been

[102] Gordon Osen, 'Albinism lobby wants Murathe to apologize over remark on Mwaura' *The Star,* 22 May 2021.

[103] Osen, 'Albinism lobby wants Murathe to apologize over remark on Mwaura'.

[104] Osen, 'Albinism lobby wants Murathe to apologize over remark on Mwaura'; see also Wycliffe Nyamasage, 'Albinism Society calls out Murathe over offensive TV utterances' *KahawaTungu,* July 2021.

[105] UN News, 'Kenya makes progress in supporting people with albinism, but 'much remains to be done' says UN expert' *UN News,* 18 September 2018.

[106] UN News, 'Kenya makes progress in supporting people with albinism, but 'much remains to be done' says UN expert

documented.[107] This report points out that in many cases attacks go unreported.[108]

Among the documented attacks, persons with albinism were murdered for their body parts pursuant to the beliefs that such parts could be used to generate wealth and bring luck.[109] The report added that in other cases, these body parts are sold in the black market for thousands of dollars.[110] Esther Moraa, a four-month old baby was killed by the mother due to threats of divorce from her husband who termed the baby as a bad omen and a disgrace to the family.[111] On the other hand, two other victims, Margaret and Joyce, were abducted, murdered and parts of their bodies chopped off.[112] Further, other persons with albinsim were attacked but they managed to escape.[113] The report documents the stories of Robinson Mukwahana and A Bettlyn, who were abducted by people who tried to sell them but were unsuccessful.[114] These findings highlight that the struggle of persons with albinism to live in an equal and safe society in Kenya remains far from achievement.

4.2 The right to education

In her report, the Independent Expert on the enjoyment of human rights by persons with albinism observes there still exist challenges that hinder the enjoyment of the right to education of children with albinism despite the guarantee of access to education in the same manner as other children.[115] While considering cases from Kenya and other Af-

[107] Albinism Foundation of East Africa (AFEA), Albinism Society of Kenya (ASK), Kenya National Commission on Human Rights (KNCHR), Under the Same Sun (USS), 'The human rights of persons with albinism in Kenya; Universal Periodic Review', June 2014, *Repository on Disability Rights in Africa(RODRA)*, July 2022.

[108] AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

[109] AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

[110] AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

[111] AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

[112] AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

[113] AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

[114] AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

[115] Report of the Independent Expert on the enjoyment of human rights by persons with albinism, Women and children impacted by albinism, Human Rights Council (43rd

rican countries, the Independent Expert also notes that when it comes to education, children with albinism face rejection by school authorities based on the misconception that they are unable to study in mainstream schools.[116] Several studies also point out that children with disabilities have not been 'fully integrated into the education system in Kenya' despite policies and other legal instruments supporting inclusive education.[117]

This assertion is also affirmed by the Albinism Society of Kenya which reports that learners with albinism are sometimes turned away from schools due to assumptions held by the school community that they are all blind, and are thus designated to learn in special schools for the blind and to use braille. This affects their employability and productivity.[118] The Albinism Society of Kenya further adds that at present, around 70% of Kenyan children with albinism attend schools for the visually impaired where both those who are blind and those who are not are forced to learn braille.[119] Grace Nzomo, a person with albinism adds that using braille while doing mathematics during her years in school was like teaching the Greek language to non-speakers.[120] Although she is not blind, she adds that the forceful use of braille made her feel blind.[121]

The Independent Expert further reports that in some cases teachers lack sufficient knowledge on how to provide reasonable accommodation or a generally supportive environment for children with albinism. Furthermore, in other cases teachers receive training on how to support children with visual impairments only as opposed to supporting chil-

Session), A/HRC/43/42, 24 December 2019.

116 UN News, 'Kenya makes progress in supporting people with albinism, but 'much remains to be done' says UN expert'.

117 T Mwoma, 'Education for children with special needs in Kenya: A review of related literature' 8(28) *Journal of Education and Practice,* (2017) 188-200. See also Malasi Nyali Maghuwa Flora, Samuel Wanyonyi Juma 'The role of educational assessment resource centres in promoting inclusive education in Kenya' 7(1) *International Journal of Science and Research*, 885-889.

118 Albinism Society of Kenya, *Albinism Report 2019,* 2.

119 Aidex Voices, 'Living positively with albinism in Kenya'.

120 Aidex Voices, 'Living positively with albinism in Kenya'.

121 Aidex Voices, 'Living positively with albinism in Kenya'.

dren on the entire spectrum of albinism. Ashley Julia Robertson posits that it takes only a trained eye to observe the challenges faced by these children and as such, regular teachers may not realise that the child is struggling.[122]

In addition to the above instances, in some cases families neglect the education of children with albinism as they see their child as a source of shame and believe their education is unnecessary.[123] Olanike Adelakun and Maryann Ajayi posit that in some cases African parents shy away from sending their children with albinism to schools due to the erroneous belief that children with albinism cannot compete successfully with their peers and therefore cannot prosper in life.[124]

Grace Nzomo adds that most children with albinism remain hidden from society causing them to develop low self-esteem. This affects their development and progress as individuals, in school and in other fields of life.[125]

On tertiary education, there is little data with regards to persons with albinism. Ikponwosa Ero attributes this to discrimination and lack of reasonable accommodation that contributes to poor academic performance, demotivation, low school attendance and high dropout rates among learners living with albinism, so much so that many do not get to the tertiary level of education.[126]

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122 Julia Robertson Ashley, 'Improving teacher and caregiver strategies for meeting the special needs of children with the visual disability of ocular albinism or oculocutaneous albinism (birth to age 14)' A practicum II report presented to the Ed.D. program in early middle childhood in partial fulfilment of the requirements for the Degree of Doctor of Education, (1992).

123 AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

124 Olanike S Adelakun, Maryann O Ajayi, 'Eliminating discrimination and enhancing equality: A case for inclusive basic education rights of children with albinism in Africa' 29(2) *Nigerian Journal of Medicine* (April-June 2020), citing RJ Gaigher, PM Lund, E Makuya, 'A sociological study of children with albinism at a special school in the Limpopo province' 25 *Curatonis* (2002) 4-11.

125 Aidex Voices, 'Living positively with albinism in Kenya'.

126 Ero, Muscati, Boulanger and Annamanthadoo, *People with albinism worldwide*, 24.

From the discussion above, two facts come out clearly. First is that ignorance is deeply entrenched in the society leading to discrimination from parents and the society in guaranteeing the right to education of persons with albinism. Second, the lack of training for teachers on how to handle learners living with albinism makes such learners vulnerable to discrimination in the learning institutions.

4.3 The right to employment

Rohwerder submits that despite significant progress in the development of policies and laws which recognise the right of persons with disabilities to work, their impact on the real situation of persons with disabilities access to work and employment opportunities has been minimal.[127] Some studies point out that in Kenya, the employment rate for persons with disabilities is about 1% compared to 73.8% for the general population.[128]

According to the Albinism Society of Kenya, persons with albinism continue to suffer double discrimination as employers assume that their capacity to deliver within the workplace is below par.[129] This has denied them equal opportunities for their economic empowerment. The Kenya National Commission on Human Rights adds that besides the discrimination on face value in the workplace, persons with albinism suffer discrimination in the education system that results in high dropout rates from school, which in turn leaves most of them unskilled and unequipped for jobs.[130] In a study of 30 people with disabilities, almost all cited their inability to attain higher education as a major factor limiting

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127 Rohwerder, 'Kenya situational analysis: Inclusion works' (2020) citing A Kingiri, W Khaemba, J Olenja, A Gitonga, W Oloo, E Nyariki & S Wafula, 'Policy brief: The labour market situation in Kenya - promoting right to work and employment for persons with disabilities' (2017).

128 ID Ebuenyi, AJ van der Ham, JFG Bunders-Aelen & BJ Regeer, 'Expectations management: Employer perspectives on opportunities for improved employment of persons with mental disabilities in Kenya' 42(12) *Disability Rehabilitation* (June 2020), 1687-1696.

129 Albinism Society of Kenya, *Albinism report 2019*, 2.

130 AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

their access to employment.[131] Interestingly, some people who incurred disability after they had received their education felt that the education enabled them secure jobs.[132]

Further, the Kenya National Commission on Human Rights posits that in employment opportunities, other persons with disabilities receive more consideration than persons with albinism.[133] This discrimination flows from the fact that most employers do not regard persons with albinism as persons with disabilities.[134] Such discrimination in the workplace and in school leaves them only with the option of menial jobs which subject them to hostile conditions such as sunlight or bright light, which in turn puts them at risk of skin cancer or sight impairment.[135] One of the notable myths that exists is that people with albinism are inferior and incapable of completing normal mental and physical tasks.[136] The Human Rights Council's Advisory Committee indicates that states should launch and sustain education and awareness campaigns aimed at combating the underlying causes of discrimination, which include stereotypes and misconceptions against people with albinism.[137]

5. Steps Kenya has taken so far: The status quo regarding persons with disabilities

Article 21 of the 2010 Constitution reiterates the government's duty to observe, respect, protect, promote, and fulfil rights and funda-

131 Rohwerder, *Kenya situational analysis, June 2020 update* citing MP Opoku, WM Mprah, JA Dogbe, JN Moitui, & E Badu, 'Access to employment in Kenya: The voices of persons with disabilities' 16(1) *International Journal on Disability and Human Development* (2016).

132 Rohwerder, *Kenya situational analysis, June 2020 update* citing A Kingiri, W Khaemba, J Olenja, A Gitonga, W Oloo, E Nyariki, S Wafula, 'Policy brief: The labour market situation in Kenya: promoting right to work and employment for persons with disabilities' (2017).

133 AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

134 AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

135 Albinism Society of Kenya, *Albinism report 2019*; see also AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

136 Ero, Muscati, Boulanger and Annamanthadoo, *People with albinism worldwide*. 24.

137 Ero, Muscati, Boulanger and Annamanthadoo, *People with albinism worldwide*. 24.

mental freedoms in the Bill of Rights. This obligation encompasses the government's commitment to the progressive realisation of the rights of all Kenyans including persons with disabilities.[138] In light of this, the Government is quick to note that following the progress made in the implementation of its obligations under the law concerning persons with disabilities, there has been a slow but noticeable improvement in public perception towards the treatment of persons with disabilities.[139]

The United Nations Independent Expert on the enjoyment of human rights by persons with albinism, Ikponwosa Ero, also welcomed some of Kenya's unique achievements, saying the country was set to become one of the leaders on the issue in the region.[140] The Independent Expert acknowledged Kenya's successes that include the allocation of a substantial annual budget geared towards encompassing specific measures for the protection of persons with albinism, who had historically been left out of key sectors such as health and education and had fallen prey to ritual attacks and consequent insecurities.[141] However, the Expert also noted that much remains to be done including undertaking an intense and widespread sensitisation campaign across the country, particularly in rural communities, to ensure that the conditions that create attacks and discrimination in the first place are dealt with.[142]

5.1 Domestic institutional schema with respect to persons with albinism

Under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, states parties are expected to establish or designate national mechanisms, including forming independent national institutions, to monitor the implemen-

138 Constitution of Kenya (2010), Article 21.

139 KNCHR, *Compendium on submissions to the Committee on the Rights of Persons with Disabilities* (2016).

140 OHCHR, 'Persons with albinism: Kenya on the way to becoming regional champion,' (2018), *United Nations Human Rights Office of the High Commissioner*, 7 May 2022.

141 OHCHR, 'Persons with albinism: Kenya on the way to becoming regional champion'.

142 OHCHR, 'Persons with albinism: Kenya on the way to becoming regional champion'.

tation of the rights of persons with disabilities.[143] To give effect to this provision Kenya has made key initiatives such as establishing the Kenya National Commission on Human Rights, the National Gender and Equality Commission, the National Council for Persons with Disabilities and the State Department for Social Protection.

5.1.1 Kenya National Commission on Human Rights (KNCHR)

The KNCHR was established pursuant to Article 59 of the 2010 Constitution as an independent commission and the principal institution of the state in ensuring compliance with human rights treaties and conventions.[144] Its functions include: promoting respect for human rights and developing a culture of human rights in the republic, monitoring, investigating and reporting on the observance of human rights in all spheres of life in Kenya, promoting the protection and observance of human rights in public and private institutions, receiving and investigating complaints about alleged abuses of human rights and taking steps to secure appropriate redress where human rights have been violated. Additionally, the KNCHR may institute investigations into allegations of violations of human rights on its own initiative or upon a complaint. Under this function, any person including a person with albinism has a right to complain to the Commission alleging that their right(s) or fundamental freedom(s) in the Bill of Rights has been denied, violated, infringed or is threatened.[145]

Against this backdrop, the Commission has made steps in discharging its functions of monitoring, investigating and reporting on the violation of rights of persons with albinism in Kenya. This is evidenced in Part III of this article which has cited some of the Commission's documented reports on various violations of the rights to dignity, employment and education of persons with albinism.[146] Further, in the dis-

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143 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Article 34(2).

144 Constitution of Kenya (2010), Article 59.

145 Constitution of Kenya (2010), Article 59(3).

146 AFEA, ASK, KNCHR, USS, 'The human rights of persons with albinism in Kenya.

charge of its function to promote respect for the rights of persons with albinism, the Commission prides itself in facilitating the inclusion of persons with albinism in the 2019 Kenya Population and Housing Census, which according to the Commission sets the stage for planning and intervention to advance the rights of persons with albinism.[147] Additionally, the Commission observes that it is collaborating with persons with albinism, their representative organisations, and other stakeholders towards the development of a Kenya Plan of Action to end attacks and other human rights violations targeting persons with albinism.[148] This plan falls in line with the recommendations of Ikponwosa Ero's and the African Commission on Human and Peoples' Rights of creating a brief but comprehensive national action plan to end violence and violations against persons with albinism.[149]

Going forward, the Commission calls upon the state, at both levels of government to increase public awareness on albinism and the human rights violations faced by persons with albinism.[150]

5.1.2 National Gender and Equality Commission (NGEC)

The National Gender and Equality Commission Act establishes NGEC as a successor to the Kenya National Human Rights and Equality Commission in the discharge of functions assigned to it pursuant to the 2010 Constitution.[151] Its functions include: to promote gender equality and freedom from discrimination in accordance with Article 27 of the 2010 Constitution, to monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in

147 KNCHR, 'Press Statement: Commemoration of International Albinism Awareness Day,' 13 June 2021.

148 KNCHR, 'Press Statement: Commemoration of International Albinism Awareness Day'.

149 UN News, 'Kenya makes progress in supporting people with albinism, but 'much remains to be done' says UN expert'.

150 KNCHR, 'Press Statement: Commemoration of International Albinism Awareness Day'.

151 National Gender and Equality Commission Act (2011), Section 3. See Constitution of Kenya (2010), Article 59(5).

> …all national and county policies, laws, and administrative regulations in all public and private institutions, to act as the principal organ of the state in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups….

This certainly includes persons with albinism.

Additionally, NGEC has a mandate of coordinating and facilitating the mainstreaming of issues of persons with albinism and advising the government on all aspects concerning this. The Commission also has the mandate of investigating on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination, coordinating and advising on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination, and preparation and submission of annual reports to Parliament.[152]

However, NGEC does not have adequate resources to do comprehensive audits and enforce the provisions of the law.[153] So far, there is little data reported on the progress made by the NGEC in facilitating protection and enjoyment of the rights of persons with albinism as it has majorly focused on addressing gender equality and non-discrimination.[154]

5.1.3 National Council for Persons with Disabilities (NCPWD)

Section 3 of the Persons with Disabilities Act establishes this body and its functions include:[155] registering persons with disabilities, providing to the maximum extent possible assistive devices, appliances and other equipment to persons with disabilities, making provisions for assistance to students with disabilities in the form of scholarships, loan programmes, fee subsidies and other similar forms of assistance in both public and private institutions. The Council also formulates and develops measures and policies designed to achieve equal opportunities for persons with disabilities by ensuring that they obtain education

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152 National Gender and Equality Commission Act (2011), Section 8.

153 Rohwerder, *Kenya situational analysis, June 2020 update*.

154 National Gender and Equality Commission, *2017-2018 annual report*.

155 Persons with Disabilities Act (2011), Section 3, 7.

and employment opportunities to the maximum extent possible. Furthermore, the Council formulates and develops measures and policies designed to co-ordinate services provided in Kenya for the welfare and rehabilitation of persons with disabilities and implements programmes for vocational guidance and counselling. In addition to these functions, the Council formulates and develop measures and policies designed to recommend measures to prevent discrimination against persons with disabilities, and formulate and develops measures and policies designed to put into operation schemes and projects for self-employment or regular or sheltered employment for the generation of income by persons with disabilities.[156]

In the discharge of its statutory functions, the Council has been implementing the National Persons with Albinism Sunscreen Support Programme that is currently providing sunscreen lotion to over 4000 persons with albinism.[157] This programme is designed to carry out awareness and offer lip care and after sun lotion and other services for all persons with albinism in the country which cushions them from the effects of harmful sunrays that cause skin cancer.[158]

In May 2022, the Kenya Medical Supplies Authority (KEMSA) and the National Council for Persons with Disabilities flagged-off a consignment of sunscreen agents worth KSh 54 million destined for more than 192 public health facilities, to address these needs of persons with albinism in 45 counties.[159] Speaking at the flag-off event, KEMSA Acting Chief Executive Officer (CEO), John Kabuchi said that KEMSA and the NCPWD have been ensuring that these sunscreen agents are delivered promptly to all health facilities, to ensure the comfort of persons with albinism.[160]

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156 Persons with Disabilities Act (2011), Section 3, 7.

157 National Council for Persons with Disabilities, 'Albinism support program' *National Council for Persons with Disability*, 29 April 2022.

158 National Council for Persons with Disabilities, 'Albinism support program'; Kenya Disability Resource, 'Kenya Government disability services,' *Kenya Disability Resource*, 1 May 2022.

159 Hamdi Mohamud, 'KEMSA flags-off sunscreen agents for persons living with albinism,' *Kenya News,* Friday 13 May 2022.

160 Mohamud, 'KEMSA flags-off sunscreen agents for persons living with albinism'.

One of the recommendations of the experts on the prevention of skin cancer is the provision of protective clothing and avoidance of prolonged exposure to the sun.[161] Besides providing skin care products to persons with albinism, the Council also provides them with protective clothing with the aim of preventing skin cancer.[162] The Council has also set aside funds to provide comprehensive eye care for all persons with albinism.[163] On this, the Council identified a service provider who will support it in providing comprehensive eye care for persons with albinism in the entire country.[164] The Council also pays for full eye check-up including the cost for eye glasses.[165]

Besides procuring sunscreen, body lotions and other assistive products, the NCPWD prides itself for developing the National Plan of Action on Accessibility for Persons with Disabilities, taking steps to review the Persons with Disabilities Act[166] and all other legislations affecting the rights of persons with disabilities, and the development of the Affirmative Action Policy for Persons with Disabilities.[167] Additionally, the Council has set aside a legal service department that provides professional legal services to persons with disabilities, relevant government ministries and departments, stakeholders and the general public with the aim of assisting the Council deliver on its statutory mandate.[168] This department serves persons with disabilities and the public on a walk-in-walk-out basis with the aim of protecting and promoting the interests of persons with disabilities.[169]

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161 Kenya Disability Resource, 'Kenya Government disability services'.

162 Kenya Disability Resource, 'Kenya Government disability services'.

163 Kenya Disability Resource, 'Kenya Government disability services'.

164 Kenya Disability Resource, 'Kenya Government disability services'.

165 Kenya Disability Resource, 'Kenya Government disability services'.

166 Persons with Disabilities Amendment Bill 2020.

167 National Council for Persons with Disabilities, 'Achievements of the Council' *National Council for Persons with Disability*, 4 June 2022.

168 Kenya Disability Resource, 'Kenya Government disability services'.

169 Kenya Disability Resource, 'Kenya Government disability services'.

5.1.4 State Department for Social Protection

Executive Order No 1 (14) of 2018 issued by the president created the State Department for Social Protection to coordinate the formulation of policies and legislation on disability and oversee the implementation of various disability development programmes and rehabilitative services among other social development programmes.[170] In the discharge of its mandate, the department developed a Disability Awareness Booklet with the aim of demystifying disability to reduce stigma and discrimination, and enhance social inclusion of persons with disabilities.[171] Additionally, this booklet aims to raise public awareness on the needs, aspirations and capacities of persons with disabilities in order to enhance their acceptance, participation and inclusion in society.[172]

Although this looks like step in the right direction, the mere publishing of laws does not guarantee legal awareness.[173] Arnold Nciko, notes that in fact many scholars posit that the rule of law could easily be brought to naught if the mere publication of laws is not taken a step further.[174]

5.2 Other measures taken by the state of Kenya

5.2.1 The National Development Fund for Persons with Disabilities

The National Development Fund for Persons with Disabilities (NDFPWD) supports the provision of assistive devices and services to persons with disabilities in Kenya to enable these individuals to function in society.[175] The Fund gives priority to those individuals requiring assistance to function in a learning, training or work environment.[176]

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170 The Presidency, 'Executive Order No 1 of 2018: Organisation of the Government of the Republic of Kenya', June 2018, Government Printer.

171 Ministry of Labour and Social Protection, *Disability awareness creation booklet*, 50.

172 Ministry of Labour and Social Protection, *Disability awareness creation booklet*, 50.

173 Arnold Nciko, 'Ignorance of the law is no defence: Street law as a means to reconcile this maxim with the rule of law,' 3(1) *Strathmore Law Review* (2018), 36.

174 Nciko, 'Ignorance of the law is no defence', 36.

175 Kenya Disability Resource, 'Kenya Government disability services'.

176 Kenya Disability Resource, 'Kenya Government disability services'.

Expensive items, such as cars and business equipment like sewing machines or laptops are not included.[177] In cases of expensive assistive devices, the individual is directed to ask their work place or education institution to contact the Fund Programme Office directly and make an application for equipment that can then be shared and accessed by multiple students or staff members with disabilities.[178] For assistive services, the funding given is used to train individuals working in an institution like a school or hospital in sign language.[179] The Fund also provides grants to community and self-help groups made up of persons with disabilities for economic empowerment and fund schemes.[180] These grants aim to help persons with disabilities gain self-sufficiency in generating income and enables them to access the loans required to grow their business.[181]

Besides providing support for assistive devices and economic empowerment, the Fund also provides financial support to persons with disabilities from primary school, secondary school, college, vocational training school and university.[182] These education grants aim to empower persons with disabilities by enhancing opportunities for them in education, training and rehabilitation institutions.[183] The Fund covers up to 75% of course fees but in exceptional circumstances, it may cover 100% of fees, if the applicant can provide additional evidence of extreme poverty.[184] The NDFPWD sends funding to the educational institution directly, not to the beneficiary. The funds may cover all levels of education except the doctorate level.[185]

177 Kenya Disability Resource, 'Kenya Government disability services'.
178 Kenya Disability Resource, 'Kenya Government disability services'.
179 Kenya Disability Resource, 'Kenya Government disability services'.
180 Kenya Disability Resource, 'Kenya Government disability services'.
181 Kenya Disability Resource, 'Kenya Government disability services'.
182 Kenya Disability Resource, 'Kenya Government disability services'.
183 Kenya Disability Resource, 'Kenya Government disability services'.
184 Kenya Disability Resource, 'Kenya Government disability services'.
185 Kenya Disability Resource, 'Kenya Government disability services'.

5.2.2 Job placement

Besides the National Development Fund for Persons with Disabilities, the government has also established a Job Placement Portal where persons with disabilities can access job vacancies some of which are from partners of the National Council for Persons with Disabilities.[186]

In addition to providing job opportunities, the career portal also contains special courses for persons with disabilities aimed at helping them improve and enrich their skills.[187] So far, over 1000 persons with disabilities have registered in the portal while over 15 corporate organisations have signed up to help provide employment opportunities for persons with disabilities.[188] Going forward, the NCPWD estimates that the portal would benefit over 3,000 persons of a working-age with disabilities.[189]

5.3 Steps taken by county governments

Counties are also at the forefront of promoting and protecting the rights of persons with disabilities. The Kisumu County Government, for instance, has enacted the Kisumu County Persons with Disability Act.[190] Besides the Act, the County Government has taken further steps such as creating a Youth, Women and Persons with Disability Fund, and ensuring the inclusion of persons with disabilities in trade funds.[191] Furthermore, there is a special delivery unit in the County that oversees the implementation of the CRPD and the Kisumu County Persons with Disability Act.[192] To this end, *Business Today* newspaper reports that Kisumu County government is a front-runner in the localisation of the

[186] Kenya Disability Resource, 'Kenya Government disability services'.

[187] National Council for Persons with Disabilities, 'NCPWD career portal', 3 June 2022.

[188] National Council for Persons with Disabilities, 'NCPWD career portal'.

[189] National Council for Persons with Disabilities, 'NCPWD career portal'.

[190] Business Today editorial team, 'Kisumu County feted for enacting law on disability' *Business Today*, 6 November 2018.

[191] 'Kisumu County feted for enacting law on disability'.

[192] 'Kisumu County feted for enacting law on disability'.

CRPD among county governments in Kenya.[193] Other counties such as Kilifi, Kiambu and Bungoma have formulated legislation that protects and promotes the rights of persons with disabilities in their counties.[194] In common, these authorities have established a Youth, Women and Persons with Disabilities Enterprise Development Fund, to promote the establishment and development of micro and small businesses and industries by the youth, women and persons with disabilities in the respective counties.[195] These Funds have been instrumental in assisting persons with disabilities to realise their fundamental rights and freedoms.[196]

6. The way forward

Pursuant to the National Gender and Equality Commission Act, one of the core mandates of the Commission is to co-ordinate and advice on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination.[197] The National Council for Persons with Disabilities also has a mandate of spreading awareness on the rights of persons with disabilities to the public.[198] A 2016 report by NGEC explains that according to local chiefs, there is need for public sensitisation to break cultural taboos and help people understand better the needs of children with disabilities.[199] In the report, head teachers called for regular refresher courses for all teachers on how to handle children with disabilities.[200]

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193 'Kisumu County feted for enacting law on disability'.

194 Bungoma County Youth, Women and Persons with Disabilities Enterprise Development Fund Bill, 2014; Kiambu County Youth, Women and Persons with Disabilities Enterprise Development Fund Act, 2014; Kilifi County Persons with Disabilities Bill, 2021.

195 Rohwerder, *Kenya situational analysis, June 2020 update*.

196 Rohwerder, *Kenya situational analysis, June 2020 update*.

197 National Gender and Equality Commission Act (2011), Section 8(h).

198 Persons with Disabilities Act (No 14 of 2013), Section 7(1)(i).

199 National Gender and Equality Commission, *Access to basic education by children with disability in Kenya*, 2016.

200 National Gender and Equality Commission, *Access to basic education by children with disability in Kenya*.

Findings in a nationwide survey by the Kenya Institute of Special Education also point out to the fact that there has been inadequate advocacy, sensitisation and mobilisation on the needs of children with disabilities in education at the grassroots, and that parents are not actively involved in the education of their children with disabilities.[201] The Social Protection Department of the Kenyan Government further reports that creating awareness reduces stigma and discrimination which enhances social inclusion,[202] and perhaps the mainstreaming of disability issues. The Department adds that raising awareness on the needs, aspirations and capacities of persons with disabilities enhances their acceptance, participation and inclusion in society.[203]

As such, to fully support the wellbeing of persons with disabilities, there needs to be public re-education on disability.[204] All Kenyans need to be taught about disability, and the old mantra that 'disability is not inability' needs to be taught to all.[205] Such foundation needs to be laid from the home to nursery schools, primary schools, secondary schools and all the way to colleges, workplaces and public places.[206] However, such re-education needs to be informative and practical.[207]

A programme tailored to influence community groups in Kilifi County, found that as a result of the intervention their beliefs about disability changed, this led to increased support and inclusion of persons with disabilities and their families.[208] Additionally, awareness should be cross cutting when it comes to persons with disabilities. This is so because, a survey by the Kenya Institute of Special Education found that

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201 Kenya Institute of Special Education, *National survey on children with disabilities and special needs in education*, 2018.

202 Ministry of Labour and Social Protection, *Disability awareness creation booklet*, 2021, 50.

203 Ministry of Labour and Social Protection, *Disability awareness creation booklet*, 2021, 50.

204 Tom Odhiambo, 'We have ignored the plight of persons with disabilities,' *Nation,* 2 April 2022.

205 Odhiambo, 'We have ignored the plight of persons with disabilities'.

206 Odhiambo, 'We have ignored the plight of persons with disabilities'.

207 Odhiambo, 'We have ignored the plight of persons with disabilities'.

208 Rohwerder, *Kenya situational analysis, June 2020 update*, citing CR Bauer, L Mbonani & J Charles, 'Changing cultural perception on disability through empowerment of families and local leaders', 2019.

barriers to access to education included lack of information on education opportunities for children with disabilities.[209]

7. Conclusion

From the foregoing, it is evident that persons with albinism suffer significantly when discriminated based on their disability. As seen, such discrimination mostly emanates from stereotypes and myths, and stretches to other aspects of the lives of persons with albinism, thereby threatening their enjoyment of other rights and fundamental freedoms. Although the government has taken numerous steps and measures to protect the rights of persons with albinism through the establishment of relevant institutions, provision of sunscreen, protective clothing and reasonable accommodation; much still remains to be done when it comes to debunking myths and misconceptions which have had a profound negative effect on the lives of persons with albinism.

However commendable the efforts by the government are, they have proven insufficient in addressing existing myths and stereotypes since they are calculated towards the provision of material support to persons with albinism and other persons with disabilities, thereby neglecting and scarcely addressing the violations that result from myths and stereotypes. This calls for sufficient, effective and efficacious public education and creation of awareness among the Kenyan people about the rights and fundamental freedoms of persons with albinism.

[209] Kenya Institute of Special Education, *National survey on children with disabilities and special needs in education.*

Political integrity as irrational and hypocritical values: Do the high standards of Chapter Six of the Constitution of Kenya breed a dangerous hypocrisy in the political class?

Golo Bokao*

Hypocrisy has a round-about nature in that the rigid righteousness of the anti-hypocrite, the puritan, is hypocritical in itself.[1]

Abstract

The progressive and transformative Constitution of Kenya, 2010 brought with it Chapter Six on leadership and integrity which outlines the integrity standards required of persons holding or intending to hold public office in both elective and appointive positions. The chapter has been deemed a reflection of the aspirations of Kenyans who are desirous to clean the country's politics that has been riddled with corruption and abuse of power. This article particularly focuses on the integrity fitness of those seeking elective offices with the aim of interrogating and attempting to bring out the controversies surrounding political integrity in Kenya. This study is premised on

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1 Judith N Shklar, *Ordinary vices*, The Belknap Press of Harvard University, 1984.

the hypothesis that the integrity definition adopted by the Kenyan courts is too stringent and needs to be moderated to allow for moral frailties necessitated by liberal democracy. This moral stringency is presumed to be the reason why the integrity test is seen as limiting political rights and is not currently applied to qualify or disqualify persons running for elective office as envisaged by the Constitution. This article proceeds to make a contribution in this area of law by defining integrity in politics based on the distinctive character of politics which require ethics unique to politics and how its application need not be seen as infringing political rights by showing how democracy is adapted to a country's unique circumstances and priorities without undermining the fundamentals of the ideal.

Keywords: political integrity, moral integrity, integrity rationality test, liberal democracy, leadership and integrity, Chapter Six of the Constitution of Kenya

1. Introduction

The Constitution of Kenya 2010 was a much-anticipated document after years of a quest to get a new reformative constitution. Although the agitation for reforms and gains can be traced to 1991, when the then ruling political party, Kenya African National Union (KANU) was forced to repeal Section 2A of the then Constitution to restore multiparty democracy, the formal history of the constitutional review process dates back to 1980s.[2] The people voted for the Constitution of Kenya 2010 in a referendum and promulgated it on 27 August 2010, following a series of amendments and draft constitutions. One of the important new and improved features of the 2010 Constitution are the provisions of Chapter Six on leadership and integrity. For a country plagued by widespread corruption, embezzlement of public funds and ethnically divisive politics, Chapter Six reflects the desire of the people for better governance by persons holding public offices.

The importance of Chapter Six is well captured in the petition *Trusted Society of Human Rights Alliance v Attorney General and 2 others* where the judges opined:

> Kenyans were very clear in their intentions when they entrenched Chapter Six and Article 73 in the Constitution. They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office.[3]

One may argue that the primary concerns of Kenyans are with mismanagement of public funds and service delivery. Moral uprightness beyond reproach may be a little overreaching given the very nature of politics where unethical behaviour is rewarded. An ethical code of conduct for public officers is provided for in the Public Officer Ethics Act

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2 Kenya Human Rights Commission, 'Wanjiku's journey: Tracing Kenya's quest for a new constitution and reporting on the 2010 national referendum', November 2010.

3 Petition 229 of 2012, Judgment of the High Court at Nairobi (2012) eKLR.

No 4 of 2003[4] and penal laws are in place for the misappropriation of public funds. Chapter Six therefore comes across as a homage paid to virtue in politics and public service.[5]

2. Legislating Chapter Six

The inclusion of Chapter Six in the Kenyan Constitution is no doubt the aspiration of Kenyans to strive for accountability in public office and these aspirations are intended to have substantive bite.[6] Article 80[7] requires Parliament to enact legislation for effective administration of Chapter Six, prescribing penalties for its breach, providing application of the Chapter with necessary applications to public officers and making any other necessary provisions for promotion and enforcement of Chapter Six.[8]

Following this requirement, Parliament enacted the Leadership and Integrity Act No 19 of 2012. However, this Act was insufficient as it did not provide for effective application and enforcement of Chapter Six. This is the argument in *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others*[9] where the Commission for the Implementation of the Constitution (CIC) alleged that the Act sets out ethical and moral requirements already provided for in Articles 73 and 74 of the Constitution while failing to provide for mechanisms and procedures for effective administration of Chapter Six.[10] The CIC alleged that parliament watered down the Bill prepared by the CIC and other

4 *Public Officer Ethics Act* (No 4 of 2003).

5 Rochefoucauld's phrase 'hypocrisy is the homage that vice pays to virtue' quoted in Ruth Weissbourd Grant, *Hypocrisy and integrity: Machiavelli, Rousseau and the ethics of politics,* University Press of Chicago, 1999.

6 *Trusted Society of Human Rights Alliance v Attorney General and 2 others,* Petition 229 of 2012, Judgment of the High Court at Nairobi (2012) eKLR.

7 Constitution of Kenya (2010), Article 80.

8 Constitution of Kenya (2010), Article 80.

9 Petition 454 of 2012, Judgment of the High Court at Nairobi (2013) eKLR.

10 Petition 454 of 2012, Judgment of the High Court at Nairobi (2013) eKLR.

stakeholders in an attempt to subvert the stringent moral and ethical requirements of Chapter Six.[11]

The CIC asserted that the Constitution envisaged that one of the mechanisms of ensuring compliance with Chapter Six was to ensure that leaders who do not comply with its provisions are either barred from holding public office or are removed from such office and the Leadership and Integrity Act failed to capture this.[12] Article 99(2)(h) stipulates that a person is disqualified from being elected as a member of parliament if the person is found, in accordance with any law, to have misused or abused a state office or public office or in any way to have contravened Chapter Six.[13] Articles 193(2)(g) and 194(1)(c) make similar provisions in relation to a member of county assembly.[14]

Regrettably, for Chapter Six to be used to determine qualifications to run for public office and to bar those who fail the integrity rationality test, adequate enforcement provisions have to be granted by the Leadership and Integrity Act as required by Article 80 of the Constitution. It is not the province of the courts alone to enforce Chapter Six. In fact, the courts' hands are tied despite the best intentions to see to it that the aspirations of Kenyans to clean up politics are kept alive.[15] The doctrine of separation of powers has it so that all the organs of government work together to realise implementation of Chapter Six. In particular, the legislature and other independent institutions such as the Independent Elections and Boundaries Commission (IEBC)[16] and Ethics and Anti-Corruption Commission (EACC)[17] have the mandate to enforce Chapter Six.

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11 Petition 454 of 2012, Judgment of the High Court (2013) eKLR.

12 *Commission for the Implementation of the Constitution v Parliament of Kenya and 5 others* (2013) eKLR.

13 Constitution of Kenya (2010), Chapter Six.

14 Constitution of Kenya (2010), Article 193(2)g and 194(1)c.

15 *Mumo Matemu v Trusted Society of Human Rights Alliance and 5others,* Civil Appeal No 290 of (2012), Judgment of the Court of Appeal (2013) eKLR.

16 Constitution of Kenya (2010), Article 73(2)(a).

17 Ethics and Anti-Corruption Commission Act, Section 11(1).

A look at the interpretation of Chapter Six and definitions of integrity adopted by the Kenyan courts and the complex interplay between the broad provisions of Chapter Six with other provisions of law, particularly those on political rights, shed light on the difficulties of fully and properly legislating Chapter Six, perhaps out of self-preservation by the legislature.

3. Interpreting Chapter Six

3.1 'Integrity' according to Kenyan courts

Integrity is defined as the firm adherence to moral and ethical values in one's behaviour.[18] The High Court of Kenya defines integrity thus:

> integrity is therefore not only about an individual's own perception about the correctness or appropriateness of their conduct, but also has a fundamental social and public quality to it. It is our view that as the society also expects certain values to be upheld, the integrity provisions of the Constitution demand that those aspiring to state office be like Caesar's wife: they must be beyond reproach.[19]

The integrity standard was also set out in *Trusted Society of Human Rights Alliance v Attorney General and Others* where the High Court observed:

> … a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behaviour, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not… it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity.[20]

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18 Africa Centre for Open Governance 'Implementation of Chapter Six of the Constitution of Kenya 2010', 8 February 2021.

19 *International Centre for Policy and Conflict and 5 others v Attorney General and 5 others,* Petition 522 of 2012 and Petitions 554,573 and 279 of 2012 (Consolidated), Judgement of the High Court, at Nairobi (2013) eKLR, 131.

20 Petition 229 of 2012, Judgement of the High Court at Nairobi (2012) eKLR, 107 (emphasis added).

Integrity is therefore the public's perception of a politician's character who ideally should be a virtuous leader, which is as a standard, a little more than being ethical. Here, being ethical is in conformity with codified regulations of office. Integrity can also be understood in terms of its opposite; corruption, which is putting personal interests before those of the public.[21] Integrity includes morality and wholeness or unity and opposes corruption.[22] An ideal leader would then be selfless and honourable in all circumstances.

These definitions adopted by the courts are quite unsettling because they are about moral arbitrariness and are rather too stringent. Let he who is without sin run for office. The difficulty presented by these interpretations is that premising integrity on public perception is assuming the universality of moral uprightness. This moral absolutism is what makes a leader with integrity to be one beyond reproach like Caesar's wife. Absolutism, also categorically imperative as advanced by Kant, is based on universal principles that an act is to be judged by the intent forming it, the good will, which is to be of universal application.[23] Moral absolutism has been faulted for its lack of universality considering the sheer diversity of moral standards.[24] Therefore, deciding the integrity of a politician or lack thereof, especially one which does not rise to the threshold of criminality, leaves a lot of discretion to the deciding body, be it the court or the electoral regulatory body, making integrity as big as the chancellor's foot.

3.2 Integrity as defined by perceptions: Attitude towards personal morality in politics among students in Kabarak University

In this study, we sampled the perceptions of a sample population, being students of Kabarak University on leadership and integrity. The graphs below show the results of the analysis from responses to close ended questionnaires.

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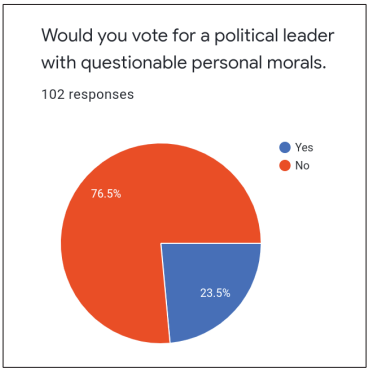
21 Richard Mulgan, *Corruption,* ANU Press, 2012, 26.

22 Mulgan, *Corruption,* 26.

23 Immanuel Kant, *Groundwork for metaphysics of morals* (first published 1785).

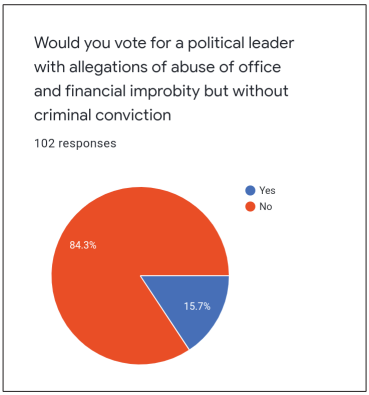
24 'Moral absolutism: The basics of philosophy', 8 February 2021.

Figure 1



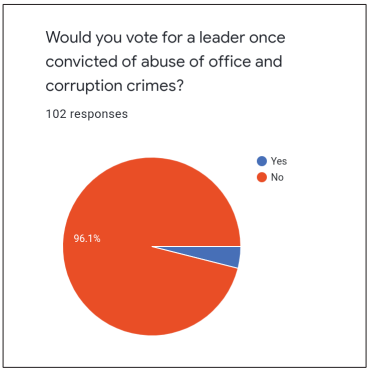
Financial improbity and abuse of office carry more weight in determining choice of leaders with emphasis on criminality threshold. Figure 2 shows this among Kabarak University students.

Figure 2



The impact and importance of criminal threshold in integrity perception is further illustrated by a follow up question in figure 3.

Figure 3



These perceptions are also reflected in application of Chapter Six in appointive positions. For instance, the recommendation by Parliament's Departmental Committee on Justice and Legal Affairs to the National Assembly on the suitability of Mumo Matemu as the chair of the Ethics and Anti-Corruption Commission that he 'lacked the passion, initiative and the drive to lead the fight against corruption' was rejected by the National Assembly and his appointment was approved.[25] This perhaps demonstrates the relativism of morality in determining competence to hold public office.

The definitions of integrity adopted by the courts look, not only at the actions of the leaders, but also to the character of the leader. This interpretation is deontological with emphasis on personal virtues. This creates a paradox for elective politics – long been termed 'a dirty game' where unethical behaviour and tricks are rewarded – which is the norm in liberal democracy.

4. Characteristics of liberal democracy

Liberal democracy is a government formed through popular vote and operates under principles of liberalism such as individual rights,

[25] *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others, Civil Appeal No 290 of 2012, Judgment of the Court of Appeal at Nairobi* (2013) eKLR.

equality and limited government.[26] Its origin can be traced back to the ancient Greek *polis* in the western culture although the idea is believed to have emerged and evolved in different civilisations all over the world in variations.[27] For instance, the current systems of democratic governance in countries of northern Europe such as Norway, Denmark, Sweden and later Iceland are said to be influenced by regional assemblies that existed during their Viking era and not the Greek *polis*.[28] Liberal democracy is presently the most popular and favourable system of government in the world compared to other alternatives.[29]

This system is not without its faults and is heavily criticised for creating dependency of the political leaders on the electorate.[30] It is this dependency and need to woo the public to gain the majority's favour that is seen to cultivate a culture of hypocrisy, flattery and manipulation.[31] Adam Smith goes as far as comparing political leaders to beggars because of their dependency on the people to elect them into office every few years, forcing them to fawn like a dog does to please his master in order to be fed.[32] Liberal democracy therefore breeds hypocrisy which is one of the worst of ordinary vices.[33]

Hypocrisy ranks second after cruelty in Judith Shklar's list of ordinary vices. It is a vice that is most repulsive for its 'double iniquity' where first there is the sin or the lie then second there is the cover up.[34] Hypocrisy as a word traces its origin back in the Greek theatres, *hypokrisis,* which means 'taking up a role in a play', acting a part that is not one's true self.[35] The word then evolved into religious use where

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26 Oxford languages, 8 February 2021.

27 Robert A Dahl, *On democracy,* Yale University Press, 1998, 26.

28 Dahl, *On democracy*, 26.

29 Ian Shapiro, *Democracy's place,* Cornell University, 1996.

30 Grant, *Hypocrisy and integrity,* 17.

31 Grant, *Hypocrisy and integrity: Machiavelli, Rousseau and the ethics of politics,* 17.

32 Grant, *Hypocrisy and integrity: Machiavelli, Rousseau and the ethics of politics,* 37-39.

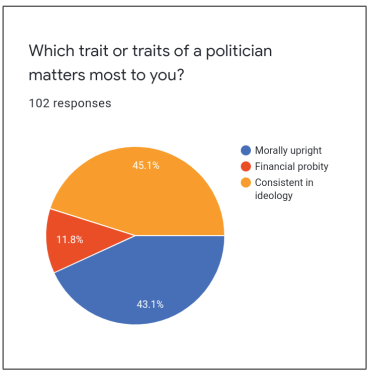
33 Shklar, *Ordinary vices*, 47.

34 Thomas Hobbes, *De Cive* in David Runciman, *Political hypocrisy: The mask of power from Hobbes to Orwell and beyond,* Princeton University Press 2008.

35 Shklar, *Ordinary vices*, 47.

it meant 'false piety', a trait that was and still is highly repulsive.[36] It then became a practice in religious contests: in order to discredit the other, one would 'unmask' their falsehood by showing contradiction in a claim of piety and their actual way of life.[37] This practice was the most effective way of defeating one's opponent because of the repulsive nature of hypocrisy as a vice because nobody likes to be taken for a fool.[38] Soon after, unmasking became a tool in political use with the adoption of democracy.[39]

Figure 4 shows a sample of most valued trait in politicians by students in Kabarak University



The prominence of consistency in ideology as a favoured trait in a politician is no surprise as inconsistency in ideology alludes to hypocrisy which is undesirable in a leader.

The practice of unmasking one's political opponents has been made easier in contemporary politics by the availability of 24-hour news channels and permanent digital records that now go several years back.[40] It has become easier to obtain footage and statements of one's past political positions and show contradictions that will discredit one as being

36 Shklar, *Ordinary vices*, 47.

37 Shklar, *Ordinary vices*, 47.

38 Shklar, *Ordinary vices*, 45.

39 Shklar, *Ordinary vices*, 48.

40 David Runciman, *Political hypocrisy: The mask of power from Hobbes to Orwell and beyond*, Princeton University Press, 2008, 12.

untrustworthy. Consistency in one's political ideals has become a good strategy in politics without questioning the correctness of those ideals since, in liberal democracy, different values exist and each group is entitled to their beliefs.[41] The unmasking culture is deep-rooted in liberal politics, so much so that tell-it-all books are a norm when changing political alliances. *Peeling back the mask* is one such book intended to expose Raila Odinga, Kenya's former Prime Minister (2008 to 2013) for who he really is.[42] The 45th President of the United States, Donald Trump is also controversial with several such books written about him and his political strategies and leaks of recordings of his conversations.[43]

Negative advertising is one other catchy and effective strategy to bring down one's political opponents where everything else fails.[44] Politicians appeal to the public's moral ideals and their intolerance of vices (hypocrisy in particular) to win the majority vote. Fake news and conspiracies are effective tools in contemporary politics where dependency on majority votes could force politicians to resort to manipulation. Perhaps one of the biggest 21st century manipulations of democracy is data mining allegations by social media platforms such as Facebook and Cambridge Analytica firm, accused of using private user information to create voter profiles and controlling their news feeds with the goal of feeding them information that will influence their voting decisions.[45] This manipulation of voters has been met with anger worldwide,[46] an indication of the public's intolerance of deceit and what Hobbes terms 'double iniquity'[47] first the false information they were fed and second, passing off as the suitable candidates.

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41 Runciman, *Political hypocrisy*, 12.

42 Miguna Miguna, *Peeling back the mask: A quest for justice in Kenya,* Gilgamesh Africa, 2012.

43 See, for instance, Amanda Carpenter, *Gaslighting America: Why we love it when Trump lies to us*, HarperCollins Publishers, 2018; Mark Leibovich, 'Thank you for your servitude: Donald Trump's Washington and the price of submission', Penguin, 2022; Hal Brands, *American grand strategy in the age of Trump*, Brookings Institution Press, 2018.

44 Runciman, *Political hypocrisy*, 12-15.

45 Nicholas Confessore, 'Cambridge Analytica and Facebook: The scandal and fallout so far' *New York Times* 4 April 2018.

46 Confessore, 'Cambridge Analytica and Facebook'.

47 Runciman, *Political hypocrisy*, 17.

The internet and social media in particular has been an avenue for disseminating political information to a large number of users. It has become a good way of encouraging young people to participate in politics.[48] However, it also poses threats to democracies as seen with Facebook and Cambridge Analytica, which was accused of playing a role in Kenya's 2017 elections by manipulating Facebook news feeds of potential voters.[49] The internet is susceptible to misuse and manipulation as an avenue for uncensored and unregulated flow of misinformation. The perceived anonymity by users also creates a platform for hate and bigotry, causing deep divisions between interest groups.

Caution needs to be exercised so that Chapter Six is not used as a tool for unmasking political opponents in our democracy. This is why the interpretation of integrity adopted by the courts is wanting for being highly subjective and even ironic for such a standard of moral integrity is incompatible with the nature of liberal democracy.

5. The paradox of liberal democracy

The paradox of liberal democracy is that it insists on principles of liberty, justice and equality yet it breeds hypocrisy like a kettle gives off steam.[50] Liberal democracies are egalitarian in principle but the legitimacy of self-interest is unquestioned in liberal democracies because that will mean doing away with electioneering and lobbying which are accepted practices in populist politics.[51]

Self-interest is central in liberal democracy just as it was in monarchies where the king shared loot from conquered cities with his soldiers.[52] Similarly, political leaders promise and give ministerial offices

48 Taufiq Ahmad, Aima Alvi and Muhammad Ittefaq, 'The use of social media on political participation among University students: An analysis of survey results from rural Pakistan' *SAGE Open* (July-September 2019) 1-9 DOI: 10.1177/2158244019864484.

49 Jina Moore, 'Cambridge Analytica had a role in Kenya elections too' *New York Times,* 20 March 2018.

50 Shklar, *Ordinary vices*, 72.

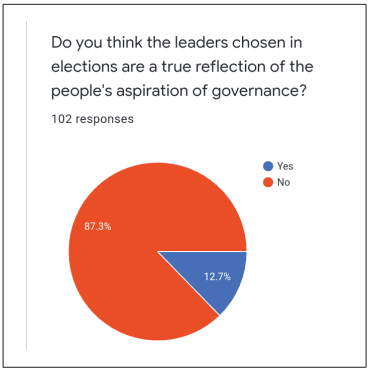
51 Richard Mulgan, *Corruption,* ANU Press, 2012, 26.

52 Max Weber, *Politics as a vocation,* Duncker and Humblodt, 1919.

to their most influential supporters once they get into power.[53] Political parties form coalitions and sometimes have to form extra offices to accommodate all the affiliate parties into government as a way of equal representation.[54] Self-interest is also disguised as affirmative action, it even influences a system of reserved seats for special interest groups. Liberal democracy therefore is hypocritical for insisting on egalitarian values while legitimising some forms of self-interest.

Lawyers in particular often become politicians because their profession is not far placed from the dynamics of liberal politics.[55] Democracies represent interest groups as lawyers represent the interests of their clients.[56] Lawyers often make better politicians compared to other professions because lawyers are trained to plead the interest of their clients.[57] Their craft is to persuade and convince, similar to the task of politicians. Civil servants even with a good cause are likely to fail because they make weak arguments while lawyers make the strongest case for logically weak arguments and are likely to win over the majority.[58] Manipulation is therefore central to politics.

Figure 5 shows this dynamic among students in Kabarak University



53 Weber, *Politics as a vocation*.
54 Weber, *Politics as a vocation*.
55 Weber, *Politics as a vocation*.
56 Weber, *Politics as a vocation*.
57 Weber, *Politics as a vocation*.
58 Weber, *Politics as a vocation*.

Joseph Schumpeter insists that 'democracy does not mean and cannot mean that the people actually rule in any obvious sense of the terms "people" and "rule". Democracy means, people have the opportunity of accepting or refusing the men who are to rule them'.[59]

Shklar suggests that we should not worry too much about hypocrisy in politics but worry about our intolerance of the frailties of politics in a system that breeds hypocrisy.[60] Even Kant with his renowned insistence on moral uprightness and adherence to the rule of law poses the reasonability of stealing from a thief.[61] Perhaps this is why the Kenyan legislature failed to provide enforcement mechanisms for an integrity test in qualifications for running for elective office in the Leadership and Integrity Act as required by Article 80 of the Constitution.[62]

The Kenyan legislature has been accused of watering down the Leadership and Integrity Bill prepared by the Commission for the Implementation of the Constitution and other stakeholders in an attempt to subvert the stringent moral and ethical requirements of Chapter Six.[63] The Leadership and Integrity Act No 19 of 2012 is very similar to the Public Officer Ethics Act No 4 of 2003. In fact, the Ethics Code forms part of its General Leadership and Integrity Code.[64] This gives the impression that 'integrity' and 'ethics' is one and the same thing. This also gives us a glimpse into law makers' minds on objectivity of the integrity test and question whether we needed 'integrity', or 'ethics' alone will suffice.

The Constitution is said to have a vision of among other values, financial probity '…and about behaving so carefully that there is no risk of even appearing not to be honest'.[65] These are the standards envisaged

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59 Joseph Schumpter, *Capitalism, socialism and democracy,* Harper and Brothers, 1942.

60 Shklar, *Ordinary vices*, 48.

61 Immanuel Kant, *Groundwork for metaphysics of morals* (first published 1785).

62 *Commission for the Implementation of the Constitution v Parliament of Kenya and 5 others* Petition No 469 of 2013, Judgment of the High Court at Nairobi (2013) eKLR.

63 *Commission for the Implementation of the Constitution v Parliament of Kenya and 5 others Petition No 469 of 2013, Judgment of the High Court at Nairobi.*

64 Leadership and Integrity Act (No 19 of 2012), Section 6.

65 Yash Pal Ghai, 'The vision of Chapter Six of the 2010 Constitution' *Katiba Institute*, 20 February 2021.

by Article 99(2)(h), which remains a pipe dream for such standards are unattainable in a democracy, leave alone in the everyday life of a human. These moral sentiments are only desires of people perhaps praying on the mythical philosopher king or leaders in this case.

6. Political integrity

Premising on the argument that liberal democracy breeds hypocrisy and the paradox it creates by its insistence on integrity, Machiavelli and like-minded scholars make a case for a less stringent form of integrity unique to politics; political integrity.

It is not suggested that there be a separate moral code for politicians but rather a flexibility that accommodates the nature of liberal politics.[66] The root cause of hypocrisy or rather lack of integrity in politics is caused by those who put hypocrisy first; looking outwards instead of reflecting on our own human nature.[67] Hypocrisy has a round-about nature in that the rigid righteousness of the anti-hypocrite, the puritan, is hypocritical in itself.[68] To achieve political integrity is a struggle between utopianism and realism. Raw human nature is not always attractive, for instance, power is dressed up in chivalry, an illusion to make power and obedience gentle.[69] The fact that kings and queens are humans but causing their death is not murder but treason is an illusion that dresses up power as well.[70] Therefore, hypocrisy is the homage vice pays to virtue.[71] Liberalism is not purely egalitarian since its objective is also the advancement of a specific set of interests from a ray of conflicting ones. Fact-value distinction has to be made in order to achieve political integrity.

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66 Grant, *Hypocrisy and integrity.*

67 Shklar, *Ordinary vices.*

68 Shklar, *Ordinary vices.*

69 Edmund Burke quoted in Runciman, *Political hypocrisy.*

70 Edmund Burke quoted in Runciman, *Political hypocrisy.*

71 Francois Rochefoucauld, *Reflections or sentences and moral maxims* (JW Willis Bund and J Hain Friswell, trans) Simpson Low, Son, and Marston, 1871.

Political integrity is classified as a type of integrity. Shklar warns us against bundling up hypocrisy as one since there exists different types of hypocrisy such as moral hypocrisy, religious hypocrisy and political hypocrisy.[72] Similarly, integrity can be unbundled into moral integrity and political integrity. Distinction has to be made between a legitimate compromise and a sell-out, idealism and fanaticism, statesmanship and demagoguery.[73] This wide and liberal definition of integrity is made possible by Article 259(1)(d) of the Constitution.[74]

The United States of America is touted as a contemporary example of liberal democracy. A look at its formation as a democracy in the 18th century sheds some light into the separation of politics from morality. America was founded on British ideologies of morals and politics.[75] The founding fathers were greatly influenced by British and Scottish political thinkers such as John Locke, Bolingbroke, Francis Hutcheson, Lord Kames and Adam Smith.[76] These were republican thinkers with piety and virtue central to their ideologies.[77] One influential eighteenth century thinker that stood apart from the prevailing political thinking of the time was Mandeville who was of the view that virtue is a form of self-denial from our natural inclinations.[78] These views were quite controversial at that point in time and were met by opposition as shown by Benjamin Franklin's writings such as 'On liberty and necessity, pleasure and pain' 1725 and 'Self-denial not the essence of virtue' 1735.[79] Much later in his life, Benjamin Franklin wrote his autobiography showing duplicity of his character necessitated by politics. This begged questions like 'Who is the real Benjamin Franklin?' for those trying to understand him years later.[80]

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72 Runciman, *Political hypocrisy*, 7.

73 Grant, *Hypocrisy and integrity.*

74 Article 259(1)(d) of the Constitution of Kenya 2010 states that the Constitution shall be interpreted in a manner that promotes good governance.

75 Runciman, *Political hypocrisy*, 77.

76 Runciman, *Political hypocrisy*, 78.

77 Runciman, *Political hypocrisy*, 77.

78 Bernard Mandeville, *The fable of the bees* (first published 1714).

79 Runciman, *Political hypocrisy*, 82.

80 Runciman, *Political hypocrisy*, 81.

Separation of morals from politics in the history of the foundation of the US is best illustrated by the slavery question in the Declaration of Independence. The founding fathers proclaimed the famous words that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and pursuit of happiness' yet some, if not all of them, were from the slave holding class like Thomas Jefferson who was the principle author of the Declaration.[81] John Adam's wife Abigail Adams voiced a similar concern when she wrote in 1774 to her husband the future president saying 'It always appeared to me to be a most iniquitous scheme… to fight for ourselves for what we are daily robbing and plundering from those who have as good a right to freedom as we have.'[82]

The slavery question was seen as a political question and not a moral question.[83] The founders were aware that consensus could not be reached on slavery but no one questioned the importance and value of freedom, especially their own freedom from the Crown in Britain.[84] This then is acceptable hypocrisy since after-all democracy is populist.

As expected, this hypocrisy was used as a political arsenal by critics of US democracy at the time, Britain, pointing out the irony of US Americans still owning slaves. Britain was in turn accused of inciting the slaves to revolt against their masters.[85] Knowing the round-about nature of hypocrisy, the US Americans too were quick to point out the hypocrisy of the Crown which refused to ban slave importation to the US in the first place.[86] In fact, the hypocrisy of the King was documented in the original Declaration of Independence but was later cut out, a decision opposed by some founders like Thomas Jefferson.[87] This shows the pitfall of hypocrisy which is a game of unmasking each other with-

81 Runciman, *Political hypocrisy*, 81.
82 Runciman, *Political hypocrisy,* 74.
83 Runciman, *Political hypocrisy*, 76.
84 Runciman, *Political hypocrisy.*
85 Runciman, *Political hypocrisy*, 75-77.
86 Runciman, *Political hypocrisy*, 75-77.
87 Runciman, *Political hypocrisy,* 75.

out addressing the real underlying questions as Shklar[88] cautions would happen when you put hypocrisy first.

US political thought moved away from its British roots of theology and moral political philosophy, questioning the viability of absolute political sincerity.[89] Jefferson and Franklin were anti-hypocrites who were aware of the trapping of hypocrisy and tried to avoid that pitfall by not over emphasising hypocrisy's role in politics.[90] Thomas Paine was one such anti-hypocrite of strong conviction. His insistence on political sincerity in his work *The rights of man*[91] was the catalyst for political fallout between Jefferson and John Adams but even Jefferson could not totally embrace the ideologies of Paine.[92] Jefferson was rather cunning and subtle, reputed as a man of many masks similar to Benjamin Franklin in that aspect.[93]

Franklin's *Autobiography* showed that he used virtue as a means to an end, using virtue to cultivate relations with people, which is being virtuous for the benefit it gives and not for its inherent value as Mandeville puts it. Yet Franklin was strongly against Mandeville's political thoughts.[94] This insight into the foundation of the United States of America shows the evolution of the struggle between utopian moralistic views of politics versus the realities of politics.

7. The compromise: Achieving political integrity

Trusted Society of Human Rights Alliance v Attorney General and 2 others defined lack of integrity as:

> when there are *serious unresolved questions* about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or

88 Shklar, *Ordinary vices*.

89 Runciman, *Political hypocrisy*, 80.

90 Runciman, *Political hypocrisy*, 80.

91 Thomas Paine, *Rights of man* (first published 1791).

92 Runciman, *Political hypocrisy*.

93 Runciman, *Political hypocrisy*.

94 Runciman, *Political hypocrisy*.

> his commitment to the national values enumerated in the Constitution… it is enough if there are *sufficient serious, plausible allegations* which raise *substantial unresolved questions* about one's integrity.[95]

The terms *'serious unresolved questions'*, *'sufficient serious plausible allegations'* and *'substantial unresolved questions'* are more accommodative compared to *'moral uprightness beyond reproach'* set by the *International Centre for Policy and Conflict and 5 others v Attorney General and 4 others*.[96] It is this flexibility that should be allowed in politics.

Giving up on integrity in politics all together is defeatist and our goal as humans is to attain and uphold morality even in politics. Rousseau is more optimistic and believes that integrity is the authentic nature of Man.[97] The need to dress up bad habits in good manners, etiquette and chivalry shows the desirability of morals.[98] Machiavelli himself is not totally opposed to the virtuous nature of man because he separates relations between enemies, political allies and family.[99] Machiavelli advocates for the use of hypocrisy only when politically necessary in international diplomacy and domestic politics and even so, for the greater good.[100] This way he distinguishes hypocrisy from sociopathic behaviour.[101]

The strength of moral impulse in human nature is what informs the need for integrity in politics. An 'honest politician' might not be an oxymoron after all. A plausible compromise needs to be achieved between the hypocritical nature of liberal democracy and the desire for integrity since as highlighted in the *Trusted Society case* '…Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office'.[102]

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95 Petition 229 of 2012, Judgment of the High Court at Nairobi [2012] eKLR (emphasis added).

96 Petition 552 of 2012, Judgment of the High Court at Nairobi (2013) eKLR, 131.

97 Grant, *Hypocrisy and integrity*, 35.

98 Runciman, *Political hypocrisy*.

99 Grant, *Hypocrisy and integrity*, 19-20.

100 Grant, *Hypocrisy and integrity*, 19-20.

101 Grant, *Hypocrisy and integrity*, 19-20.

102 *Trusted Society of Human Rights Alliance v Attorney General and 2 others,* Petition 229 of 2012, Judgment of the High Court at Nairobi (2012) eKLR.

However, the reality is that Kenyans still elect persons with questionable character and corruption allegations despite numerous legislation put in place to instil integrity including; the Leadership and Integrity Act of 2012, the Public Finance Management Act of 2012 and the Ethics and Anti-Corruption Commission Act of 2011, alongside Chapter Six of the Constitution. This begs the question as to whether the fundamentals of leadership and integrity have been internalised by leaders and Kenyans alike.[103]

8. Interpreting the law to fit popular rhetoric: Realising Kenyans' aspirations

The enforcement of Chapter Six is a collective duty of all relevant organs of the State and its institutions. The centre-piece of anti-corruption and public integrity reform is Chapter Six of the Constitution, the Anti-Corruption and Economic Crimes Act and the Leadership and Integrity Act, alongside independent offices and commissions, including the Ethics and Anti-Corruption Commission (EACC), the Independent Electoral and Boundaries Commission (IEBC), the National Police Service, and the Office of the Director of Public Prosecutions (ODPP).

8.1 The role of the courts

In 2019, the High Court emerged with jurisprudence setting a high bar with regard to interpretation of Chapter Six of the Constitution.[104] In *Moses Kasaine Lenolkulal v Director of Public Prosecutions,*[105] the High Court barred Governor Lenolkulal from accessing office without prior written authorisation from the investigating authority, the EACC, while investigations into alleged corruption and abuse of office in contravention of the Anti-Corruption and Economic Crimes Act (ACECA) was going on. The Governor challenged this position claiming its illegality

[103] PLO Lumumba, 'The trial of integrity in Kenya', *Katiba Institute,* 20 February 2021.

[104] Transparency International Kenya, 'Analysis interpretation of Chapter 6 Constitution of Kenya 2010 by Kenyan courts', 2 March 2021.

[105] Criminal Revision No 25 of 2019, Ruling of the High Court at Nairobi (2019) eKLR.

since the law provides for the procedure for removal from office and that suspension of public officers under ACECA should not apply to elective positions. The High Court however determined that such suspension pending investigation is not a violation of rights and is well within the purpose and spirit of Chapter Six of the Constitution.[106]

In a similar case of *Ferdinand Ndungu Waititu Babayao & 12 others v Republic,*[107] a then sitting governor charged with conflict of interest and dealing in suspect property contrary to Section 42(3) of ACECA was barred from accessing his office while investigations were going on. The court reasoned that allowing access to office for those accused of 'moral ill-health' would entrench corruption and impunity against the aspiration of Kenyans and spirit of Chapter Six of the Constitution.[108]

The High Court once again came to the aid of keeping Chapter Six alive when the legality of investigative powers of the EACC came to question. The EACC is the lead agency in the fight against corruption in Kenya. The Commission has no prosecutorial powers; it only carries out investigations and recommends prosecution through the ODPP.[109]

The constitutionality of the investigative role of the Commission given by the EACC Act and ACECA was questioned in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* as the power to conduct criminal investigations is vested in the National Police and the ODPP.[110] The petitioners averred that the role of EACC according to Article 79 is to help build capacity by setting up systems and mechanisms for better functioning of its mandate. This is limited to ensuring compliance with and enforcement of the Code of Conduct for State and Public Officers.[111]

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106 Transparency International Kenya, 'Analysis interpretation of Chapter 6 Constitution of Kenya 2010 by Kenyan courts', 2 March 2021.

107 High Court (2019) eKLR.

108 Transparency International Kenya, 'Analysis interpretation of Chapter 6 Constitution of Kenya 2010 by Kenyan courts', 2 March 2021.

109 EACC, 2 March 2021.

110 *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others*, Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR 8.

111 *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others* Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR.

However, the High Court held that the EACC is the only commission not specifically located in Chapter Fifteen of the Constitution and therefore its composition and mandate are statutory.[112] Following this understanding, Section 11(1)(d) of the ACECA mandates the EACC to investigate and recommend prosecution of corruption or violations of ethics to the ODPP.

Further, Section 35 of the ACECA read with Section 11(1) of the EACC Act provide that upon concluding investigations, EACC reports to the DPP who then makes an independent decision to prosecute or not based on the evidence provided.[113]

Thus, on the question of the constitutionality of the legislation granting EACC investigative powers reserved for the National Police and the ODPP, the Court pronounced that 'the Constitution grants powers to commissions to perform functions prescribed by the Act of Parliament'. The same Constitution creates the National Police Service and equally vests it with the mandate to prevent corruption and to undertake investigations,[114]and the legality or validity of the Constitution is not subject to challenge.[115] Where provisions of the Constitution are conflicting as the case might be, the underlying norms and principles must be considered.[116] To further give meaning to the intention of the Constitution, the Court resorted to the history that informed the inclusion of Chapter Six in the Constitution where it was of the view that the Constitution was drafted with the intention of dealing with a long legacy of impunity, institutional frailties and embedded corruption.[117] Thereby, the Court successfully shaped the functions of the EACC in line with the aspirations of Kenyans.

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[112] *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others,* Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR, 7.

[113] *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others,* Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR, 78.

[114] *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others*, Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR. 91.

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

[116] *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others,* Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR. 97.

[117] *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others*, Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR. 97.

8.2 The role of the Ethics and Anti-Corruption Commission (EACC)

The EACC is an independent commission established by Article 79 (within Chapter Six) of the Constitution, and the Ethics and Anti-Corruption Commission Act, No 22 of 2011, for the purpose of ensuring compliance with and enforcement of the Chapter's provisions.[118] EACC is primarily concerned with investigating financial probity of state and public officers, promoting ethical standards, good governance and leadership integrity.[119]

Following the impeachment of two governors, the Governor of Kiambu County, Ferdinand Waititu on 29 January 2020 and the Governor of Nairobi County, Mike Sonko on 17 December 2020 on charges of abuse of office among others, new regulations were put in place by EACC to qualify candidates hoping to fill those positions. This came about after the impeached governor of Kiambu County expressed interest to run for the office of governor in Nairobi County. The wonder in this is that there is still no law, despite the provisions of Chapter Six, to bar him from exercising his political rights granted by the Bill of Rights in Article 38.[120] This is the dangerous precedence set by the High Court in the *International Centre for Policy and Conflict case*.[121]

However, EACC issued a directive through a press release on 29 December 2020 in exercise of its constitutional mandate to enforce Chapter Six and its constitutional responsibility to advice the IEBC on integrity compliance status of all candidates.[122] EACC stated that a person is disqualified pursuant to Chapter Six of the Constitution if the person has been dismissed or removed from office for contravention of Chapter Six or its enabling legislation; the Leadership and Integrity Act.[123] This directive is pursuant to Article 75(3) which provides that any

118 Constitution of Kenya (2010).

119 EACC, 2 March 2021.

120 Constitution of Kenya (2010).

121 Petition 552 of 2012 and Petition 554,573 and 579 (consolidated),Judgment of the High Court at Nairobi (2013)eKLR

122 EACC, 'Press release: Integrity compliance under Chapter Six of the Constitution by persons seeking election into public office' (Nairobi, 29 December 2020), 2 March 2021.

123 EACC, 'Press release', 29 December 2020.

person dismissed from office on account of financial improbity, holding multiple offices while still a full time state officer or turns out to be a non-citizen are disqualified from holding any other state office.[124] In this light, an impeached governor on account of financial improbity is disqualified as a candidate for any other state office.

EACC also stated that a person is disqualified to run for elective position if found by a court of law or any competent agency mandated by the Constitution, in accordance with any law, to have misused or abused a state office or public office.[125] The EACC further committed to conduct integrity vetting of all candidates in any up-coming by-election and communicate its determination to IEBC for further action.[126]

A look at the standards or requirements set out by the EACC shows misuse of office to advance personal interests and financial probity at the heart of integrity test. The moral requirement as to one's character as contemplated by the courts seems not to have any practical place. In practice, integrity is not a vague abstract but rather a codified ethical regulation.

EACC has stressed the role citizens play in enforcing Chapter Six by reminding Kenyans that the ultimate and most effective vetting lies with them, and that entrusting the management of public affairs to persons with questionable 'integrity' will only entrench corruption and impunity.[127]

8.3 Reasonable restrictions to political rights

The wording of Article 38(3)(c) 'Every adult citizen has the right *without unreasonable restrictions* to be a candidate for public office… and if elected, to hold office'[128] suggests that this right is not absolute and there are reasonable restrictions anticipated by the provision.

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124 EACC, 'Press release', 29 December 2020.

125 EACC, 'Press release', 29 December 2020.

126 EACC, 'Press release', 29 December 2020.

127 EACC, 'Press release', 29 December 2020.

128 Constitution of Kenya (2010).

The chapters that follow; Chapter Seven on the Electoral System and Process, Chapter Eight on the Legislature, Chapter Nine on the Executive and Chapter Eleven on Devolved Government, are some of the provisions strongly related to Article 38 and Chapter Six. The restrictions imposed by these Chapters are uncontested because they are regulated by respective legislations and are not a new concept as the integrity test of Chapter Six.

Article 83 of Chapter Seven for instance, limits the registration of voters to the registration of adults of sound mind and those not convicted of an election offence in the preceding five years. These restrictions are reasonable and have been in practice for as long as democracy has been exercised in Kenya. These show that political rights are not absolute.

Another reasonable limitation is in Article 91 of the 2010 Constitution which directs that political parties should not be founded on religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis. Political parties are also prohibited from engaging in violence or intimidation of its members or those of their opponents.[129] Maintaining paramilitary groups or militias is also prohibited as well as engaging in corruption and use of public resources for own interest unless allowed by law.[130]

Chapter Eight presents additional and essential restrictions concerning eligibility for election into public office. Article 99 requires candidates for Member of Parliament to be a registered voter nominated by a political party or an independent candidate. The candidates must also satisfy educational, moral and ethical requirements prescribed by the Constitution and relevant legislation which is the Elections Act.[131] In this instance, state and other public officers other than the incumbent office holder, officers of the IEBC within five years preceding the election, non-citizens, and those who have been citizens for less than

[129] Constitution of Kenya 2010), Article 91.

[130] Constitution of Kenya (2010), Article 91.

[131] Elections Act (No 24 of 2011).

10 years are disqualified from running for office.[132] Similar provisions are reiterated in Article 137 disqualifying those ineligible for running. Persons of unsound mind, those with undischarged bankruptcy, those serving imprisonment terms of more than six months and those found in accordance with any law, to have misused or abused a state office or public office or in any way to have contravened Chapter Six are also disqualified from running for member of parliament, member of county assembly and for the presidency by virtue of Article 193.

The political rights guaranteed under Article 38(2) of the Constitution touches on the right to run for public office and the rights of the citizens to free, fair and regular elections based on universal suffrage. Barring candidates from running for elective positions on account of Chapter Six will limit the political rights of the candidate vying for public office and limit the rights of citizens to freely elect representatives into office. A delicate balance needs to be observed particularly when enforcing one constitutional right which overrides another fundamental right.[133]

Article 24 of the Constitution comes in to balance these rights out where it provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom. This means that the Leadership and Integrity Act needs to provide for enforcement mechanisms for Chapter Six to be used to bar persons of questionable character from running for public office.

Due process, fairness and justice must be incorporated in applying the integrity rationality test. Article 50 stresses that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

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132 Constitution of Kenya (2010), Article 177.

133 *Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission and 16 others.* Advisory opinion Reference 1 of 2017, Ruling of the Supreme Court, (2020) eKLR.

Therefore, for Chapter Six to be used to determine qualifications to run for public office and to bar those who fail the integrity rationality test, adequate enforcement provisions have to be granted by the Leadership and Integrity Act as required by Article 80[134] of the Constitution. It is not the province of the courts alone to enforce Chapter Six. In fact, the courts hands are tied despite their best intentions to see to it that the aspirations of Kenyans to clean up politics are kept alive.[135] The doctrine of separation of powers has it so that all the organs of the government work together to realise the implementation of Chapter Six. In particular, the legislature and other independent institutions such as the IEBC and EACC have the mandate to enforce Chapter Six.

9. Kenyans' aspirations in Chapter Six of the Constitution versus the reality; why democracies produce bad government

A good deal of traditional democratic theory leads us to expect more from national elections than they can possibly provide. We expect elections to reveal the 'will' or the preferences of a majority on a set of issues. This is one thing elections rarely do, except in an almost trivial fashion.[136] The folk theory of democracy poses that governments and government policies are formed by the preferences of ordinary citizens where these citizens choose leaders who advance the majority interests and carry out their will.[137] Citizens can also directly make policies through referendums[138] creating an ethically defensible legitimate government.[139]

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134 Constitution of Kenya (2010), Article 80.

135 *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others,* Civil Appeal 290 of 2019, Judgment of the court of Appeal, (2013) eKLR.

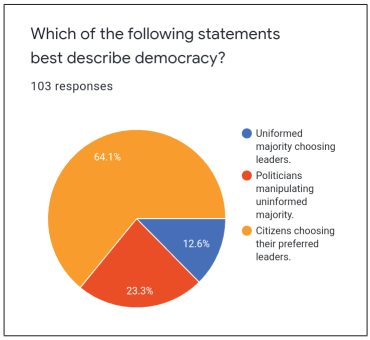
136 Robert A Dahl, *A preface to democratic theory,* Yale University Press, 1956, 131.

137 Christopher H Achen and Larry M Bartels, *Democracy for realists: Why elections do not produce responsive government,* Princeton University Press, 2016.

138 Achen and Bartels, *Democracy for realists.*

139 Achen and Bartels, *Democracy for realists.*

Figure 6 shows the perception of democracy by students in Kabarak University



Why then do democracies fail to actualise the peoples' desires and aspirations? The answer to this question is both inward looking and outward looking. One theory advanced by this article is that politicians manipulate the voters by putting up a front, hiding their true intentions and cunningly gaining voters' trust and approval. The second quest to solve this question is inward looking where we investigate the electorates themselves to see why their choices do not reflect their aspirations.

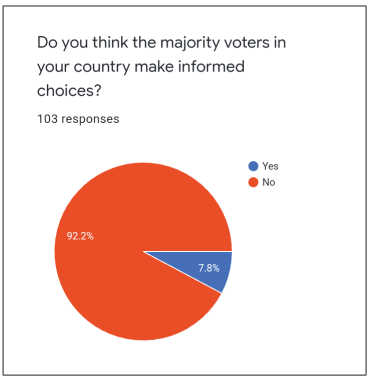
The folk theory presumption of informed ordinary citizens' choices is heavily criticised as surveys have shown that ordinary citizens pay little attention to politics.[140] Very few actually read policies and bills tabled before parliaments but only rely on news bites and phrases repeated by politicians. The danger here is that these politicians may have not internalised the phrases themselves.[141] Ordinary people have ordinary everyday struggles. They have families to look after, bills to pay, unemployment to worry about, illness to battle, schools to attend, personal struggles like drug addictions and other myriads of everyday bustle.[142] Many out of these people barely have time for political deliberations unlike professional politicians and political analysts who advance this idea of democratic folk theory.[143] Sometimes, even for the learned, polit-

140 Achen and Bartels, *Democracy for realists.*
141 Achen and Bartels, *Democracy for realists.*
142 Achen and Bartels, *Democracy for realists.*
143 Achen and Bartels, *Democracy for realists*, 44.

ical ideas and judgments are stereotypes and simplifications with little room for adjustments.[144] The democratic ideal could in fact be a smoke screen to serve those who profit from the distortion and biases in the policy-making process of actual democracies.[145]

An ordinary citizen's choices are, more often than not, informed by the nature of the times especially the current state of the economy and generational political loyalties.[146] Their social identities in turn shape their policy preferences, political party choices, and the ideologies they subscribe to. These identities are prone to prejudices and aversion.[147] Political choices based on social identity are not a new concept in Kenyan politics. In fact, this ideal is so deep-rooted it goes back to the very foundations of this nation.

Figure 7 shows this perception among students in Kabarak University



9. The marred foundation of liberal democracy in Kenya

Social identities that inform political choices in Kenya have a rather sinister origin going back into the colonial past. History is subversive

144 Achen and Bartels, *Democracy for realists*, 10.
145 Achen and Bartels, *Democracy for realists.*
146 Achen and Bartels, *Democracy for realists.*
147 Achen and Bartels, *Democracy for realists.*

because it is the result of a struggle showing change which is always perceived as a threat by all the ruling class in oppressive exploitative systems.[148] Democracy in Kenya has a flawed past as it did not go through organic transformation. It was not a home grown ideal. This is not to say that it is entirely foreign and may not have a place in African communities. Democracy as an ideal is a universal concept that developed in civilisations across the world in different variations.[149] Community participation is not unimaginable in Africa even when the political hierarchy was mostly based on chiefdoms and local monarchies. The modern liberal democracy practised in Kenya currently that is so vehemently protected by our court system has faulty foundations and is perhaps why the aspirations of Kenyans are not reflective of their political choices as is.

Kenya's current political system was forged by British forces restructuring the communities in the colonial territory to create new high politics and a hierarchy of self-interest out of the existing network of authorities in the communities.[150] African leaders were used to socially engage and incorporate the colonial system of governance in the region.[151] At first the colonialists needed social influence as the native population outnumbered them but this changed to excessive use of force as the railway was being built and more British soldiers were deployed in the territory.[152] The political structures of Kenyan communities were drastically changed when the communities first lost their trust in their leaders who were being used as agents of the colonialists.[153] The colonialists appointed chiefs on the basis of colonial self-interest.[154] In turn, the chiefs and local leaders got benefits at the expense of their people.[155]

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148 Ngugi wa Thiongo, 'Foreword' in Maina wa Kinyatti (ed), *Kenya's freedom struggle: The Dedan Kimathi papers*, London, 1987, xiii.

149 Robert A Dahl, *On democracy*, Yale University Press, 1998.

150 Bruce Bernam and John Lonsdale, *Unhappy valley, conflict in Kenya and Africa – Book One: State and class,* Ohio University Press, 1992, 13.

151 Bernam and Lonsdale, *Unhappy valley,* 15.

152 Bernam and Lonsdale, *Unhappy valley,* 13.

153 Bernam and Lonsdale, *Unhappy valley,* 13.

154 Bernam and Lonsdale, *Unhappy valley,* 13.

155 Bernam and Lonsdale, *Unhappy valley,* 31.

Social division and corruption of authority became the essential foundation of State power.[156] Young Kenyans were directly employed in farms and into the police force and the army, and no regard was paid to the traditional hierarchies, social status or geographical restrictions.[157] Power was now controlled by markets, capital and labour.[158] Everyone then on was in pursuit of self-interest.

While all these were going on, Kenya was segregated into respective communities for easier control by the colonialists. The white settler farms were located to act as buffer zones between warring tribes.[159] This segregation further divided the people and is still reflected in the present-day Kenyan ethnically based politics.

10. Understanding the voter

A look at one of the earliest forms of democracy shows how contemporary folk theory of democracy has morphed into an entirely different ideal. Socrates is profoundly opposed to this popular ideal that celebrates the wisdom of popular judgment. Popular vote eventually led to his execution.[160] In his rhetoric, Socrates imagines a scenario where the crew on a ship at sea that lost its captain is faced with the task of appointing a new captain.[161] Socrates ask then whether everyone on board should have a say on who is to become the captain or whether only those experienced in sea voyage should choose who is to be captain.[162] Using this rather simple scenario, Socrates advances that only the informed and educated, and those who have thought rationally and

156 Bernam and Lonsdale, *Unhappy valley.*

157 Bernam and Lonsdale, *Unhappy valley,* 36.

158 Bernam and Lonsdale, *Unhappy valley,* 36.

159 Bernam and Lonsdale, *Unhappy valley,* 34.

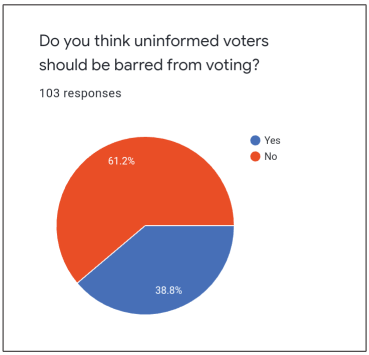
160 Plato, 'Apology', *Academia. Brooklyn.Cuny.edu*, 17 December 2022. Socrates was condemned to death through majority votes.

161 Plato, *Republic*, Penguin, 2007.

162 Plato, *Republic.*

deeply on the subject should vote.[163] Socrates preferred intellectual democracy over the current ideal of democracy by birth right.[164] He was conscious to the dangers of manipulation and ignorance of the general public.

Figure 8 shows the difficulty of the idea of intellectual democracy overcoming the contemporary folk theory of democracy among Kabarak University students



This simple faith in popular sovereignty is so prevalent in the 21st century so much so that any frustrations with the government are fixed by more democracy.[165] Political reforms to fix the problems of representative democracy advances the creation of more opportunities for citizens to observe, participate in, and control their government's actions.[166] Democracy is the prescribed cure for government corruption, misrepresentation and incompetence in the rhetoric of folk democracy.[167]

The United States in its foundation was conscious to this danger and their democracy was intended to have a fail-safe by the creation of caucus in primaries and presidential elections.[168] However, earlier proponents pushed for direct primaries as the narrative of popular sov-

[163] 'Why Socrates hated democracy' *The School of life*, 2 March 2021.
[164] 'Why Socrates hated democracy' *The School of life*, 2 March 2021.
[165] Achen and Bartels, *Democracy for realists*, 51.
[166] Achen and Bartels, *Democracy for realists*, 52.
[167] Achen and Bartels, *Democracy for realists*, 53.
[168] Achen and Bartels, *Democracy for realists*, 51.

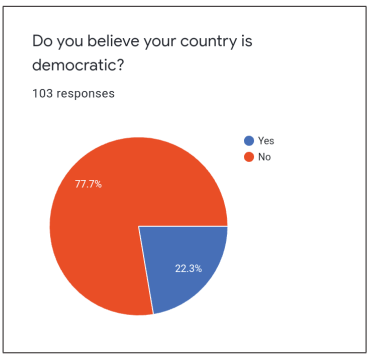
ereignty took root. The founders believed that direct popular control of government would be undesirable and dangerous.[169] James Madison in *Federalist Papers Number 10* argued that the system of representation through caucus would 'refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love for justice will be least likely to sacrifice it to temporary or partial considerations'.[170] The vision and worries of the founders regarding the frailties of people's judgments seem rather distant in the 21st century folk theory of democracy narrative.[171]

11. Understanding democracy

There is a prevailing difficulty in separating the understanding of democracy as an ideal and democracy as the actual government. Philosophers refer to this as distinguishing between real things and ideal things; value judgment and empirical judgments.[172] While democracy as a populist choice is easily understood, there is doubt on the democratic nature of the resultant government. Dahl supposes that for a State to be truly democratic it needs political institutions. Large-scale democracy needs institutions that make it possible to have elected officials, free-fair and frequent elections, freedom of expression, alternative sources of information, association autonomy and inclusive citizenship. To reflect these, Lenin one of the founders of the Soviet Union, once asserted 'Proletarian democracy is a million times more democratic than any bourgeois democracy; the Soviet government is a million times more democratic than the most democratic bourgeois republic'.[173]

169 Runciman, *Political hypocrisy.*
170 Runciman, *Political hypocrisy.*
171 Runciman, *Political hypocrisy.*
172 Dahl, *On democracy,* 26.
173 Dahl, *On democracy,* 100.

Figure 9 shows this perceptions of level of Kenyan democracy among Kabarak University students



12. Conclusion

The aspirations of Kenyans that informed the creation of Chapter Six of the Constitution are realised and can be realised through the purposive interpretation of the law. However, it is not the province of the courts alone to clean the politics of the country. It would take the cooperation of independent commissions such as the EACC, IEBC, ODPP, National Police, the Parliament and every other state organ, as well as civil society organisations. The biggest and most important task lies with the electorate themselves to vote in people of character.

The stringent moral definition of integrity has proven to be defeatist in a liberal democracy ridden with the hypocrisy of politicians necessitated by the need to win popular vote among groups with varying interests. To realise the aspirations of Kenyans to clean up their politics, a more morally flexible, accommodative definition that can be narrowed down and codified is preferred as a reasonable limit to political rights to run for office.

Under BITs and through class actions: Subjecting transnational mining corporations to environmental rights in the DRC

Arnold Nciko*

Abstract

Transnational mining corporations have gained an abundance of power and influence that defy the institutionalisation of the international human rights regime. Their activities have resulted in dire violations of human rights, especially environmental rights. The international human rights regime has left states with the duty to enforce the respect for human rights on all persons, including legal persons such as transnational mining corporations that are within their respective jurisdictions. However, fulfilling this duty has been a herculean task for many Third World states. In these states, these corporations have been able to interfere with law enforcement and accountability through judicial process. Thus, despite violating human rights, they continue to enjoy action with impunity. In response to this, a few attempts have been made to subject these corporations to human rights accountability at an international level. This study examines these attempts and concludes that they are inadequate. Relying on Third World Approaches to Interna-

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tional Law (TWAIL), the study progresses the discussion by proposing an international law mechanism that may subject these corporations to the international human rights regime. This is what we term 'Under BITs and through class actions' mechanism. This mechanism entails inserting human rights obligations in Bilateral Investment Treaties (BITs) and enforcing them with the help of class actions. To critically present this proposition, the study takes as case study of environmental rights violations by transnational corporations that are mining in the Democratic Republic of the Congo (DRC).

Keywords: business and human rights, mining, class actions, local accountability, Bilateral Investment Treaties (BITs), TWAIL

1. Introduction

In this increasingly globalised world, transnational mining corporations have become major actors in the international human rights regime.[1] Their mining operations have had devastating effects on the environment, particularly in Third World states (Latin America, Africa and Asia).[2] One such state is the Democratic Republic of Congo (DRC). In the DRC, alarming cases of violations of environmental rights by transnational mining corporations abound. For instance, the Centre for Research on Multinational Corporations conducted a field study on the operations of China Nonferrous Metal Mining Company in Mabende village and found that the spreading of this company's acid spills led to deforestation. Deforestation, in turn, led to the destruction of sources of livelihood of the Mabende people; namely, caterpillars, mushrooms, fruits, small mammals and medicinal plants.[3] Further, its dust pollution caused the Mabende people to suffer from lung diseases. Yet, these people rely on medicinal plants, which the company has destroyed, yet modern hospitals are out of reach.[4] Another point to note is that the company's effluent waste contaminated community drinking water, making it 'murky and microbiologically unfit for human consumption'.[5] Glencore plc and Tiger Resources ltd, amongst others, have also perpetrated similar violations in Mutanda.[6]

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1 Jephias Matunhu, 'Poverty and corporate social responsibility in Africa: A critical assessment' 1 *Zimbabwe International Journal of Open and Distance Learning* (2011) 87-88.

2 Anghie Antony, BS Chimni 'Third World Approaches to International Law and individual responsibility in internal conflicts' (2)1 *Chinese Journal of International Law* (2003) 96.

3 L Musas, J Mwema, E Sikyala, A Tumba and C Bwenda, '"You can go accuse us where you want…": Violations of human rights by Chinese mining companies established in Democratic Republic of Congo: The case of China Non-Ferrous Métal Mining Corporation at Mabende', SOMO, 2018, 28.

4 Musas, Mwema, Sokyala, Tumba and Bwenda, 'You can go accuse us where you want…', 29.

5 Musas, Mwema, Sokyala, Tumba and Bwenda, '…You can go accuse us where you want…', 27.

6 Bread for All, 'Glencore in RD Congo*:* Incomplete due diligence' (2018) 3-4.

However, as these violations are happening, these transnational mining corporations continue to enjoy continued conduct with impunity because of the lack of law enforcement and accountability through the judicial process in the Congolese mining sector. Studies have connected this to the fact that the mining sector is one of the largest and most complex corruption networks in the DRC.[7] To promote environmental protection, the Congolese Mining Code requires mining corporations to publish an environmental impact study and a project environmental management plan.[8] However, China Nonferrous Metal Mining, for instance, has refused to do so. This decision has been backed by government officials as, apparently, such documents have technical and confidential aspects which should not be published.[9] A provincial mines minister tried to inquire into the environmental situation in Mabende village and China Nonferrous Metal Mining told him 'Go ahead, try to accuse us…'.[10] It is also instructive to note that this company did not conform to Article 281 of the Congolese Mining Code.[11] Article 281 provides that, in case of environmental violations, the concerned mining company should both compensate the aggrieved parties and rehabilitate the environment.[12] The same disregard of law is also true for other transnational mining corporations such as Glencore Plc, which government officials have portrayed as Caesar's wife – beyond reproach.[13]

Moreover, the power of Parliament and the President to appoint judges[14] and that of the Minister of Justice to initiate and discontinue

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7 Annie Callaway, 'Powering down corruption: Tackling transparency and human rights risks from Congo's cobalt mines to global supply chains', *Enough Project*, October 2018, 2.

8 Congolese Mining Code (No 18/00), Article 1(9), (19).

9 Musas, Mwema, Sokyala, Tumba and Bwenda, 'You can go accuse us where you want…', 25.

10 Musas, Mwema, Sokyala, Tumba and Bwenda, 'You can go accuse us where you want…', 24.

11 See generally Musas, Mwema, Sokyala, Tumba and Bwenda, 'You can go accuse us where you want… '.

12 Congolese Mining Code (No 18/00), Article 28.

13 'Trouble in the Congo: The misadventures of Glencore' *Bloomberg News,* 16 November 2018.

14 Constitution of the DRC (2006), Article 158.

prosecutions,[15] as well as presidential state of emergency powers to suspend courts' decisions (yet the circumstances leading to a state of emergency are not defined under any law)[16] are some of the loopholes in Congolese law that may be used to further the ends of corruption in the mining sector.

The lack of accountability of transnational mining corporations by judicial process persists even at the international level because international law is state-centric. The international human rights regime does not apply directly to corporations.[17] It has left states with the duty to impose human rights obligations on the corporations. Third World states, such as the DRC, have clearly faltered in this regard.

Given the state-centric nature of the international human rights regime, there have been attempts at the global level to put in place multilateral treaty-based institutions to deal with transnational corporate-related human rights violations. These are based either on international criminal law, voluntary compliance, collaboration with domestic legal systems, or are intended to apply directly to transnational corporations. With respect to international criminal law, some international criminal courts have maintained that crimes 'are committed by men, not by abstract entities (such as transnational corporations), and only by punishing individuals who commit such crimes (on behalf of corporations) can the provisions of international law be enforced'.[18] However, classical international crimes, namely, the crime of genocide, crimes against humanity, war crimes and the crime of aggression,[19] do not extend to violations of rights that relate to the environment, for instance.

The life cycle of a mine starts with prospection and exploration, then progresses to development and extraction; building up to closure

15 Code of Judicial Organisation and Competence of 1982, Article 10.

16 Constitution of the DRC (2006), Article 85, Article 156.

17 Chris Jochnick, 'Confronting the impunity of non-state actors: New fields for the promotion of human rights' (21) 1 *Human Rights Quarterly* (1999) 58-59.

18 Evelyne Owiye Asaala, 'Corporate criminal liability under the Malabo Protocol: Breaking new ground?' in HJ van der Merwe and Gerhard Kemp, *International criminal justice in Africa*, 2017, Strathmore University Press, Nairobi, 2018, 107, 114.

19 Rome Statute of the International Criminal Court, 1 July 2001, Article 5.

and/or rehabilitation. In this cycle, environmental rights are the ones that are more likely to be threatened or violated by a mining company. However, as noted above, transnational mining companies do not come under the purview of existing enforcement mechanisms.

An example of an attempt to establish a rights enforcement mechanism based on voluntary sign up by such companies is the Draft Statute on Business and Human Rights that Julia Kozma, Manfred Nowak and Martin Scheinin have proposed.[20] It requires corporations to first declare whether or not they agree to subject themselves to the jurisdiction of the proposed court and to decide which laws should apply to them.[21] This will be highly unlikely to succeed in most instances or simply unhelpful given the profit-centred objectives of transnational corporations.[22]

The Republic of Ecuador has proposed the 'Zero Draft' Business and Human Rights Treaty, which contemplates collaboration with domestic legal systems in order to fight corporate-related human rights violations.[23] Under the deep sea mining regime under the United Nations Convention on the Law of the Sea (UNCLOS), states are required to enforce environmental standards and it is such host states theselves that are then accountable at the international plane for any violations committed by mining companies that they licence, whether private or state owned enterprises (SoEs).[24] Multilateral treaties such as the Zero Draft and the UNCLOS regime may not help the situation in the DRC because they assume that domestic legal systems are willing and able to

[20] See generally Julia Kozma, Manfred Nowak and Martin Scheinin, 'Statute of the world human rights court-consolidated draft and commentary', 2010, 27.

[21] Statute of the World Human Rights Court (Draft), Article 51.

[22] Jephias Matunhu, 'Poverty and corporate social responsibility in Africa: A critical assessment' 1 *Zimbabwe International Journal of Open and Distance Learning* (2011) 125.

[23] Business and Human Rights Center, 'Ecuador's Revised Draft Treaty; Getting down to business,' 3 September 2019 < https://www.business-humanrights.org/en/blog/ecuadors-revised-draft-treaty-getting-down-to-business/

[24] Humphrey Sipalla, 'Bridging the business and human rights divide with lessons from UNCLOS deep sea mining regime' in Juan Carlos Sainz and others (eds) *Liber amicorum in honour of a modern renaissance man, His Excellency Gudmundur Eiriksson*, University for Peace Press/OP Jindal/Universal Law Publishing, 2017, 14, available on SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837671. See generally the United Nations Convention on the Law of the Sea (UNCLOS).

bring accountability through the judicial process on transnational mining corporations.

There have also been attempts to put in place a multilateral treaty-based institution that is directly applicable to transnational corporations without collaborating with a state.[25] However, as John Ruggie notes, they run the risk of being of little or no practical relevance.[26] Ruggie notes:

> there are 70,000 transnational corporations, with about 80,000 subsidiaries and millions of suppliers... Then there are millions of other national corporations. The existing treaty bodies have difficulty keeping up with 192 member states, and each deals with only a specific set of rights or affected group. How would one [multilateral-treaty-based institution] handle millions of corporations, while addressing all rights of all persons?[27]

The Africa Mining IQ has stated that only about 7,000 mining corporations and engineers are currently mining in Africa.[28] This number may reduce if attention is paid only to transnational mining corporations. Therefore, Ruggie's sentiments, it might be protested, may change if he limits his focus to transnational mining corporations at a continental level such as Africa, or at regional level, such as Central Africa – because it may still be impractical for one global multilateral-treaty-based institution to deal with thousands of corporations. Further, focusing on a continent or region should be done bearing in mind that these corporations may not be violating environmental rights simultaneously.

Following this logic, a continental treaty such as the Malabo Protocol (not yet in force) may be relevant. It provides for vicarious corporate liability, which is helps in holding mining corporations liable for

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25 See for instance Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity, Treaty on Transnational Corporations and Their Supply Chains with Regard to Human Rights, October 2017.

26 See -<https://www.business-humanrights.org/es/node/175772> on 1 March 2019.

27 John Ruggie, 'Business and human rights – Treaty road not travelled' Global Policy Forum, 6 May 2008.

28 See Africa Mining IQ -< http://www.projectsiq.icedev.co.za/mining-companies-in-drc.htm> on 8 August 2019.

the misconduct of their personnel.[29] One of the crimes that it is meant to fight is the illicit exploitation of natural resources,[30] which may cover a wide range of violations of environmental rights. A regional treaty such as a Central African treaty may be even more practical since it would deal with fewer transnational mining corporations than a continental treaty can.

One of the shortcomings of any continental or regional treaty-based institution is that its judgements run the risk of remaining abstract since it cannot be enforced against transnational mining corporations whose assets are outside the continent or the region in question.[31] In a state such as the DRC, for instance, 20 out of the 24 active transnational mining corporations are not from Africa.[32]

It seems accurate to conclude that, in a state such as the DRC, an international law mechanism that can subject transnational mining corporations to environmental rights should have two attributes. First, its judgements against corporations should be globally enforceable (or at least in almost all countries of the world). Second, it should have the capacity to deal with the large number of transnational mining corporations that exist in the world today.

Bilateral Investment Treaties (BITs) can pave the way for such an international law mechanism. A judgement endorsed by an institution that is meant to administer any disputes arising out of a BIT would be globally enforceable.[33] The reason for this is that such an institution

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29 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). See generally, Africa Centre for Open Governance, Kenyans for Peace with Truth & Justice 'Seeking or shielding suspects? An analysis of the Malabo Protocol on the African Court' Africa Centre for Open Governance, November 2016, 10.

30 Protocol on Amendments to the Statute of the African Court of Justice and Human Rights, 27 June 2014, Article 28A.

31 Convention of on Settlement of Investment Disputes between States and Nationals of other States, 19 October 1966, Article 54.

32 See Africa Mining IQ, 'Mining Companies in the DRC'.

33 See Convention of on Settlement of Investment Disputes between States and Nationals of other States, 19 October 1966, Article 54.

would be established by a global treaty.[34] However, the institution administering disputes arising out of a BIT should only do so to a certain extent in order to avoid congesting itself. It should, therefore, set out rules that an *ad hoc* arbitral tribunal should conform to in handling a BIT-related environmental rights violations dispute. Such a tribunal should conform to the rules of the institution in order for the institution to endorse the judgement of such a tribunal. This would avoid the issues of practicality that one multilateral-treaty-based institution is likely to suffer from in dealing with thousands of transnational mining corporations. More details on how this institution should work are discussed in Section 3 below.

In light of the above, Section 2 of this study provides a context to understanding the shortcomings of state-centric international law in the Congolese mining sector. To achieve this, Section 2 relies on Third World Approaches to International Law. Although the context Section 2 provides generally helps to examine all the findings of this study, it specifically tests the following hypothesis: 'transnational corporations cannot be held accountable for violations at the international level because international human rights law is state-centric and based on "egalitarianism"'.

Section 3 argues for inserting an international law mechanism of enforcing environmental rights against transnational mining corporations in BITs. Such a mechanism is what this study refers to as the 'Under BITs and through class actions' mechanism. As Section 3 shows, the class action device is an efficient way of affording redress to victims of violations of environmental rights by transnational mining corporations in a state such as the DRC. This Section tests the following hypothesis: 'a creative use of international law at a bilateral level can help hold transnational mining corporations accountable for environmental rights violations'.

Section 4 looks into the impact inserting human rights (such as environmental rights) obligations in BITs may have on the international

[34] See Convention on Settlement of Investment Disputes between States and Nationals of other States, Article 54.

human rights regime. This Section tests the following hypothesis: 'holding transnational mining corporations accountable for environmental rights violations under international law requires a restructuring of international law in a creative way'. Section 5 concludes the discussion. It restates the initial problem, the research findings and the recommendations for the way forward.

2. State-centric nature of international law and TWAIL

Powerful non-state actors, namely, transnational mining corporations, continue to violate environmental rights in Third World states such as the DRC due to lack of accountability through the judicial process in these states.[35] This is fuelled by the fact that these corporations have accumulated tremendous political and economic power, which has allowed them to interfere with domestic judicial systems. As Jephias Matunhu notes, the combined sales of two hundred of the largest transnational corporations is more than the gross domestic product of all the states in the world.[36] Despite this, the structure of international law is state-centric, expecting that only states have the duty to protect their populations from environmental rights violations by transnational mining corporations.[37]

Third World Approaches to International Law (TWAIL) is perhaps the most notable response to this state-centric nature of international law. TWAIL is a school of thought that argues that international law has failed to cater for the needs of the Third World. The reason for this, TWAIL advances, is that international law is premised on a history by analogy, which hopes that all states of the world are to achieve liberal nationalism and democratic internal self-determination.[38] TWAIL main-

[35] Lee James McConnell, *Extracting accountability from non-state actors in international law: Assessing the scope for direct regulation* Routledge, 2017, 1.

[36] Jephias Matunhu, 'Poverty and corporate social responsibility in Africa: A critical assessment' 1 *Zimbabwe International Journal of Open and Distance Learning* (2011) 84.

[37] McConnell, *Extracting accountability from non-state actors in international law*, 6.

[38] Makau Mutua, 'Savages, victims and saviors: The metaphor of human rights' 42(1) *Harvard International Law Journal* (2001) 243.

tains that this universalisation of international law has worked to subordinate Third World states to economic domination. For this reason, TWAIL sees international law as an accomplice to colonialism, and that this has continued in recent times through the phenomenon of neo-colonialism, which has helped imperial states maintain economic superiority over Third World states.[39] It is not surprising, therefore, that many TWAIL scholars advocate for an urgent need to address the interplay between rights and duties, and between international law and economic systems.[40]

Indeed, transnational mining corporations operating in Third World states such as the DRC carry out their activities in an economic and legal system that grants them rights without any corresponding duties. This economic system is sustained by way of international instruments known as Bilateral Investment Treaties (BITs). BITs are international legal instruments through which two states impose obligations on themselves regarding the treatment of their respective nationals who are investors (such as a transnational mining corporation) in each other's territory.[41]

The origin of BITs justifies the claim that they further neo-colonialism. They were first designed as a strategic response to the legacy of colonialism in postcolonial states.[42] This legacy is well captured by scholars such as Mahmood Mamdani and Hastings Winston Opinya *Okoth-Ogendo.* In *Citizen and subject*, Mamdani examines the colonial state and finds that throughout Africa, the colonialists were faced with what he coined 'the native question': how can a tiny and foreign minority rule over an indigenous majority?[43] The solution was to have a

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39 Anghie and others 'Third World Approaches to International Law and individual responsibility in internal conflicts', 96.

40 Mutua, 'Savages, victims and saviors', 243.

41 Jacobs Michael, 'Transnational corporations and proliferation of bilateral investment treaties: More than a bit influential' 8 (2) *Transnational Corporations Review* (2016) 93.

42 Jurgen Kurtz, 'The shifting landscape of international investment law and its commentary' 106(3) *The American Journal of International Law* (2012) 686.

43 Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, Princeton University Press, Princeton, 1996, 16 and 148.

civil society for settlers, the citizens; and to tribalise, hence divide, the indigenous majority, the subjects. The citizens lived in fertile lands and greener pastures while the subjects were forced into reserves.[44] Almost all tribes had an imposed indigenous leadership, led by a chief. The imposed chief was appointed by the settlers to reinforce their agenda of extra-economic coercion. They vested in him legislative, judicial and executive authority over his tribe. The fact that his tribe's resources were held in common allowed him to expropriate such resources through an administratively-driven customary law.[45]

Postcolonial African leaders welcomed this colonial enterprise with open arms. *Okoth-Ogendo* illustrates this in his famous piece 'Constitutions without constitutionalism'. African leaders, he demonstrated, substituted the settlers' civil society with a bureaucratic minority exerting extra-economic coercion on their states. Just like the settlers did this legitimately through the chief, African leaders found their legitimacy in constitutions.[46] Constitutions granted them control over their domestic judicial systems, allowing them to effectively expropriate even foreign assets without compensation.[47] In the DRC, for example, the late President *Mobutu Sese Seko* converted such assets into political resources for him to reward his loyal disciples.[48]

Against the wave of expropriations that were observed in postcolonial states in the 1950s and 1960s, capital exporting states devised BITs in order to afford their nationals investing in Third World states such as the DRC full security and protection against uncompensated expro-

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44 See generally Charles Simkins, 'Agricultural production in the African reserves of South Africa, 1918-1969' 7(2) *Journal of Southern African Studies* (1981).

45 Mamdani, *Citizen and subject*, 23.

46 HWO Okoth-Ogendo, 'Constitutions without constitutionalism: Reflections on an African paradox' in Douglas Greenberg, Stanley N Katz, Melanie Beth Oliviero and Steven C Wheatley, *Constitutionalism and democracy: Transitions in the contemporary world*, Oxford University Press, Oxford, 1993, 67-68.

47 Okoth-Ogendo, 'Constitutions without constitutionalism: Reflections on an African paradox', 71-73. See also Kurtz, 'The shifting landscape of international investment law and its commentary', 686.

48 William SK Reno, 'Sovereignty and personal rule in Zaire' 1(3) *African Studies Quarterly* (1997) 42.

priation and nationalisation, and fair and equitable treatment.[49] In case of any breach of a BIT, the matter was to be brought before the International Court of Justice (ICJ)[50] since domestic judicial systems were compromised.[51] Subsequently, owing to the spectacular adoption of BITs by most states, a significant change was made to their structure. They started affording foreign investors legal standing before international investment arbitral tribunals to pursue cases regarding their treatment by host states.[52]

What remains ironical is that if an investor violates the human rights of the nationals or peoples of the host state, the general trend in investment law thus far is to take the violators to domestic judicial bodies. Yet, the assumption that these bodies are not independent in many postcolonial states was the cornerstone upon which BITs were erected.[53] It is not surprising, therefore, that transnational mining corporations investing in states such as the DRC get away with environmental rights violations.

As international legal instruments, BITs do not impose duties on transnational corporations because the international human rights regime has been engineered on the basis of egalitarianism.[54] Egalitarianism is a theory connoting that all persons, including legal persons such as transnational mining corporations, should be treated equally. Under this theory, a state should therefore impose on these corporations the

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49 Kurtz, 'The shifting landscape of international investment law and its commentary', 686. See also Margaret L Moses, *The principles and practice of international commercial arbitration*, Cambridge University Press, Cambridge, 2017, 255-256.

50 Stephen Schwebel, 'The overwhelming merits of bilateral investment treaties' 32(2) *Suffolk Transnational Law Review* (2009) 267.

51 Chia-yi Lee and Noel P Johnston, 'Improving reputation BIT by BIT: Bilateral investment treaties and foreign accountability' 42(3) *International Interactions* (2016) 429.

52 Todd Weiler, 'Balancing human rights and investment protection: A new approach for a different legal order' 27(2) *Boston College International and Comparative Law Review* (2004) 430.

53 Kurtz, 'The shifting landscape of international investment law and its commentary', 686.

54 Nien-hê Hsieh, 'Should business have human rights obligations?' *Journal of Human Rights* (2015) 1-2 and 10.

duty to respect human rights, the same way it does for its own citizens. This is by going through domestic courts,[55] which have been unable to hold to account transnational corporations mining in states such as the DRC. There emerges then an urgent need for a new theory to respond to the egalitarian nature of the international human rights regime.

In the place of egalitarianism as the cornerstone of the international human rights regime, TWAIL is the framework within which international law should be rethought and restructured in a Third World state such as the DRC. Of relevance to the discussion carried out throughout this study is the second generation of TWAIL scholars that are people-centric.[56] They advocate for an international law approach that can be used to protect the peoples of the Third World such as the Mabende people alluded to in the introduction of this study. These people are to be protected against their states and other international actors. This is because Third World states often act in ways that are against the principles of their people (they could therefore be accomplices with transnational corporations).[57] It is in this vein that TWAIL espouses the mantra that unless there is radical rethinking and restructuring of the international legal order, the rights of Third World peoples will remain elusive in significant ways.[58] There then emerges a need to investigate how BITs can be used creatively to bring accountability by judicial process to transnational mining corporations in international law. This study intends to do this through what it has coined the 'Under BITs and through class actions' mechanism, which is tackled in the following Section.

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55 Nien-hê Hsieh, 'Should business have human rights obligations?', 10. This task has been left to states as egalitarianism is a school of thought attaching to states the exclusive duty to protect, respect and remedy human rights.

56 L Ramina, 'TWAIL - Third World Approaches to International Law and human rights: Some considerations' 5(1) *Revista de Investigações Constitucionais* (2018) 263.

57 Anghie and others, 'Third World Approaches to International Law and individual responsibility in internal conflicts', 78 and 82.

58 Anghie and others, 'Third World Approaches to International Law and individual responsibility in internal conflicts', 261.

3. The 'Under BITs and through class actions' mechanism

The fact that BITs grant foreign investors protection without imposing on them any corresponding duties has been the subject of much critique. Some commentators have opined that BITs constitute an actual threat to human rights,[59] and have gone on to argue for the inclusion of a mechanism of enforcing corporate-related human rights violations under BITs.[60] Todd Weiler argues for the creation of *ad hoc* human rights tribunals of the same calibre as the investment arbitral tribunals (for instance those under the International Centre for Settlement of Investment Disputes, (ICSID) that are currently handling BIT-related disputes. A host state's nationals, who are victims of corporate-related human rights violations, would seek redress before such *ad hoc* tribunals. He further argues that the compensation awarded should be enough to constitute an incentive for non-governmental organisations (NGOs) to investigate, prepare and bring an action on behalf of the alleged victims.[61]

There are some weaknesses in Weiler's argument. Such *ad hoc* arbitral tribunals do not at present have an administering institution. As such, they run the risk of either party to the arbitration delaying the aims of justice by engaging in deliberate obstruction of the arbitral process.[62] It would then seem better to establish and rely on international arbitral institutions specialising in the intersection between human rights and investment law. The advantage of arbitral institutions is that the awards they endorse have more credibility. They are also timely and reasona-

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59 James D Fry, 'International human rights law in investment arbitration: evidence of international law unity' 18 *Duke Comparative and International Law* (2007) 77.

60 Aaron Cosbey and Howard Mann, 'Bilateral investment treaties, mining and national champions: Making it work', Background paper for the Ad Hoc Experts Group Meeting: Bilateral Investment Treaties and National Champions; 18th Meeting of the Inter-Governmental Committee of Experts (ICE) 'National Champions, Foreign Direct Investment and Structural Transformation in Eastern Africa' Kinshasa, 17-20 February 2014, International Institute for Sustainable Development Report.

61 Weiler, 'Balancing human rights and investment protection: A new approach for a different legal order', 438.

62 Margaret L Moses, *The principles and practice of international commercial arbitration*, Cambridge University Press, Cambridge, 2017, 10.

ble and allow for the arbitrators' fees to be paid without any delay or complication.[63] However, it is impossible for states to agree to fund a bilateral arbitral institution for each BIT that they are party to because of limited resources. The DRC for example is party to about 17 BITs.[64] Further, only the two states that are party to the BIT can enforce any award realised by such an institution yet a transnational mining corporation may decide to keep its assets in other jurisdictions. To avoid this, states have acceded to multilateral treaties, such as the ICSID Convention, establishing one international arbitral institution.[65] However, as demonstrated in the Introduction of this study, it is difficult for a multilateral treaty-based institution to have the capacity to regulate the thousands of transnational mining corporations that exist in the world today.

This study sides with the arbitral tribunals that Ulrich Schroeter has coined 'borderline cases' of arbitral tribunals. They are neither *ad hoc* nor are they institutional arbitral tribunals; they are a combination of the features of both *ad hoc* and institutional tribunals.[66] To avoid imposing an unmanageable caseload on an institution such as ICSID while at the same time guaranteeing the enforcement of the 'award' in as many jurisdictions as possible, conventions such the ICSID Convention should provide for rules governing an *ad hoc* arbitral tribunal. Then, while such an *ad hoc* tribunal shall be established by the parties to the dispute requiring it, its judgement shall be endorsed by an institution such as ICSID for it to be enforceable in all jurisdictions that are party to a treaty such as the ICSID Convention.

Another weakness to be noticed in Weiler's argument is the lack of clarity on how a case is to get to such an *ad hoc* tribunal. It is not clear which nationals he is referring to. Can any Congolese national, for instance, bring an action before an *ad hoc* BIT-established tribunal? If the

63 Moses, *The principles and practice of international commercial arbitration*, 10 and 14.

64 See, UNCTAD Investment Policy Hub, 'International Investment Agreements Navigator; Congo'.

65 See ICSID, 'Database of ICSID Member States'< https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> on 4 December 2019.

66 Ulrich Schroeter, 'Ad hoc or institutional arbitration – A clear-cut distinction? A closer look at borderline cases' 10(2) *Contemporary Asia Arbitration Journal* (2017) 141-142.

answer to this question is 'yes', then such a tribunal will suffer from a heavy caseload, rendering its authority feeble. One may as well wonder: where will such a Congolese get the resources to approach such a BIT-established tribunal? It is not clear also, which NGO he is referring to. What will guarantee, for example, that such an NGO serves the interests of the aggrieved party? There is a need to establish proper safeguards to avoid any opportunistic behaviour on the part of an NGO or any person representing the aggrieved party.

This study proposes the class action device as a solution to this problem: how a case would get to the arbitral tribunal and how an aggrieved person would have adequate representation.

3.1 Through class actions

3.1.1 Overview

The functioning of the class action device is dealt with in detail in the following subsection, but a brief overview is in order here. The class action device is a multiple-parties claim that is brought before a court or a tribunal by someone who has been entrusted with the collective standing of a class of victims.[67] It does not require class members to opt in it because many of them may be too busy with their lives or are just uninformed about their rights. They may not therefore take the trouble of opting in to a class action.[68] However, in most cases, each class member remains with the option of opting out before any judgment or settlement binds the class.[69] This promotes the *res judicata* doctrine because when a court reaches a judgement or settlement, it binds all class members who have not opted out of the class.[70] For the avoidance of doubt, a line must be drawn between class actions, as explained above, and the old American 'spurious class actions' and the French '*action en représentation con-*

[67] Antonio Gidi, 'Class actions in Brazil - A model for civil law states' 51(2) *American Journal of Comparative Law* (2003) 334.

[68] Edward Sherman, 'Consumer class actions: Who are the real winners?' 56(2) *Maine Law Review* (2004) 228.

[69] Sherman, 'Consumer class actions: Who are the real winners?', 228.

[70] Gidi, 'Class actions in Brazil - A model for civil law states', 334.

jointe'. Spurious class actions and the *action en représentation conjointe* do not promote the *res judicata* principle. They only bind those class members who have opted in the class action expressly, through a signed document.[71] Spurious class actions and the *action en représentation conjointe* are not the ones advocated for in this study.

The class action device helps a class of victims, which could not have otherwise had the necessary information on their rights, or the resources to file a case.[72] This is achieved through what John Coffee has labelled 'entrepreneurial litigation'.[73] Entrepreneurial litigation refers to a lawyer acting as an independent entrepreneur. They dedicate time and effort and other necessary resources to investigate and prepare an action against an alleged abuser of the rights of a class of victims.[74] The lawyer is seen as an entrepreneur and the class action as their private investment.[75] If they lose, they will not get any payment in return. If they win, they will get a significant portion of the compensation that the defendant, a mining company in this case, will pay in damages.[76]

The class action device has been for many decades a United States (US) phenomenon. Few states have adopted it, all of which are in or close to the common law tradition.[77] It is a very recent development in civil law states,[78] among which Brazil has been at the forefront. This study borrows from the US and Brazilian experiences to propose how the class action device may be transplanted responsibly into BIT-based disputes. The focus is on environmental rights for two reasons. First, the precise definition of human rights is a hot debate and discussing

71 Gidi, 'Class actions in Brazil - A model for civil law states', 96.

72 Sherman, 'Consumer class actions: Who are the real winners?', 227.

73 John Coffee, 'The regulation of entrepreneurial litigation: Balancing fairness and efficiency in large class action', 54 *The University of Chicago Law Review* (1987) 877.

74 J Coffee, 'The regulation of entrepreneurial litigation', 878 and 882-883.

75 Gidi, 'Class actions in Brazil - A model for civil law states', 369.

76 Gidi, 'Class actions in Brazil - A model for civil law states', 369. See also E Sherman, 'Consumer class actions: Who are the real winners?', 224.

77 Samuel Baumgartner, 'Class actions and group litigation in Switzerland' 27(2) *Northwestern Journal of International Law and Business* (2007) 308-309.

78 Gidi, 'Class actions in Brazil - A model for civil law states', 323.

more than one right will inevitably go beyond the remit of this study.[79] Second, and most importantly, looking at the life cycle of a mine, environmental rights are the most likely to be threatened or violated by a mining company.

3.1.2 Lessons from US and Brazilian class actions

The US class action device is provided for under Rule 23 of the 1966 Federal Rules of Civil Procedure. Rule 23 sets out proper safeguards to avoid frustrating the judicial economy, and any opportunistic behaviour from the entrepreneurial lawyer.[80] Subsection (a) of the Rule mainly speaks to judicial economy. It contains a four-limb test to be satisfied in order to bring a class action before a court of law. There should be numerous class members, commonality of questions of law or fact typicality between the class representatives' claims and those of the whole class, and adequacy of representation.[81]

With respect to the numerosity criterion, class representatives must prove that class members are so many that it is impractical to have the traditional joinder of their claims.[82] To meet commonality, they have to prove that class members are so similarly situated that the class can be identified easily.[83] Typicality is close to commonality. It is satisfied when the class representatives and the class as a whole share in the approximate cause of harm.[84] Adequate representation speaks to which person(s) should have collective standing on behalf of the class.[85]

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79 Kathrin L Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 4 *Brigham Young University Law Review* (1999) 1149.

80 Sussana Kim Ripken, 'Conflicting ideologies of group litigation: Who may challenge settlements in class actions and derivative? 66 *Tennessee Law Review* (1998) 113.

81 [US] Federal Rules of Civil Procedure, (2018), Rule 23(a).

82 Melissa Hart, 'Will employment discrimination class actions survive?' *Akron Law Review* (2004) 815.

83 Boyd, 'Collective rights adjudication in US courts', 1159.

84 Boyd, 'Collective rights adjudication in US courts', 1162.

85 Gidi, 'Class actions in Brazil - A model for civil law states', 363.

Rule 23(e) aims at curbing any opportunistic behaviour that the entrepreneurial lawyer may be tempted to engage in. This provision demands the court's approval before dismissing or compromising a class action. It also requires that notice on the same be sent to all class members,[86] and their approval sought.[87] Susanna Kim Ripken captures the opportunistic behaviour that the provision is meant to fight:

> the [class lawyers] may be tempted to agree to a premature and inadequate settlement, or they may be inclined to reject a perfectly adequate settlement, depending on how much of the settlement offer covers lawyers' fees. There is always a possibility that the [class lawyers] will conspire with the defendant to exchange a small settlement for a large award of [their] fees.[88]

Edward Sherman has also warned that settlements have often been 'sweetheart deals' between the defendant and the class lawyers.[89] The requirement of notice has been heavily criticised in the US on the basis that it is not issued in a simplified form for many class victims to make sense of it. Notice should, therefore, be broken down even in the native language of class victims.[90] Thus far, although one may say that a comparative lawyer should look at the US class action device with interest, such lawyer should also look at it with suspicion,[91] especially in the enforcement of collective rights such as environmental rights.

Rule 23's requirement of numerosity can be met easily in environmental cases. It is evident that all it requires is a large number of victims. To meet the requirement of typicality and commonality, class members have to be similarly situated in an identifiable class.

To meet the typicality requirement in cases of environmental violations, the US experience may be instructive. In the US, class representatives must make a *prima facie* case of the existence of 'more than a mere occurrence of isolated or accidental or sporadic (environmental

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86 Federal Rules of Civil Procedure, (2018), Rule 23(e).

87 Federal Rules of Civil Procedure, (2018), Rule 23(e).

88 Kim, 'Conflicting ideologies of group litigation: Who may challenge settlements in class actions and derivative?', 124.

89 Sherman, 'Consumer class actions: Who are the real winners?', 232.

90 Sherman, 'Consumer class actions: Who are the real winners?', 228.

91 Sherman, 'Consumer class actions: Who are the real winners?', 224.

rights violation) acts. It must be established by a preponderance of the evidence that this was the corporation's *modus operandi*.[92]

It is difficult to meet commonality in cases of environmental rights violations, because of the differences in the class of victims, some of whom might not have manifested full-blown injuries.[93] US jurisprudence on class actions has also cautioned that there may be many differences as to the type of harm class members might have suffered. However, these differences only establish that their positions and claims are not identical, however, it does not follow that they are not similar. 'Victims may be similarly situated without being identically situated'.[94] Putting victims in one class mandatorily, however, implies averaging compensation among class members, hence overlooking the merits of individual claims.[95]

A solution to this problem has been sub-classing. Therefore, in cases of environmental violations, where a transnational mining corporation may have caused different environmental abuses to different groups of people, these people may be subdivided into groups that share similar injuries.[96] Sub-classing does not, however, do away with the problem of mandatory classing altogether. It only renders the differences between the individual claims minimal.[97] An example of sub-classing is the class settlement on the victims of the Holocaust, whereby victims were divided into sub-classes of Jews, Jehovah's Witnesses, gypsies, homosexuals and disabled people. These groups had experienced different abuses.[98]

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92 *General Telephone Co v Falcon*, 457 United States Supreme Court 147 (1982).

93 Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1164.

94 *Shain v Armour and Co*, United States District Court for the Western District of Kentucky 40 F. Supp. 488 (1941). See also Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1161.

95 Coffee, 'The regulation of entrepreneurial litigation: Balancing fairness and efficiency in large class action', 878.

96 Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1164

97 Coffee, 'The regulation of entrepreneurial litigation: Balancing fairness and efficiency in large class action', 921.

98 Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1156.

What should be considered is the substantive interests that are at stake. Sub-classing may be resorted to in order to provide special treatment to those victims who have already manifested full-blown injuries, bearing in mind that others may manifest injury after a considerable period has elapsed.

Further, a bicentric approach should be taken in enforcing environmental rights, one that protects the environment both for its intrinsic value and one that protects human beings from the violation of the environment.[99] Since class members will not be defined, money earned in compensation should cater progressively for those who manifest full-blown injuries and may also be used flexibly and creatively to protect the rights that are equal to those that the class action was advancing. It may for instance fund research and educational projects that are in the interests of the victims.[100]

In addition, the fund should be managed by a human rights non-governmental organisation (NGO) for the benefit of restoring a clean and healthy environment. The Brazilian 1985 Public Class Action Act may be instructive here. It provides for a Special Fund Account in Protection of Diffuse Rights, because of the difficulty of distributing individual damages to unknown class members.[101]

To meet the requirement of adequacy of representation, the rules of the institution establishing the arbitral tribunal should set out the standards that an environmental NGO or an entrepreneurial lawyer must meet in order to represent a class of victims.

In the DRC, public attorneys are more likely to face financial or political constraints. Therefore, they are more likely to fail in investigation and in the proper preparation of meritorious cases .[102] American scholarship on class actions has shown that class actions are better led

[99] Timonah Chore, 'Reconceptualising the right to a clean and healthy environment in Kenya: The need to move from an anthropocentric view to a bicentric view' 4(1) *Strathmore Law Review* (2018) 71-85.

[100] Gidi, 'Class actions in Brazil - A model for civil law states', 339.

[101] Gidi, 'Class actions in Brazil - A model for civil law states', 339.

[102] Sherman, 'Consumer class actions: Who are the real winners?', 232.

by organisations rather than state actors. Environmental rights NGOs, for instance, have more interest in the subject of litigation rather than in the money as is the case with entrepreneurial lawyers.[103]

The requirement of Rule 23(e), giving notice to all the victims before the class representatives can dismiss or compromise a class action case may be virtually impossible to achieve with respect to environmental rights cases.[104] The arbitral tribunal should be consulted on this. However, notice should still be issued to those that may be identified, at the 'class level' through reasonable effort.[105]

Class actions have a significant impact on the behaviour of corporations as they necessitate changes in these corporations' policies, practices or designs. This may prevent malpractice in the future,[106] hence bringing about structural changes in law and institutions. This is because class actions give victims an opportunity to bring to the fore any unjust treatment that they may have been experiencing in their home states. Class actions provide a 'constructive context for victims to "tell their story", applying pressure on domestic legislatures to respond with legislation against repressive regimes…'.[107] Such pressure may bring about judicial reforms in a state such as the DRC.

4. Impact on international law

This Section tests the following hypothesis: 'Holding transnational mining corporations accountable for environmental rights violations under international law requires a restructuring of international law.' The Section looks into the impact that subjecting transnational mining corporations to the respect of environmental rights through BITs

103 Gidi, 'Class actions in Brazil - A model for civil law states', 370.

104 Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1168-1169.

105 George Rutherglen, 'Title 7 class actions' 47(688) *The University of Chicago Law Review* (1980) 670.

106 Sherman, 'Consumer class actions: Who are the real winners?', 232.

107 Kevin R Johnson, 'International human rights class actions: New frontiers for group litigation', 3 *Michigan State Law Review* (2004) 656.

and class actions will have on international law. It demonstrates that if transnational corporations are to be held accountable for environmental rights at the international level through BITs and class actions, there is a need to rethink BIT-related disputes as matters falling within the sphere of private law. BITs should be considered as part of public law because the violations of environmental rights are matters of general public importance and transcend the parties involved. This implies providing the public with access to the arbitral tribunal proceedings, which are traditionally kept private. Further, the Section makes and justifies the claim that enforcing environmental rights through BITs and class actions may provide a solution to the difficulty of enforcing group rights such as environmental rights. It concludes by urging that international law be restructured in such a way that takes cognisance of the particular circumstances of Third World states such as the DRC instead of being premised on history by analogy.

James Fry, like many others, has maintained that international investment arbitrations are not appropriate fora for human rights adjudication. Fry argues that the majority of arbitrators are not well versed with international human rights law because their background is informed by the private international law sphere. He goes on to argue that arbitrators rely on philosophies and skills that depart significantly from those of public international law where human rights fall.[108] He has also stated that there already exist many fora before which human rights grievances can be addressed.[109]

In response to this, Weiler has argued that it is not a herculean task to constitute a bench of arbitrators that are well versed in a certain area of human rights such as environmental rights.[110] After all, the parties before an arbitral tribunal have the choice to decide on which arbitrators will constitute an arbitral tribunal.[111]

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108 Fry, 'International human rights law and investment arbitration', 110-111.

109 Fry, 'International human rights law and investment arbitration', 111.

110 Weiler, 'Balancing human rights and investment protection: A new approach for a different legal order', 438.

111 Moses, *The principles and practice of international commercial arbitration*, 1.

Further, the discussion in this study has clearly shown that bringing accountability to transnational mining corporations calls for further consideration of the international human rights regime. Fry's second criticism would lose its strength on account of the international human rights mechanisms that are in place to impose human rights obligations on corporations that have proven to be inefficacious in states such as the DRC. The following observation by Kathryn Boyd may lend support to this:

> enforcement of human rights has been the obsession of proponents in the twentieth century; some have questioned the existence of the rights altogether when there are no measures for enforcing them. Indeed, it is well accepted in rights theory that where there is no remedy for a claim of right, the existence of the correlative right is tenuous at best.[112]

It is along these lines that Ruggie maintains that international corporate accountability will never come to fruition 'without standing international human rights law on its head'.[113]

Enforcing environmental rights through BITs and class actions may therefore be a milestone towards filling in the gap that has existed for a long time between the international human rights regime and transnational corporations. Resorting to arbitration, which should allow for discovery,[114] is important because it will guarantee enforcement of an arbitral award by enforcing it in jurisdictions in which these corporations have assets.[115] In most instances, these jurisdictions are not the party to the BIT. It is instructive to note that such corporations generally abide by the laws of developed states, which impose stringent legal obligations.[116] This situation changes when they carry their businesses to Third World states which have 'weak' mechanisms for enforcing human rights.[117]

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112 Boyd, 'Collective rights adjudication in US courts: Enforcing human rights at the corporate level', 1182.

113 See Ruggie, 'Business and human rights – Treaty road not travelled'.

114 Moses, *The principles and practice of international commercial arbitration*, 4-5.

115 Moses, *The principles and practice of international commercial arbitration*, 258.

116 Tebello Thabane, 'Weak extraterritorial remedies: The Achilles heel of Ruggie's 'Protect, Respect and Remedy' Framework and Guiding Principles' *African Human Rights Law Journal* (2014) 43.

117 Sophie Schiettekatte, 'Do we need a world court of human rights: Filling in the gaps for TNC responsibility' Master's Thesis, Universiteit Gent, 2015-2016, 43.

Being in a joint venture with a state-owned mining corporation or another private mining corporation should not help these corporations avoid liability for environmental rights violations. In case of a joint venture, the rules of liability as they relate to production-sharing contracts should apply, and their enforcement should be the responsibility of these corporations.[118]

Further, arbitration is usually meant to be private. However, environmental rights violations being matters of general public importance, the public should be in a position to access the arbitral proceedings.[119] This trend is already taking shape even within the field of investment law where transnational corporations enjoy rights only, without any corresponding obligations. It should be a welcomed contribution in terms of holding transnational mining corporations accountable for environmental rights violations.[120] The ripple effect of this will be to build confidence and jurisprudence in an area of law where transnational mining corporations can be held accountable for environmental rights violations at the international law level.[121]

It is said that 'the term *jurisprudence* denotes a body of learning built up from a number of judicial pronouncements on a particular issue resulting in a coherent principle or set of principles.'[122] The enforcement of collective rights such as the right to a clean and safe environment is in itself problematic in the regime of human rights law. This is because human rights stem from 'the inherent dignity of the human person'. As such, it may be argued, any rights that can only be enjoyed in the solidarity of a community are not human rights.[123] Enforcing human rights

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118 Charltons, 'Advising resource companies' < https://charltonsnaturalresources.com/en/members-affiliations/14-charltons-boutique-hong-kong-solicitors/advising-resource-companies> on 5 July 2019.

119 See Lucy Trevelyan, 'International arbitration: A time of change', *International Bar Association: The Global Voice of the Legal Profession*, 27 October 2017.

120 See Trevelyan, 'International arbitration: A time of change',

121 See Trevelyan, 'International arbitration: A time of change'.

122 A Zuckerman, 'Super injunctions - Curiosity-suppressant orders undermine the rule of law: Injunctions, interim injunctions, secrecy, transparency' (29) 2 *Civil Justice Quarterly* (2010) 135.

123 Johnson, 'International human rights class actions: New frontiers for group litigation'.

under BITs and through class actions should therefore be a welcome contribution to addressing this pathology that inheres the international human rights regime.

All claims of the universality of the international human rights regime (which is state-centric) ought to be approached with caution and trepidation.[124] The current international order tends to give meaning to contemporary realities of Third World peoples through history by analogy. As a result, such realities are de-historised, dissuaded from the context and processes that have led to it.[125] The aim has been fitting comfortably into an abstract universalism.[126] The international human rights regime has sided with this on the question of the legal accountability of transnational mining corporations. It is of universal practice to subject transnational mining corporations to human rights through domestic legal systems, irrespective of whether they are more likely to be compromised by these corporations.

To sum up, this Section has tried to demonstrate that transnational mining corporations can be subjected to human rights at the international level through BITs and class actions. This proposition implies rethinking the very foundation of international law, specifically international investment law. International investment law has been traditionally considered as falling under the private sphere. As such, the public does not have access to investment-related arbitral proceedings. However, if human rights such as environmental rights are to be enforced at the international level via BITs, there is a need to make the proceedings entertained by a BIT-established tribunal open to the public. This may be relevant for the sake of transparency and building jurisprudence as far as holding transnational mining corporations accountable for environmental rights is concerned.

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124 Makau Mutua, 'Human rights in Africa: The limited promise of liberalism' 51(1) *Journal of African Studies* (2008) 19.

125 Mamdani, *Citizen and subject*, 12-13.

126 Mamdani, *Citizen and subject*, 13.

5. Conclusion and recommendations

This conclusion has four objectives. First, it starts by restating the initial problem that this study intended to solve. Second, it provides the four main hypotheses that the study has developed in the aim of solving the problem under study. Third, it brings to the reader's attention the findings that this study has arrived at on these hypotheses. Fourth, it provides recommendations on the way forward in directing future research.

5.1 Initial problem

This study started by demonstrating the need to hold transnational mining corporations operating in the DRC to account under international law for environmental rights violations. This need is occasioned by the lack of accountability by judicial process in the DRC mining sector. The study demonstrated that transnational corporations are not directly held accountable for such violations under international law because international law is state-centric. International law expects states to impose the respect of environmental rights on transnational mining corporations, a task that has become elusive for many Third World states such as the DRC.

5.2 Findings

5.2.1 That the mining operations of transnational corporations continue to violate environmental rights in the DRC because of lack of accountability by the judicial process in the Congolese mining sector

With regard to the first hypothesis, this study has found that this is true because of corruption that pervades the mining sector in the DRC. Further, this is coupled by the fact that there are many loopholes in Congolese law that threaten the independence of the judiciary.

5.2.2 That transnational corporations cannot be held accountable for these violations at the international level because international human rights law is state-centric and based on egalitarianism

With regard to the second hypothesis, this study relied on TWAIL to make a case for a departure from this state-centric nature of international law. The second generation of TWAIL scholars argue that often Third World states do not promote the rights of their peoples. As such, international law should respond to this by holding any violator of rights of people accountable at the international level.

5.2.3 That a creative use of international law at a bilateral level can help hold transnational mining corporations accountable for environmental rights violations

This hypothesis resulted first into an inquiry why holding these corporations accountable at global, continental or regional level can be inefficacious.

At the global level, the study found that one institution such as a world court for transnational corporations would be of little relevance because such an institution would lack the capacity to deal with all environmental rights disputes related to such corporations. The reason for this is, for instance, the fact that there exist between 70,000 and 80,000 transnational corporations operating in the world today. However, this number may reduce significantly if one focuses only on environmental rights violations by transnational mining corporations in a continent or a region. In the DRC for example, there exist about 24 active transnational mining corporations (at the time of the writing of this study). Hence, following this logic, a continental or regional court for transnational mining corporations may be in a position to deal with environmental rights disputes related to a transnational corporation at a continental or regional level.

Despite the cogency displayed by the proposition of a continental or regional court, the study noticed a weakness in it. The study demonstrated that any judgement issued by a continental or regional court may only be enforceable in the continent or the region to which such a

court is related. This is due to the fact that any state that is not party to a treaty establishing such continental or regional court is not under any legal obligation to enforce such judgement. This may be, for instance, by freezing the assets of the corporation against which a judgement has been issued. To illustrate this, 20 out of the 25 transnational mining companies operating in the DRC are nationals of non-African countries. In response to this, the study inquired into whether and how transnational mining corporations operating in a country such as the DRC can be held accountable at a bilateral level, with the help of BITs. This inquiry raised questions such as whether any Congolese national, for instance, can just bring a case before a BIT-established arbitral tribunal. Will he or she have the resources to do so? How will adequate representation be guaranteed?

As an answer to all these questions, the study has proposed the class action device. The class action device involves 'entrepreneurial litigation'. This entails having a lawyer who acts as an independent entrepreneur, investing time, money and other resources to investigate and prepare an action against an alleged abuser of the rights of a class of victims. The lawyer is seen as an entrepreneur and the class action as their private investment. As such, they face a lot of incentives to embark on class actions and to handle it with care.

It is instructive to note that this shall not be done through an *ad hoc* arbitral tribunal because many states where a transnational mining corporation has assets may not be under the obligation to enforce awards given by an *ad hoc* tribunal. Neither shall it be done through an institutional arbitral tribunal. In as much as an institutional arbitral tribunal can enforce its judgment in all states that are parties to the treaty establishing that tribunal, it may face the issues of practicality. This is especially true when it comes to regulating the conduct of the thousands of transnational corporations operating in the world today. To remedy this, the author has suggested 'borderline cases' of arbitral tribunals, which have the features of both *ad hoc* and institutional arbitral tribunals. Under these types of tribunals, *ad hoc* arbitral tribunals may adjudicate the disputes concerning the violations of environmental rights by a transnational corporation. Their judgments may then be enforced by

a global institution such as ICSID established by a global treaty for it to be widely enforceable.

5.2.4 Holding transnational mining corporations accountable for environmental rights violations under international law requires a restructuring of international law

Finally, with regard to the fourth hypothesis, this study has demonstrated that subjecting transnational mining corporations to environmental rights in an international forum implies rethinking the very structure of international law. As John Ruggie maintained, international corporate accountability will never come to fruition 'without standing international human rights law on its head'. This study has, though in a modest way, made an attempt to stand international law on its head. This entails, for instance, dealing with BIT-related issues as a matter falling within the realm of public law and not investment law. The reason for this is that environmental rights violations are a matter of public interest.

5.3 Directing future research

This study has focused exclusively on the violations of environmental rights by transnational mining corporations operating in the DRC. The DRC being a Third World state, this study may be applicable to any Third World state lacking accountability in its mining sector. The study may be also helpful in directing research towards the violations of other human rights by any type of transnational corporation. Such rights include, but are not limited to, employment and fair labour practices, and the rights of indigenous peoples.

An unhealthy state of affairs: The dilemma in the fight against corruption and the right to health

Onesmus W. Musungu*

Abstract

Corruption has found its place not only in the society at national level but also globally. Yetunde Aluko in her article 'Corruption in Nigeria: Concept and dimensions. Anti-corruption reforms in Nigeria since 1999'[1] opined that corruption has transcended national boundaries and is therefore not a preserve of any nation, race or section of the world. Some people believe that corruption is becoming a culture and hence a way of life. Corruption has been unlawfully entrenched in our society and has become part of the society's norms and culture. This article seeks to unravel the 'place' of corruption in our health facilities and how it has destabilised the health system leading to the poor implementation of Article 43(1) of the Constitution of Kenya (2010). This article suggests possible legal and societal approaches to curb the practice of corruption and ensure the right to health is progressively realised.

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1 Yetunde Aluko, 'Corruption in Nigeria: Concept and dimensions. Anti-corruption reforms in Nigeria since 1999: Issues, challenges and the way forward,' IFRA Special Research Issue 2009 Vol 3.

1. Introduction

The Constitution of Kenya (2010) as well as ratified treaties make provision for the right to health.[2] The State has an obligation to guarantee the right to the highest attainable standard of health and is required to ensure that the right to the highest attainable standard of health is realised progressively.[3] As the State positively tries to ensure the achievement of this right, corruption has strived hard to render its realisation impossible. It goes without saying that corrupt activities in the health sector have irreparably damaged the ability of health care systems to deliver high quality and effective services to those who are in need of it.[4] Corruption in itself is a 'disease' that has affected health care provision. It has impoverished the population, increased inequality in access to medication and is responsible for health deterioration especially among vulnerable members of society.[5]

The guarantee of the right to health is an ambitious promise which is to be progressively realised by the State.[6] This article will provide a brief overview of the right to health and its enshrinement in the Constitution of Kenya with specific reference to the main achievements and setbacks in the healthcare sector which have been caused by corruption. Additionally, this article will analyse the framework provided for in the Bill of Rights (Chapter Four) with regards to the right to health and health related rights.[7]

Corruption hinders the enjoyment of the right to health. The list of mega corruption scandals recorded in the health sector in Kenya as

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2 African Charter on Human and Peoples' Rights, Article 16; International Covenant of Economic, Social and Cultural Rights, Article 12. See also, Universal Declaration of Human Rights, Article 2. For applicability in Kenya, see Constitution of Kenya (2010), Articles 2(5) and (6).

3 Constitution of Kenya (2010), Article 43.

4 Judith Jepkorir, 'Combating corruption in the provision of the highest attainable standard of healthcare' *KenyaLaw.org Blog*, 30 July 2021.

5 Jepkorir, 'Combating corruption in the provision of the highest attainable standard of healthcare'.

6 Constitution of Kenya (2010), Article 43.

7 Constitution of Kenya (2010), Chapter Four, Bill of Rights.

documented over the years include; the National Hospital Insurance Fund graft corruption allegations by its officials,[8] and promotion of unmerited staff to senior positions,[9] the CovidMillionnaires scandal where the Kenya Medical Supplies Authority (KEMSA) allegedly squandered COVID-19 pandemic funds and donations.[10]

The above clearly shows that corruption has made it difficult for the State to discharge its mandate of fulfilling, respecting and protecting the right to health. The finances which had been set aside for purchase of medical supplies, hiring of more staff and development of infrastructure for purposes of enabling and facilitating the citizens in enjoyment of their right to the highest attainable health standards have been embezzled, the end result being death and losses in various forms.[11]

Corruption is an insidious plague that has variant corrosive effects on societies.[12] Thus, curbing corruption would be a step further in realising basic human rights and fundamental freedoms.

This article contends that ending corruption is not easy, it will entail transforming our political, social and legal agenda. It suggests that Kenya should benchmark from such models and adopt human rights approaches to corruption as it will be discussed in this article.[13] This paper will show that the Kenyan Bill of Rights contains pioneering provisions with regard to the realisation of the right to health for Kenyan citizens. This article will focus on the right to the highest attainable health standard and the impact of corruption on its realisation. It will examine the areas in which corruption is prevalent in the health sector and pro-

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8 Cyrus Ombati and Roslyn Obala, 'Over 10 billion feared to be lost in new NHIF pay scandal' *The Standard*, 12 September 2022.

9 Anthony Mwangi, 'NHIF boss sued over staff promotion' *People Daily*, 12 September 2022.

10 Jepkorir, 'Combating corruption in the provision of the highest attainable standard of healthcare'.

11 Judith Jepkorir, 'The effect of corruption on the right to health' *Amka Africa Justice Initiative*, 18 July 2022.

12 Mathew Murray and Andrew Spalding, 'Freedom from official corruption as a human right', *Governance Studies at Brookings,* January 2015.

13 Jepkorir, 'The effect of corruption on the right to health'.

pose some recommendations to that effect for purposes of preventing corruption in the health sector.

2. Corruption

Corruption is an offence under the provisions of Sections 39 to 44, 46, 47 of the Anti-Corruption and Economic Crimes Act (No 3 of 2003, Revised in 2016). These provisions identify bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust or an offence involving dishonesty as grounds upon which one may be charged for corruption.[14]

Transparency International defines corruption as the unlawful and improper enrichment of officials in the public sector or those close to them through the misuse of public power entrusted to them.[15]

Corruption has been defined as 'a non-violent criminal activity which is committed with an objective of pocketing wealth illegally either by individuals or by a group of persons hence violating present laws which govern the economic activities of the government and its administration'.[16] Yemi Akinseye describes corruption as the 'mother of all crimes'.[17]

From the above conceptualisations, it is evident that writers' and scholars' definitions vary. Therefore, we can allude to the fact that the definitions of corruption are straightforward but they vary depending on different intellectual approaches. Corruption knows no boundary, culture, or society and there is no profession or occupation that is immune from its practices.[18] This threat has led to situations such as po-

14 Anti-Corruption and Economic Crimes Act (No 3 of 2003, Revised 2016), Section 2.

15 'What is corruption?', *Transparency International*, 24 April 2022.

16 Ezenwa C Ngwakwe, 'An analysis of jurisdiction tuitions in Nigeria (2009)' in *Anti-corruption reforms in Nigeria since 1999: Issues, challenges and the way forward*, IFRA Special Research Issue, (2009) 3.

17 Yemi Akinseye George, *Legal system, corruption and governance in Nigeria*, New Century Law Publishers, 2000.

18 David Iyanda, 'Corruption: Definitions, theories and concepts' *Arabian Journal of Business and Management Review* (2012) (OMAN Chapter).

lice extortion, queues at public offices for those seeking public services, election irregularities, and ghost workers syndrome among others.[19] Corruption is endemic in any system of government and since it is as old as the world it is viewed as a regular, repetitive and integral part of the operation of most political systems.[20] We cannot shy away from the fact that corruption threatens among other things several aspects of the right to health.[21] This includes reproductive health care, clean and safe water, adequate food of acceptable quality, and reasonable standards of sanitation.[22]

3. The right to health

3.1 Historical development of the right to health

The right to health is a fundamental human right. The exercise of other rights is dependent on it. The United Nations Charter foreshadowed the right to health in 1945 when it described one of its substantive purposes being to promote international cooperation in solving international problems of economic, social and cultural nature.[23] In the same year, the World Health Organisation (WHO) whose aim is to implement the human right to health was established.[24]

The 1948 Universal Declaration of Human Rights (UDHR) recognises the right to an adequate standard of living. It states that 'everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing and medical care…'[25]

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19 Iyanda, 'Corruption: Definitions, theories and concepts'.

20 James C Scott, 'Comparative political corruption' 70 *American Political Science Review* 1976.

21 2012 Report to the General Assembly. These include management of financial resource, distribution of medical supplies and the relationship between health workers with patients. Also see ICHRP 53.

22 Constitution of Kenya (2010), Article 43.

23 United Nations Charter, Preamble.

24 'History of WHO', *World Health Organisation*, 25 April 2022.

25 Japhet Biegon, 'The inclusion of socio-economic rights in the 2010 Constitution: Con-

The UDHR though a non-binding instrument, plays an important role as the normative foundation of the international human rights system.[26]

In 1966 the International Covenant on Economic Social Cultural Rights (ICESCR), which recognises the right of everyone to enjoy the highest attainable standard of physical and mental health was adopted.[27] The UN Committee on Economic, Social and Cultural Rights has interpreted the right to health by encompassing it in General Comment 14 (2000).[28]

In 2002, the UN Commission on Human Rights (now replaced by the UN Human Rights Council) appointed a UN Rapporteur to report on the enjoyment of the highest attainable standard of physical and mental health.[29] The protection of the right to health at the international level is emphasised by other instruments which include: the Convention on the Right of the Child (CRC),[30] the Convention on the Rights of Persons with Disabilities (CRPD), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Development of the right to health in Africa is attributable to the inception of the African Charter on Human and Peoples' Rights (ACHPR) which was adopted in 1981.[31] Right to health is enshrined in Article 16 of the ACHPR which provides that every individual shall have the

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ceptual and practical issues' in Japhet Biegon and Godfrey Musila (eds) *Judicial enforcement of socio-economic rights in the 2010 Constitution: Conceptual and practical issues,* Kenyan Section of the International Commission of Jurists, 2011.

26 Biegon, 'The inclusion of socio-economic rights in the 2010 Constitution'.

27 International Covenant on Economic Social Cultural Rights, 3 January 1966, 993 UNTS 3, Article 12.

28 United Nations Economic and Social Council, General Comment No 14: The right to the highest attainable standard of health. UN Doc E/C.12/2000/4 (11 August 2000).

29 Office of the High Commissioner for Human Rights: Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health UN Doc E/C /4 Res 31/2002.

30 'United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health', *United Nations Human Rights Office of the High Commissioner*, May 2021.

31 Guiseppe Pascale, 'The human right to health in Africa: Great expectations, but poor results' *Voelkerrechtsblog*, 24 June 2016.

right to enjoy the best attainable state of physical and mental health.[32] Further, it states that African Union (AU) member states should take necessary measures to protect the health of their people and to ensure that medical services, goods, and facilities are available, accessible, and of good quality.[33]

It is also important to note that the international law guarantees aforementioned are binding in Kenya as per provisions of Article 2(5) and (6) of the Constitution (2010).

3.2 Right to health and the rule of law

The rule of law is a fundamental concept within the Kenyan legal framework. The principle implies that all persons, officials and institutions, including the State itself, are accountable under the laws which are equally enforced, independently adjudicated, and which conform to international human rights standards.[34] It is deeply rooted in public involvement where all persons within the meaning of Article 260 of the Constitution of Kenya, are equally accountable to just, fair and equitable laws and are further entitled without any discrimination, to equal protection before the law.[35] The right to health places an obligation on the state to guarantee every person the right to health.[36]

As a state party to the ICESCR, Kenya is required to submit a report to the UN Committee on Economic Social and Cultural Rights showing the steps it has taken to ensure respect, protection and fulfilment of the right of health. This ensures accountability. The process of reforming a country's public health laws illustrates the obligation of states to fulfil

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32 African Charter on Human and Peoples' Rights, Article 16.

33 African Charter on Human and Peoples' Rights, Article 16.

34 *Advancing the right to health: The vital role of law*, World Health Organisation, Geneva, 2017, 77.

35 Declaration on the high-level meeting of the General Assembly on the rule of law at national and international levels, 30 July 2013, A/Res/67/1, para 2.

36 Constitution of Kenya (2010), Article 43(1)(a).

the right to health.[37] The obligation to respect, protect or fulfil the right to health in a systematic and sustainable manner by the state will be trampled on if the rule of law is not respected.[38]

The implementation or enforcement of the law is susceptible to corruption.[39] Corruption in the health sector threatens progress towards national health goals.[40] The principles of good governance which revolve around upholding the rule of law, help to guard the law reform process against corruption and failures by the government to faithfully serve the public interest.[41] Thus, it is important to allude to the fact that corruption weakens the accountability of State officials, reduces transparency in the conduct of functions of state institutions and permits the breach of right to health to go unpunished.[42]

Health care provision systems depend on the efficient combination of human resources, financial resources, supplies, and competent delivery of services.[43] Corruption and mismanagement of funds is illustrative of lack of integrity and accountability by those entrusted with the role of managing resources. It takes into account accountability to the public for decisions and actions by state officers. Accountability connotes that state officers exercise powers delegated to them in good faith. However, without transparency, this would likely fail. Additionally, Article 201 of the Constitution provides that public money should be used in a prudent and responsible way. This is supplemented by the guiding principles stipulated in Section 3 of the Public Procurement and Asset Disposal Act (PPADA) which prescribes maximum value for money as a key principle in procurement. Further, it is an offence for an indi-

37 United Nations Economic and Social Council, General Comment No 14: The right to the highest attainable standard of health. United Nations Doc E/C.12/2000/4 (11 August 2000) para 8.

38 *Good governance practices for the protection of human rights*, Office of the United Nations Commissioner for Human Rights, New York 2007, 1-2.

39 *Advancing the right to health: The vital role of law,* 74.

40 *Advancing the right to health: The vital role of law*, 74.

41 *Advancing the right to health: The vital role of law*, 74.

42 *Good governance practices for the protection of human rights*, 59.

43 Maureen Lewis, 'Governance and corruption in public health care systems' Centre for Global Development Working Paper No 78, 2006.

vidual to engage in corrupt activities as stipulated under Section 66 of the PPADA. These principles have not been appreciated in the Kenyan health sector since we have witnessed mismanagement of resources by public officers. This can be recalled from the NHIF saga and the #Covid-Millionares saga, which have proven that provisions of leadership and integrity in Chapter Six of the Constitution are not well reflected upon by persons holding office in the health sector.

3.3 Legal framework to the highest attainable health standard

3.3.1 Domestic laws

> Quite beyond argument then, the Bill of Rights in Kenya's constitutional framework is not a minor peripheral or an alien thing removed from the definition, essence and character of the nation. Rather, it is said to be integral to the country's democratic state and is the framework of all the policies touching on the populace. It is the foundation on which the nation and state is built. There is a duty to recognise, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights… The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State... respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.[44]

Health care is a fundamental right that is indispensable for the enjoyment of other human rights, in particular the right to food, work, education, housing and water.[45] Article 43(1)(a) of the Constitution of Kenya 2010 took into account the right to the highest attainable standard of health, which includes the right to healthcare services, and reproductive healthcare.

Article 21(1) of the Constitution of Kenya 2010, requires the state to observe, respect, promote, protect and fulfil the rights and fundamental freedoms in the Bill of Rights. In *Kenya Society for the Mentally Handi-*

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[44] *Attorney General v Kituo cha Sheria & 7 others,* Civil Appeal 108 of 2014, Judgment of the Court of Appeal 17 February 2017 eKLR, para 29.

[45] Margret Vidar, 'The interrelationships between the right to food and other human rights' in Wenche Barth Eide and Uwe Kracht (eds), *Food and human rights in development: Legal and institutional dimensions and selected topics,* Intersentia, 2005, 144.

capped v Attorney General and others,[46] the petitioner alleged violation of social and economic rights of persons with disabilities. While issuing its judgment, the Court held that its purpose was not to prescribe policies but to ensure that policies followed by the State meet constitutional standards and that the State should meet its obligations to take measures to observe, respect, promote and fulfil fundamental rights and freedoms.

The government of Kenya is obliged to ensure that there is progressive realisation of social and economic rights as stipulated in Article 21(2) of the Constitution which requires the state to take legislative, policy and other measures, including the setting of standards to achieve the progressive realisation of the rights guaranteed under Article 43. The Constitution of Kenya provides for a normative approach of the right to health. The right to health encompasses availability of health services which ensure that quality services within a state party are accessible.[47] Article 43(1) of the Constitution of Kenya guarantees every citizen the right to the highest attainable standard of health. Article 43(2) of the Constitution of Kenya further provides that every person is entitled to emergency medical care. For this provision to be fully realised, Article 21 is invoked in which it requires the state to take legislative policies and other measures to achieve the progressive realisation of the rights guaranteed under Article 43 of Constitution. State organs and public officers have constitutional obligations to address the needs of indigenous persons and groups in the society.[48] It should be noted that, the state has been further obliged under Article 46 of the Constitution to protect consumer rights, including the protection of health, safety, and economic interest.[49]

The High Court of Kenya has opined thus on the status of progressive realisation:

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46 *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General & 7 others,* Constitutional Petition 155A of 2011, Ruling of the High Court 18 December 2012 eKLR.

47 General Comment No 14, para 12.

48 These include women, older members of society, persons with disabilities, children and youth, members of minority or marginalised communities, and members of particular ethnic and religious or cultural communities.

49 Constitution of Kenya (2010), Article 46.

> … Article 21 and 43 requires that there should be a 'progressive realisation' of social economic rights, implying that the state must begin to take steps towards realisation of these rights… Granted, also, that these rights are progressive in nature, but there is a constitutional obligation on the state when confronted with a matter such as this, to go beyond the standard objection… its obligation requires that it assists the Court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social economic rights, and policies, if any, it has put in place to ensure that the rights are realised progressively, and how the petitioners in this case fit into its policies and plans.[50]

Every citizen should enjoy access to medical services despite their economic status, culture or gender. In the case of *PAO and 2 others v Attorney General*, the Court categorically held that, the fundamental right to life, human dignity and health as protected and envisaged by Article 26(1), 28 and 43(1) of the Constitution encompasses access to affordable and essential drugs including generic drugs. The Court further stated that any legislation that tries to limit these rights will not suffice.[51] In essence, the legislation will be null and void from its initiation.

When applying the rights 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 three principles which are provided for under Article 20(5) of the Constitution. Article 20(5) stipulates thus: first principle requires the state to show that the resources are not available. The second principle requires the state to give priority in allocating resources to ensure the widest possible enjoyment of the right or fundamental freedom having regard to the prevailing circumstances. Finally, the court, tribunal or other authority should not interfere with a decision by a state organ concerning the allocation of resources on the basis that it would have reached a different conclusion.[52]

The provision of health services is distributed between the national government and the county governments to realise the right to health.

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50 *Mitu-Bell Welfare Society v Attorney General & 2 others,* Constitutional Petition 164 of 2011, Judgment of the High Court 11 April 2013 eKLR.

51 *PAO and 2 others v Attorney General, Aids Law Project (interested party)* Petition 409 of 2009, Judgment of the High Court, 20 April (2012) eKLR.

52 Constitution of Kenya (2010), Article 20(5).

The Fourth Schedule of the Constitution mandates the national government with the task of adopting health policies, building of national referral health facilities, capacity building and technical assistance to counties. On the other hand, the county governments should promote county health services. Section 15 of the Sixth Schedule of the Transition to Devolved Government Act (No 1 of 2012) provides in its preamble, the framework for transition to devolved government pursuant to Section 15 of the Sixth Schedule to the Constitution, and for the connected purposes. In *Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others*,[53] the learned judge was of the view that the inadequacies of provision of health services in the county is a matter of national concern and it is the obligation of the national government to ensure that every person's right to the highest attainable standard of health as stipulated under Article 43 of the Constitution is attained.

The right to health as per General Comment 14 stipulates that the right to the highest attainable standard of health does not create an entitlement for one to be healthy.[54] Nor does it hold states responsible for all potential causes of poor health, including the individual's choice to adopt unhealthy lifestyles. However, states have an obligation to respect, protect and fulfil the right to health. This includes adopting administrative actions that are over-arching in offering guidance to government action in the realisation of the highest attainable standard of health.

The right to health has substantive value to the population and as such, the government has an obligation to create conditions necessary for a healthy, productive and flourishing life.[55] With respect to the implementation of Article 43 of the Constitution of Kenya, Kenya is obliged under Article 21(2) to take legislative, policy and other measures, including the setting of standards to facilitate the progressive real-

[53] *Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others* Judicial review application 317 of 2013, Judgment of the High Court 18 December 2013 eKLR, para 86.

[54] International Covenant on Economic, Social and Cultural Rights, Article 12.

[55] *Advancing the right to health: The vital role of law*, 12.

isation of the rights guaranteed.[56] In the quest to align with the progressive realisation of the right to health, Kenya has adopted key legislative enactments after the Constitution of Kenya 2010 which revolve around health. These include: the Kenya Medical Supplies Authority Act (No 20 of 2013) which makes provisions for the creation of the Kenya Medical Supplies Authority (KEMSA) and for connected purposes in enhancing the full realisation of right to heath; and the Public Health Officers (Training, Registration and Licensing) Act (No 12 of 2013), which makes provisions for training, registration and licensing of public health officers and public health technicians. The aim of all this is to achieve the right to health.

The Kenya Health Policy 2014-2030 extrapolates the improvement on the overall status of health in Kenya.[57] The policy aims to fulfil the right to health and to attain this, the policy seeks to employ a human rights based approach in health care delivery.[58] This policy focuses on six objectives which will help the government achieve its goals. The objectives are to: eliminate communicable conditions, halt and reverse the rising burden of non-communicable conditions, reduce the burden of violence and injuries, provide essential health care, minimise exposure to health risk factors, and strengthen collaboration with other sectors that have an impact on health.[59]

3.3.2 International law relating to health

Article 2(6) of the Constitution of Kenya 2010 provides that any treaty or convention ratified by Kenya shall form part of the Laws of Kenya. In light of the above provision, Kenya is bound by several glob-

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56 Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) *Mapping the constitutional provisions on the right to health and the mechanisms for Implementation in Kenya; Case study report,* 10.

57 Ministry of Health, 'Kenya Health Policy 2014-2030', *National Cancer Institute of Kenya*, 14 July 2022.

58 Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), *Mapping the constitutional provisions on the right to health;* Case study report, 13.

59 Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), *Mapping the constitutional provisions on the right to health, Case study report*, KELIN/EQUINET, 2018, 14.

al and regional agreements and treaty documents that enumerate the state's duty to realise the right to health. The Constitution of the World Health Organisation (WHO) defines health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.[60]

Some of these adopted international instruments include; the International Covenant on Economic Social Cultural Rights (ICESCR) and the Universal Declaration of Human Rights. Article 12 of the ICESCR, is reflected in General Comment No 14. It obliges states parties to recognise everyone's right to the enjoyment of the highest attainable standard of physical and mental health. Article 12(1) illustrates a number of steps that states are required to conform to in achieving the full realisation of this right.

Article 25 of Universal Declaration of Human Rights (UDHR) states that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care.[61]

The Constitutional Court of South Africa defined progressive realisation in the *Grootboom case*, stating that when a right could not be realised immediately then the obligation is to take steps to ensure its realisation. The Court recognised that the goal of the Constitution is to ensure that the basic needs of all people in our society are effectively met and the requirement of progressive realisation meant that the state must take measures to achieve this goal. This includes the obligation to take progressive steps in ensuring accessibility.[62]

In General Comment 3, the Committee on Economic Social and Cultural Rights[63] concluded that the concept of progressive realisation constitutes recognition of the fact that full realisation of all economic,

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60 Constitution of the World Health Organisation, 22 July 1946, Preamble.

61 Universal Declaration of Human Rights, Article 25.

62 2000 (11) BCLR 1169 (CC) para 45.

63 General Comment No 3: The nature of state parties' obligations, 14 December 1990, E/1991/23, para 9.

social and cultural rights will generally be impossible to achieve in a short period of time.

'The nature of state parties obligation' encompassed in General Comment No 3, elaborates that states are required to take appropriate measures towards the full realisation of the socio-economic rights to the maximum of their available resources.[64] The lack of resources can hamper the right to health which can be achieved progressively, this is denoted by the concept 'resource availability'.[65] States are to strive to obtain such resources.

By the wording of the General Comment 14, the right to health has 'core content'. The minimum core describes the minimum level in which the provision of the right falls. The state parties to ICESCR have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights stipulated in the Covenant, including essential primary healthcare.[66] The Committee on Economic Social and Cultural Rights in General Comment 3, enunciates that a minimum core obligation ensures the satisfaction of at the very least essentials of the rights of each state.[67]

Article 16 of the African Charter on Human and Peoples' Rights ('Banjul Charter') guarantees the right to enjoy the best attainable state of physical and mental health. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('the Maputo Protocol') is vibrant with respect to ensuring that women access better healthcare.[68]

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64 International Covenant on Economic, Social, Cultural Rights, Article 2(1).

65 Biegon and Musila (eds) *Judicial enforcement of socio-economic rights in the 2010 Constitution*.

66 Committee on Economic Social Cultural Rights, General Comment 14, para 43.

67 Committee on Economic, Social and Cultural Rights, General Comment No 3, 14 December 1990, E/1991/23.

68 Maputo Protocol, Article 14.

4. Corruption in the health care sector

A number of key factors, among them being poor governance and corruption, compromise the provision of adequate health.[69] Corruption affects all health systems, whether public or private, through embezzlement of funds from health budgets and or bribes extorted at the point of health service delivery.[70] As such the effect is enormous and the burden falls disproportionately on the citizens especially the poor.[71]

Incidences of corruption vary among societies and it can be rare, widespread or systemic.[72] Where such incidences are rare, it is easy to detect, isolate and punish, and prevent the disease from spreading further.[73] It is difficult to curtail corruption when it is widespread.[74] Worse still, is that when such incidences are systemic it suggests that the system is adapted to corruption as the norm.[75]

4.1 Corruption in procurement

Procurement is the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system.[76] The Organisation for Economic Co-operation and Development (OECD) in the *Compendium of Good Practices on the Use of Open Data for Anti-Corruption*[77] defines public procurement as the

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69 Kenya Anti-Corruption Commission (KACC), 'Sectoral perspectives on corruption in Kenya: The case of the public health care delivery', February 2010.

70 KACC, Sectoral perspectives on corruption in Kenya'.

71 KACC, 'Sectoral perspectives on corruption in Kenya'.

72 U Myint, 'Corruption: Causes, consequences and cures' 7 *Asian Pacific Development Journal* (2000).

73 Myint, 'Corruption: Causes, consequences and cures'.

74 Myint, 'Corruption: Causes, consequences and cures'.

75 Myint, 'Corruption: Causes, consequences and cures'.

76 Public Procurement and Asset Disposal Act (2015), Section 2.

77 OECD, *Compendium of good practices on the use of open data for anti-corruption: Towards data-driven public sector integrity and civic auditing*, 13.

purchase of goods, services and works by governments or state owned enterprises from the private sector.[78]

In essence, public procurement is a process starting with procurement planning and proceeding, in sequence, to advertising, invitation to bid, bid evaluation, contract award and contract implementation. These phases occur in three processes: pre-tendering phase, tendering phase and post-tendering phase.[79]

Procurement corruption encompasses: bribes, kickbacks, extortion, embezzlement, nepotism, patronage systems, fraud, false invoices, fraudulent invoicing, insider trading, collusion among suppliers and failure to audit performance on contracts which results in the raising of prices paid for goods or services, thus increasing inefficiency.[80] In the health sector, corruption manifests itself in the following areas: health facility construction, equipment and supply purchasing, pharmaceutical distribution and use, heath worker education, falsification of medical research et cetera.[81]

High levels of corruption have been linked to weak health outcomes.[82] Corruption in the health sector drastically reduces the availability of resources essential to health and lowers the quality, equity and effectiveness of healthcare services.[83] A survey conducted by the then Kenya Anti-Corruption Commission identified the procurement department and process as the most corrupt.[84]

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78 'Procurement corruption in the public sector and associated money laundering in the ESAAMLG Region, September 2019' Eastern and Southern Africa Anti Money Laundering Group, May 2021.

79 E Mantzaris, 'Public procurement, tendering and corruption: Realities, challenges and tangible solutions' (2014) 7(2) *African Journal of Public Affairs* (2014) 67-79.

80 Mantzaris, 'Public procurement, tendering and corruption: Realities, challenges and tangible solutions', 71.

81 T Vian 'Review of corruption in the health sector: Theory, methods and interventions' 23(2) *Health Policy and Planning* (2008) 94-98.

82 Karen Hussmann, *Health sector corruption; Practical recommendations for donors*, Chr. Michelsen Institute/Anti-Corruption Resource Centre (2020) 3.

83 Karen Hussmann, *Health sector corruption.*

84 KACC, 'Sectoral perspectives on corruption in Kenya'.

The Kenya Anti-Corruption Commission report identified corrupt practices within the health sector that are likely to impede the highest attainable standard of health.[85] The examples included manipulation of the tendering system, misappropriation of drugs and other supplies, procurement of sub-standard commodities and equipment, hoarding of supplies and inflation of prices, bribery, and embezzlement of funds, favouritism and misappropriation of procurement funds.[86]

In 2012, the National Health Insurance Fund (NHIF) corruption saga revealed the depth of corruption in the health sector.[87] Millions of shillings released by the NHIF allegedly went down the drain.[88] In 2017, the US government suspended direct aid, worth $21 million, to Kenya's Ministry of Health due to concerns over corruption.[89] Justifying this, the US Embassy said that it took the step because of the reports of corruption and weak accountability in the Ministry.[90] The Afya House scandal was based on an audit report that was leaked to the Kenyan media in October 2017. The audit showed that the Ministry had failed to account for 5 billion Kenyan shillings and diverted funds meant for free maternity.[91] The Ministry of Health is clearly not in 'good health' because of this and other scandals that have plagued it.[92]

Allan Maleche, the Executive Director of the Kenya Legal and Ethical Issues Network on HIV/AIDS (KELIN) stated:

> We wish to draw the attention of the public to the fact that the Covid-19 billionaires scandal is not an isolated case of corruption in the health sector. For a long

85 KACC, 'Sectoral perspectives on corruption in Kenya'.

86 KACC, 'Sectoral perspectives on corruption in Kenya'.

87 James Macharia, 'Kenya minister urged to resign over medical scam' *Reuters,* 8 May 2012.

88 Macharia, 'Kenya minister urged to resign over medical scam'.

89 Katharine Houreld, 'US suspends aid to Kenyan health ministry over corruption concerns' *Reuters,* 9 May 2017.

90 Houreld, 'US suspends aid to Kenyan health ministry over corruption concerns'.

91 Houreld, 'US suspends aid to Kenyan health ministry over corruption concerns'.

92 Caroline Omari Lichuma, 'Economic wrongs and social rights: Analyzing the impact of systemic corruption on realization of economic and social rights in Kenya and the potential redress offered by the Optional Protocol to the International Covenant on Economic, Social Rights and Cultural Rights' *Transitional Human Rights Review* (2018) 63.

> time, the health sector has been facing high instances of corruption which is negatively impacting on the realisation of the right to health. We are concerned that such corruption is robbing the country of critical funds meant to ensure citizens can access quality health services, vaccines for children, essential drugs for the vulnerable and marginalised, better health facilities, guaranteed healthcare personnel, quality health equipment and supplies, among others.[93]

From the onset of the Covid-19 pandemic, select groups of businessmen locally and globally are turning their fortunes into Solomonic riches amid the gloom.[94] Innovators, manufacturers, contractors and e-commerce entrepreneurs are collectively sharing the biggest part of the Coronavirus billions.[95] *The Standard* revealed that when the Ministry of Health announced the spotting of the virus in the country, one state agency channelled close to Ksh. 2 billion to nine companies for the government's response to the pandemic.[96]

Corruption violates the right to health in the public sector. In our public facilities, for instance, the right to health is violated when someone is required to pay a bribe to access health-care services which include access to medicine and medical treatment.[97]

4.2 Lack of trust in KEMSA and its effect on HIV, Malaria and TB patients

Since July 2013, KEMSA has made significant progress in engaging with all the 47 counties under the model system of a KEMSA medical superstore, which involves mutually agreed Memoranda of Understanding (MoUs) and Service Level Agreements (SLAs).

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93 Kenya Legal and Ethical Issues Network on HIV/AIDS (KELIN), 'Corruption in the health sector is negatively affecting realisation of the right to health,' Press statement on 23 August 2020.

94 Daniel Wesangula, 'Corona? What Corona? How businesses are making a kill amidst a pandemic,' *Sunday Standard,* 3 August 2020.

95 Wesangula, 'Corona? What Corona? How businesses are making a kill amidst a pandemic'.

96 Wesangula, 'Corona? What Corona? How businesses are making a kill amidst a pandemic'.

97 'Impact of corruption on specific human rights', *United Nations Office on Drugs and Crime* Module 7, 9 February 2022.

However, lack of integrity, transparency and corruption allegations may have cost Kenya Medical Supplies Authority (KEMSA) a contract with the United States Agency for International Development (USAID) hence denying 1.5 million HIV patients lifesaving drugs.[98] The United States Secretary of State Antony Blinken raised concern over corruption in KEMSA.[99] He averred that they had a positive obligation to taxpayers in terms of accountability and transparency.[100]

USAID and KEMSA had a five-year contract for the procurement and supply of HIV, Malaria and family planning drugs which ended in 2020.[101] The USAID asked the Global Health Supply Chain- Procurement and Supply Management-implemented by Chemonics and a consortium of partners to distribute the said drugs in Kenya instead of KEMSA. In 2020, KEMSA faced allegations of corruption and mismanagement of COVID-19 funds. The Cabinet Secretary (CS) of Health, Hon Mutahi Kagwe stated that USAID decided not to use the state corporation for the distribution of the HIV drugs because it did not trust KEMSA.[102] Hon Kagwe insinuated that the Kenyan government was actively working to address USAID's 'lack of trust' in KEMSA by making changes in the organisation which would gain back trust from USAID and other donors.[103]

The board of KEMSA led by chairman Kembi Gitura was grilled over their handling of procurement of drugs and other goods which were to be relied upon in addressing the Covid-19 situation.[104] Parliament undertook a parallel probe into the issue while the officials from the Auditor General had camped at the KEMSA offices. Jonah Manjari

98 Angela Oketch, 'Kenya: Corruption cases cost KEMSA contract with USAID' *Daily Nation,* 29 April 2021.

99 Oketch, 'Kenya: Corruption cases cost KEMSA contract with USAID'.

100 Oketch, 'Kenya: Corruption cases cost KEMSA contract with USAID'.

101 Sara Jerving, 'Exclusive: USAID says no Kenya HIV medication deal' *Devex,* 22 April 2021.

102 Jerving, 'Exclusive: USAID says no Kenya HIV medication deal'.

103 Jerving, 'Exclusive: USAID says no Kenya HIV medication deal'.

104 Cyrus Ombati, Roselyne Obala, 'KEMSA board grilled at EACC offices over saga', *Sunday Standard,* 9 September 2020.

the Chief Executive Officer of KEMSA was suspended over the corruption saga.[105]

5. Recommendations

There is need to ensure that there is transparency in the entire procurement process in the public health sector. Transparency in essence requires that the information in procurement decisions is publicly made available so as to allow prices paid for the same health product to be compared across a local, regional or national level and also to curb price gouging, price manipulation and overpayments. Data transparency can illuminate patterns of normal procurement behaviour and identify potential outliers indicative of overpayments, collusion, or kickbacks.[106]

According to the WHO recommendations for Good Governance for Medicines (GGM) Programme which was launched in 2004, there is need for Kenya to implement anti-corruption laws governing the health sector, especially the pharmaceutical companies which are vulnerable to corruption. If the stakeholders in the health sector strictly comply with these laws, they will create accountability and transparency for the actions of the stakeholders within this sector because all the activities within will not only be monitored but also accounted for.[107]

Various supervisory agencies should be incorporated to ensure strict compliance with stipulated administrative rules and regulations in conjunction with good governance and anticorruption measures. The whistle blowing mechanism will encourage the reporting of misconduct, fraud and corruption. However, this must be done by provision of effective protection for whistle-blowers in order to support a transparent organisational culture where employees are not only aware of how to report but also have assurance of protection in the reporting process. This will support smooth administration of the health sector.

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105 Ombati, Obala, 'KEMSA board grilled at EACC offices over saga'.

106 South African Human Rights Commission, 'Access to health care'.

107 DO Tormusa, and AM Idom, 'The impediments of corruption on the efficiency of healthcare service delivery in Nigeria' 12(1) *Journal of Health Ethics* (2016).

6. Conclusion

Poor governance and corruption negatively affect the provision of the highest standard of healthcare. Proactive mechanisms to detect corruption and the enforcement of negative sanctions against those found guilty of corruption are important interventions to create disincentives for engaging in corrupt activity. Alternative approaches, which include overarching common goals to motivate those who share a common vision and emphasising ethical values and decision-making, are equally important.[108] Corruption hurts health outcomes and it is the less privileged in the society that suffer the most.[109]

[108] Laetitia C Rispel, Pieter de Jager, Sharon Fonn, 'Exploring corruption in the South African health sector' 31(2) *Health Policy and Planning* (2016) 239-249.

[109] Tormusa and Idom, 'The impediments of corruption on the efficiency of healthcare service delivery in Nigeria'.

Legal art of artistic law: Interdisciplinary reflections of law and other disciplines

Sharon Moraa Amwama *

Abstract

The law never emerged, it developed. It is not static, and despite being written, is not always clear. Hence the different ways in which it can be interpreted. This article emanates from a conversation held during the Symposium on the role of creative arts in social transformation held at Kabarak University in January 2022. The theme was based on the Professor Willy Mutunga's chapter, 'The role of creative arts in social transformation' in Furthering constitutions, birthing peace: Liber amicorum Yash Pal Ghai (2021). Joining in this conversation was Godfrey 'Gado' Mwapembwa, the expert cartoonist, and faculty and students of the Schools of Law and Music. This article reflects upon their sentiments expressed at this Symposium, which championed the values of interdisciplinary research. The article discusses criminal liability of actions committed by actors while in character, the need for humility in the legal profession, the right to freedom of expression and artistic creativity. It goes further to look at the need for and actions towards integration of the disciplines. This article anchors its argument on the need for respect among professions. It emphasises the importance of and need for all disciplines as bearers of solutions to societal problems.

Keywords: art and the law; interdisciplinary gap; interdisciplinary integration; humility in the legal profession; respect among professions; criminal liability of actors in character

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1. Introduction

This article flows from a symposium that was held in the afternoon of 27 January 2022 at Kabarak University School of Music and Performing Arts[1] and was also live-streamed on Zoom and Facebook. The symposium titled 'The role of creative arts in social transformation: Interdisciplinary perspectives' was organised by Kabarak University Press and Kabarak University School of Music and Performing Arts. This symposium reflected on Prof Justice Willy Mutunga's book chapter 'Activists art for social reform: The judiciary in transition as seen by Kenyan cartoonists'.[2] This symposium also played another important role, as it was the precursor to Prof Justice Mutunga's inaugural lecture at Kabarak University[3] which he delivered the following day on 28 January 2022.

The symposium discussions were led by various panellists. These were: Prof Justice Willy Mutunga, Godfrey 'Gado' Mwapembwa, co-founder and executive chairman of Buni Media, animator, content creator and producer of the *XYZ Show*, Dr Wilson Shitandi, Director of the Institute for Post-Graduate Studies at Kabarak University, and Ms Joyce Mochere, a lecturer from the School of Music and Performing Arts. Mr Thuku Kimani, a lecturer from the School of Music and Performing Arts was the symposium moderator. Also in attendance was the Kabarak University School Chaplain, Reverend Justus Mutuku. The audience was comprised mainly of students from the School of Music and Performing Arts and the School of Law.

The event created an avenue for interdisciplinary conversations through which students and lecturers from the School of Law; and the School of Music and Performing Arts, as well as other disciplines could learn from one another to make society better. This article is anchored in, and benefits immensely, from the conversations held during the

1 The School has since been renamed Kabarak University School of Music and Media.

2 Willy Mutunga, 'The role of creative arts in social transformation' in Humphrey Sipalla and J Osogo Ambani (eds) *Furthering constitutions, birthing peace: Liber amicorum Yash Pal Ghai*, Strathmore University Press, 2021, 217-240.

3 The inaugural lecture is titled, 'In search and defence of radical legal education: A personal footnote'.

symposium and also gives an understanding of the importance of the interdisciplinary relations.

The article emphasises a need for humility in the legal profession. It addresses questions on criminal liability flowing from acts committed by artists while performing, and having taken up roles and assumed their characters' personas, the freedom of expression and artistic creativity, and finally it discusses the integration of disciplines through overcoming disciplinary suspicion. It emphatically takes the position that the need for interdisciplinary relations may be the solution to the various issues aforementioned. Finally, it briefly engages Prof Justice Mutunga's interpretation of cartoonist's arts.

2. Brief overview of Willy Mutunga's book chapter

Willy Mutunga's book chapter 'Activists art for social reform: The judiciary transition as seen by Kenyan Cartoonist' takes a very eccentric approach from the rest of the chapters in the liber amicorum. Taking a quick survey from my Kabarak Law School contemporaries who have had a look at the book, it seems generally accepted that the chapter is the most attractive and exciting of the chapters in the book. This is so much so because of Prof Justice Mutunga's use of illustrations that were drawn by various cartoonists in Kenyan newspapers to explain how their works, as criticisms, promoted judicial activism. In all the drawings Prof Justice Mutunga selects in this chapter, he appears to be the main character. The reflections and drawings are based on the period in which he served as the Chief Justice. In some of the drawings, he is depicted as a driver, pilot, and even a tiger rider!

He begins his chapter by confirming the value of cartoonists as his critics. He contends that he has a great passion for supporting artists' movements in which cartoonists are a great pillar, and that he values his critics, critics of society and the world.[4] Additionally, he sees cartoonists as the new frontier for human rights and social justice and further

[4] Mutunga, 'The role of creative arts in social transformation', 218.

regards them as confident individuals who do not shy from contesting political power.[5] He refers to cartoonists as public intellectuals, a reflection of his appreciation for this profession. He responds to the cartoonists drawings and how their works impacted his service in the judiciary; these are individuals from other disciplines playing a role in the discipline of law.

3. Interdisciplinary moves

3.1 Into the thick of it: The conversation

The conversation was originally to be spearheaded through a panel discussion chaired by Prof Justice Mutunga and Gado as was indicated in the programme. However, having settled for the session, Thuku Kimani, the charismatic moderator, led a selection of music and law students in a discussion as they awaited the arrival of the panellists. When they arrived, Prof Justice Mutunga, impressed by the setup, asked that it be adopted and the discussions continue. Together with the other panellists, they sat in the audience and let this students-chaired session to form the introduction to the symposium through a question-and-answer session that was meant to provoke the mind of the students. This 'simple' gesture goes a long way since ordinarily invited guests are expected to sit in their respective reserved sections, which is usually elevated and distinguished from those of the other attendees. However, the Mutunga-led panel, in insisting on sitting with the audience and letting the students take the elevated podium, undid this traditional setup. Indeed, this came as no surprise since Prof Justice Mutunga has consistently refused to classify the youth as leaders of tomorrow, but rather leaders of today.

3.1.1 Criminal liability

The student-chaired question and answer session began with a question on the liability of actors in committing crimes while acting and

[5] Mutunga, 'The role of creative arts in social transformation', 218.

having assumed their character's persona. Actors, in the course of their work, assume the role of the persona of the character they play. A lot of times, this involves them tapping into emotions and persona that is alien to them. A query arose on whether an actor committing a crime while in this state can be held criminally liable. Two contesting answers were derived from this scenario. Some posited that the guilty but insane verdict would be entered, while others maintained that the individual should be found by a court to be guilty of manslaughter.

One music student opined that the fact that one is in character should not diminish their criminal liability. In her explanation, she implied that the perpetrator of the crime, that is the actor, ought to be held responsible for the act. She added that actors who play gruesome personas are accorded counselling sessions and medical services hence there ought not be an excuse for any criminal actions. Where such services are not provided then liability queries may arise. She further commented that even as roles are assumed, artists should maintain humanity as they are taught how to differentiate personalities. She concluded by commenting that in theatrics, one ought to draw a line, as they are still sane persons before they take up certain persona. To hold that such individuals should not be culpable introduces a dilemma in the society. The dilemma being that individuals may 'get away with murder'.

The position in Kenyan law, as in many other jurisdictions, is that an element of malice aforethought, the *mens rea*, as well as *actus reus*, that is committing the crime itself, must be proven for one to be convicted of a crime. Malice aforethought circumstances relevant to the above scenario includes: the intention to cause death, knowledge that a certain act would cause harm or death and the intent to commit felony.[6] Manslaughter is an unlawful act or omission which causes the death of another, an unlawful omission amounting to negligence to discharge a duty tending to the preservation of life or health.[7]

6 Penal Code Cap 63, Section 206.

7 Penal Code Cap 63, Section 202.

One of the defences for criminal liability is insanity, that an individual is not criminally responsible for an act or omission if at the time of committing the act or making the omission, they were incapable of understanding what they were doing was wrong and that it is attributed to a disease of the mind. The law however provides that if such disease does not make one incapable of understanding what they are doing, then they are guilty.[8] The conclusion drawn from the above is that such a person should be charged but on conviction be considered guilty but insane. However, this still went contested among certain factions in the audience, who defended the manslaughter position.

On a different set of circumstances an example was given in the case of Alec Baldwin who shot dead a cinematographer and wounded a director on set.[9] This situation does not involve an actor in character, rather it questions liability. It focuses on the responsibility the crew members in the film production had in ensuring that the gun that was a prop was safely disarmed. New Mexico workplace safety organisation found the Rust Production Company liable and fined them for disregarding weapons safety laws that led to the shooting.[10] From this event, a question was posed from the audience on whether the actor Baldwin ought to be charged with murder. The position was that he may be liable to be charged with manslaughter.

In Kenya, prior to the practice directions issued by the Chief Justice in 2022, a defence of insanity had to be alluded to and evidence given to that effect after which the court would make a finding of guilty but insane.[11] The Criminal Procedure Code directs the court to order that the accused person is held in custody awaiting orders from the president for them to be detained in a mental hospital.[12] The officer in charge is then required to access the individual and submit a report to the minis-

8 Penal Code Cap 63, Section 12.

9 'What we know about the fatal shooting on Alec Baldwin's New Mexico movie set' *New York Times,* 21 April 2022.

10 Mansa Dellata, 'Rust' Investigation still ongoing six months after on-set shooting, authorities say', *Forbes,* 25 April 2022.

11 Criminal Procedure Code Cap 75, Section 166(1).

12 Criminal Procedure Code Cap 75, Section 166(3).

ter who forwards it to the president who considers the report and makes the final decision as regards detainment.[13] These sections of the Criminal Procedure Code have been declared unconstitutional in a number of cases including the case of *Republic v SOM*.[14]

However, the current practice directions issued by the Chief Justice provide that during pre-trial conferences, judges are to issue directions on mental assessment of an accused person.[15] This essentially directs an accused person to be assessed by a medical practitioner. This in essence shows how the discipline of medicine can be integrated into the discipline of law. And in the event it concerns actors committing crimes while in character, it would only be prudent to include an expert in performing arts.

3.1.2 Humility in the profession

As the student-based session went on, the moderator, Mr Kimani, asked Prof Justice Mutunga (who was still seated with the audience), the same question on criminal liability. Prof Justice Mutunga passed the question back to the students as he commented that:[16]

> Maybe we may have given other disciplines the notion that we know everything because we call ourselves learned.

He commented that lawyers are ignorant of other disciplines. He further noted that the question came from an assumption that having served as Chief Justice, he knew all laws and that he would be able to answer any question put forth to him. He admitted that such a question had not crossed his path and therefore, he did not have an answer for it. He humbled himself and confessed his ignorance and stated thus:[17]

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13 Criminal Procedure Code Cap 75, Section 166(4).

14 Criminal Case No 6 of 2011 (Ruling on sentence) High Court of Kenya at Kisumu 2018.

15 Kenay Gazette, CXXII(189) 10 September 2021, 9439: Practice directions to standardise practice and procedures in the High Court, Section 27.

16 Kabarak University School of Music and Performing Arts, 'The role of creative arts in social transformation: Interdisciplinary perspectives', *Facebook* 27 January 2022 30:00-32:29.

17 Kabarak University School of Music and Performing Arts, 'The role of creative arts in social transformation: Interdisciplinary perspectives'.

> I confess my ignorance and want those students who have done criminal law to answer. I did criminal law in 1968. I cannot remember.

This clearly depicted the person the professor says he is in his inaugural lecture[18] where he notes a practice he started when teaching at the University of Nairobi in the 1970s, which he has kept to date, which is to accept that he did not have answers to particular questions and would research and give his answer later.

Prof Justice Mutunga recalled a law student who had previously shared his views. As is expected of a lawyer, in the first instance relied on legalese terms in answering the question. He had referred to the terms *actus reus and mens rea*, in a fashion that presumed everyone, including the students from the other disciplines, understood what he meant by the Latin terms. Prof Justice Mutunga wondered out loud: Is it the desire of being recognised as a lawyer that makes lawyers use such terms? Or perhaps a silent insensitiveness that makes one fail to recognise that these are technical terms used within the profession, and couched as words used in everyday parlances even beyond the profession?

One would then have to reflect on the words of Phillip Areeda that:

> To satisfy that office, law professors must be conversant with other fields but without overestimating their expertise there.[19]

This essentially means that lawyers should take cognisance of the fact that legalese is not meant for all audiences. At the moment the use of legalistic terms is highly discouraged especially in communicating with a judge or client or member of the public. Despite lawyers' selfish need to brag about such knowledge, they ought to humble themselves and resist the use of such terms. At the end of the day, lawyers are to serve the public and that cannot be effectively done if information is conveyed in words the client or public may fail to understand.

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[18] Willy Mutunga, 'In search and defence of radical legal education: A personal footnote' 1(1) *Kabarak Law School Occasional Paper Series*, (2022) 20.

[19] Phillip Areeda, 'Always a borrower and other disciplines' *Duke Law Journal* (1988) 1043.

3.1.3 The right to freedom of expression and artistic creativity

The right to freedom of expression is a right guaranteed under Article 33 of the Constitution of Kenya 2010. It includes the freedom to impart information and ideas and freedom of artistic creativity.[20] It is not guaranteed in situations that involve vilification of others' rights, and in exercising this freedom, the rights of others and their reputation is to be respected.[21] In this part of the symposium, Gado Mwapembwa shared his views. He noted that the current young generation is lucky as the Constitution protects the freedom of expression. It is important to note that, like other rights, it is limited by Article 24 of the 2010 Constitution. Its limitation, just like all other limited rights and freedoms, is subject to the nature of such right or fundamental freedom, importance of its limitation, and extent of its imitation, the need to ensure enjoyment of other rights and whether less restrictive means of limitation could be used.[22]

Mr Mwapembwa mentioned that he himself had been threatened and even sued on account of his critical and provocative drawings and cartoons. That he was however lucky as he has worked for big name newspapers whose legal teams dealt with the cases. He confirmed that his work came with risks that one should be aware of. He submitted that there were instances when his employers would not publish some of his cartoons, as well as parts of the XYZ Show. Instead of doing away with them, he would post them on his social media pages.

Looking into another form of art is the use of poetry. Musician King Kaka, through a rap poem, criticises Kenyan government officials and almost gets sued by Hon Ann Waiguru.[23] Mr Mwapembwa recalled the funny but frightening words of Idi Amin Dada, 'There is freedom of speech but I cannot guarantee freedom after speech.' Looking into the words that were used by King Kaka, it may have been possible that he did not adhere to the limit of such a right as he may have ruined the

20 Constitution of Kenya (2010), Article 33(1).

21 Constitution of Kenya (2010), Article 33(2)(d),(3).

22 Constitution of Kenya (2010), Article 24.

23 Ian Omondi, 'King Kaka records statement with police over alleged DCI summons' *Citizen Digital*, 17 December 2019.

reputation of government officials.[24] Perhaps if he did not focus on mentioning names he would not have gotten in trouble.

Art is used to critic individual character or social behaviour and such critique should be taken as positively as Prof Justice Mutunga did. Indeed, such critique became a social check on the judiciary's actions. Prof Justice Mutunga confessed that the criticism by the cartoonists assisted in the Judiciary's transformative journey as they found their way into the Judiciary Training Institute now referred to as Kenya Judiciary Academy.[25] The Academy offers continuing judicial education for judges and magistrates to enable them to keep track with developments in law and society.[26] He considered it to be a form of public participation; this shows that citizens play a vital role as an 'institution' of checks and balances.

3.1.4 Integrating disciplines: Informal versus formal platforms in countering interdisciplinary suspicions

Prof Justice Mutunga emphasised that disciplines are correlative. He gave an example of the Supreme Court case in *Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others*,[27] one of the cases where the Supreme Court required and relied on experts' opinions in order to make a determination. This case involved 'digital migration', that is, the move from use of analogue to digital television broadcasting and the possible breach of the rights and freedoms of Kenyans. The Supreme Court had to rely on experts in this technical area to explain to the Court how the broadcasting spectrums work. In the same case Prof Justice Mutunga commented that the Court quoted the famous Kenyan musician Ken wa Maria who sang a song titled 'Fundamentals' which brought about debate on its relevance to

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24 King Kaka, 'Wajinga nyinyi' *Youtube*, 14 December 2019.

25 Kenya Judiciary Academy, <https://www.judiciary.go.ke/about-us/affiliate-institutions/kenya-judiciary-academy/> on 25 July 2022.

26 Kenya Judiciary Academy, <https://www.judiciary.go.ke/about-us/affiliate-institutions/kenya-judiciary-academy/> on 25 July 2022.

27 *Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others* Petition No 14 of 2014, Judgement of the Supreme Court 30 September 2014, eKLR.

the case.[28] This was quoted by an advocate making his submission and he stated thus:

> I started by taking you on a flight to the Caribbean and referring to, or quoting Mr Robert Marley. Let me come back home with regard to the three principles… If I could refer to our very own Ken wa Maria, 'these things, these are my things, these are your things, these are our things, these are the fundamentals'. [29]

Another art form is storytelling. Prof Justice Mutunga referred to us back to a Supreme Court case where he mentioned an election case in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others*[30] where the Court quoted Ngugi wa Thiongo's *Wizard of the crow* which described the mlolongo system of elections in 1988.

Aside from that, other judges such as Justice Patrick Kiage, Judge of the Court of Appeal in Kenya has numerously relied on poetic quotes to communicate and deliver his judgements.[31] Notwithstanding the above, there is also a practise where lawyers adopt poetic pieces of known poets in making their submissions. This is especially so in opening and closing statements, aimed at capturing the attention of the judges.

Cartoonists not only entertain but also question and interrogate issues which an opinion commentator would not touch on. Cartoonists assist in asking the rough and tough questions. Gado Mwapembwa commented that art is not just about drawing. It requires one to be a veracious reader and to have a broad knowledge of various subjects relating to the audience. He insisted on the value of collaborating with various professionals as he does with puppeteers, voice talents, and writers in the *XYZ Show*.

Ms Mochere's continued along this thought, noting that art is a means of communication. She gave an example that singing is not just singing, without purpose. She further states that its use has been diluted

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28 Victor Nzomo, 'Supreme Court of Kenya addresses "fundamentals" of copyright law in *Digital migration case*,' *IP Kenya blog*, 1 October 2014.

29 Petition No 14 of 2014, para 388.

30 Petition 2B of 2014 Judgement of the Supreme Court (2014) eKLR, para 236.

31 Mwangi Gathanwa, 'Justice Kiage steals the show with poetic judgement of BBI (video)'*Pulse Live*20 August 2021.

and we ought to be careful lest we forget that art is a means of communication. The message in art being passed to individuals whose levels of understanding varies.

In other instances, the practice of law is inherently dramatic, it is a performance. This confirms that law and performing arts are indeed related. A student gave an example of the famous 'Vioja Mahakamani' which is a dramatisation of the court system and process in Kenya featuring on the Kenya Broadcasting Corporation (KBC) TV. This gives 'Wanjiku' an opportunity to understand court proceedings. There is both communication of legal rules as it is a commentary on society. It was further contended that lawyers are performers because they appear in court rooms in costume, reading scripts and delivering certain particular lines. In the legal profession there are characters on stage protagonists, antagonists, voices of reason (*amici curiae*, that is friends of the court) and the one that brings a solution, that is, the judge. Therefore, you cannot separate performance from the practice of law.

Among the questions asked during the student panel discussion was whether another form of expression, for instance, music, can be used in litigation. Why cannot lawyers sing and dance as a form of making a presentation or an argument in court. A student responded by asking, 'would you rather sing your client to jail or argue?' She opined that music and theatrical plays can be used for sensitisation. She emphasised that despite law being a performance there is a need for balance. She further posited that there is a level of formality and seriousness that is required when it comes to matters of conviction or acquittal. This is part of the reason why the Law Society of Kenya and Kenya School of Law provide for a mandatory dress code for lawyers. She concluded by saying that lawyers sing by presenting arguments in court.

In an article on Fela Kuti's background, Babatunde Fagbayibo posits that artists are to be included at the forefront of exposing global imbalances and Eurocentric dominance.[32] Although this was in relation to

[32] Babatunde Fagbayibo, 'Fela's music can decolonise international law in African Universities,' *The Conversation,* 13 May 2018.

international law, it shows that artists play a vital role in social transformation. Art can be incorporated into law. Take an example of Fela Kuti's song 'Beast of no nation' that informs and educates on the rights of individuals.[33]

There is a need for lawyers to respect other disciplines and not to see them as any less than the discipline of law. The fact remains that in most of the disputes that arise in court reliance is placed on other areas of knowledge to arrive at the truth and to then dispense justice. An ordinary day in court would for instance, include policemen, in the case of criminal cases. Others who provide assistance to courts commonly include: doctors, engineers, scientists, land surveyors and probation officers. Prof Justice Mutunga concluded with an example of relying on a student that has studied literature to assist in editing legal write-ups.

4. Towards interdisciplinary integration

Interdisciplinary integration enables its dependents to complement and understand each other. However, individuals across different disciplines often fail to understand each other and this poses a challenge to interdisciplinary integration. In order to achieve this, the integration change should emanate from the core. The education system ought to reflect interdisciplinary dialogues. Prof Justice Mutunga suggested that the interdisciplinary relations change begins at the school/faculty level with opening dialogues where various professionals make the effort to understand other disciplines in exchange for also teaching others their own disciplines.

During the symposium, it was contended from the outset, that we are first human beings, then agents of a profession. Therefore, we should understand the roles we play individually and respect each other's role. Once that is accomplished then we can come together and identify the needs of the society and find solutions. Prof Justice Mutunga puts it thus simply that, 'Not one discipline comes with a solution.' He gave

[33] Fela Kuti, 'Beast of no nation', *YouTube,* 26 August 2016.

an example of the Standard Gauge Railway (SGR) construction contract that has been criticised for not having preserved Kenya's interests fully. He opined that the ideal situation required input from various individuals with expertise in various disciplines for instance lawyers, engineers, and land surveyors.

Ms Mochere posited that artists need to interpret their work to avoid misinterpretation. Within art there is music, drawings, poems, stories – the list is endless: they have meanings and should therefore be interpreted distinctly. Looking into Prof Justice Mutunga's chapter in *Furthering constitutions, birthing peace: Liber amicorum Yash Pal Ghai,* the language of the chapter relies on the interpretation of art in the author's opinion. One cannot help but wonder whether there is a possibility that Mutunga may have misinterpreted Gado's work. An instance is quoted in the book where Prof Justice Mutunga questioned Gado Mwapembwa meaning and in a particular cartoon depicting three arms of government, and suggested to Gado that he should redo it to reflect what he believed to be one invisible arm of government. Gado never took up the proposition, presumably standing firm in his interpretation being different from Prof Justice Mutunga, who was then the Chief Justice.[34] Mutunga's own thought is later taken up by Paul 'Maddo' Kelemba and he draws it; possibly because their minds met in thought unlike with Mwapembwa.

It is therefore possible that there may be no meeting of minds on every single detail, and in order to find a solution to a problem being highlighted by another, then there has to be a consultation. In order to achieve a meeting of minds regarding the interpretation of cartoons and other forms of art there could be platforms for cartoonists and artists to talk about their works.

What normally happens at the beginning of the semester in some, if not all, of the units taught in law schools, is that as a unit is being introduced, students are lectured on how the unit relates with other disciplines. These very short segments of the semester would include con-

[34] Mutunga, 'Activist art for social reforms' 224.

versations on topics such as law versus morality and law versus ethics, and hardly features in examinations at all. However, the relationship between law and other disciplines should be a unit in itself. In doing so, law students will then get to dig deeper into where law generates from and appreciate the role other disciplines play in it.

Prof Justice Mutunga in the symposium suggests that lecturers from other schools should also teach in law school as law lecturers teach in those schools. He draws this practise from his days at the University of Dar es Salaam, where law students would be taught by lecturers from other disciplines, such as the historian Walter Rodney.[35] This opens up an opportunity for law students to even identify gaps in law arising from other fields. In fact, if one was keen enough during the session, they may have left with a research topic for their dissertation. For instance, protection of child artists/performers.

An example of such change would be to do away with the separation of schools in universities as this makes it difficult for students to interact with one another. Having a law school building technically means law classes are to be held there. The same applies to other schools which have their own sequestered spaces within the school building. In certain universities, the school of law is even separated and geographically located kilometres away from the main campus, fundamentally hindering their interaction with students and lecturers from other disciplines.

Lastly and most importantly, the idea that law is more prestigious than other disciplines should be done away with. This happens when choosing careers, with the prestigious courses being yearned for by many as others that are considered less prestigious are shunned.

5. Conclusion

This article has addressed the issue of criminal liability, humility in the legal profession, the freedom of expression and its limitation, and integration of disciplines. Within the discussion, it has realised or rather

[35] Mutunga, 'In search and defence of radical legal education', 12.

shown the need for disciplinary relations. The article has commented on the book chapter authored by Prof Justice Mutunga and the need for interpretation. It has suggested that disciplinary integration is a solution to the underlying problems in the society. Disciplines co-relate, they borrow from one another and depend on one another for fulfilment. For disciplinary integration to be successful, we must be lovers of one another and respect the role each of us, in our different disciplines play.

Structural interdicts in Kenyan constitutional law

Martha Chinyavu Muzungu*

1. Introduction

The promulgation of the Constitution of Kenya 2010 marked the start of a new era. No longer were we a nation subject to the will of the president or left at the mercy of parliament. The Constitution, as it strongly proclaims, was the supreme law of the land towering over every other law and person.[1] It draws this position of power from the Kenyan people as the people who elected for it to be the law that ruled over the land.[2] It is therefore no surprise that the rights it grants the people are not only prominently placed but are subject to great protection from violation and encroachment. Given our nation's history of rights being granted and respected when it suits the executive it is no surprise the great lengths the Constitution framers went to shield these rights from the whims of the executive. The judiciary was granted a prominent role acting as guardian of the Constitution and as an avenue for those claiming a violation of their rights to seek redress.[3]

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1 Constitution of Kenya (2010), Article 2.

2 Constitution of Kenya (2010), Article 1.

3 Constitution of Kenya (2010), Article 22, 23, 165(2).

Article 23(3) of the Constitution continues from the provisions of Article 22.[4] It empowers the courts to grant a number of reliefs to petitioners in an effort to ensure the Bill of Rights is respected and upheld. These reliefs include: 'a declaration of rights, an injunction, a conservatory order, an order of judicial review, an order for compensation or a declaration invalidating any law that infringes, violates or threatens a particular right'.[5] Interestingly in listing the remedies the Constitution uses the word 'including' which is interpreted to mean that the list of remedies that a court can issue 'is not an exhaustive list'[6] or as the Constitution puts it 'includes but is not limited to'.[7]

It is also worth noting that the Constitution makes no mention of the term 'structural interdicts'. It only calls for 'appropriate reliefs' and goes on to list what these may include. Appropriate relief in the context of Article 23(3) has been defined to be:

> …relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.[8]

The relief in which a court has the power to impose has been addressed by the High Court where it stated,

> …we are, therefore, of the view that Article 23(3) of the Constitution is wide enough and enables us to make appropriate reliefs where there has been an infringement or a threat of infringement of the Bill of Rights.[9]

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4 Constitution of Kenya (2010), Article 22; provides for the enforcement of the Bill of rights particularly the institution of proceedings before the court for claim of a right being denied, violated or threatened.

5 Constitution of Kenya (2010), Article 23(3).

6 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, Petition 14 A of 2014, Petition 14B of 2014 and Petition 14C of 2014 (Consolidated), Judgment of the Supreme Court (2014) eKLR.

7 Constitution of Kenya (2010), Article 259(4).

8 To use the words of the Constitutional Court of South Africa in similar consideration. See *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002); See also *EWA and 2 others v Director of Immigration and Registration of Persons & another,* Petition 352 of 2016, Judgment of the High Court of Kenya at Nairobi, (2018) eKLR.

9 *Nancy Makokha Baraza v Judicial Service Commission & 9 others,* Petition 23 of 2012, Judgment of the High Court of Kenya at Nairobi, (2012) eKLR, para 126.

Additionally, Kenyan courts have embraced the reasoning in *Minister of Health & Others v Treatment Action & Others* stating;

> …if it is necessary to do so, the court may even fashion new remedies to secure the protection and enforcement of these all-important rights… the courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if need be, to achieve this goal.[10]

2.0 The concept of structural interdict

Structural interdicts has no universally agreed definition. Some legal scholars explain it to involve placing a requirement on a violator of a right to remedy the violation under the supervision of the court.[11] It is also referred to as supervised interdicts.[12] They have also been defined as 'an order under which a court controls compliance with its order'.[13] Structural interdicts are an exception to the *functus officio doctrine.* This doctrine provides that a court's jurisdiction over a particular case ends upon handing a final determination.[14] Structural interdicts were put in place to cater to the inadequacies of traditional remedies in addressing systemic violations in organisations.[15] The reasoning behind this is in order to cure systemic violations, it is best to have a continued assessment of the problem and to continuously remedy the matter in response to the changes and ensure the remedy is implemented to finality.

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10 *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002).

11 *County Government of Kitui v Ethics & Anti-Corruption Commission*, Petition No 3 of 2019, Judgment of the High Court of Kenya at Machakos (2019) eKLR, para 100.

12 *County Government of Kitui v Ethics & Anti-Corruption Commission*, para 100.

13 Cherese Thakur, 'Structural interdicts: an effective means of ensuring political accountability?', Helen Suzman Foundation, 2018.

14 Daniel Malan Pretorious, 'The origin of the *functus officio* doctrine with specific reference to its application in administrative law', 122(4) *South African Law Journal* (2005) 832. See also the Special Project, 'The remedial process in institutional reform litigation' (1978) *Columbia Law Review* 784, 816.

15 Susan Sturm, 'A normative theory of public law remedies', Columbia Law School (1991) 79.

2.1 Reasons for applying structural interdicts over other remedies

These types of remedies are favoured for a number of reasons. To begin with they do not just aim to offer remedies and compensation but seek to eliminate the violation entirely.[16] This is seen in how structural interdicts are often fashioned targeting change in policy or the creation of needed policy or the implementation of a particular policy. Another advantage it poses is that it does not aim to provide a one-time approach remedy. Instead, it sets into motion an action plan that does not end at the final ruling of the matter.[17] This is through the court requiring a party to report back on a matter and to achieve certain milestones aimed ultimately at preventing or remedying a violation. The court is able to retain jurisdiction and may actively participate in the implementation of a decree.[18] This follow up ensures the party presenting a plan before the court implements it and the plan does not merely exist on paper.

2.2 Different models of structural interdicts

There are a number of models of structural interdicts. One is the 'Report Back to Court' Model. As the name suggests it requires the defendant to come up with a plan on how they will remedy the particular problem brought before the court, the court gives a timeline within which to formulate the plan and present it to the court. The petitioner is granted an opportunity to voice their opinion on the plan. Once the court is satisfied it adopts it as part of its final order.[19]

Another model is the Bargain Model where both parties come to the table to negotiate on the best solution to the issue.[20] Parties may also be directed to the Administrative Hearing Model which calls for public

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16 Sandra Liebenberg, 'The value of human dignity in interpreting social-economic rights' 21(1) *South African Journal of Human Rights* (2005), 30.

17 Abram Chayes, 'The role of the judge in public law litigation' 89(7) *Harvard Law Review* (1979) 1298.

18 Pretorious, 'The origin of the *functus officio* doctrine with specific reference to its application in administrative law', 832.

19 Christopher Mbazira, 'From ambivalence to certainty: Norms and principles for the structural interdict in South Africa' 24(1) *South African Journal of Human Rights* (2008).

20 Special Project, 'The remedial process in institutional reform litigation', 810.

hearings and the opinions of interested parties who are not party to the matter to voice their opinions and contribute towards attaining a lasting resolution to the violation.[21] It can also involve applying the Expert Remedial Formulation Model which brings together experts in the field in question tasked with formulating the appropriate remedy to respond to the issue.[22] Finally, we have the consensual Remedial Formulation Model that calls for a third party being involved in the bargaining process between the parties with the aim of arriving at a solution that sits well with all the parties.[23]

Odunga, J, in *County Government of Kilifi v Ethics & Anti-Corruption Commission*[24] expounded on the elements of a structural interdict and explained it in five steps. The first step involves the court identifying how a particular right has been violated or how the government has failed to honour its obligation in regards to the right and making a declaration to that effect. Next, the court compels the government to comply with its constitutional responsibilities. Third involves ordering the government to submit a comprehensive report under oath, detailing the ways it will remedy the violations in question. The government tables the report before the court by a specified date. The plan itself should also bear timelines for achieving various milestones identified within it. What follows is the court evaluating the plan before it and weighing whether or not it adequately remedies the situation. This stage intertwines the judiciary and the other branches of government in the implementation of policies. The final stage comes in when the government fails to adhere to the plan in place which amounts to contempt of court.[25]

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21 Sturm, 'A normative theory of public law remedies', 79.

22 Special Project, 'The remedial process in institutional reform litigation', 795.

23 It was witnessed in *United States v Michigan* 471 F. Supp. 192 (W.D Mich 1979) where a third party was included in aiding negotiations between the parties in order to help them reach an agreement on allocation of fishing waters between tribes as cited in Mbazira, 'From ambivalence to certainty: Norms and principles for the structural interdict in South Africa'.

24 *County Government of Kitui v Ethics & Anti-Corruption Commission*, para 100.

25 *County Government of Kitui v Ethics & Anti-Corruption Commission*, para 100.

In the following sections, we will explore the various Kenyan and South African cases that have elucidated the concept of structural interdict, and applied it to the resolution of violations of socio-economic rights.

3.0 The *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*[26] cases

The original petition in this case arose from a demolition exercise. Residents of Mitumba village located near the Wilson Airport were given a seven (7) day notice to evict the plot of land or face demolition. The reason given for the particular eviction was that the village was on public land which was in the flight path of landing aircraft. Another was it being a shanty and being so close to the airport, at a time when Kenya was at war with terrorist elements, created a security risk. The residents rushed to the High Court to register a petition and to seek a conservatory order until the High Court heard the petition. The order was granted but the Respondents went ahead to conduct the demolitions in disregard of the order.

The petitioners amended the petition in light of the new circumstances following the demolition. They sought a declaration that the demolitions were a violation of their rights, illegal and oppressive and sought to have the Court restrain the respondents from future demolitions. Additionally, they sought a declaration that they were legally entitled to the plot but if that failed that they were entitled to compensation, and they should be relocated or offered an alternative shelter that allowed them access to clean water, education for their children, healthcare and food at the state's expense. They also claimed they were discriminated against as high-rise buildings located in the same area were spared during the demolition with only their shacks being brought down. Lastly, they sought a declaration that they were entitled to the

[26] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)*, Petition 3 of 2018, Judgment of the Supreme Court (2021) eKLR.

full enjoyment of the social and economic rights particularly the right to housing.[27]

The Respondents in reply denied that there existed any rights of the Petitioners in regards to the plot of land in question. The land, they explain, belongs to the First Respondent, and the state carried out the demolitions as part of the obligations under the Civil Aviation Act and in the interest of safety and national security. In regards to the socio-economic rights, they opposed the declaration sought by the Petitioner stating that socio-economic rights are subject to progressive realisation.[28]

3.1 Decision at the High Court

Mumbi Ngugi, J., after considering the arguments, held that the Petitioners had no legitimate right over the land in dispute and could therefore not maintain a claim of violation of rights in regards to the land. However, as they had suffered damage to property during the prohibited demolitions and the Respondents had violated their right to property as provided for under the Constitution. Additionally, she termed the conduct of the demolition despite the existence of the court order barring the same a violation of the Petitioners' constitutional rights. She ruled that the state had violated the Petitioners' right to full enjoyment of social and economic rights based on Article 21 and 43 on the Constitution. Carrying out demolitions without proper notice and without offering alternative accommodation amounted to a violation of the Petitioners' rights under Article 43 as read with Article 21.[29]

She also looked to the decision in the celebrated *Grootboom case*[30] and consulted international law.[31] In *Grootboom*, the Constitutional

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27 *Mitu-Bell Welfare Society v Attorney General & two others,* Petition 164 of 2011, Judgment of the High Court of Kenya at Nairobi, (2013) eKLR, para 5.

28 *Mitu-Bell Welfare Society v Attorney General & two others,* Judgment of the High Court, para 6.

29 *Mitu-Bell Welfare Society v Attorney General & two others,* Judgment of the High Court.

30 *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.

31 United Nations, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, 12 May 2004.

Court of South Africa stated there needed to be a relationship between reasonable state action and the need to treat people with appropriate dignity, respect and care.[32] In regards to the enjoyment of socio-economic rights, the Court held that this would only be possible if the state ensured its citizens had access to the rights to begin with. It explained that while eviction may be necessary it was necessary to follow due process in doing it.[33]

The High Court's final order was for the second respondent to provide an affidavit bearing the state policies and programmes that provide for provision of shelter to marginalised groups like residents of informal settlements. The second respondent was tasked with coordinating with the appropriate authorities both government agencies and non-state agencies that had knowledge in matters of eviction especially of squatters and slum dwellers.

3.2 Decision at the Court of Appeal

The Court of Appeal aligned itself with the *functus officio doctrine* and viewed the High Court's orders as going against this doctrine.[34] It did recognise the development of structural interdicts as a remedy developing in the area of constitutional petitions relating to violations of rights but held that the remedy did not extend to Kenya.[35] It did this in the recognition of earlier High Court rulings and sentiments by the Supreme Court. It also viewed this as an infringement on the doctrine of separation of powers[36] and also as raising the political question doctrine.[37]

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32 *Government of the Republic of South Africa and Others v Grootboom and Others.*

33 *Mitu-Bell Welfare Society v Attorney General & two others,* Judgment of the High Court of Kenya.

34 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Civil Appeal 218 of 2014, Judgment of the Court of Appeal, (2016) eKLR, para 28.

35 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 37, 38 and 39.

36 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 35, 36.

37 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 35.

It went on to fault the High Court's decision to involve non-state actors in the formulation of the appropriate remedy. It termed it as a poor attempt at alternative dispute resolution[38] or on the other hand a move to delegate judicial function to unauthorised bodies.[39]

3.3 Decision at the Supreme Court

Speaking in regards to the structural interdicts, it expressed concern at the two opposing stances adopted by the two lower courts indicating there is still a wide disconnect when it comes to understanding what structural interdicts are. It was especially worried by the position of the Court of Appeal not only by disregarding the two earlier High Court decisions that championed for structural interdicts but also, especially so, of the Supreme Court's own express position in the matter.[40] It took issue with the Court of Appeal's move to abide by the *functus officio doctrine*[41] as embodied in the Civil Procedure Act at the expense of redressing a violation of a right enshrined in the Constitution.

In regards to the involvement of non-state parties who were not parties to the suit to engage in formulation of appropriate relief, the Supreme Court sided with the High Court. It held that it was much more acceptable to include state parties, even those who were not a party to the matter, to engage in the fashioning of appropriate relief as opposed to including non-state parties.[42] It viewed this as amounting to judicial overreach as it went beyond any constitutional or statutory mandate.[43] The final orders were to partially allow the petition and remitting the matter to the trial court for it to make the appropriate order.

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38 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 35.

39 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 27.

40 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 119.

41 Civil Procedure Act (No 17 of 1967), Order 21.

42 *County Government of Kitui v Ethics & Anti-Corruption Commission*, para 156.

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

4. Challenges and pitfalls to implementation of structural interdicts

Earlier this paper mentioned the fact that the traditional understanding of judicial remedies and the authority of a court is that it operates along the *functus officio doctrine* meaning that once a court gives its final verdict it no longer has a hand in the matter. However, structural interdicts break these boundaries. They do not restrict themselves to the strict timelines. In the *Mitu-Bell Welfare case* the High Court had directed that the second Respondent file an affidavit reporting on existing state policies and programmes on provision of shelter and access to housing for the marginalised groups like slum dwellers.[44] However, the Court of Appeal showing a lack of proper understanding of the concept ruled against the High Court's directions stating that the High Court became *functus officio* upon the handing of its judgment. It went on to fault the direction to file affidavits and reports after reading the judgment stating that it opened the door to secondary litigation thus erring in law.[45]

One of the biggest problems facing the imposition of structural interdicts is the understanding of the point at which they can be imposed. This affects both litigants and judges presiding over the matter. Additionally, the trend has been to grant a structural interdict at the conclusion of a case and not prior to the hearing. In *Law Society of Kenya & 7 others v Cabinet Secretary of Health & 8 others; China Southern Co. Airline Ltd (Interested Party)*,[46] the Petitioners were opposed to the resumption of non-essential flights into Kenya from China in 2020 fearing it would open the population of Kenya to infection with Covid-19, ultimately violating the right to health and life of the people of Kenya. The petitioners in this case moved the Court in granting an ex-parte order of injunction barring resumption of the flights. It also sought a conservatory order in the form of a structural interdict compelling the Respondent to present a

[44] *Mitu-Bell Welfare Society v Attorney General & two others,* Judgment of the High Court.

[45] *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 122 and para 29.

[46] Ruling of the High Court of Kenya at Nairobi, (2020) eKLR, para 24.

contingency plan on how it plans to prevent, monitor and control a Covid-19 outbreak and the response system it has in place. The advocate for the respondents argued against the imposition of structural interdicts at the interlocutory stage claiming they could only be imposed at the conclusion of a matter.

In response to this, the Court held that a court has the jurisdiction to grant a structural interdict at any point of the hearing including at the interlocutory stage provided it was the 'appropriate relief'.

Another challenge witnessed is the lack of understanding of what exactly a structural interdict is. The Court of Appeal in the *Mitu-Bell Welfare case* seemed to understand the structural interdicts imposed to be akin to an alternative dispute resolution mechanism. This is highlighted by its sentiments that had the High Court intended for third parties to adjudicate over the matter they ought to have done so prior to the issuing of the judgment.[47] This is because it viewed the move to involve third parties to aid in arriving at a solution as a form of alternative dispute resolution. Additionally, there was the concern that it amounted to delegating judicial functions to parties not mandated to wield such powers under any law.[48]

As explained earlier in this paper structural interdict models such as the Expert Remedial Model, Consensual Remedial Model and Administrative Hearing Model invite experts and members of the public to contribute towards fashioning the appropriate remedy. Another reason to welcome this unorthodox means will be by considering that the Constitution allows for the grant of 'appropriate remedies'[49] which has been understood to extend to the forging of new tools[50] the aim being to ensure the realisation of the rights guaranteed in the Constitution.

Structural interdicts may often mean that the court directs parties to look at the laws, policies and guidelines existing in a particular area.

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47 *Kenya Airport Authority v Mitu-Bell Welfare Society & 2 others,* Court of Appeal, para 35.

48 *Kenya Airport Authority v Mitu-Bell Welfare Society & 2 others,* Court of Appeal, para 27.

49 Constitution of Kenya (2010) Article 23(3).

50 *Nancy Makokha Baraza v Judicial Service Commission & 9 others*, para 126.

This has not gone down well in some quarters as some jurists believe it raises the matter of the political question doctrine. The Court in *Ndoria Stephen v Minister of Education & 2 others*[51] explained that policy formulation was strictly an area of the Executive. These sentiments were echoed by the Court of Appeal in the *Mitu-Bell Welfare case* in a move to do away with the High Court's directives for the Respondent to present existing policies and consult human rights groups and organisations with knowledge in the area.[52] The Court of Appeal viewed this as the High Court encroaching on the state's power to formulate policy. It opined that the Court could not interfere in how the state chose to allocate the resources available neither could it engage in the execution of judgements.[53]

The question of encroachment on the separation of powers doctrine has been brought up as a challenge to the imposition of structural interdicts that touch on policy development. In response to this the South African apex court in *Port Elizabeth Municipality v Various Occupiers*[54] addressed this stating;

> …the procedural and substantive aspect of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways…[55]

Additionally in *Government of the Republic of South Africa and Others v Grootboom and Others*[56] the Court did not shy away from looking into the allocation of resources by the state to determine it had failed to make reasonable provision of available resources to go towards the realisation of the right to housing and to live in sanitary conditions.[57] The case arose from an eviction of the respondents who had been occupying private land earmarked for formal low-cost housing. Following the eviction,

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51 Judgment of the High Court of Kenya at Nairobi (2015) eKLR, para 55.

52 *Kenya Airport Authority v Mitu-Bell Welfare Society & 2 others,* Court of Appeal, para 35.

53 *Kenya Airport Authority v Mitu-Bell Welfare Society & 2 others,* Court of Appeal, para 36.

54 *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004).

55 *Port Elizabeth Municipality v Various Occupiers.*

56 *Government of the Republic of South Africa and Others v Grootboom and Others.*

57 *Kenya Airport Authority v Mitu-Bell Welfare Society & 2 others,* Court of Appeal, para 99.

they petitioned the Court to order the government to provide them with basic shelter and housing until they acquired permanent housing.

The grant of structural interdicts in regards to socio-economic rights has also been barred by the argument of socio-economic rights being subject to progressive realisation. This has meant while civil and political rights are actively catered to and prioritised, the State is often reluctant when it comes to social economic and cultural rights. It has been argued that these rights create no mandatory obligation to ensure their realisation.[58] It led to some scholars referring to socio-economic rights as second-generation rights.[59]

5. Opportunities for using structural interdicts successfully to promote the rule of law

Structural interdicts are a useful tool for ensuring that policy and guidelines translate into reality instead of being mere words on paper. It provides a way for the judiciary to poke its nose into the arena of policy formulation in order to ensure the government is executing its role in the realisation of rights. In *Ndoria Steven v Minister of Education & 2 others*[60], the court was asked to determine whether the Respondents were in violation of the right to education in respect to children living in marginalised areas of Kenya. The Respondents furnished the court with copies of the various policies and guidelines in place to address that issue. The Court recognised that there was much evidence to show that policies and guidelines existed but no steps were in place to monitor implementation of those steps. The Court however, felt its powers were limited to ensuring that there existed policies and guidelines but did not

58 *Government of the Republic of South Africa and Others v Grootboom and Others.*

59 Andrew Byrnes, 'Second-class rights yet again? Economic, social and cultural rights in the report of the National Human Rights Consultation' (2010) 33(1) *UNSW Law Journal* 193; Rotem Litinski, 'Economic rights: Are they justiciable and should they be?', American Bar Association, 23 July 2022.

60 *Ndoria Stephen v Minister for Education & 2 others*, Petition 464 of 2012, Judgment of the High Court of Kenya at Nairobi (2015) eKLR.

extend to ensure those policies were actually implemented.[61] Through structural interdicts, the courts have an avenue to monitor the implementation of policies and guidelines.

This remedy is effective not just in the realisation of policy but in making sure a judgment issued against the state is executed. As was highlighted in the *Mitu-Bell Welfare case* the state is quick to disregard injunctions and normally, since courts adhere to the *functus officio doctrine*, traditionally the court's hands were tied. However, by imposition of a structural interdict the court extends its power over the matter post pronouncement of a judgment.

This was highlighted in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*[62] where the Court had ordered the City of Johannesburg to provide alternative accommodation and relocate residents of a building that had been declared unfit for occupation. The residents now in desperate need of alternative accommodation approached the Court to compel the City to offer an alternative in line with securing their right to housing. The Court ruled that the two parties were to engage in talks to arrive at a suitable compromise or a solution that both parties were comfortable with. A timeline was given and later extended within which to conclude talks. However, time passed and a proper solution was not provided. The existence of the structural interdict opened the door for the Court to follow up and once again interrogate the matter.

Structural interdicts also offer a means to ensure the violation of rights is stopped from occurring in the first place. The *Law Society of Kenya & 7 others v Cabinet Secretary of Health & 8 others; China Southern Co. Airline Ltd (Interested Party)*[63] case came at a time when the world was on high alert following the outbreak of the Covid-19 virus which was

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61 *Ndoria Stephen v Minister for Education & 2 others*, para 54.

62 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (19 February 2008).

63 *Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 others; China Southern Co. Airline Ltd (Interested Party)*, Petition 78, 79, 80 & 81 of 2020 (Consolidated), Ruling of the High Court of Kenya at Nairobi (2020) eKLR, para 24.

spreading fast and had devastating effects. China had been identified as a hot spot and most countries were restricting flights between China and their territories. The same was happening in Kenya. However, an announcement was made that Kenya planned to reopen its airports to receive non-essential flights from China. The Petitioners rushed to court seeking an injunction to stop this. They argued that this would put the country at risk of allowing infected individuals into the country. The petition was grounded on the possible infringement posed to the right to health and the right to life.

The Court agreed granting an injunction barring the resumption of the flights. It also imposed on the respondent the responsibility of showing the contingency plan and response system it had in place to handle a possible Covid-19 outbreak in Kenya. All these directions being put in place before the actual violation of a right occurs.

Social and economic rights are subject to progressive realisation. This has often meant the executive does not prioritise the realisation of these particular rights. In fact, when their failure or reluctance in working towards the realisation of the rights is challenged in court, they use 'progressive realisation' shield to justify their inaction. They claim the nature of these rights does not create a mandatory obligation on the state to take measures towards their realisation.[64] Structural interdicts offer a way to force the government's hand into action in terms of these often neglected rights. The Supreme Court points out that socio-economic rights like all other rights require the state to formulate the needed policy and legislation to ensure their enjoyment. Additionally, it is well within the powers of the court to apply an interpretation of the law that most favours the enforcement of the bill of rights.[65] It goes on to state that the Court can use of structural interdicts to require the government to furnish the Court with evidence that indeed it is incapable, owing to limited resources, to realise the right.[66]

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64 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 91.

65 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 147.

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

6. Conclusion

Our nation has endured a history ridden with scores of human rights violations and infringements. There are several instances of the state acting in complete disregard of the rights of citizens. The courts were often either turning a blind eye or assuming the role of a toothless dog when addressing matters of the violation of rights. When it came to social and economic rights the situation was even more pitiful. In the instances when the state acknowledged them as rights to begin with, they hid behind the progressive realisation clause to justify their reluctance to work towards their realisation. Where they did make an effort, it was often in the form of well written policies and plans that were mere markings on paper with little or no implementation.

The current Constitution came in with the aim of shaking things up and changing our trajectory where the Bill of Rights is concerned. It introduced radical changes placing obligations and imposing restrictions in equal measures to ensure the rights that it guaranteed were realised and enjoyed with minimum state interference. It knew that it was prudent to appoint watch dogs because the alternative would mean lack of checks and balances. This led it to hand power to the judiciary allowing it to determine whether there was a violation and where the answer was in the affirmative, put in place the needed remedies to rectify the situation.

It was also aware that the judiciary could not act as a custodian to the Constitution with no powers to back its orders. This led it to authorise a discretion – wider than previously available – that allows the judiciary to fashion creative ways to bend the state to the will of the Constitution. One such way is through structural interdicts. Admittedly it is not explicitly listed anywhere in the Constitution. It is a tool that has emerged in the area of constitutional law and the Bill of Rights to remedy violations and infringements. The wide scope of remedies the Constitution allows the judiciary in the area has allowed for its adoption into Kenya.

The remedy has not been received by all with open arms. Some jurists still cling to the doctrines of *functus officio,* separation of power and the political question doctrine. They want to abide to the traditional powers and remedies the judiciary is granted and refuse to accept the change. The Supreme Court, the highest court in the land, has however made its pronouncement; structural interdicts are here with us and they are here to stay. However, they warrant care and proper reasoning in informing their imposition.

Structural interdicts come with challenges mainly in understanding how they operate. That notwithstanding they are an opportunity. A breath of fresh air in a land that has for long been suffocating under an iron fisted government that turned rights into luxuries enjoyed at its behest. This remedy not only loosens the noose around our necks but it forces the state to play its part as required under the Constitution. The state is brought to the mercy of the Constitution; it is finally made to work for the people who put in a position of power. This however, is only true where the remedy is imposed and imposed correctly.

‘HONOUR YOUR ELDERS’ SERIES

The Exclusive Economic Zone and the legacy of FX Njenga

Patricia Cheruiyot*

'No man is truly great who is great only in his lifetime.
The test of greatness is the page of history.' William Hazlitt

Introduction

Many dream of leaving behind great legacies. To some, this remains a fantasy, to a few, the dream materialises. The likes of Wangari Maathai[1] and Christof Heyns[2] are fine examples of people whose legacies live on. This paper will delve into the history of another legend, FX Njenga,[3] whose eminence transcends national and regional boundaries. Born on 6 January 1940, Njenga pursued his primary and secondary education in Kenya. He proceeded to Makerere University for the Preparatory University Studies Intermediate Certificate from 1959 to 1961. Between 1961 and 1963, he attended University College, Dar es Salaam where he studied law and obtained an LLB (Hons). He took his graduate studies at Columbia University from 1964 to 1965 and later got into New York University for a year's postgraduate studies in 1967. In 1965, he attended the Hague Academy Course in the Netherlands where he obtained a diploma in the Academy.

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1 Kenyan social, environmental and political activist. The first African woman to receive a Nobel Peace Prize.

2 South African human rights expert, activist and champion for pan Africanism.

3 6 January 1940-26 December 2008.

Njenga served in various capacities and is remembered as a preeminent professor of law, as an international civil servant, diplomat, and firm believer in the equal status and importance of the views of the Third World in the construction and development of international law. In particular, his contributions to the discipline of international law as a pioneer African scholar and practitioner of international law remain exemplary, as this paper will detail shortly.

Prof Njenga exemplifies competent leadership, pan Africanism, and critical scholarship. Prof Njenga had served as Dean, Faculty of Law, Moi University, and taught in the Faculty up till his unfortunate demise in 2008. A close friend recalls that he carried student dissertations with him to hospital and would be marking on his bed. His former students of Moi University remember his commitment to his students, and his relaxed easy personality that made him loved by students. A story is recounted by one of his former students, that once the law students were on strike, had blockaded the law building and would not let in their lecturers until their demands were met. Then came along Prof Njenga, affable, strutting to his office. The striking students instinctively unblocked the entrance to let him, *and him alone,* pass, and then resumed their blockade.

But even before his professorial years at Moi University, Prof Njenga served with distinction in varied regional and international bodies such as the United Nations General Assembly (UNGA) Committee on Peaceful Uses of the Sea Bed and Ocean Floor (1969-1972), the Third United Nations Conference on the Law of the Sea (UNCLOS III) (1973-1980), United Nations Commission on International Trade Law (1970-1975) and as a member and President of the UNGA Sixth Committee (1969-1975). Prof Njenga also served in the Organisation of African Unity as Political Director (1980-1987), and as Secretary General of the Asian African Legal Consultative Organisation (1988-1994).[4] All through his career, he was, from time to time consulted as a trusted legal adviser to the Kenyan Ministry of Foreign Affairs. More especially, Prof Njenga is widely remembered for his contribution to the development of modern

[4] FX Njenga's Curriculum Vitae, UN A/CN.4/456/Add.2, 19 April 1994.

law of the sea and the development of the exclusive economic zone concept which is the focus of this paper.

The exclusive economic zone, as defined by the United Nations Convention on the Law of the Sea, refers to an area beyond and adjacent to the territorial sea, under which the rights and jurisdiction of the coastal state and the rights and freedoms of other states are governed.[5] The EEZ was a *new* concept introduced in the 1982 Law of the Sea Convention (LOSC) and has been described as one of the most important pillars of the Convention.[6] To understand the significance of Prof Njenga's contribution, there is need to take into cognisance three things: the practice and intercourse of coastal states in respect to similar notions before the conceptualisation of the exclusive economic zone concept; Asian and African States' position in the then legal framework of laws governing the seas; and the implication of the concept at its inception and contemporarily.

i. State practice before the exclusive economic zone

Assertions of exclusive jurisdiction over maritime resources beyond the territorial sea can be traced to a proclamation issued by the United States with respect to coastal fisheries. This assertion saw a declaration for the establishment of conservation zones in areas of the high seas contiguous to the coasts of the United States, where fishing activities had been taking or would be taking place substantially in light of future development.[7] In this Proclamation, the freedom of navigation for all states was maintained, this being a customary right of the high seas.

Subsequently, a Declaration was made by the President of Chile on 23 June 1947 where Chile asserted national sovereignty over submarine

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5 United Nations Convention on the Law of the Sea, 10 December 1982, C.N.236.1984, Article 55.

6 SN Nandan, 'The exclusive economic zone: A historical perspective' <http://https://www.fao.org/3/s5280t/s5280t0p.htm> on 15 September 2022.

7 Proclamation No 2668, Policy of the United States with respect to coastal fisheries in certain areas of the high seas, 28 September 1945.

areas, regardless of their size and depth, as well as over the adjacent seas extending as far as necessary to reserve, protect, preserve and utilise natural resources and wealth.[8] The Declaration further established a demarcation of 'protected zones for whaling and deep-sea fishery' to extend to 200 nautical miles from the coasts of Chilean territory.

The Chilean Declaration is linked to a decree by the Government of Peru in the same year which similarly, established a maritime zone of 200 nautical miles.[9] State practice before these declarations was an exercise of jurisdiction over maritime resources at a breadth of three-nautical miles.[10] Incidentally, at that time, the territorial sea concept was recognised as a derogation from the freedom of the sea.[11] As such, any attempt to assert jurisdiction beyond the three nautical miles was vehemently rejected.[12] This position began to erode later albeit gradually.[13]

The 1958 Geneva Conference on the Law of the Sea was unable to craft an agreed limit for the territorial sea, with forty out of seventy-three countries in attendance strongly supporting the three-nautical mile territorial sea as against an extension of the same. The 1960 United Nations Conference on the Law of the Sea also failed, by one vote, to adopt a compromise of a six-mile territorial sea, and a further nine-mile exclusive jurisdiction over fishing, subject to certain limitations.[14]

The differences in the fisheries issue and the breadth of the territorial waters saw the need for finding a realistic solution for the conservation and management of coastal states fisheries resources.[15] Njenga's – together with Joseph Warioba of Tanzania – proposal for the establishment of an exclusive economic zone was amongst the solutions. The basis of the exclusive economic zone was for there to be a zone that

8 Presidential Declaration concerning continental shelf, 1947.

9 Nandan, 'The exclusive economic zone: A historical perspective', 1987.

10 Benard G Heinzen, 'The three-mile limit: preserving the freedom of the sea', 11 *Stanford Law Review* (1959) 629.

11 Emerrich de Vattel, *De droit des gens*, 1758; republished in 1964, Liberty Fund, 250-251.

12 FX Njenga, *International law and world order problems*, Moi University Press, 2001, 112.

13 Heinzen, *The three-mile limit: Preserving the freedom of the sea,* 630, 640.

14 Njenga, *International law and world order problems,* 112-113.

15 Njenga, *International law and world order problems, 107.*

would safeguard the interests of the coastal state in the waters adjacent to its coast without unduly interfering with the other legitimate uses of the sea by other states.[16] The proposed exclusive economic zone was not to be regarded as a territorial sea since traditional freedoms of the high seas including those of navigation and overflight, together with the freedom of laying pipelines and submarine cables would persist.[17] It would also be distinguished from the high seas owing to the fact that the coastal state would have the exclusive right to explore, exploit, regulate and control fisheries, besides exploiting the resources of the seabed within the zone.[18]

Similar to a number of unilateral declarations with respect to the breadth of the zone, the proposal for an exclusive economic zone was 200 nautical miles.[19] Comparatively, the patrimonial sea concept founded by Latin American states and contained in the *Text of the Declaration of Santo Domingo,* shows a similarity to the exclusive economic zone concept.[20] That Njenga's idea, which he developed together with Joseph Warioba (who later rose to be Prime Minister of Tanzania, Judge of Appeal, and was a member of the first bench of the International Tribunal on the Law of the Sea) was widely accepted by a majority of states, manifest in its inscription in the 1982 United Nations Convention on the Laws of the Sea. This speaks to the substantiality of his contribution in the jurisprudence of modern law of the sea.

ii. The exclusive economic zone and Third World interests

Njenga and Warioba's idea for establishing an EEZ was of much more critical significance to developing states. Besides general protec-

16 Njenga, *International law and world order problems, 122*.

17 'International legal materials', 12 Cambridge University (1973) 33-35. See also *Revised Draft Articles on Exclusive Economic Zone Concept Submitted by Kenya,* 1972, Article 3.

18 *Revised Draft Articles on Exclusive Economic Zone Concept Submitted by Kenya*, International Legal Materials, Articles 2 and 4.

19 The 1952 Santiago Declaration on the Maritime Zone signed by Chile, Peru and Ecuador; 'National claims in adjacent seas' *Geographical Review* (1951) 185. *Draft Articles on Exclusive Economic Zone Concept Submitted by Kenya*, Article 7.

20 Declaration of Santo Dominigo, UN A/AC138-80, 9 June 1972.

tion of all coastal states interests, there was an exigency to ameliorate the position of African and Asian states in the international regime governing the seas. Prior to UNCLOS III, the interests of developing states had been largely ignored in the development of international law. At the thirteenth session of the Asian African Legal Consultative Committee, it was stated that the 'present regime of the high seas benefits only the developed countries... '.[21] Consequently, measures were adopted to put an end to the situation. Among them was bloc formation and common position negotiation among the developing countries with the purpose of creating a solid platform for negotiations at the global conference. Kenya's 1971 report submitted to the Asian African Legal Consultative Committee (AALCC), contained the following remarks:

> For a long time, our views were unheard and our interests unheeded, when international law was being formulated by the so-called civilised nations, which by definition excluded both Asian and African countries. With the grant of independence to these countries, we now have the opportunity of having our views heard and incorporated in the development of international law.[22]

The Kenyan delegation to the AALCC, headed by FX Njenga, was opposed to UNCLOS III being used as a forum for tackling unresolved issues arising from the 1958 Convention.[23] In their report, the delegation pointed out that most states in Africa had not participated in the formulation of the four Geneva Conventions on the Law of the Sea. In any case, if the rules of the law of the sea served the interests of developing countries, such was only by coincidence and not by design. The delegation strongly held that the forthcoming UNCLOS III, which was scheduled to start in 1973, must have the competence to re-examine those rules which perpetrated inequalities and not simply the unresolved issues from the previous legal regime.[24]

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21 Report of the Thirteenth session of the Asian-African Consultative Committee, Lagos, 1972, 18-25.

22 Asian African Legal Consultative Committee, Report of the twelfth session, held in Colombo, 1971.

23 Njenga, *International law and world order problems*, 121.

24 Report of the twelfth session of the Asian-African Legal Consultative Committee, 93-94.

As such, the exclusive economic zone concept was precisely aimed at securing Third World interests. Tayo Akintoba reports that

> the concept was first introduced by African states … [it] called for the extension of fisheries jurisdiction within the zone *in order to keep developed countries away from their shores and to ensure the exclusive right of coastal African states to exploit living and non-living marine resources*.[25]

The ingenuity of Njenga and Warioba's idea occasioned massive support from AALCC membership. The exclusive economic zone concept was subjected to evaluation in subsequent sessions of the AALCC.[26] In these sessions, the concept was developed further and its main elements concretised. The proposal was wholly endorsed by the Committee prior to the Kenyan delegation's formal presentation of the same to the Seabed Committee in 1972.[27] The Organisation of African Unity (OAU) also contributed to the strengthening of African states' position in the advocacy for equitable rights for developing states in the international law regime of the seas.[28] It did so by passing no less than fourteen resolutions on the question of the law of the sea. Particularly, the OAU adopted a declaration on the issues of the law of the sea which captured the exclusive economic zone concept.[29] More specifically, it played a unifying role in the harmonisation of the African position. It would have been almost impossible to have a coherent African position without the political guidance of the OAU.[30]

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25 TO Akintoba, *African states and contemporary international law: A case study of the 1982 Law of the Sea Convention and the exclusive economic zone*, Martinus Nijhoff, The Hague, 1996, 2-3, cited in Humphrey Sipalla, 'Bridging the business and human rights divide with lessons from UNCLOS' deep sea mining regime' in Juan Carlos Sainz-Borgo and others (eds) in *In honour of a modern Renaissance man: Liber amicorum Guðmundur Eiríksson,* UPeace/OP Jindal/Universal Law Publishing, San Jose/Sonepat/Gurgaon, 2017, 243.

26 Reports of the thirteenth and fourteenth sessions of the Asian-African Legal Consultative Committee, 1972-1973.

27 Nandan, *The exclusive economic zone: A historical perspective,* 1987.

28 C Odidi Okidi, 'The role of the OAU member states in the evolution of the concept of the exclusive economic zone in the law of the sea', *Dalhousie Law Journal* (1982) 45.

29 Supplement No.21 [A/9021], Report of the Committee on the Committee on the Peaceful Uses of the Seabed and Ocean Floor beyond the limit of National Jurisdiction.

30 Njenga, *International law and world order problems,* 129.

An appreciation of Njenga's pan Africanism ascription would be incomplete in the absence of mentioning Articles VI and VII of the revised Draft Articles on EEZ. In the spirit of African solidarity, Njenga and Warioba proposed for the right of landlocked, near landlocked and states with a small shelf, to exploit the living resources of an exclusive economic zone belonging to a neighbouring coastal state.[31] Despite a modification of the original draft which diluted the initial vision of the exclusive economic zone, owing to discordant views amongst African countries, the essential idea was largely retained. Article VIII of the original draft reads as follows:

> that African countries recognise, in order that the resources of the region may benefit all regions therein, that the landlocked and other disadvantaged countries are entitled to share in the exploitation of the region on equal basis as nationals of coastal States, on the basis of African solidarity and under such regional or bilateral agreements as may be worked out.[32]

Indeed, the rights of landlocked and geographically disadvantaged states in reference to exploitation of living resources within the exclusive economic zones of coastal states are enshrined in LOSC Articles 69 and 70.[33]

iii. Implication of the exclusive economic zone concept at its inception and contemporarily

The inscription of the exclusive economic zone in LOSC saw the granting of equal jurisdiction for the exploitation of maritime resources to an extent of 200 nautical miles. This jurisdiction was to apply to all coastal states; developed or developing. The issue of equality was thus addressed competently giving African and Asian states a pedestal from

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31 Draft Articles on the Exclusive Economic Zone Concept, International Legal Materials, Articles 6 and 7.

32 Declaration of the Organisation of African Unity on the 'Issues of the law of the sea' of 2 July 1973.

33 Louis B Sohn and John E Noyes, *Cases and materials on the law of the sea*, Brill, 1951, 570-572.

which they could manage and control their maritime resources without undue interference from developed countries. The establishment of such a zone was also significant as it prevented the exploitation of African states' maritime resources by developed states on the basis that the developing states did not have the capacity to utilise their resources by dint of their lack of technological assets essential for such exploitation.[34]

The legal assertion of developing states' rights to avert exploitation of maritime resources by developed states was thus successful. This notwithstanding, it is troubling to note that African states are barely taking any measures aimed at realising the immense potential of the seas around Africa. Besides the various legislations establishing respective national exclusive economic zones, there are hardly any regulations at national, regional or continental level for the exploitation, exploration or conservation of the zones.[35] In the interest of developing states, it would be beneficial for these states to have short-term and long-term mechanisms in place which would assure the full exploitation of the maritime resources of their various exclusive economic zones.

Further, potential realisation by African countries of their maritime endowment is significant as it would honour the valiant efforts of the pioneers of this concept; them being African for that matter. Whether out of some sense of duty or not, paying homage to the exceptional achievements which led to concretised norms that safeguard African states' interests in the international legal regime of the seas seems to be of great import.

African concerns aside, many disturbing issues have arisen over the years owing to the exclusive economic zone concept. The establishment of the exclusive economic zone was effectively the commencement of a process of substantial 'privatisation-nationalisation' to shrink what has been called the global commons. Sovereign rights before 1982 extended to a breadth of 12 nautical miles.[36] After the LOSC, 35% of the world's

[34] Nandan, *The exclusive economic zone: A historical perspective,* 1987.

[35] Njenga, *International law and world order problems*, 137.

[36] Martin Lishexian Lee, 'The interrelation between the law of the sea convention and customary international law', *San Diego International Law Journal* (2006) 412.

waters have been excluded from the 'common heritage of mankind'.[37] Concern arises where, with the workings of ocean currents that lead to huge concentrations of phytoplankton – the crucial base of the fisheries food chain – being massively deposited within exclusive economic zones, so that 87 coastal states control over 95% of the world's fisheries, and replenishment rates are seriously threatened because of overfishing by these states.[38] In 1989, global fish catch was recorded at 90 million metric tonnes. This value has never been repeated since and with subsequent catches, the numbers have remained stagnant or declined. The situation is so bad that it is estimated that all the world's fisheries could collapse by 2050 as ocean acidification and habitat destruction are also taking their toll.[39] Unless stringent measures are taken to restrict and prevent overexploitation of living resources in the economic zones, there is an anticipation of horrid consequences.

There is also a worrying trend for coastal states to forego their marine conservation obligations. The prioritisation of economic ambitions especially among developed states at the expense of protecting the sea has led to various negative environmental side effects such as noise and light pollution which endanger not only the living organisms in the sea but also have adverse effects on the seabed.[40] This particularly relates to mining activities in the exclusive economic zone and the high seas.[41] Lack of clear mechanisms formulated to hold states accountable for destruction of the environment only adds to the problem at hand. Coastal states ought to take the initiative of conserving the marine environment through domestic legislation, regional and continental resolutions. With

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37 Liam Camping, Alejandro Colas, *Capitalism and the sea: Sovereignty, territory and appropriation in the global ocean,* 2017, 5.

38 Achin Vanaik, 'The UNCLOS isn't as perfect and it's time we acknowledge that,' Transnational Institute, 12 August 2020. < https://thewire.in/world/unclos-maritime-law-flaws > on 24 March 2022.

39 Vanaik, *The UNCLOS isn't as perfect and it's time we acknowledge that*, 2020.

40 Greenpeace International, 'Deep seabed mining: An urgent wake-up call to protect our oceans,' July 2013.

41 Kathryn A Miller, Kristen F Thompson, Paul Johnston and David Santilo, *An overview of seabed mining including the current state of development, environmental impacts, and knowledge gaps,* 2018.

effects of adverse climate change already being felt, such measures for preservation of the sea should not be taken lightly.

Another problem that has arisen from the establishment of exclusive economic zones is the creation of disputes between and among states. When these zones overlap, it is ordinarily left to the disputing states involved to sort matters out.[42] However, with states that have existing political tension and divergent economic ambitions, the situation only tends to intensify.[43]

iv. Conclusion

This paper's focus has been on FX Njenga's contribution to the creation of the exclusive economic zone. Having gained international acceptance, the exclusive economic zone concept can be said to be part of customary international law. With differing observations noted from state to state with regard to the exclusive economic zone, the fact that the concept provides something for every state is of primary essence. Future developments pertaining to the concept would be critical in determining the overall benefits and malefits of it. This notwithstanding, a reflection on the exclusive economic zone concept this far calls for an appreciation of its existence together with its originator. This piece is more than anything a dedication to the inspiring life of a renowned African legend.

42 United Nations Convention on the Law of the Sea, Articles 74 and 83.

43 Vanaik, 'The UNCLOS isn't as perfect and it's time we acknowledge that,' 2020.

KABARAK LAW STUDENTS TRIBUTE TO THE KIANJAKOMA BROTHERS

The Kianjokoma Brothers – A clarion call to never forget

Samson Muchiri Amboka*

Our teacher, Elisha Z Ongoya is fond of reminding us, again and again, the saying attributed to Thomas Jefferson: 'Eternal vigilance is the price of liberty'. The case of our friend and his brother is tragically emblematic of this.

On 2 August 2021, media houses reported the alleged murder of two brothers, Benson Njiru Ndwiga and Emmanuel Mutura Ndwiga, in unclear circumstances involving the police enforcing Covid-19 night time curfew regulations on the night of 1 August 2021.[1] Benson Njiru, 22, was an Engineering student of Embu University while Emmanuel Mutura, 19, was a first year LLB student in Kabarak University Law School. Their sudden demise sent widespread chill and vexation around the student community in Kenya and among citizens at large. In fact, riots erupted the days following the murders, which in turn led to the shooting death of at least one protester. One year later, the circumstances under which the family and community of Mr and Ms Ndwiga was rid of their sons remain unclear.

In an excruciatingly sorrowful burial ceremony on 13 August 2021, members of the Kianjokoma locality, including politicians, both young and old, called to the government for justice: condemning the impunity

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1 George Munene, 'Slain Embu brothers buried in emotional ceremony', *Nation*, 15 August 2021.

boldly and continually exercised by the police.[2] This was no ordinary or general call: they chanted the names and titles of the police officers allegedly involved. The people were clear, they did not want the officers transferred of suspended: they wanted them prosecuted and sentenced to prison.[3] While the tenacity of the assurances issued by the politicians in attendance in response to the public cries is not worth discussing here, the government action that followed is instrumental to mention.

For Mr and Mrs Ndwiga, together with the residents of Kianjokoma, the Constitution was supposed to protect them. They believed in the right to life, the right to human dignity and the right against torture and inhuman treatment. They were confident there was a remedy in Kenyan law against the alleged crimes of public officers. They were convinced the legal system in Kenya would uphold and effect the rights of their lost sons.

On the 2 September 2021, the accused police officers were finally charged before the High Court on two counts of murder. According to the prosecution, the six police officers jointly murdered the brothers at Kianjokoma Trading Centre on the night of 1 August 2021 as the students were heading home.[4] The Court began hearing on 9 February 2022 and is in the process of taking the prosecution's evidence from various witnesses.[5]

The residents of Kianjokoma are not an isolated class of victims. Even before the pandemic, the Independent Policing Oversight Authority (IPOA) reported a rise in cases of abuse and killings by the police.[6]

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2 Muriithi Mugo, 'Leaders call out police as Embu brothers buried', *The Standard*, 13 August 2021.

3 Eric Biegon, 'Calls for justice dominate burial of slain Embu brothers', *KBC*, 13 August 2021.

4 Paul Ogemba, 'Kianjokoma murder cops finally charges after day of drama', *The Standard*, 2 September 2022.

5 CORRESPONDENT, '2 witnesses testify as Kianjokoma brothers death trial commences', *Capital News*, 9 February 2022; Margaret Kalekye, 'Hearing of Kianjokoma brothers murders case resumes at High Court', *KBC*, 16 May 2022.

6 VOA, 'Abuse by Kenya police officers on the rise: IPOA report', *Citizen Digital*, 24 January 2022.

Covid-19 only presented more opportunity for police to increase in impunity through the pandemic regulations.[7] The trend remains to be a shuddery cycle of death through police brutality; demonstrations and outcries; transferrals, suspensions and possible prosecutions, with few convictions. By the end of 2021, the Independent Policing Oversight Authority could only report 17 convictions on police officer cases involving various offences, 10 of which are murder. This is despite the Authority's report that of at least 169 incidents of deaths involving police in 2021 alone.[8] Missing Voices, a coalition of civil society groups, on the other hand records 187 police killings in 2021.[9]

Though much can be said about the inhuman enforcement of Covid-19 regulations in protecting public in third world states, the challenge in this particular context runs deeper. The monster of police brutality continues to systematically consume many in the country, before, during and after Covid-19 restrictions. Multiple questions abound in this regard. Do we have sufficient safeguards against these brazen violations of human rights? Is the criminal justice system sufficient to provide victims effective remedies against rogue police officers? Is the missing link in the law, in implementation, or in both? What steps could be taken to better protect human rights against law-and-order enforcers? What does the future look like for the students and citizens of Kenya who must learn to co-exist with the police? What role can individuals play in ensuring justice for the victims of police killings and security for the rest of the nation?

To a large extent, the reaction of the government's protective mechanisms seems to be influenced by the intensity of public outcries. Four days after the Kianjokoma brothers were laid to rest, the Office of Director of Public Prosecutions arraigned six police officers linked to the killings were before Magistrate Daniel Ndugi. The court denied their

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7 Amanda Sperber, '"They have killed us more than corona": Kenyans protest against police brutality', *The Guardian,* 9 June 2020.

8 Gordon Osen, 'Cops killed 169, disappeared 28 in 2021, says IPOA', *The Star*, 11 July 2022.

9 Missing Voices, 'Delayed Justice', 2021 Annual Report, 16.

application for bail, ordering, instead, that they remain in custody to allow investigations without any interference.[10] These preliminary expeditious steps in securing justice for the Kianjokoma brothers, and security for all other Kenyans is a result of the public participation in demanding state accountability for the killings. From their demise to their burial and weeks after, Kenyans, human rights organisations, and a few politicians took to social media (under the hashtag #JusticeForKianjokomaBrothers on Twitter and Facebook) and other platforms to compel action by oversight authorities.

On Friday 22 July 2022, after 6 years of the public waiting in protests, demonstrations and outcries for justice, the court finally convicted three police officers for the murder of human rights lawyer Willie Kimani his client Joseph Mwenda and taxi driver Joseph Muiruri.[11] For the hundreds of people that took to the streets and digital platforms to condemn the killing of the three individuals, this judgement brings relief, albeit temporary, in light of other pending cases. Speaking on the case, Elsy Sainna, executive director at the International Commission of Jurists, Kenya stated, 'We must sustain the advocacy efforts both with the judiciary and even with the police that nobody can get away without being accountable for their actions, particularly if they are police officers'.[12]

On the matter of our fallen brothers from Kianjokoma, the words of the late Willie Kimani's father suffice: 'we have wounds in our hearts. As long as this case is in court, the wounds won't heal.'

[10] Susan Kendi, 'Police officers involved in the death of Kianjokoma brothers to remain in custody', International Commission of Jurists Kenyan Section, 17 August 2021.

[11] AFP, 'Kenya court finds three police guilty of killing rights lawyer', *The Citizen,* 22 July 2022.

[12] Sarah Johnson, 'Kenyan police officers found guilty of murder of three including human rights lawyer', *The Guardian,* 22 July 2022.

Policing in Kenya during Covid-19: Between humanity and status-quoism

George Omondi Gor*

The very motto of the Kenyan police, *Utumishi kwa wote* ('service to all'), depicts not only the aspiration of these uniformed forces, but also the very basis of their self-view, and even more so, their self-perceived entitlements to that view… - Sipalla and Lewela[1]

Abstract

Kenya's policing history has for the longest time been partisan to the ruling regime. This has created a culture of brutality and disdain among members of the Kenya Police, towards members of the public whom they ought to protect and serve. Although the National Police Service Standing Orders provide that police officers shall be committed to the welfare of the public and shall maintain the highest professional and ethical standards in providing service to members of the public, recent practices and especially events that followed the Covid-19 containment measures prove the contrary. While the law makers may have been well intentioned, brutality cases on the part of the police in enforcing containment measures were recorded in several

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1 Humphrey Sipalla, Karest Lewela, 'Policed perceptions, masked realities: Human rights and law enforcement in Kenyan popular art' in Frans Viljoen (ed), *Beyond the law: Multi-disciplinary perspectives on human rights*, Pretoria University Law Press, 2012, 209 and 220.

instances leading to injuries and deaths among many Kenyans, not least of which was the death in custody of our classmate Emmanuel Mutura and his brother Benson Ndwiga in Kianjakoma, Embu. Thus, this article argues that while Kenya boasts of an egalitarian transformative constitution, the most crucial entity that maintains law and order has maintained a retrogressive, non-egalitarian policing culture. Further, it advances the argument that in the long term, the police have to be trained in an egalitarian manner in order to achieve the true purpose of the Constitution of Kenya (2010).

Keywords: policing culture; brutal policing; transformative constitution; Covid-19 containment measures; curfews; excessive force; rule of law

Introduction

The use of excessive force by the police in colonised states, especially those in the Global South,[2] is as a result of the colonialists' way of gaining control instead of 'maintaining law and order'.[3] The colonial powers found colonial laws disadvantageous to their 'Mosaic aim'[4] which was to civilise their subjects; thus, they resorted to use of force by uniformed forces to meet their true aim which was to gain economic and political mileage.[5] Over time, excessive use of force has become systemic[6] and rooted in the policing culture in Kenya. Since independence from the British in 1963, the police force has had a history of being used by authoritarian regimes to entrench power.[7] These historical injustices have characterised the negative perceptions of people, real or perceived towards the police.[8]

While the use of force is legal under the National Police Service (NPS) Act (No 11A),[9] there are principles laid down under its Sixth

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2 For purposes of this article, Global South means underdeveloped countries in contrast with Global North that means developed countries. For a clearer analysis of this dichotomy, see Obijiofor Aginam, 'Global village, divided world: South-North gap and global health challenges at century's dawn' 7(2) *Indiana Journal of Global Legal Studies* (2000) 603, 607.

3 In *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service and 4 Others; Kenya National Commission on Human Rights and 3 Others (interested parties)* Petition no 120 of 2020 (Covid 025) Judgment of the High Court, 16 April 2022 eKLR. The Court at paragraph 137 furthers this argument as it identifies that for a long time, the role of the police has been believed to be maintenance of law and order. This case is discussed in part I of this paper in detail.

4 Drawn from Biblical teachings, 'Mosaic aim' is used in this article to refer to the colonial goal of advancing uncivilised people (their subjects) from their 'backwardness' to civilisation.

5 Thomas Martin, *Violence and colonial order: Police, workers and protest in the European colonial empires, 1918-1940*, Cambridge University Press, Cambridge, 2012, 23.

6 Martin, *Violence and colonial order*, 41.

7 Martin Mavenjina, 'Police brutality in Kenya' *Kenya Human Rights Commission,* 26 May 2017.

8 David Throup, 'Crime, politics and the police in Kenya, 1939-65' in David Anderson, David Killingray (eds) *Policing and decolonisation: Politics, nationalism and the police, 1917-65,* Manchester University Press, 1992, 127.

9 National Police Service Act (No 11A of 2011), Sections 49(5) and 61.

Schedule that limit such use of force.[10] These principles – necessity, proportionality, legality, dignity, accountability, transparency and individual responsibility – ensure that the police do not, at their own will, use force on individuals under any circumstance.[11] In essence, the police are mandated under the Sixth Schedule of the NPS Act to ensure that they employ non-violent means that are proportional to the intended objective prescribed under law.[12] The legal underpinning regulating the use of force by the police is the NPS Act, the NPS Standing Orders and primarily, Article 49 of the Constitution touching on the rights of arrested persons. These provisions, in my view, are pleasing to the eye, even though the drafters of the Constitution and the laws regulating the use of force by the police have had the best intentions. However, the implementation of these provisions has truly become an uphill task for the state, even post-2010 when the transformative Constitution and its constitutive elements await implementation.[13]

With the emergence of the coronavirus (Covid-19) pandemic, the world was in a race to mitigate its effects, further creating a disparity between the Global North and the Global South.[14] Increased casualties necessitated imposition of stringent measures in order to curb the disease, measures which were developed globally by the World Health Organisation (WHO).[15] After the first case in Kenya being recorded on 12 March 2020, the state put in place a dusk to dawn curfew from 27 March

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10 National Police Service Act, Sixth Schedule, Section 61(2).

11 Probert Thomas, Kimari Brian and Ruteere Mutuma, 'Strengthening of police oversight and investigations in Kenya: Study of IPOA investigations into deaths resulting from police action' *Centre for Human Rights and Policy Studies* October 2020, 14.

12 Thomas, Kimari, Mutuma, 'Strengthening of police oversight and investigations in Kenya' 14.

13 Willy Mutunga, 'In search and defence of radical legal education: A personal footnote', 1(1) *Kabarak Law School Occasional Paper Series*, Kabarak University Press, 2022, 40.

14 Kunle Ola, 'COVID-19 Strategic global North-South divide: Access to knowledge quadrants imperatives for granting the WTO waiver' *European Intellectual Property Review* (2021) 1, 2.

15 World Health Organisation, 'Covid-19 transmission and protective measures' <https://www.who.int/westernpacific/emergencies/covid-19/information/transmission-protective-measures> on 27 April 2022.

2022.[16] Movement was allowed only with the permission of the police in charge of a division or county in writing.[17] The Order exempted certain personnel, including healthcare professionals and other 'important' stakeholders from various sectors.[18] Various rules and regulations followed this Order, some which were subjected to judicial scrutiny to determine their constitutionality. These shall be discussed further in detail in the subsequent sections of this article. As will be seen, several instances of excessive use of force towards the citizenry were revealed during the enforcement of these measures. While the intention of the government could have been to curb the adverse effects of the pandemic, negative policing practices usurped this motive.

This paper is divided into five parts. Part I of this article shall evaluate the legality of enforcement of Covid-19 measures that the government of Kenya adopted. Part II shall render an account of the numerous violations of human rights and fundamental freedoms arising from the police officers' use of excessive and brutal force. Part III of this paper shall engage in a discussion of the use of force by the police during the pandemic in South Africa. Essentially this part aims to compare the situation in Kenya with that of South Africa. Part IV shall recommend the way forward whereas Part V shall lay the conclusion. In conceptualising the way forward, Part IV argues that Kenya has long relied on the police to implement policies that could essentially be bestowed upon other state and non-state agencies. In essence, this continued heavy reliance on the police to enforce social preventive measures of Covid-19 has deepened the disconnect between the people and the uniformed forces. Therefore this entrenches a sense of status-quoism among the police insofar as their entrenched retrogressive policing practices were allowed.

16 Public Order (State Curfew Order, 2020), Section 3.

17 Public Order (State Curfew Order, 2020), Section 4.

18 Public Order (State Curfew Order, 2020), Section 5.

I. Legality and enforcement of Covid-19 measures

At the onset of the Covid-19 pandemic and following its first case in Kenya, several laws were put in place to enforce measures that were intended to curb the spread of the disease. The Public Order (State Curfew) Order, 2020 was the first legal notice that introduced the dusk to dawn state curfew. On 2 March 2020, Covid-19 was declared an epidemic by the Cabinet Secretary for Health.[19] Following the Public Health Order, there was the Public Order (State Curfew) Variation Order 2020 that mandated employers whose employees did not fall in the category of essential workers to leave their various work places before 4pm so they may be home by 7pm.[20] Several rules were put in place pursuant to the enactment of the Public Health (Prevention, Control and Suppression of COVID-19) Rules, 2020 that provided the procedure on how to handle persons infected with the virus (or suspected to be infected). Breach of the rules provided for imposition of monetary fine or imprisonment for six months against an individual.[21] Through a series of rules and regulations, the State was in a race to impose these measures instead of actually preventing the spread of Covid-19.[22]

The constitutionality and enforcement of the curfew orders were then contested in *Law Society of Kenya v Hillary Mutyambai and Others* (Mutyambai case).[23] According to the petitioner, the curfew order was

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19 Public Health (Declaration of Formidable Epidemic Disease, 2020) Order, Section 2.

20 Public Order (State Curfew Variation Order 2020), Section 2(a).

21 Public Health (Prevention, Citation. Control and Suppression of COVID-19 Rules, 2020), Section 15.

22 Public Health (COVID-19 Restriction of Movement of Persons and Related Measures Rules, 2020); Public Health (COVID-19 Restriction of Movement of Persons and Related Measures, Nairobi Metropolitan Area Order, 2020); Public Health (COVID-19 Restriction of Movement of Persons and Related Measures, Mombasa County, Order, 2020); Public Health (COVID-19 Restriction of Movement of Persons and Related Measures, Kilifi County, Order, 2020); Public Health (COVID-19 Restriction of Movement of Persons and Related Measures, Kwale County, Order, 2020); Public Health (COVID-19 Restriction of Movement of Persons and Related Measures, Variation Rules, 2020); Public Order (State Curfew Variation Order, 2020); and Public Health (COVID-19 Restriction of Movement of Persons and Related Measures Variation Rules, No 2 of 2020).

23 *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service and 4*

made in reliance of Section 8 of the Public Order Act Cap 50 yet public health emergencies such as the Covid-19 were to be governed by Section 36 of the Public Health Act Cap 242.[24] In the petitioner's words, the underlying objective of a curfew is to enable security officers move into an area affected by criminal acts leading to public disorder, and thus a tool for fighting crime which should not be employed in health pandemics.[25] The Law Society of Kenya (LSK) also contended that Article 24 which allows for limitation of fundamental rights and freedoms should be reasonable and done in an open and democratic society based on human dignity, equality and freedom.

The petitioner further posited that the curfew order was abused since police officers used it as a ground to: violently assault vulnerable persons like pregnant women; bludgeon providers of exempted services such as watchmen, supermarket workers, food truck drivers and medical personnel who were on the way from or to work; and recklessly congregated large crowds contrary to the advice by the WHO on the need for social distancing in order to prevent the spread of the coronavirus.[26] The LSK also brought to the attention of the court, the teargassing, beating and use of unreasonable force and added that those acts violated the rights to human dignity under Article 28 of the Constitution, the right to freedom and security of the person, and freedom from cruel and degrading treatment under Article 29(f) of the Constitution.[27]

While determining the matter the Court first appreciated the fact that a curfew is a tool for fighting crime, but went ahead to provide that a curfew may not be limited to purposes of combating crime since its purpose is to bring law and order to areas visited by turmoil that is generally caused by man.[28] Additionally, the Court added that although some statutes cannot be applied to situations other than what they were

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Others; Kenya National Commission on Human Rights and 3 Others (Interested Parties), Petition 120 of 2020 (Covid 025) eKLR.

24 *Law Society of Kenya v Inspector General National Police Service and 4 Others.*

25 *Law Society of Kenya v Inspector General National Police Service and 4 Others.*

26 *Law Society of Kenya v Inspector General National Police Service and 4 Others.*

27 *Law Society of Kenya v Inspector General National Police Service and 4 Others.*

28 *Law Society of Kenya v Inspector General National Police Service and 4 Others.*

enacted for, there are laws which are multipurpose in nature since they fit all situations, and can thus be invoked to address various circumstances. As such the court pronounced itself that section 16 of the Public Health Act indeed allows application of other laws to health matters as long as there are no conflicts between the laws.[29] The Court therefore agreed with the respondents that the Public Order Act which provided for the curfew is applicable to health emergencies such as the one posed by the Covid-19 pandemic.

However, the Court added that a curfew order should contain a specified period of applicability, failure to which the order will be illegal since an instrument that restricts rights and freedoms should be clear as to how long the limitation will last.[30] The Court added that the challenged curfew order met the constitutionality and statutory thresholds and that the government cannot be faulted for enforcing precautionary and restrictive measures which were aimed at protecting Kenyans from the spread of the fatal virus.[31] On this, the Court further opined that the unconstitutional and illegal acts which occur in the implementation of a legal instrument cannot not render the instrument unconstitutional.[32]

Against the foregoing, the Court however noted with concern that the main problem with the curfew was the manner in which it was implemented since while implementing it, members of the police service put the law-and-order mentality at the fore even in the midst of a pandemic. The Court also reiterated and made it clear that diseases or pandemics cannot be contained through visiting violence on the members of the public. In addition, the Court contended that one cannot supress or contain a virus by mercilessly beating people. As such it called upon the National Police Service and went ahead to state that it must be held responsible and accountable for the numerous violations of the rights to life, dignity and other rights of members of the public.

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29 *Law Society of Kenya v Inspector General National Police Service and 4 others.*

30 *Law Society of Kenya v Inspector General National Police Service and 4 others.*

31 *Law Society of Kenya v Inspector General National Police Service and 4 others.*

32 *Law Society of Kenya v Inspector General National Police Service and 4 others.*

II. Violations of fundamental human rights and freedoms during the pandemic in Kenya

Pandemics, as *Mutahi* and *Wanjiru* note, 'reproduce the power inequalities that already exist' and engender divides between social classes.[33] This assertion is affirmed by CJ emeritus Prof Willy Mutunga who notes that the excessive use of force towards the citizenry, during a pandemic, violates several human rights under international law and under Kenya's transformative 2010 Constitution.[34] Indeed as will be noted, the deployment of extreme force by police officers when dealing with members of the public has caused members of the public to view the police as a problem as opposed to being a solution.[35]

According to Human Rights Watch, at least 10 people died from police violence during the first days of the dusk to dawn curfew imposed by the government on 27 March 2020 following the pandemic.[36] Police were reported to have beaten and shot at members of the public who were returning home from work before the start of the curfew with no apparent reason or justification.[37]

Amnesty International Kenya notes that, the pandemic provided the perfect storm for indiscriminate mass violence by the police.[38] In some areas such Nairobi, it is reported that police officers forced members of the public who were walking home to kneel, then brutally

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33 Patrick Mutahi, Kate Wanjiru, 'Police brutality and solidarity during the COVID-19 pandemic in Mathare' 17(6) Mambo*!* (2020).

34 Willy Mutunga, 'Transformative constitutions and constitutionalism: A new theory and school of jurisprudence from the Global South?' 8 *Transnational Human Rights Review* (2021), 30. See also, *In the Matter of the Speaker of the Senate and Another*, Advisory Opinion no 2 of 2013 Advisory Opinion of the Supreme Court, 18 Novmeber 2013 eKLR.

35 Mutahi, Wanjiru, 'Police brutality and solidarity during the COVID-19 pandemic in Mathare', 4.

36 Human Rights Watch 'Kenya: Police brutality during curfew' 22 April 2020 21 July 2022.

37 Human Rights Watch, 'Kenya: Police brutality during curfew'.

38 John Allan Namu, Tess Riley, 'Nine weeks of bloodshed: How brutal policing of Kenya's Covid curfew left 15 dead' *The Guardian,* 23 October 2020.

whipped and kicked them.[39] This was also the case in Mombasa where the police threw teargas canisters at passengers lining up to board a ferry on their way home from work and went ahead to unleash a barrage of kicks, blows, slaps, lashings and beatings from batons and gun butts.[40]

In the Mombasa incident, huge crowds had built up as they tried to get into the limited ferries which were running at lower capacities due to the social distancing rules.[41] In total disregard of the state of affairs, the officers went ahead to force members of the public to huddle together and even lie on top of each other in spite of the distancing requirements which were put in place to curb the spread of Covid-19.[42] It is interesting to note that these officers were not wearing masks or other protective clothing when they mercilessly beat members of the public for failing to complying with the same.[43]

Members of the public in other areas of the country were also not spared from extreme violence by police officers.[44] In Busia and Kakamega counties, police were recorded beating and shooting at people who were found outside during curfew hours.[45] In one recorded incident in Kakamega, police officers arrived at an open-air market in trucks and began beating, kicking and shooting at persons engaging in business in the market. As a result of the incident two traders were killed by officers who fired bullets at them.[46]

A more distressing and sorrowful incident in Embu county shocked the country, was the death of two brothers in the hands of police officers as a result of the excessive force and violence that was metered upon them.[47] Benson Njiru Ndwiga and Emmanuel Ndwiga were university

39 Human Rights Watch, 'Kenya: Police brutality during curfew'.

40 Human Rights Watch, 'Kenya: Police brutality during curfew'.

41 Namu, Riley 'Nine weeks of bloodshed: How brutal policing of Kenya's Covid curfew left 15 dead'.

42 Human Rights Watch, 'Kenya: Police brutality during curfew'.

43 Human Rights Watch, 'Kenya: Police brutality during curfew'.

44 Human Rights Watch, 'Kenya: Police brutality during curfew'.

45 Human Rights Watch, 'Kenya: Police brutality during curfew'.

46 Human Rights Watch, 'Kenya: Police brutality during curfew'.

47 Rasna Warah, 'A brutal pandemic: Kenya Police under fire for the death of two brothers' *One Campaign,* 16 August 2021.

students aged 22 and 19 years respectively at the time of their death. Emmanuel Ndwiga was a promising law student at Kabarak University, whereas his brother Benson pursued an engineering course at Embu University.[48]

According to media reports, the two were arrested by officers attached to Manyatta Police Station in Kianjokoma shopping centre for defying the curfew orders and were not found until the family filed a missing persons claim.[49] After being referred to Runyenjes Police Station by officers at Manyatta, the family was notified that their two sons had jumped from a moving police car and died on the same day.[50] The officers' report given to the family was however contradicted by eye witness reports which indicated that the two were met with extremely violent force from the officers before they were put into the police vehicle.[51] An autopsy conducted revealed that the two promising brothers died as a result of broken ribs and head injuries.[52]

It is important to note that even before the pandemic, the Human Rights Watch reported that the Kenya Police shot dead more than 100 civilians who were engaged in opposition protests that followed the 2017 General Elections.[53] Furthermore in 2016 police officers were also recorded unleashing violent force on protesters leading to the death of five civilians whereas 60 civilians were brutally wounded.[54]

Such cases not only show how terribly members of the public suffer at the hands of police officers, but also indicate how the use of violent force is deeply entrenched among members of the police service resulting in numerous violations of the rights to life, dignity, security and freedom of members of the public.

48 Warah, 'A brutal pandemic: Kenya Police under fire for the death of two brothers'.

49 Susan Kendi, 'Police officers involved in the death of Kianjokoma brothers to remain in custody' *International Commission of Jurists Kenyan Section,* 17 August 2021.

50 Kendi, 'Police officers involved in the death of Kianjokoma brothers to remain in custody'.

51 Kendi, 'Police officers involved in the death of Kianjokoma brothers to remain in custody'.

52 Warah, 'A brutal pandemic: Kenya Police under fire for the death of two brothers'.

53 Human Rights Watch, 'Kenya: Police brutality during curfew'.

54 Human Rights Watch, 'Kenya: Police brutality during curfew'.

III. South Africa: Brutality a colonial legacy in the Global South?

At the confirmation of the first case of Covid-19 on 5 March 2020 by a report of the National Institute of Communicable Diseases,[55] South Africa like other countries put in place a series of regulations and guidelines that have been since in force.[56] The South African Disaster Management Act (DMA)[57] provides for a policy of disaster management which focuses on: 'preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery; the establishment of national, provincial and municipal disaster management centres; disaster management volunteers; and any matters incidental thereto'.[58] Covid-19 was declared a national disaster by the head of the National Disaster Management Centre on 15 March 2020, in line with Section 23 (1) (b) of the DMA after assessment as to its severity and magnitude of the disease.[59]

South Africa came up with an 'Alert System' whose aim was to manage the gradual adjustment of the lockdown that was put in place.[60] The Alert System is divided into five levels: Level one, that shows a low spread of Covid-19 with a high preparedness; Level two indicates that moderate spread of the disease with high preparedness; Level three

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55 Ciara Staunton, Carmel Swanepoel, Melodie Labuschaigne, 'Between a rock and a hard place: COVID-19 and South Africa's response' 7(1) *Journal of Law and the Biosciences* (2020), 1.

56 South African Government, 'Regulations and guidelines – Coronavirus Covid-19' <https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19?gclid=CjwKCAjwhaaKBhBcEiwA8acsHDOXp5z7-kgONTyC1Z-f2OUKSZKDfDZ7bAyOUgylehiNusn0IDqrRghoClcUQAvD_BwE> on 22 September 2021.

57 Disaster Management Act, (Act No 57 of 2002).

58 Centre for Human Rights University of Pretoria, 'South Africa - Nature and description of emergency COVID-19 measures' <https://www.chr.up.ac.za/covid19-database/south-africa?start=1> on 22 September 2021.

59 Centre for Human Rights, 'South Africa - Nature and description of emergency COVID-19 measures'.

60 South African Government, 'About alert system' <https://www.gov.za/covid-19/about/about-alert-system> on 22 September 2021.

demonstrates moderation both in spread of disease and preparedness; Level four is indicative of the fact that there is a moderate to high spread of Covid-19 while there is a low to moderate readiness; and Level five shows that there is high spread of the disease and a low preparedness of the healthcare systems.[61]

Subsequently, measures such as social distancing, isolation and limitation of movement were put in place by the government to curb Covid-19.[62] However, the enforcement of these measures bred contempt from the populace instead of being appreciated.[63] Violence against citizens existed even before the introduction of the regulations.[64] In policing, the police used masculinity, race and class to perpetrate violence and abuse.[65] Langa and Leopeng contend that there was heightened brutality towards black men in South Africa by law enforcement.[66] One notable incident is the murder of Collins Khosa, by South African National Defence Force (SANDF), who had been deployed to police the Covid-19 containment measures.[67] Khosa's death was attributed members of the SANDF who violently forced themselves into his home and inflicted blunt force trauma on his head.[68] Reports from the family indicated that Khosa was strangled, slammed against a cement wall and hit on the head with the butt of a machine gun.[69] Following his death his family contested the nature of the force that was being used by the po-

61 Disaster Management Act of South Africa (No 57 of 2002); Directions regarding the criteria to guide the determination of alert levels.

62 Staunton, Swanepoel, Labuschaigne, 'Between a rock and a hard place' 5.

63 Staunton, Swanepoel, Labuschaigne, 'Between a rock and a hard place' 7.

64 Langa Malose, Leopeng Bandile, 'COVID-19: Violent policing of Black men during lockdown regulations in South Africa' 8(2) African Journals Online (2020), 118.

65 Malose, Bandile, 'COVID-19: Violent policing of Black men during lockdown regulations in South Africa' 119.

66 Malose, Bandile, 'COVID-19: Violent policing of Black men during lockdown regulations in South Africa' 121.

67 Katie Trippe 'Pandemic policing: South Africa's most vulnerable face a sharp increase in police-related brutality' Atlantic Council: *Africa Source*, 24 June 2020.

68 Trippe, 'Pandemic policing: South Africa's most vulnerable face a sharp increase in police-related brutality'.

69 Trippe, 'Pandemic policing: South Africa's most vulnerable face a sharp increase in police-related brutality'.

lice before the South African High Court. In *Khosa and others v Minister of Defence and Military Defence and Military Veterans and others* (*Khosa Case*)[70] it was held that the law enforcement officers ought not to use force unless there is need and if there is, the force ought to be minimum.[71]

Other reported South African cases include the use of violent force, water cannons and rubber bullets by law enforcement officers in areas such as Alexandra to disperse members of the public who had queued outside food shops to replenish their food supplies.[72] It is further reported that the use of extreme force by the police and other law enforcers was rampant across South Africa leading to the death of at least 10 members of the public.[73]

IV. The way forward

Kenya and South Africa are similar in two ways; first, they are African states and secondly, South Africa's history of an apartheid regime and Kenya's history of being under an authoritarian regime gave birth to the Constitution of South Africa 1996 and the Constitution of Kenya 2010 respectively that have both been termed as transformative. However, one would ask, what does it take to truly transform society if the legal culture remains the same and status quo is maintained? I attempt to give an answer by making two broad arguments: one, that transformative constitutionalism has to be advocated for not just in the civilian populace but also in the policing environment; and two, that civilians should not to be comfortable and merely say 'thank God it's not me' where the policing system fails.

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70 *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020).

71 *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others*.

72 Trippe, 'Pandemic policing'.

73 Trippe, 'Pandemic policing'.

Karl Klare argues that where there is a disconnect between the transformative aspirations of a constitution and a conservative backward-looking legal culture and education, no true transformation can occur.[74] To put this into context, a long-term solution in the form of transforming the policing culture ought to be fast tracked by ensuring an intentional framework for transformative education is carried out. While these solutions may seem merely aspirational, there is need to challenge status quo since the 2010 Constitution would not exist if legal minds such as Yash Pal Ghai did not put in efforts in it.[75] The scenarios of police brutality during Covid-19 shows the world how hypocritical it is to say on one hand, that the 2010 Constitution is transformative in the egalitarian sense yet on the other hand, the police (who are agents of the state that is mandated to implement the Bill of Rights)[76] blatantly illustrate the backwardness that is contrary to the aspirations of the 2010 Constitution.

Although it has been held that it may be difficult to alter the legal culture of a state since it takes into consideration numerous societal factors including history and context,[77] there is still need to alter and replace retrogressive elements of police training that at the core, inculcate the law-and-order mentality among members of the police force.

Further, in order to change the status quo, there is need to adopt police training that encompasses human rights courses geared at informing and educating members of the service on how to deal with members of the public who are the greatest causalities and victims of extreme police force. This training should enable police officers appreciate that members of the public are not trophies, and that in discharging their duties they should respect and protect the dignity, life and other rights and freedoms of members of the public.[78]

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74 Karl Klare, 'Legal culture and transformative constitutionalism' 14(1) *South African Journal of Human Rights* (1998), 146, 151.

75 J Osogo Ambani, 'The Ghai in our Constitution' in Humphrey Sipalla and J Osogo Ambani (eds) *Furthering constitutions, birthing peace: Liber amicorum Yash Pal Ghai,* Strathmore University Press, 2021, 173.

76 Constitution of Kenya (2010), Article 21.

77 Klare, 'Legal culture and transformative constitutionalism', 151.

78 National Police Service Standing Orders, Ethical Standards and Principles.

Finally, as Sipalla and Lewela contend, police officers should be trained to help citizens rather than fight them since this is the very essence of their motto.[79] This will help achieve an egalitarian form of policing in Kenya furthering transformative constitutionalism as Klare puts it.[80]

V. Conclusion

To this end, the foregoing discussion makes it clear that a culture of violent use of force is deeply entrenched among members of the police service. As evidenced, this culture stretches from Kenya to South Africa, resulting in numerous violations of the rights to; life, dignity and other fundamental rights and freedoms of members of the public in both countries. Although Kenya and South Africa have progressive and transformative constitutions which guarantee fundamental rights and freedoms, there still exists much to be done, especially in the Police Service in both countries so as to ensure that members of the public do not suffer violations of their rights at the hands of police officers. It therefore follows that constant and consistent radical adjustments of operations and training of the police officers should be undertaken so as to change the culture of violent and unreasonable use of force by police officers. This will also ensure that the policing culture becomes egalitarian and stays true to its motto.

[79] Sipalla, Lewela, 'Policed perceptions, masked realities', 220.

[80] Klare, 'Legal culture and transformative constitutionalism', 150.

The response of IPOA and other state institutions to deaths in custody and police misconduct in Kenya

Russel Crowe*

Abstract

This article looks into deaths in police custody and police oversight in Kenya. Death in police custody includes instances where an individual in the custody of police loses their life in one way or another, including through suicide. The article defines death in custody, discusses the right to life, and briefs on the reports made by institutions such as Independent Policing Oversight Authority (IPOA). It also analyses the Kenyan legal framework that governs police conduct and institutions responsible for reporting, investigating and prosecuting cases on death in police custody. It describes the process though which reports can be made to relevant authorities and establishes that IPOA plays a major role in holding police officers accountable. This article also posits that the State in general, IPOA, the Internal Affairs Unit, Office of the Director of Public Prosecutions and police officers have failed in their mandate to report and investigate and satisfactorily prosecute complaints of deaths in custody. It highlights the success and challenges IPOA faces in effecting its mandate. It goes further to give recommendations towards improving the prosecution of death in custody cases.

Keywords: death in custody; police accountability; prosecution; right to life; police conduct; IPOA

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1. Introduction

Deaths in custody cause untold grief to the victims' loved ones and creates fear among the general populace. The right to life is enshrined in the Constitution of Kenya (2010) and, although it can be limited, its limitation can only be valid if done within the constraints of the law.[1] Under the provisions of the Constitution, rights can only be limited after the consideration of certain factors. These factors include: the nature of such a right, importance or purpose of its limitation, nature and extent of its limitation, and finally the relation between the limitation and purpose and whether less restrictive means to achieve such limitation are present.[2] Individuals have a right not to be subjected to any form of violence or torture not to be treated or punished in a cruel inhumane or degrading manner.[3] These rights encompass the right to freedom and security of a person.[4] In *Zeitun Juma Hassan v Attorney General and 4 others*,[5] the High Court opined that the right to life is foundational, sacrosanct and cannot be limited unless its limitation is within the provisions of law. The enjoyment of other rights is dependent on the very enjoyment of the right to life.

The state has a responsibility of guaranteeing the right to life. Organs such as the National Police Service established under Article 243 have a mandate to comply with constitutional standards of human rights and fundamental freedoms. The National Police Service Act further requires both the Kenya Police Service and the Administration Police to protect life, and prevent and detect crime.[6] Ironically, the police appear to be the perpetrators of violations of the right to life.

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1 Constitution of Kenya (2010) Article 26(3).

2 Constitution of Kenya (2010) Article 24(1).

3 Constitution of Kenya (2010) Article 29.

4 Constitution of Kenya (2010) Article 29.

5 Petition No. 57 of 2011, Judgement of the High Court at Nairobi (2014) eKLR, para 25.

6 National Police Service Act (No. 11A of 2011), Section 24(d), 27(d).

In 2022 alone, 72 individuals are reported to have been killed and 3 to have disappeared in police custody.[7] In 2021, 187 were killed in police custody while 32 disappeared.[8] Of the deaths in custody reported, 2 young citizens in Kianjakoma, Embu County, Benson Njiru Ndwiga and Emmanuel Mutura Ndwiga, lost their lives to police officers who were enforcing COVID-19 curfew orders. Emmanuel Mutura was our colleague at Kabarak Law School. Consequently, protests took place in Embu and live rounds of ammunition were used to disperse crowds, one individual was shot dead.[9] In 2020, 158 people were killed while in police custody, and 10 disappeared.[10] The Independent Policing Oversight Authority (IPOA) conducted a survey which revealed that only 30% of incidents get reported.[11] IPOA reports that in 2020, they received and processed 1,557 complaints, investigated 330, 16 were referred to the National Police Service Internal Affairs Unit, 45 were forwarded to the Office of the Director of Public Prosecutions (ODPP) and 95 were filed before court.[12]

The criminal justice system is comprised of the community, the police who investigate alleged crimes and arrest suspected criminals, the judiciary and the prison service as key actors.[13] It is also comprised of institutions with the goal of maintaining social control and deterring crime.[14] These have different functions and powers entrenched in the

7 Missing Voices Kenya, 'Extrajudicial killings in 2022' *Missing Voices- Trial Tracker*, 25 July 2022.

8 Missing Voices Kenya, 'Extrajudicial killings in 2021' *Missing Voices- Trial Tracker*, 8 September 2021.

9 'Kenya: One killed in protests over brothers' deaths in custody' *Al Jazeera* 5 August 2021.

10 Missing Voices Kenya, 'Extrajudicial killings in 2021'.

11 Independent Policing Oversight Authority, *Baseline survey on policing standards and gaps in Kenya* (2013) 16, 17.

12 Independent Policing Oversight Authority, *Annual report and financial statements for the year ended 30 June 2020*.

13 National Council for the Administration of Justice, *Criminal justice system in Kenya: An audit*, 2017, 33-35.

14 SAGE, 'An introduction to crime and the criminal justice system', 16 September 2021.

Constitution and relevant statutes and they are all expected to work together in order to maintain a peaceful and orderly country.[15]

1.1 Death in custody

For the purposes of this present discussion, 'Custody is the confinement of a person in any place by the State and it includes custody of person while in transit.'[16] Custody begins when an individual is arrested or deprived of his liberty by agents of the state it includes detention or imprisonment where one is not allowed to leave at will and ends when one is permitted to leave.[17] Hence, death in custody is death of an individual while in the hands of the State or its agents.

The police are guided by laws and regulations including the Constitution of Kenya 2010, the Criminal Procedure Code (CPC) Cap 75, the National Police Service Act (NPS) (No 11 of 2011), and the National Police Service Standing Orders.

The Criminal Procedure Code outlines the procedure to be followed when a person is taken into custody by a police officer. Custody is effected through arrest. Arrest is the act of apprehending a suspect by a legal authority.[18] A police officer or a person may make an arrest.[19] In conducting an arrest, the Criminal Procedure Code allows for use of all means necessary to effect the arrest but only to the extent that such means are reasonable and proportional to the conduct of the offender at the time of arrest.[20] Arrests should be done lawfully and in compliance with the guidelines set out in the Sixth Schedule of the NPS Act in the event of the use of force.[21] The guidelines, inter alia, stipulate the use of

15 SAGE, 'An introduction to crime and the criminal justice system'

16 National Coroner Services Act (No 18 of 2017), Section 2.

17 International Committee of the Red Cross, 'Guidelines for investigating deaths in custody', (2013) 8

18 National Police Act (No 11A of 2011), Section 2.

19 Criminal Procedure Code (Cap 75), Section 21.

20 Criminal Procedure Code (Cap 75), section 21(1, 2).

21 National Police Service Act (No 11A of 2011), Section 49(4), (5).

non-violent means of arrest first, and only allow for resort to forceful means if the former does not work.[22] Elements such as necessity, proportionality, seriousness of the offence and resistance if any of the person being arrested guide the conduct of such arrests.[23] An officer who commits any offence by going against the said regulations is liable to prosecution as stipulated in the NPS Act.[24]

In *Republic v IP Veronicah Gitahi and PC Issa Mzee*,[25] the Court held that police officers in their judgement should have either shot the victim in her arm or should have disarmed her instead of shooting her in the head and chest. Consequently, the officers were found guilty of murder.

The Constitution provides for the rights of an arrested person and such rights include the right to be arraigned in court within 24 hours after arrest, or as soon as is reasonably possible.[26] During such period if the arrested individual dies, then he or she is said to have died in custody.

2. Legal framework on police conduct

The Constitution of Kenya establishes the following actors in the criminal justice system; the Office of the Director of Public Prosecutions, the National Police Service, the office of the Inspector-General of the National Police Service, the courts and other independent institutions.

2.1 Institutions in charge of police conduct

2.1.1 Office of the Director of Public Prosecutions

This Office of the Director of Public Prosecutions (ODPP) is established under Article 157 of the Constitution of Kenya 2010. It mandates the Director of Public Prosecutions to direct the Inspector General of the

22 National Police Service Act (No 11A of 2011), Sixth Schedule (1).
23 National Police Service Act (No 11A of 2011), Sixth Schedule (1).
24 National Police Service Act (No 11A of 2011), Section 49(13).
25 Criminal Appeal 23 of 2016, Judgement of the Court of Appeal (2016) eKLR.
26 Constitution of Kenya (2010), Article 49(f).

National Police Service to investigate criminal conduct allegations.[27] The ODPP has power to institute, take over and discontinue prosecution of cases.[28] In performing the latter, the ODPP requires the permission of a court.[29] The ODPP has power to direct an investigative agency to conduct investigations.[30] The ODPP is required to implement an effective prosecution mechanism to maintain the rule of law, contribute to fair justice and effect the protection of citizens.[31] Further, the Office is required to cooperate with investigative agencies to ensure effective public prosecutions.[32] The ODPP reports to the president on the fulfillment of the functions of the office. The president may also require a report on a particular issue.[33] The ODPP has the discretion of determining cases for prosecution.[34]

2.1.2 National Police Service

The Constitution of Kenya provides for the establishment of national security organs to protect Kenyans.[35] It establishes among other organs the National Police Service (NPS) that comprises of the Kenya Police Service and the Administration Police. It is headed by the Inspector General (IG) and two deputies. The Constitution mandates parliament to enact legislation to provide for its functions and administration.[36] To effect this, Parliament enacted the National Police Service Act No 11A of 2011. Article 243 mandates the Service to comply with constitutional standards of human rights and fundamental freedoms.[37]

The IG and deputy IGs are responsible for monitoring, evaluating, supervising and providing internal oversight of the Kenya Police Ser-

27 Constitution of Kenya (2010), Article 157(4).
28 Constitution of Kenya (2010), Article 157(6).
29 Constitution of Kenya (2010), Article 157(8).
30 Office of the Director of Public Prosecutions (No 2 of 2013), Section 5(2)(b).
31 Office of the Director of Public Prosecutions (No 2 of 2013), Section 5(4)(b).
32 Office of the Director of Public Prosecutions (No 2 of 2013), Section 5(4)(c)
33 Office of the Director of Public Prosecutions (No 2 of 2013), Section 7(2,3).
34 Office of the Director of Public Prosecutions (No 2 of 2013), Section 23(1).
35 Constitution of Kenya (2010), Article 238(1).
36 Constitution of Kenya (2010), Article 239(1)(c).
37 Constitution of Kenya (2010), Article 244(c).

vice and Administration Police.[38] The National Police Service has the mandate of protecting life and property, investigating, preventing and detecting crime and enforcing all laws and regulations with which they are charged.[39]

The Act requires police officers to report to their superiors occurrences and incidences encountered while on duty.[40] Moreover, they are required to act in conformity with the law and if they use force, they are to act as per the provisions in the Sixth Schedule to the Act.[41] The Act further requires that in the event complaints are made against any police officer, the complaint should be reported to IPOA.[42]

The Act sets out that arrests and detention should adhere to the provisions in the Fifth Schedule to the Act.[43] That is to comply with all rights set out in Articles 49, 50 and 51 and to report to IPOA in the event a death occurs.[44]

2.1.3 Internal Affairs Unit

Section 87 of the NPS Act establishes the Internal Affairs Unit. Its functions include receiving and investigating complaints lodged against the police and maintaining records of such complaints.[45] The Unit receives and investigates complaints of misconduct from both the public and members of the Service.[46] The Unit may investigate complaints on its own initiative, following the direction of senior officials and the Inspector General or at the request of IPOA.[47] Following such investigation, the unit may recommend appropriate actions to the Inspector General. The recommendations include: interdiction of an officer, sus-

38 National Police Service Act (No 11A of 2011), Section 23 and 26.
39 National Police Service Act (No 11A of 2011), Sections 24 and 27.
40 National Police Service Act (No 11A of 2011), Section 49(3).
41 National Police Service Act (No 11A of 2011), Section 49(5),(6).
42 National Police Service Act (No 11A of 2011), Section 50(3).
43 National Police Service Act (No 11A of 2011), Section 59.
44 National Police Service Act (No 11A of 2011) Fifth Schedule, 13.
45 National Police Service Act (No 11A of 2011), Section 87(2).
46 National Police Service Act (No 11A of 2011), Section 87(4) (a).
47 National Police Service Act (No 11A of 2011), Section 87(4)(b)(c)(d).

pension of an officer, administration of a severe reprimand (that is a formal expression of disapproval) or any other lawful action.[48] The offences the unit can speak to include offences in the Eighth Schedule. As for criminal offences occasioned by police officers they should subject them to criminal proceedings in the court of law.[49] Police officers who torture individuals are subject to imprisonment for a term not exceeding 25 years and those who treat individuals with cruelty are subject to imprisonment for 15 years.[50]

2.1.4 Independent Policing Oversight Authority (IPOA)

The Independent Policing Oversight Authority Act No 35 of 2011 establishes the Independent Policing Oversight Authority.[51] The Act established the Authority to make provision on civilian oversight over the work of police.[52] IPOA's mandate is to receive and investigate complaints related to both disciplinary and criminal offences of police officers.[53] IPOA has a mandate to monitor and investigate policing operations, review and audit investigations and keep record of actions taken by the Internal Affairs Unit.[54] It has the power to take over on-going internal investigations and request the ODPP to provide a response to any recommendation IPOA makes in as far as prosecutions are concerned.[55]

2.2 Procedures for lodging complaints of deaths in custody

2.2.1 Procedure according to the Criminal Procedure Code

The Criminal Procedure Code (Cap 75) provides a procedure through which death in custody cases may be handled. This is done

48 National Police Service Act (No 11A of 2011), Section 87(6).
49 National Police Service Act (No 11A of 2011), Section 88(3).
50 National Police Service Act (No 11A of 2011), Section 95(2) (3).
51 Independent Policing Authority Act (No 35 of 2011), Section 3.
52 Independent Policing Authority Act (No 35 of 2011), long title.
53 Independent Policing Authority Act (No 35 of 2011), Section 6 (a-c).
54 Independent Policing Authority Act (No 35 of 2011), Section 6(d).
55 Independent Policing Authority Act (No 35 of 2011), Sections 7(b, d).

through inquests which are authorised by the magistrate within the jurisdiction in which the death occurred.[56]

This begins with a full report from an officer to the nearest magistrate court and to the Director of Public Prosecutions through the Inspector General informing them of such death.[57]

Section 387 provides thus:

a. that the nearest magistrate with the power to hold inquest shall hold an inquiry into the cause of the death.

b. if such inquiry is successful and the perpetrator is known or disclosed, the magistrate is to issue a warrant of arrest for such person and cause them to answer to the charge.

c. if the perpetrator is still unknown the magistrate is to give his or her opinion on the issue and share the copy with the Director of Public Prosecutions (DPP) through the Inspector-General of Police (IGP).

2.2.2 Procedure in accordance to the National Police Service Act

The NPS Act makes provision on the procedure to be followed in the event a detained individual dies in custody. General powers of a police officer include reporting incidences in a daily occurrence book and availing such reports to their superiors.[58] This includes death reports. Such accountability enhances the response of the criminal justice system to deaths in police custody as it imposes an obligation on fellow police officers to make reports. The NPS Act provides that in the event of death in custody, a police officer should report to the officer in charge or the direct superior of the officer who caused the death.[59] The reporting officer is required to secure the scene for investigation.[60] Police officers that submit such reports to IPOA are immune from disciplinary proceedings and unfair administrative actions.[61]

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56 Criminal Procedure Code (Cap 75), Section 385.

57 Criminal Procedure Code (Cap 75), Section 386.

58 National Police Service Act (No 11A of 2011), Section 49(3).

59 National Police Service Act (No 11A of 2011), Sixth schedule, Condition 5.

60 National Police Service Act (No 11A of 2011), Sixth schedule, Condition 7(5).

61 National Police Service Act (No 11A of 2011), Section 49(12).

Responsible officers are required to report to IPOA, and any other body required by law to be so notified in writing, within twenty four hours of the incident for purpose of investigations.[62] The superior officers or station commanders are also required to report such cases to IPOA and supply them with necessary information that may assist the investigations.[63]

2.2.3 Procedure under the Independent Policing Oversight Authority Act

IPOA receives and investigates claims and recommends prosecution of suspected officers.[64] Such claims may not only be made by police officers but also civilians. In 2019, IPOA reported to have received 84% of complaints from civilians, 3.1% were complaints by police officers and the other reports were from their own motion or by state and non-state actors.[65]

Complaints to IPOA are made either orally or in writing. When made orally, they should be reduced to writing.[66] Upon receipt of a complaint, IPOA shall call for information or reports from the appropriate government department, agency or any other body and shall initiate an inquiry into the complaint.[67] IPOA also investigates deaths in custody.

Once IPOA receives such a complaint, it is then obligated to investigate such death with the help of police who are to obtain and secure evidence related to the investigation.[68] IPOA's duty in that regard only goes as far as investigating and acquiring evidence since they do not have powers to prosecute.[69]

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62 National Police Service Act (No 11A of 2011), Fifth Schedule, Rule 13; National Police Service Standing Orders, Chapter 15(8).

63 National Police Service Act (No 11A of 2011), Sixth Schedule, Condition C, 3.

64 Independent Policing Oversight Authority Act (No 35 of 2011), Section 6.

65 Independent Policing Oversight Authority *Annual Report 2018-2019*, 20.

66 Independent Policing Oversight Authority Act (No 35 of 2011), Section 24(1).

67 Independent Policing Oversight Authority Act (No 35 of 2011), Section 24(4).

68 Independent Policing Oversight Authority Act (No 35 of 2011), Section 25.

69 Independent Policing Oversight Authority Act (No 35 of 2011), Section 29(a).

After conclusive investigations that disclose criminal liability, IPOA refers the matter to the ODPP and recommends prosecution for the individual(s).[70] If the ODPP fails to prosecute, IPOA may apply to the court to enforce its recommendations.[71]

2.2.4 Procedure according to the National Coroners Service Act (No 18 of 2017)

This Act exists to make provision for independent investigation of reportable deaths by coroners.[72] It establishes the National Coroners Service that investigates the causes of all reportable deaths.[73] In the event of death in custody, officers are required to report to the coroner within 6 hours of the death of the individual.[74] The coroner then conducts a medical investigation on the cause of death and reports to IPOA.[75] For purposes of criminal investigations and subsequent prosecution, the coroner also submits an interim and subsequently a final report of its investigation to the National Police Service and ODPP.[76] A coroner is also required to conduct or prepare and submit an autopsy report to the investigating police officer if requested.[77]

From the above provisions, it is clear that investigations regarding deaths in custody almost always find their way to the Independent Policing Oversight Authority.

70 Independent Policing Oversight Authority (No 35 of 2011), Section 29(a).
71 Independent Policing Oversight Authority (No 35 of 2011), Section 29(2).
72 National Coroners Service Act (No 18 of 2017), long title, Section 8.
73 National Coroners Service Act (No 18 of 2017), Section 28(c).
74 National Coroners Service Act (No 18 of 2017), Section 25(1).
75 National Coroners Service Act (No 18 of 2017), Section 25(3).
76 National Coroners Service Act (No 18 of 2017), Section 32(4).
77 National Coroners Service Act (No 18 of 2017), Section 46(2).

3. Successes, failures and challenges of IPOA and other institutions and offices in the investigations of death in custody

3.1 Successes and failures of IPOA

Before enactment of the IPOA Act, a police-led taskforce was constituted in 2004. It mainly focused on addressing operational, infrastructural and administrative problems.[78] There was also the Commission of Inquiry into the Post-Election Violence in 2009 which noted that the police failed to conduct themselves professionally and used excessive force which led to many deaths.[79] The National Task Force on Police Reforms in 2009 recommended the establishment of an oversight body that would not only benefit the police themselves, but also ensure public confidence in having their complaints dealt with and in the dispensation of justice and fairness.[80] As a result, the enactment of Independent Policing Oversight Authority Act (No 35 of 2011) saw the establishment of the Independent Policing Oversight Authority in November 2011.[81]

In its inaugural report for the period of June to December 2012, IPOA stated that it had embarked on among others, the formulation of IPOA regulations, development of an internal policy framework and the recruitment of professionally qualified staff.[82] The Authority admitted that it also faced some challenges such as lengthy government procurement procedures which were due to lack of sufficient personnel to constitute a tender committee.[83] There was also lack of investigative staff and lack of awareness by the public about its existence.[84]

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78 Thomas Probert, Brian Kimari, Mutuma Ruteere, *Strengthening policing oversight and investigations in Kenya; Study of IPOA investigations into deaths resulting from policing action*, Centre for Human Rights and Policy Studies, 2020, 6.

79 Probert, Kimari, Ruteere *Strengthening policing oversight and investigations in Kenya*, 6.

80 Report of the National Task Force on Police Reforms, Government Printer, Nairobi, 2009 (Ransley Report).

81 Independent Policing Oversight Authority, 'Who are we', 26 July 2022.

82 Independent Policing Oversight Authority 'Inaugural performance report' Chairperson's remarks, (2012) 4.

83 Independent Policing Oversight Authority 'Inaugural performance report' Chairperson's remarks, 4.

84 Independent Policing Oversight Authority 'Inaugural performance report' Chairperson's remarks, 4.

In 2014, Kenya submitted a report to the United Nations Committee against Torture where the government was required to respond to its recommendations.[85] The report noted that IPOA had formulated regulations that propose stringent measures against police officers who do not assist in securing of evidence in the occurrence of death in custody through disciplinary or criminal proceedings.[86] The regulations, in their opinion, addressed the issue of clarity between the Internal Affairs Unit and IPOA, where IPOA will deal with cases of gross misconduct and deaths while IAU deals with other cases which IPOA may take over in case of delay.[87] However, up until now, the regulations have not been adopted or gazette. They are still at the stakeholder feedback stage.[88]

From the performance reports of IPOA from 2014 to 2019, IPOA has been able to form its regulations and establish six board committees, which include: investigations and legal committee; inspections committee; monitoring and research committee; communications and outreach committee; risk and audit committee; human resource and compensation committee; and finance and administration committee.[89] IPOA has been able to make itself known to the public through its communications and outreach committee by receiving invitations in the broadcasting companies.[90] It has also received media coverage including interviews of the chairman on numerous occasions.[91] In these interviews,

85 Independent Policing Oversight Authority 'Inaugural performance report' Chairperson's remarks, 4.

86 Follow-up information to the concluding observations of the UN Committee against Torture in connection with the consideration of the second periodic report of Kenya on the International Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment, 214, 2.

87 Follow-up information to the concluding observations of the UN Committee against Torture in connection with the consideration of the second periodic report of Kenya on the International Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment, 214, 2.

88 IPOA Publications, 'External stakeholder feedback template on draft IPOA regulations', 26 July 2022.

89 Independent Policing Oversight Authority, 'Performance Report January-June 2013', 3.

90 On 22 August 2013, IPOA organised a media briefing breakfast at Laico Regency Hotel, Nairobi.

91 Interviews on NTV AM Live (13 November 2013), KTN News (20 November 2013), and GBS News (22 November 2013).

the chairman highlighted the key achievements of IPOA since inception and the way forward for achieving its mandate.[92]

IPOA developed a Strategic Plan 2019-2024 that focuses on police accountability, stakeholder cooperation, and complementarity.[93] In this Plan, IPOA notes that there has been lack of cooperation from police, delayed implementation of recommendations, inadequate resources such as funding, inadequate protection of whistle blowers from the service and low public awareness.[94] In the period 2014-2018, out of 10,381 complaints made, only 105 were recommended for prosecution, 53 were filed before court and 3 convictions were obtained.[95]

Finally, IPOA lacks clear data, despite giving reports on the outcome of investigations and cases to their completion. This is because as they report it they hardly specify the nature of cases. Their reports are general hence making it difficult to account for cases related to death in custody. From 2014 to 2021, IPOA reported only 14 convictions.[96] Moreover, it has between January and June 2021, received 71 death complaints from police action, 21 of which were deaths in custody complaints.[97]

3.2 Challenges faced by IPOA

There has been an existing readiness by the police to abandon the law especially when conducting an operation in a 'hostile environment'. During the Covid-19 dusk to dawn curfew imposed on 27 March 2020, the police caused the death of at least six people within 10 days.[98] Despite efforts of IPOA to curb police violence, cases keep rising. This puts the relevance of IPOA into question.

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92 Independent Policing Oversight Authority, 'Performance report July-December 2013', 17.

93 Independent Policing Oversight Authority, *Strategic Plan 2019-2024.*

94 Independent Policing Oversight Authority, *Strategic Plan 2019-2024*, 18.

95 Independent Policing Oversight Authority, *Strategic Plan 2019-2024*, 22.

96 Independent Policing Oversight Authority, 'Convictions', 26 July 2022.

97 Independent Policing Oversight Authority, 'Convictions'

98 Human Rights Watch *Kenya: Police brutality during curfew*, 20 September 2021.

IPOA lacks prosecutorial powers,[99] hence it is like a toothless dog in exercising its oversight role over the police.[100] This is because when referring the cases to the Office of the Director of Public Prosecution, effecting their recommendations takes time, hence the public sees IPOA as not taking action.[101] This limits the number of complaints brought in by the affected parties.[102]

There has also been the lack of resources and personnel that could cover the whole country and cater to the rising increase in complaints by the public.[103] This has hampered the effectiveness of IPOA in dealing with the cases thus the low number of convictions in the cases it deals with.[104]

Furthermore, there is a lack of clarity among various laws that make provision on investigations of deaths in custody. For instance, the Criminal Procedure Code in Section 385 empowers the magistrate to hold inquests into sudden deaths where the officer in charge has to report back to them.[105] Whereas, in the National Police Service Act, the police officer or the officer in authority is supposed to report to the Independent Policing Oversight Authority.[106]

Generally, there is low public confidence in IPOA leading to low public turn-up by in lodging complains to the Authority.[107] As a result a number of cases are not reported leading to constitutional injustice.[108]

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99 Independent Police Oversight Authority Act (No. 35 of 2011), Section 29 1(a).

100 Bryson O Omukonyi, *Improving police accountability in Kenya: Curing the shortcomings of the IPOA in bringing an end to police brutality in the country,* Kenya School of Law (KSL), 2020, 2.

101 Probert, Kimari, Ruteere, *Strengthening policing oversight and investigations in Kenya*.

102 Probert, Kimari, Ruteere, *Strengthening policing oversight and investigations in Kenya*.

103 Independent Policing Oversight Authority 'Inaugural performance report' Chairperson's remarks, 4.

104 Probert, Kimari, Ruteere, *Strengthening policing oversight and investigations in Kenya*, 6.

105 Criminal Procedure Code, Section 385.

106 National Police Service Act (No 11A of 2011), Sixth Schedule, Section 5.

107 Probert, Kimari, Ruteere, *Strengthening policing oversight and investigations in Kenya*.

108 Probert, Kimari, Ruteere, *Strengthening policing oversight and investigations in Kenya*.

The police on the other hand continue to use excessive force in dealing with arrested persons and suspects causing grievous harm that eventually leads to death. Further, they fail to report on such cases as they are required to, and in some instances they fail to report events in the occurrence book.[109] It is possible that just like in *Nahashon Mutua v Republic*, the police hide and even blame other cell mates for injuries and harm caused to individuals while in custody. In this case the officer in charge of the police station in Ruaraka caused the death of the person in custody through inflicting injuries using a metal pipe on a suspect identified as Martin and attempted to blame another suspect, Tom.[110]

4. Proposed solutions to enhance the response of the police to deaths in custody and the establishment of liability

In 2020, the police used excessive force while implementing curfew orders that led to deaths of individuals.[111] From a reading of the ODPP Act, it is clear that the president can require the DPP to report on particular issues. Therefore, in order to ensure accountability, the president should urgently seek for reports concerning police brutality and death in custody cases.

Over the years, there has been a general perception by the public that the police still use archaic methods of policing used in the colonial times.[112] A possible solution to this would be to review the training of the officers in order to instill in them the importance of abiding in the existing laws and procedures while undertaking their duties.

IPOA should also ensure effective protection of whistleblowers in the police service. Although the Witness Protection Act is in existence it

[109] Defenders Coalition: The Police Reforms Working Group-Kenya condemns the death of siblings Benson and Emmanuel Njiru within the jurisdiction of Manyatta Police Station, 27 July 2022.

[110] Criminal Appeal 55 of 2019, Judgement of the Court of Appeal (2020).

[111] Mercy Asamba, 'President Uhuru apologises to Kenyans for police brutality', *East African Standard* 1 April 2020..

[112] Amos Kareithi, 'Echoes from the past: Kipande's dark past', *The Standard*, 23 November 2021.

has been ineffective especially in as far as whistleblowers are concerned. As such, there is need for specific provisions in regards to police officers who are to appear as witnesses to police human rights violations.

The adoption of pending IPOA regulations need to be fast-tracked to ensure implementation of the proposal that IPOA focuses on deaths in custody and gross misconducts while IAU focuses on other cases. This will place focus on cases of deaths in custody.

IPOA receives monies to finance their mandate parliament, donations and loans approved by the Cabinet Secretary for finance.[113] IPOA's budgeting and finance ought to be increased to enable it obtain personnel who will enable it implement its mandate effectively.

Parliament should review the laws relating to the procedures of reporting deaths in custody. Such a revision should include provisions that mandate IPOA and IAU as the only institutions to which reports can be made. This will ensure that magistrates focus on hearing and determining cases of deaths in custody as opposed to following up on inquests.

In order to ensure police do not subject suspects to inhumane treatment and torture, the state can install cameras within the police station to record occurrences within the station. The State can also take the approach used in the United States where in some states the police use body cameras that are required to always be on while on duty.[114] The State can create a policy requiring police officers to use body cameras and have them on while on duty. In addition to this, IPOA officers should be stationed in police stations to effect their oversight role in ensuring adherence to the laws and policies to govern the police.

IPOA needs to submit their reports and progresses in regards to cases of deaths in custody with clarity and specificity. Furthermore, even where cases have not been given attention, it would be prudent to mark such cases as blind spots that need critical attention and redress.

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113 Independent Policing Oversight Authority Act, Section 32.

114 Candice Norwood, 'Body cameras are seen as key to police reform. But do they increase accountability?' *PBS News Hour,* 25 June 2020.

Finally, all actors in the criminal justice system should endeavor to cooperate with one another to ensure implementation of the protection of the right to life and accountability of the police.

5. Conclusion

The state of a criminal justice system is very essential in determining its ability to respond to deaths in custody. There are a number of shortcomings on the effectiveness of IPOA which is mandated to investigate deaths in police custody. This has therefore affected the overall outcome of cases and has failed in accounting for the deaths in police custody. Therefore, legal and structural changes should be effected in order to realise an improvement in the system. Hence, every sector should be robust and function properly as stated in the relevant statutes.

This article has established that despite the fact that the role of curbing death in custody revolves around IPOA it is clear that it cannot work alone. It has thus called for actors like the Internal Affairs Unit, the Director of Public Prosecutions, National Police Service members to work together with IPOA to effect accountability. The state may have created a means through which it responds to deaths in police custody, however, it has been ineffective.

A comprehensive reparations system for custodial deaths: A human rights approach to justice

Marion Jeluget Bomett*

Abstract

Death in police custody is one of the major social injustices in Kenyan society today. While many continue to call for the criminal prosecution of police officers involved in such extrajudicial deaths, less is said about the human rights remedies available for the victims surviving the deceased. National, regional and international law provides for remedies for human rights violations in the form of reparations. The jurisprudence of Kenyan courts, the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights confirm that such victims are entitled to various forms of reparations.

This paper analyses victimhood and the reparation systems in Kenya. The introduction briefly discusses death in police custody as a form of human rights violation. The paper then investigates the notion of a victim in national, regional and international law, with the aim of highlighting the scope of accruing human rights and the attached remedies. Consequently, the paper evaluates the Kenyan system of reparations available to victims in both national, regional, and international human rights law. This evaluation expounds on the forms of reparations available for victims of deaths in police custody. In concluding, this paper makes recommendations for victims and their families pursuing human rights remedies in addition to criminal sanctions against the police.

Keywords: death in custody; reparations; extrajudicial deaths; police misconduct; victimhood

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1. Introduction

Deaths in police custody, commonly referred to as extrajudicial killings, are 'killings committed outside the judicial process by or with the consent of public officials or agents of the government',[1] particularly by police officers. The Constitution of Kenya guarantees the right to life meaning that no one shall be intentionally deprived of his life except through the due process of the law.[2] The law also provides all Kenyan citizens with the absolute freedom from cruel, inhuman or degrading treatment or punishment.[3] This is to mean that such a freedom should never be limited.[4] Kenyan constitutional jurisprudence continues to uphold the right to life as a central human right in national, regional and international law.[5] Regional jurisprudence also considers the right to life a core human right, one on which the enjoyment of all other rights depend, and that imposes a negative duty on states to refrain from interfering with its enjoyment.[6] The positive obligation to protect, and the negative obligation to refrain from interference apply to the right to freedom from torture, degrading treatment and punishment as well.[7]

For these reasons, extrajudicial killings violate both the right to life and the right to freedom from torture and degrading treatment or pun-

1 N Rodley, *The treatment of prisoners under international law*, 2nd ed., Clarendon Press, Oxford, 1999, 182; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 7 June 2021, A/HRC/47/33, section I B.

2 Constitution of Kenya (2010), Article 26 (1) (3); African Charter on Human and Peoples' Rights, 1 June 1981, CAB/LEG/67/3, Article 4; International Covenant on Civil and Political Rights 23 March 1976, 999 UNTS 171, Article 6.

3 Constitution of Kenya (2010), Article 25(a); African Charter on Human and Peoples' Rights, Article 5; International Covenant on Civil and Political Rights, Article 7.

4 Constitution of Kenya (2010), Article 25(a).

5 See *Zeitun Juma Hassan (petitioning on behalf of the Estate of Abdul Ramadhan Biringe (Deceased)) v Attorney General & 4 others,* Petition 57 of 2011, Judgment of the High Court at Nairobi (2014) eKLR, para 20.

6 *Forum of Conscience v Sierra Leone* Communication No 223/98, (ACHPR/Commission, 6 November 2000), para. 20.

7 *Estate of Abdul Ramadhan Biringe (Deceased) v Attorney General & 4 others*, Judgement, para 27.

ishment,[8] constituting grave abuses against fundamental human rights.[9] 'Where there is a right there is a remedy.'[10] The law rightfully provides victims of death in police custody with remedies. However, before elaborating on the scope of such remedies, it is important to elaborate on the nature of victims.

2. Victimhood

In Kenya, a victim is 'any natural person who suffers injury, loss or damage as a consequence of an offence'.[11] This definition could be extrapolated by virtue of Article 2(6) that imports the treaties and conventions ratified by Kenya as part of domestic law. The relevant treaties in this regard are the African Charter on Human and Peoples' Rights (African Charter) and the International Covenant on Civil and Political Rights (ICCPR), among other ratified treaties that provide for the right to redress for gross human rights violations.

The African Commission on Human and Peoples' Rights (African Commission), in interpreting the right to an effective remedy under Article 7 of the African Charter, defines 'victims' to be 'persons who individually or collectively suffer harm, including physical or psychological harm, through acts or omissions that constitute violations of the African Charter.'[12] The identification of a victim is carried out on a case-by-case

8 Kenya National Commission on Human Rights, *Human rights: The elusive mirage? The Fourth State of Human Rights Post Promulgation 2010-2014*, para 2.1.2.2.

9 Special Rapporteur of the Commission on Human Rights, Human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, United Nations General Assembly, Fifty-fifth session, 11 August 2000, A/55/288, para. 21.

10 *Masoud Salim Hemed & another v Director of Public Prosecution & 3 others*, Petition 7 & 8 of 2014 (Consolidated), Judgement of the High Court of Kenya (2014) eKLR, para 37.

11 Victim Protection Act, (No 17 of 2014, Rev 2019), Section 2.

12 General Comment No 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), African Commission on Human and Peoples' Rights, para 16.

basis, depending on the harm experienced by the individual or group.[13] The nature of a victim is independent of the victims' relationship with the perpetrator and notwithstanding whether the perpetrator of the violation is known, prosecuted, or convicted.[14] The African Commission expressly includes the affected family members or dependants of the victim, and persons who suffer harm while intervening to assist victims under the term 'victims'.[15]

Similarly, the UN Basic Principles on the Right to a Remedy and Reparations, under Principle 8, describe victims as:

> …persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.[16]

The Principles equally describe a victim as the 'immediate family and dependents of the direct victim'; they further prescribe victimhood as independent of whether the perpetrator of the violation is 'identified, apprehended, prosecuted or convicted'.[17]

A death in custody direct victim, therefore, is any person who has died as a result of the acts or omissions of the police as the perpetrator by way of torture, deprivation of liberty or execution. An indirect victim is an immediate family member, dependents of the victim or any other person who has suffered harm in intervening to assist victims in distress.

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13 General Comment No 4, ACHPR, para 19.

14 General Comment No 4, ACHPR, para 17.

15 General Comment No 4, ACHPR, para 17; *Zongo and others v Burkina Faso* (reparations), African Court on Human and Peoples' Rights (ACtHPR), (2015) para 46.

16 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Commission on Human Rights, Resolution 2005/35, UN Doc. E/CN.4/2005/ L. 10/Add. 11 (19 April 2005).

17 Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principles 8 and 9.

A victim of suicide whilst in custody is equally considered as a victim of death in custody as the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*[18] mandates a rebuttable presumption of state responsibility on persons under state custody. The Human Rights Committee emphasised this in *Guillermo Ignacio Dermit Barbato and others v Uruguay*, in rejecting the State's defence that the deceased had committed suicide in prison.[19] Consequently, persons who die as a result of gross negligence by the personnel handling them, be it state or non-state actors, are to be equally considered as victims of death in custody.

A victim can thus include persons who die after coming into contact with the police. This is not to necessarily physical contact but where an individual dies following some kind of interaction with the police, such as a hostage situation where the police or relevant authorities have some sort of control over the situation, but the besieged person ends up killing themselves or the hostages.

3. The Kenyan reparations system

3.1 National remedies

The remedies available under constitutional law in Kenya (Article 23(2)) are: declaration of rights, an injunction, a conservatory order, orders of invalidity of unconstitutional law, orders for compensation and an order of judicial review. In addition, an order of *habeas corpus* is entrenched as 'unlimitable' under Article 25(d) of the Constitution.

Aside from the constitutional provisions aforementioned, the right to life is also protected under Section 203 of the Penal Code Cap 63 through criminalisation of murder.[20] Within the realm of public law,

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18 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, 21 November 2021.

19 *Guillermo Ignacio Dermit Barbato and others v Uruguay*, Communication No. 84/1981, UN Doc. CCPR/C/OP/2 at 112 (1990), para 9.2.

20 Penal Code, Cap. 63 (2009), Section 203.

therefore, the most imperative local remedy for custodial deaths is instituting criminal proceedings against persons alleged to be responsible for the custodial deaths. Provided the death at issue occurred in police custody, there is a rebuttable presumption of state responsibility.[21] The High Court appreciated this in *Zeitun Juma Hassan v Attorney General & 4 others*, citing the jurisprudence in *Veronica Wambui Karanja v Attorney General* where the High Court found the state culpable for torture, cruel and inhuman treatment based on circumstantial evidence such as that the deceased was 'in no other company except the law enforcement personnel of the Kenya Police'.[22]

The Constitution of Kenya (2010) under Article 19(1) describes the Bill of Rights as an integral part of Kenya's democratic state and a framework for social, economic and cultural policies. Article 21(1) mandates the state and every state organ to respect and uphold rights and fundamental freedoms in the Bill of Rights. Victims or their representatives have the right to institute court proceedings claiming that the government has violated their rights under the Bill of Rights.[23] It further confers authority on the courts to enforce the Bill of Rights under Article 165 by hearing and determining cases of violation of rights contained in the Bill of Rights.[24] In this regard, the High Court has jurisdiction over such claims and may issue remedies such as a declaration of rights, an injunction, a conservatory order and an order for compensation.[25]

The High Court in *Masoud Salim Hemed & another v Director of Public Prosecution & 3 others* also appreciated the remedy of an order of *habeas corpus* under Article 51(2) as an immediate and urgent relief to the family of the victim in cases where the location of the victim's body remains unknown.[26] Section 389(1) of the Criminal Procedure Code Cap

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21 *Estate of Abdul Ramadhan Biringe (Deceased) v Attorney General & 4 others*, para 48; Draft Articles on Responsibility of States for Internationally Wrongful Acts, Articles 4, 7 and 8.

22 *Estate of Abdul Ramadhan Biringe (Deceased) v Attorney General & 4 others*, para 48.

23 Constitution of Kenya (2010), Article 22.

24 Constitution of Kenya (2010).

25 Constitution of Kenya (2010), Article 23.

26 Petition 7 & 8 of 2014 (Consolidated), Judgement of the High Court of Kenya (2014) eKLR, paras 30-33.

75 equally provides the power of the High Court to grant an order of *habeas corpus*. Article 25(d) of the Constitution guarantees that the right to an order of *habeas corpus* is not subject to limitation.

According to *Laban Kipsang v Director of Public Prosecutions* a conservatory order under Article 23(c) of the Constitution would preserve the status quo in case of any attempt by the perpetrators to abuse the legal process or any other substance of law.[27] In this case, the petitioners sought conservatory orders to prevent the police from interfering with inquest proceedings and investigations to establish the circumstances in which the deceased died in police custody.

3.2 Regional and international remedies

Well-founded principles and human rights treaties further guarantee victims of gross human violations the right to an effective remedy in the form of reparations. The African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights accord victims of human rights violations the right to an effective remedy.[28] These treaties do so in two ways: first, in requiring states to remedy human rights violations as an international obligation.[29] Second, by providing mechanisms for enforcement mechanisms such as the African Commission on Human and Peoples' Rights and the Human Rights Committee.[30]

This stance was reaffirmed by the African Commission of Human and Peoples' Rights in the case of *Zimbabwe Human Rights NGO Forum v Zimbabwe*.[31] The complainants argued that government agents had violat-

27 Criminal Case 20 of 2014, Judgment of the High Court at Nyeri (2016) eKLR.

28 International Covenant on Civil and Political Rights, Article 2(3).

29 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*, (Judgment), 1 AfCLR 219; International Covenant on Civil and Political Rights, Article 2.

30 African Charter on Human and Peoples' Rights, Article 45; Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, GA/R/2200A, Articles 1 and 2.

31 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACmHPR 2006).

ed human rights in the African Charter and had caused the death of more than 80 people during a constitutional referendum.[32] The Zimbabwean government argued that the complainants should have approached the Attorney General to prosecute suspects or institute private prosecution of the suspects.[33] The African Commission emphasised that it is the state's responsibility to maintain law and order by instituting criminal proceedings against alleged suspects of human rights violations. [34]

Kenya, as state party to the Charter, is required by the African Charter to provide adequate, effective and comprehensive reparations to victims of violations attributable to the State. Similarly, the UN Basic Principles require Kenya, as UN member state, to incorporate in national law, provisions to avail adequate, effective, prompt and appropriate remedies such as reparations.[35] The African Commission thus noted in *Mbiankeu v Cameroon*, that once a state is liable for an internationally wrongful act, it should make full reparation that is adequate, effective, comprehensive, and proportional to the gravity of the violations and harm suffered.[36] The African Commission's General Coment and the UN Basic Principles, categorise reparations as restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. [37]

3.2.1 Restitution

Restitution purposes to restore the victim to the position they were prior to the human rights violation.[38] This is an integral part of reparations, which, as elaborated by the African Court on Human and Peoples' Rights, should 'wipe out all the consequences of the illegal act and

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32 *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para 1-13.

33 *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para 61, 62 and 68.

34 *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para 70.

35 Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 3.

36 *Mbiankeu v Cameroon* (decision on reparations), 389/10, ACmHPR (2015) para 131; See also *Mebara v Cameroon* (decision on reparations), 416/12, ACmHPR, Views, (2015), para 135; Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 15.

37 Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 15

38 General Comment 4, ACHPR, para 36.

re-establish the situation which would, in all probability, have existed if that act had not been committed'.[39]

The defaulting parties are thus required to restitute the victim, family of the victim or the dependents of the victim by paying for the harm or loss occasioned to the affected parties and reimbursement for expenses incurred as a result of the violation. In custodial death, as a result of the impossibility of restitution of the victim due to their death, (part) restitution can take effect through the families and dependents of the victim. For state actors acting in official or quasi-official capacity, the state through the principle of vicarious liability ought to restitute the victims.[40]

3.2.2 Compensation

Compensation constitutes economically assessable damage commensurate to the severity of the human right violation and the circumstances under which it occurred.[41] Principle 20 of the UN Basic Principles mandates compensation to be derived from physical or psychological harm suffered as a result of the infringement.[42] Compensation also covers past, present and future medical expenses and personal and professional development expenses resulting from the violation.[43]

In *Konate v Burkina Faso,* the African Court granted reparations under the African Charter in form of compensation for loss of income, medical expenses and moral damages.[44] With death in custody as a violation of human and constitutional rights, compensation thus takes the form of general damages. This would include loss of dependency by the dependents of the victim, pain and suffering.

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39 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo, Baise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (judgement on reparations)*, ACtHPR, 5 June 2015, para 20.

40 Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 19.

41 General Comment 4, ACHPR, paras 37 and 38.

42 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN/GA/R 40/34 of 29 November 1985.

43 General Comment 4, ACHPR, paras 38 and 39.

44 *Lohe Issa Konate v Burkina Faso* (judgement on reparations), 004-2013, ACtHPR, (2018).

3.2.3 Rehabilitation

This is the restoration of independence on the part of the victims and their participation in society. [45] Rehabilitation incorporates medical and psychological care to the victims as a result of mental harm occasioned by the violation contained in Principle 21 of the UN Basic Principles. The standards of rehabilitation under the African Charter require a holistic approach, taking into account the resilience of the victim and their chances of re-traumatisation.[46] Victims of death in custody may seek rehabilitation for psychological harm including distress caused by the death of their kin.

3.2.4 Satisfaction

Satisfaction are symbolic forms of reparations such as official declarations, commemoration and tributes truth seeking and public disclosures.[47] A court's finding of guilt accompanied by judicial sanctions may be considered as satisfaction.[48] Official declaration or judicial verdict that seeks to restore the reputation and dignity of the victim will also serve likewise. An official public apology to the family, administrative action and human rights training to various security arms of the government under Principle 22 of the UN Basic Principles may also constitute satisfaction. The African Commission further includes the right to truth as satisfaction – that is, the state's recognition of its responsibility.[49]

In *Zongo v Burkina Faso,* the African Court granted satisfaction under the African Charter in the form of an order requiring Burkina Faso to publish the Court's judgement.[50] Satisfaction is thus available to custodial death victims by way of a full and public disclosure of material

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45 General Comment 4, ACHPR, para 40.

46 General Comment 4, ACHPR, para 42.

47 Public International Law and Policy Group (PILPG), *Core element of reparations*, 2013.

48 Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 22(f); REDRESS, European Mechanisms,

49 General Comment 4, ACHPR, para 44.

50 *Zongo and Others v Burkina* Faso (reparations) ACtHPR, (2015) para 100; *Rev Christopher Mtikila v United Republic of Tanzania* (judgement), ACtHPR, (2014) paras 45 and 46(5).

facts of the offence, verification of facts by way of adequate investigation, a public apology by the state in a case of state-enforced custodial deaths.

3.2.5 Guarantees of non-repetition

Guarantees of non-repetition consist of broad policy and structural changes which touch of institutional reforms aimed at preventing a recurrence of the violations. Such measures are aimed at combatting the impunity behind the violations.[51] These may range from protection of witnesses and whistle-blowers and adequate media coverage under Principle 23 of the UN Basic Principles.[52] They also include continued training of law enforcement officials on the obligations of the state under the national and international human rights law.[53] The victims of custodial death, as well as the members of the public benefit from this reparation through the promotion of human rights in public services which ensures prevention of torture of detainees that could result in death.

4. Factors considered in determining reparation

International law places the burden of proof on the victim seeking reparations to establish a causal link between the wrongful act and the moral prejudice warranting reparations.[54] However, there is a presumption that the link exists as an automatic result of a human right violation.[55]

Guided by the International Criminal Court in *Prosecutor v Katanga*, in establishing a case for reparations, the claiming victim need only adduce evidence to the standard of preponderance of evidence.[56] The

51 General Comment 4, ACHPR, paras 45 and 46.

52 Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 22(f).

53 General Comment 4, ACHPR, para 46(I).

54 *Rev Christopher Mtikila v United Republic of Tanzania* (judgement), ACtHPR, (2014) para 40.

55 *Zongo and Others v Burkina Faso* (reparations) ACtHPR, (2015) para 55.

56 *Prosecutor v Katanga* (order for reparations), ICC-01/04-01/07, International Criminal Court, (2017) par. 39.

standard of proof, therefore, is on a balance of probabilities.[57] That is, 'more probable than not' or 'more likely than not' that the victim is entitled to the reparations sought.[58] The African Court in *Konate v Burkina Faso* determined that this standard applies to all aspects of reparations under the African Charter, including the identity of the victims and the harm suffered.[59]

5. Conclusion

The Penal Code criminalises murder, thus warranting criminal remedies against police officers in cases of deaths in police custody. However, the Independent Policing Oversight Authority – responsible for prosecuting criminal cases against the police[60] – has only secured a handful out of the hundreds of deaths in police custody cases reported. Various reasons are adduced for this shortcoming: difficulty in investigations due to police interference and lack of cooperation, lack of sufficient evidence to convict, among others.[61] Human rights remedies present under the Constitution and under regional and international human rights instruments such as the African Charter and the ICCPR offer victims of deaths in police custody more effective remedies. The reparations guaranteed under these human rights remedies go beyond criminal sanctions in addressing the trauma and other forms of harm the victims suffer in using effective and restorative measures. In light of the financial implications that may arise from pursuing such reparations, this paper recommends that victims use representative avenues such as the Kenya National Commission on Human Rights to enforce their rights to an effective remedy.

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57 *Prosecutor v Lubanga* (Decision establishing the principles and procedures to be applied to reparations), ICC-01/04-01/06, International Criminal Court, (2012), para 253.

58 *Prosecutor v Katanga* (Order for Reparations), ICC, para 50.

59 *Konate v Burkina Faso* (judgment on reparations), 004/2013, ACtHPR, (2016) para 15(d).

60 Independent Policing Oversight Act (No 35 of 2011), Sections 5 and 6.

61 Report of Independent Policing Oversight Authority on Performance for January-June 2021, 22 March 2022, 28.

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