EAST AFRICAN LAW JOURNAL

(2015)

School of Law, University of Nairobi

ISSN 0070-797X

Available online at *www.heinonline.org*

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Cover and layout:

Onra Designs Limited
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Printed and bound by:

Colourprint Limited
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EDITORIAL TEAM

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ACKNOWLEDGEMENTS

On the occasion of re-launching the East African Law Journal issue, it is with much celebration that we, the Editorial Board, declare this Lugbara proverb to be true: "the footprint of only one person is narrow". The successful production of this re-launch issue was achieved through the efforts of many people, to whom we must convey our utmost gratitude.

Firstly, our sincere appreciation goes to all the authors who have contributed to this issue. We are also grateful to our panel of peer reviewers for their commitment and dedication in ensuring the quality of the papers. We owe a debt of gratitude to Prof. Patricia Kameri-Mbote, Dean of the Law School for her unwavering support and encouragement as we worked to make the this re-launch issue a reality. Thank you also to the senior management of the University of Nairobi for generously funding and making possible the production of this issue. We are grateful to our advisors, the Research Library and Publications Committee, for their guidance. Finally, but far from least, we thank our student editorial team, for working tirelessly towards the success of the re-launch issue.

To all of you - *Ahsante sana!*

FOREWORD

As a Law School committed to scholarly excellence, research constitutes a vital underpinning of our teaching and learning. I therefore take this opportunity to congratulate the editorial team on the publication of this issue of the East African Law Journal. This is a significant achievement, particularly given the long hiatus in the publication of the Journal. Since the Journal's last publication in 2005, there have been momentous developments in the legal landscape, most notably the promulgation of the Constitution of 2010 as well as emerging issues and challenges in governance, security and human rights at the national, regional and global levels. All these require rigourous examination and critique by the legal scholar in an endeavour to offer solutions to complex problems and thereby inform policy and practice. The Journal provides a platform for such critical engagement.

The Journal also offers opportunities for mentoring and nurturing emerging scholars. It is therefore gratifying to note the involvement of students in the editorial team as well as in the authorship of papers.

The Journal is hosted on HeinOnline, hence expanding access to a wide readership and also enhancing the Law School's online visibility.

It is my hope that this re-launch issue marks the start of long and uninterrupted publication of the Journal well into the future.

Patricia Kameri-Mbote, SC

Professor of Law & Dean
School of Law, University of Nairobi

EDITORIAL

BACKGROUND

The East African Law Journal is produced by the University of Nairobi, School of Law. Since the 1960s, the Journal has published papers by legal scholars and practitioners in Kenya and the East African region, as well as by researchers from all over the world who are interested in law in East Africa. However, the collapse of the East African Community in 1977 was followed by the lapse of the publication of the Journal, which was at the time edited jointly by then Faculty of Law and the Community. Since then, there have been international, regional and national legal developments. Therefore, when the Journal was revived in the mid-2000s, its objective was to provide a forum for scholars in the region and the world to publish their academic papers on diverse topical legal issues, which were relevant to law in East Africa.

The focus of the Journal therefore is law in East Africa, and the broader issues affecting its development and operation in the region. The objective of the Journal remains the encouragement of the process of research by publishing cutting edge research in specific areas of law in East Africa. Founded on the tenets of integrity in the research process and relevance of information in the field of law, the Journal is a useful tool for those who are conducting research, those who teach and those who study law.

The Journal also has a strong tradition of encouraging student mentorship initiatives, and it has provided opportunities through which students are encouraged to carry out and publish research. This is one of the main areas where the East African Law Journal has fostered the process of developing transferable skills in research, and ensuring that these skills are indeed transferred in an effective manner. The Journal is therefore an integral part of the teaching and learning process at the School of Law, whereby students are taught and equipped with practical skills to enable them conduct research.

ABOUT THE CURRENT ISSUE

The East African Law Journal has not been published since 2005, and therefore this is the re-launch issue. All the papers have been written post Kenya's current Constitution, which was promulgated in 2010. Accordingly, the papers address a diversity of issues in contemporary Kenya, highlighted through the lens of the Constitution, while also reflecting current statutory and other legal developments at the domestic, regional and international levels. The contributions also contain comparative analysis between Kenya and other African countries. In tandem with the Journal's focus on student mentorship, the current issue contains contributions from both academic scholars and students of law.

Prof. Patricia Kameri-Mbote and Prof. James Otieno–Odek address the link between Intellectual Property Protection (IPP) and Genetic Use Restriction Technologies (GURTS). Their main focus is on the impact of IPP for GURTS innovations on access to seeds and technologies by farmers in developing countries. They look into how countries in the region can use regulatory mechanisms to harness the positive impacts of GURTS without compromising their national and regional sustainable development goals.

Dr. Attiya Waris compares African constitutions to explore the power of taxation by States and notes that there is no African constitution that explicitly provides for tax responsibilities. She recommends that the State's right, power or ability to tax should not be free of checks and balances that are constitutionally provided for and should not be amended except through a national referendum.

Dr. Duncan Ojwang' redefines corporate social responsibility through the lenses of Ubuntu principles. He argues for the use of this approach as a means to fill up the existing gap of checking corporate irresponsible behaviours while leaving the principles non-binding. He also suggests that this approach will make corporations culturally sensitive.

Prof. Ben Sihanya examines how biological diversity (biodiversity) and genetic resources have been conceptualized in Kenya under the appropriate transnational laws dealing with intellectual property. He also argues for appropriate reforms to establish or strengthen the system of plant breeders' rights in Kenya.

Prof. Migai Akech evaluates the extent of democracy in Kenya's Legislature which as currently provided for under Chapter Eight of the Constitution of Kenya 2010. He acknowledges that there have been efforts to improve democracy over the previous decades, but that there is still more to be done in actualizing the optimal level of democracy in Kenya's Legislature.

Prof. Winifred Kamau examines the relationship between customary law and statutory law of succession in the context of inheritance disputes involving women in Kenyan courts. She examines two opposing approaches that Kenyan courts have taken towards the application of customary law *vis-a-vis* statutory law in succession cases. She argues that the approaches adopt a static view of customary law that sets up a dichotomy between customary law and state law, hence inhibiting the growth of customary law.

Njaramba Gichuki takes a human rights approach in exploring access to financial services. He identifies a gap in the International Conventions as well as the Kenya Constitution 2010 regarding access to financial services as a right. He therefore argues that human rights activism should of necessity include the right to access to financial services.

Dr. Agnes Meroka revisits the '160 Girls Case', a constitutional petition brought before the High Court in Meru, Kenya. The petition resulted from the police failure to investigate sexual offence complaints by over 160 girls. Although the Court held that this amounted to a violation of a Constitutional right of access to justice, Dr. Meroka demonstrates that the human rights approach was restrictive and prevented the court from taking positive steps to compel the State to act. She therefore explores how the capability approach can be used to complement the human rights approach in order to come up with wider solutions to cater for every girl and woman in Kenya regarding sexual offences.

Dr. Collins Odote and Smith Otieno discuss social sustainability and emphasise its importance with regard to extractive industries. They focus on Kenya's gas and petroleum industries and recommend socially sustainable measures that the industries need to adopt in order to avoid future conflicts with communities, as has happened in other countries.

Dr. Adams Oloo explores how successive regimes that span the Kenyatta, Moi and the first term of Kibaki eras exploited various mechanisms both political and legal to tame the opposition and demonstrates how these undermined the institutionalization of democracy in Kenya.

Nancy Baraza examines feminist legal theory's critique of the dominant legal doctrine and more specifically its presentation of legal rules as objective, rational, legitimate and normative. She further demonstrates how the traditional legal doctrine has contributed to the discrimination and oppression of women.

Prof. Winifred Kamau reviews a book authored by Njaramba Gichuki titled *Law of Financial Institutions in Kenya*. The book is a pioneer in the area and covers more than the traditional bank customer relationship. The book also endeavours to cover emerging issues in the area. Prof. Kamau recommends the book to law lecturers, students and practitioners as a useful resource.

Zaina Kombo, George Osino and Faith Lukosi, review the case of *CKW v Attorney General & Another* [2014] eKLR which deals with consensual sexual relationships between adolescents.The authors analyse the issues raised by the petition including the discriminatory application of sexual offences laws against the boy child which they argue is contrary to the spirit of Article 27(4) of the Kenyan Constitution 2010. They point out the gaps in the Sexual Offences Act and recommend appropriate legislative measures to cure the deficiencies.

GENETIC USE RESTRICTION TECHNOLOGIES, INTELLECTUAL PROPERTY RIGHTS AND SUSTAINABLE DEVELOPMENT IN EASTERN AND SOUTHERN AFRICA

*Patricia Kameri-Mbote**
*James Otieno-Odek***

ABSTRACT

This paper addresses the link between Intellectual Property Protection (IPP) and Genetic Use Restriction Technologies (GURTS). The central issue is the impact of IPP for GURTs innovations on access to seeds and technologies by farmers in developing countries. It focuses on Intellectual Property Rights (IPRs) considerations and other related regulatory aspects regarding the potential impact of GURTs in Eastern and Southern Africa (ESA). While both IPRs and GURTs allow control over the use of genetic materials, they differ in the mode of control. Thus, the question always is how the countries in the region can use regulatory mechanisms to harness the positive impacts of GURTs without compromising their national and regional sustainable development goals.

I. INTRODUCTION

The role of intellectual property rights in the attainment of sustainable development continues to be a subject of great interest among different groups of people. Historically, IPRs, particularly patents, have been considered a tool that fosters economic development by promoting innovation and inventiveness. In contemporary terms, national views on the merits and demerits of IPRs tend to break down along the lines of who is developing new technologies and who needs them.[1] Existing conventions on intellectual property protection (IPP) favour those with ready access to economic and legal resources and can work unfairly against those who do not have such access.[2]

The internationalisation of intellectual property protection through the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)[3] ensures that the technology owner has protection of their IP in all areas of technology. Discussions about the implications of this provision in the context of a human

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** Associate Professor of Law & Judge of the Court of Appeal in Kenya.

1 Advancement Foundation International, *Conserving Indigenous Knowledge: Integrating Two Systems of Innovation* (A Study by Rural Commissioned by UNDP 1994).

See also, Rohini Acharya, *Intellectual Property, Biotechnology and Trade: The Impact of the Uruguay Round on Biodiversity, Biopolicy International No. 4* (ACTS Press, Nairobi 1992).

2 International Development Research Centre, *The Crucible Group, 'People, Plants and Patents: The Impact of Intellectual Property on Biodiversity, Conservation, Trade and Rural Society* (1994) 54.

3 Marrakesh Agreement Establishing the World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex C signed in Marrakesh, Morocco on 15 April 1994.

right to food and healthcare have generated considerable heat at the international level. The protection of IP in the realm of food and healthcare is not always easy to reconcile with these rights where access is hindered by the existence of IPRs.[4]

IPRs have generally been conceived as statutory rights which can only be justified from a societal point of view if they are balanced with specific clauses in the public interest. Thus, patents are usually granted for a limited duration and the patentee has to disclose his/her invention in return for the monopoly rights granted by the state. For a long time, IPRs were conceived as a purely technical tool which contributed to technological development. This theoretical premise has been challenged over time from different directions.

Firstly, the appropriate scope of protection has been the object of debates for a long time. The balance between the need to provide incentives for research into new technological innovations and the desire to reward inventors has always been difficult to find since someone's innovation may be someone else's basic research material for a different type of innovation. In recent years, these concerns have become increasingly pronounced.

Secondly and related, it has become apparent over the past couple of decades in particular that it is not tenable to separate IPRs from sustainable development. In developed countries, the granting of life patents has progressively blurred the line between human inventiveness and nature's creation. In developing countries, the adoption and implementation of the TRIPS Agreement has clearly brought out the fact that the introduction of IPRs has not only economic and technological consequences, but also human rights, social, environmental and agricultural consequences.[5]Indeed, the biggest challenge that African countries face today is the need to reconcile the introduction of the minimum standards of intellectual property protection of the TRIPS Agreement with the need to comply with all their international and national sustainable development commitments.

Following the adoption of the TRIPS Agreement and its progressive implementation in developing countries, debates concerning the contribution of IPRs to economic and social development have become much more pronounced. The TRIPS Agreement firstly, commits developing countries to significantly raise their standards of intellectual property rights protection even though it is generally accepted that this will at best have some positive results in the long term for most countries.[6] Secondly, the TRIPS Agreement makes few concessions for the smaller, economically weaker countries, including in particular few concessions to least developed countries. Limited differentiation has led to major controversies such as the controversy concerning access to drugs in countries severely affected by HIV/AIDS. Thirdly, in the context of increasing appropriation of knowledge through intellectual property rights which has characterised developed countries over the past couple of decades, there are renewed debates over the 'appropriate' level of intellectual property protection for social and economic development.

4 Patricia Kameri-Mbote & Philippe Cullet, *International Property Protection and Sustainable Development – Towards a Common African Institutional Framework and Strategy* (A Background Study Commissioned by the Science and Technology Commission of the New Partnership for Africa's Development December, 2004).

5 ibid.

6 Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (London: CIPR, 2002).

In a North-South context, concerns over the appropriate scope of intellectual property protection include the whole gamut of issues debated in developed countries and a host of other issues. Among a number of initiatives that have been taken in recent years to address some of the IPR-related problems in developing countries, the 2002 report of the Commission on Intellectual Property Rights stands out.[7]It provided a largely balanced account of the pros and cons of intellectual property protection in developing countries and found that there were a number of significant problems in the existing system.

The interface between intellectual property protection and sustainable development has become most pronounced as biotechnological innovations have progressed. In addressing IPRs and biotechnology in Africa, the issue of genetic resources and the role that these resources play in African countries is pivotal to the perception of proprietary rights. This is linked to the value of the resources and the issues of access, control and ownership. IPRs for biotechnological innovations raise heated debates at the international, regional and national levels over, firstly, control of biotechnology IPRs and, secondly, ownership of biotechnology inventions in instances where a different person other than the one that has come up with the invention has nurtured the resources.[8] The valuation scale does not indicate a continuum from the raw material to a transformed product. There is a marked dichotomy between the valueless raw germplasm and the commodified varieties that are processed in laboratories.[9]

Relevant IPRs in the field of biotechnology are patents and plant breeders' rights (PBRs).[10] Traditionally, plants were excluded from patentability and were governed by PBRs.[11]The gradual move towards patenting of life forms in the US first affected plants and has recently been extended to animals. Since the case, in the US, of *Diamond - v - Chakrabarty,* biotechnology IPRs is liberally granted. The Supreme Court held in that case that it had no objection to the grant of patent rights that these were living organisms and that the patent system should grant patent protection for "everything under the sun made by the hand of man".[12]Many African countries exclude plants and animals from patentability. With respect to plants, countries provide for plant variety protection through plant breeders' rights.

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7 ibid.

8 Patricia Kameri-Mbote *et al*, *Unlocking Africa's Future : Biotechnology & Law* (Forthcoming 2015).

9 Vandana Shiva, *Monocultures of the Mind : Perspectives on Biodiversity and Biotechnology* (1993).

See John H Barton & Eric Christensen, *Diversity Compensation Systems: Ways to Compensate Developing Nations for Providing Genetic Materials in Seeds and Sovereignty – The Use and Control of Plant Genetic Resources* (Jack R Kloppenburg, Jr. ed, 1988).

338 [Shiva:1994 Debate on commodification of seed – from a means of production and product to a commodity with a price tag].

10 Trademarks also relate to biotechnology in instances where products of biotechnology are branded to distinguish them from other products of competing firms. This is especially the case in the area of pharmaceutical products.

11 See, for instance, Rebecca S Eisenberg, *'Proprietary Rights and the Norms of Science in Biotechnology Research'* (1987) 97 Yale L.J. 177 [188].

12 Diamond vs Chakrabarty, 100 S. Ct. 2204, 2208 (1980). Chakrabarty applied to patent a bacteria from the genus Pseudomonas containing therein at least two stable energy generating plasmids, each said plasmid providing a separate hydrocarbon degradative pathway. The US Supreme Court held that 'the patentee had produced a new bacterium with markedly different characteristics from any found in nature… His discovery is not nature's handiwork, but his own, accordingly, it was patentable.'

This genus of IPRs was first developed within the context of the International Convention for the Protection of New Varieties of Plants (UPOV).[13] These rights were an alternative to fully fledged patents and were seen as more flexible and admitting of seed exchange between farmers and breeders.

The key questions that arise in Sub-Saharan Africa generally, in relation to IPRs, are threefold. Firstly, whether there is evidence that inventors are being encouraged by the system to invent new products and processes to improve older technologies. To this end, there is need to establish evidence that links rates of inventions to the existence of IPRs as an incentive to invent. Secondly, whether there is evidence of an improvement in and maintenance of high rates of inventiveness as a direct result of IPRs. In other words, are IPRs fostering improvements in the rate of technological development in the biotechnology realm? Thirdly, whether inventors in the region appreciate the concept of IPRs as a form of reward for inventions, consequently encouraging them to engender new ideas and invent. Basically, are the theoretical functions of IPRs being successfully translated practically in the field of biotechnology on the Sub-Saharan scene?

The role of IPR in Africa's development has to be considered within an array of factors. On the one hand, African farmers have limited access to seeds and technology. This is blamed on restrictive IPRs that act as a barrier to acquisition of seed and propagative material as well as the use of genetic use restriction technologies which limit farmers' use of seeds. The ownership of IPRs, specifically patents, by developed-country based multinational corporations is replicated in the realm of biotechnology. This domination of world food products by a few companies and perceived increased dependence on industrialised countries by developing countries pits the latter group of countries against IPRs. The situation is not helped by examples of biopiracy and foreign exploitation of natural resources of poor countries by industrialised countries.

In developing countries it might have been expected that technological innovations would be spurred by such regulatory tools as intellectual property rights (IPRs) and that those innovations would be of such a nature as to promote sustainable development. However, it seems that these expectations are unlikely to be realized. This is so mainly because of the following. First the modern trends in international intellectual property (IP) rulemaking tend toward a single model or a one-size-fit-all approach to IP. Secondly, it has been amply demonstrated elsewhere that this approach is not compatible with developing country needs.[14]

It is within this context that this paper addresses the link between intellectual property protection (IPP) and genetic use restriction technologies (GURTS). The central issue is the impact of IPP for GURTs innovations on access to seeds and technologies by farmers in developing countries. GURTs, also referred to as terminator technologies, are said to have great potential to impact significantly on the seed industry and the organisation of agriculture since they alter a fundamental characteristic of the seed, its self-reproducing

13 The International Union for the Protection of New Varieties of Plants, International Convention for the Protection of New Varieties of Plants, UPOV Convention (1961), as revised at Geneva (1972, 1978 and 1991) Status on May 12, 2009.

14 See for instance, *UK Commission on IPRS Integrating Intellectual Property Rights and Development Policy* (12 September, 2002).

nature and threatens to change agricultural practices developed over millennia.[15] Not surprisingly, they are perceived as unethical and immoral and with negative impacts for millions, especially the resource poor farmers, because of their focus on returns on investment as opposed to access to seeds.

So far, the works of the Food and Agriculture Organization (FAO) of the United Nations and the United Nations Environment Programme (UNEP) on GURTs provide some of the most instructive analyses of that subject. This paper partly draws on these pieces of technical literature about GURTs. It is, however, important to point out that while there is relatively little information about GURTs at the global level, there is hardly any reliable information on GURTs in Eastern and Southern Africa (ESA). Thus, the most one can glean from the little information currently available regarding the ESA situation is speculative conclusions.

This paper centres on the interplay between GURTs and IPRs. Terminator technologies are really induced technological responses to inadequacies and weaknesses of existing intellectual property protection (IPP).[16] To that extent, the question of whether GURTs are an IP issue or not is, in our view, moot. GURTs are innovations which are amenable to IPP. The commonplace view is that, first, GURTs are 'bad' and second, IPRs promote GURTs. If both IPRs and GURTs allow control over the use of genetic materials, one might be tempted to claim that there is an association between IPRs and GURTs. However, it is hard to see how that association is causative. In other words, the rise of GURTs may not be fairly traceable to the protection of IPP.

Against that background, this paper focuses on IPRs considerations and other related regulatory aspects regarding the potential impact of GURTs in ESA. While both IPRs and GURTs allow control over the use of genetic materials, they differ in the mode of control. Thus, the question always is how the countries in the region can use regulatory mechanisms to harness the positive impacts of GURTs without compromising their national and regional sustainable development goals.

This paper suggests that IPRs, or anything akin to IPRs, are inadequate to enable ESA countries avoid the real or potential adverse impacts of GURTs. This is largely because IPRs provide *legal control* over the use of genetic material, whereas GURTs provide *technological control*. The relevance of this distinction lies in the fact that GURTs transcend the legal realm in the sense that they may apply whether or not the technology in question is itself subject to legal protection (in the form of IPRs or related *sui generis* regimes). The absence of technological capacity on the part of ESA countries may, indeed, disadvantage them when it comes to the use of GURTs to secure their innovations. The legal control over genetic material provided by IPRs, on the other hand, is limited to the innovations that satisfy criteria for IPP. There are potential benefits, costs and risks of IPP for GURTs from different viewpoints. (See Table A) ESA countries need to assess these and align them to different actors within their territories to determine the best way to go with GURTs.

15 CS Srinivasan & C Thirtle, *'Terminator Technologies in Developing Countries,'* in RE Evenson et. al, (eds) *Economic and Social Issues in Agricultural Biotechnology*, (CABI Publishing, Oxon & New York, 2002) 159 and 162.

16 ibid. Similar measures have been taken in the realm of copyright to prevent copying of music and software.

Table A: Genetic Use Restriction Technology (GURT): Potential Economic Benefits, Costs & Risks

	Benefits	Costs	Risks
Farmers	Increased productivity from improved inputs due to increased research and development (R & D) investment	Increased input costs from seed purchase (including transaction costs)	Misuse of monopoly powers by breeders Reduced seed security and access to genetic improvements (marginalized framers)
Breeders (especially Private Sector)	Increased appropriation of research benefits from new products	Increased cost for access to gene pools of other breeders	
Governments	Reduced investment requirements in breeding Fewer enforcement costs for plant variety protection (PVP)	Complementary R & D investment requirements Other regulatory sources	
Society	Increased agricultural productivity		Reduced genetic diversity in fields

Source: D. Eaton et al., Economic and Policy Aspects of 'Terminator' Technology, Biotechnology and Development Monitor, No. 49, p 19-22

II. GENETIC USE RESTRICTION TECHNOLOGIES (GURTS)

GURTs may be defined as a set of 'technological means that rely on genetic transformation of plants to introduce a genetic switch mechanism which prevents unauthorized use of either particular plant germplasm or trait(s) associated with that germplasm.'[17] In other words, GURTs is a term that describes a class of biotechnology–based switch mechanisms applied to restrict the unauthorized use of genetic material. There are two types of GURTs, namely variety–use restriction (V-GURTs) and use–restriction of a specific trait (T-GURTs). V-GURTs, also known as 'terminator' technology, renders the subsequent generation sterile, whereas T-GURTs, also known as 'technology protection system', requires the external application of inducers to activate the trait's expression. T-GURTs refer to a set of technologies that, using an external trigger, make it possible to switch on and off specific characteristics of a plant, such as resistance to disease.

The opponents of GURTS argue that there are no profound agronomic benefits other than imposing a limitless biological patent on the relevant crops. Moreover, T-GURTs may exacerbate this situation by creating dependency on costly seeds and chemicals as well as the foreign companies that produce them. The diffusion of such technologies to farmers is also seen as problematic and they also deny farmers their democratic rights to choose. Altogether, T-GURTs are argued to be a threat to food security. The potential negative impacts range from loss of agricultural biodiversity to alteration of ecosystems and widening of the technological gap between resource–poor and better-off farmers.

17 R Jefferson et al, *'Genetic use Restriction Technologies'* (1999) see also UNEP/CBD/SBSTTA/4/9/REV/Annex.

The proponents of this technological innovation argue that it is self-regulating. It provides a biological means of strengthening IPP on newly developed agricultural crop varieties or animal breeds. This enables the technology owner to restrict others from reproducing their innovation.[18]Thus, it can reduce the costs of policing seed patents or breeders' rights. In turn, this allows innovators to capture the returns to their investments as well as encourage further innovation. Also, it prevents horizontal gene transfers from GM crops because it has an in-built safety mechanism to prevent germination of seeds produced from unwarranted pollination from transgenic plants. It can also be used in 'precision agriculture' to turn specific traits on and off when that is desired by the farmer or breeder. GURTs, therefore, present a useful tool for containing transgenes in biosafety systems.

A. GURTS and IPRs

Both IPRs and GURTs provide control over the use of genetic material. However, GURTs are designed to provide a genetic, in-built, protection against unauthorized reproduction of the seed or the added–value trait. GURTs, thus, may be broader, more effective and less limited by time constraints than the protection conferred by intellectual property rights.[19]

Due to the potential adverse impacts of GURTs on food security, agro-biodiversity, environment, and so on, policy and regulatory concerns have tended to unduly revolve around whether and how IPRs mechanisms might be used to discourage GURTs. This approach is inadequate largely because of the following. While IP legislation could invalidate IPRs on certain types of GURTs, for instance, those that are adjudged repugnant to the national food policy, that invalidation does not necessarily mean that those particular GURTs will no longer be in use. This is because of the very nature of GURTs - which GURTs are capable of being applied irrespective of whether or not they are subject to legal protection. That is, the biological, in built mechanism prevents infringement. In fact, there seems to be anecdotal evidence to suggest that denial of patents on GURTS could actually spur their commercial use. Therefore, the most appropriate approach to discouraging the use of GURTs might be to use a mix of policy and regulatory tools restricting use.

However, regarding the potential impact of GURTs on the regulatory framework, it is interesting to note that FAO recommends :

> GURTs, by increasing the level of technological protection over the product, may result in a significant lowering of transaction costs that would otherwise have been required to enforce the intellectual property protection through legal channels, and may ensure such protection in countries with no IPR systems in place. This could ensure a higher return to breeders and thus motivate increased R&D investments. If the higher returns were passed on to the farmer, this might result in cheaper seed.

18 D Eaton et al, *'Economic and Policy Aspects of 'Terminator' Technology,'* (49) Biotechnology and Development Monitor,19-22.

19 R Jefferson (n17).

> The policy question facing governments is whether increased technological protection to genetic resources by GURTs is desirable, and how this would interface with IPR regimes. In this, governments may wish to distinguish between GURTs applications that offer intrinsic production increases, and those that serve merely as use restriction strategies.[20]

As the US comments on the FAO Report rightly point out, the recommendation that countries may discriminate in their national laws between those GURTS that enhance agricultural production and those that mainly serve to restrict use of specific genetic material, fails to take into account countries' obligations under international regulatory instruments, such as TRIPS. For instance, Article 27.1 of TRIPS forbids discriminations on the basis of technology. Thus, the recommended approach might violate TRIPS.

Relatedly, Article 27.2 of TRIPS states that:

> members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by domestic law.

The FAO Report mentions this provision. A number of concerns, however, still remain. *First*, already many countries that are parties to TRIPS have opted to exercise their rights under that provision by expressly providing in their relevant national regulatory frameworks that IP protection would be denied on technologies that represent a danger to the environment or human, animal or plant health. However, the difficulty is that to date there is no conclusive evidence that GURTs actually pose such a danger. Having said that, the question arises on whether WTO TRIPS members that are also parties to the UN Convention on Biodiversity[21] (and the Cartagena Protocol on Bio-safety[22]) might wish to apply the precautionary principle and, hence, prohibit deployment of negative traits of GURTs on that basis.

Second, and perhaps more importantly, even if one were able to exclude from IP protection certain GURTs under Article 27.2 of TRIPS, there might still remain the other problem of restricting use. As discussed above, exclusion from patentability does not necessarily mean the technology may not be used.

Within the context of the Convention on Biological Diversity, an Ad-hoc Technical Expert Group meeting on the potential impacts of genetic use restriction technologies on smallholder farmers, indigenous and local communities and farmers' rights was held in 2003.[23] The meeting identified potential positive and negative impacts of GURTs on

20 CGRFA 9/02/17 Annex, 'Potential Impacts of GURTS on Agricultural Production Systems: Technical study' [44].

21 United Nations Conference on Environment and Development: Convention on Biological Diversity (Done at Rio de Janeiro) June 5, 1992, reprinted in 31 I.L.M.818 (1992).

22 Cartagena Protocol on Biosafety, Protocol to the on Convention on Biological Diversity Convention, 39 ILM 1027 (2000).

23 UNEP/CBD/SBSTTA/9/INF/6-UNEP/CBD/WG8J/3/INF/2, 29 September 2003.

smallholder farmers and indigenous and local communities. The main negative impacts identified comprised gene flow and environmental containment where the genes could escape and pass on to other members of the same or other species. This was perceived as being of particular concern in the centres of origin.

The biosafety advantage of GURTs, particularly V-GURTs sterility which makes the technology potentially useful in preventing unwarranted escape of genetic material into the wild, was seen as promoting genetically modified crops. Further, the promotion of GURTs could prevent and/or reduce further research on gene containment alternatives at a legal and biological level. Other potential negative impacts included reduced availability of new varieties, unintentional use of GURTs-foodgrain as seed, dependency, intentional misuse and diversion of agriculture research and development resources from the public sector to the private sector.[24]

The potential impacts of GURTs on Farmers' Rights were identified as restriction of traditional practices, such as seed saving, farmer breeding and unhindered exchange of seeds. GURTs were also seen as increasing opportunities for appropriation of genetic resources by the developers and owners of the technology, beyond the possibilities of hybridisation, outside the bounds of patents, other IPRs and regulatory systems. The appropriation and enclosure of elements of traditional knowledge and genetic resources through GURTs' IPP will negatively impact the rights of smallholder farmers, indigenous and local communities to equitably participate in the sharing of benefits arising from the utilisation of plant genetic resources.[25]

III. INTERNATIONAL RULEMAKING AND STANDARD SETTING ON IP

A. Philosophical Foundations of IP

There are various justifications of IP protection. However, the main ones revolve around desert and reward. The argument goes that the creator of something deserves something in return for their effort. That reward may take the various forms but the generally accepted one is ownership. Relatedly, the utilitarian argument maintains the position that creations of the human mind are necessary for the development of society and that such creations gain fresh impetus from some rewards. In other words, innovators expend a lot of time, effort, money and other personal resources to generate and develop ideas and they need incentives to so work. Given that there would be the greatest happiness to the greatest number of members of the society if new ideas were generated, then innovators should be rewarded in one form or another.

This utilitarian justification for IP appears to have been adopted in the World Trade Organization (WTO). The WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) essentially treats IPRs as economic or commercial rights. However, it captures the utilitarian justification in the Article 7 objective that IP protection should contribute to the promotion of technological innovation and to the transfer and dissemination of technology.

24 ibid.

25 ibid.

Two important issues arise from the foregoing. *First*, critics might question the justice of rewards. For instance, is ownership, whether in the form of IPRs or not, the best or a just reward? Indeed, it might be arguable by a utilitarian that putting all ideas in the public domain (for instance, by relaxing or abolishing IPRs) would be more beneficial to society as anyone could work on or develop anything and, therefore, generate more innovation.

Second, critics often point out that to say IP stimulates technological innovators is little more than an article of faith. Put in another way, does IP actually encourage innovations? To be sure, in the context of the WTO, some developing countries are increasingly becoming pessimistic in reference to the question of whether the object and purpose of TRIPS in establishing a viable technological base in all countries is achievable. It is partly due to this that there is the attempt to move from the TRIPS Council of the WTO to the World Intellectual Property Organization (WIPO). The question however is, is the forum shift necessary? A further question from the point of view of this paper is whether the question of GURTs is best addressed within the context of WTO and WIPO.

B. Institutional Anchorage of IP

The World Intellectual Property Organization (WIPO) was established in 1970 by a convention that was adopted in 1967. A specialized agency of the UN since 1974, WIPO administers over 20 multilateral treaties on different aspects of IP and counts 179 nations as member states. The main role of WIPO is to assist developing countries in enactment and enforcement of IP laws, to bolster international cooperation in the development of international and regional IP law, and to assist countries in the development of skills necessary for the enforcement of IP.

In the 1980s, there emerged a shift from WIPO to the General Agreement on Tariffs and Trade (GATT) Uruguay round of multilateral trade negotiations. These negotiations eventuated in, among others, the inception of TRIPS under the aegis of the WTO in the 1990s. The imperative issue is why the world of IP was forced into the realm of the WTO. A number of reasons might be given for the forum shift. First, WIPO lacked a formal court–like dispute settlement mechanism. Second, WIPO gave states enormous sovereign discretion over IP standard setting. In light of this flexibility, the competitiveness of countries that relied a lot on information-based goods and services was threatened , at least to the extent that any developing country would enjoy relatively low standards of IP protection. Relatedly, WIPO lacked a linkage – bargain diplomacy whereby countries could agree on trade-offs in return for concessions in other areas. Nevertheless, as mentioned above, some developing countries are pushing for a shift from the WTO TRIPS to WIPO. What are the important trends at WIPO that might have led to this forum shifting?

The Convention on Biological Diversity addresses IPRs to the extent that they are relevant for meeting its objectives, namely, conservation of biological diversity, sustainable utilisation of its components, and fair and equitable sharing of benefits emanating from the resources. Article 15 of the Convention, while recognising the sovereignty principle enunciated at Article 1, provides that the state concerned should exploit its resources according to environmental policies and should endeavour to conserve the resources and promote their sustainable utilisation. The Convention also seeks to ensure both the availability of biological resources for the scientific community and the enjoyment of

the benefits accruing therefrom to the state providing the resources.[26] The Biodiversity Convention recognises the need to ensure equitable allocation of ownership rights and intellectual property rights to biotechnology. Further, while stressing the need for recognition of intellectual property rights, Article 16 provides that such rights should support the objectives of the Convention and not run counter thereto.[27]

It emphasises the need to have the intellectual property rights enhance the objectives of the Convention, but does not provide which of the two should prevail in the event of a conflict.[28] Article 22 of the Convention also intimates the possibility of property rights being overridden where they threaten serious damage to the environment. From the foregoing, it is clear that GURTs IPP are the subject of different normative and institutional regimes, ranging from the CBD and the WTO TRIPS to WIPO.

IV. MODERN TRENDS IN THE WORLD OF IP

A. The Cost of IP Systems

Although there are no definitive studies on the impact of TRIPS on developing countries, reliable empirical estimates indicate that, overall, developing countries lose from protecting IP even at the minimum standard in TRIPS.[29] These studies appear to support speculations that had been made prior to the adoption of TRIPS. As one economist had predicted, 'all evidence and arguments… point to the conclusion that… the effect of enhanced IPR protection… will be a transfer of wealth from [developing countries] to foreign, mostly industrial country firms.'[30]

When the cost of maintaining an IP system (in terms of both money and practicability and difficulty) is assessed in light of the meager resources of many developing countries, especially those from the ESA region, one might wonder whether it makes sense for these countries to be subjected to onerous IP regimes like TRIPS. However, given the nature of IP and the measurement problems associated with it, our understanding of its role in the economic development process is incomplete. Yet, despite this fact, it might be probable to employ a balanced and scientifically based risk/benefit analysis for case-by-case assessment of the role of IP. Currently, there appears to be no such information available. This is the lens within which one looks at IPRs for GURTs

26 Article 16, It exhorts states entering into agreements for access to genetic resources to take legislative, policy and administrative measures to ensure fair and equitable sharing of the research results and benefits arising form the commercial utilisation of the resources between the parties. It also recommends the participation of the source state in scientific research using resources from such state.

27 See Biodiversity Convention, Article 16 (4) (n73) which provides that "Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall co-operate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives."

28 Philippe Sands, *Principles of International Environmental Law 678* (2003).

29 L Sanjaya and M Albaladejo, *'Indicators of the Relative Importance of IPRs in Developing Countries'* (Paper commissioned by UNCTAD/ICTSD, November 2001).

30 D Rodrik, 'Comments on Maskus and E by-Konan' in A Deardorff and R Stern (eds), *Analytical and Negotiating Issues in the Global Trade System* (University of Michigan Press Michigan 1994) 449.

B. Speculations About a (New) Development Agenda in WIPO

Since the 2001 Doha WTO Ministerial Conference, development issues have come to the forefront of debates on IP in both the WTO and WIPO. In the WTO, for instance, not only is the TRIPS Council directed to follow TRIPS objectives and principles, but it is also obliged to take development objectives fully into account.[31]

Moreover, the preamble to the WTO Agreement states, in pertinent part, the objective is to ensure the 'use of the world's resources in accordance with the objective of sustainable development'. This objective has attracted jurisprudential attention in some WTO disputes. For example, the Appellate Body in the *US – Shrimp* case stressed that this language of the WTO preamble 'demonstrates recognition by WTO negotiators that the optimal use of the world's resources should be made in accordance with the objective of sustainable development'.[32]

For developing countries that are eagerly desirous of removing the IP agenda from WTO TRIPS back to WIPO, it might be important to consider the modern trends regarding integrating IPRs and development objectives. Apparently, WIPO's mandate does not come out clearly on this issue. From the way WIPO has approached a number of IP problems, it is not entirely clear how development objectives are brought to bear on WIPO solutions. Accordingly, as detailed immediately below, it is difficult to adequately assess developing country perceptions of WIPO.

C. Changing Perceptions of Developing Countries

The classic argument for the move by developing countries from the TRIPS Council of the WTO to WIPO is likely to be that WIPO is more developing country friendly than WTO. There is no doubt that prior to the inception of the WTO, WIPO proactively promoted polices that probably favoured developing countries. Nowadays, however, WIPO has had to adjust itself to accord with the reality that obtains in the global era of the governance of IP. This adjustment has been characterized by such practices as adoption of a dispute settlement mechanism and attempts at harmonization/internationalization of standards. For example, WIPO's work on a patent law treaty brings with it both costs and benefits for developing countries.

There is also an on-going work in WIPO on traditional knowledge and folklore. While many developing countries are likely to support this work on the ground that they are the main producers of such creations, it is worth pointing out that that may not necessarily be the case. Besides the fact that 'African countries have received little assistance from the WTO, WIPO or other relevant organization with regard to IPRS … whenever any assistance is forthcoming it appears to be disadvantageous from a developing country's perspective.'[33]

31 Doha WTO Ministerial 2001: Ministerial Declaration (14 November 2001) WT/MIN (01)/DEC/1 (Doha Implementation Decision) Paras 17-19.

32 WTO, United States; Import Prohibition of Certain Shrimp and Shrimp Production (AB – 1998 – 4 Report of the Appellate Body, WT/DS58/AB/R) 153.

33 J Ayamunda *'Bilateralism and TRIPS,'* (Unpublished MLitt Thesis, Oxford University 2004) 152.

For instance, if some developing countries that turned to WIPO for legislative assistance were made to implement their national IP laws more extensive protection than is otherwise required under the already onerous TRIPS, it is difficult to see how WIPO can be said to be considerate towards developing countries development needs.

V. THE POTENTIAL IMPACT OF GURTS IPP IN ESA

It must be stated at the outset that there is no scientific evidence or any data that assesses the impact of GURTs on agro biodiversity and related issues in reference to the Eastern and Southern African region. However, a number of global studies conducted on GURTs generally, and with particular reference to smallholder farmers, indigenous and local communities and farmers', rights may be of direct relevance to ESA.[34]

These studies indicate that all the impacts are merely speculative, as none of them has been proven. In brief, despite the lack of reliable scientific data, it is clear that GURTs could have numerous positive and negative impacts. One might, therefore, go along with the US in suggesting that given the novel challenges that GURTs pose, there is need for 'careful, sound, scientific, case-by-case assessment of these technologies' risks and benefits.'[35] Yet, it might be important to be generous to critics of GURTs. This is because, although GURTs may elicit overstated concern for their potential negative impacts, this imbalanced view and speculation might actually spur more rigorous research and development.

Some of the potential benefits associated with GURTS include increasing the amount of research and development efforts devoted to "value-added crops", improving the ability to reduce unintended gene flow from transgenic crop varieties to non–transgenic varieties and wild relatives of crops, and contributing important new basic knowledge of plant genomes and reproductive biology overall.[36]V-GURTs may indirectly contribute to the protection of traditional knowledge and varieties in specific conditions by limiting gene flow where they are used with full and informed prior consent and under the capacity of smallholder farmers and indigenous and local communities.[37]For innovators, GURTs present an opportunity to protect innovations through technology where legal measures in the form of IPRs offer inadequate protection.

Many of the ESA countries have their economies anchored in agriculture. The majority of the farmers are subsistence farmers. The impacts of GURTs have, therefore, to be seen within the context of smallholder farmers. The prediction is that GURTs will replicate the experiences in hybrid-based agriculture where there will be increased investment by private seed companies.

34 The ad hoc Technical Expert Group Meeting, the Potential Impacts of Genetic Use Restriction Technologies on Smallholder Farmers, Indigenous and Local Communities and Farmers' Rights (UNEP/CBD/SBSTTA/9/INF/6– UNEP/CBD/WG8J/3/INF/2, 29 September 2003).

35 US Comments on CGRFA 9/02/17 Annex, 'Potential Impacts of GURTs on Agricultural Production Systems: Technical Study.'

36 US Comments on CGRFA 9/0217 Annex.

37 Annex 1, UNEP/CBD/SBSTTA/9/INF/6-UNEP/CBD/WG8J/3/INF/2, 29 September 2003.

Conversely, there will be reduced public expenditures in agriculture R&D.[38] Given that IPRs are private monopoly rights, it is likely that they will provide incentives to private actors to invest in GURTs as an additional protection for their innovations.

Over and above all these is the fact that the level of biotechnology development in ESA countries is low. Only a handful of countries are working on genetic modification technologies.[39]Similarly, many of the countries have not developed IPP regimes to cover biotechnology innovations. Consequently, it remains to be seen whether these countries will utilise GURTs to protect their innovations or to what extent GURTs will impact access to seeds by farmers in the region.

A. ESA Approach to IPP

Many ESA countries are members of the WTO and have also signed and ratified the CBD. To that extent, they are bound to domesticate TRIPS' IPP provisions. Theoretically, they would grant IPP for GURTs, since patents are available for all technologies. Article 27.1 of the TRIPS Agreement stipulates that "patents shall be available for any inventions, whether products or processes, in all fields of technology" and the patents shall be available, and patent rights enjoyable, without discrimination as to the field of technology. This provision expressly implies that patents may be available in the biotechnology field. Further, Article 27.3 stipulates that members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. This provision further consolidates the position with regard to granting of IPRs in the field of biotechnology, particularly as it relates to plant varieties.

First, under the TRIPS Agreement, the subject matter of protection is left to the discretion of national states and, thus, the scope of protection of products and processes of new technologies is uncertain. Second, different countries exclude different subject matter from patentability and, thus, unification and harmonization of patent laws is a remote goal. The absence of criteria for patentability is favourable because each country, with distinctive public interests shaped by its level of economic development, is able to pattern its national patent laws to correspond to its development goals. This enables developing countries to use infant industry arguments to protect certain sectors from competition or limit the application of the general patent system in certain fields such as pharmaceutical or food industries.[40] Unfortunately, most African countries have not availed themselves of the flexibility allowed to them through TRIPS. The International Union for the Protection of New Varieties of Plants (UPOV) encourages the adoption of *sui generis* mechanisms for protecting new plant varieties.

38 T Goeschl & T Swanson, 'The Impact of Genetic Use Restriction Technologies on Developing Countries: A Forecast,' in RE Evenson *et. al* (eds), *Economic and Social Issues in Agricultural Biotechnology* (CABI Publishing, Oxon &New York, 2002) 93.

39 These include South Africa, Kenya and Zimbabwe.

40 This would involve extending protection to products and processes that are simple, adaptive and appropriate to local conditions. It would also allow limitation of patentability to local products rather than granting protection to imports as well thereby permitting imitation processes and products to thrive and assist in the development of these countries.

The duration of patents should also be considered to be in line with the development concerns of the country. A shorter period may be conducive to development as the patented product or process quickly passes into public domain allowing others to use it.

It creates its own system that requires that a plant variety be new, distinct, homogenous or uniform and stable in order to be eligible for protection.

There are four versions of UPOV.[41] The 1991 UPOV version restricts the plant breeder's and farmer's exemption by extending PBRs beyond the reproductive material to the harvested material. This form of UPOV entered into force in 1998 and is currently the only available UPOV option for new membership. Countries, such as Kenya and South Africa, have joined UPOV 1978 in a bid to provide protection for plant varieties. This preempts opportunities for coming up with locally designed *sui generis* regimes for protecting plant varieties. *Sui generis* regimes provide an opportunity for defining national agenda and could provide a way of dealing with GURTs as a national development agenda item.

At the regional level, the only effort at defining a regime concerning biological resources is the model law on community rights on access to biological resources developed in the context of the Organisation of African States (OAU). It generally recognises the need to protect the rights of local communities over biological resources and their knowledge, innovations and practices. This implies, at a minimum, recognition in perpetuity of the fact that local communities are creators, users and custodians of their biological resources and knowledge.

The model law accepts the principle that traditional ways of use or exchange of biological resources and knowledge between local communities will not be affected by the law put in place and also recognises the right of local communities to restrict access to their resources and knowledge. It further affirms local communities' inalienable right to keep, use, exchange or share their biological resources that sustain their livelihood systems. Some countries, such as Namibia, Ethiopia and Uganda, are in the process of domesticating some of the provisions of the Model Law.

The need to protect the rights of communities is of great concern in ESA countries. Articles 8 (j) and 10(c) of the Convention on Biological Diversity and Article 9 of the International Treaty on Plant Genetic Resources call for the recognition of these rights. The environment policy of Ethiopia, adopted in April 1997, acknowledges community intellectual property rights and decrees the need to create a system for the protection of community intellectual property rights'. The concept of community intellectual property rights is a new concept. It is very difficult to define the subject matter of protection and who the holders of such a right are and how the rights will be exercised and enforced. These are the issues that African model legislation for the recognition and protection of local communities, farmers and breeders seeks to address.

B. The Case for *Sui Generis* Regimes as a Counter to Negative Impacts of GURTS

The WTO Agreement on Trade Related aspects of Intellectual Property (TRIPS) provides that Members may exclude from patentability:

> plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and

41 The International Union for the Protection of New Varieties of Plants (UPOV) was concluded in Paris in 1961; and revised in Geneva in 1972, 1978 and 1991.

> microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.[42]

Under this Article, countries can provide for the protection of plant varieties by patents and/or by any effective *sui generis* system. There are no parameters for a *sui generis* system and the term 'effective' is not defined. Although this is subject to the general principles of TRIPS and may be ultimately determined by WTO provisions especially those relating to dispute resolution, TRIPS leaves wide latitude for interpretation. For that reason, each country can pattern its national laws to correspond to its particular circumstances and aspirations. One way of countering GURTs would be the protection and enforcement of community rights, farmers' and breeders' rights through a *sui generis* system. Such can be tailored to require limitations on protection of GURTs. GURTs, as IPRs, are essentially monopoly rights. Recognizing community rights which are outside the purview of IPP is a way of countering GURTs.

1. Community Rights

One of the main concerns regarding community rights is determining what can be protected and the strength of the protection. Article 8(j) of CBD calls for the protection of knowledge, innovations and practices of indigenous communities. In this context, a *sui generis* system of legislation would be one that would recognize the unique status of local communities and their contribution to the conservation of biodiversity, sustainable use of genetic resources, and fair and equitable benefit-sharing arising from its use.[43]GURTs, as a form of *technological control,* are unlikely to provide the balance of societal and individual benefits that even mainstream IPRs seek to achieve. GURTs do not avail new traits and varieties for further breeding that line patents and breeders' rights do.[44]

In most African customary societies, there are entities with the capacity of legal persons. These entities could receive recognition in national legislation and be vested with rights so as to keep away potential GURTs that can impinge on such rights. The nature of these groups is very well captured in the following statement on land tenure system:

> Access has always been specific to function, for example, cultivation or grazing. Thus, in any given community a number of persons could each hold a right, or bundle of rights, expressing a specific range of functions. In a typical case, therefore, a village could claim grazing rights over a parcel of land subject to the hunting rights of another, the transit rights of a third and the cultivation rights of a fourth. Each one of these categories carries with it varying degrees of levels of social organization.

42 Article 27(3b).

43 P Cullet, *Intellectual Property Protection & Sustainable Development* (New Delhi, India, Lexis Nexis Butterworths, 2005).

44 Annex 1, UNEP/CBD/SBSTTA/9/INF/6-UNEP/CBD/WG8J/3/INF/2, 29 September 2003.

> For example, while cultivation rights were generally allocated and controlled at the extended family level, grazing rights was a matter of much wider segment. The *raison d'être* of control was to guarantee these rights and to allocate them among other members of community should this be necessary.[45]

Community proprietary rights are in accord with TRIPs[46] and the OAU Model Law on Community Rights.[47] The main risk in community rights is that because the property is owned by every individual member of the group, there is little incentive to conserve as compared to individual property.

In reference to what might constitute an effective sui generis regime, the following are important considerations. The relevant legislation should be one that would provide mechanisms for protecting new plant varieties. Further, and more importantly, that protection need only be real and not necessarily the strongest possible. However, to be effective, it must provide for the effective enforcement of IPRs, for example, through a transparent judicial procedure and border control measures. While it is possible to enact a *sui generis* law for community rights and for plant varieties that takes into account farmers' rights, it is hard to see how certain regional regulatory models are, nonetheless, TRIPs compliant.[48] Nevertheless, to some experts, the major objectives of a *sui generis* system should be conservation of biodiversity and sustainable use of genetic resources.[49]

Toward this end, the regime must seek alternative mechanisms of protection of property rights of local communities. For instance, the regime should be a form of property rights substantively different from any existing systems, such as UPOV or patents,[50] a non-monopoly right, have little emphasis on commercialization, and be "effective" in the sense that its definition of property rights caters for all concerned parties and it is in harmony with other legal instruments.[51]

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45 H.W.O Okoth-Ogendo, 'Land Tenure and Transformation of Peasant Economies in Kenya' (Paper presented at the International Women's Year Tribune's Panel on the Family, Mexico City, Mexico)153, quoted in Kiriro, A. & Juma, C. (eds.), Gaining Ground: Institutional Innovations in Land-use Management in Kenya (Acts Press, Nairobi,1991) 43-44.

46 TRIPs does not prohibit the development of additional protection systems or subject matter. Article 8 of TRIPs allows measures to be taken to protect public health and nutrition; and to promote the public interest in sectors of vital importance to their socio-economic and technological development. The cumulative effect of this is to entitle Member countries to enact a law recognizing community intellectual rights to safeguard their local knowledge systems as well as their informal innovations and thereby protect them from illegal exploitation.

47 OAU African Model Law for the Recognition and Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources. Another international initiative to strengthen community rights is the UNESCO/WIPO "Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions" UNESCO/WIPO, Paris 1985.

48 For example, OAU Model Law appears to entirely reject any form of patentability of life forms.

49 P Cullet, Plant Variety Protection in the TRIPs: Towards the Development of Sui Generis Protection Systems (Paper prepared for the ACTS Regional Workshop on Biotechnology, 1999, Nairobi, September 27-29) 9.

50 However, the Regime for the Protection of Plant Breeders' Rights under Article 27(3) (b) of TRIPs will essentially establish IPRs although in a unique manner.

51 ibid. (n 50) 10-12.

2. Breeders' Rights

Granting breeders' rights is another way of countering GURTs. Under UPOV, plant breeder's exemption is allowed. This refers to the right of the breeder to use protected varieties for research. Additionally, farmers' exemption accords farmers the liberty to save harvested seed from protected varieties for replanting. Farmers' ability to store seed for replanting or utilize it for experimental purposes is curtailed under the 1991 UPOV version. However, Member states may allow farmers to save seed for their own use.[52] Plant variety protection in the form of breeders' rights needs to safeguard this aspect which is totally absent when GURTs are used.

The requirement of uniformity as a condition for grant of plant breeders' rights has been criticised as leading to higher degrees of vulnerability of farmers' rights. Local communities feel that they should be guaranteed rights so as to enable them to breed new varieties that maintain genetic diversity in their communities.[53] Most traditional varieties are locked out. If the criterion is made broader, there is the risk of broadening property claims (including for GURTs) and, subsequently, limiting the nature of the right granted.

Further, any "effective" *sui generis* system must clearly define what is protected. Due to the leeway in Article 27.3(b), the term "plant variety" could be defined in various ways. In the interests of protection, compensation and conservation, the traditional PBRs system's criteria (requiring distinctiveness, stability and uniformity) could be abandoned and replaced by the sole criterion of identifiability. Such a system would effectively cover the interests of both local communities and large-scale commercial breeders.

3. Farmers' Rights

This concept was given an international impetus in 1989 when it was recognised by the FAO International Undertaking on Plant Genetic Resources. Farmers' rights have been defined as:

> rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources, particularly those in the centres of origin/diversity.[54]

It is worth noting that farmers' rights emerged as a mere political concept of the need to curb the growing use and expansion of plant breeders' rights, particularly within the context of UPOV. As such the term was not legally defined.

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52 It is instructive to note that although other articles of TRIPs refer to other agreements, Section 5, Article 27 (3b does not refer to UPOV. It is not clear whether this omission means that UPOV is not an effective sui generis system or it was meant to give parties a wider space of designing their regimes.

53 R Acharya, Intellectual Property,Biotechnology and Trade: The Impact of the Uruguay Round on Biotechnology (Acts Press,Nairobi 1992) 16.

54 FAO Conference Resolution 5/89, 1989, quoted in SH Bragdon and DR Downes, Recent Policy Trends and Developments Related to the Conservation, Use and development of genetic resources (Rome, IPGRI 1998) 27.

Today, there is widespread disagreement on the nature of the rights,[55] and efforts are being made, at both the international and national levels, to interpret the term as a legal concept.

As a legal term, it would be necessary to define the rights, say, as a form of IPRs. These rights would cover, for example, the products of farmer selection and breeding. As noted above, GURTs may threaten traditional practices, such as seed saving, farmer breeding and unhindered seed exchange. Recognising and protecting farmers' rights is one way of securing these rights against appropriation by owners and developers of GURTs.

VI. STRATEGIC POLICY RESPONSES AND WAY FORWARD

It is worth pointing out that, firstly, GURT is a technology and that no technology is innately good or bad. The utility of any technology depends on the use to which it is put. Secondly, GURT, as a technology, is amenable to IPP. If they satisfy the criteria set out for grant of IPRs, reasons would have to be found for refusing to grant the rights. TRIPS has provisions against discriminating particular kinds of technologies. Consequently, the application of GURTs in ESA is unlikely to be countered through non-recognition of GURTs or IPP for GURTs. The following are some strategic measures that can be used to link GURTS and IPP with sustainable development.

A. Assessment of Benefits, Costs & Risks of GURTS & IPP

It is imperative that ESA countries assess both the impacts of IPP and GURTs on food security, agriculture and the environment in the region. This assessment should be followed by a determination of what measures the countries should take to counter the negative impacts, while building on the potential positive impacts of GURTs. The analysis in Table 1 above on benefits, costs and risks is informative and can form an initial basis for assessment.

B. Alignment with National Development Imperatives

The assessment of benefits, costs and risks should be followed by an alignment of GURTs and IPP with strategic needs, such as food security, sustainable agro biodiversity management and environmental sustainability. It should also include an assessment of the role of seed industry and local farmers in seed management activities and tailor an appropriate regime to motivate all actors within their contexts, given that the motivation of private seed companies may be economic while that of farmers may be both economic and social.

C. Use of Flexibilities Under TRIPS

If IPP is deemed to be a useful tool in this regard, countries should determine the best way to utilise them without flouting obligations under TRIPS. The use of flexibilities under TRIPs is one way of exempting particular technologies from patentability, especially if they are a threat to national security. Framing a food security or environmental

55 P Cullet, Plant Variety Protection in the TRIPs: Towards the Development of Sui Generis Protection Systems (Paper prepared for the ACTS Regional Workshop on Biotechnology, Nairobi,1999) September 27-29)2.

sustainability argument as a national security concern is one way in which ESA countries can limit negative impacts of GURTs and IPP.

D. Regulation

There should also be regulation of the application of GURTs to ensure that the negative impacts are minimised while the positive ones are harnessed. Mechanisms, such as compulsory licensing, can be used to make GURTs available where this is deemed important for national food security. Where GURTs are likely to lead to reduced public R&D investment, concerted efforts should be made to ensure that there is strategic investment in public sector research to avail R&D results to resource poor farmers.

E. Engagement in Ongoing Debates on GURTS

There is also a window of opportunity availed by the Article 8(j), Working Group, which has been mandated to examine the socio-economic impacts of GURTs.[56] Countries in ESA should participate effectively in this working group to bring their perspectives to bear on the findings and the actions decided on. Article 8(j) provides:

> Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

This provides a context for bringing in the protection of community, breeders and farmers' rights as a counter to negative impacts of GURTs.Indeed, having GURTs addressed under this provision provides a context for linking IPP to technology and exigencies of equity in the sharing of benefits by taking into account the multiplicity of actors involved in the conservation and management of biological resources.

F. Development of a *Sui Generis* Regime

The negative impacts of GURTs and IPP on sustainable development can be countered through the fashioning of an effective *sui generis* regime. The core elements of a *sui generis* national policy and legislation for plant varieties should include:[57]

The recognition and protection of the rights of local communities; additional requirements such as allocating value for cultivation and use (to provide incentives for innovation in the interests of local needs such as food security) and declaration of origin (to help establish whether prior informed consent was obtained) may be set up; recognition and protection of farmers' and community rights without the need for registration; restriction of breeders' rights to exclude harvested crops; limitation of the concept of an essentially

56 Decision VII/16(D), Article 8(j) and Related Provisions, in Report of the Seventh Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc UNEP/CBD/COP/7/21 (2004).

57 Patricia Kameri-Mbote, 'Community, farmers' and Breeders' Rights in Africa: Towards a Legal Framework for sui generis Legislation'(2003) University of Nairobi Law Journal, 120.

derived variety; enhancement of farmers' privilege to save seeds; public interest broadly construed must prevail over plant breeders' rights; enhancement of plant breeders' exceptions such as research; provision for compulsory licensing; full consideration of environmental and ethical concerns; and promotion of food and health security.

National law should assist, not only in contributing to the sustainable management of biodiversity, but also in giving and allocating property rights to local innovators as well as to all other actors in the seed and agriculture industry. Accordingly, the following measures are proposed.

1. Community Rights[58]

The community should be defined as a legal entity referring to a group of people having a long standing social organization and include indigenous people and local communities. Such communities should have inalienable rights over its biological resources, innovations, practices, knowledge and technology (including the community's right to use and collectively benefit from those resources).The recognition of the community intellectual rights should not be predicated on registration, butcustomary laws and practices of communities should be applicable to community rights.

Any access to biological resources belonging to a community should be subject to prior informed consent of the community through an established procedure. Further, the right to use resources should be coupled with the corresponding duty towards the conservation and sustainable use of biological diversity. The existence of concurrent rights in a community a number of persons should be permitted so that each member may hold a right, or bundle of rights, expressing a specific range of functions. Where the community institutions have disintegrated, the rights should be vested in a trustee appointed by the state to hold in trust for concerned communities.

2. Farmers' Rights

Farmers' rights should be expressly recognized and protected as the rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources. Like community rights, these rights must not require prior declaration or registration. The rights would be defined as a form of IPR and would cover the products of farmer selection and breeding, and the traditional resources that contribute to the conservation, development and sustainable use of plant and animal genetic resources. They would include rights to use exchange and market farm-saved seeds, protection of traditional knowledge, benefit-sharing and participation in decision-making at the national level. They must also include the right to information so that they can participate effectively in the decision-making process. Additionally, customary laws and practices of the concerned communities must be applied in the protection of farmers' rights.[59]

58 ibid.

59 ibid.

3. Breeders' Rights

The core elements of a *sui generis* national policy and legislation on plant varieties should include the recognition and protection of the rights of local communities (such as their prior consent must be sought).There should be no creation of rights in favour of third parties in respect of local varieties, and breeders' rights should allow for farmers' rights to produce and/or sell plants and propagating material of the protected variety on a non-commercial basis. Additional requirements, such as value for cultivation and use (to provide incentives for innovations in the interests of local needs such as food security) and declaration of origin (to help establish whether prior informed consent was obtained), may also be instituted.

Identifiability and distinctness of the new variety should be the only criteria of eligibility for recognition and protection. The requirements of uniformity and stability could be applied in a very flexible manner. This is in the interests of protection, compensation and conservation. Such a system would effectively cover the interests of both local communities and large-scale commercial breeders. However, the plant grouping may still have to be distinct. Further, breeders' rights to exclude harvested crops should be restricted and limits placed on the concept of 'essentially derived variety'. Provision should be made for compulsory licensing or limitation on the number or type of varieties in the public interest. Public interest should be broadly construed to prevail over plant breeders' rights, but ensure compensation and due process of the law through provisions for the effective enforcement of IPRs, for example through a transparent judicial procedure. Further, the duration of plant variety protection for commercial breeders should, as much as possible, conform to the socio-economic context and circumstances of each country. Full consideration of environmental and ethical concerns should be made by, for instance, excluding protection of certain plant varieties in order to protect plant life or the environment, prohibiting the patenting of plants, animals and traditional knowledge, including bio-safety provisions, such as the ban on the protection of varieties injurious to biodiversity, and promoting food and health security.

IV. BENEFIT-SHARING

Benefit-sharing needs definition in key areas. These include the mechanisms of benefit-sharing,[60] who should receive benefits, and what constitutes a benefit. Benefits can be a form of compensation, reward or recognition. Benefits may include royalties, lump sum fees, technology transfer and training, business ventures and development assistance, especially in the context of community rights.[61]

Fair and equitable sharing of benefits should also be defined. Prior informed consent and declaration of origin are critical instruments for the implementation of benefit-sharing mechanisms, and could also be used as additional protection requirements. One option is to place the resources in trust with the government. Concerned groups could then make claims to the government. Another option is to create community funds or trusts, into which royalties could be channeled. Establishing registers would go a long

60 ibid.; The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 29 October 2010, Nagoya Japan.

61 ibid.

way towards facilitating benefit-sharing mechanisms. Alternatively, community group representatives could be registered and used as custodians of these resources.[62]

Specific descriptions should be provided of the manner in which benefit-sharing arrangements should be negotiated. Fair and equitable sharing of benefits should cater for the coffers of government, private and public sector institutions, and local communities.

Legal guarantees should include biodiversity collecting regulations. The critical elements of such legislation should include user fees, where appropriate, and provisions for the equitable sharing of benefits.[63]

Contractual agreements should be developed for access to biological resources. In the context of joint research and development, technology transfer could be used as a form of benefit-sharing. Access and sharing of benefits should depend on various factors, such as the nature of the objective (such as commerce or education/research). Commercial research agreements could also be more rigorous in pursuit of benefit-sharing.

H. Institutional and Administrative Frameworks

Sui generis policies and legislation should provide for the establishment or designation of appropriate institutions for their effective implementation. These institutions could include a national institute or other authority and a national trust fund for distribution of benefits. A judicial or administrative enforcement structure should be set up. Most countries' environment management authorities have formulated draft regulations on the national environment. These regulations contain the recognition and appreciation of farmers' and community rights and traditional knowledge systems. The authorities are mandated to promulgate regulations on access to genetic resources, including guidelines on benefit-sharing.[64]

National policy and legislation can go a long way towards achieving the objectives of conservation, development and equitable benefit-sharing. However, legislation alone may not be enough. There is also need to enhance capacity building, in terms of research and training, as well as institutional, legal, commercial, technological, informational and human capacity.[65]

The above are some of the institutional and technical matters of particular concern to developing countries. Community and farmers' rights must be recognized at the outset. Only then can different interests be balanced with the need for active participation of all players. Countries may need to strengthen regional approaches to benefit from stronger negotiating positions. The East African Community (EAC) and the South African Development Community (SADC) should provide the context for cooperation in areas of food security and natural resources.[66]

62 ibid.

63 ibid.

64 ibid.

65 ibid.

66 ibid.

DELINEATING A RIGHTS-BASED CONSTITUTIONAL FISCAL SOCIAL CONTRACT THROUGH AFRICAN FISCAL CONSTITUTIONS

*Attiya Waris**

ABSTRACT

This paper examines the African constitutions to see whether they are indeed clear and precise on what the state can do in the context of the fiscal social contract and the fiscal constitution as well as how this reflects on government behaviour. It makes a case for the need to re-assess most of the tax constitutions and to look into ways in which states and government representatives are accessing the tax money of the citizens and residents.

I. INTRODUCTION

A tax system is based on the constitution of a country. However as far as developing countries are concerned, relatively little attention appears to have been paid to the assembly, as a system, of the fiscal constitution's building blocks.[1] Principles of constitutional law like equality, the protection of marriage and family, and the guarantee of welfare are particularly important features of tax systems. These principles are found in both human rights as well as constitutional law. In addition, the constitution builds the framework of all governmental activities, including the tax policy; e.g. the German Constitutional Court has developed jurisprudence remarkable for its judicial activism in the tax area.[2]

Beginning with Adam Smith, writers have been attempting to establish criteria by which revenue and expenditure policies should be evaluated. The principles laid down by Adam Smith in Wealth of Nations are still followed today in taxation policy. Smith argued that people pay according to their abilities, according to the proportion of revenue they enjoy under the protection of the state.[3] He thus covers both the ability to pay and the benefit theories of taxation. Reformulated by J S Mill ability to pay became known as 'ability to inflict equal sacrifice'.

There is continuing debate whether this principle affects both revenue and expenditure and how to best deal with it. Musgrave argues that the principle is said to have fallen short of providing the full answer for budgetary policy. He states that it deals with the raising of tax only, while expenditure is left out traditionally, considered by the ability to pay theorists to be a political matter not for economic analysis.

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1 Ahmad Litvack *et al*, *Rethinking Decentralisation in Developing Countries* (New York, World Bank 1998).

2 Victor Thuronyi, *Comparative Tax Law* (The Hague, Kluwer Law International 2003) 83.

3 Adam Smith, *The Wealth of Nations* (London and New York, Dent & Dutton 1977) Book V Chapter II.

Musgrave goes a step forward and states that no one questions the fact that the budget should be designed to maximise welfare but that the fundamental question that remains unanswered is how benefit is valued and how the valuation then depends on the manner in which the tax bill is distributed.[4]

Finally, there has long been a debate on taxation and fairness. Rousseau argued on the basis of the impulse to help that seems to be one of the more pleasant sides of human nature. Rousseau[5] classed it among the "natural" feelings and Adam Smith also thought it was inherent to human nature.[6] In addition, Henry George argued for the idea that the strong and the rich have a moral obligation to assist the weak and that need is normative in all major world religions.[7]

Assistance could also take the form of charity and be voluntary. Keynes stated that in framing tax principles and state finance, political and social aims must be considered together with the equitable and economic aims.[8] However, within today's context of the welfare state as well as the connection between tax revenue and expenditure within the social contract would lend itself to the possibility that the connection being made could be possibly activated through the fairness in the levy and distribution of tax income? Although African states are predominantly not welfare states they have all signed onto the international human rights instruments and these do hold welfare based concepts.

Africa is of particular interest because not only does it currently have constitutions that date from the 1950s up to 2010 but these constitutions have come into place through a myriad of processes and political systems: through national referendums and constitutional assemblies, supporting existing monarchies or creating democracies and overturning dictatorships. In all these texts the fiscal provisions are always present. The result is a multiplicity of approaches to the creation of a fiscal constitution that are worth exploring and discussing to attempt to reach some understanding of what would be most suitable for a tax state attempting to achieve the level of a fiscal state. This paper will use the sociology theories of Schumpeter as well as Ormrod and Bonney on the development of the fiscal state as well as Buchanan's political science argument on the right or power to tax, to analyse the various African constitutional texts and begin to understand the constitutional problems facing taxation and its constitutionality in Africa within the context of the behaviour of African governments.

This paper, which is divided into 5 parts, is a preliminary textual analysis of African constitutions to see if they are indeed clear and precise on what the state can do in the context of the fiscal social contract and the fiscal constitution as well as how this reflects on government behaviour. Part 1 will introduce the issue. Part 2 will discuss the theory of a fiscal social contract and its place in a constitution from both a sociological and political science perspective. Part 3 will analyse the fiscal provisions in African constitutions currently with reference to the practice of the governments. Part 4 will make recommendations and part 5 will conclude.

4 Richard Musgrave and Alan Peacock, *Classics in the Theory of Public Finance* (London, Macmillan & Co 1962) xi.

5 Jacques J Rousseau, Discourse on the Origin and the Foundations of Inequality among Men (1754).

6 Cited in Paul Sweezy, The Theory of Capitalist Development (Monthly Review Press, 1970) 4.

7 Milton Friedman, *Capitalism and Freedom* (Chicago, University of Chicago Press 1962).

8 John N Keynes, *The Scope and Method of Political Economy*. (London, Macmillan and Co 1917) at 81.

II. FRAMING THE FISCAL SOCIAL CONTRACT

While the overall constitution can be said to mould the spatial organization of the state, the fiscal constitution can be said to mould the spatial organization of the public finances. By doing so to some extent, the fiscal constitution sets the organizational conditions and structures through which it may influence the geography of economic development. The spatial organization of the public finances generally coincides or overlaps with the multilevel system of government, where such a system exists. No effects of the fiscal constitution upon the geography of economic development could materialize without the fiscal interactions between the system of government, multilevel or otherwise, and its outer environment (e.g., taxpayers, beneficiaries of public spending).[9]

The sociological approaches deal with a multilevel system of government from a fiscal standpoint.[10] Following the classic statement by Musgrave (1959), the economic functions of government are classified in three branches: resource allocation, macroeconomic stabilization, and income and wealth redistribution. Contrary to what the fiscal federalism label suggests, such literature is frequently applied to both unitary and federal systems of government, or, for that matter, to any system of government integrated by a plural number of levels of government, loosely defined.[11] Such is distinctively the case when fiscal federalism is defined, as Bird does, as "the analysis of the problems that gave rise to, and arise from, the existence of more than one level of government within the same geographical area."[12] Certain assumptions employed in the fiscal federalism literature (e.g., perfect information and fully rational decision making), as well as the theoretical implications that follow therein, have been strongly and rightly criticized.

The political science approach looks at the differences in income and wealth between persons typically give rise to differences in income and wealth between regions in a given country. As income and wealth constitute the backbone of taxation, regional disparities in fiscal capacities (i.e., the potential capacity to generate tax revenues) and, under certain assumptions, in the provision of public goods arise. A central normative question in this regard is whether governments should seek to redress regional economic disparities.

One approach holds that whatever the norms of distributive equity are, they should apply to individuals, rather than to groups, regional or otherwise. For instance, Buchanan argues for the use of the principle of "equal fiscal treatment for equals" over the national scope, where individuals, instead of the sub-central government jurisdictions

9 Jorge Armando Rodriguez, 'Fiscal Constitution and Regional Disparities in Economic Development: An Exploration of the Cases of Colombia, Canada and Spain' (DPhil thesis, University of Pittsburgh 2009).

10 Within neoclassical economics, for example, Charles Tiebout's 'A Pure Theory of Local Expenditures' (1956) 64 (5) The Journal of Political Economy 416; Richard Musgrave's 'The Theory of Public Finance: A Study in Public Economy' (1960) 15(1) The Journal of Finance 118; and Wallace Oates's 'Fiscal Federalism'(1972) 6(4) Journal of Economic Issues 225 are commonly considered ground-breaking works in the body of literature known as fiscal federalism, which examines, mostly from a normative viewpoint, the assignment of functions and revenue sources between levels of government.

11 Wallace Oates, 'An Essay on Fiscal Federalism' (1999) 37 Journal of Economic Literature 1120.

12 Richard Bird 'Rethinking Subnational Taxes: A New look at Tax Assignment' (1999) Working Paper No. 99/ 165, Washington, D.C, International Monetary Fund.

(for example, states, departments), would be the appropriate units for the assessment of equity.[13] This would be best implemented, according to Buchanan, by means of "geographically discriminatory central government personal income taxation," with tax rates varying from jurisdiction to jurisdiction "so as to offset differences in state fiscal capacities." (p. 595) But this policy option is judged by the author to be unfeasible, especially from a political standpoint.

Since many African states are either conflict or post conflict states, Schumpeter's argument that war justifies the collection of taxes from the populace, and further, that the viability of any state can be measured by its ability to draw taxes from the citizenry takes on importance.[14] He further argues that without the financial need, the immediate cause for the creation of the fiscal state would have been absent.[15] Thus, the infringement of the individual liberties and by extension human rights by the ruler in order to further his interests is argued by Backhaus as being the crisis of the fiscal state where needs arising outweigh the resources at the disposal of the state.16 This links back to the need to have taxes responsive to needs of the state and potentially human rights concerns.

A. The Sociological Approach: the Typology of the Fiscal State

The stages of development of the fiscal state can be broken into different stages or types based on the existence, the extent of reliance and the complexity of application of taxation. There have been 4 types of states set out, analysed and subcategorised, the domain[17] and tax[18] states. He argued that the main difference between these two states was that domain states were not supported by tax but by estates predominantly while the tax state relied more on tax.[19] Ormrod and Bonney have subsequently added two new types of states: the tribute state[20] that relied mainly on plunder and the fiscal state[21] that not only relied on taxes but also used them to improve societal well-being. Daunton[22] set out

13 James Buchanan, 'Federalism and Fiscal Equity' (1950) 40 The American Economic Review 583.

14 Joseph Schumpeter, 'The Crisis of the Tax State' in Richard Swedberg (ed) The Economics and Sociology of Capitalisms. (New Jersey, Princeton University Press 1991) 99.

15 ibid. 108.

16 Juergen Backhaus, 'Fiscal Sociology-What for?' (2002) 61(1)American Journal of Economics and Sociology 55, 73.

17 Tilly describes this by stating that in the middle ages rulers relied on their own estates or domains for resources and on the provision of goods and services by dependants. Resources might have also been obtained by plunder or colonization, by coercion or trade.

18 During the wars, there was a search for additional revenues outside those already levied and thus began the levy of tax by the state. See Richard Bonney, Economic Systems and State Finance, (Oxford: Clarendon Press 1995), 14.

19 Schumpeter (n 14) 102-110.

20 They defined the tribute state as a state that relies on plunder and extortion where a surplus is produced by the colonised from domain or otherwise. See Richard Bonney and William Ormrod, 'Crises, Revolutions and Self-Sustained Growth: Towards a Conceptual Model of Change in Fiscal History' in William Ormrod, Margaret Bonney and Richard Bonney (eds.), Crises, Revolutions and Self-Sustained Growth: Essays in European Fiscal History, 1130-1830 (Paul Watkin Publishing 1999) 4.

21 his state also combines a high level of tax revenue with large-scale borrowing ibid. 13.

22 Daunton, Trusting Leviathan: The Politics of Taxation in Britain 1799-1914 (Cambridge, Cambridge University Press 2001).

the pre-cursors of the modern fiscal state as the domain state and the tax state adopting Ormrod and Bonney's definitions while making no reference to primitive states.[23]

In considering colonial states, Bonney added on a sub-category to the domain state of the primitive, less primitive, entrepreneurial and colonial states but did not address the placement of the post-colonial state.[24] However, Moore added the term rentier state to refer to the post-colonial state that relies mainly on rent from resources and other strategic interests as well as foreign aid calling it a pre-tax state without addressing where in the models it fitted.[25]

Schumpeter argued that a state develops from one stage to another based on the level of development of the fiscal state. Ormrod and Bonney later developed a table analysing Schumpeter's argument and developing it further. Within that table they set out the place of the constitution in the development of the fiscal state. They argue that the constitution reflects the level of the development of the fiscal state. The specific provision is set out in the table extract below:

Characteristic	Primitive State	Domain State	Tax State	Fiscal State
Form of Government	'Predatory' rulers (usually dynastic) or tribes seek to extend their rule at the expense of their neighbours. Different forms of government possible: a peripatetic ruler forms the main link between the centre and periphery.	Personal, few limits in decision making	Highly developed institutions and precise legal procedures leading towards an advanced 'fiscal constitution'	Precise credit and tax legislation and highly advanced 'fiscal constitution'.

Source: Ormrod and Bonney[26]

The extent of this element within the OB model is that the more specific and precise the reference to the tax and the fiscal within the constitution of a state the closer it is to achieving the level of the fiscal state. However the detail of how the discussion takes place is limited to a use of the term specificity. This specificity is broken down into the discussions on how the phrasing is set out in constitutions as argued by Brennan and Buchanan.

The first Constitution to address the issue of resources was the French Declaration of 1789. It recognised the transfer of the responsibility for security to the state in exchange for money in its articles 13 and 14:

> 13. A common contribution is essential for the maintenance of the public forces and for the cost of administration. This should be equitably distributed among all the citizens in proportion to their means.

23 ibid. 4, relied on the Ormrod-Bonney model in his analysis of the types of states and adopts the evolution of states from one form to other by using the model as his reference point.

24 Ormrod, Bonney and Bonney (n 20) 14.

25 Mick Moore, 'Revenue, State Formation, and the Quality of Governance in Developing Countries' (2004) 25 International Political Science Review 297-319.

26 Derived from the Ormrod-Bonney Model see Ormrod, Bonney and Bonney (n 20).

14. All the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put; and to fix the proportion, the mode of assessment and of collection and the duration of the taxes. [27]

Following from this, the Constitution of France of 1793 declared:

Society owes subsistence to its unfortunate citizens either by giving them work or assuring them the means to exist if they are incapable of work.[28]

From a historical perspective, it can be argued that the French tax state was first codified here through the recognition of the link between resources and welfare or human rights in its constitution. The citizens were granted the right to control the state's resources and at the same time were granted the right to work and the constitutional authorisation to set up what were the rudimentary beginnings of modern social welfare.

Despite this ground breaking step in linking rights to resources in the French Constitution, this development did not spread to other states. Instead the world was split on the basis of class, race, gender as well as other historical factors that led to the neglect of the need to fund the improvement of the well-being of the society using its available resources, and political and civil rights took precedence over the socio-economic rights. Unfortunately, there are no other constitutions that adopted this approach.

B. The Political Science Approach: The Power to Tax

Brennan and Buchanan argue that the power to tax does not carry with it the obligation to use tax revenue in a particular way. It is simply a power to take. As a result, all constitutional rules may be seen as possibly limiting the power to tax.[29] They thus state, that there is no commensurate right of citizenry for the money they remit to government. It could as a result, be argued that no one may be deprived of property arbitrarily and thus there is an entitlement for that deprivation. However, the power to tax debate does not make room for this argument. This debate of power versus the right to tax situates this paper, which must look at the constitutionality of the taxation and finance provisions found in constitutions.

Detailed discussion on the constitutionality of the power to tax in recent debates centres on the issue of unitary and federal power sharing.[30] In the United States[31], scholars like Beale never made any reference to whether the founding fathers of the US Constitution

27 Declaration of the Rights of Man and Citizen, (26 August 1789) 1.

28 Constitution of the Republic of France (1793).

29 Geoffrey Brennan and James M Buchanan, *The power to tax: analytical foundations of a fiscal constitution*. (Cambridge, Cambridge University Press 1980) 8.

30 Gerard VL Forest, The Allocation of Taxing Power under the Canadian Constitution. (Toronto, Canadian Tax Foundation 1981); Oluwole Akanle, The Power to Tax and Federalism in Nigeria. (Lagos, Centre for Business and Investment Studies 1988).

31 William S Moore, 'Procedural and Quantitative Constitutional Constraints on Fiscal Authority' in William S Moore and Rudolph G Penner (eds), The Constitution and the Budget: Are Constitutional Limits on Tax, Spending, and Budget Powers Desirable at the Federal Level (Washington, American Enterprise Institute 1980).

inferred into the provisions the right of government to levy tax.[32] Dividing tax power between different levels of government in a federation is shown to arguably lead not only to over-taxation but also distorts the composition of state and federal public spending.[33] In federal states however, constitutional law, discussions are on the division of tax power in between the constituent states of federal states like Canada, US and Nigeria. They are concerned with the share of taxation that is remitted back to the federal authority vis-à-vis the amount retained by the state and how to maintain the balance based on population and productivity[34]

The major motives of government taxation policy can be derived from the view of Musgrave's classical functions of public finance[35]: financing and steering. If we take the financing requirements as given, then the public deficit can be seen as an indicator for the demand of tax policy and tax reforms or just evidence of overspending.[36] Imposing taxes can thus also be a key factor in determining the amount of savings and investment in an economy, as well as how much people work, when and on what they spend their income, and on the structure of business.

A higher tax rate translates directly into a lower amount of disposable income which means less money available for saving and investment, it also results in people working to obtain a certain disposable income and nothing more (thus not working harder for more money but to maintain a standard of living) and finally businesses are structured in order to avoid as much tax as possible. As a result, theoretically, the distribution of the tax burden might stimulate tax payer behaviour by encouraging remission of taxes if they are geared towards a common welfare goal.[37] Constitutional theorists, thus, seem to approach the economics of the issue from a distance. They argue that since government has the power to tax, the only limitations that can be placed on it must be constitutionally and legislatively imposed and hence that state-society relations are moot.

C. The Economist Approach: Tax and Fairness

The principle of John Locke, echoed by the French philosophers of the 18th century is that man is entitled to the fruits of his labour.[38] Locke thus concluded that this lead to the clear philosophical belief that it is a contradiction in a free society for government to take more than half the fruits of a man's labour.

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32 Joseph H Beale, "Jurisdiction to Tax." (1919) 32 Harvard Law Review 587; Akhil Amar Reed, "Our Forgotten Constitution - A Bicentennial Comment." (1987) 97 Yale Law Journal 281.

33 Berthold U Wigger and Udo Wartha, "Vertical tax externalities and the composition of public spending in a federation." (2004) 84(3) Economics Letters 357.

34 Richard Bird, *Tax policy and economic development Baltimore*. (John Hopkins University Press 1982).

35 Richard A Musgrave and Peggy B Musgrave, *Public finance in theory and practice*. (New York, McGraw-Hill 1980).

36 Gerrit B Koester, "The political economy of tax reforms - Evidence from the German case 1964-2004." [2005] DOI 6.

37 Donald Racheter and Richard E Wagner, (eds.) Politics, taxation, and the rule of law: the power to tax in constitutional perspective. (Dordrecht, Kluwer Academic Publishers 2002).

38 John Locke, Two Treatises of Government. (1690) at chapter 5 section 27 <http://history.hanover.edu/courses/exerpts/111locke1.html> accessed 13 December 2006.

In the 18th century progressive thinkers such as Locke[39] and Hume[40] felt it was wrong and this has also been argued recently in the House of Commons.[41]

Arguments that dispose of the fairness concept usually argue for security and defence. Defence is seen as being more important than opulence[42] and many allow the imposition of tariffs to prevent dependence on imports.[43] Malthus also supported the concept of high tariffs based on the argument of future wars agreeing with Adam Smith.[44] Ricardo however disagreed with this analysis and felt that no matter what sanctions were imposed food would always be allowed through.[45]

D. The Social Welfare and Human Rights Approach: The Right to Tax

The beginning of the twentieth century resulted in creation of the Poor Law, an old age pension, unemployment and sickness benefits were introduced and in the 1942 Beveridge Report mapped out the development of social security.[46] The European Union's Social policy has been that of the maintenance of the welfare state with the wellbeing of citizens being paramount. The concept began with the avoidance of unemployment and political focus on economic and social issues. Democracy was seen as a free market where people were taken care of.

Cobham has analysed the concept of development economics and governance with a focus on tax. He argues that there is a need to assess how a welfare state can be funded in Africa.[47] This is an interesting argument and may prove to be the link that one could use between human rights and taxation. The concept of the welfare state developed in Europe and there have been arguments posited by various European authors that the age of the welfare state in Europe is passed as it is working to prevent the continuous development of the state. This argument could be used to show that there is now a necessity in developing countries to actually have a welfare state in order to alleviate poverty but through and by nation states for their domestic populations instead of looking to the international community to pool resources for development projects.

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39 ibid.

40 David Hume, An Enquiry Concerning Human Understanding (1748) <http://oregonstate.edu/instruct/phl302/texts/hume/humeunderstanding. html> accessed 13 December 2006.

41 House of Commons Debate 14 June 1991, Col 1155 <http://www.publications.parliament.uk/pa/cm199091/cmhansrd/1991-06-14/Debate-1.html> accessed 16 April 2007.

42 Smith (n 3).

43 Mancur Olson, *The economics of the wartime shortage: a history of British food supplies in the Napoleonic War and in World Wars I and II*. (Durham, NC, Duke University Press 1963) 3.

44 Thomas R Malthus, "Observations on the Effects of the Corn Laws, and of a Rise or Fall in the Price of Corn on the Agriculture and General Wealth of the Country." (1814) <http://socserv.mcmaster.ca/econ/ugcm/3ll3/malthus/cornlaws> accessed 1 May 2007.

45 David Ricardo and Piero Sraffa, The works and correspondence, (Cambridge U.P. 1962) 176.

46 John A Kay and Mervyn A King, *The British Tax System*. (Oxford; New York, Oxford University Press 1990) 105.

47 Alex Cobham, 'Recommendation to the Dept. for International Development of the United Kingdom: Funding a Welfare State in Africa' The Guardian(London, 20 February 2006).

Taxation plays a key role in helping African countries to reach their Millennium Development Goals (MDGs). African governments aim to use taxation to: finance their social and physical infrastructure needs; provide a stable and predictable fiscal environment to promote economic growth and investment; promote good governance and accountability by strengthening the relationship between government and citizens; and ensure that the costs and benefits of development are fairly shared. However they neither place human rights nor social welfare on the list of their aims.

Thus far there is only a limited legal perspective on constitutions that has so far led to fiscal issues being dealt with only in terms of the powers of the government to raise taxes, and the duties of citizens to pay them. The wider social science concept of fiscal constitutions suggests that what is needed is also a set of obligations on government relating to expenditure. In addition the role of fiscal policy in macro-economic management, which in Africa means economic development, rather than the welfare state will also be partially discussed in order to contrast the actions of government's vis-à-vis their fiscal constitutions. These theories of Smith and Rousseau will be used in approaching the research question as to whether African constitutions grants government the right or the power to tax. This will be done by analysing the fiscal provisions in the constitution granting the state the ability to tax while focusing on the link between income and expenditure of government and how to approach the link from the point of view of the overall system of governance.

III. THE FISCAL CONTRACT IN AFRICAN CONSTITUTIONS

The issue that now arises is where would one place a state simply from a reading of the fiscal constitution. The provisions in the 1789 French Constitution are the most inclusive and well controlled of the provisions. They were a result of a well-fought battle for the emancipation of the people from an oppressive regime. Arguably the position of the French republic as a post-conflict state at a point in time that was pre-industrialisation would be a fairly similar example as to where we would place many of the post-colonial, post-conflict as well as conflict developing states in Africa today. It is with this basis in mind that diverse constitutions around Africa are being discussed and analysed in this paper in order to indeed assess whether they are adequate for the needs and requirements of developing states generally and whether the use of language in the constitution adequately captures the requirements of states at this stage of development

A. The Power to Tax

Twenty African constitutions make reference to a power to tax either directly or indirectly. The constitutions that specifically refer to or use the term 'power' include the Constitution of the Republic of Ethiopia, 1995. Article 96 is titled 'the federal power of taxation'. The Federal Government shall levy and collect custom duties, taxes and other charges on imports and exports.

1. It shall levy and collect income tax on employees of the Federal Government and international organizations.
2. It shall levy and collect income, profit, sales and excise taxes on enterprises owned by the Federal Government.

3. It shall tax the income and winnings of national lotteries and other games of chance.
4. It shall levy and collect taxes on the income of air, rail and sea transport services.
5. It shall levy and collect taxes on income of houses and properties owned by the Federal Government; it shall fix rents.
6. It shall determine and collect fees and charges relating to licenses issued and services rendered by organs of the Federal Government.
7. It shall levy and collect taxes on monopolies.
8. It shall levy and collect Federal stamp duties.

Other provisions in the Ethiopian Constitution make specific reference to regional as well as centralized taxing powers.[48] Similarly the Constitutions of Sierra Leone[49], Kenya[50], and Liberia[51] are very clear on the term power and specify how it is to be imposed in intense detail.

48 Article 97 sets out the state power of taxation; article 98 refers to the concurrent power of taxation; article 99 the undesignated powers of taxation.

49 Article 110
(1) No taxation shall be imposed or altered otherwise than by or under the authority of an Act of Parliament.
(2) Where an Act enacted pursuant to subsection (1) confers a power on any person or authority to waive or vary a tax (otherwise than by reduction) imposed by that Act, the exercise of the power of waiver or variation in favour of any person or authority shall be subject to the prior approval of Parliament by resolution passed in that behalf.
(3) Parliament may make provision under which the President or a Minister may by order provide that, on or after the publication of a Bill (being a Bill approved by the President) that it is proposed to introduce into Parliament providing for the imposition or alteration of taxation, such provisions of the Bill as may be specified in the order shall, until the Bill becomes law, have the force of law for such period and subject to such conditions as may be prescribed by Parliament: Provided that …
(4) Parliament may confer upon any authority established by law for the purpose of local government power to impose taxation within the area for which that authority is established and to alter taxation so imposed.

50 Constitution of Kenya 2010, Article 209
(1) sets out the power to impose taxes and charges. Only the national government may impose –
(a) income tax;
(b) value-added tax;
(c) customs duties and other duties on import and export goods; and
(d) excise tax.
(2) An Act of Parliament may authorize the national government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).
(3) A county may impose –
(a) property rates;
(b) entertainment taxes; and
(c) any other tax that it is authorised to impose by an Act of Parliament.

51 The Constitution of Liberia 1986, Article 34 states that the Legislature shall have the power:
d) to levy taxes, duties, imports, exercise and other revenues, to borrow money, issue currency, mint coins, and to make appropriations for the fiscal governance of the Republic, subject to the following qualifications:

This same characteristic can be found in the constitutions of South Africa[52] and Zambia[53].

Other terminology evokes the principle of the power to tax including terms apart from the word power includes terms such as 'obligations' or 'duty' on citizens as well as 'imposition' of tax by the state. The Constitution of the Republic of Cameroon sets out in Article 29(6) that a person must work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society; (emphasis mine). The use of the word imposed here amounts to terminology that puts this constitution into the power to tax side of the debate.

52 The Constitution of the Republic of South Africa 1996, Article 228.
Provincial taxes (a) A provincial legislature may impose taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and (b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or custom duties. [Para. (b) substituted by s.9 of Act No. 61 of 2001.] The power of a provincial legislature to impose taxes, levies, duties and surcharges may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour; and must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered. (Date of commencement: 1 January, 1998.)
229. Municipal fiscal powers and functions Subject to subsections (2), (3) and (4), a municipality may impose rates on property and surcharges on fees for services provided by or on behalf of the municipality; and *2 if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty. The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and may be regulated by national legislation. When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation.
The division may be made only after taking into account at least the following criteria:the need to comply with sound principles of taxation; the powers and functions performed by each municipality; the fiscal capacity of each municipality; the effectiveness and efficiency of raising taxes, levies and duties; equity.
Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area. National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.

53 Constitution of the Republic of Zambia 1996, Article 323.
(1) A tax shall not be imposed, except by or under an Act of Parliament.
(2) Where a law enacted under clause (1), confers powers on any person or authority to waive or vary a tax imposed by that law, that person or authority shall report to the National Assembly periodically on the exercise of those powers, as shall be prescribed by an Act of Parliament.
(3) Parliament may enact legislation to confer power on a local authority established by law, to impose tax specified in that Act, within the area of authority of that local authority.

The constitutions of Malawi[54], Mauritania[55], Libya[56], Gambia[57], Tanzania[58], Ghana[59] similarly use the word imposed.

The Constitution of the Gabonese Republic, as adopted on 26 March 1991, amended up to 11 October 2000, states in Article 48 that, "All resources and expenses of the state must, for each fiscal year, to be evaluated and included in the annual finance bill tabled by the government in the National Assembly at the opening of the second ordinary session and no later October 30. If, after the budget session, Parliament voted separates without a balanced budget, the government is authorized to extend the previous budget by ordinance. This order may nevertheless provide, if necessary, any reduction in spending or increase revenues.

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54 The Constitution of Malawi chapter 18 states at article 171 and 172
171. No tax, rate, duty, levy or imposition shall be raised, levied or imposed by or for the purposes of the Government or any local government authority otherwise than by or under the authority of the law.
172. All revenues or other moneys raised or received for the purposes of the Government shall, subject to this Constitution and any Act of Parliament, be paid into and form one Fund, to be known as the Consolidated Fund (emphasis mine).

55 The Constitution of the Islamic Republic of Mauritania at article 20 states that: Citizens are equal before tax. Everyone should participate in public office according to his ability to pay. No taxes can be imposed only by law (emphasis mine).

56 The Constitution of Libya (1969) at article 17 taxation:
No tax will be imposed, modified, or cancelled and no one will be exempted from paying taxes except inaccordance with the law (emphasis mine).

57 The Constitution of the Gambia states that at article 149
(1) No taxation shall be imposed except by or under the authority of an Act of the National assembly
(2) An Act of the National Assembly may make provision -
(a) for the collection of taxes proposed to be imposed or altered in a Bill which has been presented to the National Assembly during a period of four months from the date of presentation or such longer period as may be specified in a resolution passed by the National Assembly after the Bill has been presented; or
(b) for any local government authority established by law to impose taxation within the area for which such authority is established, and to alter such taxation, but no provision shall include the power to waive any tax due.
(3) Where any law confers power on any person or authority to waive or vary a tax imposed by any law, the exercise of that power in favour of any person or authority shall be subject to the approval of the National Assembly (emphasis mine).

58 Article 138.
(1) No tax of any kind shall be imposed save in accordance with a law enacted by Parliament or pursuant to a procedure lawfully prescribed and having the force of law by virtue of a law enacted by Parliament.
(2) The provisions contained in sub article (1) of this Act shall not preclude the House of Representatives of Zanzibar from exercising its powers to impose tax of any kind in accordance with the authority of that House.

59 The Constitution of the Republic of Ghana 1992 at article 174
(1) No taxation shall be imposed otherwise than by or under the authority of an Act of Parliament.
(2) Where an Act, enacted in accordance with clause (1) of this article, confers power on any person or authority to waive or vary a tax imposed by that Act, the exercise of the power of waiver or variation, in favour of any person or authority, shall be subject to the prior approval of Parliament by resolution.
(3) Parliament may be resolution, supported by the votes of not less than two-thirds of all members of Parliament, exempt the exercise of any power from the provisions of clause (2) of this article (emphasis mine).

At the request of the Prime Minister, Parliament is convened within fifteen days in special session for further debate. If Parliament has not voted a balanced budget at the end of this special session for further debate. If Parliament has not voted a balanced budget at the end of this special session, the budget is definitively established by order of the Council of Ministers and signed by the President of the Republic be created, if it is of direct taxes and assimilated contributions or taxes are assessed as of 1 January. The Court of Auditors assist Parliament and the Government in monitoring the implementation of the Finance Act. The bill settlement, established by the Government together with the general declaration of conformity and the report of the Court of Auditors, to be tabled in Parliament no later than the beginning of the first ordinary session of the second year following the year of implementation of the budget concerned." (Translated)

The Constitution of Mali states at Article 23 that, "every citizen must work for the common good. Every citizen must fulfil all civic obligations, notably contributing monetary donations." (emphasis mine). The use of the word obligation is also found in the Constitution of Benin[60]. The Constitution of Mali also makes other references to financing the state[61]. Other constitutions that refer to obligations include the Democratic Republic of Congo[62].

The term duty is used in the Somali constitution, which states that:

> (2) The exercise of equality, freedoms, and other rights is inseparable from duties. Accordingly, it is the duty of each citizen:
>
> (a) … (h) To become a good tax-payer in order to contribute to the public expenditure according to the law and the citizen's capacity to pay …

60 The Constitution of the Republic of Benin 1990, Article 33, All citizens of the Republic of Benin have the duty to work for the common good, to fulfil all of their civic and professional obligations, and to pay their fiscal contributions (translated).

61 Article 70 states that the law shall be voted on by a simple majority in the National Assembly. Law shall establish regulations concerning among other issues the system of distribution of money, the tax base, taxes and methods of collection. In addition that under article 108 The Economic, Social and Cultural Council must be consulted on every project within the law of finances, every plan or program of the economy, society or culture as well as any legislative provisions of a fiscal, economic, social or cultural nature.

62 The Constitution of the Democratic Republic of Congo sets out in article 65 that:
All Congolese have the duty to fulfil their obligations to the State faithfully. They are also obliged to pay their taxes and duties (emphasis mine).

This is reflected in the Ugandan Constitution[63] and the Angolan constitution[64] and while, duty is not used in the Constitution of Equatorial Guinea[65], tax is to be paid without any reference to state responsibilities.

The question that arises is: do these states act upon these provisions of power based tax?

The South African Constitutional Court has heard cases on the right to housing[66] and medical care.[67] However, in all these three cases the decision was that the resources allocated for these issues were limited to the government budget and the court could not rule on how government policy distributes government revenue annually.[68] The arguments presented was that the link between state resources was left to the political will and the limited resources available to the state.[69] In Kenya in the case of Okunda v R the court made its decision in line with the South African position and in Uganda, the court held the same position in the recently decided case on maternal mortality.[70]

B. The Right to Tax

The right to tax is not stated explicitly in any constitution in Africa. It is however expressed through terms such as 'community duty' 'participation' and 'citizen's power'. The Constitution of Cape Verde has an interested approach to taxation where Article 82 is phrased in terms of 'duties towards the community' which states that:

Everyone shall have the duty to:

a) Serve the national community, making available to it his physical and intellectual capacities;

b) Work within the limits of his capabilities and capacities;

c) Pay the contributions and taxes established by law;

63 17. (1) It is the duty of every citizen of Uganda- (g) to pay taxes.

64 The Angolan Constitution, Article 88 under the provision of a duty to contribute states that: It shall be the duty of all to contribute to public expenditure and society in proportion to their economic means and the benefits they enjoy, through taxes and charges based on a fair system of taxation, under the terms of the law. Article 101 titled the Fiscal system states that, "The fiscal system shall aim to meet the financial needs of the state and other public entities, ensure that the economic and social policies of the state are realised and undertake the fair distribution of income and national wealth." Article 102 titled Taxes states that, "Taxes may only be created by law, which shall determine their applicability and rate, tax benefits and guarantees for taxpayers."

65 The Constitution of Equatorial Guinea, Article 19 sets out that every citizen shall pay taxes according to his revenues with no reference to any state responsibilities. The expenses and revenues of the State and the investment programs shall be registered in each financial year within the annual budget elaborated in accordance with the legislation in force.

66 Government of the Republic of South Africa v. Grootboom [2000] ZACC 19 (Grootboom case).

67 Treatment Action Campaign v. Minister of Health[2002] ZACC 16 (TAC case) See also Soobramoney v. Minister of Health (KwaZulu-Natal)[1997] 12 BCLR 1696 (CC) (Soobramoney case).

68 See generally Soobramoney v. Minister of Health (KwaZulu-Natal) (1997) ; South Africa v. Grootboom (2000) ;Treatment Action Campaign v. Minister of Health (2002).

69 Attiya Waris, Tax and Development: Solving the Fiscal Crisis through Human Rights. (Nairobi, Law Africa 2013).

70 Gijs Ooms *et al*, 'A Global Social Contract To Reduce Maternal Mortality: The Human Rights Arguments And The Case Of Uganda' (2013) 21(42) Reprod Health Matters 129.

It also has other more detailed provisions further strengthening this provision.[71]

Chad's Constitution at Article 53 states that tax is participatory. Each citizen participates, according to his or her income and his or her health, in public expenses. The Constitution of Morocco interestingly uses the word power for taxpayers rather than the state:

> Article 17: All citizens shall, according to their contributory power, bear public costs which shall be enacted and allocated only by the law, and in the manner stipulated in the provisions of the present Constitution.
>
> Article 18: All shall, in solidarity, bear the costs resulting from disasters suffered by the Nation.

The Constitution of Mozambique talks about a system of social justice and re-distribution making it a rights based tax system.[72]

> Article 100: Taxes shall be established and modified by law, and shall be set according to criteria of social justice. (emphasis mine).

Central African Republic Constitution in Article 15 states;

> Every citizen is equal before public duties and notably before taxation that only the law may, within the conditions provided by the present Constitution, create and rescind. They support in all solidarity the duties resulting from natural calamities or endemic, epidemic or incurable illnesses.

However these are a minority and only 5 constitutions in Africa have this approach. None of these countries have any case law that has been litigated to test these provisions however they all have social welfare provisions within the state with well-funded health care and education systems. For example, all medical services available in Mozambique are free.

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71 In addition article 95 sets out clear provisions on the fiscal system which states that:
1. The fiscal system shall be structured with a view to satisfying the financial needs of the State and the remaining public entities, attaining the objectives of the economic and social policies of the State and guaranteeing a fair distribution of income and wealth.
2. Taxes shall be levied by law which shall determine the tax base, the rates, the fiscal benefits and the taxpayer's guarantees.
3. No one shall be obliged to pay taxes which have not been levied in accordance with the Constitution or whose determination and payment are not made in accordance with the law.
4. The tax base shall not be increased, nor shall the rates be aggravated in the same financial. Fiscal Law shall not have retroactive effect, unless it has a more favourable content for the tax payer.

72 Article 127 Tax System
1. The tax system shall be structured in order to meet the financial needs of the State and other public bodies, achieve the objectives of the State's economic policy, and guarantee the fair distribution of income and wealth.
2. Taxes shall be established and modified by law, which shall stipulate tax incidence and tax rates, and fiscal benefits and guarantees afforded to taxpayers.
3. Nobody may be compelled to pay taxes that have not been established in accordance with the Constitution, and which are not assessed and collected in terms of the law.
4. During the course of the same financial year, the bases of tax incidence and tax rates may not be increased.
5. Tax law shall not have retroactive effect, except where this would be more favourable to the taxpayer.

C. Ability to Collect Tax

Some constitutions mention contribution and taxes but do not specify whether this is a distinct power or right. However the word tax is used in these constitutions. They instead refer to equality before taxes which is a principle or taxation or that tax is a domain of the law. They basically seem to only allow enough to state that the state has the ability to pass law on the collection of taxes. Article 64 of the Constitution of the Empire of Algeria (2008) states that:

(1) The citizens are equals with respect to taxation.

(2) Everyone should participate in financing the public expenses, in accordance with his contributory capacity.

(3) No taxes can be laid down unless in accordance with the law.

(4) No tax, contribution or duty of any nature can be laid down with a retrospective effect.

The difficulty with these constitutions is that a preliminary reading does not clarify whether it is a power or right to tax simply that the law on tax can be passed as in the Constitution of the Republic of Comoros (1996),[73] Burundi[74] and Madagascar (see

73 Article 39 Matters which are not attributed to the islands by the Constitution, pertain to the competence of the State. The law is voted by the Federal Assembly. The following matters are of the domain of the law: the tax base, rate of interest and modalities of collecting taxes receivable throughout the Republic …

74 Constitution of Burundi, Article 107:
The fundamental guarantees and obligations of the citizen:

– safeguard of the individual freedom; protection of the public freedoms; constraints imposed in the interest of the national defense and of the public security, to the citizens on their persons and on their assets.

The status of the persons and of the assets:
– Nationality, status and capacity of persons; matrimonial regimes, inheritance and gifts; regime of the property, of the real rights and of the civil and commercial obligations.

The political, administrative and judicial organization:
General organization of the administration; territorial organization, creation and modification of the administrative circumscriptions as well as the electoral divisions; electoral regime; general organization of the national orders, of the decorations and of the honorific titles; general rules of organization of the national defense; general rules of organization of the national police; statute of the personnel of the Corps of Defense and of Security; statute of the personnel of the Parliament; general principles of the public function; statute of the public function; state of exception; organic framework of creation and of suppression of the public [and] autonomous establishments and services; organization of the jurisdictions of all orders and procedure followed before these jurisdictions, creation of new orders of jurisdiction, determination of the status of the magistrature, of the ministerial offices and of the auxiliaries of justice; determination of crimes and misdemeanours as well as of the penalties applicable to them; organization of the bar; penitentiary regime; amnesty; the protection of the environment and the conservation of the natural resources.

The financial and patrimonial issues:
Regime for the emission of the currency; budget of the State; definition of the base and of the rate of the taxes and the assessments [taxes]; alienation and administration of the domain of the State; the nationalization and denationalization of enterprises and the transfer of property of enterprises from the public sector to the private sector; the regime of teaching and of the scientific research; the objectives of the economic and social action of the State; the legislation of work, of social security, of the syndical right, including the conditions for the exercise of the right to strike. (Translated)

Apprendix 2:1), Namibia[75] and Niger[76] and Togo (see Appendix 2:2).

In some constitutions the closest reference to tax can almost be presumed that a state can collect tax without any guidance on the extent of the ability except that it requires legislation. The Constitution of Botswana the closest reference to tax or fiscal policy is set out in article 117 on the consolidated fund.

All revenues or other moneys raised or received for the purposes of the Government of Botswana (not being revenues or other moneys that are payable by or under any law into some other fund established for a specific purpose or that may by or under any law be retained by the department of Government that received them for the purposes of defraying the expenses of that department) shall be paid into and form one Consolidated Fund.

75 Namibia Article 63 Functions and Powers:
(1) The National Assembly, as the principal legislative authority in and over Namibia, shall have the power, subject to this Constitution, to make and repeal laws for the peace, order and good government of the country in the best interest of the people of Namibia.
(2) The National Assembly shall further have the power and function, subject to this Constitution:
(a) to approve budgets for the effective government and administration of the country;
(b) to provide for revenue and taxation;
(c) to take such steps as it considers expedient to uphold and defend this Constitution and the laws of Namibia and to advance the objectives of Namibian independence;
(d) to consider and decide whether or not to succeed to such international agreements as may have been entered into prior to Independence by administrations within Namibia in which the majority of the Namibian people have historically not enjoyed democratic representation and participation;
(e) to agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e) hereof;
(f) to receive reports on the activities of the Executive, including parastatal enterprises, and from time to time to require any senior official thereof to appear before any of the committees of the National Assembly to account for and explain his or her acts and programmes;
(g) to initiate, approve or decide to hold a referendum on matters of national concern;
(h) to debate and to advise the President in regard to any matters which by this Constitution the President is authorised to deal with:
(i) to remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies;
(j) generally to exercise any other functions and powers assigned to it by this Constitution or any other law and any other functions incidental thereto.

76 Constitution of the Republic of Niger, 2010
Article 90.
The National Assembly votes the law and consents to taxes. It controls the action of the Government;
Article 114.
The National Assembly is referred to the matter of the bill of the law of finance from the opening of the budgetary session; the bill of the law of finance must specify the receipts necessary for the complete coverage of the expenses.The National Assembly votes the budget in equilibrium. If the National Assembly has not decided within sixty (60) days of the presentation of the bill, the provisions of this bill can be put into force by ordinance. The government refers the matter, for ratification, to the National Assembly convoked in extraordinary session, within a time period of fifteen (15) days. If the National Assembly has not voted the budget at the end of this extraordinary session, the budget is definitively established by ordinance. If the bill of the law of finance could not be presented in a timely fashion to be promulgated before the beginning of the fiscal year, the Prime Minister demands of urgency of the National Assembly the authorization to continue to receive the taxes and to continue with expenditures, the budget of the preceding year by provisional twelfths. (Translated)

Other constitutions that make minimal reference to tax include Burkina Faso[77], Mauritius[78], Senegal and Zimbabwe[79]. Rwanda[80] makes reference to public funds and the work of the auditor general at best.

The most precise reference to the ability of the state to levy taxes is set out in Article 81 where it is set out that:

No taxation can be imposed, modified or removed except by law. No exemption from or reduction of tax may be granted unless authorised by law.The Chamber of Deputies may upon request by the Cabinet and after adoption of a law relating to certain rates of taxes and duties by an organic law, authorise its immediate application.

This article of the constitution does not make any reference to either the word power or right. Neither does it make clear that tax is an obligation or compulsory constitutionally this is left to the particular legislative provisions that come in particular laws of the state as passed by the National Assembly. It simply allows the creation and amendment of the law.

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77 The Constitution of Burkina Faso set out in article 17 'The duty to discharge oneself of one's fiscal obligations in conformity with the law applies to everyone'.

78 The Constitution of Mauritius makes reference to collection and sources of collection without referencing the power or right to tax in articles 8 and 9
Article 8. Protection from deprivation of property
(2) No person who is entitled to compensation under this section, other than a resident of Mauritius, shall be prevented from remitting, within a reasonable time after he has received any amount of that compensation, the whole of that amount (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Mauritius.
(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1):
(a) to the extent that the law in question makes provision for the taking of possession or acquisition of property – (i) in satisfaction of any tax, rate or due;
Article 9. Protection for privacy of home and other property
(c) to enable an officer or agent of the Government or a local authority, or a body corporate established by law for a public purpose, to enter on the premises of any person in order to value those premises for the purpose of any tax, rate or due, or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government, the local authority or that body corporate, as the case may be.

79 Zimbabwe. Article 101. Consolidated Revenue Fund
All fees, taxes and other revenues of Zimbabwe from whatever source arising, not being moneys that:
(a) are payable by or under an Act of Parliament into some other fund established for a specific purpose; or
(b) may, by or under an Act of Parliament, be retained by the authority that received them for the purpose ofdefraying the expenses of that authority.

80 Article 183: The Office of the Auditor General of State Finances is an independent national institution responsible for the audit of state finances. It is vested with legal personality and has financial and administrative autonomy. The office is headed by the Auditor General assisted by a Deputy Auditor General and other necessary personnel.
Article 184 States that a report by the AG must be presented to parliament and must indicate the manner in which the budget was utilized, unnecessary expenses which were incurred or expenses which were contrary to the law and whether there was misappropriation or general squandering of public funds.

D. No Constitutional Reference to Tax

The constitutions that least provide guidance on the ability to tax a population include those with no direct reference to tax at all. However they would make mention of public funds other show no clarity or guidance at all like Eritrea[81] São Tomé and Príncipe[82] and Djibouti[83]. Other constitutions simply refer to participating in life like Guinea Bissau[84]. Some simply make reference to the consolidated fund like Lesotho[85], Seychelles[86] and Swaziland. Nigeria makes no reference to tax but speaks of harnessing the resources of the state without specifying accessing taxes (see Appendix 2:4).

IV. RECOMMENDATIONS

The Constitutions of Africa came into existence predominantly after independence in the late 1950s and 1960s. Of these many of them remain in place apart while others were reviewed extensively or revised and overhauled or replaced over the years. However the fiscal provisions in these constitutions did not go through the extensive scrutiny when these processes of constitutional amendment, review or reflection were taking place. As a result the constitutional provisions analysed above were limited to the one that grants a state the ability to levy, collect and spend taxes. As a result there is a need to re-assess most of the tax constitutions and to begin to re-assess the ways in which states and government representatives are accessing the tax money of the citizens and residents of a state.

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81 The Constitution of the Republic of Eritrea (1997) sets out at article 25 the duties of citizens to strive for development but no direct reference to taxation.
All citizens shall have the duty to:
owe a allegiance to Eritrea strive for its development and promote its prosperity;
2. be ready to defend the country;
3. complete one's duty in national service;
4. advance national unity;
5. respect and defend the Constitution;
6. respect the rights of others; and
7. comply with the requirements of the law.

82 Sao Tome and Principe (French)
http://www.wipo.int/wipolex/en/text.jsp?fileid=180006 no references to tax.

83 Constitution of Djibouti, Approved on 4 September 1992 .

84 The Constitution of Guinea Bissau simply states at article 24
Men and women shall be equal before the law in all areas of political, economic, social, and cultural life and at article 43(1)
Every citizen shall have the right and duty to participate in the nation's political, economic, and cultural life, according to law.

85 The Constitution of Lesotho 2009 states at article 110 on the consolidated fund that all revenues or other moneys raised or received for the purposes of the government of Lesotho shall be paid into and form a Consolidated Fund.

86 151. There shall be a Consolidated Fund into which shall be paid all revenues or other moneys raised or received for purposes or on behalf of the Republic, not being revenues or other moneys that are payable by or under an Act for some specific purpose or into some other fund established under an Act for a specific purpose.

It is therefore recommended that there be an assessment of the fiscal provisions of the state and that there be consideration made of the French provisions of 1786 before finalising the language in the constitution and that there be clauses placing responsibilities on the state for monies collected at the constitutional level and that this ability, right or power to tax must not be free of checks and balances that are constitutionally enshrined and not amended except through reference to the people by a national referendum.

V. CONCLUSION

A constitution is the supreme law of a nation or state, which establishes the character and basic principles of the government. Constitutionalism is the idea that the powers of government can and should be limited, and that its authority flows from enforcing these limitations. In constitution making and analysis, the right or power of the government to tax seems almost superfluous. No real analysis goes into analysing and tying down the right or power of government to tax, the amount collectible and the use to which it is put. Instead there tends to be a presumption that a state can tax and that taxes cannot be tied to services at all. However, this presumption has proven to encourage a culture of tax evasion, avoidance, impunity, corruption, lack of responsibility, and accountability as well as outright theft across the continent.

Appendix 2:1

Excerpt from Constitution of Madagascar

Article 36 [Taxation]:

Every citizen's share in public expenditures must be progressive and calculated on his ability to pay.

Article 88 [Appropriations Bill]:

(1) Parliament shall examine the appropriations billduring its second ordinary session.

(2) Under the authority of the Prime Minister, as Head of the Government, the Minister responsible for the budget shall prepare the appropriations bill, which shall be enacted in the Council of Government. Parliament shall have a period of at least sixty days to examine it.

(3) The National Assembly shall have a period of thirty days from the presentation of the bill for the first reading.In the absence of a decision within this period, the bill shall be considered adopted and sent to the Senate.

(4) Under the same conditions, the Senate shall have a period of two weeks for the first reading and each Assembly shall have five days for each of the following readings.

(5) In the absence of a decision by an Assembly in a given period, the bill before it shall be considered adopted.

(6) If the Parliament has not adopted the appropriations bill before the end of the second session, the provisions of the bill may be put into effect by ordinance, including one or more of the amendments adopted by the two Assemblies.

(7) Any amendment to the appropriations bill which entails an increase in spending or a decrease in public resources must be accompanied by a bill to increase revenue or an equivalent savings.

(8) Conditions for the adoption of an appropriations bill shall be provided by law.

(9) If the appropriations bill for a fiscal year has not been presented in time to be promulgated before the beginning of that fiscal year, the Government shall ask Parliament for authorization to collect taxes and create credits by decree for services which have been voted.

Article 134 [Local Resources]:

The resources of territorial entities shall consist of:

– the proceeds of taxes voted by the Assemblies of the territorial entities and levied for their budgets; the law shall establish the nature and maximum rate of these taxes, taking into account expenses assumed by the territorial entities and national expenses;

– their share in the proceeds of taxes levied for the State budget. This pro rata share shall be determined by law according to a percentage which takes into account the expenses assumed individually and collectively by the territorial entities and the level of their own resources, in order to assure fair and equal treatment of the territorial entities and a balanced economic and social development among all territorial entities.

The utilization of its share shall be freely determined by each territorial collectivity;

– the proceeds of endowments granted by the State to the territorial entities, as a whole or in part, to meet expenses resulting from the transfer of jurisdictions, or to compensate territorial entities for expenses resulting from particular programs or projects mandated by the State and implemented by the territorial entities;
– the proceeds of loans contracted by the territorial entities in the national or foreign market, with the agreement of national monetary authorities, with or without guaranty by the State;
– the proceeds of foreign aid obtained through the national monetary authorities and the ministerial department responsible for foreign relations;
– the proceeds of gifts; and
– revenue from territorial land.

Article 135 [Local Funds, Public Treasury]

Funds of territorial entities whose use falls within their jurisdiction shall be deposited in the public treasury under conditions provided for by law.

Appendix 2:2

Excerpt from Constitution of Togo

Article 107:

The Court of Accounts judges the accounts of the public accountants. It assures the verification of accounts and of the management of the public establishments and of the public enterprises. It assists the Parliament and the Government in the control of the execution of the laws of finance. It proceeds to all studies of public finance and of accounting that are demanded of it by the Government, the National Assembly or the Senate. The Court of Accounts establishes an annual report addressed to the President of the Republic, to the Government and to the National Assembly and in which it determines, if there have arisen infractions committed, and the responsibilities incurred.

Article 108

The Court of Accounts is composed of:

- The First President
- The presidents of [the] chamber
- The master-councilors
- The Referred Councilors [conseillers référendaires]
- And of auditors.

The public ministry before the Court of Accounts is held by the procurator general and the Attorney-General. The number of offices of these different grades is established by the law. The first president, the procurator general, the general attorneys, the presidents of the chamber and the conseillers-maîtres are appointed by decree of the President of the Republic taken in the Council of Ministers. The conseillers référendaires and the auditors are appointed by the President of the Republic on proposal of the Prime Minister after the opinion of the Minister of Finance and [the] favorable opinion of the National Assembly. Only the jurists of high level, the inspectors of finance, of the Treasury and of taxes, the economist-managers and the expert accountants having experience of fifteen (15) years at least, may be elected or appointed to the Court of Accounts.

Article 109

The President of the Court of Accounts is elected by his peers for a time period of three (3) years renewable.

Article 110

The members of the Court of Accounts have the quality of magistrates. They are irremovable during the duration of their mandate.

Article 111

The functions of member of the Court of Accounts are incompatible with the quality of member of the Government, the exercise of any elective mandate, of any public, civil or military office, of any other professional activity as well as of any function of national representation. An organic law determines the organization and the functioning of the Court of Accounts.

Appendix 2:3

Excerpt from Constitution of Sénégal

Article 25

Everyone has the right to work and the right to seek [*prétendre*] employment. No one may be impeded in their work for reason of their origins, of their sex, of their opinions, of their political choices or of their beliefs. The worker may affiliate with a union and defend their rights through union action. Any discrimination between men and women in employment, salary and taxation [*impôt*] is forbidden. The freedom to create labor or professional associations is recognized to all workers. The right to strike is recognized. It is exercised within the framework of the laws which govern it. It may not in any case infringe the freedom to work, or place the enterprise in peril. Every worker participates, by the intermediary of his delegates, in the determination of the conditions of work in the enterprise. The State sees to sanitary and humane conditions in the places of work. Specific laws establish the conditions of assistance and of protection which the State and the enterprise accord to the workers

Article 68

The Parliament votes the bills of laws of finance within the conditions specified by an organic law. The bill of the law of finance of the year, which includes notably the budget, is deposited with the Bureau of the National Assembly, at the latest [on] the day of the opening of the sole ordinary session. The National Assembly [has] at its disposal sixty days at the most to vote the bills of the laws of finance. If, for reason of a case of force majeure, the President of the Republic has not deposited the bill of the law of finance of the year in a timely fashion so that the Parliament may dispose of it, before the end of the session established, [in] the time period specified in the previous paragraph, the session is immediately and of plain right prolonged until the adoption of the law of finance.

The National Assembly decides in first reading within the time period of thirty-five daysafter the deposit of the bill and the Senate [has] at its disposal fifteen days counting from the dateof reception. If the Senate adopts a text identical to that of the National Assembly, the law istransmitted without delay to the President of the Republic for promulgation. If the Senate has not decided within a time period of fifteen fays or there is disagreement with the National Assembly, the bill is transmitted of urgency to the National Assembly which decides definitively. If the Parliament has not decided within the time period of sixty days, the bill of the law of finance is brought into force by ordinance, taking into account the amendments voted by the National Assembly or by the Senate and accepted by the President of the Republic.

If the law of finance ofthe year has not been promulgated before the debut of the fiscal year, the President of the Republic is authorized to prescribe the collection of the existing taxes and the renewal by decree of the services voted. The Court of Accounts assists the President of the Republic, the Government and the Parliament in the control of the execution of the laws offinance. (Translated)

Appendix 2:4

Excerpt from Constitution of Nigeria

Article 16.

(1) The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution.
   (a) harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy;
   (b) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;
   (c) without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;
   (d) Without prejudice to the right of any person[o] to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.

(2) The State shall direct its policy towards ensuring:
   (a) the promotion of a planned and balanced economic development;
   (b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;
   (c) that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and
   (d) that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.

(3) A body shall be set up by an Act of the National Assembly which shall have power;
   (a) to review, from time to time, the ownership and control of business enterprises operating in Nigeria and make recommendations to the President on same; and
   (b) to administer any law for the regulation of the ownership and control of such enterprises.

Article 31 and 32 set out the Revenue Mobilisation Allocation and Fiscal Commission.

Article 80 states that money go into the Consolidated Revenue Fund of the Federation. While article 120 sets out the state Consolidated Revenue Fund of the State.

CONVERGING UBUNTU PRINCIPLES WITH CORPORATE SOCIAL RESPONSBILITY TO EXTEND CORPORATE BENEFITS TO COMMUNITIES

*Duncan Ojwang**

ABSTRACT

Extractive industries in Kenya have been criticized for lack of proper benefit sharing with communities around them. Scholars have developed a stakeholder theory, examining the relationship between corporations and stakeholders. However, none of them considers it in terms of African Ubuntu principles and ethics. This paper argues for a redefinition of CSR in a manner consistent with the Ubuntu principles as a compromise between the different arguments on the CSR reforms. The advantage of this proposal is that it will fulfill the desire of both sides by enabling CSR to check corporate socially irresponsible behaviors while leaving it non-binding.

I. INTRODUCTION

Corporations wield massive influence around the world and the most powerful economic institutions next to governments.1 They are the "mother's milk of world economic prosperity.2 Meaning that, economic strength has transferred from public or state institutions to multinational corporations (hereafter MNC), without the necessary accountability and transparency.3 MNC are defined as large companies from rich countries that conduct their business in several "host nations."4 In this regard, many MNCs have ventured into different businesses in Africa ranging from minerals like copper, oil, uranium, diamond, gold to large scale farming. For example MNCs trade in oil accounted for 90% of Angola's 2001 budget.5 They are crucial in Sub-Saharan African foreign Direct Investment (FDI), because the private sector investment in the region, made up of 46 countries, exceeds some governments' expenditure ten-fold.[6] The current definition of CSR does not incorporate law in it.

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1 Alfreda Robinson, 'Corporate social responsibility and the African American reparation jubilee' [2003] 5 Rutgers L. Rev. 309.

2 ibid.

3 Can the poor and disenfranchised have their voices heard over the MNC's? Markowitz and Rosner, Deceit and Denial: The deadly politics of industrial pollution (New York, University of California Press 2002); See also, Mary Robinson, Speech, Human Rights, Development and Business – An Introduction (Basel, Switzerland, 27 November, 2003 <http://www.novartisfoundation.com/en/articles/human/symposium_human rights/speeches/speech_robinson.htm> accessed 16 October 2014.

4 WC Kim 'The Changing Nature of Multinational Business' [2000] 18(3) Strategic Management Journal 145-152.

5 Ken Booth, 'A Security Regime in Southern Africa: Theoretical Considerations,' in South African Perspectives [1994] 30 Centre for Southern African Studies 3.

6 ibid.

Corporations are considered a person by law.[7] The underlying issue is that corporations are created as the legal person and this is universal. This is a big assumption because a person's role and responsibility as viewed through African Ubuntu is different from the Kantian ethics that is common in Western culture and is used to define corporate role. Currently CSR is based on Kantian ethics not practiced in Sub- Saharan Africa.[8] As discussed later in this paper both Ubuntu and Kantian ethics are two ways of reviewing whether an action is right or wrong, however they are very different on the emphasize placed on the role and responsibility of a person.[9]

Traditional Western cultures regard the self as a bounded entity and defined in terms of internal attributes like thought not in terms of relationship.[10] Since Descartes (1596-1650), many of the most influential Western philosophers have held the same. With Kantian deontology helping others is voluntary as long as ones action does not harm others, while Ubuntu makes helping others in a community a requirement and mandatory. In African culture, philosophers describe the being of a person in terms of relation. To quote Professor Mbiti, 'I am because we are, and since we are, therefore I am'. Being a human therefore, is primarily relational.[11]

Ideally because of the above corporate legal personality, corporations just like people prefer to consider themselves to be part of the community they operate in. Seeking to be responsible parts of the community, Corporations hatched corporate social responsibility (hereinafter, CSR) in 1960s.[12] CSR is meant to make corporations responsive to their community and other stakeholders beyond shareholders.

As discussed in this paper, although CSR purports to uphold the principle of partnership with community, it is based on Kantian deontology that is very individualistic as compared to Ubuntu principles which is egalitarian. Scholars like Pratt have criticized CSR as based on Kantian philosophy, which is individualistic and does not reflect the Sub-Saharan milieu that is egalitarian.[13]

As will be seen below, so far the reform to make corporate more 'communitarian" only remains at the vocabulary level without much success. Halina Ward, the director of the program on Corporate Responsibility for Environment and Development (CRED) at the International Institute for Environment and Development in London, wrote a remarkable article on the topic, titled the interface between globalization, corporate responsibility, and

7 Afterword: What Kind Of A Person Is The Corporation? POLAR, Political and Legal Anthropology Review[November, 2014] 37 POLAR: Pol. & Legal Anthropology Rev. 296.

8 Immanuel Kant, The Law of Autonomy (1734-1804); (Sullivan, 1989) 49 RJ Sullivan, Immanuel Kant's Moral Theory (Cambridge, Cambridge University Press 1989); See also, Cornelius B. Pratt, 'Multinational Corporate Social Policy Process for Ethical Responsibility in Sub-Saharan'(1991) 10(7) Journal of Business Ethics, 532 <http://www.jstor.org/stable/25072181> accessed 16 August 2013.

9 ibid.

10 ibid. 27.

11 John Mbiti, African Religions and Philosophies (New York, Doubleday and Company 1970) 141.

12 Cynthia A Williams, 'The Securities and Exchange Commission and Corporate Social Transparency'[1999] 112 HARV. L. REV. 1197, 1267-68.

13 Pratt (n 8).

the legal profession.[14] According to Halima Award, the weak non-binding CSR definition does not address the tyranny of globalization and be a check to the powerful MNCs', ironically it aids globalization by seeking less regulation and liberal economy in support of the status quo. Since CSR is a voluntary definition and non-binding venture it does not address the exploitative practices as a result of today globalized market. However, the voluntary approaches to CSR are non-inclusive as it simply serves shareholders interest and does not care for the interests of groups and regulators.

Fortunately, the momentum to reform corporate is present. The paper joins the new progressive movement that arose around 1990s to push for CSR reform by making it more community focused. The call for CSR reforms is famous amongst African governments and policy makers. All of them accept that it is time to make MNC operating in Africa more beneficial to communities. This research complements these efforts by giving state actors, policy makers and scholars on corporate governance an authentic and unique African view on what can be an ethical and responsible corporate behaviour through CSR.

While there is great literature on corporate reform and community involvement there is only a single mention on the possible role of Ubuntu in an article by Ved Nanda. Nanda's article scantly points to the idea that Ubuntu principles can be a better ethics than the current Kantian ethics that dominates CSR definition.[15]Nanda argues that applying Ubuntu will protect third world countries from the MNCs' abuse as it will enhance interconnectedness between a corporation and the community.[16] Therefore, this paper is exceptional literature on CSR reform, in its attempt to discuss the CSR reform through the lens of the Africa Ubuntu principle. Which is a common principle in Africa among various tribes to evaluate the ethics of an action. Therefore the justification is that in the context of Sub-Saharan Africa, as other cultures, corporate actions can be evaluated based on the unique African shared community values. [17]

Although there is no literature on the use of Ubuntu, there is a lot of literature on the CSR reform that have also criticized the Kantian ethics as inadequate foundation of CSR. For example Cornelius Pratt recommends the application of utilitarian and situation ethics in Sub-Saharan Africa, which is very close to the paper proposal except in his proposal decisions will be based on situations.[18] Pratt proposal is an admission of the failure of Kantian ethics and bolster the paper's position that no ethics is universal but must be reviewed within a particular context. Situational ethics means actions are not defined by rules but the general morality which is applied in a specific situation. [19]

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14 Halina Ward, 'Corporate Responsibility and the Business of Law' <http://pubs.iied.org/pdfs/G00195> accessed 1 December 2012.

15 Ved P Nanda, 'The Law of Transnational Business Transactions' (2012) 1 Chapter 1 International Business & Law Series.

16 Wayne Visser, 'Corporate Social Responsibility in Developing Countries' in Corporate Social Responsibility Readings and Cases in a Global Context 474 (Andrew Crane, Dirk Matten, Laura Spence (eds), 2007).

17 Nwafe RL Nwankwo and CG Nzelibe, 'Communication and Conflict Management in African Development' (1990) 20 Journal of Black Studies 253-266.

18 Pratt (n 13).

19 Situation ethics, developed in 17th -century (Drucker, 1981; Boarman, 1982). condemns rigid legalism and places each act in its concrete setting.

Pratt argues that the situation ethics proposed is relevant to the African environment because people in the rural society rely on oral rather than written decisions.[20] It can be very practical in Africa because it fits into the practice of village meetings where villagers meet and seek consensus on issues as a community.[21] The situational and utilitarian ethics are in tandem with most corporate social policy already.[22]

The advantages of redefining CSR with Ubuntu principles, especially the MNCs in this Sub-Saharan region are numerous: First Ubuntu is not against individual endeavors and profit making but tampers it with community interest. The proposal accommodates both sides in the CSR reform debate by taking care of their major concerns without making CSR legal obligation or leaving it non-responsive to community interest. It is also fair because it is tandem with the goal of CSR which is to make corporations part of the community. This is important for those MNCs operating in Africa, to incorporate the African community value and culture as opposed to depending on their own western culture.[23] Since, it is through CSR that corporation's judge and evaluates their ethical, moral, legal and social impacts of their actions; it must adhere to the particular community standards. CSR must respect the African culture and ethics, which is commonly Ubuntu.

What is wrong or right is usually a matter of value, and usually based on place and circumstance.[24] Therefore the western dominated Kantian ethics cannot apply universally in all cultures. The European ways of life cannot be used exclusively to address human needs across cultures and across time.[25] As colonised people seek to curb cultural imperialism, the homogeneity of culture, philosophy, law etc. must be questioned. They are the reason a better day for the community has not come, even with the new extractive industry legal and policy framework in Kenya.

Ubuntu emphasizes community responsibility. While in the Western culture giving to the society is good it is not tied to being a person: In Africa giving to community is not just a duty but as a way of being a person.[26]In brief, the central tenet of Ubuntu is that people who cannot relate positively with others are not humans but animals.[27] Attributes like deception and exploitation or any action not bettering others, simply indicate that the actor lacks personhood or humanness.[28]

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20 ibid.

21 ibid.

22 ibid.

23 Heidi S. Bloomfield, 'Sweating" the International Garment Industry: A Critique of the Presidential Task Force's Workplace Codes of Conduct and Monitoring System'(1999) 22 Hastings Int'l & Comp. L. Rev. 567, 570.

24 EMEpstein, *'The Corporate Social Policy Process: Beyond Business Ethics, Corporate Social Responsibility, and Corporate Social Responsiveness'*, [Spring] 29 California Management Review 99-114.

25 Mkhize N, Communal personhood and the principle of autonomy: the ethical challenges (London:The University of London Press 1966) 122.

26 Kwasi Wiredu, 'An oral philosophy of personhood: Comments on philosophy and morality' (2009) 40(1) Research in African Literatures 10.

27 Thaddeus Metz and Joseph BR Gaie, 'The African Ethic of Ubuntu/Botho: Implications for research on morality,' University of Johannesburg, South Africa; Botswana, University of Botswana.

28 ibid.

So the judgment of personhood is based on one's ability to positively relate with others.[29]

The paper discusses the issue of CSR using the law and society theory. The framework provides context to critically discuss law as it ought to be. Considering CSR in the context of law and society, means law or principles generally must reflect societal value and underscore fairness and justice. Makau Mutua asserts that "law is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society."[30]

Law is successful when consideration is given to the society culture, values, politics etc.[31]A good number of critical legal theorists like Makau are skeptical that most law and principles used in most colonised countries are copied from the west without regard to the culture and custom of local communities. According to Makau Mutua developing countries must protect themselves from the imbalanced law and power relation as a result of the structural imbalance.[32]Some of the structural imbalance lead to structural violence against the local community that unfortunately been accepted as normal. [33]

This paper is divided into four sections. Section I gives an overview of corporate social responsibility reform movements and history across the world. Section II discusses the current inefficiency of corporate social responsibility and various suggestions in corporate literature to fix it. Section III discusses Ubuntu as a way of defining African personhood and its way of reviewing whether action is right or wrong. It also reviews the difference between Ubuntu and Kantian ethics common in western countries that is currently the foundation of CSR. Section IV in turn discusses the application of Ubuntu to challenges of human rights abuse in the Sub-Saharan Africa by MNC's. Section V, gives examples of terrible corporate practices. Thereafter, I conclude by pushing for CSR reformed that is based on Ubuntu principles

29 DA Masolo, *African Philosophy: In Search of Identity* (Nairobi, East African Educational Publishers Ltd. 1992).

30 ibid.

31 According to Brian Z Tamanaha, 'The Primacy of Society and the Failure of Law and Development' (2009) Cornell International Law Journal, Forthcoming; Washington U. School of Law Working Paper No. 10 <http://ssrn.com/abstract=1406999> the "law and development" initiatives around the world focus on "enhancing legal education, implementing judicial reform, constitution or code drafting, transplanting laws and institutions, law enforcement training, combating corruption, educating lay people about law, providing access to law for the poor, and supplying material assistance for legal institution building." He continues, quoting Golub: "To put the point mildly, a society seen from a hotel is far different from one experienced every day," 44.

32 Makau Mutua, 'What is TWAIL?' (2000) 94 Proc. Am. Soc. Int'l L. 31; Third World Approaches to International Law, political and legal, critical view that see the International law from the critical view of the poor and marginalized country unlike the mainstream International law scholars, which view non state actors as terrorists.

33 Phoebe Akinyi Dar-Nyawalo et al, The Invisible Violence In Kenya: A Case Study of Rift Valley and Western Region (European Union in collaboration with Konrad Adenauer Stiftung (KAS) 2011) <http://ciagkenya.org/index.php?option=com_docman&task=doc_download&gid=14&Itemid=8> accessed 1 October 2014.

II. CORPORATE SOCIAL RESPONSBILITY REFORM MOVEMENTS AND HISTORY

Interestingly, by 1974 only few corporations used the "social responsibility yardstick."[34]To emphasize its voluntary nature it is commonly referred to In words like "giving back to the society," "Corporate philanthropy "or "charity. " It is only in the 1990s that most corporations sought to go by corporate social responsibility albeit a weak sense of social responsibility. The background of CSR followed a bad image that corporations had developed following their "earth scorch" business practices.

Most of the definition of socially responsible corporate behavior only focuses on the bottom minimum behavior of corporations and not on what the behavior should be.[35]Various definitions of CSR indicate that it is a voluntary non-binding obligation to business. The European Mission defines CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."[36] As the European definition emphasizes there is a strong element of its non-binding nature and voluntarism of CSR. CSR is also defined by others as the sum behavior of companies obligating themselves to participate in creating wealth, to obey formal and informal laws of society, and to enhance the welfare and the improvement of society, within a global and free trade environment.[37]

What the above definitions of CSR have in common is the emphasis on its non-binding nature. Therefore accepting the above definitions of CSR above, I want to briefly highlight some scholars and movements that have argued for its reform and some of their suggestions.

The history of CSR reform goes back to 1970s. The push for CSR reforms can be traced back to early 1970s in America. The group known as the "corporate social responsibility movement" dominated the1980s pushing for some minimum corporate reform under law and economics jurisprudence. [38] However, it was the constitutionalists' jurisprudence in the late 1970s, who held numerous meeting at Colonial Williamsburg, Virginia, under

34 Douglas Branson, 'Corporate Governance Reform and the 'New' Corporate Social Responsibility'(2001) 61 University of Pittsburgh Law Review 605, 2001. See also Cynthia A Williams, 'The Securities and Exchange Commission and Corporate Social Transparency' (1999) 112 HARV. L. REV. 1197, 1267-68.
<http://papers.ssrn.com/ sol3/papers.cfm?abstract_id=1352530&download=yes>
accessed 12 October 2014.

35 John L Campbell, 'Why would corporations behave in socially responsible way? An institutional theory of corporate social responsibility' (2007) 32(3) Academy of Management Review 946–967
<http://laisumedu.org/DESIN_Ibarra/desin/imagenescampbell/tres-c.pdf>
accessed 12 October 2014.
See also, WT Allen, 'Our schizophrenic conception of the business corporation' (1992) 14 Cardozo Law Review 261–281.

36 Commission of the European Communities, Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development (July 2, 2002)
<http://europa.eu.int/comm/employment_social/soc-dial/csr/csr2002_en.pdf>
accessed 16 August 2014.

37 ibid.

38 ibid.

the America Law Institute that managed to come with the major draft on "principles of corporate management." Unlike the Corporate social responsibility movement, the American Law institute was proactive in entrenching constitutionalism. They finally succeeded in the 1990s to make corporate management directors independent in order to limit the "scorch earth" corporate practices which did everything to maximize shareholders profit over other stakeholder's interest.

Ultimately, out of those early 80s corporate governance reform, the current corporate reform was born. By 1990 the "progressive corporate law movement" advocated for new corporate social responsibility that sought to rearrange corporate from "purely economic" entity to a social component. In opposition to the law and economics model that dominated 1980s, the movement sought a "communitarian" corporation that "focuses on the sociological and moral phenomenon of the corporation as a community, in contrast to the individualistic, self-reliant." Most of the reforms to strengthen CSR as demonstrated below are clearly within these context of making corporations less focused in profit for shareholders but also considering other stakeholders like the workers, consumers, communities and the environment.[39]

Africa continent have also experienced its own wave of CSR reform. Africa countries started an enormous effort towards redefining the corporate operations according to Aka in 2000.[40] The first conference was seen in South Africa was a general effort by African countries to put corporate operation and law in the African context and empower the black citizens. [41]

The South Africa conference made great resolutions on how to handle corporations in Africa. The meeting adopted the King Report(s) on Corporate Governance in South Africa.This was immediately followed by another meeting in 2000 in Kenya. Kenya hosted fourteen African countries that reached a resolution that African countries should urgently harmonize corporate law in the view of Africa.[42] They unanimously agreed to a "harmonized development of corporate governance standards and practices in the continent that takes into consideration the needs of the continent.[43]"

The harmonization was crucial if Africa was to develop and fight issues like corruption and lack of transparency which have hampered growth in Africa.[44] The third meeting was same year was in Ghana and the agenda was to make CSR relevant to Africa.[45]

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39 David Millon, 'Communitarianism in Corporate Law: Foundations and Law Reform Strategies,' in Lawrence E Mitchell (ed), Progressive Corporate Law 1 (Westview Press 1995) 73; Marleen A O' Connor, Promoting Economic Justice in Plant Closings.

40 Philip C Aka, 'Corporate governance in South Africa: Analyzing the dynamic of corporate reform in the "Rainbow nation"' 33 N.C. J. Int'l L. & Com. Reg. 219.

41 Adriette Dekker and Irene-Marie Esser, 'The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles'(2008) 3(3) Journal of International Commercial Law and Technology.

42 ibid.

43 ibid.

44 Centre for International Private Enterprise and Institute for Economic Affairs, West Africa, Conference on Corporate Governance: Corporate Governance for Sustainable Growth 3 (2001) [hereinafter Corporate Governance for Sustainable Growth] <http:// www/cipe.org/about/news/conferences/africa/ghana/pdf/ghana.pdf> accessed 2 October 2014.

45 ibid.

The green movement reform have succeeded where the effort to make corporations community friendly sometimes only remain in the vocabulary. It is the "green movement" aspect of CSR which also began in late 1980s that have succeeded in Europe and USA.[46] Most corporations consider the green movement a more acceptable form of CSR with immediate benefit against their competitors who are not as "green" given large percentage of informed consumers in Western countries. [47] Perhaps the success of green movement according to one commentator is that is more "muted" and not the push for social reform that is a "power to the people" movement.[48]

III. THE PROBLEM WITH CORPORATE SOCIAL RESPONSBILITY AND PROPOSED SOLUTIONS

Having considered the history, in this section I focus on the various deficiency of CSR as it currently defined and a review of literature on CSR reform. The literature is unanimous that because of CSR's limitations corporations engage in socially irresponsible behaviors.[49] According to Pratt the underlying CSR foundation is the Kantian deontology.[50] Therefore, Kant's Categorical Imperative is defined as: "Act in such a way that the maxims of your actions can serve at the same time as universal laws, that is, as maxims on which all other autonomous agents may also act." [51]According to the Kantian philosophy an action taken by an agent must be an act they will not mind having repeated in the world.[52] It does not impose obligation or duty to work or help the society.

Amao argues that the CSR alone is not able to regulate the MNCs' unethical behavior and human rights abuse.[53] According to Amao CSR can only be effective when the African countries are strengthened and involved in regulating the MNCs' operations.[54] Amao points out that so far the governance and control of MNCs is at the international level; they need to be controlled at the host country and their operations monitored locally.[55]

46 Branson (n 34) Three components of green corporation; green advertising, green product manufacture and competition and management. Branson considers how advertising is driven, at times, by consumer preference rather than any strong corporate social responsibility mission. American consumers now consistently rank environmental protection as with up to 76% of American consumer polled in Gallup consider themselves environmentalist. Also up to 54% of Americans willing to pay more for products if they are environmentally friendly and greener.

47 David Hess, 'Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness' (1999) 251 CORP. L. 41.

48 Branson (n 34).

49 John L Campbell, 'Why would corporations behave in socially responsible way? An institutional theory of corporate social responsibility (2007) 32(3) Academy of Management Review 946–967 <http://laisumedu.org/ DESIN_lbarra/desin/imagenescampbell/tres-c.pdf> accessed 12 October 2014.

50 See the Law of Autonomy by Immanuel Kant (1734?1804). (Sullivan, 1989, p. 49).Sullivan, R J.: 1989, Immanuel Kant's Moral Theory (Cambridge University Press, Cambridge).

51 ibid.

52 ibid.

53 Olufemi Amao, 'Cororate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52(1) Journal of African Law 89-113 <http://ssrn.com/abstract=1128237> accessed 16 October 2014.

54 ibid.

55 ibid.

In the same vein Vanda Shiva points out that the push for CSR reform is welcomed, but she regrets that it has taken a liberal and global perspective that is not seeking to strengthen African states but to strengthen civil societies and global institutions.[56]

African countries have not been fully integrated in corporate reform by international community. Shiva recommends that rather than the international community treating African states with suspicion, they should be the focus of these reforms.[57]

African states should be involved because they are the only legitimate and able body to protect its citizens. She argues that the focus should be in "reclaiming the state to protect people's interests… and reinvent the state to play their oversight roles." [58] The current approach of sidelining African states according to Shiva and Amao in global business is counterproductive and a is a product of globalization which places greater emphasis on the states' interdependency and trans nationalization of non-state actors such as MNCs.

Halina Award is one of the scholars who argue that CSR must be a legal duty to have any impact. She points out that the failure of CSR is because its current scope is basically voluntary and it is non-binding to MNCs.[59] Award notes that lawyers and the legal field is generally not involved on the issue of CSR; she criticizes corporate lawyers for neglecting ethical discussion of CSR. [60] She accuses corporate lawyers of entertaining business practices that are on the edge and exploitative to other stake holders in pursuit of their promotions and favor with the corporate management.[61] She points at the following nine weaknesses of the CSR that:

Halina makes a compelling argument that lawyers must involve themselves with the issue of corporate governance beyond just serving the corporate executives as legal advisors. Halina supports her argument for seeking lawyers and law involvement with the issue of CSR reform, because: the CSR and issues of ethics generally operates within a corporate legal framework. For example code of conduct usually assumes contractual binding status and applied to cases of defamation and false advertising. She argues that CSR has brought into focus issues of running corporation and how it handles social and environmental issues.

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56 VandanaShiva, Water Wars: Privatisation Pollution and Profit (Boston, South End Press 2002); See, Paula Richardson, *Corporate Crime in a Globalized Economy: An Examination of the Corporate Legal Conundrum and Positive Prospects for Peace* (Carleton University 2003) 28.

57 Shiva(n 56) 19.

58 To give the theoretical framework, the study has considered postmodernist or 'critical' human security approach that is rooted in pluralist theory of international politics. This approach is based on a set of assumptions that essentially attempt to dislodge state as the primary reference of human security, while placing greater emphasis on the interdependency and trans-nationalisation of non-state actors such as MNCs. See Richardson(n 56) 28.

59 Ward (n 14) 819.

60 ibid. Ward gives the example of Foley Hoag LLP which announces that: 'We help savvy business leaders limit their companies' risk by incorporating internationally recognized standards into their strategic planning, crisis response strategies, and relationships with stakeholders. … by providing them with the information by which they can adopt risk-controlling, strategic business practices'. <http://www.foleyhoag.com/overview.asp?pID=000320864101> accessed 28 October 2014.

61 ibid.

If corporations are concerned with their image and reputations CSR can either uphold their image or dent it. Already there is a consensus in the countries corporations operate in; there is a consensus that there is a need for them to regulate the environment and labor issues on corporations.

According to Alfreda Robinson the major limitation of CSR is its focus on shareholders and profits. [62] The second limitation leading to CSR ineffectiveness is the narrow design to protect shareholders.[63] The current CSR as we know it is a "shareholder model"[64] as preoccupied with pleasing shareholders, she discusses how almost any unethical and exploitative practice to the poor laborers or consumers can be explained as collateral damage in advancing shareholders interest.[65]

Robinson advocates for an expansion of the focus of CSR to include other stakeholders besides the shareholders.[66] He proposes that CSR be expanded to accommodate the agenda of African-American Reparations.[67] His model called "a stakeholder model" as opposed to the above "shareholder model" can be more sensitive to the needs of wider community corporations operate in.[68] It appears Robinson's stakeholder model is an expansion of Professor Mari J. Matsuda's approach of "looking to the bottom."[69]

Halina Ward advocates for a more forceful and prominent role of legislation and the legal profession.[70] Her premise is that suggestions and making CSR a non-binding legal optional has made it useless.[71] She believes that since the area is touching on ethics lawyers should be actively involved in defining the contours of CSR, instead of being mere observers.[72] She makes a compelling argument that the legal profession, especially business lawyers, should not limit their role to that of advising business on how to beat rules but to guide and strengthen them to ethical and moral corporate business practices.

According to Naomi Cahn to fix CSR the African businesses' oversight and structure must be reformed and strengthened.[73] She calls in all stakeholders like the World Bank to consider reforms the priority.[74]

62 Alfreda Robinson, 'Corporate social responsibility and African American Reparation' (2003) Jubilee, Rutgers L. Rev. 309.

63 ibid.

64 ibid.

65 ibid.

66 ibid.

67 ibid.

68 ibid.

69 Matsuda (n 5) 324. As Professor Mitchell puts it, 'For while American culture and American capital markets are … wildly individualistic, the American corporate culture is aggregative. It is the most powerful focal point for wealth and work in the world'.

70 ibid.

71 ibid.

72 ibid.

73 Naomi Cahn, 'Corporate Governance Divergence and Sub-Saharan Africa,' (2004) 33 Stetson L. Rev. 893.

74 ibid.

Finally, she recommends CSR should be defined in a way requiring MNCs to conduct transparent and open dealings with developing countries' government as a way to eliminate corruption.[75]

There are three approaches used to reform CSR according to Cahn; (1) government led regulations, (2) corporation efforts and (3) other stakeholders like consumers and NGOs.[76] However, Cahn emphasizes the priority of strengthening and reforming some sub-Saharan African businesses' oversight and structure first before seeking to expand the CSR. The dilemma is making CSR address MNCs' activities in some Sub-Saharan countries where there is no structure as a result of corruption to regulate MNCs. For example, according to David Gantz, in Congo where corruption is rampant up to 98 % of the country's budget was spent by the Central Bank without the regular oversight of the Central Bank.[77]

IV. AFRICAN UBUNTU

So what is Ubuntu? It is the "non-individuality of the African" that forms the basis on which one cannot separate the individual interest from the group interest, a value that is in conflict with the CSR ethics according to Pratt. [78] In this regard, many African cultures and ethics hold tenaciously to a view of joint fate. While the African cultures emphasize the use of group-centered first person plural e.g., "we," "our," "ours," and "us" for the use of the first person, self-reference words are rampant in western culture e.g., "I," "me," "my" and "mine."[79]

Desmond Tutu in his view on Ubuntu:

> A person with Ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are.[80]

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75 ibid. see, the Global Witness, Publish What You Pay: An Appeal for Social Responsibility through Financial Transparency Headed by George Loros and a Coalition of NGOs. <http://www.globalwitness.org/campaigns/oil/publish_what_ pay.php> accessed 18 November 2014. See also South African Institute of International Affairs, Fighting Graft Bribe by Bribe, (2004) 2 The Electronic Journal of Governance and Innovation <http://www.wits.ac.za/saiia/eAfrica/AfricaMarch.htm> accessed 18 November 2014.

76 Cahn (n 73).

77 David A Gantz, 'Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus' (1998) 18 Nw. J. Intl. L. & Bus. 457, 458. The IMF estimated that less than two percent of all government spending in the Congo during the year 2000 was expended through normal government budgetary procedures.

78 K.A Opoku, 'Ancient Wisdom in the African Heritage' (1987).

79 Cornelius B Pratt, 'Multinational Corporate Social Policy Process for Ethical Responsibility in Sub-Saharan Africa' (1991) 10(7) Journal of Business Ethics 532 <http://www.jstor.org/stable/25072181> accessed 16 August 2014.

80 Desmond Tutu, No Future without Forgiveness (Doubleday 1999).

There are several sources of tribes' belief in Africa that show that Ubuntu is widely and commonly practiced principle of African culture and custom through history. For example, the Luo, my tribe, considers a person *dhano* in terms of their success or failure in relating positively with others. Being *dhano* or a human being according to the Luo's is something one can succeed or fail in, depending on relationship with others. In reviewing the African customary law and philosophy of personhood, I will focus on how it describes a person; interestingly there is no other definition of a person that is not solely pegged on relationship with community. [81]

The Kantian philosophy does not impose duty to help others as long as you do not harm others, there is no moral duty to participate and benefit the community. Similar to Buddhist, attachment to community is the cause of individual suffering that one should break from through nirvana. Ubuntu view on community is however similar to the Confucianism, which puts community relationship above anything else.[82] Unlike Christianity that might emphasize relationship with God over others in community, Ubuntu emphasize "spiritual" aspect of relationship with God and ancestors on one hand and with other people on the other hand. It means, "Every member is expected to consider him/herself an integral part of the whole and to play an appropriate role towards achieving the good of all."[83]

The principle of autonomy is the individualistic account of a person, which was a rejection of the traditional self as abounded person in their thinking during the renaissance and enlighten period.[84]The principle of autonomy is based on the individualistic view of the person, which gained ascendancy in the Western world during the Enlightenment period

The point of departure between personhood in Africa and the western culture is the way this two cultures describes existence. Personhood in Africa is measured on very different grounds. The western culture and philosophy, judges a person by looking at different aspect of existence, like physical and psychological characteristics. [85]Further, western philosophers like utilitarianism and Kantianism Kohlberg view of a person as a thinking being and the dichotomy between mind and body is how a person is described.

81 DA Bell and T Metz, 'Confucianism and Ubuntu: Reflections on a Dialogue between Chinese and African Traditions' (2011) 38(1) Journal of Chinese Philosophy 82.

82 On the normative implications of the Confucian account of the social self, see the essays in Confucian Ethics: A Comparative Study of Self, Autonomy, and Community (ed), Kwong-loi Shun and David B Wong (Cambridge, Cambridge University Press 2004). For some clear statements by African philosophers, see, Kwasi Wiredu, 'The African Concept of Personhood,' in African-American Perspectives on Biomedical Ethics (ed), Harley Flack and Edmund Pellegrino (Washington DC Georgetown University Press 1992), 104–117; Ifeanyi Menkiti, 'On the Normative Conception of a Person', in A Companion to African Philosophy (ed), Kwasi Wiredu (Malden, Blackwell Publishing 2004) 324–31.

83 Thaddeus Metz, 'Toward an African Moral Theory' (2007) 15(3) The Journal of Political Philosophy 321–41.

84 N Mkhize, Communal personhood and the principle of autonomy: The ethical challenges (London, The University of London Press 1966) 122.

85 Menkiti (n 82).

African personhood is different.[86] Otherwise, the Western emphases on individual autonomy by Locke making the individual the right bearer rather than group, are contrary to Ubuntu.[87]

In African culture a "person" might have two meanings. One of the meanings is that one has body and is physically with a human body. However, the second meaning is more to do with ethics, morality and self-worth of a person--and this is the deeper and truest meaning of being a person.[88]An individual person does not and cannot exist alone, only corporately.[89] Living a moral life is having a vibrant relationship with others.[90] Even if one can be a person there is a degree of personhood; one can be more or less of a person depending on the quality of their relationship with others. [91]Since personhood is an achieved status and the highest status a human being can achieve, as far as one is a life he/she needs to work on improving personhood. [92]

In addition African philosophers insist that persons, not humans, are special.[93] It is by being a person that we "impose humaneness upon our humanness."[949596] But in Ubuntu a person is a person only through other persons.[97]Nobody existed or could be known except in relation to others.[98] A little trickle of Ubuntu concept exists in the western world as an adage "living for others," but it is not central to the existence of a person according to the western philosophy.

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86 Godfrey B Tangwa, 'Is Bioethics Love of Life? An African View-Point' (1999)9 IAB NEWS 4,5. See also, Godfrey B Tangwa, 'Genetic Information: Questions and Worries from an African Background, in Genetic Information Acquisition, Access and Controle' (New York, Academic/Plenum Publishers 999) 277.

87 ibid.

88 Fortes Meyer, *Religion, Morality and the Person: Essays on Tallens Religion* (Cambridge UP 1987). See also Gbadegesin Segun, *African Philosophy: Traditional Yoruba Philosophy and Contemporary African Realities* (New York, Peter Lang 1999); Harry Gensler, Symbolic Logic (Englewood Cliffs, Prentice).

89 Kiriuki J Kahiga, 'Education for Transformation after –Reconciliation Through Justice and Peace' (2010) 51 Gaba Publications, 484-92; Kiriuki J Kahiga, 'The Challenges of Political Authority and Governance in Africa' in RA Akanmidu Keffi(ed), Thoughts in the Humanities (2011) 137-63; Kiriuki J Kahiga, 'Philosophical Fundamentals for Sustainable Development in Kenya' (2011) 3(1) Current Research Journal of Social Sciences 28-33.

90 DA Bell and T Metz, 'Confucianism and Ubuntu: Reflections on a Dialogue between Chinese and African Traditions' (2011) 38(1) Journal of Chinese Philosophy 83.

91 ibid.

92 Anthony Manser, *Sartre : A Philosophical Study* (London, The University of London Press 1966) 122 -180.

93 Kwasi Wiredu, 'An Oral Philosophy of Personhood: Comments on Philosophy and Morality' (2009) 40(1) Research in African Literatures 10.

94 RMJ Oduor, *A Critical Review of D.A. Masolo's Self and Community in a Changing World* (Bloomington and Indianapolis, Indiana University Press 2010) 165.

95 Metz and Gaie (n 27) 273–290.

96 ibid.

97 ibid.

98 ibid.

It is a mark of African culture to emphasize the communistic rather than the individualist perspective common in western culture.[99]From the Kikuyu tribe perspective, personhood may be diminished or lost in two ways: Lessening or loss of connection with other diverse beings – Kiswahili: "Mtu duni." Similarly, lost consciousness might also lead to loss of personhood according to some cultures. In both cases there is no human communion with "others" which results in diminished personhood. [100]

Often, from the western perspective, personhood cannot be diminished by lack of interrelations with other beings. To be called a nonperson is, in general, to be downgraded according to Ubuntu.[101]Several African culture describes these is different languages according to tribes i.e mtu ni utu (Swahili); Umuntu Ngubuntu Ngabantu (Zulu); Munhu Anehunhu Muvanhu (Shona); Enikan kije awade (Yoruba); Dhano (Luo).

Since the community is important in defining a person, a person is characterized by ties to the community, collective sense of identity, the bond of relationships, loyalty to the group and a sense of duty to members.[102] This does not mean Ubuntu disregard or have no need for individual endeavors, as for example the individual names given at birth. The individual names demonstrate that the community still needs and adores individual talents and roles;[103] however, even these individual names are always tied back to somebody, ancestor or community. Self-identity[104], if such a term exists, is only in reference to the society according to Ubuntu. Common in purpose and value, a community should be seen as an individual, with one mind and soul. [105]

The ideal of community as a way of existence is demonstrated by the way Africans live and relate within kinship. The duty of individual to others varies with a higher duty owed to relatives; all the rest are owed a duty by virtue of humanity.[106] Especially, great value is put on hospitality, and being hospitable to everybody is crucial in African society. Usually, one has more relationships and bonds a plethora of relatives, who western culture might not usually consider relatives. So the duty to family, to other relatives, to one's clan, to tribesmen, to foreigners and strangers, decreases as the 'intimacy" decreases; however the general principles and duty for harmony extends to all.[107]

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99 DA Masolo, *African Philosophy: In Search of Identity* (Nairobi, East African Educational Publishers Ltd. 2012) 121.

100 Wiredu (n 93).

101 ibid.

102 Oduor (n 94); Thought and Practice: A Journal of the Philosophical Association of Kenya (PAK), New Series 4(1), 1-24. See also Andrew Heywood, *Political Theory: An Introduction* (3rd edn, Hound mills, Palgrave Macmillan 2004) 33.

103 AJ Wilson, 'Personhood, human rights and health among the Akan and Igbo of West Africa' (2012) 10(4) African Identities 443.

104 Mluleki Munyaka and Mokgethi Motlhabi, 'Ubuntu and Its Socio-Moral Significance' Reprinted in MF Murove, African Ethics: An Anthology of Comparative and Applied Ethics (University of Kwazulu-Natal Press 2009) 70.

105 Augustine Shutte, 'Ubuntu as the African Ethical Vision'Reprinted in Murove (n 105), 85–99,quotation found on 94- 95.

106 Bénézet Bujo, 'Springboards for Modern African Constitutions and Development in African Cultural Traditions' Reprinted in Murove (n 105).

107 ibid.This is different with other ethics, which provides that duty does not change with ties or relation, moral duty is the same, Buddhism, utilitarianism, and Kantian deontology.

Ubuntu view relationship as a life time event, so that a wedding was not an event or condition but a life time process of creating bonds. [108] With continual gifts exchange like dowry by the groom to the bride's family, a child is brought up with the knowledge of kinship and start bonding to others early within the culture. As a result of these bonds one has duty to these relatives.[109] The person is also owed a duty by their relatives in an equal measure.[110] This interconnectedness defines what it means to be a person because personhood is about morality and choices; it is hard to see how a child can be considered a person in this culture. [111] One can become a full person as they improve; the goal of a child and others not full human is to become a genuine human being. [112]Some tribes believe that it is only elders who attain full personhood, implying that only they are capable of moral wisdom. It is the goal of all, especially young people to learn how, for example, to overcome resentment toward others, to cultivate empathetic awareness etc. [113]

V. NECESSITY OF USING UBUNTU PRINCIPLES TO STRENGTHEN CORPORATE SOCIAL RESPONSBILITY

What changes must be brought in order to make Corporate Social Responsibility (CSR) more responsive to vulnerable local communities in Kenya? This is because what is needed is for CSR to be strengthened to protect the stakeholders' interest. New thinking and policy that can bolster the stakeholder theory which seeks a balance between shareholders interest and stakeholders' interest to assure equitable benefit sharing. [114] So with Africa "global connectedness," as the result of globalization we must seek to how to include the African host countries agendas in the MNCs agendas.

Thirty years of CSR inception has left a lot to be desired with regard to MNC conduct in Sub-Saharan Africa.[115] In most cases one may detect the overpowering influences of Kantian or Deontological ethics focused on individual autonomy. The Kantian view of ethics and judgment of an action, inquiring whether one will want one's action repeated universally, is arguably a mismatch to the Africa culture and values, with its strong sense of community. According to Kantian ethics one has no duty or obligation to help the community, so long as one's decision does not harm others.

108 ARRadcliffe-Brown, 'Introduction', in AR Radcliffe-Brown and D Forde (eds), *African Systems of Kinship and Marriage* (London, Oxford University Press for the International African Institute 1951); C Murray, 'Marital Strategy in Lesotho: The Redistribution of Migrant Earnings' (1976) 35(2) African Studies 99.

109 GodfreyB Tangwa, 'Genetic Information: Questions and Worries from an African Background' in *Genetic Information Acquisition, Access and Control*, DAK Thompson and RE Chadwick (New York, Academic/Plenum Publishers 1999) 277.

110 ibid.

111 Anthony Manser, *Sartre: A Philosophical Study* (The University of London Press 1966) 122.

112 ibid.

113 Kwasi Wiredu (ed), A Companion to African Philosophy (Malden, MA, Blackwell 1966) 324–331.

114 "Equitable benefit sharing is the activity of maintaining the equal rights of all classes of people, ethnic groups and gender of society to air, water and food required for the life process or natural resources including forests, rivers, streams and land and the services obtained from them which are necessary for livelihoods and sharing of benefits received from these resources and services based on certain limitations and standards." 3 Environmental Justice, Martin Chautari.

115 G Aras and D Crowther, 'The Social Obligation of Corporations' (2008) 1(1) Journal of Knowledge Globalization 43– 59.

This redefinition, it is argued, allows for CSR to be culturally sensitive by bridging the gap between the dominant African culture and the current CSR Kantian foundation. It is instructive that CSR upheld cultural sensitivity depending on the community culture. CSR as formulated by a multinational corporation in individualistic state like New York has not made impact in a very egalitarian society like Lodwar in Kenya where Tullow oil is exploring oil. The concept of what is fair and just is different. This is the reason for the argument that the two societies have different expectations on what an ethical community member must be. As discussed in introduction, the law already considers corporations a person, but there is a clash of values and culture in how each society defines a person.

The possible repressive nature of culture, which fairly opens up each culture to genuine review and criticism, means "no culture is an end by itself." [116] Pratt Cornelius notes that the above cultural mismatch might be the reason some corporations are involved in human rights abuse in Sub -Saharan Africa and a reason for their poor image in the region.[117] Some philosophers argue that this focus of western culture and philosophy is the way the culture has explained and covered for immoral choices like colonization and slavery.[118] It is the extension of logics and a seemingly harmless, "objective' criteria, that either one meets or not. The focus in seemingly "objective" and "logical" and "categorical" idea leads to actions that shift the blame and focus from the perpetrator to the victims.

VI. EXAMPLES OF INJURIOUS CORPORATE OPERATIONS

Below is a brief discussion of some corporate behavior that harms the community and can benefit from the Ubuntu principle. Tullow Oil in Turkana is criticized for neglecting the Turkana community.[119] The company has taken advantage of Kenya's weak regulatory structures to refuse the publication of the Environment Impact Assessment (EIA) reports.[120] They are also accused of excluding the Turkana community by taking politicians and leaders on their side to condone unethical practices like denying the local communities of jobs, under compensating them for their land and marginalizing them.[121] For in depth discussion on Turkana oil and Kenya laws on extractive industry look at the

116 DA Masolo, *African Philosophy: in Search of Identity* (Nairobi, East African Educational Publishers Ltd. 2012) 121.

117 Cornelius B Pratt, 'Multinational Corporate Social Policy Process for Ethical Responsibility in Sub-Saharan Africa (1991) 10(7) Journal of Business Ethics 527-541 (532) <http://www.jstor.org/stable/25072181> accessed 16 October 2014.

118 Godfrey B Tangwa, 'Genetic Information :Questions and Worries from an African Background' in DAK Thompson and RE Chadwick, Genetic Information acquisition, Access and Control (New York, Academic/ Plenum Publishers 1999) 277.

119 Christabel Nyamwaya, Benefit sharing on natural extractive resources with society in Kenya (Kenya Human Rights Commission) <http://www.fes-kenya.org/media/publications/Benefits%20Sharing%20on%20Extractive%20Natural%20Resources%20with%20Society%20in%20Kenya%202013.pdf> accessed 14 October 2014.

120 ibid.

121 ibid.; See also Kefa Chesire, Chepkwony and Titus N Muriuki, 'Corporate Social Responsibility Link to Strategy among Mobile telephone Service Provides in Kenya.'

Kenya Human Rights report, titled Benefit sharing on natural extractive resources with society in Kenya. [122]

The MNC history and conduct like oil spill in Nigeria, the toxic dumping in Ivory Coast, the support of war in Congo etc, indicates that Sub-Saharan countries might not see much benefit until MNCs adopt fair policies towards them. [123] For example, there has been recent protest on some controversial activities of MNCs in several countries like Ghana, where they sought to sell water, Zambia with genetically modified food, Niger Delta the centre of oil extraction and Ethiopia with huge land leases.[124] Most controversial is the recent purchase and lease of millions of hectares by the MNCs in Africa as they claim that Africa has surplus land. According to the Oxfam report, *Our Land, Our Lives*, millions of hectares of land in African countries like Sudan, Tanzania and Ethiopia have been leased or sold to MNCs. This land primarily is used by MNCs to grow bio-fuels and food for export to countries out of Africa. While the issue of African hunger is not a new thing, there is controversy over whether this is a corporate quest to meet world food demands by exploiting African resources for commercial profit. According to the report the secrecy of these land deals between these governments and MNCs, the very little public benefit and cost to MNCs, the eviction of peasants, the cheap labor and the commercialization of food are predicted to increase starvation in these regions.

The attempt of the U.S.A to limit the human rights abuses and corruptions by their MNCs operating off shore has led to the passage of many laws like the Anti-corruption law and the Alien Torts Act .[125] The Alien Tort Claims Act (ATCA) or Alien Tort Statute (ATS) was originally passed in 1789, 28 U.S.C. § 1350. It essentially grants jurisdiction to U.S. federal courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The most influential case on ATA, is Sosa v. Alvarez-Machain et al.[126]If one has a foreign national who has been injured by conduct involving a U.S. corporations, and if the injury can be characterized as a serious violation of human rights, the Alien Tort Claims Act should be considered.

122 ibid. Highlight of Kenya key legislation on extractive industry (Exploration and Production) Act, Chapter 308 of the Laws of Kenya (the Petroleum Act), regulations made under the Petroleum Act and the Ninth Schedule to the Income Tax Act, Chapter 470 of the Laws of Kenya. The key institutions involved in regulating the oil and gas sector are currently the Ministry of Energy and the National Oil Corporation of Kenya Limited (NOCK). There is no separate industry regulator. The 2010 Constitution provides for the establishment of the National Land Commission (NLC) and for ratification of grants of rights or 25. See Patricia Kameri-Mbote *et al* , 'Involuntary Resettlement: Policies and Strategies,'(2008) and C. O. Okidi [1993].

123 Benjamin Fishman, 'Binding corporation to human rights norms through public law settlement' <http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-81-4-Fishman.pdf> accessed 20 October 2014.

124 Jacklyn Cock, 'Public Sociology and the struggle against corporate environmental abuse in Africa' (Sociology Department, University of the Witwatersrand, Johannesburg, South Africa) <http://www.swopinstitute.org.za/files/durban3.pdf> accessed 16 October 2014.

125 There are three principle laws that can be used to effectuate a remedy for acts done by U.S. corporate citizens abroad. One can obtain jurisdiction in the United States under the Smoot-Hawley Tariff Act of 1930.

126 See Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004).

The commonest crime the MNCs can be responsible for is aiding and abetting under the Alien Tort Claims Act.[127] Recent decisions have made clear that a multinational may become liable on the basis of having aided and abetted the other actor's activity.[128] There are some controversies on the use of ATS; recently Second Circuit opinion rejected liability for corporations generally under the ATS, in any form, aiding and abetting or otherwise. Courts have decided to give strong presumption against extraterritorial effect and authority to claims brought by foreigners in the United States, in order to protect American corporations. [129]

Some MNCs have been involved in human rights abuse by aiding and abetting in countries perpetrated in Nigeria in the 1990s in protest to the inhuman and exploitative oil business with the government as they supported military interventions.[130] A number of the activists like the renowned journalist Ken Sarowiwa and other members of the Ogoni tribe were arrested, tortured and hanged for the alleged murder of Nigerian military in a trial without international judicial standards.

Another painful example of MNC's human rights abuse and failure of the CSR principle in developing countries is the Castro Alvaro case, which centered on Costa Rican banana workers hired by Standard Fruit, a MNC. The workers were required to handle dibromochloropropane (DBCP), a pesticide used to kill nematodes in the roots of the banana plants without any safety precaution. DBCP can cause sterility in men when used without proper protective measures. Meanwhile, food-related use of DBCP has been banned in the U.S. since the 1970s. In disregard to the employees' health, the supplier companies, Dow and Shell, continued to export DBCP overseas to Standard Fruit for use in its Costa Rican plantations for two years after the United States Environmental Protection Agency banned the chemical. In Costa Rica, Standard Fruit continued to use the product with thousands of Costa Rican workers handling the chemical without any protection; as a result, millions of workers became sterile.

Finally, the workers and their wives living with their husbands' sterility sued for product liability and negligence in state courts in Texas, Florida, and California against Dow, Shell and, later, Standard Fruit. As a strategy, the defendants shifted the cases to federal courts and invoked the principle of *forum non convenience*, in an attempt to move the case to Costa Rica where the maximum recovery could only be $1,500. The forum non convenience motion was rejected, forcing the companies to settle out of court in 1992.

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127 The Alien Tort Claims Act (ATCA) or Alien Tort Statute (ATS) was originally passed in 1789. Alien Tort Claims Act, 28 U.S.C. § 1350.Alien Tort Claims Act.

128 *Sinatrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1258 & n.5 (11th Cir. 2009); Romero v. Drummond Co., Inc., 552 F.3d 1303, 1315 (11th Cir. 2008) (The law of this Circuit permits a plaintiff to plead a theory of aiding and abetting under the Alien Tort Statute and the Torture Act); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 287-88 (2d Cir. 2007).
(Hall, J. concurring) (per curiam) (agreeing to adoption of the Restatement (Second) Torts' definition of aiding and abetting for Alien Tort Claims Act).

129 *EEOC v Arabian American Oil Co.*, 499 U.S. 244 (1991). *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949).

130 See Kiobel case. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S.Ct. 472 (US 2011). See *Esther Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, 2012 WL 628670 (US 2012) (oral argument), at 3-8.

Another interesting example is the Saipan case in 1999, three separate lawsuits were filed in California state and federal courts the case was against some U.S. clothing manufacturers based in Saipan. This was a class action of about 30,000 foreign textile workers, the majority of whom were migrant workers from China and the Philippines. The suit by migrant workers asserted that the corporation aided and abetted violations by their contractors in Saipan leading to involuntary servitude; the case was also settled in 2002 at about $20 million.

Similarly, Thor Chemicals is another case on CSR arising in South Africa. In the Thor Chemicals case, two separate actions were brought by workers at the site of the South African facility. [131]The site carried on mercury-related operations, which were said to have resulted in the deaths or injuries of a number of workers in South Africa. Similarly in *Nike, Inc. v.Kasky* in the U.S,[132] case touching on CSR was settled with further obligation that Nike design a trust fund to workplace-related program investments totaling $1.5 million.

Finally MNCs dealing with natural resource based are also accused in supporting rebel or government as a result of their trade.[133] In the oil and diamond sectors in countries like Angola companies like , De Beers, Chevron, Elf, Texaco Total, Fina, Royal Dutch, Shell, ExxonMobil, BP, etc., have involved in the Angolan war directly and indirectly. They take advantage of the political instability and corrupt system to maximize profit. There is a direct link between the MNC's operation in Africa and the conflict and wars in Africa

VII. CONCLUSION

As the world is pushing for a world of less trade barriers and promoting interlinked economy, many communities are waiting with abated breath for corporate social responsibility reform. However CSR reform that does not change the underling structure and operations is futile. Therefore CSR for the corporations in Sub-Saharan Africa must reflect their value and ethics. The dimension for CSR reform should base it on the principle characteristic of African Ubuntu. The Ubuntu principle, unlike Kantian principle makes fairness and justice a great and binding corporate responsibility. It is the only realistic proposal to bridge the two sides of CSR reform by accommodating their core concerns on CSR failure. This is suggested as the only realistic way to include the African communities to the corporate agenda through CSR. This will make corporations culturally sensitive and acceptable member of these Sub-African communities.

131 Jackie Cilliers, 'Business and War' in *African Security Review* (2001) 10(3) Institute for Security Studies.

132 *Kasky v. Nike, Inc.*, 119 Cal. Rptr. 2d 296 (Cal. 2002).

133 See Ashley Campbell, 'Fuelling Conflict or Financing Peace and Development? Linkages Between MNC Investment, Development and Conflict: Case Study Analysis of BP Amaco's Social Policies and Practice in Colombia,' (2003) Country Indicators for Foreign Policy, Carlton University 8 <http://www.carleton.ca/cifp/docs/cifpmnclongreportPART_11.pdf> accessed 15 January 2015.

PLANT BREEDER'S RIGHTS IN KENYA: APPROPRIATE IP FOR BIODIVERSITY AND BIOTECHNOLOGY

*Ben Sihanya**

ABSTRACT

This paper addresses three research questions and arguments. First, how have biological diversity (biodiversity) and genetic resources been conceptualised in Kenya and under the appropriate transnational law dealing with intellectual property? Second, what are some of the theoretical and practical intellectual property questions; especially related to patents and plant breeder's rights regarding the application of biotechnology, and especially genetic engineering to biodiversity? Third, I argue for appropriate reforms to establish or strengthen the system of plant breeder's rights in Kenya.

I. THE RATIONALE OF BIODIVERSITY PROTECTION AND PBR

Biodiversity is valuable to nature and human beings. It provides the conditions and processes that sustain life on earth. It is the variety of living organisms on the planet, and also the interdependence of all living things, including humans.[1] Biodiversity has an intrinsic value independent of its social and economic value for humanity[2] and therefore it ought not to be appreciated solely for its utility to humanity. Humanity derives benefits from biodiversity in the form of food, medicines, forest products, industrial use, fibres, pharmaceuticals, personal care products, as well as education and recreation, among others.[3]

Some indirect use values of biodiversity include water purification, flood control, regulating the climate, air quality, photosynthesis, pollination, decomposition and disposal of waste. The non-use values include aesthetic, ethical and spiritual values.[4] Humanity's capacity to continue deriving benefits from biodiversity will depend upon the mode of use and how human activities impact upon the ecosystem. Degradation of habitats, pollution and unsustainable use of biological diversity have led to loss of species, thus jeopardising present and future generations.[5]

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1 Vernon Hilton Heywood, I. Baste and KA Gardner, Global Biodiversity Assessment (Vernon Hilton Heywood, Cambridge University Press 1995).

2 Ben Sihanya, 'Developing Environmental Consciousness in Kenya: Biotechnology and Property Rights' (Unpublished dissertation, University of Nairobi 1991).

3 Calestous Juma, *Biotechnology and Innovation: Conserving and Utilizing Genetic Resources in Kenya* (ACTS Press 1989).

4 Neville Ash et al, 'Biodiversity,' in UNEP, Global Environment Outlook: GEO4- Environment for Development (UNEP, 2007) <http://www.unep.org/geo/geo4/report/05_Biodiversity.pdf> accessed 13 May 2014.

5 Intra and intergenerational equity are conceptualized, problematized, and contextualized in, among others, WCED Our Common Future, (OUP, 1987) <http://www.un-documents.net/wced-ocf.htm> accessed 14 February 2013.

Over exploitation of resources erodes biodiversity. Inappropriate hunting, gathering and resource harvesting technologies are a major threat to the population and variability among plants and animals. It is in this context that the Convention on Biological Diversity (CBD) emphasizes three goals: conservation and suitable use of biodiversity; access to genetic resources; and the fair and equitable benefit sharing, including the related technology transfer to facilitate the foregoing.[6]

II. NOMENCLATURE AND CONCEPTUALIZING PLANT BREEDER'S RIGHTS

Biological diversity and biotechnology have continued to attract attention in intellectual property (IP) discourses mainly because of Article 27 of the Agreement on Trade Related Aspects of Intellectual Property Rights, 1994. Article 27 provides for the patentability of life forms, as well as *sui generis* (or special) forms of protection.[7]

A. Genetic Resources

Article 2 of the Convention of Biological Diversity defines "genetic resources" to mean genetic material of actual or potential value, and "genetic material" to mean and include any material of plant, animal, microbial or other origin containing functional units of heredity.[8] Thus 'genetic resources' consist of plants, animals or micro-organisms of value as a resource for the present and future generations of humanity.[9] It is desirable to maintain as diverse a range of organisms as possible, to maintain a wide genetic base. The wider the genetic base, the greater the capacity for survival and adaptation to particular environmental conditions.

B. Biodiversity and Biotechnology

Biological diversity eludes an authoritative definition in the framework of the World Trade Organisation (WTO) and World Intellectual Property Organisation (WIPO). The Convention on Biological Diversity (CBD) defines it to mean the variability among living

6 The challenge in the governance of the environment and natural resources at the least closely related strategies. First, a holistic approach involves integrating sustainable utilization, equitable sharing, conservation and improvement, mitigation or remediation. Second, the law, policies, strategies and tactics must emanate from a holistic perspective, and sectoral concerns should be a matter of detail and focus. Third, policy making, legislation and resource administration generally should shift from the command and control (or prohibit and punish) approach to providing incentives and facilitating resource governance.

7 Ben Sihanya, Intellectual Property and Innovation in Kenya and Africa, (Innovative Lawyering, forthcoming 2015) Ch. 3.

8 Convention on Biodiversity 1992 Article 2; cf. *Nagoya Protocolon Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilizatio*n adopted by the Conference of the Parties to the Convention on Biological Diversity at its tenth meeting on 29 October 2010 in Nagoya, Japan. See also Republic of Kenya, 'The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions,' (Government Press, 2009), 24. See also Stefan Jungcurt, 'The Nagoya Protocol on Access and Benefit-sharing: Exploring the scope for specialized ABS Regimes' Paper presented at the annual meeting of the International Studies Association Annual Conference "Global Governance: Political Authority in Transition," Le Centre Sheraton Montreal Hotel, Montreal, Quebec, Canada, 16 March 2011.

9 Edward O Wilson, Biodiversity (The National Academies Press 1988); Juma (n 4).

organisms from all sources, including terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are part. It includes diversity within species, between species and of ecosystems.[10]

Biotechnology is defined as the commercial application of biological processes to life forms to create industrially and commercially useful products.[11] It consists of various technologies such as plant tissue culture, which is used in the development of disease resistant plants. It also involves the use of living organisms or their products to make or modify a substance, including genetic modification of human and animal tissues aimed at disease prevention, reproduction and tissue replacement.[12] The term has come to refer more to the production of genetically modified organisms or the manufacture of products from genetically modified organisms (GMOs). Remarkably, genetic engineering processes are now being used in the modification of microorganisms, plants and animals for the production of new plants, foods, medicines and energy forms.[13]

C. Biodiversity and Biopiracy in Kenya and Africa

Biopiracy refers to the appropriation of the knowledge and genetic resources of farming and indigenous communities by individuals of institutions who seek exclusive monopoly control (patents or intellectual property over these resources and knowledge.[14] Biopiracy has been cited as a key issue on the use of genetic resources and traditional knowledge. However, there are no legal instruments to stop biopiracy of bio-resources and traditional knowledge in Kenya.[15]

Kenya and other African countries have diverse resources in terms of plants, animals, and microorganisms.[16] Farmers in these countries usually possess traditional knowledge (TK) and use traditional techniques to manage and develop new crops and animals. Seed companies, plant breeders, animal breeders and research institutions benefit from such traditional knowledge.[17] Increasingly, African countries are going to court over

10 Convention on Biological Diversity, Article 2.

11 UNCTAD-ISTD, *Resource Book on Resource Book on TRIPs and Development*, (Cambridge University Press 2005) 388 cf. Juma (n 4).

12 ibid.

13 Calestous Juma, 'Why Biotechnology Sceptics Are Wrong' *Saturday Nation* (Nairobi, 31 May 2014) 24.

14 Daniel F Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates* (Earthscan Publishing 2010) 18; Jonathan Tanui and Irene Kinuthia (eds), *Biodiversity, Traditional Knowledge and Intellectual Property in Kenya: The Legal and Institutional Framework for Sustainable Economic Development*, (Institute of Economic Affairs, 2011) 12, 25.

15 ibid.

16 UNEP, 'State of Biodiversity in Africa,' (UNEP website, International Year of Biodiversity, 2010) <https://www.cbd.int/iyb/doc/celebrations/iyb-egypt-state-of-biodiversity-in-africa.pdf> accessed 17 June 2014.

17 Michael Blackeney, 'Regulating Access to Genetic Resources'(International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) Congress, New Delhi, October 6, 8, 2002), para.1; Anil K Gupta 'How can Asian Countries Protect Traditional Knowledge, Farmers Rights and Access to Genetic Resources Through the Implementation or Review of the WTO TRIPS Agreement' (Joint ICTSD/CEE/HBF Regional Dialogue for Governments and Civil Society, Chiang Mai, 2001).

patents on their indigenous plants.[18] However, some countries like Kenya have failed to challenge most of the reported instances of bio-piracy over indigenous biodiversity.[19]

According to the Edmonds Institute and the African Biosafety Centre Report of 2006 on Access and Benefit Sharing (ABS), the microbe *actinomycete Actinoplanes* sp. strain SE50 was harvested from Ruiru and used to manufacture the drug acarbose which is used to cure type II diabetes.[20] Arcabose now has the trade names Precose (in the US and Canada) and Glucobay (in Europe and elsewhere). Glucobay was patented by German Pharmaceutical giants Bayer in 1995. In 2004, Bayer sales of acarbose totalled €278 million (US $379 million, as of 31 Dec 2004).[21] There is no proof that Kenya challenged Bayer for this unauthorized use of Kenya's genetic resources and biodiversity.

One of the most celebrated cases involves the Hoodia cactus from the Kalahari Desert. For centuries, the San people of southern Africa ate pieces of the cactus to stave off hunger and thirst.[22] Analysing the cactus, the Council for Scientific and Industrial Research (CSIR) in South Africa found the molecule that curbs appetite and sold the rights to develop an anti-obesity drug to Pfizer, the well-known US pharmaceutical company.[23] It could be worth billions.[24] African farmers are also innovative in plant and animal breeding. African farmers have historically saved seeds from previous crops and they have cross-bred animals using appropriate technologies.[25]

III. PLANT BREEDER'S RIGHTS IN KENYA AND AFRICA

Plant Breeder's Rights (PBRs) are defined by the International Union for the Protection of New Plant Varieties (UPOV)[26] as exclusive rights over the commercial production

18 Hannilie Zulu 'Africa's stolen biodiversity: Patenting life' (2005) The Zambian <http://thezambian.com/2005/12/01/africas-stolen-biodiversity-patenting-life/> accessed 13 May 2014.

19 An example of this is the arrangement between AVEDA and the Katkabbuba community from Wiluna in Western Australia and Mount Romance on the use of sandalwood oil from the Katkabbuba inhabited lands. AVEDA then uses the sandalwood oil in the manufacture of skin care products see Duke Law website, "Examples of use and misuse of indigenous knowledge' Duke Law <http://web.law.duke.edu/cspd/itkpaper3> accessed 13 May 2014; Dora Marinova and Margaret Raven 'Indigenous Knowledge and Intellectual Property: A sustainability agenda' (2006) 20 J. Econ. Surv. 587.

20 Tanui and Kinuthia (n 16) 6; Jay McGown, Out of Africa: Mysteries of Access and Benefit Sharing (Edmund Institute 2006).

21 ibid.; Peter Drahos and Susy Frankel (eds), *Indigenous People's Innovation: Intellectual Property Pathways to Development* (ANU E Press 2012) 86, 88.

22 Antony Barnett 'In Africa the Hoodia Cactus Keeps Men Alive: Now its Secret is 'Stolen' to Make us Thin' (2001) The Observer.

23 Gerard Gathier *et al*, 'Forensic Identification of CITES Protected Slimming Cactus (Hoodia) using DNA barcoding' (2013) 58 (6) J Forensic Scipp, 1467,1471.

24 Ginger Thompson, 'Twee Rivieren Journal: Bushmen Squeeze Money from a Humble Cactus' (2003) The New York Times <http://www.nytimes.com/2003/04/01/world/twee-rivieren-journal-bushmen-squeeze-money-from-a-humble-cactus.html> accessed 13 May 2014.

25 MS Swaminathan, 'Farmers' rights and plant genetic resources' (1998) Biotech Monitor <www.biotech-monitor.nl> accessed 23 December 2011.
See Science in Africa, 'Focus on biopiracy in Africa' (Science in Africa, 2002), <www.scienceinafrica.co.za/2002/september/biopiracy.htm> accessed 23 December 2011.

26 In French it is *Union internationale pour la protection des obtentions végétales* UPOV Convention of 1991.

and marketing of the reproductive or vegetative propagating material of the protected variety.[27] The creation of this category of rights as an alternative to patents was intended to provide incentives for the seed industry.

PBRs are granted by the state to protect the proprietary rights of a plant breeder with regard to breeding or discovery of a new plant variety. A grant of a plant breeder's right for a new plant variety gives the holder the exclusive right to produce for sale and to sell propagating material of the variety. In the case of vegetatively propagated fruit and ornamental varieties, a plant breeder's right gives the holder the additional exclusive right to propagate the protected variety for commercial production of fruit, flowers or other products of the variety.[28] Just like the patent system, PBR or Plant Variety Protection (PVP) allows the plant variety owner to prohibit specific unauthorized uses of the variety.

Plant variety protection (PVP) in the form of a plant breeder's right has existed in industrialised countries for a long time. A number of European countries have recognised various kinds of plant breeders' rights since the 1920s.[29] From the 1930s, plant varieties were admitted to patent protection in the US and Germany. At the international level, the Convention of the International Union for Protection of New Varieties of Plants (UPOV) has recognised the need for protecting plants to safeguard the interests of breeders. It was first adopted in 1961 and has been subsequently revised in 1972, 1978 and 1991.

In Africa, steps toward the protection of plant breeders' rights have been made by individual nations like Kenya which have statutes on protection of PBRs.[30] Collective steps have also been made by some of the regional organisations such as Southern African Development Community (SADC), African Regional Intellectual Property Office (ARIPO) and the Organisation Africaine de la Propriété Intellectuelle (OAPI).[31]

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27 Tshimanga Kongolo, Unsettled International Intellectual Property Issues, (Kluwer Law International, 2008), 68, 69.

28 Seeds and Plant Varieties Act, Cap 326; Patricia Kameri-Mbote, 'Community, farmers' and breeders' rights in Africa: Towards a legal framework for sui generis legislation' University of Nairobi Law Journal 120, 130.

29 Hossam El-Saghir, James Mwijukye and Grace Issahaque, 'Plant varieties, biodiversity and developing countries' (IP Watch website 2010) <http://www.ip-watch.org/weblog/wp-content/uploads/2010/02/egypt-biopiracy-section-11.doc> accessed 18 May 2014; Michael Blakeney, Trade Related Aspects of Intellectual property Rights: A Concise Guide to the TRIPs Agreement (Sweet and Maxwell 1996) 21.

30 Seed and Plant Varieties Act 1975 [Rev 2012] Cap 326 based on UPOV 1978.

31 For instance, SADC has developed the draft Protocol for the Protection of New Plant Varieties which is largely based on the provisions and framework of UPOV 1991. See Intellectual Property watch website 'Draft Protocol for the Protection of New Plant Varieties of Plants (Plant Breeders' Rights) in the Southern African Development Community Region,' (Intellectual Property Watch website 2012)<http://www.ip-watch.org/weblog/wp-content/uploads/2013/04/SADC-Draft-PVP-Protocol-April-2013.pdf> accessed 18 February 2014. Cf. Voor-Groenberg Nursery CC and Anotherv Colors Fruit South Africa (Pty) Ltd (A21/12) [2012] ZAWCHC 157. See also Sue Blaine 'Scientists reject SADC groups' fear of seed control' (2013) BusinessDay Live <http://www.bdlive.co.za/national/science/2013/04/10/scientists-reject-sadc-groups-fear-of-seed-control> accessed 17 June 2014. Further, ARIPO also has the draft Legal Framework on Plant Variety Protection from the African Regional Intellectual Property Office based on UPOV 1991 too. See Catherine Saez, 'UPOV to examine ARIPO legislation on plant variety protection' (Intellectual Property Watch 2014), <http://www.modernghana.com/news/534510/50/upov-to-examine-aripo-legislation-on-plant-variety.html> accessed 17 June 2014.

Kenya became one of the first developing countries to have PVP or PBR legislation when it passed the Seeds and Plant Varieties Act, which entered into force in 1975.[32] There was little demand from domestic breeders for such legislation, which suggests that external pressure, mainly from foreign firms whose horticultural varieties were being planted in the country, played a large role in persuading policy makers of the need for such a law.[33] According to the Registrar of the Plant Breeders' Rights Office, in the first few years most of the 200-plus applications came from foreigners,[34] and were mostly for horticultural varieties with roses constituting about half the total. The Act is largely modeled on the UPOV Convention 1978[35] (and is similar to the relevant UK law).[36]

The PVP section of the Act could not be implemented until the 1990s when the Seeds and Plant Varieties (Plant Breeders' Rights) Regulations were passed (in 1994). The Seed and Plant Varieties Act is divided into seven parts; Part V deals with the plant breeders' rights. The public sector produces most new varieties bred in Kenya. This includes the Kenya Agricultural Research Institute (KARI) and the Kenya Seed Company. The public sector is now showing interest in seeking plant breeder's rights (PBR) applications. New firms are also starting up. Given the amount of time it takes to breed new varieties, it is likely to be several more years before any increased private sector breeding activity is realised and reflected in the number of applications. Remarkably, most products that rely on foreign breeding material are cultivated largely for export. Cut flowers are the best examples.[37]

The South African plant variety protection system is aligned to the 1978 UPOV Convention. Some 60 per cent of plant breeders' rights holders are foreigners.[38] Interestingly, foreign applicants and plant breeders' rights holders in Kenya account for 61 per cent of such rights holders and applicants which is very close to that in South Africa.[39]

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32 Hannington Odame, Patricia Kameri-Mbote and David Wafula, 'Governing Modern Agricultural Biotechnology in Kenya: Implications for Food Security' (2003) IDS Working Paper 199/9/2003, 19. Cf. Seeds and Plant Varieties Act, Cap 326. See also Seeds and Plant Varieties Act (Cap 326) 1994, Seeds and Plant Varieties (Amendment) Act, 2012, Seeds and Plant Varieties (NPT) Regulations, 2009.

33 ibid.

34 According to Dr Phillipe Cullet, foreigners submitted 91 per cent of the applications in the period 1997-1999. As 2012, about 501 applications had been received from local and international applicants but with only 106 of them being successful. See at Evans Olonyi Sikinyi, 'Baseline Study/ Survey Report on the Seed Sector in Kenya' (2012) A study under the auspices of African Seed Trade Association, 17. See Philippe Cullet, 'Plant Variety Protection in Africa–Towards Compliance with the TRIPS Agreement' (2001) 45 (1) Journal of African Law, 97-122.

35 Kenya has been a Member State of the UPOV Convention since 1999 and has adhered to the 1978 Act (in accordance with s. 37 of the 1991 Act).

36 Graham Dutfield, Intellectual Property, Biogenetic Resources and Traditional Knowledge (Earthscan Publishers 2010) . Cf. UK Plant Varieties and Seeds Act, 1964.

37 Queen Mary Intellectual Property Research Institute, The Relationship between Intellectual Property Rights (TRIPs) and Food Security (Queen Mary Intellectual Property Research Institute 2004) <http://trade.ec.europa.eu/ doclib/docs/2005/february/tradoc_121618.pdf> accessed 18 October 2010.

38 Genetic Resources Action International,'Plant Variety Protection to feed Africa? Rhetoric vs. Reality' (GRAIN, October 1999) http://www.grain.org/article/entries/13-plant-variety-protection-to-feed-africa-rhetoric-versus-reality accessed October 18 2010; Republic of South Africa, Plant Breeders' Rights Policy (Department of Agriculture, Forestry and Fisheries, May 2010) 11.

39 Bas Smit and Kordes Roses, 'Plant breeder's rights in Kenya' (WIPO, 2009), <http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_res_dev_ge_09/wipo_res_dev_ge_09_www_130148.pptx> accessed 19 June 2014.

IV. RATIONALE FOR PLANT BREEDER'S RIGHTS PROTECTION

The TRIPs Agreement obliges signatory states to establish mechanisms for protection of the rights of breeders.[40]According to Prof Cullet, plant variety protection in TRIPs is premised on the need to provide incentives to private sector actors to engage in plant breeding.[41] He further argues that the ultimate rationale for plant variety protection is the enhancement of food security through the provision of new improved varieties and improved availability of seeds through private sector channels.[42]

The development of a new variety is usually a long and costly undertaking. By allowing a breeder to control commercialization of the variety, the PBR gives her a chance to recoup costs and profit from the breeding investment. Without the legal protection of rights, a breeder can lose control of the commercialization of a new variety to persons who did not contribute towards the breeding costs. By providing an incentive to a breeder, PBR encourages investment and effort into plant breeding in Kenya and Africa.[43] The result is that farmers and the general public gain access to an increased number and range of improved varieties.

V. TRANSNATIONAL PLANT BREEDER'S RIGHTS LAW

Plant breeder's rights (PBR), like patent and other forms of intellectual property (IP) law, are largely territorial. That is, protection applies only in countries where protection has been sought and granted. Thus, the owner of a maize variety protected in South Africa would have no legal control over how that variety was used inside Kenya or Nigeria. However, the variety owner could prevent the importation into South Africa of the variety including grain, plants, plant parts, and, in some countries, even manufactured products produced using the protected variety.[44]

Various transnational regimes have provisions on plant breeder's rights (PBR). Many of these instruments are negotiated in parallel, posing a serious challenge for many African countries to engage in such discussions in a coherent manner.[45]

A. Plant Breeder's Rights Under TRIPs Agreement

While the TRIPs Agreement is better known for the debate on the patenting of plants and other life forms, there is a basis for plant breeder's rights (PBR) under the TRIPs Agreement.

40 TRIPs Agreement, Article 27.

41 Phillipe Cullet and Radhika Koluru, 'Plant variety protection and farmers' rights: Towards a broader understanding' (2003) 24 Delhi Law Review, 41, 44.

42 ibid.

43 Kameri-Mbote (n 29); Cullet (n 35).

44 William H. Lesser and Susan Eckert Lynch 'Plant breeders' rights: An introduction' (ipHandbook, 2008) <http://www.iphandbook.org/handbook/ch04/p05/> accessed 15 October 2010.

45 ibid.

It has been widely argued that plant variety protection in TRIPs is premised on the need to provide incentives to private sector actors to engage in plant breeding.[46]Article 7 lays down a strong basis for the protection of PBRs when it outlines objectives.[47]

The first three objectives include technological innovation, transfer and dissemination of technology, and the production and use of technological knowledge. Prof Peter K. Yu argues that although they focus mainly on technological development and may not affect all forms of intellectual property rights, the latter two have a much broader focus and cover virtually all forms of intellectual property rights.[48]

1. Plant Breeder's Rights vis-a-vis Patent vis-a-vis *Sui Generis* System

One of the most contested provisions of the TRIPs Agreement relates to plant variety protection (PVP). Article 27(3)(b) of the Agreement allows countries to:

> .exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and micro-biological processes.

Art. 27(3)(b) continues:

> However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis [or special] system or by any combination thereof.

Thus African countries may protect plant varieties through one of three distinct approaches: patent law as in the US;[49] an effective *sui generis* (or special) system; or a combination of both systems. PBR is clearly a *sui generis* system, but what constitutes "effective" is unclear. The fact that TRIPs has not defined what should constitute an 'effective' system opens the term 'effective' to wide interpretation. This has been credited as leaving a wide discretion on member states to define what to them would constitute an effective *sui generis* system.[50] Even so, notwithstanding the apparent flexibility and lesser rigidity, such an instrument of intellectual property protection must satisfy certain *de minims* requirements.[51]

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46 Cullet and Koluru (n 42).

47 Article 7 states that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Cf. Ben Sihanya 'Technology Transfer, Intellectual Property Rights and Bio-safety: Strategies for Implementing the Convention on Biodiversity' (1994) 6:3 AgBiotech News and Information,Centre on Agricultural Biotechnology (CAB), London, 53N-60N.

48 Peter K Yu 'The Objectives and Principles of the TRIPS agreement' (2009) 46:4 Houston Law Review 984-1046, 1000.

49 Many developed countries do offer patents on plants if patent requirements are met, that is, novelty, inventive step and industrial applicability. Section 25(4) (b) of the South African Patents Act 1978 excludes the patentability of living organisms. Section 26 of Kenya's Industrial Property Act 2001 excludes plant varieties as provided for in the Seeds and Plant Varieties Act, Cap 326, but not parts thereof or products of biotechnological processes. See Chapter 3.

50 S Bala Ravi, 'Effectiveness of Indian sui generis law on plant variety protection and its potential to attract private investment in crop improvement' (2004) 9 JIPR, 533, 548.

51 ibid.

The meaning of *sui generis* (special) is one of the more complex issues in the TRIPs Agreement. Some argue that the term enables member states to design their own system of protection for plant varieties if they have elected not to use their patent system for plant protection.[52] The TRIPs Agreement does not refer to the UPOV Convention. This leaves other options in formulating a *sui generis* (special) system. Furthermore, key elements for the shaping of *sui generis* systems are either unclear or not defined.

2. Patent vis-a-vis *Sui Generis* system

The question of *sui generis* (or special) IP protection for plant varieties is crucial in the context of implementing the TRIPs Agreement. Since it was a compromise during the negotiations, TRIPs requires the introduction of plant breeder's rights (PBR) or plant variety protection (PVP) in all Member States. It however does not impose the introduction of patent. Article 27(3)(b) specifically requires all Member States to "provide for the protection of plant varieties either by patents or by an effective *sui generis* (special) system or by any combination thereof."

The introduction of PVP or PBR is largely a challenge to African and other developing countries. In comparison, countries had largely already introduced either plant patent or PBRs before the adoption of the TRIPs Agreement. Developing countries that are members of WTO were left with the choice of either adopting the existing regime proposed in UPOV or to devise their own plant variety protection system adapted to their specific situation.[53] For African countries in particular, the issue has been how to balance the interests of breeders and farmers while providing protection for new varieties of plants.[54]

Remarkably, the TRIPs Agreement embodies minimum standards of protection for patent and other forms of intellectual property. It has no further standards as to what constitutes an effective *sui generis* system. Nor does it mention UPOV. African countries could develop a *sui generis* system as provided by the 1978 or 1991 Act of the UPOV Convention. Kenya adopted the *sui generis* system as provided under the 1978 UPOV Act, whereas the African Intellectual Property Organisation (OAPI) Agreement has implemented the UPOV 1991 Act.[55] Alternatively, African countries could adopt a *sui generis* (special) system different from the one provided under the UPOV Convention.[56]

In cases where plant breeder's rights (PBRs) are adopted only as part of the regime, the regime is completed by the introduction of a form of farmers' rights. In fact, existing *sui*

52 Pierre Arhel, 'Review of Article 27.3(b) of the TRIPS Agreement,' and 'Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD)' Regional Trade Policy Course (RTPC, World Trade Organisation 2011). Cullet (n 35) 97.

53 Arhel (n 53); Kameri-Mbote (n 29).

54 Susette Biber-Klemm, 'Biotechnology and Traditional Knowledge: In Search of Equity' (2000) 2 Int. J. Biotechnology, 85,102.

55 Kongolo (n 29) 4; Dutfield (n 37).

56 The problem with sui generis (special) systems is that enforcement may be limited, especially where states or regions that do not subscribe lead in the use of PBRs like the Netherlands or Europe and the US generally.

generis options can be generally defined as regimes introducing both PBRs and farmer's rights.[57]Farmers' rights are defined as:

> …rights arising from the past, present and future contribution of farmers in conserving, improving and making available plant genetic resources, particularly those in the centres of origin/diversity[58]

The purpose of these rights is stated to be 'ensuring full benefits to farmers and supporting the continuation of their contributions.'[59]

Under a patent regime, all criteria and conditions for patentability must be met. The plant variety must be new, involve an inventive step and be capable of industrial application.[60] A patentee would then be granted the exclusive rights to her invention. In the case of plant variety protection this would mean the breeder would have exclusive rights to prevent third parties (including farmers and seed merchants) from making, using, offering for sale, selling, importing, or even stocking the concerned variety.

There are major problems with Art. 27(3(b) of the TRIPs Agreement: First, there are no parameters on what a *sui generis* (special) system is. Second, it does not provide for what an *effective sui generis* system is. Some WTO members have expressed the view that genes and microbiological processes are not inventions and therefore are not patentable subject matter.[61] Without a clear benefit-sharing mechanism, TRIPs offers limited remedies for the ongoing wave of biopiracy. There is a perspective that TRIPs embodies an inbuilt system to protect breeders and biotechnologists at the expense of farmers and local communities. Many countries perceive a conflict between TRIPs and the rights and obligations of countries previously acquired under the Convention on Biological Diversity (CBD).[62]

B. International Union for the Protection of New Varieties of Plants (UPOV)

The UPOV Convention was signed on December 2, 1961 by the representatives of Belgium, France, the Federal Republic of Germany, Italy and the Netherlands. On November 26, 1962, Denmark and the UK acceded, followed by Switzerland on November 30, 1962. The Convention entered into force on August 10, 1968, following its ratification by the Netherlands, the Federal Republic of Germany and the UK.

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57 ibid. (n 56).

58 Extract of Conference Resolution 5/89, Twenty-Fifth Session of the FAO Conference, Rome, 11-29 November 1989.

59 ibid.

60 Sihanya (n 8) Chapter 3 (Patentability).

61 Arhel (n 53).

62 Mitchell Smith, 'The Relationship Between TRIPs and the CBD: A Way Forward?' (2009) Bond University Faculty of Law, Working Paper Series <http://dx.doi.org/10.2139/ssrn.1403000> accessed 17 June 2014; cf. Laurence Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of international intellectual property lawmaking' (2004) 29 Yale Law Journal of International Law 29, 32. GRAIN 'For a full review of TRIPS 27.3(b): An update on where developing countries stand with the push to patent life at WTO' (March 2000) <http://www.grain.org/briefings/?id=139> accessed 18 October 2010.

The Convention applied to "all botanical genera and species." It was envisaged that it would have a gradual introduction. A list of 13 genera was annexed to the Convention: wheat, barley, oats or rice, maize, potato, peas, beans, Lucerne, red clover, ryegrass, lettuce, apples, roses or carnations. Article 4(3) required each Member State on entry into force of the Convention to apply it to at least five genera from this list and within eight years to all the listed genera.[63]

The Convention requires member countries to provide an IP right specifically for plant varieties, that is, PBR. UPOV establishes a framework law that may be adopted by countries into their own national laws. The variety must be distinguishable from any other variety which is publicly known at the time of filing the application. The variety must have predictable characteristics and be able to be reliably reproduced. The additional requirement under the 1991 Convention states that the variety must be "new." "New" is interpreted to mean that the variety has not been sold or otherwise disposed of by the breeder for commercial purposes prior to filing for protection.[64] The 1991 Convention protects all plant varieties including those that are "essentially derived" that is, plants which require the protected variety for their production. Protection confers the right to exclude others from:

(a) producing or reproducing

(b) propagating

(c) offering for sale

(d) selling or other marketing

(e) exporting

(f) importing, or

(g) stocking for any of the above purposes the protected variety.65

The breeder's rights under the 1978 and 1991 Acts may be subject to an exception: the "breeder's exemption." The right of a breeder to use a protected variety as an initial source of variation for the creation of new varieties without authorisation from the original breeder (breeder's exemption). The 1978 Act provides for a farmer's privilege which is the liberty to re-sow seed harvested from protected varieties for the farmer's own use.[66] Under the 1991 Act, breeders are now granted exclusive rights to harvested materials and the distinction between discovery and development of varieties has been

63 Barry Greengrass, 'Plant variety protection and protection of traditional knowledge' (UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, Geneva, 30 October–1 November 2000) <http://r0.unctad.org/trade_env/docs/upov.pdf> accessed 5 January 2012.

64 Interpretation of New Plant Variety.

65 UPOV Convention 1978, Art. 5.1 and UPOV Convention 1991 , Art. 14 (1).

66 Cf. Vandana Shiva, 'Farmer's Rights And The Convention On Biological Diversity' In Vicente Sanchez and Calestous Juma, Biodiplomacy: Genetic Resources And International Relations (Acts Press, 1994); Andersen Regine, Governing Agrobiodiversity: Plant Genetics And Developing Countries (Ashgate Publishing, 2008); Andersen Regine ,The History Of Farmers' Rights (Fni Report 8 2005).

eliminated.[67] Further, the right to save seed is no longer guaranteed as the farmer's privilege is optional.[68]

C. Convention on Biological Diversity

Debate on biodiversity reached a turning point in the late 1980s and early 1990s. The Rio Earth Summit, which was convened in June 1992, promulgated the Convention on Biological Diversity (CBD), the Rio Declaration on Environment and Development and Agenda 21. The CBD was an attempt to establish an international legal instrument for the conservation and utilisation of the biological resources and for the 'fair and equitable sharing' of the benefits arising from the utilisation of genetic resources.[69] 'The single most divisive issue in the negotiations was the relationship between intellectual property rights and access to genetic resources.'[70] The Convention on Biological Diversity was inspired by commitment to sustainable development. It represents a dramatic step forward in the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.[71]

Kenya and other African countries, with the most substantial source of genetic resources, sought to use the Convention on Biological Diversity (CBD) as a means of bargaining for access to those resources for royalties, technology and research data.[72] The CBD has provisions on access to genetic resources;[73] access to and the transfer of technology;[74] informed consent and the distribution of benefits of biotechnological innovations.[75] CBD acknowledges that states have sovereign control over the biological resources within their borders and shall ensure their conservation and sustainable use.[76] It further provides that such states shall endeavor to create conditions that facilitate access to such resources.

The Convention on Biological Diversity (CBD) does not deal specifically with the issue of plant variety protection but is of direct relevance to the establishment of protection regimes for plant varieties since its scope encompasses all biological resources. Generally, it constitutes the central instrument concerning biodiversity at the international level. In this context, CBD broadly delimits the rights of states and other relevant actors in

67 3-3 <http://www.ielrc.org/content/f0303.htm> accessed 18 June 2014.

68 Cf. Gurdial Singh Nijar and Chee Yoke Ling, 'The Implications of the Intellectual Property Rights Regime of the Convention on Biological Diversity and GATT on Biodiversity Conservation: A Third World Perspective,' in Anatole F. Krattiger et al(eds), Widening Perspectives on Biodiversity 277 (International Academy of the Environment 1994).

69 See F. McConnel, *The Biodiversity Convention: A Negotiating History* (Kluwer Law International 1996).

70 CBD, Art. 1.

71 ibid.

72 Kristin G. Rosendal, 'The Convention on Biological Diversity: A Viable Instrument for Conservation and Sustainable Use' in Helge Ole Bergesen, Georg Parmann and Øystein B. Thommessen (eds), *Green Globe Yearbook of International Co-operation on Environment and Development* (Oxford University Press, 1995) 69, 81.

73 Convention on Biological Diversity, Article 15.

74 CBD, Article 16. See also Sihanya (n 49).

75 Article 19.

76 Sihanya (n 61).

biological resources. Although CBD addresses plants, animals, and micro-organisms as well as diversity in ecosystems, the subtext and *travaux preparatoires* (preparatory materials) tend to focus on plant genetic resources.

D. International Treaty on Plant Genetic Resources for Food and Agriculture

After seven years of negotiations, the UN Food and Agriculture Organisation (FAO) Conference[77] adopted the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), in November 2001. The Treaty is vital in ensuring the continued availability of the plant genetic resources that are essential in food and agriculture. The objectives of this treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits derived from their use. The treaty is to be implemented in harmony with the Convention on Biological Diversity, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) for sustainable agriculture and food security.

0This treaty covers all plant genetic resources relevant for food and agriculture. The treaty protects the material in gene banks and in farmers' fields from being directly patented by others. It encourages countries to protect farmer's rights, including the farmer's knowledge. According to the ITPGFRA, the obligation of protection of farmers' rights as relates to plant genetic resources for food and agriculture is imposed on the member states and their national mechanisms.[78] Article 9 recognises the contribution of all local and indigenous communities and farmers towards the conservation, improvement and provision of access to the resources. Nonetheless, States are free to decide on the most appropriate framework.

The ITPGRFA protection and access mechanism is based on the unique Multilateral System (MLS) of access and benefit-sharing. This is based on the recognition of the sovereign rights of States over their own plant genetic resources for food and agriculture, including the fact that the authority to determine access to those resources rests with national governments and is subject to national legislation.[79]

State parties under the ITPGRFA have agreed to establish a Multilateral System (MLS) for access and benefit-sharing with regard to plant genetic resources for food and agriculture (PGRFA).[80] The MLS is a global pool of PGRFA for a select group of crop species (Annex I species) to which access will be facilitated for research and breeding for food and agriculture, subject to the condition that users will share benefits derived from commercial products incorporating materials from the system, if access for further research and breeding is restricted.[81] The collection of Annex I materials in the MLS is

77 See Resolution 3/2001 of the UN FAO.

78 ITPGRFA, Article 9.

79 ITPGRFA, Articles 10-13.

80 ITPGRFA, Articles 10-13; I López Noriega, M Halewood and I Lapeña, The Multilateral System of Access and Benefit Sharing: Case Studies on Implementation in Kenya, Morocco, Philippines and Peru (Biodiversity International 2012).

81 ibid.; Claudio Chiarolla and Stefan Jungcurt, 'Outstanding Issues on Access and Benefit Sharing under the Multilateral System of the International Treaty on Plant Genetic Resources for Food and Agriculture' (2011) Background study paper, 12.

included by the Member States, the collections of International Agricultural Research Centres (IARCS) of the Consultative Group on International Agricultural Research (CGIAR), and other international organizations, and collections by natural and legal persons from Member States who have placed their collections under the Multilateral System.[82]

The MLS mechanism has drawn criticism because of slow notification of inclusion of national gene bank materials in the MLS since that has hindered the intended benefits envisioned under the treaty.[83] An issue that has remained a challenge is inculcating indigenous varieties owned by communities into the MLS mechanism. Therefore, the challenge has been to develop a process that ensures that communities give their prior informed consent (PIC) to make their materials available to the MLS and have access to materials in the System and participate in the benefits distributed through it.[84] UNEP has proposed the adoption of bio-cultural community protocols (BCPs) to ensure that communities give their prior informed consent for inclusion of their plant varieties in the MLS.[85]

VI. REGIONAL FRAMEWORKS ON PLANT BREEDER'S RIGHTS

There are two major African regional frameworks on plant breeder's rights (PBRs): the African Regional Intellectual Property Organisation (ARIPO) and African Intellectual Property Organisation (OAPI) framework, on the one hand, and the African Union (AU) (formerly OAU) on the other.

A. OAPI, ARIPO and the AU on Plant Breeder's Rights

The African Intellectual Property Organisation (OAPI) has dealt with plant variety protection directly. OAPI member states agreed to a revision of the Bangui Convention in 1999. This new text commits to a revision to the 1991 version of the UPOV Convention.[86] Majority of OAPI member states are least developed countries (LDCs). The new agreement has extended its scope to deal with plant varieties.[87] Article 6 of Annex I, explicitly excludes plant varieties from the ambit of patents. Therefore, the agreement

82 ibid.

83 Chiarolla and Jungcurt (n 82). See also Subash Dasgupta and Indrajit Roy (eds), 'Enhancing understanding and implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture in Asia (GCP/RAS/284/JPN)' (Report of the First National Focal Point Meeting of the project, May 27,28, 2013, Food and Agriculture Organization of the United Nations, Bangkok) 4.

84 Nagoya Protocol, Articles 5 and 7. Chiarolla and Stefan (n 82) 33. cf. Kabir Bavikatte and Harry Jonas (eds), Bio-cultural Community Protocols: A community Approach to Ensuring the Integrity of Environmental law and Policy (UNEP, 2009) 9.

85 ibid.; A BCP is a protocol that is developed after a community undertakes a consultative process to outline their core ecological, cultural and spiritual values and customary laws relating to their TK and resources, based on which they provide clear terms and conditions to regulate access to their knowledge and resources.

86 See Agreement to Revise the Bangui Agreement on the Creation of an African Intellectual Property Organisation of 2 March, 1997, Bangui, 24th February, 2000; Cullet (n 35).

87 Annex X.

does not permit plant variety protection under the patent regime. Article 4 of Annex X sets out the criteria and conditions in respect of plant variety protection.[88]

The African Regional Intellectual Property Organisation (ARIPO) has not dealt specifically with the issue of plant variety protection following the adoption of the TRIPs Agreement. Further, the current patent regime put in place by the Harare Protocol on Patents and Industrial Designs (1982)[89] does not offer useful guidance. The Protocol does not have substantive provisions on patenting. It focuses on procedural and administrative matters.[90]

However, it is worth of mention that, ARIPO also has developed the draft Legal Framework on Plant Variety Protection in a bid to ensure proper protection of plant breeders' rights under a *sui generis* system as proposed under TRIPs and to supplement the Harare Patents system.[91] This proposed legal framework has however drawn a lot of criticism from the civil society on grounds that it is a threat to farmers' rights.[92]As earlier indicated, SADC has developed the draft Protocol for the Protection of New Plant Varieties based on UPOV 1991.[93]

The OAU (now known as the AU) has also developed a regime concerning biological resources called the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources.[94] This model deals with access to biological resources, benefit sharing, and the rights of farmers and breeders over their knowledge and resources. It is premised on the rejection of patenting life forms or the exclusive appropriation of any life form, including derivatives.[95]

B. African Model Law on Plant Breeders' Rights

Kenya and many African countries are very rich in crop species and related plants. The African Union (AU) has developed programmes to assist African countries in fulfilling their obligations under the Convention on Biological Diversity (CBD) and the WTO's TRIPs Agreement. One major development is the Model Legislation on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of

88 The plant variety must be new, distinct, homogenous, or uniform stable and bearing a denomination in accordance with Annex X of the Bangui Agreement.

89 The Harare Protocol on Patents and Industrial Designs within the Framework of the African Regional Industrial Property Organization (ARIPO) 1982. See also Sihanya (n 8), Ch 2, 4.

90 ibid.

91 Saez (n 32).

92 ibid.

93 Intellectual Property watch website, 'Draft Protocol for the Protection of New Plant Varieties of Plants (Plant Breeders' Rights) in the Southern African Development Community Region' (2012) Intellectual Propertywatch <http://www.ip-watch.org/weblog/wp-content/uploads/2013/04/SADC-Draft-PVP-Protocol-April-2013.pdf> accessed 18 February 2014. Cf. Voor-Groenberg Nursery CC and AnothervColors Fruit South Africa (Pty) Ltd (A21/12) [2012] ZAWCHC 157; Blaine (n 32).

94 See African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (2000). See Sihanya (n 8), Ch2, 3, 25 and 27 (discussing OAU Model Law and related issues).

95 Sihanya (n 95).

Access to Biological Resources of 1997. The AU Heads of State adopted the Model Law in June 1998 at Ouagadougou, Burkina Faso. They proposed that the Model Law be the basis of all national laws on the matter across Africa.[96]

The Model Law adopts a *sui generis* (special) regime based on UPOV 1991.[97] However, it incorporates farmer's rights and combines these with some of the access principles of the CBD.[98] It has four components; access to biological resources, community rights,[99] farmer's rights[100] and plant breeder's rights (PBRs). The Model Law seeks to ensure the conservation, evaluation and sustainable use of biological resources, including agricultural genetic resources, and knowledge and technologies. A major objective is to maintain and improve biodiversity as a means of sustaining all life support systems.

The Model Law provides for women's full participation at all levels of policy-making and implementation in relation to biological diversity, and associated knowledge and technologies.[101] Uganda's Plant Variety Protection Bill 2010 was developed along the line of the African model law.[102] Even so, the African model law was not completely adopted in the 2010 bill. For example, in spite of the fact that the model law protects plant breeders' rights in harmony with farmers' and community rights'; the final gazette Ugandan bill lacks substantive sections that had provided for the recognition and protection of farmers' and community rights.[103]

96 See Sihanya, ibid., Ch 2, 3 and 4 (OAU Model Legislation).

97 African Centre for Biosafety, 'ARIPO's PVP law undermines Farmers' Rights and Food Security in Africa' (2012) African Centre for Biosafety <http://www.acbio.org.za/index.php/media/64-media-releases/409-aripos-pvp-law-undermines-farmers-rights-a-food-security-in-africa> accessed 16 June 2014.

98 OAU Model Legislation on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources of 1997; Arts.15 and 16 CBD 1992.

99 Community rights recognised include rights over their biological resources and the right to collectively benefit from their use, rights to their innovations, practices, knowledge, and technology and the right to collectively benefit from their utilisation. In practice, these rights allow communities the right to prohibit access to their resources and knowledge but only in cases where access would be detrimental to the integrity of their natural or cultural Heritage. See Draft Model Law For Au Member States On Access To Information Prepared Under The Auspices Of The Special Rapporteur On freedom of expression and access to information in Africa in partnership with The Centre For Human Rights, University Of Pretoria; Susette Biber-Klemm and Thomas Cottie, Rights To Plant Genetic Resources And Traditional Knowledge: Basic Issues And Perspectives (Cabi Publishing, 2006).

100 These include at least five categories of rights: first, the protection of their traditional knowledge relevant to plant and animal genetic resources; second, the right to an equitable share of benefits arising from the use of plant and animal genetic resources; third, the right to participate in making decisions on matters related to the conservation and sustainable use of plant and animal genetic resources; fourth, the right to save, use, exchange and sell farm-saved seed or propagating material; and fifth, the right to use a commercial breeders' variety to develop other varieties. Cf. Shiva (n 67).

101 See generally OAU Model Legislation on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources of 1997.

102 Hillary Muheebwa, 'Small farmers' rights sidelined in Uganda's plant breeding regulation' (Intellectual Property Watch, 2014) <http://www.ip-watch.org/2014/06/12/small-farmers-rights-sidelined-in-uganda-plant-breeding-regulation/> accessed 16 June 2014.

103 ibid.

The AU seeks to protect farmers' breeds and seeds according to the criteria based on customary practices. A farmer has the right to save, use, multiply and sell seeds.[104] There is a limitation that sale of materials owned by the farmers should not be on a commercial scale. Breeders' are also protected with respect to their intellectual property (IP) rights over new varieties that are distinct sufficiently homogenous or uniform. Breeder's rights in a new variety are subject to restriction with the objective of protecting food security, health, biological diversity and any other requirements of the farming community for propagating material of a particular variety. Thus breeders' rights are subordinate to farmers' rights.

C. The Measures Adopted for the Protection of PBR's in the SADC

SADC has taken a positive step in encouraging the use of biotechnology as well as the support and protection of PBRs. The UPOV Convention 1961 seeks to protect the variety of the plant and not the plant itself. Therefore, the subject matter of protection is not the whole plant. In a case involving ten different varieties of seedless grapes, a Western Cape High Court interpreted key provisions of South Africa's Plant Breeders' Rights Act.[105] A sub-licensee ("Colors"), sought to assert ownership rights over plants and plant materials it received under a sub-licensing agreement even though both the head-license and the sub-license agreement had already been terminated.[106] In the alternative, Colors argued that it was entitled to possess and exploit the plant materials in question and relied in part on the provision of Section 23(6) of the Act relating to a plant breeder's rights. The court ruled that the section did not provide for a cause of action and consequently, the company could not improperly exercise ownership rights over the disputed plant varieties.[107]

In the quest to help improve the development of PBR's, SADC has come up with the SADC Draft protocol for the protection of New Plant Varieties (PVR's). The draft protocol has been modeled after UPOV 1991. The draft protocol builds "on the need to have an effective *sui* generis system of intellectual property protection of new varieties that meets the requirements of the TRIPS agreement."[108] According to the draft protocol, PBR's in the region will allow farmers access to a wide range of improved varieties to contribute to the attainment of the regional goal of economic development and food security.[109]

The draft protocol was expected to be a welcome solution for the protection of PBR's but that has not been the case. It has faced a lot of opposition especially from civil society groups in the southern region and has been heavily criticized as being inflexible restrictive and also because it is said to impose a "one size fits all" plant variety protection

104 Robert Ali Brac de la Perrière and Guy Kastler (eds), Seeds and Farmers' Rights: How international regulations affect farmer seeds, (Peasant Seeds Network, and Association BEDE, 2011), 77, 80.

105 South Africa's Plant Breeders' Rights Act 15 of 1976.

106 Voor-Groenberg Nursery CC and Another v Colors Fruit South Africa (Pty) Ltd (A21/12) [2012] ZAWCHC 157 (23 August 2012).

107 ibid.

108 TRIPs Agreement., Article 27.3(b).

109 Saez (n 92).

system on all SADC countries irrespective of the nature of agricultural systems, social and economic development.[110] They argue that the UPOV 1991 was developed by industrialized countries to address their own needs, and does not reflect the concerns and conditions of African nations.[111]

The rights of farmers under the draft protocol have been restricted. Under the protocol, the unauthorized sale of seeds stored after harvesting a crop grown from the seeds of a protected variety is forbidden. However, almost 80% of all seeds used in Africa come from the informal seed systems and thus it would be unrealistic to apply this provision as it would mean barring almost all farmers from practicing agriculture with the aim of satisfying this provision in the draft protocol.[112]

The draft protocol also contains provisions that diverge from the positions and commitments of SADC members undertaken regionally and internationally concerning community and farmer's rights as well as PBR's ,for example, most SADC members have ratified the International Treaty on Plant Genetic Resources on Food and Agriculture (ITPGRFA). This treaty commits its members to develop and maintain appropriate policies and legal measures that promote the sustainable use of plant genetic resources for food and agriculture, such as promoting plant breeding efforts with the participation of farmers.

The draft protocol has also ignored the African model law on "The Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources" ("African Model Law") which was adopted by the Council Ministers of the Organization of African Unity (OAU).

The SADC draft protocol imposes the restrictive regime of UPOV 1991 on all SADC members by proposing a regional PVP system whereby the SADC regional PBR office has full authority to grant and administer breeder's rights on behalf of all contracting states. A regional PVP system, it has been argued, is aimed at simplifying and harmonizing procedures and also renders national laws inapplicable.[113] This approach therefore denies individual SADC members the right to any decision related to plant varieties. This system has been referred to as the "one-grant" system whereby the SADC regional authority has power to grant and administer breeder's rights on behalf of the contracting states.

The ITPGRFA[114] recognizes the rights of local and indigenous communities and farmers to participate in decision making, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture. Civil Societies have questioned the rationale and underlying premise for the SADC draft protocol based on the UPOV 1991 and what consultation were done when drafting the

110 SADC Civil Society Organization Submission website, <http://www.ip watch.org/weblog/wp-content/uploads/2013/04/CSO-submission-SADC-April-20131.pdf> accessed 26 June 2014.

111 ibid.

112 M Smale, D Byerlee and T Jayne, 'Maize revolutions in Sub-Saharan Africa' (2011) Policy Research Working Paper 5659 Development Research Group, 7.

113 Saez (n 92).

114 ITPGRFA, Article 9(2)(c).

protocol and what data and impact assessments that were used in the development of the draft protocol.[115] The critics of the draft protocol have urged the SADC members to reject the protocol on of UPOV 1991 using the argument that the convention does not meet the needs of the SADC member states.[116] The argument has been advanced further that the convention was developed by industrialized countries to meet their needs.[117] It thus would not be applicable because most of the SADC member states are among the least developed countries and thus have entirely different needs.[118]

The critics also urge that any legal framework to be adopted for the protection of plant varieties by the SADC should embody the following six parameters: first, recognize and support the contribution of farmers in conserving, improving, and making available plant genetic resources for food and agriculture. Second, uphold and promote farmers rights to save, use, exchange, and sell farm-saved seed/propagating material/harvested material. Third, strike a fair, equitable, socially just balance between breeders' rights and farmers rights. Fourth, enhance agricultural bio-diversity and food sovereignty and protect livelihoods. Fifth, reaffirm and not hinder the sovereign right of SADC members to take measures necessary to address national challenges and protect the public interest. Sixth, recognize that SADC members are at different levels of socio-economic development and build-in sufficient appropriate flexibilities to accommodate member states' particularities and vulnerabilities.[119]

D. Requirements for Plant Breeders Rights in Kenya and Africa

A number of African countries have adopted plant variety protection regimes in conformity with obligations under the TRIPs Agreement and other transnational legal instruments.[120] Kenya, South Africa, and Zimbabwe had PBR before the adoption of the TRIPs Agreement.[121] Most African countries did not have a plant variety regime before 1995.

115 Saez (n 114).

116 ibid.

117 African Centre for Biosafety South Africa website <www.acbio.org.za/index.php/media/64-media-releases/424-new-seed-legislation-spells-disaster-for-small-farmers-in-africa> accessed 4 July 2014.

118 ibid.

119 SADC Civil Society Organization Submission website <http://www.ip-watch.org/weblog/wp-content/uploads/2013/04/CSO-submission-SADC-April-20131.pdf> accessed 26 June 2014.

120 Wynand J Van der Walt, 'Plant Variety Protection for Southern Africa: Progress and Pitfalls' (Seed Quest website 2007) <http://www.seedquest.com/forum/v/VanDerWaltWynand/07jul.htm> accessed 17 June 2014; Bram De Jonge et al,'IP policies and practices at African research organisations' in Willem van Genugten and Anna Meijnecht (eds.), Harnessing Intellectual Property Rights for Development Objectives: The double role of IPRs in the context of facilitating MDGs Nos. 1 and 6(Wolf Legal Publishers 2011) 178, 193, 183.

121 See Zimbabwe's Plant Breeders Rights Act 1973; South Africa's Plant Breeders' Rights Act No. 15 of 1976; Kenya's Seeds and Plant Varieties Act 1977.

In most African countries, for a plant variety to qualify for protection and be registered it must be new, *distinct*, *uniform* and *stable* (DUS).[122]

The Plant Breeders' Rights Act, 2012 of Tanzania,[123] and South Africa's Plant Breeder's Rights Act of 1976[124] provide that for a plant variety to be protectable it must be new; distinct (clearly distinguishable from any other variety of common knowledge at the time of the application); uniform; and stable (unchanged after repeated propagation). The Plant Breeders' Rights Act of Zimbabwe (1973) provides that the plant variety must not have been made available to the public in trade or otherwise before the date of application. It must also not have been generally known before the date of application; distinct, uniform and stable.[125]

The legal framework for PBR or PVP in Kenya was established in the Seeds and Plant Varieties Act of 1977 which was revised in 1991. Kenya acceded to the UPOV Convention in 1999. The administration of PBR lies with the Kenya Plant Health Inspectorate Service (KEPHIS) under the auspices of the Ministry of Agriculture.[126]

1. Newness or Novelty of a Plant Variety

A variety is considered to be new if propagating material, whole plant or harvested material of it has not been sold or offered for sale with the licence of the owner in Kenya for more than 1 year before the date of application.[127] Alternatively, it should not have been sold outside Kenya for more than 6 years before application date in the case of woody plants, or more than 4 years for non-woody plants.[128]

122 Article 5 of UPOV 1991 Act; Article 6, 1978 Act; s. 2 of South African's Plant Breeders; Rights Act, Act No.15 of 1976. See information on Plant Breeders' Rights under South Africa Government Services <http://www.services.gov.za/services/content/Home/OrganisationServices/permitslicencesrights/plantproduction/Applyforplantbreedersrights/en_ZA> accessed 28 January 2013; Noluthando Netnou-Nkoana and JN Loff 'The South African Floricultural Industry and the Plant Breeders' Rights Act: A Short Review,' (World Patent Information 2012); Kameri-Mbote (n 30); R. Wynberg, J van Niekerk, R Williams and L Mkhaliphi Policy Brief: Securing Farmers' Rights and Seed Sovereignty in South Africa, (Biowatch South Africa and the Environmental Evaluation Unit: University of Cape Town 2012).

123 S. 13 of PBR Act, 2012; s. 14, Protection of New Plant Varieties (Plant Breeders' Rights) Act 2002 (Tanzania – Repealed under s. 54 of the PBR Act 2012.

124 S. 2(2); cf. s. 18(3) of Kenya's Seeds and Plant Varieties Act which stipulates that the plant variety must conform to the rules set out in the Fourth Schedule, Part II Rule 1.

125 Joseph Rusike and Philip A. Donovan, 'The maize seed industry in Zimbabwe' (1995) 12(2) Development South Africa,189-196.

126 Under the Seeds and Plant Varieties Act the Cabinet Secretary or Minister is 'the Cabinet Secretary or Minister for the time being responsible for matters relating to agriculture.' See also Republic of Kenya (2008) *Presidential Circular No. 1 of 2008*, which places the Kenya Plant Health Inspectorate Service (KEPHIS) under the Ministry of Agriculture. Cf. Republic of Kenya, *Presidential Circular No. 1 and No. 2 of 2013* (Government Press 2013).

127 Evans Olonyi Sikinyi, 'Baseline Study/Survey Report on the Seed Sector in Kenya' (2010), A study under the auspice of the African Seed Trade Association and facilitated by COMESA and the European Union, 20; Seeds and Plant Varieties Act, Cap 326. Cf. Seeds and Plant Varieties Act, Cap 326, 1994, Seeds and Plant Varieties (Amendment) Act, 2012. See also Seeds and Plant Varieties (NPT) Regulations, 2009.

128 ibid.

Similar provisions are contained in UPOV and South African Plant Breeders' Rights Act.[129]

Zimbabwe's Plant Variety Act provides that the plant variety must have been unknown prior to the date of application. The owner is expected to have taken every reasonable precaution to ensure that no plant of the new variety or any part of it is sold earlier than the time allowed. This requirement assures that the public is not giving away exclusivity rights to something already available, while recognizing that some limited use or testing will typically be required prior to application.

This prior sale rule does not apply in the following three situations. First, where the sale is part of a contractual arrangement for increasing the applicant's stock. Second, where the sale is for carrying out evaluation trials or tests under which the whole of the material produced directly or indirectly and any unused propagating material becomes or remains the property of the applicant. Third, where the plant material produced during the breeding, increasing of stock and trials or tests of the variety that is not required for these purposes, is disposed of for non-propagating purposes.[130]

The novelty condition is given in relation to commercialization of a particular variety in which the Act authorizes an allowance period for sale before application. The allowance period is one year in the country of application, or, in any other country, six years for trees or vines, or four years for other plants.

E. Claim of Priority for Plant Breeder's Rights

It is possible for a breeder who has applied for a PBR in another UPOV country to claim "priority" in respect of an earlier application. Such a claim must be made when applying in Kenya by completing the relevant section of the application form.[131] If there has been more than one application overseas, priority may only be claimed for the first application. The first overseas application should have been made within one year before the date of application in Kenya.[132] The advantage of claiming priority is that the date of application overseas becomes regarded in effect as the date of application in Kenya. This may give the applicant precedence over a competitor that she would not otherwise have enjoyed.[133]

F. Distinctness of Plant Varieties

Under UPOV "a variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of

129 Newness (or novelty) requires that the applicant variety has not been – sold or otherwise disposed of to others for more than one year in the country of application or for four years (six for trees or vines) elsewhere. See s. 2(2) of Kenya's, Seeds and Plant Varieties Act, Cap 326; Cf. Seeds and Plant Varieties (Amendment) Act, 2012.

130 Seeds and Plant Varieties Act, Cap 326. Cf. Seeds and Plant Varieties (Amendment) Act, 2012.

131 ibid.

132 Seeds and Plant Varieties Act, Cap 326. Cf. Seeds and Plant Varieties (Amendment) Act, 2012.

133 ibid.

the filing of the application."[134] The variety must be distinct from all commonly known varieties existing at the date of application, in one or more of the following characteristics: morphology (e.g. shape, colour); physiological (like disease resistance); cytological, chemical or other characteristics taken into account when the rights were granted.[135]

Similarly, a variety can be considered to be of common knowledge if, first the plant variety is already in cultivation or exploited for commercial purposes. Second, if the plant variety is included in a recognized commercial or botanical reference collection. Third, if there are precise descriptions of the variety in any publication. [136]

G. Uniformity of Plant Varieties

The variety must be sufficiently uniform.[137] Uniformity here means that the variety must have regard to the particular features of its sexual reproduction or vegetative propagation.[138] Uniformity has been established under UPOV to ensure that the variety can be defined in as far as it is necessary for the purpose of protection.[139] The criteria used takes into account the nature of the variety and the characteristics relevant to its protection.[140]

H. Stability in Plant Warieties[141]

The variety must remain true to its description after repeated propagation. Stability and uniformity serve the important function of making a variety identifiable after propagation. The two also serve important commercial needs, including satisfying the legitimate expectations of farmers, breeders, consumers, and the general public.

1. Denomination of a Plant Variety

Every applicant for a plant breeder's right must propose a denomination (or a suitable name) for the new variety.[142] This denomination must be used in the market

134 Art. 87 of the 1991 Act. Andre Heitz, 'Intellectual property rights and plant variety protection in relation to demands of the World Trade Organization and farmers in Sub-Saharan Africa' (1999, FAO Plant Production and Protection Papers, Rome), 139-162; Hossam El-Saghir, James Mwijukye and Grace Issahaque, 'Plant Varieties, Biodiversity and Developing Countries' (IP watch website) <http://www.ip-watch.org/weblog/wp-content/uploads/2010/02/egypt-biopiracy-section-11.doc> accessed 28 January 2013.

135 Seeds and Plant Varieties (Amendment) Act, 2012.

136 E Sikinyi, 'Plant Variety Protection (Plant Breeders Rights) in Kenya' in Moni Wekesa and Ben Sihanya (eds), *Intellectual Property Rights in Kenya* (Konrad Adenauer Stiftung 2009) Ch 4, 73,107.

137 The 1991 Act, Article 8, See also Seeds and Plant Varieties Act, Cap 326, S. 18 Fourth Schedule Part II.

138 Seeds and Plant Varieties Act, Cap 326, S. 18 Fourth Schedule Part II.

139 The International Union for the Protection of New Varieties of Plant, Getting the Most out of your New Plant Variety, World Intellectual Property Organisation, <http://www.wipo.int/sme/en/documents/upov_plant_variety.htm> accessed 29 August 2013.

140 ibid.

141 UPOV 1991, Article 9. See also Sikinyi (n 137).

142 Jared Onsando, 'Plant variety Protection in Kenya: (Procedures and Scope)' Presentation at Intellectual property Workshop, University of Nairobi under the Kenya Plant Health Inspectorate Service, July 18, 2013, Nairobi.

to avoid confusion and misidentification of varieties. The denomination should conform to internationally accepted UPOV guidelines on recommendations for variety denominations. If the proposed denomination is unacceptable the Registrar of plant breeder's rights (PBRs) will require the applicant to propose an alternative.

J. Applying for Plant Breeder's Rights, Who? How?

Only the owner of a new variety is entitled to apply for a grant of PBR. The owner is the breeder[143] or the discoverer of the variety, her employer or her successor in title.[144] However, an application may be made by an agent on behalf of the owner or an assignee. An applicant must make an application for the protection of a PBR.[145] The applicant must send to the PBRs office the following five items: first, an application form, fully and legibly completed in English.

Second, a completed technical questionnaire applicable to the particular genus application and questionnaire forms may be obtained from the PBR Office. Third, colour photographs representing the variety, in the case of fruit, ornamental and tree varieties. Fourth, a sample of seed as specified by the PBR Office (PBRO), in the case of an arable crop, pasture, and amenity grass and vegetable varieties. Fifth, payment of the appropriate fees.[146] The right holder is required to pay the prescribed fees in order to maintain the right.[147]

VII. TERM OR DURATION OF PROTECTION OF A PLANT BREEDERS RIGHTS

Under UPOV, the plant breeder's rights (PBR) protection period is a minimum of 15 years, which extends to 18 years for woody plants under the 1978 Act.[148] The 1991 Act extends the periods to 20 and 25 years, respectively.[149]

In some African countries plant breeder's rights are granted for 25 years for vines and trees, and for 20 years for all other crops.[150] The term or duration is calculated from the date on which a certificate of registration is issued. The rights holder may request the Registrar for an extension upon expiry of the term. In Kenya fruit, forest and ornamental trees as well as grape vines are protected for 18 years or more. For all other plant materials, the period is 15 years or more.[151]

143 ibid.

144 S. 6 (1)(a) of the Zimbabwe's Plant Variety Act; s. 6(1) of South Africa's Plant Variety Act; s. 18(2) of the Seed and Plant Variety's Act of Kenya.

145 S. 7 of the South Africa Plant Variety's Act 1976; s. 7 of Zimbabwe's Plant Variety Act 1973.

146 Cf. Sihanya (n 8) Chapter 4 (Patent procedure).

147 Seeds and Plant Varieties (NPT) Regulations, 2009.

148 Art. 8.

149 UPOV Act 1991 Art. 19(2).

150 Tanzania's Protection of New Plant Varieties (Plant Breeders' Rights) Act, No. 22 of 2002, Section 35.

151 Seeds and Plant Varieties Act, Cap 326, Sections 20.

VIII. RIGHTS, LIMITATIONS AND EXCEPTIONS UNDER PBR

Plant breeders have important rights and privileges. These are subject to limitations and exceptions.

A. Rights and Privileges Under PBR152

Plant breeders' rights (PBRs) are granted by the state to protect the proprietary rights to the breeder or discoverer of a new plant variety. Statutes on PBR, for instance, Kenya's Seeds and Plant Varieties Act, invariably, provide that the breeder of a protected variety has the exclusive right to perform any of the following activities:[153] First, to produce for sale and to sell propagating material of the variety. Second, to reproduce or multiply the propagating materials. In the case of vegetatively propagated fruit and ornamental varieties, PBRs give the holder the additional exclusive right to propagate the protected variety for commercial production of fruit, flowers or other products of the variety. [154]

Third, the plant breeder's rights (PBR) holder has the right to process the variety. Fourth, to stock the variety. Fifth, to export the variety.[155] Sixth, to collect royalties through licensing and assignment of her rights. The PBR holder may license others to produce for sale and to sell propagating material of the protected variety. Holders of rights commonly collect royalties from the commercialization of their protected varieties.[156]

B. Limitations and Exceptions to PBRs

Kenya's Seeds and Plant Varieties (SPV) Act provides for limitations and exceptions to the plant breeder's rights (PBRs),[157]as provided under the 1991 UPOV Act. The Kenyan SPV Act provides that the PBRs do not cover private and non-commercial acts, experimental acts or those carried out for the purpose of breeding other varieties.[158] Section 34 permits a farmer to save the seeds of a protected variety harvested in her own holdings. Unlike the UPOV Convention of 1991, section 34 does not require the authorities to limit a farmer regarding how much should be saved on her own holdings.

Others are free to do any of the following three activities: First, to grow or use a protected variety for non-commercial purposes. Second, to use the plants or parts of the protected variety for human consumption or other non-propagating purposes.

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152 cf. Parts 1.5- 1.6 of this paper.

153 Seeds and Plant Varieties Act, Cap 326, S. 23. Cf. Zimbabwe's Protection of New Plant Varieties (Plant Breeders' Rights) Act, No. 22 of 2002; s. 23 South African's Plant Breeders; Rights Act, Act No. 15 of 1976.

154 of the Seeds and Plant Varieties Act, Cap 326, S. 27 (c) (d).

155 The relevant exporters of horticultural products from Kenya are thus protected. Consider the work of the Horticultural Crops Development Authority on their website, <http://www.hcda.or.ke/tech/> accessed 21 May 2014.

156 Seeds and Plant Varieties Act, Cap 326, S. 23.

157 Seeds and Plant Varieties Act, Cap 326, S. 20 (1), S. 23 (6).

158 South African's Plant Breeders; Rights Act, Act No. 15 of 1976. Cf. the limitations and exceptions to protected rights under the recent African patent laws South Africa, Uganda, Nigeria. For example, s. 58 of IPA 2001 (Kenya). See also Chapter 4 (Patent Rights, Limitations and Exceptions and Obligations).

And third, to use a protected variety for plant breeding.[159] Repeated use of a protected variety for commercial production without the authority of the holder of the rights is not permitted.

IX. COMPULSORY LICENSING OF PBRS

Any person may apply to the Registrar for a compulsory licence in respect of that right in either of two contexts. First, where the person who is of the opinion that the holder of a plant breeder's right has unreasonably refused to grant to her a licence under section 25 of the Plant Breeders Rights (PBR) Act.[160] Second, where such a holder imposes unreasonable conditions for the issue of such a licence.[161]

X. INFRINGEMENT OF PBR, DEFENCES AND REMEDIES

Plant breeder's rights (PBRs) may be infringed through any of the following five actions: First, the unauthorised production and sale of the protected variety under its real name.[162] Second, unathorised production and sale of the protected variety under a different name.[163] Third, unathorised export to territories where there is no protection for the species in question. Fourth, production outside the protected area and unauthorised import into the protected territory.[164] And fifth, the use of farm-saved seed without paying the fees due to the breeder.[165]

Infringement of a plant breeder's rights (PBR) is a civil wrong and a criminal offence. Therefore, like any other intellectual property (IP) rights holder, the owner of a PBR may seek administrative or civil remedies as well as criminal sanctions. The administrative remedies include alternative dispute resolution (ADR) mechanisms and border measures to stop the export of infringing varieties.[166] Defences to PBR infringement include the limitations and exceptions to PBR discussed above. Remedies available to a PBR holder include an injunction and damages.[167]

In South Africa, the holder of a plant breeder's right may upon proof of infringement and without proof of injury, in lieu of any action for damages, recover compensation

159 Onsando (n 143).

160 UPOV 1978 Act. Art 9.

161 The general rules governing compulsory licensing of patent and copyright apply. See also Ch4 (Patent Rights, Limitations and Exceptions and Obligation) 8, 9, and 10 (Copyright – dealing with copyright). Cf. Arts. 21, 24 and 25 Kenya's Constitution 2010.

162 South Africa's Department of Agriculture Forestry and Fisheries 'Plant Breeders' Rights Policy' (National Department of Agriculture, 2011) <http://www.nda.agric.za/docs/Policy/PlantBreederPol_2011.pdf> accessed 21 May 2014.

163 ibid.; South Africa's Plant Breeders' Rights Act No. 15 of 1976 [1996],Section 15, 23 and 23A.

164 ibid.; Sihanya (n 8), Chapters 25 (IP Administration) and 26 (IP Enforcement).

165 ibid.

166 Sihanya (n 8) , Chapters 25 (IP Administration) and 26 (IP Enforcement).

167 Courts apply the general principles governing the award of remedies in IP cases, and especially under patent law. See Sihanya (n 170), Chapters 5 (Patent Remedies), 25 (IP Administration) and 26 (IP Enforcement).

in an amount not exceeding Rand 10 000.00.[168] In addition to any other remedy, a court may make an order in respect of the custody, surrender for disposal of any book, document, plant, propagating material, product, substance or other article.[169] Action may also be taken by the holder of plant breeder's rights (PBR) against someone who sells propagating material of another variety of the same genus or species using the denomination approved for the protected variety.[170]

Remarkably, developments on plant breeder's rights and plant variety protection (PVP) are having an impact on other aspects of plant genetic resources (PGR) in Kenya, South Africa and other African Countries. Others would prefer more specific vesting of farmers' rights (FRs). The focus in the regulatory and policy debates is on Plant Genetic Resources (PGRs). Animal genetic resources (AGRs) and animal breeder's rights (ABR) also need attention in Kenya and Africa.

A. Traditional Knowledge: Plant Breeders Rights

Traditional knowledge (TK) is sometimes used as an omnibus intellectual property (IP) concept or doctrine. It also suffers from conflation and lack of doctrinal specificity. TK is increasingly becoming a major issue in national and transnational debates on intellectual property (IP) and especially on plant and animal genetic resources. TK may also be referred to as indigenous knowledge (IK) or local knowledge. TK takes various forms, including cultural and religious products or activities, and agricultural practices as well as health interventions.

Arguably, indigenous and marginalised communities have generally lost out.Farmers pay for improved varieties that they use. Yet the economic value of biological diversity conserved through conventional crop farming has not been the subject of appropriate valuation and compensation.

Indigenous and local communities as well as other holders of traditional knowledge (TK) argue that there is a holistic relationship between their TK, the genetic resources and the expressions of folklore. That these reflect their cultural identity of TK through intellectual property (IP), and in this context some African governments as well as the World Intellectual Property Organisation (WIPO), the UN Educational Scientific and Cultural Organisation (UNESCO), the UN Conference on Trade and Development (UNCTAD), and UN Environment Program (UNEP) have been working on the protection and promotion of TK, folklore and genetic resources.

168 South Africa's Act, s. 47 .See also Spoor and Fisher Firm, 'Plant Breeders rights South Africa' Spoor and Fisher Firm website <http://www.spoor.com/home/index.php?ipkContentID=620> accessed 15 October 2013.

169 ibid.

170 South Africa's Plant Breeders' Rights Act, S.23, 23A and 45.

B. The Swakopmund Protocol in Light of Protection of Community Plant Breeder's Rights

The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) was adopted in August 2010. It is guided by the principle that the knowledge, technologies, biological resources and cultural heritage of the local and traditional communities are the result of past tested practices in the past generations and are held in trust by today's custodians for future generations.[171] The Protocol is intent on recognizing the intrinsic value of traditional knowledge, traditional cultures and folklore, including their social, cultural, spiritual, economic, intellectual, scientific, ecological, agricultural, medical, technological, commercial and educational value. Therefore, it seeks to promote the rights of communities over their traditional knowledge.[172]

Community rights are those belonging to members of an identifiable indigenous community, with each member entitled to use common property and any management issue pertaining to the property must have consent of the entire community.[173] A differentiation of these rights is often difficult as property rights are individualistic in nature, but this should not negate recognition of community rights which recognize their conservation role, to provide for incentives and also fulfill their human rights entitlements.[174] In practice, these rights allow communities to prohibit access to their knowledge and resources, but only in cases where access would be detrimental to the integrity of their natural or cultural heritage.[175]

In promoting community rights, the Swakopmund Protocol also seeks to protect the rights of community plant breeders'. Under the Swakopmund Protocol, community rights over plant varieties are not directly mentioned. However, this does not mean that they are covered by the protocol. The Swakopmund Protocol provides for the protection of traditional knowledge. In the Protocol, the definition of traditional knowledge is not limited to any specific technical field as it includes Agricultural, Environmental or Medical Knowledge and also knowledge associated with genetic resources.[176] The reference of tradition in traditional knowledge is not to characterize that the information is ancient or static.

171 Preamble of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) 2010.

172 ibid.

173 Patrick Ngwediagi, 'Establishment of plant breeders' rights system in Tanzania: Achievements and challenges' (2009) A Case study under the Ministry of Agriculture Food Security and Cooperatives, Tanzania -CAS-IP NPI Collaboration Project, 7.

174 Patrick Nwendiagi, 'Establishment of plant breeders' rights system in Tanzania' (WIPO, 2009) website, <http://www.wipo.int/wipolex/en/text.jsp?file_id=216640> accessed 25 June 2014 ibid.

175 African Model Legislation for the Protection of Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources, 2000. Article 20.

176 ection 2.1 of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organisation (ARIPO).

Traditional knowledge is traditional only so far as the knowledge referred to is part of the usually only orally transmitted cultural tradition of a given community.[177]

XI. SEED COMPANIES IN KENYA AND PBRS

Seed companies play a key role in the promotion, protection and distribution of protected varieties. Seed companies constitute the formal seed sector.[178] They also play a central role in the commercialisation of plant varieties. In Kenya, KEPHIS records 112 registered seed sellers/merchants as of 2014.[179] Initially, there were only three registered seed companies in the 1980s but this number grew to eighteen companies in the 1990s.[180] Further liberalisation of the seed industry in the mid-1990s resulted in the exponential increase in seed players in the seed market resulting in the over 82 seed companies having been officially registered by mid-2010.[181]

Seed companies have formed the Seed Trade Association of Kenya (STAK) under the Societies Act.[182]STAK is an organisation of seed companies which are registered by the Kenya Plant Health Inspectorate Services (KEPHIS) to produce, process and/or market seed in Kenya, including service providers in the seed industry.[183] Interestingly, the members of STAK constitute 90 % of the formal seed trade in Kenya.[184]

XII. REFORMING PBR IN KENYA AND AFRICA

Plant breeder's rights (PBRs) have the potential to benefit Kenya and Africa. This is mainly because plant biodiversity are crucial in health or medicine, food, and agriculture, and industry, among others. Yet the degradation of biodiversity poses a great threat to humans (including breeders, and the environment).

177 A reflection of the difficulty to define the concept of *traditional knowledge* is also that local knowledge is sometimes used instead of traditional knowledge. See M.O. Hinz, 'Local knowledge and its legal Protection' (Unpublished course materials 2002) Windhoek/Stellenbosch: University of Namibia/Trade Law Centre South Africa; cf. Moni Wekesa, 'Traditional Knowledge the need for *Sui Juris* Systems Of Intellectual Property Rights Protection' in M. Wekesa and Ben Sihanya (eds), *Intellectual Property Rights in Kenya* (Konrad Adenauer Foundation 2009).

178 Sikinyi (n 128). Kenya Seed Company was marked the first establishment in the formal seed company in the country in 1956. The informal seed sector refers to the production, processing, marketing and/or distribution of seed by unregistered seed producers. It is constituted of NGOs, farmers, farmers' groups and community based organisations. See Paul A. Omanga and Paul Rossiter, 'Improving Emergency Seed Relief in Kenya: A Comparative Analysis of Direct Seed Distribution and Seed Vouchers and Fairs' (2007) FAO corporate document repository <http://www.fao.org/docrep/007/y5703e/y5703e07.htm> accessed 17 June 2014.

179 KEPHIS website <http://www.kephis.org/images/docs/Registered_Seed_Merchants.xls> accessed 17 June 2014.

180 Sikinyi (n 128) 3, 4.

181 ibid.

182 SETAK website <http://stak.or.ke/14-sample-data-articles/68-seed-trade-association-of-kenya-stak.html> accessed 17 June 2014.

183 ibid.

184 Speech by H.E. William Arap Ruto, EBS, (then MP, and Minister for Agriculture) during the release of new seed varieties on Thursday, April 16, 2009, at Kilimo House Board Room, <http://www.kilimo.go.ke/index.php?option=com_contentandview=articleandcatid=48:press-releasesandid=78:the-release-of-new-seed-varieties> accessed 17 June 2014.

There are also many pharmaceutical companies, corporations or enterprises specializing on plant as well as scientists are going into tropical forests and pastoral fields to study plant genetic resources (PGR), and micro-organisms to see how best to commercialize the resources. The local communities need to be sensitized and trained to appreciate the market value of these genetic resources for purposes of an equitable transaction. This will ensure that bio-prospectors do not appropriate the resources at little or no cost and later even obtain patents on them. Measures should be taken so that the benefits associated to PBRs are shared equitably and the animal and plant genetic resources are used equitably as well as sustainably and conserved appropriately.

The Government needs to take up necessary, progressive and adaptive reforms in the protection of plant breeders' rights and animal breeders' right in Kenya. The reforms taken up need to respond to the relevant developments affecting plant breeders rights. I shall review these reforms in protection of plant breeders' rights using a three-pronged approach.

A. Constitutional Implementation on PBR and ABR in Kenya and Africa

Article 69 of the Constitution of Kenya 2010 provides that the State shall protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.[185] Further, the article imposes an obligation on the State to protect genetic resources and biological diversity.[186] The Constitution of Kenya requires the State to promote the intellectual property rights of the people of Kenya.[187] Parliament is under the specific obligation to enact legislation to recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.[188] The Seed and Plant Varieties (Amendment) Act has since been passed in compliance with article 11 of the Constitution of Kenya 2010.[189]

B. Legislative and Policy Reforms on PBR and ABR in Kenya and Africa

Plant breeders' rights are addressed under the National Seed Policy of 2010[190] while animal breeders' rights are addressed in the National Livestock Policy of 2008.[191] However, it should be noted that the rights of breeders under the latter policy are not clearly defined and protected as they have been in the National Seed Policy. Both animal breeders' and plant breeders' are further addressed under the National Biotechnology Development Policy 2006.[192] A more comprehensive policy on the rights of animal breeders should be developed so as to form the basis of the relevant legislation on animal breeders' rights.

185 Constitution of Kenya 2010, Article 69(1)(c).

186 ibid., Article 69(1)(e).

187 ibid., Article 11(2)(c).

188 ibid., Article 11(3) (c).

189 Seed and Plant Varieties (Amendment) Act No. 53 of 2012.

190 Republic of Kenya, 'National Seed Policy'Ministry of Agriculture'(Government Press 2010).

191 Republic of Kenya, 'National Livestock Policy'Ministry of Livestock Development'(Session Paper No 2 of 2008, Government Press 2008).

192 Republic of Kenya, 'National Biotechnology Development Policy' (Government Press 2006).

Part of the reforms sought to be introduced include the introduction of the Agriculture, Livestock, Fisheries and Food Authority Bill, 2012. The bill sought to repeal three other Acts including the Agriculture Act, Suppression of Noxious Weeds Act and Grass Fires Act.[193] The bill also sought to establish the Agriculture, Livestock, Fisheries and Food Authority (ALFA). The ALFA was to replace the Coconut Development Authority, Kenya Sugar Board, Tea Board of Kenya, the Coffee Board of Kenya, the Horticultural Crops Development Authority, the Pyrethrum Board of Kenya, the Cotton Development Authority, the Sisal Board of Kenya, the Agriculture, Livestock, Fisheries and Food Authority Bill, the Pig Industry Board, the Kenya Dairy Board, Kenya Meat Commission, Pests Control Products Board, Kenya Plant Health Inspectorate Service, National Cereals and Produce Board.[194] It had been argued that the Agriculture, Livestock, Fisheries and Food Authority was to a have departmental arrangement including all the thirteen subsumed authorities including one on protection of plant breeders' rights.[195]

The Kenya Plant Health Inspectorate Services is the primary institution charged with licensing and protection of plant varieties. KEPHIS is charged with the primary obligation to implement plant variety protection in Kenya, administer plant breeders' rights and maintain the Plant Breeders' Rights Register.[196]

However, the introduction of the ALFA caused a stir among advocates for the legislation on livestock protection. Following this controversy, the Agriculture, Livestock, Fisheries and Food Authority Bill was revised and passed as the Agriculture, Fisheries and Food Authority Act (AFFA)[197] this time excluding legislation over livestock.[198] Under AFFA 2013, the roles of KEPHIS were to be taken over by the Agriculture, Fisheries and Food Authority. According to the Presidential Taskforce on Parastatal Reforms, KEPHIS and the National Biosafety Authority (NBA) would be merged to form the Kenya Plant and Animal Health Inspectorate Services.[199] The Report proposed:[200]

> Kenya Plant Health Inspectorate Service be reinstated and its mandate be enhanced to include regulation on Genetically Modified Organisms. This should lead to a merger of the Kenya Plant Health Inspectorate Service and the National Biosafety Authority.

193 Agriculture, Livestock, Fisheries and Food Authority Bill , 2012, Section 41.

194 First Schedule, Section1 in the Agriculture, Livestock, Fisheries and Food Authority Bill, 2012.

195 *The Star* 'Parastatals to go in sweeping agriculture reforms' The Star (Nairobi, 12 November 2012) <http://www.the-star.co.ke/news/article-95142/parastatals-go-sweeping-agriculture-reforms#sthash.gEHZRRxq.dpuf> accessed 16 June 2014.

196 KEPHIS Act No 54 of 2012, Section 5(f).

197 Agriculture, Fisheries and Food Authority Act No 13 of 2013.

198 Under s. 1 First Schedule, the AFFA placed ten parastatals including the Coconut Development Authority, the Kenya Sugar Board, the Tea Board of Kenya, the Coffee Board of Kenya, the Horticultural Crops Development Authority, the Pyrethrum Board of Kenya, the Cotton Development Authority, the Sisal Board of Kenya, the Pests Control Products Board, and the Kenya Plant Health Inspectorate Service.

199 James Onsando, 'Plant health agency stronger despite numerous challenges' (2014) The EastAfrican Business Times <http://www.eabusinesstimes.com/index.php/welcome/item/242-plant-health-agency-stronger-despite-numerous-challenges> accessed 13 June 2014; Republic of Kenya, Report of the Presidential Taskforce on Parastatal Reforms (Government Press 2013).

200 Republic of Kenya (n 197) 97. This Taskforce was co-chaired by Hon Abdikadir H. Mohamed and Mr. Isaac Awuondo. The report was presented in October 2013.

However, the passing of AFFA was met with a lot of resistance especially from exporters, the Pest Control Products Board (PCPB) and KEPHIS. On their part, the exporters contended that the 'dissolution' of KEPHIS would compromise the quality of seeds grown in the country, and ultimately the exports to 'phytosanitary-sensitive' markets like the European Union.[201]

Agricultural value chain players through their lobby group, the Agricultural Industry Network (AIN), warned in early October 2013 after the passing of AFFA that the country stood to lose an estimated KES 200 billion a year in export earnings due to six-month precautionary bans by export markets.[202] Further, ALN argued that the government had not issued a 60-day notice on proposed changes in legislative and regulatory framework as required by the World Trade Organisation.[203] KEPHIS is a member of Kenya's National Committee on WTO (NCWTO).[204]

Agriculture, Fisheries and Food Authority Act was passed in October 2014. Four months later and with the participation of the Cabinet Secretary of Agriculture, Mr Felix Koskei, amendments were tabled in Parliament to the effect that KEPHIS was once again rendered independent. PCPB also retained its independence under the 2014 amendments.[205] KEPHIS is still under the Kenya Plant Health Inspectorate Service Act of 2012.[206] There was some controversy on the drafting of the ALFA Bill and the passing of the AFFA Act later because neither the former nor the latter Act had any express provisions repealing or even referring to the KEPHIS Act of 2012.

The Constitution of Kenya provides that the legislation on intellectual property rights is the function of the National Government.[207] Statutes and regulations on protection of plant and animal breeders' rights should be reformed to balance rights of owners and those of the communities. Further, the law on protection on animal breeders' rights should be drafted and enacted after participation and consultation at the county level.[208] This should ensure that the local and indigenous communities are better involved in passing legislation that ensures maximum benefits for them and protection of their rights. From this participation, the statutes on PBR and ABR laws can be tailored different to respond to the specific needs at the county level to bar bio-piracy and ensure adequate compensation.[209]

201 Onsando (n 204).

202 ibid.; Constant Munda, 'KEPHIS not affected by New Regulations' *The Star* (Nairobi, 25 October 2013) <http://www.the-star.co.ke/news/article-141099/kephis-not-affected-new-regulations#sthash.dUV3s4yr.dpuf> accessed 15 June 2014.

203 ibid.; cf. Walter Odhiambo, Paul Kamau and Dorothy McCormick, 'Kenya's participation in the WTO: Lessons learned' in Peter Gallagher (ed) *Managing the Challenges of WTO Participation*, (WTO 2005).

204 ibid.

205 Munda (n 207).

206 Act No. 54 of 2012. Initially, KEPHIS was established by Kenya Plant Health Inspectorate Service Order, 1996 (L.N. No. 305 of 1996) which has since been repealed by the KEPHIS Act of 2012.

207 Constitution of Kenya 2010, Fourth Schedule: Part 1.

208 Cf. Convention on Biodiversity, Article 9(c) of the CBD provides for 'the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.' See Kameri-Mbote (n 29) 3, 5, 6 and 13.

209 Blackeney (n 18); Gupta (n 18); Marinova (n 20).

C. Administrative Reforms on PBR and ABR in Kenya and Africa

Some of KEPHIS laboratories have received International Accreditation: Seed Testing Laboratory by International Seed Testing Association and Analytical Chemist Laboratory by South Africa National Accreditation System. The Constitution of Kenya 2010 brought devolution to the fore in all administrative and legislative issues.[210] As such, it is arguable that the spirit of devolution should be extended to the administration of the Kenya Plant Health Inspectorate Services to improve accessibility and efficacy in protection of plant breeders' rights. Article 174 of the Constitution of Kenya 2010 provides that some of the objects of devolution including to recognise the right of communities to manage their own affairs and to further their development and to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya.[211]

Therefore, KEPHIS and other relevant institutions should open service points in most if not all of the 47 counties in the country. For instance, KEPHIS has a few offices in the country including Mombasa, Nakuru, Kitale, Embu, Kisumu and the headquarters at Nairobi. By extension, the establishment of these new regional offices shall out of necessity require restructuring of the administrative structures within the organisation. It is arguable that if the restructuring affects the board composition, then the parent Act may have to be amended.

210 Ben Sihanya, 'Devolution and Education Law and Policy in Kenya' (2014) 10(1) Law Society of Kenya Journal, 59-90.

211 Cf. Conrad Bosire (2012) 'Will Devolution help Kenya's Poor?' Published on Open Society Initiative of Southern Africa (OSISA), August 2, 2012, <http://www.osisa.org/economic-justice/blog/will-devolution-help-kenyas-poor> accessed 17 June 2014.

BUILDING A DEMOCRATIC LEGISLATURE IN KENYA

*Migai Akech**

ABSTRACT

This paper evaluates the extent to which Kenya's Legislature (known as Parliament) is democratic, and suggests how its democratic character can be enhanced. The paper argues that although institutional reforms of the past decade have gone a long way towards enhancing the democratic character of Parliament, a number of significant institutional reforms, which would make Parliament truly democratic, are yet to be implemented. First, there is a need to enhance democracy in the decision-making processes of Parliament so that the views of all citizens are taken into account. Second, there is a need to re-examine the powers of the Senate vis-à-vis the National Assembly in general, and to clarify the roles of the National Assembly and the Senate in the passage of legislation in particular. Third, Parliament should establish effective procedures for public participation in, and accountability of, legislative processes. Fourth, there is a need to observe the rule of law in the determination of the remuneration of legislators. Finally, Parliament needs to establish a credible and enforceable ethics regime.

I. INTRODUCTION

Over the last decade, Kenya has made significant progress towards building a legislature that is not only effective in carrying out its constitutional responsibilities but is also responsive to the citizenry. Thanks to recent institutional reforms, Kenya's Parliament is now considered 'one of the two most significant national legislatures on the African continent.'[1] Among other things, it enjoys considerable autonomy from the executive branch of government, and has become an institution of 'genuine…countervailing power to the executive branch.'[2] Further, the Constitution of Kenya 2010 requires Parliament to account to citizens, and ensure their participation, in the exercise of its powers.

The idea of accountability to the public is particularly important since concerns remain that Parliament sometimes abuses its powers and fails to act in the public interest. For example, Members of Parliament (particularly members of the National Assembly) continue to insist on unilaterally increasing their salaries and allowances thereby undermining the role of the Salaries and Remuneration Commission, which is created by the Constitution to regulate the salaries and allowances of all state officers.

Second, the country is emerging from a general election in which the Jubilee Alliance won the majority of seats in both Houses of Parliament (namely the National Assembly and the Senate). It can be expected that this balance of political party power would impact on the democratic character of Parliament. On the one hand, Parliament could take a majoritarian approach to decision-making, meaning that the Jubilee Alliance would

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1 Joel D. Barkan and Fred Matiangi, 'Kenya's Tortuous Path to Successful Legislative Development' in Joel D. Barkan (ed), *Legislative Power in Emerging African Democracies* (Lynne Rienner, 2009)

2 ibid.

always have its way. On the other hand, Parliament could take a consensus approach to decision-making, meaning that the Jubilee Alliance would include the opposition in making its decisions. As we shall see in Part IV (B), Parliament needs to adopt a consensus approach to its decision-making, since this approach would enhance the prospects of the inclusion of citizens who did not vote for the Jubilee Alliance in governance.

Third, it is worth noting at the outset that the Constitution puts emphasis on devolution, which is seen by many Kenyans as the solution to the perceptions and realities of ethnic marginalization and exclusion in the sharing of national resources. In particular, the Constitution grants the Senate the important role of protecting the interests of the counties and their governments.[3] From this perspective, a need arises to evaluate how the Senate will play this role effectively, given that the exercise of its law-making powers requires the concurrence of the National Assembly in significant respects. Fourth, the Constitution establishes principles of governance, leadership and integrity such as public participation, accountability, and public trust that bind Parliament.[4] A need therefore arises to ensure that these principles are mainstreamed in the operations of Parliament.

This paper grapples with these issues in the context of evaluating the extent to which Parliament is democratic, and suggests how its democratic character can be enhanced. The paper argues that although institutional reforms of the past decade have gone a long way towards enhancing the democratic character of Parliament, a number of significant institutional reforms, which would make Parliament truly democratic, are yet to be implemented. First, there is a need to enhance democracy in the decision-making processes of Parliament so that the views of all citizens are taken into account. Second, there is a need to re-examine the powers of the Senate vis-à-vis the National Assembly in general, and to clarify the roles of the National Assembly and the Senate in the passage of legislation in particular. Third, Parliament should establish effective procedures for public participation in, and accountability of, legislative processes. Fourth, there is a need to observe the rule of law in the determination of the remuneration of legislators. Finally, Parliament needs to establish a credible and enforceable ethics regime.

Part I provides the paper's conceptual framework and examines the idea and significance of a democratic legislature. Part II consists of a brief history of Parliament and how it has been reformed over the years. Part IV examines the extent to which the new constitutional order has established an institutional framework that facilitates the sustenance of a democratic parliament. It also makes recommendations on enhancing democracy in the operations of Parliament. Part V is a brief conclusion.

II. THE IDEA AND SIGNIFICANCE OF A DEMOCRATIC LEGISLATURE

Democracy is a form of government in which a group of people who belong to a political organization, such as a nation-state, rule themselves.[5] It is a system of rule by the many, as 'distinguished from monarchy (the rule of one person), aristocracy (the rule of the best),

3 Constitution of Kenya 2010, Article 96(1).

4 ibid. Article 10 and Article 73.

5 David Held, *Models of Democracy* (1st edn, Stanford University Press 1996).

and oligarchy (the rule of the few).'[6] In more concrete terms, democracy is a process of making collective decisions.[7] In this respect, it requires the participation of the members of a political organization in the making of collective decisions. In particular, democracy mandates 'voting equality at the decisive stage,' which means that each citizen ought to be given 'an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other citizen.'[8]

However, it is virtually impossible to ensure the direct participation of citizens in governance on the scale of a nation-state.[9] Part of the answer to this problem is found in the idea of representative government.[10] That is, the people elect a group of leaders, who then govern on their behalf by making or repealing laws, and ensuring the due administration of the law and due application of public resources.[11] This group of leaders – otherwise known as legislators – forms a legislature, which constitutes one branch of a tripartite system of government, the other two being the executive and the judiciary. In this system of government, the exercise of power is regulated by the separation of powers doctrine, which seeks to avoid 'excessive accumulation of power within a single institution of government' by dispersing governmental functions among the three branches, and equipping each branch with devices to protect itself.[12]

Unfortunately, representative government is only a partial solution to the challenge of ensuring that all citizens participate effectively in governance. As Robert H. Dahl has observed, the adoption of representative government created problems for the growth of democracy.[13] For one, the 'institutions of representative democracy removed government so far from the direct reach of the demos that one could reasonably wonder… whether the new system was entitled to call itself by the venerable name of democracy.'[14] The danger was that, being out of reach and out of touch, representative government could no longer act in the interests of the people since it could not be able to discern those interests. And it could not discern those interests since citizens would no longer be able to actively participate in the governance of the polity, because the larger size of the nation-state 'made it impracticable for the whole people to assemble'.[15] A second concern was whether elected representatives actually represented the views, and acted in the interests of, the electors. In its Greek conceptualization, democracy consisted of a democratic order that satisfied a number of requirements, two of which are relevant here.[16]

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6 Marc Plattner, 'Liberalism and Democracy: Can't Have One Without the Other' (1998) 77 (2) Foreign Affairs 171.

7 Robert A. Dahl, Democracy and its Critics (3rd edn, Yale University Press 1989).

8 ibid. 109-113.

9 ibid. 2.

10 ibid. 27.

11 J.B Ojwang', *Constitutional Development in Kenya: Institutional Adaptation and Social Change,* (Acts Press, 1990).

12 Elizabeth Magill, 'The Real Separation in Separation of Powers Law', (2000) 86 Va. L. Rev. 1127.

13 Dahl (n 7) 29.

14 ibid. 30.

15 Plattner, 'Liberalism and Democracy: Can't Have One Without the Other' (1998) 77 (2) Foreign Affairs 171.

16 Dahl (n 7) 18.

One prerequisite was that 'citizens must be sufficiently harmonious in their interests so that they can share, and act upon, a strong sense of a general good that is not in marked contradiction to their personal aims or interests.'[17] Second, citizens 'must be highly homogenous with respect to characteristics that would otherwise tend to produce political conflict and sharp disagreements over the public good.' But in the nation-state, citizens were neither harmonious in their interests nor homogenous. Instead, the nation-state was characterized by 'a diversity of interests and interest groups came into existence.'[18] In particular, the Greek 'belief that citizens could and should pursue the public good rather than their private ends became more and more difficult to sustain, and even impossible, as "the public good" fragmented into individual and group interests.'[19] This perhaps explains why Rousseau asserted that 'the moment that a people gives itself representatives, it is no longer free.'[20]

From this perspective, we should therefore view representative democracy as a principal-agent relationship, in which the people (the principals) have delegated their sovereignty to popularly elected representatives (the agents).[21] Indeed, as public choice theory (that applies the theories and methods of economic analysis to the analysis of political behavior) has demonstrated, public officials such as legislators are not benevolent public servants who faithfully carry out the will of the people. Instead, they are driven by the goal of utility maximization.[22] In other words, they are guided predominantly by their own self-interests, including enhancing their powers and prestige.

A need therefore arises for mechanisms for enforcing the contract between the people and legislators, so that legislators do in fact represent the views and act in the interests of the electors, as opposed to acting in their own interests. Examples of such mechanisms include periodic elections, the right of electors to recall a legislator, and public input into the legislative process. These accountability mechanisms serve the important purpose of keeping legislators aware of the fact that they will be called upon to account for their actions, thereby helping the electorate to prevent abuses of power.

In addition, it is important to appreciate that the challenge of ensuring that citizens participate effectively in governance is even more formidable in divided societies, such as ours. Through the so-called "tyranny of numbers,"[23] for example, the general elections of 2013 clearly demonstrated that Kenya's large ethnic groups will continue to dominate the smaller ethnic groups, which necessitates a rethinking of the design of the constitution, if our democracy is to be truly inclusive. In ethnically divided societies such

17 ibid.

18 ibid. 30.

19 ibid.

20 Plattner (n 15) 174.

21 Mark Bovens, 'Public Accountability,' in Ewan Ferlie et al (eds), *The Oxford Handbook of Public Management* (Oxford University Press 2007).

22 James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, 1962); Dennis C. Mueller, *Public Choice III* (Cambridge University Press, 2003).

23 Oscar Obonyo, 'Small Tribes' Fight to End Tyranny of Numbers' The East African Standard (Nairobi, 31 August 2013).

as ours, scholars agree that 'the successful establishment of democratic government… requires two key elements: power sharing and group autonomy.'[24]

While power sharing 'denotes the participation of representatives of all significant communal groups in political decision making… group autonomy means that these groups have authority to run their own internal affairs.'[25] With respect to the design of the legislature in such societies, federalism is perceived as "an excellent way" to provide for group autonomy.[26] Further, it is recommended that the constitutions of such societies should provide for strong bicameralism.[27] That is, such societies should have a politically powerful second legislative chamber (typically a Senate) in which less populous units of the federation are overrepresented.[28] It is recommended that this second chamber "must have significant power – ideally, as much power as the first [majoritarian] chamber."[29] The idea is to establish mechanisms that can constrain the power of majorities, because without such "demos-constraining"[30] mechanisms, majorities can oppress minorities.

We can therefore say that a democratic legislature is one that is genuinely representative of the electorate in its composition and decision-making processes, accessible and accountable to the public, open and transparent in its procedures, and effective in representing the people, making law, and maintaining oversight of the executive.[31] Further, legislatures in divided societies such as ours will be democratic where their second chambers have significant demos-constraining powers. Legislatures that observe these principles are likely to be perceived as legitimate by the electorate. In other words, observing these principles is significant because it promotes public acceptance of, and confidence in, the legislature. Indeed, legitimacy is a quality that every legislature ought to strive for, since the legislature is "the institution through which the will of the people is expressed, and through which popular-self-government is realized in practice."[32]

From these premises, a question arises as to how the ideal of a democratic legislature can be realized. At the international level, there are various initiatives that seek to facilitate the realization of this ideal. One such initiative is the Commonwealth Parliamentary Association's on-going efforts to develop benchmarks for democratic legislatures. This initiative draws on the common practices among countries and the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government of 2003. The Commonwealth Parliamentary Association (CPA) seeks to develop benchmarks relating to: the representative aspects

24 Arend Lijphart, 'Constitutional Design for Divided Societies' (2004) 15 Journal of Democracy 96.

25 ibid.

26 ibid. 104.

27 Arend Lijphart, 'Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories,' (1985) 15 Piblius: Journal of Federalism 3.

28 Lijphart (n 24) 105.

29 Lijphart (n 27) 9.

30 Afred Stepan, 'Federalism and Democracy: Beyond the U.S. Model,' (1999) 10 Journal of Democracy 19.

31 David Beetham, *Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice* (Inter-Parliamentary Union, 2006).

32 ibid. 4-5.

of the legislature; ensuring the independence, effectiveness and accountability of the legislature; procedures of the legislature; public accountability; the bureaucracy of the legislature (or Parliamentary service); and relations between the legislature and the media.[33]

Concerning the representative aspects of the legislature, the CPA recommends that legislators should be 'elected by direct universal and equal suffrage in a free and secret ballot" and that their term lengths should 'reflect the need for accountability through regular and periodic legislative elections.'[34] The objective of this recommendation is 'to ensure that the current opinions of the electorate are represented in the legislature.'[35] However, representation does not necessarily ensure that all the citizens who constitute the electorate are heard in the legislature and that their voice counts in decision-making. For this reason, an election, however free and fair, does not guarantee that the legislature will be democratic. Quite simply, majoritarian elections produce winners and losers, and the resulting legislature will typically consist of a majority party or coalition of parties and a minority party or coalition of parties. Accordingly, such a legislature needs to adopt decision-making procedures and practices that ensure that the voice of minorities count if it is to be democratic.

In this respect, the CPA makes five useful recommendations. First, it recommends that women and other disadvantaged groups should be appointed to prominent legislative positions.[36] Second, it recommends that the 'legislature's assignment of committee members on each committee shall include both majority and minority party members and reflect the political composition of the legislature.'[37] Further, it recommends that opposition members should have the right to submit minority reports of the committees in which they serve.[38] Minority reports not only give minority committee members an incentive to continue investing their time in committees, but are also a useful means of ensuring that committee reports are cross-partisan.[39]

Third, it recommends that the legislature should 'provide adequate resources and facilities for party groups pursuant to a clear and transparent formula that does not unduly advantage the majority party.'[40] Fourth, it recommends that legislators should 'be able to propose legislation and introduce bills in the public interest, regardless of majority or minority status.'[41] Fifth, it recommends that oversight committees should 'provide meaningful opportunities for minority or opposition parties to engage in

33 Commonwealth Parliamentary Association, *'Benchmarks for Democratic Legislatures: A Study Group Report'* (Commonwealth Parliamentary Association 2006).

34 ibid. 10.

35 ibid.

36 ibid. 11.

37 ibid. 12.

38 ibid.

39 National Democratic Institute, 'Toward the Development of International Standards for Democratic Legislatures' (National Democratic Institute for International Affairs 2007).

40 Commonwealth Parliamentary Association (n33) 13.

41 ibid. 21.

effective oversight of government expenditures.'[42] For example, it suggests that oversight committees such as the Public Accounts Committee should be chaired by a member of the opposition party.[43] It also suggests that oversight committees should act 'in as non-partisan a manner as possible.'[44]

With respect to independence, effectiveness and accountability, the CPA makes several recommendations. First, legislators should be given 'immunity for anything said in the course of the proceedings of the legislature.'[45] However, a balance should be struck between the need to protect legislators and the need to ensure that they do not abuse this privilege.[46] Second, it recommends that legislators should be 'fairly compensated for their service' in order to enable 'any member of the public to enter the legislature regardless of their financial status.'[47] Further, the remuneration of legislators should be determined by an independent process that is not controlled by the executive.[48]

Third, in an effort to enhance the effectiveness of the legislature, it recommends that committees should 'have the right to consult and/or employ experts' to help them in their work.[49] In this respect, it commends the Scottish Parliament's practice of requiring the committees to 'go through the presiding officer to ensure fair and proper use of financial resources.'[50] A fourth recommendation aimed at enhancing the independence and effectiveness of the legislature is that it should have the power to determine and approve its own budget, unconstrained by the executive.[51] Fifth, it recommends that the legislature should have the right to override an executive veto of proposed legislation, which in most countries is achieved through a supermajority of legislators or a vote of no confidence.[52]

On the procedures of the legislature, the CPA recommends that the legislature should 'maintain and publish readily accessible records of its proceedings.'[53] The goal here is to 'facilitate the flow of information to the public, civil society and the media' so as to promote 'greater transparency and accountability of the legislature.'[54] Accordingly, information such as attendance and voting records, registers of legislators' interests should be made readily available.[55] Further, it requires the legislature to ensure that the media has appropriate access to its proceedings.[56]

42 ibid. 24.

43 ibid.

44 ibid. 25.

45 ibid. 17.

46 ibid.

47 ibid. 18.

48 ibid.

49 ibid. 22.

50 ibid.

51 ibid. 23.

52 ibid. 24.

53 ibid. 27.

54 ibid.

55 ibid.

56 ibid. 39.

Another relevant recommendation is that bicameral legislatures should have 'clearly defined roles for each chamber in the passage of legislation.[57]

In order to facilitate accountability to the public, the CPA recommends that committee hearings should be in public, and that any exceptions – such as national security and witness protection – should be 'clearly defined and provided for in the rules of procedure.'[58] In addition, where it is necessary to hold a meeting in private, a decision to that effect should be taken in public and reasons for the decision provided.[59] Second, it recommends that the legislature should provide opportunities for public input into the legislative process.[60] In New Zealand, for example, committees of the House of Representatives hold public hearings when examining draft legislation and endeavor to hear all members of the public who appear before them.[61] Third, it recommends that the legislature should exercise meaningful oversight of the military, security and intelligence services based on the principle of democratic political control of security forces and intelligence services.[62]

A fourth recommendation relates to ethical governance, and requires legislators to maintain high standards of accountability, transparency and responsibility in the conduct of all public and parliamentary matters.[63] This recommendation is premised on the idea that the legislature can only maintain the confidence of the public and hold the executive branch accountable if its conduct is above reproach.[64] Among other things, it requires the legislature to establish and enforce a code of conduct, including rules on conflicts of interest and the acceptance of gifts.[65] Further, it requires legislators to 'fully and publicly' disclose their financial assets and business interests at the time of assuming office, during, and after their term of office.[66] Another important recommendation is that the legislature should establish 'mechanisms to prevent, detect, and bring to justice legislators and staff engaged in corrupt practices.'[67] In this respect, the CPA reasons that the 'public will lose confidence in legislatures whose members are seen as corrupt [which] in turn may ultimately damage the public's confidence in democratic institutions and the democratic process in general.'[68]

The CPA also recognizes that the legislature requires an effective bureaucracy (or parliamentary service) if it is to play a meaningful role in governance. It therefore recommends that the legislature should have a non-partisan professional staff to

57 ibid. 29.

58 ibid. 31.

59 ibid.

60 ibid.

61 ibid. 32.

62 ibid.

63 ibid. 33.

64 ibid. 34.

65 ibid.

66 ibid.

67 ibid.

68 ibid. 35.

support its operations.[69] And to ensure its independence, the legislature should control the parliamentary service.[70] Further, it recommends that the head of the parliamentary service should have security of tenure to insulate him or her from undue political pressure.[71] It also recommends that the legislature should establish a code of conduct and values for members of the parliamentary service.[72]

Arguably, these benchmarks embody international best practices on the establishment of democratic legislatures. Indeed, they have since been embraced by the Parliamentary Forum of the Southern African Development Community (SADC).[73] Let us now examine the extent to which Kenya has adopted the benchmarks.

III. A HISTORY OF LEGISLATIVE REFORMS[74]

At independence, the legislature had two chambers, a House of Representatives and a Senate. This bicameral legislature was part of a federalist system, which had been created because political parties representing minority ethnic groups thought such a structure would protect their interests.[75] The Senate had limited powers. For example, unlike the House of Representatives, it could not originate money bills.[76] In practice, it did not even generate any non-money bill.[77] However, the federal system was not sustained. Once the Kenya African National Union (KANU) party, which represented the interests of the majority ethnic groups, assumed power, it undermined and then abolished the federal system and bicameral legislature. On the one hand, the KANU government withheld funds from the regional governments, which soon lost their viability.[78] Such machinations frustrated the Kenya African Democratic Union (KADU), the opposition party representing minority interests, which then decided to disband and join the ruling party in 1964. Kenya thus became a de facto one-party state.[79] On the other hand, the bicameral legislature was terminated by a constitutional amendment in 1966 that merged the two chambers into a National Assembly.[80]

69 ibid. 36.

70 ibid.

71 ibid. 38.

72 ibid.

73 SADC Parliamentary Plenary Assembly, *Benchmarks for Democratic Legislatures in Southern Africa,* (SADC 2010).

74 This Part is largely drawn from Migai Akech, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability' (2011) 18 Indiana Journal of Global Legal Studies 341.

75 Stephen N. Ndegwa, 'Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics' (1997) 91 American Political Science Review 599.

76 Constitution of Kenya 1963, Article 59.

77 J.H. Proctor, Jr., 'The Role of the Senate in the Kenyan Political System,' (1965) 18 Parliamentary Affairs 389.

78 ibid. 606.

79 David M. Anderson, '"Yours in Struggle for Majimbo" Nationalism and the Party Politics of Decolonization in Kenya, 1955-64,' (2005) 40 Journal of Contemporary History 547 (Explaining why KADU disbanded and joined KANU).

80 Constitution of Kenya 1963, Section 30; Constitution of Kenya (Amendment) Act No. 40 of 1966.

The independence of the legislature was further undermined by a series of constitutional amendments, the effect of which was to consolidate power in the presidency. Some of these amendments gave the President the power to suspend the proceedings of or dissolve the legislature.[81] The legislature therefore had no control of its calendar, and the President could simply terminate its proceedings whenever he felt that the legislature was going off course. Additionally, the absence of political party competition enabled the President to control the appointment of the presiding officer, or speaker, of the legislature. Only individuals who were considered to be loyal to the President could be elected to the office of speaker, which played a pivotal role in facilitating the agenda of the executive in the legislature.[82]

Therefore, the legislature became a mere appendage of the executive that was administered through the office of the President. For example, the bureaucracy of the legislature was part of the public service. Hence the public service recruited personnel for the legislature's bureaucracy and regulated its terms and conditions of service. The committee system of this legislature was also rudimentary and it therefore had little capacity to hold the executive accountable.[83] Nor did it have sufficient funds, as the Ministry of Finance ensured that it was starved of funds when determining its budget.[84] In addition, legislators were poorly paid and depended on executive patronage for their political survival. For example, those who were deemed loyal were appointed as ministers, assistant ministers, or chairmen of public corporations. Further, the President often gave legislators cash handouts to enable them to meet the demands of their constituents. Due to these constraints, the legislature played only a minimal role in policy making and legislation, even if it provided a useful forum for the ventilation of issues of national concern.

Nevertheless, the return to multiparty politics in the 1990s facilitated the growth of the legislature's independence by, among other things, creating a political environment in which the legislature's reform could be meaningfully deliberated. However, it was not until 2000 that the independence of the legislature was guaranteed, following an amendment to the constitution which unlinked the legislature from the executive by establishing a Parliamentary Service to oversee the legislature's administrative affairs.[85] The enactment of a statutory law further facilitated the implementation of this amendment.[86] In addition, these reforms sought to dilute the powers of the speaker by creating a Parliamentary Service Commission.[87] The legislators also enacted laws which improved their remuneration and terms of service exponentially.[88]

81 Constitution of Kenya 1963, Section 59(1), (2).

82 Barkan and Matiangi (n 1) 40 (explaining how one of the mechanisms used by African presidents to control the assembly was by 'controlling the appointment and approach of its chief presiding officer, the Speaker').

83 ibid. 37 (revealing that in actuality the legislature was dependent on the executive to assign it many of its resources).

84 ibid. (recounting that for nearly fifty years the assembly was understaffed to a point that it did not have its own legal draftsperson).

85 Constitution of Kenya (Amendment) Act No. 3 of 1999.

86 Parliamentary Service Act No. 10 of 2000.

87 Constitution of Kenya 1963, Section 45 (b).

88 National Assembly Remuneration (Amendment) Act No. 2 of 2003.

Indeed, their emoluments became the highest on the continent.[89] Presumably, their new salaries should have freed them from the financial dependency on the executive that had hampered their effectiveness during the single-party era.

The Parliamentary Service consisted of the clerk of the National Assembly and other officers appointed by the Parliamentary Service Commission (PaSC).[90] The clerk was the chief executive of the Parliamentary Service, and was responsible for matters of day-to-day administration.[91] Another key function of the clerk was to advise members of the legislature on parliamentary procedure and practice.[92]The clerk was accountable to the PaSC, and could be suspended or removed from office 'at any time and in such manner as may be prescribed under [the Parliamentary Service] Act . . . for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour.'[93]

On the other hand, the PSC consisted of the Speaker of National Assembly (who was the chairman), a vice chairman, the leader of government business in the legislature, the leader of the opposition party with the highest number of seats in the legislature, and seven members appointed by the legislature from among its members.[94] Of the seven ordinary members, four were nominated by the parliamentary party (or parties) forming the government, while the other three were nominated by the parliamentary parties forming the opposition.[95] The vice chairman was elected by the PaSC from the lot of these ordinary members.[96] Upon the dissolution of the legislature, all the members of the PaSC remained in office until new members were appointed by the next legislature.[97] The powers of the PaSC included constituting and abolishing offices in the Parliamentary Service and directing and supervising the administration of the Service.[98] As for accountability, the PaSC answered to the legislature; for example, it was required to submit annual audits of its expenditures to the legislature.[99] Furthermore, it was required to annually prepare and present to the legislature a report of its operations.[100]

The speaker also presided over the legislature and was elected by legislators in accordance with its rules of procedure, also known as "standing orders."[101] The speaker was assisted by a deputy, who was also elected by the members of the legislature. In keeping with the traditions of the Westminster system, the speaker was the spokesperson or representative

89 Barkan & Matiangi (n 1) 55-57.

90 Constitution of Kenya 1963, Article 45A and 45B.

91 Parliamentary Service Act 2000, s 13.

92 ibid. Section 14.

93 ibid. Section 16.

94 Constitution of Kenya 1963, Section 45B (1).

95 ibid. 45B(1)(e).

96 ibid. 45B (1) (b).

97 ibid. 45B (2) (a).

98 ibid. 45B (5)(a), (d).

99 ibid. 45B (5)(e)(ii).

100 Parliamentary Service Act No. 10 of 2000, s 25.

101 Constitution of Kenya 1963, Section 37.

of the legislature.[102] Subject to the provisions of the standing orders, the speaker wielded considerable power with respect to influencing the agenda and deliberations of the legislature. For example, the speaker determined who contributed to deliberations, closed debate and determined when matters could be put to vote, and punished members who did not adhere to the established rules of debate and parliamentary behavior.[103] In exercising these powers, the speaker was under a duty not to "hinder the legitimate expression of all shades of opinion," and to ensure that parliamentary debates ran smoothly.[104] In addition, the speaker had the power to interpret the standing orders and other regulations governing the functioning of the legislature. Where the standing orders did not resolve a matter in question, the speaker had the power to resolve such matters[105] and could be guided by the precedents of the legislature.

The speaker and the deputy speaker both answered to the legislature and could be removed from office by a resolution supported by the votes of at least seventy-five percent of all members of the legislature.[106] Although this may seem to have been a high threshold, the record of the legislature demonstrated that legislators could obtain the necessary votes if they deemed it to be in their best interest to get rid of the speaker. Thus the fact that legislators could dismiss the speaker limited the ability of the speaker to regulate the manner in which the legislators exercised their collective power to make policies, laws, and hold the executive to account. In these circumstances, the speaker had to be mindful of the fact that he or she could be removed from office by legislators. Indeed, the speaker was only an ex officio member of the legislature. It is therefore arguable that once elected, the speaker would endeavor to be in the good graces of the legislators. The speaker was therefore vulnerable to the whims of legislators and the need arose for the establishment of mechanisms that could facilitate the accountability of the exercise of power by the legislature.

Since the relevant laws regarding removal of the speaker and clerk did not circumscribe how these wide powers of dismissal were supposed to be exercised, they remained subject to abuse and could serve to make the speaker and the clerk subservient to the legislature and the PaSC respectively. In the case of the PaSC, it is worth noting that it had a short-term perspective, given that each legislature only had a shelf life of five years.[107] Because it wielded immense power over the clerk, the PaSC arguably could have prevailed upon the clerk to make decisions that only served the short-term objectives of legislators. In these circumstances, it was doubtful whether, for example, the legislature could objectively debate audits of the accounts of the PaSC.

A different picture of the democratic character of the legislature also emerged when one examines how legislators exercised their collective power to make policies, laws, and to

102 MarceloJenny and Wolfgang C. Müller, 'Presidents of Parliament: Neutral Chairmen or Assets of the Majority?' in Herbert Döring (ed), *Parliaments and Majority Rule in Western Europe*, (New York, St. Martin's Press 1995).

103 National Assembly Standing Orders2008, Sections 47(3), 53(1)-(2), 75(4), 97(2).

104 Jenny and Muller (n 102) 74.

105 National Assembly, Standing Orders2008, S 1.

106 Constitution of Kenya 1963, Section 37(2)(c), 38(3)(d).

107 ibid. Section 59 (4).

hold the executive accountable. This power was exercised through debate and voting in plenary sessions of the legislature. Its exercise was facilitated by the establishment of committees, which constituted a mechanism for providing legislators with the information they needed to implement decisions. The committee system enabled the legislature to organize its affairs and to shadow the operations of government ministries, departments, and agencies.[108] Thus the business of the legislature was primarily conducted in, or through, the committees. With respect to holding the executive accountable on a daily basis, the work of the legislature revolved around the so-called departmental committees, which investigated the activities and administration of the government ministries, departments, and agencies assigned to them.[109] There were twelve such committees.[110] Their functions were to investigate and report on the activities and administration of the assigned ministries and departments, to study and review legislation referred to them, and to recommend proposed legislation.[111]

Other critical committees were the Public Accounts Committee and the Public Investments Committee, two committees which investigated the expenditures of government ministries and departments.[112] Both had the power to examine public accounts and the reports of the controller and auditor general.[113] They were given significant powers to enable them to carry out their functions, including the power to summon individuals to appear before them.[114]

The committees were constituted according to the distribution of seats among the political parties represented in the legislature.[115] While the majority party also had the majority of seats in the committees, in practice the chairperson of the committee was chosen from an opposition party.[116] For example, the head of the official opposition party usually chaired the important Public Accounts Committee.[117] While this practice enhanced the impartiality and legitimacy of the work of the committees, it should be noted that political parties typically used appointments to committees to reward loyalty, which means that committees did not necessarily consist of the most competent legislators.[118]

108 Barkan & Matiangi (n 1) 48-49.

109 National Assembly Standing Orders2008, s 198(3).

110 These were the committees on (1) Administration and National Security, (2) Agriculture, Livestock and Cooperatives, (3) Defence and Foreign Relations, (4) Education, Research and Technology, (5) Energy, Communication and Information, (6) Finance, Planning and Trade, (7) Health, (8) Justice and Legal Affairs, (9) Labour and Social Welfare, (10) Lands and Natural Resources, (11) Local Authorities, and (12) Transport, Public Works and Housing; ibid. Schedule 2.

111 ibid. section 198(3).

112 Barkan & Matiangi (n 1) 49.

113 ibid.

114 National Assembly Standing Orders 2008 S 173.

115 ibid. s187(2)-(3), 188(2)-(3).

116 World Bank, *Understanding the Evolving Role of the Kenya National Assembly in Economic Governance in Kenya: An Assessment of Opportunities for Building Capacity of the Tenth Parliament and Beyond*, (Report No. 45924-KE 2008) para 78.

117 ibid.

118 ibid. para 96.

How, then, did legislators exercise their powers to make policies and laws, and hold the executive to account? Arguably, the legislature was unduly influenced by special interest groups in exercising its lawmaking power, as the enactment of the Tobacco Control Act of 2007 illustrated.[119] Furthermore, the legislature not only enacted unconstitutional laws (such as the Constituency Development Fund Act),[120] but also failed to amend laws that had been declared unconstitutional (such as the Kenya Roads Board Act).[121] These examples demonstrate that the legislature was not only prone to the undue influence of special interest groups, but also abused its collective power in significant instances.

While it was to be expected that different interest groups would legitimately lobby the legislature to enact favorable policies and laws, there ought to have been mechanisms to ensure that interest groups seeking specific legislative outcomes did not subvert the public interest. Such mechanisms include those that regulate lobbying, conflicts of interest, misconduct, and even corruption in the legislature. An attempt was been made to establish such mechanisms, as exemplified by the National Assembly (Powers and Privileges) Act.[122]

The primary purpose of the Act was to codify the convention of parliamentary privilege, which guarantees legislators the independence and freedom of speech necessary to effectively perform their duties of 'honest, unbiased and impartial examination and inquiry and criticism.'[123] Thus, according to this Act, '[n]o civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise.'[124] Because these privileges could be abused, the Act also empowered the speaker to 'issue directions in the form of a Code of Conduct regulating the conduct of members of the Assembly whilst *within the precincts of the Assembly* other than the Chamber.'[125] These powers of the speaker were exercised through the Committee of Privileges, which was empowered to inquire into allegations of breaches of the Code of Conduct.[126] The conduct of legislators within the debating chamber was also regulated by the standing orders.[127]

In general, the conduct of legislators outside the debating chamber or the precincts of the legislature was not regulated. In particular, the absence of proper regulation meant that legislators could serve on committees 'even though their membership would entail a conflict of interest – either because they faced allegations of corruption, were allegedly allied to corruption cartels, or had commercial interests that were overseen by these

119 Tobacco Control Act No. 4 of 2007.

120 Constituencies Development Fund Act 2003.

121 Kenya Roads Board Act 1999.

122 National Assembly (Powers and Privileges) Act.

123 Graham Zellick, 'Bribery of Members of Parliament and the Criminal Law' [1979] Public Law 31.

124 National Assembly (Powers and Privileges) Act, s 4.

125 ibid., section 9 (emphasis added).

126 ibid. , s 10(4).

127 National Assembly Standing Orders 2008, s 97.

committees.'[128] It should be noted, however, that the standing orders were amended to provide that when an adverse recommendation had been made against a legislator in a committee report that had been adopted by the House, that legislator was ineligible for election as chairperson or vice chairperson of any committee.[129]

As far as legitimacy was concerned, the public perceived the legislature as one of the most corrupt public institutions.[130] The general perception was that legislators did not serve the public interest and were only motivated by selfish interests.[131] In particular, this perception had been fueled by the legislator's habit of unilaterally increasing their salaries and emoluments in spite of public disapproval. There were even allegations that legislators had taken bribes from wealthy politicians to influence the deliberations and decisions of the legislature.[132] Therefore, it did not seem that salary increases had enhanced the independence of legislators.

So that although the legislature succeeded in gaining autonomy from the executive, it begun to exercise its new powers in an arbitrary manner and lost a considerable measure of legitimacy as a result.

IV. THE CONSTITUTION OF KENYA 2010 AND THE INSTITUTIONAL FRAMEWORK FOR PARLIAMENT

A. The Provisions of the Constitution on Parliament

The Constitution of Kenya 2010 establishes a Parliament with two houses, namely a National Assembly and a Senate.[133] Each house of Parliament is presided over by a speaker, who is an ex officio member.[134] Unlike the previous position where the speaker was typically appointed from a pool of current legislators, the constitution provides that the two speakers are to be elected by each house "from among persons who are qualified to be elected as [legislators] but are *not* such members."[135] Among other restrictions, each speaker may be removed from office if the relevant house "so resolves by a resolution supported by the votes of at least two-thirds of its members.'[136] The two speakers therefore do not enjoy security of tenure, and may not be able to exercise effective control over the manner in which legislators exercise their collective powers of making policies and laws or over the manner in which legislators hold the executive accountable for its actions.

128 World Bank (n 116) para 81.

129 National Assembly Standing Orders2008 s 162(2).

130 Cyrus Kinyungu, 'MPs Are Most Corrupt,' *The East African Standard* (Nairobi, 6 December 2006); Mugo Njeru, 'MPs in 'Most Corrupt' League' *Daily Nation* (Nairobi, 10 December 2005).

131 Martin Mutua & Andrew Teyie, 'Shame: MPs for Hire,' *The East Africa Standard* (Nairobi, 18 November 2004; Njeri Rugene, 'Bribery Rampant in Kenya's Parliament,' *Sunday Nation* (Nairobi, 16 May 2009); Editorial, 'Put the Voters' Interests First' *Daily Nation* (Nairobi, 21 November 2004).

132 Rugene (n 131).

133 Constitution of Kenya 2010,Article 93(1).

134 ibid., Article 106 (1) (a).

135 ibid., (emphasis added).

136 ibid. 106 (2) (c).

With respect to the administration of Parliament, the constitution establishes a Parliamentary Service and a Parliamentary Service Commission. The latter consists of the Speaker of the National Assembly as the chairperson, seven members nominated by the party or parties in government and opposition parties, and one man and one woman who are 'experienced in public affairs' and appointed by Parliament from among persons who are not legislators.[137] For the first time, persons who are not legislators therefore sit on this Commission. The presence of such outsiders may enhance the public accountability of the Parliamentary Service Commission. Further, the clerk of the Senate serves as the secretary of this commission.[138] The main functions of the Commission are to provide the services and facilities to ensure that Parliament does its work efficiently and effectively and to constitute offices in the Parliamentary Service and appoint and supervise office holders.[139] Presumably, the Commission is also responsible for discipline in the Parliamentary Service.

Each house of Parliament is headed by a clerk appointed by the Commission with the approval of the relevant house.[140] The clerks do not enjoy security of tenure, and are subject to supervision by the Commission, as they are 'offices in the Parliamentary Service.'[141]The constitution also provides for the powers, privileges, and immunities of the legislature, including 'freedom of speech and debate in Parliament.'[142] However, it makes no attempt to circumscribe the exercise of these powers. Nevertheless, it imposes a duty on Parliament to facilitate public participation and involvement in its business, including that of its committees.[143] It also gives every person the right to petition Parliament 'to consider any matter within its authority.'[144] Further, it gives the electorate the right to recall the legislator representing their constituency before the end of the term of the relevant House of Parliament, and imposes a duty on Parliament to enact legislation that will establish the grounds and procedures according to which a Member of Parliament (MP) may be recalled.[145]

In addition, the constitution establishes a Salaries and Remuneration Commission, whose mandate is to set and review the remuneration and benefits of all State officers, and advise the national and county governments on the remuneration and benefits of all other public officers.[146] Since legislators are state officers,[147] the Salaries and Remuneration Commission now has exclusive jurisdiction over the establishment and review of their remuneration. Accordingly, Parliament no longer has the power to increase the remuneration of legislators, as it did in the past.

137 ibid. 127 (2) (a), (c), (d).

138 ibid. 127 (3).

139 ibid. 127 (6) (a)-(b).

140 ibid. 128 (1).

141 ibid. 128 (2).

142 ibid. 117 (1).

143 ibid. 118 (1) (b).

144 ibid. 119 (1).

145 ibid. 104.

146 ibid. 230 (4).

147 ibid. 260.

In this respect, the constitution also prohibits legislators from voting on any question in which they have a pecuniary interest.[148] Clearly, legislators have a pecuniary interest in any bill that proposes to increase their remuneration and must not therefore vote on it. In addition, the constitution provides that an act of Parliament that confers a direct pecuniary interest on legislators 'shall not come into force until after the next general election of members of Parliament.'[149]

It should also be noted that the constitution establishes values and principles of governance that ought to be reflected in the procedures and operations of Parliament. First, it establishes values and principles of governance, which include national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, integrity, transparency and accountability.[150] Further, these values and principles bind all state organs, state officers, public officers and all persons whenever they enact, apply or interpret the constitution or written law, or make or implement public policy decisions.

These values and principles bind Parliament, legislators, and the officers of the Parliamentary Service. Second, the constitution views the authority assigned to a state officer as a public trust,' which, among other things, must be exercised in a manner that demonstrates respect for the people, brings honor to the nation and dignity of the office, and promotes public confidence and integrity in the office.[151] Among other things, the public trust doctrine requires state officers to be objective and impartial in making decisions, and account to the public for their decisions and actions.

Third, the Constitution provides that legislative authority belongs to the people, and Parliament only exercises this power as an agent of the people.[152] As in any agency relationship, the implication of this provision is that Parliament must account to the people how it is exercising the authority entrusted to it. Finally, the constitution gives every person 'the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.'[153] In particular, this provision should guide the work of the committees of the National Assembly.

In this respect, it can be argued that in performing their functions such as approving nominees to public offices or checking agencies of the executive, the committees of the National Assembly are in fact performing what the Constitution terms as administrative action. Accordingly, they should adhere to the requirements of Article 47, including providing and publishing reasons for their decisions. This means that, unless considerations such as national security reasonably dictate, the reports of the committees must be accessible to the public. And to facilitate uniformity, the Standing Orders should establish a minimum set of procedures that the committees should follow as they perform their duties.

148 ibid. 122 (3).

149 ibid. 116 (3).

150 ibid. 10.

151 ibid. 73.

152 ibid. 94.

153 ibid. 47.

Although these provisions constitute useful mechanisms for regulating the collective powers of the legislature, they need to be accompanied by mechanisms that regulate lobbying, conflicts of interest, misconduct, and abuse of power in Parliament. The absence of such mechanisms has made legislators vulnerable to capture by special interests, which jeopardizes the ability of the legislature to safeguard the public interest. It has also brought into question the legislature's ability to hold the executive accountable because its committees, which form a critical part of its arsenal of oversight instruments, often consist of legislators against whom credible allegations of corruption have been made, and who cannot therefore be expected to be genuine champions of the public interest. The provisions of the constitution dealing with leadership and integrity, including those governing conflicts of interest, therefore provide a much-needed framework for regulating the conduct of legislators.

It is arguable that the foregoing provisions of the constitution, which consolidate the institutional reforms of the past decade, have gone a long way in enhancing the democratic character of Parliament. However, a number of significant institutional reforms, which would make Parliament truly democratic, are yet to be implemented. First, there is a need to enhance democracy in the decision-making processes of Parliament so that the views of all citizens are taken into account. Second, there is a need to reexamine the powers of the Senate vis-à-vis the National Assembly in general, and to clarify the roles of the National Assembly and the Senate in the passage of legislation in particular. Third, Parliament should establish effective procedures for public participation in, and accountability of, legislative processes. Fourth, there is a need to observe the rule of law in the determination of the remuneration of legislators. Above all, Parliament needs to establish a credible and enforceable ethics regime.

B. Enhancing Democracy in Parliamentary Decision-Making Processes

In the past, elections in Kenya were held under a first-past-the-post electoral system in which the person who gained the plurality of the vote (or was the first to cross the finish line) was declared the winner. The effect of this system was that even if 80% of the electorate did not vote for the "winning" candidate, they would consequently not be represented in government. As the general elections of 1992 and 1997 illustrated, this system often produced minority governments.

The constitution of 2010 seeks to mitigate this problem in two ways. First, it provides for the nomination of twelve members to the National Assembly and twenty members to the Senate on 'the basis of proportional representation by use of party lists.'[154] It envisages that each political party taking part in a general election will submit to the Independent Electoral and Boundaries Commission (IEBC) a list of all the individuals who would stand elected if the party were to be entitled to all the proportional representation seats. The party lists should consist of alternates between male and female candidates 'in the priority in which they are listed,' and except in the case of the county assembly seats, each party list should reflect the regional and ethnic diversity of the people of Kenya.[155]

154 ibid. 90.

155 ibid.

Once an election has been held and the results announced, the task of the IEBC is then to allocate these special seats to political parties 'in proportion to the total number of seats won by the candidates of the political party.'[156] Second, the constitution reserves forty-seven special seats for women in the National Assembly. Here, it is envisaged that during a general election the voters of each county – acting as a single member constituency – will elect a woman to represent them in the National Assembly. The constitution therefore introduces the principle of proportional representation with the aim of promoting the representation of women and other special interest groups (such as the youth and persons with disabilities), which is to be achieved through party nominations.

But what happens once these special representatives become members of Parliament? For example, do they participate effectively in the decision-making processes of the two houses? Further, what roles do minority parties have in the governance of Parliament? And what are the rights of members who are not affiliated to political parties? To answer these questions, we need to look at the standing orders of the National Assembly and the Senate.

On the one hand, the standing orders of both houses have provisions that enhance democracy in parliamentary decision-making processes. First, the both embrace the principle of gender equity in the composition of organs of the House such as the speaker, chairperson's panel, the leader of the majority party, the leader of the minority party and committees.[157] As a result, the women members of both houses now participate meaningfully in the governance of Parliament, including chairing important committees.

Second, although the constitution only establishes the positions of leader of the majority party and leader of the minority party, the standing orders of both houses recognize these offices.[158] The office of leader of the minority party is particularly important from the viewpoint of enhancing democracy in parliamentary affairs. In the United States, for example, the minority leader speaks for the minority party and its policies, protects its rights, and organizes and leads criticism of the majority party.

To enable the minority leader play these important roles, he or she is often accorded special privileges. For example, the minority leader has a "right of recognition," which means that he or she must be recognized by the Speaker before other members of the House seeking recognition to speak. This privilege is useful in ensuring that the collective views of the minority party or parties are voiced on the floor of the House, in light of the Speaker's challenge of recognizing all members who want to speak in a context in which time is often in short supply. In Kenya's case, however, the two sets of standing orders do not specify the rights and responsibilities of the minority leader. Nevertheless, the recognition of this office is a significant step towards enhancing the effective participation of minority parties in the governance of Parliament.

156 ibid.

157 National Assembly Standing Orders, ss 16, 19, 20, 173 and 214; Senate Standing Orders, ss 16, 19, 175, and 214.

158 National Assembly Standing Orders, ss 19 and 20; Senate Standing Orders, ss 19 and 20.

Third, both sets of standing orders give legislators the right to propose legislation, regardless of their majority or minority status.[159] Essentially, any legislator can propose legislation, although the challenge is to ensure that such proposals become part of the agenda of the House. But once they become the agenda of the House, private members' legislative proposals (or bills) are for all intents and purposes treated as public bills. They are therefore committed to the relevant Departmental Committee, or a select committee, after the first reading.[160]

Thereafter, it becomes the responsibility of the committee to ensure that the bills are processed by the relevant house. These provisions of the standing orders remedy a deficiency in the old regime. In the past, a private bill was the property of a member, and therefore lapsed if he or she died, lost his or her seat, or otherwise ceased to be a Member of Parliament. In the current standing orders, however, a bill that has been sponsored by a member essentially becomes the property of the House once the House Business Committee has made it an agenda of the House. Fourth, the standing orders of the National Assembly require that the interests of independents should be taken into consideration in the composition of important committees of the house, such as the House Business Committee.[161] However, the standing orders of the Senate do not contain a similar safeguard for independents.[162] Finally, the standing orders of both houses give the opposition members of committees the right to submit 'minority or dissenting' reports.[163]

On the other hand, both sets of standing orders contain provisions that could undermine democracy in parliamentary decision-making. In the first place, the standing orders take a majoritarian approach to the leadership of critical oversight committees such as the Public Accounts Committee and the Public Investments Committee in the case of the National Assembly, and the Committee on Devolved Government in the case of the Senate. They both provide that once members of a select committee have been appointed, they shall elect their chairpersons and vice-chairpersons from amongst their members.[164] In the case of the National Assembly, the standing orders merely state that both the Public Accounts Committee and the Public Investments Committee 'shall consist of a chairperson and not more than sixteen other members.'[165]

In essence, it leaves it up to the governing and opposition parties to agree on the composition of these committees. In effect, where the governing party or coalition controls the legislature, it would therefore not only chair but also dominate committees that are meant to act as a check on its excesses. Put differently, it would mean that the dominant governing party would be performing the impossible task of checking itself. This scenario recently played out in the National Assembly when the Jubilee Coalition, the majority party, insisted not only on chairing these oversight committees, but also

159 National Assembly Standing Orders, Part XX; Senate Standing Orders, Part XXI.

160 National Assembly Standing Orders, s 127; Senate Standing Orders, s 128.

161 National Assembly Standing Orders, s 171 (1) (d).

162 Senate Standing Orders, s 174 (1).

163 National Assembly Standing Orders, s 199 (5); Senate Standing Orders, s 201 (5).

164 National Assembly Standing Orders, s 178 (1) (a) & 205 (5); Senate Standing Orders, s 180 (1).

165 National Assembly Standing Orders, S 205 (3) & 206 (3).

having the majority membership. Although it finally reached a compromise with the Cord Coalition, which now chairs these committees, it retained the majority membership. In order to preempt such disagreements in future, and to embrace international best practice, the Standing Orders should be amended to provide that these key committees must be chaired by members of the opposition. It is also arguable that because the function of these committees is to hold the executive to account, their membership should be dominated by the opposition.

A second drawback is that the standing orders do not provide suitable decision-making procedures for the committees. The essence of committees is that they provide a forum where reflective and deliberative decision-making can occur, and where legislators should therefore adopt informed opinions as opposed to merely parroting the parochial positions of their parties. However, the standing orders do not encourage deliberative decision-making in the committees since they merely provide that questions arising in select committees 'shall be decided by vote and the resolution on any such vote shall constitute the decision of the select committee.'[166] A need therefore arises to require committees to endeavor to make decisions by consensus, and only resort to majority voting if consensus cannot be reached. Such an approach would serve to important but related goals. First, it would enhance the negotiating leverage of minority parties, thereby enhancing the democratic quality of legislative decision-making. Second, it would enable Parliament to fulfill its constitutional mandate of manifesting the diversity of the nation, representing the collective will of the people, and exercising their sovereignty.[167]

Thirdly, it is arguable that the provisions of the constitution relating to decision making in the Senate do not enhance democratic decision-making. The constitution provides that when the Senate is to vote on a matter other than a bill, the Speaker shall determine whether or not the matter affects counties.[168] Presumably, senators can therefore cast individual votes whenever the Senate is considering bills. Further, each senator has one vote when the Senate votes on a matter that does not affect counties.[169] However, when the Senate votes on a matter that affects counties, senators vote as delegations, meaning that each county delegation has one vote, and its vote is cast by the head of the county delegation or his/her designate after consulting the other members of the delegation.[170]

For this purpose, all the senators who were registered as voters in a particular county constitute a particular delegation.[171] These provisions of the constitution have two implications. First, an individual is not required to be registered as a voter in a particular county to seek election as a senator for that county.[172] It therefore means that when such a person is elected to Senate, he or she will not be a member of the delegation of that county for purposes of voting on matters that affect counties.

166 National Assembly Standing Orders, S 196 (2); Senate Standing Orders, s 198 (2).

167 Constitution of Kenya 2010, Article 94 (2).

168 ibid. 123 (2).

169 ibid. 123 (3).

170 ibid. 123 (4).

171 ibid. 123 (1).

172 ibid. 99 (1).

Secondly, the Speaker of the Senate determines whether or not a matter affects counties. Where the Speaker determines that a matter does not concern counties, more senators would be involved in the decision-making process.

However, where the Speaker determines that a matter concerns counties, fewer senators would be involved in the decision-making process. So that although the objective of these provisions is to ensure equal representation of all counties in Senate decision-making, it could serve to undermine the representation of special interests (such as women, youth and persons with disabilities) which transcend counties. Arguably, the representation of such special interests in decision-making would be more effective if the special members of Senate were allowed to aggregate their votes.

C. Re-examining the Powers of Senate and its Role in the Passage of Legislation

Does the Senate established by the Constitution of 2010 have "significant power" or as much power as the National Assembly? On the one hand, the Constitution grants the National Assembly the following roles: representing the people of the constituencies and special interests in the National Assembly; deliberating on and resolving issues of concern to the people; enacting legislation; determining the allocation of revenue between the levels of government; appropriating funds for expenditure by the national government and other national state organs; exercising oversight over national revenue and its expenditure; reviewing the conduct in office of the President, the Deputy President and other state officers and initiating the process of removing them from office; exercising oversight of state organs; and, approving declarations of war and extensions of states of emergency.[173]

On the other hand, the Constitution grants the Senate the following roles: representing the counties and protecting the interests of counties and their governments; participating in law-making by considering, debating and approving bills concerning counties; determining the allocation of revenue among counties; and, participating in the oversight of state officers by considering and determining resolutions to remove the President or Deputy President from office.[174]

In practice, this division of responsibilities is already causing friction between the two houses, with the National Assembly seeking to assert its supremacy and the Senate struggling to establish relevance. This contest has played out with respect to the consideration of the division of revenue bill. Initially, and as required by its standing orders and the Public Finance Management Act, the National Assembly originated and passed a division of revenue bill, which it then referred to the Senate for its input.[175]

Upon receiving the bill, the Senate considered it and amended it by raising the budgetary allocations of the county governments. Upon receiving the amended bill, the National Assembly referred it to its Budget and Appropriations Committee, which asserted that the Senate had no role to play in the consideration of this bill, and recommended that the National Assembly should send its version of the bill to the President for assent.

173 ibid. 95.

174 ibid. 96.

175 National Assembly Standing Orders, S233 (4).

In the meantime, the speakers of the two houses issued contradictory rulings on the matter. On the one hand, the Speaker of the National Assembly ruled that under the constitution the passage of the division of revenue bill was the sole prerogative of the National Assembly.[176] Conversely, the Speaker of the Senate ruled that the division of revenue bill could commence in either house of parliament, and the Senate had an important role to play in its consideration because it was at the heart of the devolved system of government.[177] Thereafter, the National Assembly referred its version of the bill to the President who assented to it, sparking uproar from the Senate that threatened to take the matter to the Supreme Court for determination.

From the provisions of the constitution, it is clear that the Senate plays a limited role in governance in comparison to the National Assembly. Accordingly, the Senate does not have significant power; indeed, it has little power compared to National Assembly. First, the National Assembly is exclusively responsible for determining the allocation of national revenue between the levels of government.[178] In practical terms, this means that once the National Assembly has determined the respective shares of the annual national revenue of the National Government and the County Governments, the Senate then determines how much of the annual national revenue is allocated to each county. This division of responsibility has two implications.

First, consideration of the Division of Revenue Bill (which divides the revenue raised by the national government between the two levels of government) is the preserve of the National Assembly. It should be noted, however, that the Constitution also provides that the Division of Revenue Bill 'shall be introduced in Parliament' at least two months before the end of each financial year.[179] There are therefore two provisions of the Constitution that deal with the consideration of the Division of Revenue Bill. One is a general provision which merely requires this bill to be 'introduced in Parliament' without indicating which House should originate the bill. The second is a specific provision, which clearly indicates that the National Assembly 'determines the allocation of national revenue between the levels of government.'

At one level, it is arguable that the specific provision should prevail over the general one, which would mean that the Senate would play no role in the consideration of this bill that has implications for the resources of counties and their governments. At another level, it could be argued that since the primary role of the Senate is to 'protect the interests of the counties and their governments' it ought to have a 'say in the Bill determining how much money goes to the Counties.'[180] From this perspective, we should therefore interpret the constitution in a manner that furthers the objects of devolution, including ensuring 'equitable sharing of national and local resources throughout Kenya.'[181]

176 National Assembly, *'Communication from the Chair, Division of Revenue Bill, 2013'* 22 May 2013.

177 Senate, '*Communication from the Chair on the Disposal of the Division of Revenue Bill, 2013 by the Senate,*' 23 May 2013.

178 Constitution of Kenya 2010, Article 95 (4) (a).

179 ibid., Article 218 (1) (a).

180 Commission for the Implementation of the Constitution, 'CIC Statement on the Role of the Senate in Revenue Bills and on Salaries of MPs,' *Sunday Nation* (Nairobi, May 26 2013) 39.

181 Constitution of Kenya 2010, Article 174(g).

Accordingly, the standing orders of the two Houses could provide that the National Assembly should originate the Division of Revenue Bill and send it to the Senate for its consideration. Thereafter, the Senate would send the bill back to the National Assembly.

The dilemma, however, is that the Constitution classifies the Division of Revenue Bill as an "ordinary bill" even if it concerns county governments.[182] The procedure for the consideration of ordinary bills is as follows. If one House, say, the National Assembly, passes an ordinary bill, and the second House, say, the Senate rejects the bill; it shall be referred to a mediation committee.[183] But if, in this example, the Senate passes the bill in an amended form, the constitution requires that bill to be referred back to the National Assembly for reconsideration.[184] If after reconsideration the National Assembly passes the bill as amended by the Senate, it shall be referred to the President for assent.[185] However, if the National Assembly rejects the bill as amended by the Senate, the bill shall be referred to the mediation committee.[186] And where a bill has been referred to the mediation committee, it can only become law if both Houses approve (presumably by simple majority vote) the version of the bill proposed by the mediation committee, otherwise the bill is defeated.[187]

This is a dilemma because the Constitution gives the National Assembly the exclusive responsibility of "determining" the allocation of national revenue between the levels of government.[188] The word "determine" means to "decide", or "fix conclusively or authoritatively," or "settle," or "resolve."[189] It would therefore seem that the Constitution precludes resort to the mediation committee as far as the Division of Revenue Bill is concerned. This would mean that once the Senate sends the Division of Revenue Bill back to the National Assembly, the latter would have the final say and send it to the President for assent.

On the other hand, the consideration of the County Allocation of Revenue Bill (which divides the revenue allocated to the county level of government among the counties) is a mandate shared by the two Houses.[190] In my view, the standing orders of the two Houses should give the Senate the responsibility of originating this bill. Further, the Senate is responsible for overseeing how each County Government spends and accounts for the national revenue allocated to it. Again, this mandate is shared with the National Assembly, whose roles include exercising oversight over national revenue and its expenditure.[191]

182 ibid. Article 110.

183 ibid. Article 112 (1) (a).

184 ibid. Article 112 (1) (b).

185 ibid. Article 112 (2) (a).

186 ibid. Article 112 (2) (b).

187 ibid. Article 113.

188 ibid. Article 95 (4) (a).

189 Merriam-Webster's Collegiate Dictionary (11th edn, Springfield, MA, Merriam-Webster 2005).

190 Constitution of Kenya 2010, Article 218 (1) (b).

191 ibid. Article 95 (4) (c).

Secondly, the exercise of the law-making power of the Senate requires the concurrence of the National Assembly in a number of significant respects. One example is the determination of the basis for the allocation of national revenue among the counties.[192]

The Constitution gives the senate the responsibility of making this determination by passing a resolution once every five years. However, in making this determination, the Senate must: (i) consider certain criteria on equitable sharing of revenue; (ii) consider the recommendations of the Commission on Revenue Allocation; (iii) consult county governors, the Cabinet Secretary responsible for finance and any organization of county governments; and (iv) consider the views of the public, including professional bodies. More significantly, the resolution of the Senate cannot take effect before it is considered by the National Assembly, which can either approve or reject it. Where the National Assembly rejects the Senate's resolution, the matter should then be referred to a joint committee of the two houses of Parliament for mediation.[193]

The second example relates to the consideration of bills concerning county governments, which the Constitution classifies into the two categories of special and ordinary bills. Special bills are the annual County Allocation of Revenue Bill, and bills relating to the election of members of a county assembly or a county executive.[194] All other bills concerning county governments, including bills affecting the finances of county governments, are ordinary bills.[195] The Constitution gives the National Assembly power to amend or veto special bills that have been passed by the Senate.[196] In effect, the President can only assent to Senate versions of special bills if the National Assembly fails to marshal the support of at least two-thirds of its members.[197] But the concurrence of the National Assembly is required even in the case of ordinary county government bills. The only difference here is that where the National Assembly rejects the bill, it shall be referred to a joint committee of the two houses of Parliament for mediation.[198] Ultimately, therefore, all bills passed by the Senate can only become law after they have been considered by the National Assembly.

Thirdly, money bills can only be introduced in the National Assembly.[199] These are bills whose provisions deal with taxes, the imposition of charges on a public fund or the appropriation of public money, or the raising or guaranteeing of loans.[200] However, the Division of Revenue Bill is not deemed to be a money bill.[201] Fourth, the National Assembly is exclusively responsible for approving the appointment of cabinet secretaries and principal secretaries.[202]

192 ibid. Article 217 (4).

193 ibid. Article 113, 217 (6) (b).

194 ibid. Article 110 (2) (a).

195 ibid. Article 110 (2) (b).

196 ibid. Article 111 (2).

197 ibid. Article 111 (3).

198 ibid. Article 112.

199 ibid. Article 109 (5).

200 ibid. Article 114 (3).

201 ibid.

202 ibid. Article 152 (2), 155 (3) (b).

In view of the foregoing allocation of responsibilities, a need arises for the two Houses to coordinate their operations if they are to fulfill their mandates. In this respect, they should establish joint committees on critical matters, particularly the implementation of devolution. Further, the two Houses need to negotiate and agree on how they will perform their roles, particularly where the Constitution does not stipulate which House has the primary responsibility of originating bills. For example, the National Assembly and the Senate could agree that the National Assembly originates the Division of Revenue Bill, while the Senate originates the County Allocation of Revenue Bill. Such agreements would then be expressed in their respective standing orders, and would enable the two Houses to utilize their resources efficiently.

In the longer run, however, it will be necessary to rethink the foregoing constitutional allocation of powers, with a view to giving the Senate significant power. A good starting point here is to establish the intention of the people in recommending a bicameral legislature. To answer this question, we need to look at the records of the Constitution of Kenya Review Commission (CKRC). According to the CKRC, the principal role of the Senate was to 'provide an institutional framework through which the devolved levels of government share and participate in legislation, governance, administration and decision- making at the national level.'[203] From this premise, the CKRC draft constitution vested legislative authority in Parliament, and envisaged that the two houses would collectively exercise the powers of, among other things, enacting legislation, considering and passing amendments to the constitution, approving the sharing of revenue between the levels of government, and approving appointments.[204]

The CKRC draft constitution was therefore clear that the Senate would, save for a few exceptions, have as much power as the National Assembly. From this perspective, empowering the Senate to participate in determining the allocation of national revenue between the two levels of government would make much sense, and in particular enable it to effectively protect the interests of counties as envisaged by the Constitution of 2010. Arguably, the equitable sharing of national resources will only occur if the Senate is involved in the consideration of the division of revenue bill. Similarly, the manner in which the national government exercises power impacts on county governments, and a need arises to involve the Senate in approving the appointment of public officers such as cabinet secretaries and principal secretaries. In a nutshell, devolution will not provide a solution to the long-held perceptions and realities of ethnic marginalization and exclusion in the sharing of national resources if Senate is a feeble institution.

We should also view the need to enhance the powers of the Senate from the perspective of countering majoritarian democracy. Currently, we have a powerful National Assembly that is dominated by the governing coalition of parties, which also represents two of the most populous ethnic groups in Kenya. The result is that the Jubilee government can, for example, pass any law it desires, or appoint any public officer it fancies, without being constrained by the opposition in the National Assembly.

203 Constitution of Kenya Review Commission, 'Report of the Technical Working Group on Devolution of Power 14-15' (CKRC 2005).

204 Constitution of Kenya Review Commission National Constitutional Conference, 'Draft Constitution of Kenya 2004, Adopted by the National Constitutional Conference' (CKRC 15 March 2004).

Because the Senate is arguably more representative of Kenya's ethnic groups, enhancing its powers would enable the meaningful protection of group autonomy.

D. Establishing Effective Procedures and Mechanisms for Public Participation and Accountability

As we have seen, the constitution requires Parliament to facilitate public participation and involvement in its business. It also empowers the people to petition Parliament on any matter within its authority, and to recall legislators before the end of the term of the relevant house. Parliament has made an effort to implement these provisions of the constitution through legislation and the standing orders.

On the question of public participation, the standing orders of both houses now give the public a unique and timely opportunity to participate in law-making by requiring committees which bills have been committed to facilitate public participation and take into account the views and recommendations of the public when they make their reports on the bills to the house.[205] This requirement promises to remedy a deficiency that characterized the law-making process in the past.

Typically, there were different versions of bills, which made it quite difficult for the public to contribute to law-making as they did not know whether they were contributing to the definitive bill. Indeed, they were often dismissed for contributing to the "wrong" version of a bill. In addition, vested interests within government and other quarters often sought to control the process of preparing bills. They could then send to Parliament bills that had not been subjected to public scrutiny. And since parliament did not always have sufficient time or the expertise to scrutinize such bills, these vested interests invariably got such bills enacted into law.

The standing orders may now preclude this possibility, although their effectiveness will depend on the establishment of appropriate procedures that the committees can use to obtain the views and recommendations of the public. As framed currently, the standing orders also do not contain procedure for accounting to the public, so that it can know whether or not, and how, its views and recommendations on a bill have been considered. Accordingly, there is a need to establish procedures for ensuring public participation, such as "notice and comment" and public hearings. Under the notice and comment procedure, the public would be given, say, thirty days to submit comments on the draft bill. Alternatively, the committee could hold a public hearing over a stipulate period, if this procedure is deemed to be more appropriate to the particular bill. In either case, the committee would then be required to demonstrate, in its report to the House, how it has considered the views of the public in revising the bill for the consideration of the House. Essentially, the standing orders of both houses should therefore be revised to incorporate procedures such as notice and comment and public hearings, and time-lines for public participation and involvement in the consideration of bills.

Parliament has also enacted the Public Appointments (Parliamentary Approval) Act[206] that establishes procedures for parliamentary approval of constitutional and statutory appointments.

205 National Assembly Standing Orders, s 127 (3); Senate Standing Orders, s 128 (4).

206 Public Appointments (Parliamentary Approval) Act No 23 of 2011.

It requires appointing authorities (such as the President in the case of Cabinet Secretaries and Principal Secretaries) to notify the relevant house of Parliament through the office of the Clerk once they have nominated a person for appointment.[207] The Clerk then invites the relevant committee of Parliament to hold an approval hearing, and notify the candidate of the time and place for the hearing.[208] It also requires the Committee to notify the public of the time and place for the hearing at least seven days before the hearing.[209] All approval hearings shall be open and transparent, although the committee has the discretion to hold the whole of part of the hearing in private.[210] In keeping with the recommendations of the Commonwealth Parliamentary Association, however, the decision to hold approval hearings, or part thereof, in private should be taken in public and reasons for the decision provided.

Prior to the approval hearing, candidates are required to fill a questionnaire, and submit it to the relevant committee of Parliament.[211] Among other things, nominees are required to provide information on their education, employment record, potential conflicts of interest, and to state their sources of income and financial net worth.[212] The Act makes it an offence to submit false information in the questionnaire, and stipulates that any form of canvassing by nominees shall lead to disqualification.[213] At the same time, it provides for public input in the approval hearing. It gives any member of the public the right, prior to the hearing, to furnish the Clerk with a written statement on oath containing evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated.[214]

The Act requires the committee to vet the candidates taking into account their academic credentials, professional training and experience, and personal integrity and background.[215] After vetting a candidate, the committee is required to table a report on the suitability of the candidate in the relevant House within fourteen days from the date on which the notification of the nomination was given.[216] And once the relevant House of Parliament is seized of the matter, it shall determine the suitability of the candidate 'having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which the nomination is being made.'[217]

So far, this Act has been applied in the vetting of the President's nominees for the positions of Cabinet Secretary and Secretary to the Cabinet. From these hearings, it emerges that Parliament is also adopting the practice of seeking the views of institutions

207 ibid. s 5.

208 ibid. s 6.

209 ibid.

210 ibid.

211 ibid. s 6 (8).

212 ibid.

213 ibid.

214 ibid. s 6 (9).

215 ibid. s 6 (7).

216 ibid. s 8.

217 ibid. s 7.

such as the Ethics and Anti-Corruption Commission, the Kenya Revenue Authority and the Higher Education Loans Board on the suitability of nominees for public office.[218] Although the process of vetting Cabinet Secretaries has been criticized in some quarters as merely rubberstamping the choices of the executive, it can be a valuable mechanism for ensuring that only suitable candidates assume public office. For it to work effectively, however, Parliament needs to respect the recommendations of its committees.

In the recent vetting exercise, for example, the National Assembly's Committee on Appointments rejected the President's Cabinet Secretary nominee for the Ministry of East African Affairs, Commerce and Tourism. The Committee was not satisfied 'with the capacity of the nominee to handle functions of the Ministry she was nominated for and therefore found the nominee not suitable for appointment.'[219] However, the National Assembly approved this nominee. At any rate, the rejection of a nominee by a committee may serve the salutary purpose of discouraging future unsuitable persons from offering their candidature out of the fear of public embarrassment. Further, such a rejection undermines the authority of the nominee and ought to be taken seriously by Parliament and the appointing authority.

Secondly, the process can only work if more members of the public participate in the approval hearings by submitting evidence contesting the suitability of candidates to hold office. But given the ineffectiveness of existing laws dealing with witness protection, for example, it could be the case that potential witnesses fear victimization by nominees and their nominators. Thirdly, the relevant committees of Parliament only have fourteen days to vet candidates for public office. A need therefore arises to resource these committees adequately if they are to do their work effectively within this short duration. For example, these committees should have sufficient resources to hire competent investigators.

Parliament is also enhancing public participation in its processes by publishing the reports of its committees in a timely manner. The standing orders of both houses require the Clerk to publish reports of committees in the parliamentary website within forty eight hours after the reports have been tabled in the relevant house.[220]

However, the rules governing the right of the public to petition Parliament and to recall legislators are not appropriate. On the subject of public petitions, the standing orders of both houses provide that a petition can be submitted to the Clerk by a petitioner or, where the Speaker consents, by a Member of Parliament on behalf of the petitioner.[221] Upon receiving the petition, the Clerk is required to ascertain that it meets the requirements of the standing orders and the law before forwarding it to the Speaker for tabling in the relevant House. These requirements are quite formal and elaborate. For example, the petition must be free of alterations and interlineations, indicate whether any efforts have been made to have the matter addressed by a relevant body and whether there has been

218 National Assembly, 'First Report of the Committee on Appointments on the Vetting of the Cabinet Secretaries Nominees' (2013).

219 ibid. 67.

220 National Assembly Standing Orders, s 199 (7); Senate Standing Orders s 201 (7).

221 National Assembly Standing Orders, s 220; Senate Standing Orders s 217.

any response from that body or whether the response has been unsatisfactory, indicate whether the issues in respect of which the petition is made are pending before any court of law or other constitutional or legal body, and state the petitioner's prayer.[222]

The standing orders also require the Clerk to inform the petitioner of the decision of the House within fifteen days after the decision is made. Further, they require the Clerk to keep and maintain a register of all petitions and the decisions of the House. This register is accessible to the public. These requirements are drawn from the Petition to Parliament (Procedure) Act of 2012.[223] But these requirements are unduly formalistic, and may force potential petitioners to seek the services of lawyers before they can submit petitions to Parliament. Those who cannot afford the services of lawyers would therefore be discouraged from accessing Parliament.

The role of Parliament is to represent the people, who should therefore approach it unrestrained by technicalities of procedure. For example, when a citizen wants an issue addressed, it really should not matter whether they have made efforts to have the matter addressed by a body other than Parliament for the simple reason that many citizens just do not know where to go to have their issues resolved. Given prevalent levels of poverty and ignorance, a simple letter stating the petitioner's request should suffice. It would then be up to Parliament to establish the required mechanisms to enable the office of the Clerk to sieve petitions, with a view to placing relevant petitions before the House and referring the rest to other competent bodies. While such an approach would increase the work of the office of the Clerk, it would greatly enhance public access to Parliament.

On the right of recall, the Elections Act 2011 provides for the grounds on which a Member of Parliament may be recalled and the procedure to be followed.[224] Under this Act, the electorate of a county or constituency may recall their Member of Parliament (MP) before the end of the term of the relevant House on three grounds.[225] First, that the MP has been found, after due process of law, to have violated the provisions of Chapter Six of the Constitution, which deals with leadership and integrity. Second, that the MP has been found, after due process of law, to have mismanaged public resources.

Finally, that the MP has been convicted of an offence under the Elections Act. Where such a ground is established, a recall of the MP can only be initiated where the following four conditions are met. First, there must be a judgment or finding of the High Court confirming the ground forming the basis for the petition. Second, a recall can only be initiated twenty four months after the election of the MP and not later than twelve months before the next general election. Third, the electorate can only file one petition during the term of the MP. And fourth, the petitioner must not be a person who unsuccessfully contested an election under the Act. Where these conditions are met, the petition is filed with the IEBC.

222 National Assembly Standing Orders, s 223; Senate Standing Orders s 220.

223 Petition to Parliament (Procedure) Act No. 22 of 2012.

224 Elections Act, No. 24 of 2011.

225 ibid. s 45.

But in order for the IEBC to receive the petition, it must adhere to the following conditions.[226] First, it must be signed by a petitioner who is a voter in the constituency or county and was registered to vote in the election in respect of which the recall is sought. Second, the petition must be accompanied by an order of the High Court confirming the ground for the recall, which must be specified in the petition. Third, the petition must contain a list of the names of at least 30% of the registered voters. Further, this list must contain the names and contact details of at least 15% of the voters in more than half of the wards in the county or constituency. And the voters supporting the petition must represent the diversity of the people in the county or constituency. Fourth, the petition must be accompanied by the prescribed fee. After verifying that these requirements have been met, the IEBC issues a notice of recall to the Speaker of the relevant House.

Thereafter, the IEBC holds two successive elections, namely a recall election and a by-election. First, it holds a recall election, which can only be valid if the number of voters who concur in the recall election consists of at least 50% of the total number of registered voters in the affected county or constituency.[227] If the recall election is valid and results in the removal of the MP (by a simple majority of the voters voting in the recall election), the IEBC holds a by-election at which the MP who has been recalled may run.[228]

These are stringent requirements, and it is doubtful whether they facilitate the attainment of the object of the right of recall. The grounds upon which this right can be exercised are also quite limited. But what exactly is the object of the right of recall? In answering this question, we need to figure out the intention of the people in including this provision in the constitution. According to the Final Report of the Constitutional of Kenya Review Commission, the people wanted a Parliament that was more accountable to them and expressed the view that 'the Constitution should create a mechanism to enable people to monitor the performance of elected representatives and to recall them if their performance is not up to standard.'[229] Further, the people saw the right of recall as a manifestation of their sovereignty.[230] At the same time, however, the people sought to protect this right from abuse, which would among other things encourage frivolous harassment of MPs and discourage qualified persons from seeking public office.[231]

Essentially, a balance is therefore required between giving MPs the freedom they no doubt require to do their work without the threat of unwarranted recalls, and ensuring that they remain accountable to the electorate during their term of office. Arguably, the Elections Act tilts this balance in favor of MPs. First, the grounds on which the right of recall can be exercised are limited. For example, they exclude non-performance, which is the primary reason the people gave in support of the inclusion of the right of recall in the constitution. In this respect, we can learn from the experience of other countries that provide for the right of recall.

226 ibid. s 4.

227 ibid. s 48.

228 ibid. s 7.

229 Constitution of Kenya Review Commission, '*Final Report of the Constitution of Kenya Review Commission*' (CKRC 2005).

230 ibid. 172.

231 ibid. 173.

In the United States of America, for example, most states give registered voters the right to initiate the recall of public officials on broad grounds, such as lack of fitness, incompetence, neglect of duties, corruption, or failure to perform duties prescribed by law.[232] Arguably, serious violations of ethical rules for legislators should also constitute a ground for recall.

Second, it is arguable that the grounds stipulated by the Act should, by operation of the law, disqualify MPs from continuing to hold office. Once it has been established by the due process of law that an MP has violated the Leadership and Integrity Act, or has mismanaged public resources, or has been convicted of an offence under the Elections Act, the tenure of the MP should end automatically. In such a case, the Speaker of the relevant House should simply declare the office of such an MP vacant and ask the IEBC to hold a by-election. Indeed, it would be absurd for an MP who has been found guilty of committing these offences to subject taxpayers to the unnecessary expense of a recall election and a by-election. In other words, the grounds specified in the Elections Act are not relevant to the issue of recall, which essentially concerns the performance of MP affected MP.

Third, the requirement that the ground for the recall petition must be certified by the High Court is unduly restrictive of what is essentially a political process. It could be that this stringent requirement seeks to free MPs from an ever-present threat of recall so that they can work without hindrance.[233] This might also explain why the Act regulates the periods in the term of an MP when a recall petition may be entertained. Nevertheless, the electorate should be given the freedom to recall an MP who is not performing, if the petitioners can persuade a representative segment of the electorate of the merits of a petition.

And it should not matter that the petitioner unsuccessfully contested an election under the Act, for the simple reason that the focus should be on the performance of the MP in question. In other words, incompetence will not acquire a different identity because the person raising it was a competitor of the affected MP. Indeed, this provision of the Election Act is arguably unconstitutional because it restricts who can file a recall petition, while the Constitution extends the right to 'the electorate,' which logically includes persons who have unsuccessfully contested elections in the past. The recall process should therefore be left to the vagaries of politics, once sufficient thresholds have been established to ensure that the voters supporting the petition represent the majority of the electorate in the county or constituency.

Finally, a need therefore arises to evaluate the thresholds established by the Act. In essence, the Act provides that a recall petition must be supported by at least 30% of the registered voters, and that a recall election can only be valid if the number of voters who concur in it consists of at least 50% of the total number of registered voters in the affected county or constituency. These are very high thresholds, considering that voter turnouts rarely consist of 100% of the registered voters.

232 National Conference of State Legislatures, 'Recall of State Officials' (NCSL 2011) <http://www.ncsl.org/legislatures-elections/elections/recall-of-state-officials.aspx>.

233 Jack Maskell, '*Recall of Legislators and the Removal of Members of Congress from Office*' (Congressional Research Service 2012) 12.

Therefore, MPs are invariably elected only by a segment of registered voters in practice. It therefore seems absurd to base the removal of MPs on thresholds based on registered voters when in fact they are elected only by a section of the registered voters.

In a constituency of 5000 registered voters, for example, it would mean that the recall of an MP elected by 40% (or 2000 votes) of the registered voters would require the support of 30% (or 1500 votes) of the registered voters. Further, it would mean that the recall election would only be valid if 2500 voters (that is 50% of the registered voters) concur in it. In other words, the recall petition would need to have been supported by nearly the same number of people who voted the MP into office, and if it is to be valid the recall election would need the support of 500 more votes than the votes that took the MP to Parliament in the first place. This perhaps explains why in some countries, the requirement is that the petition should be based on a percentage of the vote in the last election for the office in question.[234] In California, for example, the requirement is that a recall petition must be supported by at least 12% of the last vote for the office.[235]

E. Observing the Rule of Law in the Determination of the Remuneration of Legislators

The country recently witnessed a conflict concerning the remuneration of legislators that pitted the National Assembly against the Salaries and Remuneration Commission (SRC). Although this conflict now seems to have abated, following the conclusion of a deal that was mediated by the Deputy President;[236] it raises a fundamental issue concerning the observation of the rule of law by both parties in the determination of the remuneration of legislators.

As we have noted, the mandate of the SRC is to set and regularly review the remuneration and benefits of state officers, and advise national and county governments on the remuneration and benefits of all other public officers. In performing these functions, the Constitution requires the SRC to take four principles into account: the need to ensure that the total public compensation bill is fiscally sustainable, the need to ensure that the public services attract and retain skilled personnel, the need to recognize productivity and performance, and transparency and fairness.[237] Further, the Salaries and Remuneration Commission Act requires the SRC to be 'guided by the principle of equal remuneration to persons for work of equal value,' and to 'take into account the recommendations of previous commissions established to inquire into the matter of remuneration in the public service.' [238]

234 National Conference of State Legislatures (n 223).

235 State of California, '*Procedure for Recalling State and Local Officials*' (Office of the Secretary of State 2007) 11.

236 Alex Ndegwa, 'Members of Parliament Agree to Pay Set by Salaries and Remuneration Commission,' *The East African Standard* (Nairobi, 12 June 2013).

237 Constitution of Kenya 2010, Article 230 (1).

238 Salaries and Remuneration Commission Act No. 10 of 2011, S12.

Sometime in 2012, the SRC carried out a job evaluation exercise, in which it was assisted by the World Bank and PricewaterhouseCoopers Limited, a consultancy firm.[239] The legislature was represented at this exercise by an officer of the Parliamentary Service Commission.[240]

It is from this exercise that the SRC established a new pay structure that it proceeded to publish in the Kenya Gazette. But upon assuming office in March 2013, legislators expressed the view that their salaries were not sufficient, and that the SRC's job evaluation had been wrong and unconstitutional.[241] Second, they alleged that the SRC had not taken into account previous reports on the remuneration of MPs, contrary to the requirements of the Salaries and Remuneration Act. Third, they alleged that the SRC's pay structure would occasion a large disparity in remuneration between the decision-making organs of the three arms of government and would in particular disadvantage the legislature.[242] Fourth, they alleged that the pay structure established by the SRC would undermine the independence of the legislature, and undermine its ability to attract individuals of high professional caliber and integrity to vie for the office of MP.[243] Last but not least, they claimed that they had not been given an opportunity to participate in the job evaluation exercise that formed the basis of the pay structure established by the SRC.[244] For these and other reasons, the National Assembly purported to annul the SRC's gazette notices and declared that the remuneration of MPs would continue to be governed by the National Assembly (Remuneration Act) and the Parliamentary Pensions Act.[245]

The approach of the legislature in handling this dispute is contrary to the rule of law, and does not endear legislators to the public. In effect, by annulling the SRC's gazette notices and threatening to disband it, the National Assembly refused to submit to the jurisdiction of the SRC. This may explain why the majority of Kenyans favored the SRC in this dispute.[246] Indeed, it is arguable that legislators had genuine issues against the SRC. For example, the SRC has not explained whether or how it complied with the requirement that it must take into account the recommendations of previous commissions established to inquire into the remuneration of MPs, such as the Report of the Akiwumi Commission to Review the Terms and Conditions of Service for Members of the National Assembly of 2010.

Second, the Salaries and Remuneration Commission Act does not repeal the legislation governing the remuneration of legislators, such as the National Assembly (Remuneration Act)[247] and the Parliamentary Pensions Act.[248]

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239 National Assembly, 'First Report of the Committee on Delegated Legislation on the Constitutionality of the Kenya Gazette Notice Nos. 2885, 2886, 2887 and 2888 Published in the Kenya Gazette of 1st March, 2013 by the Salaries and Remuneration Commission,' (2013) 13.

240 ibid. 14.

241 ibid. 15.

242 ibid. 18.

243 ibid. 19.

244 ibid. 20.

245 Report of Committee on Delegated Legislation (n 231) 32.

246 Charles Mwaniki, 'Kenyans Support SRC in Salary Row,' *Business Daily* (Nairobi, 15 May 2013).

247 National Assembly (Remuneration) Act.

248 Parliamentary Pensions Act Chapter 196, Laws of Kenya.

Therefore, the legislators' argument that their benefits are saved by the Sixth Schedule of the Constitution – meaning that their terms of service are to be determined in accordance with existing legal provisions – has some merit.[249] Third, it is arguable that the SRC exceeded its powers in establishing the disputed pay structure. In one of its gazette notices, the SRC provided that MPs would be entitled to sitting allowances for a maximum of four sittings per week.[250] Its effect, as the legislators pointed out, was to 'regulate the number of sittings a committee of Parliament may have, in violation of the independence of Parliament.'[251]

From the foregoing, there is a need to harmonize the provisions of the National Assembly (Remuneration Act) and the Parliamentary Pensions Act governing the benefits of MPs with the Salaries and Remuneration Commission Act. Second, the SRC needs to establish clear and transparent procedures that will enable it to adhere to the provisions of the Constitution and the Salaries and Remuneration Commission Act in the performance of its functions. In this respect, it should be emphasized that the SRC is an administrative agency which must ensure that its decisions are lawful, reasonable and procedurally fair. Third, Parliament needs to submit to the jurisdiction of the SRC, if only because doing so would enhance its legitimacy. Submitting to the SRC would also contribute to strengthening this new institution. As we have seen, it is arguable that Parliament had legitimate grievances against the SRC. But these grievances have not been ventilated, to the detriment of both institutions.

F. Establishing a Credible and Enforceable Ethics Regime

By far the most challenging task that Parliament faces today is to establish a credible ethics regime and enforce it. Due to lax ethics rules and the absence of effective enforcement mechanisms, legislators remain vulnerable to corrupt influence, which only serves to undermine the effectiveness, credibility and legitimacy of Parliament. In addition, an effective ethics regime is necessary because it is an important safeguard for the democratic system.[252] In this respect, an ethics regime serves two purposes.

First, in ensures that 'each citizen has the right to exercise as much influence on the political process as any other citizen.'[253] It does so by preventing wealthier citizens from corrupting legislators with a view to acquiring additional influence over the political process.[254] Secondly, it prevents corrupt politicians from utilizing 'illicitly obtained resources for their electoral campaigns, thus acquiring an advantage over the other candidates and improving their chances of being elected.'[255]

249 Report of Committee on Delegated Legislation (n 231) 26.

250 ibid. 31.

251 ibid.

252 Riccardo Pelizzo and Rick Stapenhurst, 'Legislative Ethics and Codes of Conduct,' in Rick Stapenhurst et al (eds) *The Role of Parliament in Curbing Corruption* (World Bank, 2006).

253 ibid.

254 ibid.

255 ibid.

Where this happens, corrupt candidates 'distort electoral competition and prevent the people's will from being properly expressed,' thereby posing a threat to democracy.[256] A credible ethics regime is also an instrument for maintaining public confidence in the legislature.[257]

Currently, the parliamentary ethics regime consists of the standing orders, the Code of Conduct and Ethics for members of the National Assembly, and the Leadership and Integrity Act.[258]

The standing orders require members who wish to speak on matters in which they have a personal interest to declare that interest before they speak.[259] Personal interests are defined broadly to include pecuniary interests, proprietary interests, personal relationships and business relationships.[260] However, the standing orders do not provide mechanisms for administering the declaration of personal interests, or the sanctions to be imposed where legislators violate this rule. The standing orders also provide that: 'A member against whom an adverse recommendation has been made in a report of a select committee that has been adopted by a House of Parliament shall be ineligible for nomination as a member of *that* committee.'[261]

In my view, this provision is unduly restrictive. It literally means that a legislator against whom an adverse recommendation has been made in a report of one select committee is free to serve as a member in all other select committees. However, adverse recommendations would arguably undermine the competence of such a legislator to serve on any select committee. Perhaps the concern of this standing order is to ensure that Parliament has sufficient numbers of legislators who can serve on its committees, since numerous adverse recommendations would greatly reduce the pool of committee members if such recommendations were to constitute a bar to membership of committees. However, this concern could be addressed by requiring that the adverse recommendations should first be resolved by the Parliament or the affected legislators before they can become eligible to serve on committees.

The Code of Conduct and Ethics for Members of the National Assembly is established by the Powers and Privileges Committee of the National Assembly, pursuant to the provisions of the National Assembly (Powers and Privileges) Act. It requires legislators to act with integrity and objectivity when voting, asking questions, or carrying out any other parliamentary duties.[262] Second, it prohibits legislators from allowing 'any personal benefit or interest, including the benefits or interests of relatives or friends' to influence how they perform their duties.[263]

256 ibid.

257 ibid.

258 Leadership and Integrity Act No. 19 of 2012.

259 National Assembly Standing Orders S 90 (1); Senate Standing Orders s 91 (1).

260 National Assembly Standing Orders S 90 (2); Senate Standing Orders s 91 (2).

261 National Assembly Standing Orders S173 (4); Senate Standing Orders s 175 (4) (Emphasis supplied).

262 Code of Conduct and Ethics for Members of the National Assembly, Section 14.

263 ibid.

Third, it prohibits legislators from incurring financial or other obligations that might unduly influence the performance of their duties.[264] It also states that legislators 'shall not tolerate corruption in any form.'[265] But as far as the enforcement of these rules is concerned, the Code of Conduct merely provides that where a legislator has committed a breach of the code, appropriate action will be taken in accordance with the National Assembly (Powers and Privileges) Act.

Under this Act, the Powers and Privileges Committee is responsible for enforcing violations of the Code of Conduct, either of its own motion, or pursuant to a complaint made by any person.[266] After inquiring into the alleged breach of the code, the committee reports its findings to the Assembly, which considers the report and takes disciplinary action (including suspending the legislator in question) if it so desires.[267] This Act also prohibits members from accepting or receiving bribes or gifts in order to promote or oppose a matter submitted for the consideration of the Assembly or its committees. The penalty for violating this requirement is imprisonment for a term of up to two years or a fine not exceeding KES 10,000, or both.[268] The offending legislator may also be required to forfeit the bribe or gift.[269]

The Leadership and Integrity Act gives effect to Chapter Six of the constitution that establishes principles of leadership and integrity. It requires state officers, such as legislators, to declare personal interests and to 'use the best efforts to avoid being in a situation where personal interests conflict or appear to conflict with… official duties.'[270] In particular, the Act imposes a duty on legislators to declare any pecuniary interest or benefit in any debate or proceeding of the Parliament or its committees, or transactions or communication between the legislator and other public officials.[271] To facilitate the enforcement of these requirements, it requires the Clerk to maintain a register of conflicts of interest, and open it to the public for inspection.[272]

The idea here is to give legislators 'some discretion to decide when there is a risk of conflict' but then use the public (including the media and civil society) to 'scrutinize the disclosed interests and judge whether conflicts have occurred.'[273] It should be noted that even where a legislator has declared that they have a personal interest in a matter under consideration by the Parliament or its committees, he or she may still contribute to debate on the matter. However, legislators who have a personal interest in a matter should either be required to recuse themselves or be prohibited from voting on such a matter.

264 ibid. Section 15.

265 ibid. Section 19.

266 National Assembly (Powers and Privileges) Act, Section 10.

267 ibid.

268 ibid., Section 24.

269 ibid.

270 Leadership and Integrity Act, Section 16.

271 ibid., Section 9.

272 ibid. , Section 10.

273 OSCE/ODIHR, '*Background Study: Professional Ethics and Ethical Standards for Parliamentarians*' (2012) 43.

Secondly, the Act requires public entities (presumably including Parliament) to establish specific Leadership and Integrity Codes, and to require state officers to sign and commit to this Code at the time of assuming office.[274] In this respect, a need arises to harmonize the requirements of the National Assembly (Powers and Privileges) Act and the Leadership and Integrity Act. This includes revising the Code of Conduct and Ethics for Members of the National Assembly so that it not only adheres to the requirements of the Leadership and Integrity act, but also applies to members of the Senate. And to facilitate compliance with the ethics regime, the revised code of conduct should collate 'the legal and regulatory obligations of MPs and their staff in one place.'[275] Doing so would make 'it easier for MPs to find the rules pertaining to any particular situation in which they find themselves and also [help] the media and the public to check whether MPs are living up to expectations.'[276] Compliance with the code would also be enhanced if MPs were trained regularly on the requirements of the ethics regime.[277]

Another interesting feature of the Leadership and Integrity Act is that it seeks to regulate the private conduct of legislators by requiring state officers to 'conduct private affairs in a manner that maintains public confidence in the integrity of the office.'[278] Finally, the Act requires former state officers to observe a two-year "cooling off period" before they can 'be engaged by or act for a person or entity in a matter in which the officer was originally engaged in as a state officer.'[279] This is an important requirement since 'an MP's plans for his or her future career can influence how he or she behaves while in Parliament.'[280] On the one hand, 'MPs might abuse their power to favor a certain company, with a view to ingratiating themselves and gaining future employment.'[281] Conversely, 'once working in the private sector, they might influence former colleagues to favour their new employer.'[282] The cooling off period diminishes their 'capacity to exercise undue influence or use information learned while in office.'[283]

However, a credible mechanism for enforcing the ethics regime is required. In this respect, we can learn from the experience of other countries, where three approaches have been deployed in enforcing ethics regime.[284] Under the first approach, which has been adopted in Taiwan and India, the ethics regime is administered by a regulatory commission that is external to, and independent from, the legislature. This commission investigates accusations of misbehavior, reports back its findings to the legislature, and in some cases is empowered to punish violators.[285]

274 Leadership and Integrity Act, s 40.

275 OSCE/ODIHR (n 273) 34.

276 ibid.

277 Pelizzo & Stapenhurst (n 252) 204.

278 Leadership and Integrity Act s 32.

279 ibid. s 28.

280 OSCE/ODIHR (n 273) 58.

281 ibid.

282 ibid.

283 ibid.

284 National Democratic Institute for International Affairs, 'Legislative Ethics: A Comparative Analysis,'(1999) Legislative Research Series Paper 4.

285 ibid. 18

A second approach involves establishing a regulatory mechanism within the legislature, as in Ireland and the United Kingdom. In these countries, the regulatory mechanism is created through the standing orders, and 'takes the form of a parliamentary committee composed of members, combined with an independent parliamentary commissioner or commission.'[286] In the UK, for example, the Parliamentary Commissioner for Standards maintains the Register of Members' Interests, and investigates alleged violations before reporting to the Select Committee on Members' Interests. It is then up to this Committee to determine whether to report the case to the full House.

The third approach is one under which members police themselves, as happens in the case of the United States Congress. Here, a special committee comprised of legislators receives complaints on ethics violation, investigates, and recommends appropriate sanctions to the House.[287] But this model is problematic, since it depends on legislators to investigate and sanction their fellow members.[288] It has thus been noted in the jurisdictions where this model has been adopted that legislators 'rarely report improprieties of their colleagues… and they even more rarely criticize colleagues in public for neglecting their legislative duties.'[289] Accordingly, the other two approaches may offer better options for our Parliament since they include actors external to the legislature.

V. CONCLUSION

It is quite evident that Kenya's Parliament has become an effective and increasingly democratic legislature. As we have seen, however, a number of significant institutional reforms are now required if Parliament is to become truly democratic and legitimate. First, there is a need to enhance democracy in the decision-making processes of Parliament so that the views of all citizens are taken into account. In this respect, Parliament requires procedural rules that will promote deliberation and consensus-building in its decision-making processes, as opposed to encouraging a majoritarian approach to the resolution of issues, which is often divisive. Second, there is a need to clarify the roles of the National Assembly and the Senate in the passage of legislation.

The two Houses need to negotiate and agree on how they will perform their roles, particularly where the Constitution does not stipulate which House has the primary responsibility of originating bills. Third, Parliament should establish effective procedures for public participation in, and accountability of, legislative processes. In particular, Parliament needs to adopt a permissive approach to public petitions, so that the majority of citizens, who are poor and uneducated, can access it unhindered by technicalities of procedure. The grounds for exercising the right of recall should also be expanded, and the procedural thresholds reviewed, so that the people can assert control over non-performing legislators. Fourth, there is a need to observe the rule of law in the determination of the remuneration of legislators. Here, a there is a need to harmonize the applicable laws and establish clear and transparent procedures to regulate how the SRC exercises its powers.

286 ibid. 19.

287 ibid. 20.

288 ibid.

289 ibid. citing Dennis F. Thompson, Political Ethics and Public Office (108, Harvard University Press, 1987).

In addition, Parliament needs to appreciate that it would greatly enhance its legitimacy by submitting to the jurisdiction of the SRC. Above all, Parliament needs to establish a credible and enforceable ethics regime. This entails harmonizing the laws regulating the conduct of legislators and establishing a mechanism for enforcing the ethics regime that is transparent and accountable to the public.

JUDICIAL APPROACHES TO THE APPLICABILITY OF CUSTOMARY LAW TO SUCCESSION DISPUTES IN KENYA

*Winifred Kamau**

ABSTRACT

This paper explores the relationship between customary law and statutory law of succession in the context of inheritance disputes involving women in Kenyan courts. The paper examines the two opposing approaches that Kenyan courts have taken towards the application of customary law vis-a-vis statutory law in succession cases. Each approach is informed by the gender norm to which the judge subscribes, with differential consequences for women's claims. The author argues that these approaches adopt a static view of customary law that sets up a dichotomy between customary law and state law, hence inhibiting the growth of customary law.

I. INTRODUCTION

As a consequence of colonial rule, African societies live with the reality of legal pluralism where customary and religious norms operate alongside state law. Kenya has a multiple legal heritage consisting of customary law, statutory/common law and Islamic law, which are all recognized to varying degrees as being applicable within the state. These normative orders interact and intersect in various ways and this has engendered tension and sometimes conflict. Customary law plays a significant role in the lives of Kenyans as customary norms and practices pervade people's relationships and dealings with one another. This is particularly so in the context of family relations where customary law plays a crucial role in the maintenance of cultural norms about the place of women in the family and society.

For Kenyan women, custom is particularly important as it defines their identity within society, and mediates their family relationships, entitlements and access to resources. However, women in Kenya generally occupy a disadvantaged position under customary law. This is because traditional African societies are governed on the basis of patriarchal structures where women's individual interests are subsumed under the interests of the group. Hence, customary law contains aspects that often run counter to principles of gender equality and non-discrimination espoused in both domestic and international human rights instruments.[1] The law relating to succession exemplifies the tension inherent in a pluralistic legal system.

This paper explores the relationship between customary law and statutory law of succession in the context of inheritance disputes involving women in Kenyan courts. The paper examines the two opposing approaches that Kenyan courts have taken

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1 Winifred Kamau, 'Customary Law and Women's Rights in Kenya' <http://theequalityeffect.org/wpcontent/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf> accessed 30 March 2015.

towards the application of customary law *vis-a-vis* statutory law in succession cases. Each approach is informed by the gender norm to which the judge subscribes, with differential consequences for women's claims. I argue that these approaches adopt a static view of customary law that sets up a dichotomy between customary law and state law, hence inhibiting the growth of customary law. Further, the paper explores the ways in which International Human Rights norms are permeating judicial interpretations, and considers the implications for realization of women's inheritance rights. In this analysis, the Constitution of Kenya is germane, as it promotes gender equality while at the same time it protects the right to culture, and also accords International Law an exalted position. The paper concludes by exploring ways in which the judiciary can re-conceptualize the relationship between customary law and state law to benefit women.

II. GENDER EQUALITY UNDER THE CONSTITUTION OF KENYA 2010

Prior to the promulgation of the Constitution of 2010, the position in Kenya on gender equality was ambivalent due to the former Constitution's "claw-back" provisions which, while prohibiting discrimination on the basis of sex at the same time permitted discrimination in personal law matters.[2] By contrast, the Constitution of 2010 contains important gains for gender equality and equity as seen both in its general orientation and in its specific provisions. Apart from the national values and principles of governance which include, among others, human dignity, equity, inclusiveness, equality, human right and protection of the marginalized, the Constitution explicitly provides for gender equality and non-discrimination. Under Article 27 (1), every person is equal before the law and has the right to equal protection and equal benefit of the law.

Equality includes the full and equal enjoyment of all rights and fundamental freedoms.[3] Article 27 (3) provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Under Article 27 (4) and (5), neither the State nor any person is allowed to discriminate, whether directly or indirectly against any person on any ground, including sex, pregnancy, marital status or dress, among others.[4] For the first time, anti-discrimination provisions target not just the State but also non-State persons. This enables women to obtain redress from individuals, groups and corporate bodies in relation to discriminatory action.[5]

Further, the Constitution provides that all law in force immediately before promulgation continues to be in force and shall be construed with the "alterations, adaptations,

2 See The Constitution of Kenya 1969 section 82 (3) and (4).

3 Article 27 (2).

4 The other grounds are race, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language or birth.

5 The Constitution also recognizes the principle of affirmative action and obliges the State to take legislative and other measures, designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Women have been recognized as a category of vulnerable or marginalized groups. However, under Article 24(4) the Constitution permits discrimination to the extent strictly necessary for the application of Muslim Law before the Kadhis' courts to persons who profess the Muslim religion in matters relating to personal status, marriage, divorce and inheritance.

qualifications and exceptions" necessary to bring it into conformity with the Constitution.[6] This means that legislation must be interpreted in a Constitution-compliant manner even prior to its amendment.

International Law now occupies an enhanced position under the Constitution. Article 2(5) provides that the general rules of international law shall form part of the law of Kenya, while Article 2 (6) states that any treaty or convention ratified by Kenya forms part of the law of Kenya subject to the Constitution. This signals a shift from a dualistic approach to International Law to a monistic one, and suggests that unlike in the former Constitution when ratified treaties and conventions had to first be domesticated through local legislation, these instruments may now be directly applied by the courts.[7] These include the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Charter on Human and Peoples' Rights (Banjul Charter) and the Protocol to the African Charter on Human and Peoples' Rights on Rights of Women in Africa (Maputo Protocol). This has positive ramifications for women as the human rights principles in these instruments, such as non-discrimination, may be used to challenge aspects of domestic law that are oppressive to women.

III. PROTECTION OF CULTURE UNDER THE CONSTITUTION OF 2010

The Constitution attempts to strike a balance between protection of individual rights and freedoms on the one hand and recognition of group rights, including the right to culture, on the other hand. Article 11(1) recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. The State is enjoined to promote all forms of national and cultural expression through literature, arts, and traditional celebrations, among others.[8] Article 44(1) protects the exercise of language and culture. Hence every person has the right to use the language, and to participate in the cultural life of their choice. Further, a person belonging to a cultural or linguistic community has the right, with other members of that community to enjoy the person's culture and use their language, to form, join and maintain cultural and linguistic associations and other organs of civil society.[9] However, no person shall compel another person to perform, observe or undergo any cultural practice or rite.[10]

6 Section 7 (1), Sixth Schedule.

7 In *Re Zipporah Wambui Mathara* [2010] eKLR, it was held that by virtue of article 2(6) of the Constitution, international treaties and conventions ratified by Kenya, including ICCPR, are imported as part of the sources of Kenyan Law. However, see *Diamond Trust Ltd. v. Daniel Mwema* Mulwa (2010) eKLR which held that the ICCPR was at par with statutory law and could not override the Civil Procedure Act. For a more elaborate discussion, see E. Oluoch Asher, "Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya" (2013) 11 International Journal of Humanities and Social Science 266; E.B.N. Abenga, "The Place of International Law in the Hierarchy of Valid Norms under the 2010 Kenyan Constitution" <ssrn.com/abstract=2101565> accessed 20 November 2014.

8 Article 11 (2) (a).

9 Article 44 (2).

10 Article 44 (3).

This is an important limitation for women as it means that women can now more easily challenge practices that are forced upon them in the name of culture, such as widow inheritance, widow cleansing and female genital surgeries.

The Constitution retains the pluralistic base of family law by providing for enactment by Parliament of legislation that recognizes marriages concluded under any tradition, or system of religious, personal or family law, as well as any system of personal and family law under any tradition, or adhered to by persons professing a particular religion. This recognizes the validity of customary and religious systems of customary law. However, such recognition is only to the extent that any such marriages or systems of law are consistent with the Constitution.[11]This would include the Bill of Rights and all the equality and non-discrimination provisions. Section 45 (3) provides that parties to a marriage are entitled to equal rights at the time of, during and at the dissolution of the marriage. Although the Constitution does not explicitly address the question of how to resolve conflicts between different marriage systems, it at least points to itself as the standard. Any conflict would thus have to be resolved in light of constitutional principles, including equality and non-discrimination.

For the first time there is constitutional recognition of alternative forms of dispute resolution, including traditional dispute resolution.[12] Traditional dispute resolution mechanisms usually utilize localized norms drawn from customary law and customary practices. They are often the most accessible forms of dispute resolution for the majority of Kenyans, including women but are also characterized by procedural and normative weaknesses which are disadvantageous for women. Under article 159 (3), these mechanisms are to be subject to the Constitution and Bill of Rights, and the repugnancy provisions in the Judicature Act[13] are replicated in the Constitution. Hence the Constitution seems to legitimize and grant more recognition to the cultural norms and practices that underlie customary law while clearly subordinating them to constitutional norms and provisions.

IV. CUSTOMARY LAW IN THE KENYAN LEGAL SYSTEM

A. Nature of Customary Law in Kenya

Customary law may be defined as consisting of the unwritten norms and practices of small-scale communities which date back from pre-colonial times but have undergone transformations due to colonialism and capitalism. It is localized in nature and is as diverse as the communities involved, although there is general consensus on certain fundamental principles.[14]Customary law is unwritten and it is passed on through the practices and oral traditions of the community concerned. It is characterized by dynamism and flexibility, as it develops and takes on different permutations in response to changing circumstances.

11 Article 45 (4).

12 See Article 159.

13 Cite s. 3 (2) Judicature Act.

14 These principles include the centrality of the family, supremacy of the group over the individual, and the importance of kinship ties.

The existence of multiple legal systems coupled with the fluid nature of customary law poses a challenge in determining its content in any particular case and fosters what Meinzen-Dick and Pradhan call "knowledge uncertainty".[15]

It has been noted that written accounts of customary law are not direct accounts of community practices but the work of informants who bring with them their particular preconceptions and biases.[16]Some scholars are of the view that customary law is actually an "invention" of colonial governments in collaboration with local leaders.[17]It has been argued that the courts' continued reliance upon sources which portray custom as static, buttressed by the doctrine of precedent, has resulted in the ossification of customary law, thus stifling opportunities for development of customary law.[18]Hence there are divergences between "judges' law" consisting of judges' pronouncements and "living law" consisting of people's practices on the ground.

It should also be noted that colonialism and capitalism had far-reaching effects on customary norms and practices. In general, the interaction between colonial state law and customary law worsened the position of women, particularly with regard to the individualization of title and commoditization of land. Colonialism and capitalism brought in their wake a general breakdown in community institutions and the dismantling of safeguards for protection of weaker people in society, particularly women. For instance the institution of the levirate, originally intended to perpetuate the deceased's line and to provide for maintenance of the widow and the deceased's children, has been abused and has resulted in wives and their children being dispossessed by male relatives on the death of a husband. Similarly, the institution of bride-wealth (also known as dowry) has been commercialized and women may be regarded as property which is seen as justifying their exclusion from ownership or inheritance of property.

However, there have also been changes in customary norms and practices in favour of women. Factors influencing these changes include education, women's economic empowerment, and awareness of rights among others. In *Karanja v. Karanja*[19] the court recognized that as a result of women being educated and earning salaries, it is quite possible for both married and unmarried women to acquire their own land.

Local women's groups and NGOs have been instrumental in facilitating these processes. For example, through *chamas* (women's rotating savings groups), women have been able to raise capital to buy property, own businesses on their own. Hence the customary perception that women cannot own or manage property is being put to question.

15 Ruth S. Meinzein-Dick and Rajendra Pradhan, 'Legal Pluralism and Dynamic Property Rights' CAPRi Working Paper, No. 22 (2002) at 13.

16 Kameri-Mbote IELRC.

17 See Martin Chanock, Law, *Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985); Terence Ranger, 'The Invention of Traditionalism in Colonial Africa' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 1983).

18 Anne Hellum, *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe* (Mond Books 1999); Julie Stewart, 'Why I Can't Teach Customary Law' in John Eekelaar and Thadabantu Nhlapo (eds), *The Changing Family: Family Forms and Family Law* (Hart Publishing 1998) 217.

19 (1975) KLR 307.

There is also some evidence that inheritance practices are gradually changing to accommodate the rights of daughters to inherit their fathers' estates in some instances particularly in situations where a daughter has been taking care of her father in his old age.[20] Some customary concepts, such as those relating to trusts, have in some cases operated to enable women to hold land on behalf of the family and to make decisions relating to apportionment and use of such land.[21]

Similarly, cultural practices are also undergoing change. For instance, there is some indication of modified observance of certain burial rites and practices, such as *tero buru*[22] and widow inheritance, practiced by some communities. This is attributable in large part to the influence of public health campaigns by the government and NGOSs, particularly with the spectre of HIV/AIDS.[23] In some other regions, alternative rites of passage for women have been initiated minus the "cut" usually associated with female circumcision.

B. Legal Status of Customary Law

One of the most vexing questions in Kenyan jurisprudence is what place customary law occupies in the Kenyan legal system. The Judicature Act[24] sets out the sources of law in Kenya. These are listed in section 3 (1), in descending order of importance, as: the Constitution, all other written laws (including certain Acts of the U.K. Parliament), the substance of English common law, doctrines of equity, and statutes of general application.[25] Section 3 (2) provides that:

> "The courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law."

Thus, the Judicature Act recognizes customary law as a source of law, but its applicability seems severely constrained, limited as it is to civil cases, and being subordinate to written law and subject to the "repugnancy test". This would appear to signal the inferiority of customary law in the hierarchy of norms. However, as already mentioned, customary law could at the same time be used to trump fundamental rights and freedoms by virtue of section 82 (4) of the former Constitution.

The language of section 3 (2) of the Judicature Act is marked by uncertainty. First, it is not clear whether customary law falls, in order of hierarchy, at the bottom of the ladder as a source of Kenyan law, or whether it should be treated as cross-cutting and outside

20 Celestine Itumbi Nyamu, Gender, Culture and Property Relations in a Pluralistic Social Setting (Unpublished J.S.D. Dissertation, Harvard University 2000).

21 Fiona McKenzie, 'Gender and Land Rights in Murang'a District, Kenya' (1990) 17 Journal of Peasant Studies 609 Nyamu, Property Relations (n 20) McKenzie (n 21).

22 Luo burial rite.

23 M.D. Okech-Owiti, "Some Socio-Legal Issues", in J.B. Ojwang & J.N.K. Mugambi, eds. *The S.M. Otieno Case: Death and Burial in Modern Kenya* (Nairobi, Nairobi University Press, 1989) 11.

24 Cap. 8, Laws of Kenya.

25 These latter English sources apply as they subsisted as at 12th August 1897. However, there is a proviso that common law, equity and statutes of general application shall apply only in so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

the hierarchical order. Second, it is also not clear what the term "guided" really means. Does it mean that courts are not bound to apply customary law, or does it mean that courts must always have regard to customary law when making decisions? The question of the status of customary law in the Kenyan legal system was at the heart of the famous burial dispute in *Virginia Wambui Otieno v. Joash Ougo & Omolo Siranga*[26](popularly known as the *S.M. Otieno Case*). The widow's interpretation of the word "guided" was that the courts were not bound to apply customary law but were only to take customary law into account at their discretion.

This interpretation consigns customary law to "the bottom of the pile" in the hierarchy of laws.[27] On the other hand, the clan construed the word "shall" as mandating the courts to apply customary law in applicable cases. In elaborating on the relationship between customary law and common law, the Court of Appeal (then the highest in the land) observed *that these "two great bodies of law" were complementary to each other. However, the Court also made it clear that common law was generally outside the sphere of personal law.* The Court declared as follows:

> Customary law is the personal law of Kenyan Africans and there is no way an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal… Mr. Otieno, born and bred a Luo, remained a member of the Luo community and subject to the customary Law of the Luo People.

In the end, the deceased was to be buried in his ancestral home according to the customary practices of his clan. The decision has been criticized as being inimical to gender equality as group rights embodied by the clan triumphed over individual rights of the widow. [28]

Section 3(2) of the Judicature Act subjects the application of customary law to the "repugnancy test", meaning that a rule of customary law may not be applied where the court is of the opinion that it offends justice or morality. However, the application of this test is wholly dependent on judicial discretion as to what constitutes justice and morality. In *Wambugi w/o Gatimu v. Stephen Nyaga Kimani*[29] it was held that customary law is applicable under section 3 (2) as long as the court is satisfied that the custom, if proved, is not repugnant to justice or morality. On the facts of the case, a custom that operated to bar women from inheritance (and hence discriminated against women) was found not to be repugnant to ordinary notions of justice. Moreover, **s**ome judges have expressed disquiet about declaring customary law repugnant, as happened in *Kamete Ene Ateti Marine v. Mosupai ole Ateti*[30] where the court stated that customs and traditions

26 (1987) eKLR.

27 HWO Okoth-Ogendo, 'Customary Law in the Kenyan Legal System: An Old Debate Revived' in JB Ojwang and JNK Mugambi (eds), *The S.M. Otieno Case: Death and Burial in Modern Kenya* (Nairobi University Press 1989) 135.

28 See Stamp, Patricia. 'Burying Otieno: The Politics of Gender and Ethnicity in Kenya' (1991) 16 Signs 808.

29 (1992) KAR 292 (Court of Appeal).

30 High Court Civil Appeal No. 224 of 1995, cited in William Musyoka, Law of Succession (Law Africa 2006)17.

are time tested and based on wisdom and experience; hence they should not be brushed aside lightly, however tempting it might be to do so, unless there are sound reasons for it, which have to be judicially determined.

The Constitution of 2010 declares its supremacy over all other laws and states that any law, including customary law, that is inconsistent with the Constitution, is void to the extent of the inconsistency. This provision clearly subordinates customary law to the Constitution and enables any conflicts between customary law and the Constitution to be resolved in favour of the Constitution, including the Bill of Rights and the principles of non-discrimination and equality. This is a welcome departure from the ambivalence of the former Constitution.[31]Regrettably, the Constitution is silent on the question of conflict between customary law and other laws (such as common law and statute) and this continues to plague the courts, as will later be seen in this paper in the context of succession.

C. Proof of Customary Law

Due to the ever-evolving nature of customary practices, it is often difficult to ascertain the content of customary law at any given time. Customary law is therefore treated by the courts as a question of fact which must be proved in evidence.[32] In *Ernest Kinyanjui Kimani v. Muiru Gikanga& Another*[33] it was held that where customary law is neither notorious nor documented, it must be established for the court's guidance by the party intending to rely on it. The court may take judicial notice that a given customary practice has gained notoriety and may in doing so rely on books and documents produced before it.[34] It is in this context that Eugene Cotran's *Restatements of African Law*[35] take on particular significance.

The courts in Kenya have in numerous cases treated these volumes as authoritative statements of customary law. For example, in *Mwathi v. Mwathi*[36]the Court of Appeal regarded statements contained in the *Restatements* on Kikuyu customs concerning the distribution of the estate of an intestate as binding or conclusive.[37]Anthropological literature, such as Jomo Kenyatta's *Facing Mount Kenya*,[38] account of the tribal life of the Kikuyu written in the 1930s, has also been treated as conclusive on questions of land

31 However, the ambivalence is not completely absent as some aspects of Islamic personal law are exempted from the purview of the Constitution's equality protections: see article 24.

32 This principle was laid down by the Privy Council in the Ghanaian case of Angu v. Attah(1916) PC 43, where it was stated as follows: "As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have by frequent proof in the courts become so notorious that the courts will take judicial notice of them."

33 (1965) E.A. 735.

34 See 60 of the Evidence Act. See also section 41, Evidence Act and Rule 64, Probate and Administrative Rules.

35 Eugene Cotran, *Restatements of African Law: Kenya* (Sweet & Maxwell 1969).

36 (1995-98) E.A. 229.

37 See other cases cited in Musyoka (n 30) 288.

38 Jomo Kenyatta, Facing Mount Kenya: *The Traditional Life of the Gikuyu* (Kenway Publications 1938).

inheritance among the Kikuyu, as happened in *Gituamba v. Gituamba.*[39] It is heartening to note that in at least one case, *Atemo v. Imujaro,*[40] the Court of Appeal sounded a cautionary note against treating the *Restatements* as binding on every issue of customary law and, in recognition of the dynamic nature of customary law, observed that the law in those volumes may not be the same today.

The need to prove customary law as a matter of fact has onerous implications for women litigants. This is because even though under the rules of procedure, a woman has the same capacity as a man to call evidence and rebut it, in practice the people recognized by society as custodians of custom, and therefore experts of customary law, tend to be men(usually elderly).[41] Women are generally not viewed as knowledgeable in customary law and have to call on male witnesses. These witnesses may have warped or biased views, particularly in relation to gender relations. The inability of women to give their perspectives of what constitutes customary law often results in distortion of the content of customary law, so that courts apply rigid or narrow conceptions of customary law without considering changes that have taken place on the ground or in disregard of the socio-economic context in which a particular customary practice is observed. For example, the enforcement of the customary norm that women are not entitled to maintenance on divorce fails to recognize that the social structures that previously existed to support women upon divorce no longer exist in modern times.[42]

V. LEGAL FRAMEWORK FOR THE LAW OF SUCCESSION

A. Historical Background

In colonial times, there were separate regimes of succession depending on the race and religion of the individual concerned. Hence Africans, Europeans, Indians and Muslims were governed by different bodies of law, each with its own legal incidences and consequences.[43] At independence, however, it was felt among policy makers that the imperatives of national unity demanded more cohesion and that uniformity of the legal regime was therefore desirable. In 1967, the President of the young Republic of Kenya appointed a Commission on the Law of Succession which in its 1968 report recommended the enactment of a new law of succession which would apply uniformly to all people in the Republic irrespective of race or religion and would supersede all existing statutory, religious and customary laws.[44]Another goal of the proposed legislation was to promote the equal status of women in Kenyan society.

39 (1983) K.L.R. 575.

40 (2003) K.L.R. 435.

41 Hellum (n 18); Stewart (n 18).

42 ibid.

43 Generally speaking, Africans were subject to customary law (except where they had converted to Christianity and made a will), Europeans were subject to statutory law, while Muslims and Hindus were governed by their respective religious laws. See Musyoka (n 30).

44 See Government of Kenya, *Report of the Commission on the Law of Succession* (Government Printer, 1968) [*Succession Commission Report*]. The recommendations of the *Marriage Commission Report* (n 15) have, however, never been passed into law.

Pursuant to the Commission's recommendations, a Law of Succession Act[45] was passed in 1978 and, after years of debate, it came into operation on 1st July, 1981.[46] However, after much agitation by the Muslim community, who argued that the Act embodied secular principles that were contrary to the Quran, Muslims were exempted from the operation of the Act,[47] and their intestate succession is carried out in accordance with Muslim law. Further, as will be expounded,[48] certain geographical areas in Kenya were excluded from the Act and are governed by customary law. Thus although the Act was intended to be the only body of law governing succession matters, there are actually three main bodies of law that currently apply, namely the Law of Succession Act (statutory law), customary law and Islamic law.[49] Thus Kenya's law of succession is characterized by plurality.

B. Customary Law of Succession

Empirical evidence indicates that succession of property in most communities in Kenya is normally undertaken in accordance with their customary laws, despite the presence of statutory law.[50] Succession has gender dimensions as the ownership, control and disposition of property is mediated by gender relations. Under customary law, succession of property is patrilineal, which means that property is passed through the male line.[51] The main features of customary law of inheritance include communal holding of land and property, supremacy of males (particularly the eldest son), and general exclusion of women from inheriting, particularly land.

Customary law is characterized by patriarchal relations which, when interconnected with capitalism (for instance the individualization of title to land), has resulted in the general exclusion of women from inheritance, particularly that of land. Traditionally men owned land and livestock while women could only own movable assets, such as cooking utensils and farming implements. The general rule is that a man's property is distributed equally among his sons. Daughters do not inherit any property from their father, as it is expected that they will get married and enjoy the property of their husband. Unmarried daughters may obtain cultivation rights over a portion of land, but on their marriage or death, such land would be taken over by their brothers.

45 Cap. 160.

46 *Vide* Legal Notice No. 93 of 1981.

47 *Vide* Statute Law (Miscellaneous Amendment) Act, No. 2 of 1990. Muslims are governed by Islamic law (based on the teachings of the Quran) and according to the Mohammedan Marriage, Divorce and Inheritance Act (Chapter 156) disputes between Muslims on succession matters are handled by Kadhis appointed under the Kadhi's Courts Act (No. 14 of 1967).

48 See 5.3 below.

49 Islamic law of succession is applied by virtue of the Mohammed Marriage, Divorce and Inheritance Act (Cap. 156). Under this Act, the Kadhis' courts have jurisdiction to deal with any disputes between Muslims relating matters of inheritance, among other personal law matters. Islamic law of succession is beyond the scope of this paper.

50 Patricia Kameri-Mbote 'Gender Dimension of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences' IELRC Working Paper 2001 <http://www.ielrc.org/content/w0101.pdf> accessed 11 October, 2014.

51 Most of the ethnic communities of Kenya are patrilineal, with a few exceptions such as the Digo and Duruma. However, even these have shifted towards patrilineage as a result of contact with Islam.

Where a man has only daughters and no sons, his property is divided up amongst his brothers. Widows have not absolute rights to their husband's property but are entitled to be maintained and to use part of the deceased's land for their own needs during their lifetime. However, even those limited rights cease upon their re-marriage. There is also the idea that women are themselves property to be owned, rather than legal subjects who can own property in their own right.[52]

However, as already mentioned, there is some indication of changes in customary norms and practices over time to accommodate new realities. There are therefore examples of changes in customary practices that allow women to inherit land as trustees (*muramati*), for instance in Murang'a District in central Kenya.[53] Research also shows a growing acceptance that an unmarried woman may in some cases inherit from her father, particularly where a daughter has been taking care of her father in his old age[54].

C. The Law of Succession Act

As already mentioned, the Law of Succession Act was intended to apply uniformly to all irrespective of race, ethnic group or religion. Section 2 (1) provides that:

> "This Act constitutes the law of Kenya in respect of, and shall have universal application to all cases of intestate and testamentary succession to the estates of deceased persons dying after the commencement of the Act, except as otherwise provided in the Act or any other written law."

The Act is based on English principles of succession and deals with both testate and intestate succession. It proceeds on the assumption of individual ownership of property, and recognizes the right of a spouse to succeed to the deceased's estate. The Act also assumes equality of male and female children on succession irrespective of their marital status. Thus the Act does not make a distinction between the rights of sons and daughters (married or not) to inherit their parents' estates, whether comprising movable or immovable property. This goes counter to the assumption in customary law that women do not generally own or inherit land and that daughters (particularly married ones) do not inherit their father's estate. The Act therefore seeks to be gender-neutral in its application.[55]

Although the Act is intended to be the universal law applicable in matters of succession, customary law is to some extent also applicable. Firstly, customary law is applicable to estates of people who died before the commencement of the Act in April 1981. Section 2 (2) of the Act states:

> "The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless

52 Kameri-Mbote (n 49).

53 McKenzie (n21).

54 Nyamu, Property Relations (n20).

55 However, there is differential treatment of widows and widowers in section 35 of the Act. While widows acquire only a life interest in the property of their deceased husbands, widowers acquire an absolute interest, which they can transfer and also pass on through inheritance. In addition, a widow loses her life interest in the property if she remarries. A widower continues to enjoy the inheritance regardless of his marital status.

> the administration of their estates shall commence or proceed so far as possible in accordance with this Act."

As the succession law applicable to Africans prior to the passing of the Act was customary law, this means that customary law is the substantive law applicable to such estates. The Act also provides that a person when making a will is at liberty to indicate that his or her estate will be governed by customary or religious law.[56] This means that a person dying after 1981 can still have his or her estate disposed of according to African customary law.

Further, the Act exempts some geographical regions of the country from the application of the Act. Under section 32, certain gazetted areas of the country are exempted from the application of the rules of intestacy in respect of agricultural land and livestock.[57] These are mostly areas inhabited by pastoral communities whose members generally adhere to a traditional way of life. If a person dies intestate in any of these areas, customary law is the applicable law for purposes of succession to agricultural land, crops and livestock. By exempting these regions, the Act seeks to accommodate the traditional way of life and hence makes some concessions to traditional notions of property under customary law.

However, there seems to be an unquestioned assumption that all people in those areas without exception are, or wish to be, governed by customary law which may not reflect the reality. A major problem with the exemption in section 32 is that Kenyan courts have interpreted this section in divergent ways. The section specifies that the exemption applies to geographical areas gazetted by the Minister, which means that only areas so gazetted are affected. However, as illustrated by the cases below, some judges have taken it for granted that customary law is the applicable law in relation to all agricultural law, without first finding out whether the land in question has been gazetted.

The Act also makes a concession to the existence of plural marriage systems in Kenya, and the problems that arise due to the interaction of these systems. It does this by allowing a wife married under customary law but whose husband had contracted a previous monogamous marriage to be considered a wife for purposes of the Act.[58]An amendment in 1981 introduced section 3 (5) which provides as follows:

> Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a subsequent or previous marriage to another woman, nevertheless a wife for the purpose of this Act … and her children are accordingly children within the meaning of this Act.[59]

The above provision was in direct contravention of the now repealed Marriage Act[60] and African Christian Marriage and Divorce Act[61], both of which invalidated any customary marriage contracted subsequent to a statutory marriage. It also contravenes the new

56 Section 5 (1).

57 These gazetted areas (vide L.N. No. 94 of 1981) include Wajir, West Pokot, Turkana, Tana River, Kajiado, Garissa, Marsabit, Isiolo, Mandera and Lamu. The people living in these gazetted areas are pastoralists and generally adhere to a traditional way of life.

58 Section 3 (5). This section was inserted by Act No. 10 of 1981.

59 This sub-section was inserted by Act No. 10 of 1981.

60 Cap. 150.

61 Cap. 151.

Marriage Act of 2014[62] which prohibits parties in a subsisting monogamous marriage from contracting a subsequent marriage.[63] Section 3 (5) amounts to a sanctioning of a situation after the man's death that would have been unlawful during his lifetime. Although the provision may be seen as an attempt to recognize the reality on the ground, where many men marry their first wives under statute and then proceed to marry other women under customary law (or vice versa), it has proved to be unjust to the first wife, who is forced to share her husbands' estate with women who have come into the relationship subsequently, and whose existence is often not discovered until after the man's death. The provision also assumes that all the family property belongs to the man for distribution to his wives and fails to give recognition to any contribution that the first wife may have made to the acquisition of the property.

The Act also gives recognition to certain aspects of African culture, for instance by making provision for inheritance by members of the extended family with a much expanded list of consanguinity relationships beyond members of the nuclear family.[64] Further, the Act recognizes the institution of polygamy, which is common under customary marriage systems, and in section 40 provides for the intestate succession of polygamous households.[65]Once again there is an assumption that all the wealth in the family belongs to the man for distribution to his wives. The contribution of his wives towards the acquisition of the wealth is not taken into account. The only consideration is the number of children; the estate is thus divided into "houses" according to the number of wives, with each wife being counted as a unit along with the children in that "house".

VI. JUDICIAL APPROACHES TO CUSTOMARY LAW IN SUCCESSION DISPUTES

A. Gender Norms in Succession Disputes

In succession disputes relating to women's rights to inherit property, judicial approaches to these disputes are mediated by gender norms. Two kinds of gender norms seem to be at play. The first I will call the *norm of equality*. This norm is premised on the equal status and equal rights of men and women and finds expression in the principle of non-discrimination which prohibits discrimination on the basis of sex, gender or marital status, among other grounds. This norm is to be found in various International Human Rights instruments[66] and the bill of rights of national constitutions.

62 No. 4 of 2014.

63 See sections 6 and 9 (a). However, the provisions does not appear inconsistent with Article 45 of the Constitution provides for the right to marry a person of their choice and also recognizes the validity of plural systems of marriage and family law. Marriages concluded under any tradition, or system of family law.

64 The list includes step-brothers and step-sisters, half-brothers and half-sisters, grandparents and step-grandparents, among others.

65 Polygamy here refers to polygyny where a man has more than one wife; it does not extend to polyandry where a woman has more than one husband.

66 E.g. the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of Discrimination Against Women (CEDAW) and the Protocol on Women Rights in Africa.

Judges who subscribe to this norm will usually exclude the application of customary law in succession matters, thereby holding that women have an equal right to inheritance as men. The second norm I will call the *norm of difference*. This is based on the notion that sex differences warrant differential treatment of men and women, based on their gendered roles in society. It involves according differential entitlements to ownership, use and control of property. The dominant framework of this norm is patriarchy, which means that in according differential treatment, men are generally advantaged over women. Judges in this category usually insist on applying customary law to succession disputes, resulting in exclusion of women (particularly married women) from inheritance.

In deciding succession disputes with a gender dimension, Kenyan judges adopt, whether explicitly or implicitly, one of the two norms. This is seen in their attitude towards customary law, particularly in the question of the applicability or otherwise of customary law in succession matters. These approaches may be generally categorized as follows:

B. General Applicability of Customary Law in Succession Matters

Judges in this category are of the view that customary law is generally applicable to succession matters. Some judges have maintained that customary law is generally applicable to succession matters including estates of people who died after the commencement of the Act (1981 onwards) even though the matter does not fall under one of the exclusions in the Act (i.e. sections 2 (2), 5 (1) and 32). These judges subscribe to the norm of difference and are more likely to hold that women, particularly married ones, are not entitled to inherit.

For example, in *Mwathi v. Mwathi*[67] the deceased died in 1987 after commencement of the Act without leaving a spouse or children but was survived by one brother and two sisters. The suit land was situated in Kabete, which is not within a gazetted area under section 32. The will was adjudged invalid and the High Court had ordered the intestate estate to be distributed among the deceased's brother and sisters in accordance with provisions of section 35 of the Act. However, the Court of Appeal faulted the High Court's decision and declared that:

> "Intestate succession of a deceased Kikuyu is governed by the Kikuyu customary law. The asset involved is a piece of land and the matter must therefore be determined by the Kikuyu customary law relating to land inheritance. As we have already said, the deceased died leaving no wife or children. He was survived by one brother and two sisters. The Kikuyu customary law on devolution of land is notorious and courts can take judicial notice of it, thereby dispensing with the need to prove it by evidence."

The Court relied on Cotran's *Restatements on the Law of Succession* which stated the relevant Kikuyu customary law as follows:

67 (1995)1 EA 229.

"4. Estate of an unmarried man or the property of an unmarried man, whether land, livestock or movables, is inherited as follows:-
(a) by his father, if alive; or, in his absence
(b) shared equally among his full brothers; or, in their absence,
(c) shared among his half-brothers; or, in their absence, and so on."[68]

Based on the above passage, the Court concluded that it was obvious that among the Kikuyu, sisters cannot inherit their brother's land and accordingly set aside the High Court's order which had given the deceased's sisters a share in the suit land. Similarly, in *Mary Gichuru v Esther Gachuhi*,[69] a woman filed a suit seeking to be allowed to inherit two pieces of land that had belonged to her deceased father. Her brother contended that, as a married woman, she was not entitled to inherit her father's land under the Kikuyu customary laws. In the first instance, the High Court had allowed the woman's application but on appeal in the Court of Appeal the decision was reversed. Justice Kwach, one of the appeal judges observed as follows:

> "It is a matter of notoriety among the Kikuyu that an unmarried woman who becomes a mother must inform her father of the name of the father of the child so that her father would take the necessary steps to preserve the rights of his daughter and her son. … it is settled law that under the Kikuyu custom, land is inherited by sons … If Esther was still unmarried at the time of James death, she could have inherited but a portion of land which she cultivated, which was probably less than half an acre."

Hence, as the court found that the daughter was married, she was held not entitled to a share of her father's property.[70] The rationale for this view is that even though the Law of Succession Act provides for inheritance of children regardless of their sex, the possibility of daughters getting married and inheriting further from their new families would give them an unfair advantage over other family members. This is based on the unverified assumption that all women will get married.

Likewise, in *Karanja v. Githara*[71] the same judge, while denying the deceased's married daughters a share in their father's estate, expressed the view that married daughters "had no business in interfering in the estate of their late father". The judge placed reliance on the assertions in Cotran's *Restatements* that under Kikuyu customary law, succession is patrilineal. No reference was made to the provisions of the Law of Succession Act which allow for daughters, whether married or not, to succeed to their father's estate. Further, no attempt was made by the Court to ascertain if the account of customary law contained in the restatements still obtained thirty years later.

68 Cotran's Restatement on the Law of Succession (n14).

69 Civil Appeal No. 76 of 1998.

70 It is notable that Justice Kwach as an advocate in earlier life is well-known for his role in the case of *S.M. Otieno* [1987] KLR in which his clients successfully relied on customary law to prevent the deceased's widow from burying the remains of her husband.

71 HCCC No. 2039 of 1998 (unreported).

Some judges in this category are of the view that customary law is generally applicable to succession matters except where it has been declared repugnant to law and morality.[72] Justice Bosire in *John Gitata Mwangi v. Jonathan Njuguna Mwangi*[73]was of the opinion that personal laws and customary practices, as far as they are relevant, have a bearing in determining issues touching on the estate of a deceased African unless such laws and practices are disqualified because of repugnancy. This was reflected in the dictum in *S.M Otieno* that customary law is the personal law of Kenyan Africans.

In *Estate of Kiguta Mukei alias Kiguta Mukii* [74], the deceased died in 1977 prior to the commencement of the Law of Succession Act. The application was brought by two of the deceased's daughters who had been omitted from the list of survivors and therefore excluded from a share of their father's estate. Justice Wambua noted that the two applicants were married women. He then stated as follows:

> "The law that ought to govern the estate of the deceased ought to be the law that governed the intestate estate of a deceased Kikuyu before the 1st of July 1981. That law was Kikuyu customary law. That law is notorious. There is a wealth of case law and publications by esteemed authors on it. Succession under Kikuyu customs was patrilineal. It is the sons who were entitled to inherit. Daughters only got a share in the estate if they remained unmarried. The understanding is that married daughters access property through their husbands and therefore they do not have to get another share from their own father's estate… The applicants, being married daughters, were not entitled to a share in the estate of their deceased father." (Italics mine)

Again in *Estate of Muhoro Gikaru*[75]where the deceased died in 1966, the same Judge observed that Kikuyu customary law on distribution of estates is "notorious" and had been stated in numerous decisions of the High Court and the Court of Appeal such as *Kanyi v. Muthiora.*[76]It is astounding that even though the last two mentioned cases were decided after 2010, the judge makes no reference whatsoever to the Constitution and does not consider any impact that its provisions might have had on the cases. The Judge took it for granted that the versions of customary law recorded in the case law and publications had not changed since the 1970s. Yet it is clear that recourse to customary law in this manner inevitably results in detrimental consequences for women.

The import of the judgments is that devolution of estates in the 21st century is still governed by "rules" recorded several decades ago, when the socio-economic context was vastly different. It also means that parties obtain vastly differential results in cases, based on the fortuitous fact of *when* the deceased died rather than the circumstances obtaining at the time of the distribution of the estate. This in my view fosters inequality and unevenness in the administration of justice and is particularly onerous for women who almost invariably suffer through the application of customary law in those cases.

72 This seems to accord with the opinion of the Court in S.M. Otieno Case that customary law is the personal law of a Kenyan Africa except where it is deemed repugnant to law and morality.

73 Civil Appeal No. 213 of 1997.

74 (2013) eKLR.

75 (2014) eKLR.

76 (1983) KLR 209.

Further, the decisions give no consideration for the woman who may not be happily married[77] or who subsequently gets divorced. A divorced woman suffers double jeopardy as under customary law she cannot inherit from her marital home once divorced, and yet she had already been disinherited from her father's estate on the assumption that she would obtain a share of her husband's property. It should also be appreciated that due to family pressure and fear of societal approbation, not many women are able or willing to go through the trouble and expense of court action in order to claim their share of their father's or husband's property.

C. General Inapplicability of Customary Law in Succession Matters

By contrast, judges who subscribe to the norm of equality hold the view that customary law is not generally applicable to succession disputes. These judges adopt a strict interpretation of section 2 (1) of the Law of Succession Act, which provides that the Act is of universal application in all succession matters, except where the Act otherwise expressly provides.[78] This view was expressed in *John Gitata Mwangi v. Jonathan Njuguna Mwangi*.[79] Justice Kamau set aside the decision of a magistrate distributing the estate of a person who died in 1997 in accordance with Kikuyu customary law on the ground that it was inconsistent with section 2 (1) of the Act. The judge's opinion was that the effect of section 2 (1) of the Act is to oust the application of customary law except in such circumstances as may be allowed by the Act itself.[80] Similarly, in *Rono v. Rono*[81], Justice Waki stated that the application of African customary law is expressly excluded by section 2 (1) of the Act, unless the Act itself makes provision for it. The Judge held that as the deceased died in 1988 after the coming into operation of the Law of Succession Act, section 2 (1) of the Act mandated that the deceased's estate fell for consideration under the Act.

Judges in this category use the non-discriminatory language of the Act as a basis for giving effect to women's claims to inheritance. In *Githuku v. Githuku*[82] where the question was whether a step-son has priority over a daughter in the succession to a mother's estate, Lady Justice Koome made reference to the precise provisions of the Act to rule that a step-son cannot have priority. She continued:

> "I should also hasten to add that the definition of child is without reference to the child's gender or marital status and thus I find the argument by the petitioner and his witnesses that married daughters do not inherit properties without merit and against the spirit of the law."

77 In Estate of *Morrison Karagu Kieru*,(Deceased) [2011] eKLR, Justice Sergon declined to order equal shares for siblings on the ground that that is a matter of common notoriety that the deceased's daughters who were "happily married" enjoy their husband's property.

78 E.g. under sections 32 and 33 of the Act in in respect of the gazette regions; also in respect of Muslims.

79 H.C. Civil Appeal No. 18 of 2001. See also *John Gitata Mwangi v. Jonathan Njuguna Mwangi* (CA Civil Appeal No. 213 of 1997 but note Justice Bosire's dissenting judgment.

80 This is also the view expressed by Musyoka (n 30) 18.

81 (2005) 1 E.A. 363.

82 (2006) eKLR.

Other judges use the repugnancy provisions in the Judicature Act to declare a customary law norm repugnant to justice and morality for being discriminatory against women. For example, in *Mbinga v. Mbinga*[83] Lady Justice Khaminwa made this statement:

> The courts are required under the Judicature Act … not to follow customs that are repugnant. It is my view that the customary laws of Kikuyu people which discriminate upon [the female child] are repugnant.

One of the problems faced by Courts in the old constitutional dispensation was how to deal with section 82 (4) which sanctioned discrimination in personal law matters. Prior to 2010, Kenya, whose legal system is based on the common law, subscribed to the dualist approach to international law in which international conventions were not directly enforceable in national courts unless their provisions had been imported by legislation into domestic law.[84] However, there emerged a tendency for national courts in dualistic jurisdictions to have regard to international norms when deciding cases where the domestic law is uncertain or incomplete. This was done in line with the Bangalore Principles on the Domestic Application of International Human Rights Norms of 1988. In particular, Principle 7 reads as follows:

> It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes, whether they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from, national constitutions, legislation or common law.

Kenyan courts began using this approach to hold that customary law may be excluded where it is contrary to international human rights principles. In particular, the Kenya Women Judges Association (KJSA), a chapter of International Women Judges Association (IWJA),[85] was active in lobbying for incorporation of international human rights principles into the interpretation of Kenyan domestic laws. The KWJA also spearheaded the Jurisprudence of Equality Programme (JEP) which sought to educate judicial officers on the need to protect the equality rights of women. The JEP project has successfully carried out human rights training which have had a positive impact in terms of recognition of women's rights.

The first case to incorporate International Human Rights principles in the pre-2010 dispensation was the celebrated 2005 decision of Justice Waki in *Rono v. Rono*.[86] In that case, the deceased died intestate in 1988 and left two widows and several children. The first widow had three sons and two daughters while the second widow had four daughters and no sons. The High Court had in the first instance awarded a greater share

83 (2006) eKLR.

84 Examples of the dualistic approach are found in the United Kingdom, Canada, New Zealand among others. This is by contrast to most civil law jurisdictions which adopt the monist view of international law whereby international law instruments automatically become part of the domestic law.

85 For instance the Task Force on laws relating to women set up in 1993 was headed by Justice Effie Owuor. There was also a task force on laws relating to children which culminated in the passing of the Children Act, 2001 which was headed by a woman judge.

86 (2005) AHRLR 107 (KeCa). The case was decided by a three-judge bench with Justice Waki giving the lead decision.

of the estate to the sons on the reasoning that the daughters had the option of getting married and leaving the home and that in any event, girls have no right to inheritance of their father's estate under Keiyo traditions. On appeal, one of the issues to be considered was whether customary law was applicable in the matter.

The Court of Appeal noted that the application of customary law was circumscribed by the repugnancy clause. Further, the Constitution, "which takes hierarchical primacy in the mode of exercise of jurisdiction, outlaws any law that is discriminatory in itself or in effect." Noting that "sex" was one of the grounds of discrimination in the then Constitution, the Court conceded that this protection was taken away by section 82(4) which allowed discriminatory laws in matters of personal law, including inheritance. Justice Waki then considered whether International Law was relevant for consideration in that matter. He observed that as a member of the international community, Kenya subscribes to customary International Law and has ratified various international covenants and treaties, in particular the international Bill of Rights, namely the Universal Declaration of Human rights (1948), the International Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights both of 1966. Further, in 1984, Kenya also ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Judge cited Article 1 of CEDAW which defines discrimination against women as:

> …any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Further, Kenya subscribes to the African Charter of Human and Peoples' Rights, 1981 (the Banjul Charter), which it ratified in 1992 without reservations. In article 18, the Charter enjoins member states, *inter alia* to: "ensure the elimination of any discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions".

The Judge opined that it was in the context of International Law that the 1997 amendment of section 82 of the Constitution to include "sex" as a ground of discrimination should be understood. The amendment was an indication that the country was moving in tandem with emerging global culture, particularly on gender issues. He then acknowledged the "raging debates" about the application of international laws within our domestic context.[87]

However, he observed that the current thinking on the common law theory was that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. Citing Principle 7 of the Bangalore Principles, he asserted that the principle, amongst others,

87 He observed that of the two theories on when international law should apply, Kenya subscribed to the common law view that international law is only part of domestic law where it has been specifically incorporated. This was by contrast to civil law jurisdictions, which subscribe to the adoption theory that international law is automatically part of domestic law except where it is in conflict with domestic law.

had been reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women. He cited in support the decision in *Longwe v. International Hotels*[88], where Justice Musumali stated:

> Ratification of such (instruments) by a nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute.

As a clear indicator of the currency of that thinking in Kenya, Justice Waki pointed to the then draft Constitution which proposed that the Laws of Kenya should comprise, amongst others: "customary international law and international agreements applicable to Kenya". In light of all this, the Judge took the view that the central issue relating to discrimination which this appeal raised could not be fully addressed by reference to domestic legislation alone but would also be informed by the relevant international laws which Kenya had ratified.[89]

Turning to the manner of distribution of the estate, the Judge stated that while he did not doubt the discretion donated by the Act in the distribution of the deceased's estate, the discretion, like all discretions exercised by courts, must be made judicially on sound legal and factual bases. He was of the view that the possibility that girls in any particular family may be married is only one factor among others that may be considered in exercising the court's discretion but was not a determining factor. In the particular case however, he did not find a firm factual basis for making a finding that the daughters would be married since eleven years after the appeal all except one was unmarried.[90]

The *Rono* decision is significant as it ushered in the practice of courts' consideration of International Law in succession matters which allowed courts to apply human rights principles even within the restrictive confines of the former Constitution. The case set an important precedent which has been followed in a long line of cases.

The first case to follow the *Rono* decision was *Re Estate of Andrew Manunzyu Musyoka*[91] where the deceased's daughter challenged her exclusion from the inheritance of her father's estate on the ground that she was married. In one of the clearest and boldest articulations of gender equality, Lady Justice Wendo noted that Kamba customary law, which was relied on by one of the parties, is discriminatory on the ground of sex and contrary to section 40 of the Law of Succession Act. She then proceeded to apply International and Regional Human Rights instruments espousing principles of gender equality and non-discrimination[92] notwithstanding the fact that these instruments have not expressly

88 (1993) 4 LRC 221.

89 The court also found that customary law was not applicable as it was expressly excluded by the Law of Succession Act.

90 The Judge also considered the fact that the deceased treated all his children equally and never discriminated between them on account of sex.

91 (2005) eKLR.

92 Namely UDHR, CEDAW, ICESR and the Banjul Charter.

become part of the domestic law of Kenya, despite their ratification. In doing so, the Judge disagreed with the decision in *Estate of Mutio Ikonyo v. Peter Mutua Ngui*[93]where customary law rule was applied to hold that a married woman was not entitled to inherit from the deceased's estate, stating that this decision was not binding on her especially in light of the Court of Appeal's decision in the *Rono* case.

Similarly, in *Elizabeth Karua M'Rutere v. Joshua M'Ikiugu Kuura*,[94] there was an attempt by the male relatives of the deceased to inherit the estate and exclude the deceased's widow and married daughters. These relatives based their claim on the fact that the widow had no sons and they were therefore the deceased's closest relatives on the line to inherit. It is notable that although the deceased had died in 1968 long before the coming into effect of the Law of Succession Act, Justice Lenaola nevertheless exercised discretion to apply the Act. The judge noted that although customary law was applicable to the deceased's estate by the fact of his having died before 1 July 1981 (commencement date of the Act), section 2 (2) provided that "the administration of the estate shall commence or proceed so far as possible in accordance with the Act." He went on to state as follows:

> "This being the case, I do not see that any custom that discriminates [against] women generally because they are women or because they have no sons or because they have married daughters only has any place in our legal system."

Citing *Rono v. Rono*, the Judge observed that the discriminatory customs offended section 82 (1) as read with section 82 (3) as well as International Human Rights instruments. This decision is notable as it subjected customary law to the principle of non-discrimination even where the Act itself provided that customary law was applicable. However, the Judge did not make clear what section 2 (2) meant by the administration of the estate commencing or proceeding so far as possible in accordance with the Act.

In *Estate of Lerionka ole Ntutu,*[95]the deceased's married daughters had filed an objection to the proposed distribution of his estate where their step brothers sought to exclude them on the basis that Maasai customary law of succession did not recognize the rights of daughters to inherit the estate of their fathers. The issue before the court was whether the applicable law in respect of the estate was Maasai customary law or the Law of Succession Act. Lady Justice Rawal while conceding that section 82 (4) of the former Constitution appeared to allow discriminatory treatment in matters of personal law, including devolution of property upon death observed that the constitutional amendment of section 82 (3) to include the word "sex" was made in light of Kenya's ratification of international treaties and conventions in order to prohibit discrimination on the basis of sex.

> In the circumstances, one can safely presume that the said amendment was found to be necessary after Kenya was exposed to international laws, its values and spirit. Kenya was aware of the discriminatory treatment of women in all aspects of customary and personal laws. Hence Kenya knowingly and rightly took a bold step to eliminate the discrimination of all manners and types against women. That is where the country's aspiration has reached and has rightfully intended to stay.

93 Probate & Administration HCC No. 203 (1998).

94 (2007) eKLR.

95 (2008) eKLR.

The Judge added that the courts have strived to enlarge the scope and meaning of laws and constitution so as to be in tandem with the growing social, economic and cultural aspirations and have departed from the restrictive approach to the interpretation of the constitution propagated in *R v. El Mann*[96] in favour of the more purposive "living tree approach." Thus in her opinion, the provisions of Section 82(4) (b) of the Constitution were not and could not have been made so as to deprive any person of their social or legal right only on the basis of their sex. Finding otherwise would be derogatory to human dignity and equality amongst the sexes and would also create imbalance and absurdity.

Accordingly, the Judge found without any reservation that even if Maasai customary law were applicable to the estate, such customary law which abrogated the right of daughters to inherit the estate of a father could not be applied as it was repugnant to justice and morality. The deceased's daughters were therefore entitled to inherit from their father's estate. This decision is remarkable in that the Court declined to apply customary law even though the deceased had died prior to the commencement of the Act and despite the constraints of section 82 (4) of the former Constitution.[97]

In the period following the promulgation of Kenya's current Constitution, judges subscribing to the norm of equality have increasingly relied on its clear provisions. For example, in *Eliseus Mbura Thara v. Harriet Ciambaka & Another,*[98]three sisters had been excluded from inheriting their father's land on the basis that Chuka customary law did not allow girls or women to inherit. The judge cited Article 2 (4) and proceeded to hold that Chuka customary law which precluded daughters from inheriting land from their fathers is inconsistent with the Constitution. The court also took into account the historical injustice suffered by daughters as a result of exclusion from inheritance. Pointing out that the Law of Succession Act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person, the Court held that it was therefore irrelevant that one of the daughters had at one time been married.

In *Re Estate of James Mbugua Muchuku (Deceased)*[99] the petitioners, who were the deceased's daughters, challenged an attempt to exclude them from their father's estate. They contended that the respondent could not rely on Kikuyu Customary law because statutory law takes precedence over customary law. Further, they argued that Article 27(4) and (5) of the Constitution outlaws discrimination on grounds of gender or marital status. In the court's view, the fact that the applicants were married women had no place in today's Kenyan law and declined to follow the decision in *Mwathi v. Mwathi* as it had long been overtaken by events.

96 [1969] EA 357.

97 However, in Estate of Josiah Mwangi Kariuki(1985) eKLR where the deceased died before the commencement of the Act,Lady Justice Rawal declined to apply the principles of international human rights instruments as Kenya had not ratified these instruments as at the time of the deceased's death. The judge distinguished Rono v. Rono(2005) AHRLR 107; (KeCA 2005) on the basis that in Rono's case the deceased had died after the commencement of the Act.

98 (2012) eKLR.

99 (2011) eKLR.

The court noted that the Act requires all children to be treated equally and the Constitution, which is the highest law of the land, outlaws any law that is discriminatory of itself or in its effect. A similar decision was made in *Re Estate of Kamonjo Njiinu alias Kamonjo Gachinu (Deceased)*[100]where the Petitioners sought to exclude the married daughters of the deceased arguing that it would not be in the interests of justice for the daughters to inherit from their marital homes and then come back to claim their father's estate.

The case of *Estate of Waiharo Keingati*[101]vividly brought to the fore the tension between the gender equality protections and the protection of culture contained in the current Constitution. The Applicant sought to prevent the Respondents, who were his sisters, from inheriting their father's estate, citing Kikuyu customary law, arguing this would be discriminatory as they were already married to wealthy husbands and stood to inherit from their husband's homes. He invoked Article 11(1) of the Constitution which recognizes culture as the foundation of the nation and urged the court to recognize the dignity of customary law as provided by the Constitution. Arguing that Section 33 of the Law of Succession Act recognized cultural properties, he further urged the court to invalidate Section 3(2) of the Judicature Act which did not accord customary law the primacy given to it by the Constitution.

On their part, the Respondents appealed to the provisions in Article 27(5) of the Constitution which prohibit the discrimination of any person either directly or indirectly, arguing that Kikuyu Customary Law, in so far as it discriminated against female children of a deceased, could not be upheld because it was contrary to Article 27(3) of the Constitution. They also argued that the definition of a child in the Law of Succession Act did not discriminate between a male and female child. They further submitted that the distribution of the deceased's estate should be in accordance with the Act rather than customary law.

Justice Kimaru was not persuaded by the Applicant's argument, terming it "disingenuous". The Judge agreed with the Respondents that if a married daughter would benefit by inheriting property from her parents, her husband too would equally benefit from such inheritance and hence there would no discrimination. The Judge then made the following statement:

This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women to be buried in history.

An approach that subscribes to the norm of equality undoubtedly results in better outcomes for women in court. However, the problem is that in adopting principles of equality and non-discrimination, the courts concomitantly denounce customary law as being backward, out of step with the times, or repugnant to justice and morality.

100 (2011) eKLR.

101 (2014) eKLR.

Like the judges who subscribe to the norm of difference, these judges accept accounts of customary law that are static and cast women as victims of culture. As I have argued elsewhere, this "either/or" approach prevents the development of a robust customary law, an indigenous jurisprudence that is able to take into account socio-economic change and to recognize women's agency.[102]

VII. CONCLUSION AND WAY FORWARD

The ambiguities implicit in the relationship between customary law and statutory law in matters of succession have, on the whole, operated to the detriment of women's interests. Some judges have not been committed to gender equality in personal law matters and have therefore employed the norm of difference in adjudicating succession cases to the disadvantage of women. However, more recently, other judges have applied the norm of equality embodied in human rights principles in order to arrive at more favourable outcomes for women.

It is becoming evident that due to the impact of globalization and greater interaction with the world community, succession matters are increasingly being mediated through norms generated outside the boundaries of the state. This appears to be a positive development for the realization of women's rights. In this regard, the Constitution of Kenya is set to play a more facilitative role due to its explicit promotion of gender equality and the incorporation of International Human Rights instruments that Kenya has subscribed to. However, both categories of judges have adopted a conception of customary law which is static and which does not allow for positive development of customary law jurisprudence. This has resulted in a false dichotomy between customary law and state law. There is need for an approach to customary law that recognizes that customary norms are constantly changing and that women's roles are evolving, particularly due to the influence of education, employment and changes in patterns of property ownership.

While negative aspects of customary law should be discouraged, positive values in customary law such as dignity and respect for women (as daughters and mothers) need to be reinforced. To this end, judges can choose to rely on grounded research which provides empirical evidence of changing customary practices that reflect the living law, rather than on written accounts of customary law which portray a static customary law. This will facilitate the development of indigenous jurisprudence that respects culture while at the same time fostering respect for individual rights.[103]Judicial officers can draw on progressive decisions from other jurisdictions such as the *Bhe* case.[104]

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102 Winifred Kamau, '*S.M. Otieno* Revisited: A View Through Legal Pluralist Lenses' (2009) 5 Law Society of Kenya Journal 59; Winifred Kamau, 'Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom' (2009) 23 International Journal of Law, Policy and the Family 133.

103 See section 3(c) of the Supreme Court Act (No. 9A).

104 *Bhe v. Magistrate, Khayelitsha, Shibi v. Sithole, and South African Human Rights Commission v. President of the Republic of South Africa* 2004 (1) SA 580 (CC) 1 3 (S. Afr.). In the *Bhe* case, the Constitutional Court of South Africa invalidated discriminatory customary law of primogeniture which prevented women and children from inheriting. However, the Court affirmed that validity of customary law in its own right.

In this case, the Constitutional Court of South Africa while invalidating discriminatory customary law of primogeniture which barred women and children from inheriting, at the same time affirmed the validity of customary law in its own right and emphasized that customary law was no longer dependent on rules of repugnancy for its continued validity. To enable judicial officers to play this role effectively, there is need for focused training of judicial officers. It should be noted that under the Constitution, the Judicial Service Commission is mandated to prepare and implement programmes for the continuing education and training of judges and judicial officers. One of the principles to guide the Commission in the performance of its functions is the promotion of gender equality.[105]The Judiciary Training Institute can play a critical role in implementing such training. It is hoped that such measures will go a long way towards reconciling women's rights and customary law.

105 See Article 172 (1) (d) and Article (2) (b) of the Constitution.

ACCESS TO FINANCIAL SERVICES: A HUMAN RIGHTS PERSPECTIVE

*Njaramba Gichuki**

ABSTRACT

Access to financial services is now generally recognized as a means towards the achievement of social and economic development. Access connotes both the physical and legal structures within a jurisdiction. The relationship between human rights and access to financial services has not been sufficiently addressed. The Constitution of Kenya, 2010 does not include access to financial services in its definition of social and economic rights. International instruments do not acknowledge it as a right. If indeed it is a right, we should then proceed to ascribe a duty in terms of the Hohfeldian matrix. If it fails to fit squarely in the Hohfeldian matrix, we should then consider whether all rights must indeed fit within that matrix. It is still possible to regard access to financial services as a human right despite the absence of distinctive correlative duties imposed on other persons. There are new and innovative models being used in the actualization of access to financial services. An acknowledgement that access to financial services is necessary in the pursuit of the right to human development should be the new frontier in human rights activism.

I. INTRODUCTION

Access to financial services refers to the possibility of individuals and/or corporations to access services such as credit, payment, savings, insurance, deposit and investment. This access varies from one country to another and it ranges from as low as 5% in Tanzania to as high as 100% in the Netherlands.[1] In most of the developing countries, particularly African countries, a very small percentage of the population (less than half) have access financial services.[2]

Access connotes both the physical and the legal structures in a certain jurisdiction. The relationship between human rights and access to financial services has not been the subject of critical analysis. It is only on rare occasions that access to financial services is associated with human rights. Therefore, many legal systems are silent on this subject making it more difficult for one to clearly state whether or not access to financial services is a human right. For instance, the Constitution of Kenya does not include access to financial services under its definition of social and economic rights.[3]

This uncertainty on whether or not access to financial services is a human right necessitates a study into both international and national law not only to clarify its viability as a human right but also to put into place clear rules on the matter stating who is, for instance, burdened with the duty of ensuring the public gets their right of

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1 A. Demirgüç-Kunt and Thorsten Beck and Patrick Honohan, *Finance for All? Policies and Pitfalls in Expanding Access* (World Bank Policy Research Report , Washington DC 2008) 190.

2 ibid. 169.

3 Constitution of Kenya 2010, Article 43.

access to financial services. This could be by directly providing these services or by ensuring the institutions that provide these services do it in accordance with the law. Such law should adopt a rights-based approach. The enactment of a law in itself does not guarantee compliance. However, express legal provisions encourage compliance and facilitate enforcement.

Undoubtedly, financial institutions have great influence on economic development, poverty alleviation and economic stability. Indeed it has been acknowledged that finance is central to development. Accordingly, since finance is at the centre of social welfare, access to finance has a bearing on the right to development.[4]

This paper therefore gives a brief historical background to the development of financial inclusion, global efforts made to ensure access to financial services, and its adaptation in Kenya. The study looks at the current situation as regards the legal and policy framework governing the issue of access to financial services and its viability as a human right. It also goes further to point out the gaps in law and comes up with proposals to reform. These reforms will not only ensure financial inclusion for all but also economic development of each individual hence economic freedom.

II. HISTORICAL BACKGROUND

The history of provision of financial services goes back to around 2000BC in Assyria and Babylonia. In those ancient times, financial services were only given to grain farmers and merchants who traded between cities. The financial service offered at this stage was only in form of loans given to the farmers and merchants. Later, financial services spread to other places such as Ancient Greece where these services extended to the acceptance of deposits and changing money. The provision of financial services eventually spread to other parts of Europe and the rest of the world over time. This was particularly in the period during and after the Industrial Revolution.[5]

As banking services spread throughout the world, and the kind and quality of services provided revolutionised, there arose a need to have laws to manage the sector. An example of this was when Julius Caesar, during his reign in the Roman Empire, introduced a law that allowed banks to confiscate land in lieu of loan payments. The rules established at this age were mainly intended to ensure the debtors paid their loans. Provision of these financial services was not regarded as a right. Banks were not in any way compelled to provide banking services to people.[6]

Since the start of modern forms of banking, governments in different countries seem to have less involvement in the banking sector. Most of the early banks established were privately owned. It can be clearly established that the elite banking families controlled the banking business.

4 Martin Cihák and AslıDemirgüç-Kunt and Erik Feyen, and Ross Levine, 'Benchmarking Financial Systems Around the World' (2012) Global Financial Development Report Policy Research Working Paper 6175 World Bank, Washington DC.

5 N F Hoggson, Banking through the Ages (New York, Dodd, Mead and Company 1926) 35.

6 Andrew Beattie, '*The Evolution of Banking*' (2011). <www.investopedia.com/articles/07/banking.asp> accessed 15 March 2014.

They, by all means, manipulated the market to work in their favour. This was, for instance, done through the establishment of the Federal Reserve Bank in the United States of America in 1913.[7]The founders of the Federal Reserve acted as if the bankers were opposed to the idea of its formation in order to mislead the public into believing that the Federal Reserve would help to regulate bankers when in fact it really gave even more power to private bankers, but in a less transparent way.

The Federal Reserve Act led to the formation of Regional Reserve Banks that were run by commercial bank owners. This in effect defeated the purpose for which the reserve banks were created – they were run by the very people they were created to regulate.[8]Any government official that attempted to challenge the activities of these bank owners was stopped by methods as drastic as death.[9] The situation is a clear indication that the pioneers in the banking business only had their own commercial interests at heart when they started engaging in banking business. They never treated the provisions of such services as a right to their customers, or even considered that those services should lead to individual development of the customers.[10]

It can be clearly established that the development of the banking sector was not accompanied by the development of mechanisms to ensure the financial services could be accessed by the public. Some attempts were made by some political leaders to change the banking system from being concentrated among few rich elites.[11] These attempts were futile because such leaders were removed from power and their successors reversed the situation to suit the demands of the few bank owners and those who ran the central banks.[12] In the USA, the bankers even controlled every legislation made by the Congress such that no legislation was made that favored the general public. Indeed, some Acts were passed during holiday seasons when most of the Congressmen were away say, for Christmas.[13] Other smaller bankers that tried the banking business had to shut down after a short while because the large bankers concentrated power and literally ran the financial affairs of the USA.[14]

The first formal banking service in Kenya was established in 1887 by the National Bank of India at the East African coast with a view to serving the Imperial British East Africa Company. With the declaration of the Kenya colony in 1920, the banking industry grew substantially.

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7 Federal Reserve Act 1913, S1.

8 Edward Flaherty, 'A Brief History of Central Banking in the United State' (1994) University of Groningen – Humanities Computing <www.let.rug.nl/usa/essays/general/a-brief-history-of-central-banking/federal-reserve-act.php> accessed 15 May 2014.

9 Murray N Rothbard, 'The Mystery of Banking' (2008) 2nd edn Ludwig von Mises Institute <http://mises.org/Books/mysteryofbanking.pdf> accessed 19 March 2014.

10 M N Rothbard, *A History of Money and Banking in the United States: Colonial Era to World War II* (Ludwig Von Mises Institute, Auburn, Alabama 2002) 259.

11 Stack Jones, 'A Historical Perspective: The Banking Monopoly' [2014] The Banking Swindle <https://criminalbankingmonopoly.wordpress.com> accessed 15 February 2015.

12 The Federal Reserve (USA) and the Bank of England (United Kingdom).

13 Federal Reserve Act, 1913 (passed two days to Christmas).

14 H H Bancroft 'The financial panic of 1837' 3 The Great Republic By the Master Historians.

However, banking services were not available to Africans, with their only source of banking services being the Post Office Savings Bank, started in 1910.[15]

The Nairobi Securities Exchange was established in 1954 initially as a voluntary association but formalized after obtaining a clearance from the London Stock Exchange as an overseas stock exchange. Prior to that stocks and shares were traded as early as the 1920s, with no formal market but based on 'gentleman's agreement'. Participation in the exchange during the colonial era was limited to the Europeans. Though racist restrictions were removed in 1963, the history of exclusion made it difficult for most Kenyans to view it as a means of economic empowerment. Post-independence uncertainty also caused the market to decline.

There was revived investor confidence between 1963 and 1966 due to strong economic growth. Subsequently, the exchange handled various heavily over–subscribed public issues, and the market growth continued until 1972.[16] In Kenya only19% of the adult population invests in shares. Out of the 81% that does not trade in shares, 40% does not know how the stock market works while the other 60% lacked money to invest in the shares[17].

The history of banking services and securities market services is replicated in the other financial services such as insurance. This is the background that largely informs this paper.

III. CONCEPTUAL AND THEORETICAL FRAMEWORK

Wesley Hohfeld, an American jurist, articulated the concept of rights and duties referred to as "the Hohfeldian incidents" which include claims, privilege, power and immunity. According to him, a claim and a duty are correlative concepts, and one must always be matched by the other. He further states that if person A has a claim, then another person B will have a duty to ensure A enjoys her right. If A does not have any claim, then this gives B a privilege meaning that he is free to do as he pleases in relation to A. A will not have a right against what B does in the case that B has a privilege.[18]

The Hohfeldian incidents can fit together in a characteristic way to create complex molecular rights. For instance, in a case concerning property rights, claims and privileges are considered 'first order' rights. The two incidents give the owner the claim against others using the property and privilege to use the said property. The 'second order' rights under this molecular theory include immunity and power. This is to the effect that the owner has immunity against others altering their claim on the property as well

15 Kenya Bankers' Association, 'A History of Banking in Kenya Documentary' <www.youtube.com/watch?v=dmoCBcsqN9A>.

16 N. Oldert, *African Stock Exchanges Handbook* (Johannesburg, Profile Media 1997) 33.

17 S. Kumba, 'Stock Market still an Enigma,' *Daily Nation Financial Journal* (Nairobi, 31 March 2011) 4; Njaramba Gichuki, 'The Paradox in the Implementation Matrix in Capital Markets Reform in Kenya,' (2011) Paper presented at the Emerging Trends in Commercial & Financial Law (Banking Law, Capital Markets Law & Corporate Governance) KCB Leadership Centre, Karen.

18 W. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710.

as power to waive, transfer or annul their claim. This molecular theory intends to bring out how the Hohfeldian incidents are correlated as opposed to working in isolation to ensure achievement of human rights.[19]

The financial services situation in the world can be conceptualised using the Hohfeldian conceptualisation of rights and duties discussed above. This means that if the members of the public are to have a right to access financial services, then there should be a body that is imposed with a duty to ensure that this right is enjoyed by the public. Absence of such a right to access financial services will therefore give another person the privilege of doing whatever they please. This means that for people to enjoy the right to access financial services, it must be clear on whom the duty to ensure provision of such services is imposed – whether it is the government or the banks.

It is apparent that in the current set up, access to financial services does not fall within the Hohfeldian definition of a right. This is not only due to the fact that it is not defined as a right, but also because there is no specific institution which is mandated with the duty of ensuring this right is enjoyed fully. This situation has seen bankers all over the world imposing their own rules on how to deal with their customers, hence exploiting the public to achieve selfish goals (privilege). Privilege is sometimes used interchangeably with liberty.[20] In making the foregoing averment, it is not lost on us that the state plays a critical role in the regulation of financial services sector. The regulatory role played by governments is not used in a manner to enforce rights but merely to ensure compliance with the set statutory requirements.

There have been some criticisms to the Hohfeldian concept of rights. The criticisms are based on the fact that Hohfeld's description of rights and their correlatives as well as opposites, as an ideal situation, is non-existent in practice. Hohfeld found it necessary that there must be some kind of axiomatic mutual entailment between the rights-elements. This gives the notion that his analysis was more of a presumption of an ideal scenario rather than one that could be empirically verified. In MacCormick's opinion, Hohfeld's definition treats a legal right simply as a reflex to a duty imposed on another individual.

This definition according to MacCormick makes a right a resultant of some obligation as opposed to an inherent benefit. He further explains how it is possible for a legal right to be created without being based on an existing (or made alongside) duty. The law can thereafter find a way of protecting such rights which may include imposition of duties.[21]Using MacCormick's argument, it is therefore, possible to regard access to financial services as a human right despite the fact that there are no distinctive correlative duties imposed on any other persons. It is possible for a way of protection of this right to be developed thereafter. This appears to be more useful due to the nature of services in question.

19 Leif Wenar, 'Rights' Stanford Encyclopaedia of Philosophy <http://plato.stanford.edu/entries/rights> accessed 22 May 2014.

20 ibid.

21 D.N. MacCormick, 'Rights in Legislation,' in P.M.S. Hacker and J. Raz (eds) *Law Morality and Society* (Oxford 1977).

Whereas due to the nature of rights the government must have a duty to ensure observance of the right, service providers can also be liable on the observance of the duty, especially due to the fact that Article 20(1) of the Constitution of Kenya provides that the Bill of Rights binds all State Organs and all persons.

Theories of economic regulation are also important to the issue of access to financial services.[22]There are two major theories that explain economic regulation. These are the public interest theory and the capture theory. The public interest theory states that economic regulation is done in response to public outcry for correction of inequitable market prices. According to this theory, regulation is done in respect of the interest of the consumer. The theory can therefore be used to show the importance of having a definite regulatory framework to deal with matters of access to financial services. This way, the government will ensure protection of the rights of the consumer (public); hence improve the level of access to financial services.[23]

The second theory is the capture theory or the interest group theory which states that economic regulation is done in order to respond to a number of interest groups competing in a bid to maximise the incomes of their members. There are different arguments about this theory propounded by the different theorists supporting it. Regulation, according to this theory and as seen from different perspectives, is a process through which different interest groups seek to promote their interests by controlling the institutions of a society (Marxists and muckrakers), playing a role in legislative processes (political scientists' formulation) and seeking to advance their interests rationally (economic theory of regulation).[24]

The integration of the analyses of political behaviours and that of the larger economic body is the most crucial part of the economic theory of regulation. It explains how interest groups can manipulate the outcomes of regulatory processes to suit them by providing financial or other forms of support to the regulators.[25]

The interest group theory states that economic regulation is not in any way intended to benefit the public. As such, regulation will only benefit the different interest groups in the financial sector instead of the consumers. However, it is clear that this theory has many shortcomings, such as the fact that in some circumstances a single interest group handles a number of industries with conflicting interests. How then, does such an interest group influence regulation to suit all the industries under it? There is also the issue of interest groups having the interests of their customers included as part of their interests. This eventually means that the interests of the public are taken care of within the interests of the interest groups.[26]

22 These theories were developed to explain the regulation of economic aspects such as subsidies and legal and administrative controls of taxes and rates, among other aspects of the economy.

23 Richard A Posner, 'Theories of Economic Regulation' (1974) *The Bell Journal of Economics and Management Science, Vol. 5, No. 2*, 335-336.

24 ibid.

25 George J Stigler, 'The Theory of Economic Regulation' (1971) 2 (3) Bell Journal of Economics and Management Science; Sam Peltzman, 'The Economic Theory of Regulation after a Decade of Deregulation,' (1989) Brookings Papers: Microeconomics.

26 Richard A Posner, 'Theories of Economic Regulation' (1974) 5 (2)The Bell Journal of Economics and Management Science 342.

Amartya Sen correlates the issue of development and freedom. According to him, development is a key tool in ensuring that real freedoms are enjoyed fully. Poverty, poor economic opportunities, intolerance and neglect of public facilities among other social vices are a hindrance to freedom. People living in poverty and those with little or no access to economic opportunities are vulnerable to manipulation by those in power. Eradicating such vices ensures every individual in the society enjoys their freedoms to the fullest. This can only be achieved through development.[27]

Development, which leads to ultimate freedom, is achieved through a combination of factors. Key among them are markets, market related organisations, economic opportunities, governments and civic institutions. From this argument, it is clear that development is a rigorous process which can only be achieved through the co-ordination of economic, political and social fronts. Access to financial services is at the centre of economic development. This makes it key to achieving development and, ultimately, freedom.[28]

Gender is also an important facet in addressing the issue of access to financial services. Many societies in the world are patriarchal, a fact which has given men a general advantage over women in all aspects of a society. For instance, in the case of the United States of America and most of the European countries, women were only allowed a separate economy, formal employment, and ownership of property – including patents - in the 19th century. It is only at this time that they started accessing and making use of financial services. Prior to that, only men were given these privileges. This development took place a century later in Africa and Latin American countries.[29]

This discrimination against women also extends to access to financial services. The conventional banks were created for the wealthy as well as those in formal employment. Prior to the development that saw women allowed a separate economy, formal employment and ownership of property, wealth was owned and controlled by men. Women were only allowed to do so in the event that their husbands were incapacitated. Most of the people, even today, who are in formal employment and/or control a family's wealth, are men. This means financial services are more accessible by men as compared to women. It is therefore important, in the discussion of financial inclusion, to look at the position of women in the sector. If access to financial services is to be considered a human right, then it definitely should be enjoyed by both genders without discrimination.[30]

The level of access to financial services by women varies from one community to another depending on each society's social norms. Communities which restrict women from formal employment, economic independence, ownership of property, and inheritance among other entitlements have fewer women with access to financial services. This is because such women end up depending on men, who are treated as the heads of the family and society, for financial support. In such a community, women find it

27 Amartya Sen, *Development as Freedom* (First Anchor Books Edition, New York 2000) 3.

28 ibid. 9.

29 Richard J Evans, *The Feminists: Women's Emancipation Movements in Europe, America and Australasia* (1979) 266.

30 B. Zorina Khan, *The democratization of invention: patents and copyrights in American Economic Development* (Cambridge University Press, New York 2005) 136.

unnecessary or are discouraged to have their own bank accounts. This fact has led to a situation where financial institutions are reluctant to offer credit to female clients. This is because of the misconception that women cannot manage financial matters well and, hence might be unable to repay the money.

In Pakistan, for instance, two male guarantors are required before a woman can be given credit. Permission from married women's husbands is also necessary for one to be financed.[31] In Kenya, 80 percent of the farmers are women. However, most of them farm on lands owned by men making it unable for them to obtain credit facilities using such pieces of land as security. Most of these women have therefore remained financially unstable and reduced to small scale farming despite their hard work in the farms.[32]

The likelihood that women will hold bank accounts and use them to save and borrow is to a great extent dependent on their ability to work, head households, choose where to live and receive inheritance. Consequently, where there are restrictions to the latter, chances are reduced. For instance, most financial institutions require some sort of security before giving services such as loans. This renders women who, either due to cultural barriers or other reasons, do not own property unable to access these services as they have nothing to deposit with the bank as security against the loans.[33] The level of violence against women and the incidence of early marriages for women have also been seen to contribute to low incidences of access and use of financial services.[34]This gender imbalance leads to outright discrimination especially in respect of female-led households. It also disadvantages poor households as women in such households play a central role in the sustenance of the family.[35]

IV. EFFORTS TO ENSURE ACCESS TO FINANCIAL SERVICES

Access to financial services is not *per se* defined as a human right. However, several states and the international community have taken a number of measures in recent years to ensure increased access to these services by the public. For instance, the introduction of micro-finance institutions in the financial sector was as a result of attempts to ensure access to financial services. Microfinance entails the provision of financial services to small and micro-enterprises or low income households in addition to providing them with organised systems of saving their incomes.[36]

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31 AsliDemirguc-Kunt, LeoraKlapper and Dorothe Singer, 'Financial Inclusion and Legal Discrimination against Women: Evidence of Developing Countries' (2013) The World Bank Development Research Group; Finance and Private Sector Development Team 3.

32 Andrew Wasike, 'Women Take over Kenya's Farming Sector' (2013) DeutcheWelle's Best Environmental Stories of 2013 <www.dw.de/p/188g6> accessed 13 February 2015.

33 ibid.

34 AsliDemirguc-Kunt, LeoraKlapper and Dorothe Singer, 'Financial Inclusion and Legal Discrimination Against Women: Evidence of Developing Countries' (2013) The World Bank Development Research Group; Finance and Private Sector Development Team.

35 ibid.

36 Njaramba Gichuki, *Law of Financial Institutions in Kenya* (2nd edn, Nairobi, Law Africa Publishing 2013) 57.

Modern microfinance is credited to Prof. Mohammad Yunus, who began experimenting with lending to poor women in Bangladesh during his tenure as a Professor of Economics at Chittagong University in the 1970s and eventually established the Grameen Bank.[37]

The microfinance model was started as a way to help eradicate poverty by providing financial services to the poor. The services offered by microfinance institutions include provision of loans, savings, and other basic financial services. These services are offered by the typical banks as well. The main difference is that the services offered by microfinance institutions involve relatively small amounts of money, which makes them more convenient and accessible to the poor as compared to conventional banking services.[38]

In the Asian region, for instance, there is a large number of people, 900 million or thereabouts, who live below the poverty line. Though urban poverty is also on the rise, most of these people comprise the rural population. Before the establishment of microfinance, it was hard for such poor people to access credit and other financial services. This is because conventional banks were not designed to suit low income earners due to perceived high risks associated with lack of collateral and high costs of processing small loans. However, with the advent of microfinance, the problem of access to financial services by the poor started to receive widespread attention.[39]

There is a common assumption that poor people do not save money or require loans. However, poor people do save, only that they use informal methods such as hiding the money in the house, saving in commodities like livestock, land, farm produce and participate in informal saving groups (*chama*). Whenever they need to borrow, they get the loans from friends, family members or informal moneylenders or "shylocks".[40]The challenge with this informal type of saving is the fact that keeping money in the house exposes it to the danger of theft and there is no compensation in such an event.

Commodity prices may also fluctuate at different times in the market, hence resulting in loss of the value of their savings in case they have to sell the commodities in exchange for money. It also becomes inconvenient when they just need a small amount of money since some commodities such as livestock cannot be sold in parts (one cannot sell one leg of a cow). The savings in kind are also prone to natural calamities like earthquakes, floods and drought among others. Borrowing money from "shylocks" is expensive since the interest rates may be quite high because they are not regulated by government.[41]

The above problems were substantially addressed by the establishment of microfinance institutions. Since their establishment, microfinance institutions have transformed greatly from giving loans to peasant farmers, and lending money to poor women to start small businesses, to the current formal financial institutions that have enhanced their outreach.

37 Jennifer Lindsay, *Microfinance - Developing paths to self sufficiency [An Evaluation on the effectiveness of Microfinance Institutions* (Indiana University SPEA Honors Thesis, 2010) 5.

38 ibid.

39 Asian Development Bank, *Finance for the Poor: Microfinance Development Strategy* (2000) 10.

40 KIVA Website "About Microfinance" <http://www.kiva.org> accessed 31 July 2014.

41 ibid.

They now offer a wide and varied range of financial services. They and have been able to provide financial services to approximately 160 million people in developing countries such as Bangladesh, Bolivia and most of the African countries among others.[42]

For slightly over thirty years since its establishment, the microfinance sector has provided small loans to the poor to enable establish income generating activities such as businesses. This way, it helps in the improvement of living standards, hence reduction of poverty. A decade after they were established, there was a movement towards ensuring that the microfinance institutions could support themselves without subsidies from the governments or grants from donors. This led to the commercialisation of the sector which eventually made them independent and bigger.

The sector grew and most of the poor people in developing countries, had easy access to loans from these institutions.[43] However, this commercialisation and formalisation resulted in the microfinance sector operating in more or less the same way as the conventional banks. For instance, they started charging higher interest rates that were close to the rates charged by conventional banks. This was to enable them operate independently as opposed to depending on grants and donations for their funding. The only difference, especially in the Kenyan market, is that they deal with smaller amounts of money compare to banks. This defeats the very purpose for which they were established. The formalisation of the microfinance sector has the potential to alienate some of the low income persons who were supposed to be the major reason for their establishment.[44]

Despite the worldwide effort to ensure access to financial services by all persons, research has also shown that not all of the people without access to formal financial services are in that situation because of such services being inaccessible to them. Some of these people voluntarily decide not to access financial services, however easily available they may be. In a survey carried out in Brazil, a third of all the people without access to financial services confessed that they had no interest in having such access. In India, 62 percent of the respondents claimed that they did not need formal financial services.[45]

It is also worth noting that some economists do not support the idea of microfinance, or clearly put, giving loans to persons who might not be able to repay such loans. This is not only a high risk to the individual financial institutions but also a threat to the economy as a whole. However, there is no factual data to prove that poor people have higher default rates than the others. Indeed according to Prof. Yunus, the poor always pay back.[46]

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42 ibid.

43 Milford Bateman, 'Microfinance as a Development and Poverty Reduction Policy: Is It Everything It's Cracked up to be? (2011) Overseas Development Institute, London <www.odi.org.uk> accessed 13 May 2014.

44 ibid.

45 Anjali Kumar 'Measuring Financial Access Through Users' Surveys, Core Concepts, Questions and Indicator'(2005) Paper prepared for the Joint World Bank / DFID / Finmark Trust Technical Workshop, *Defining Indicators of Financial Access*, Washington DC and London, 2005.

46 Alex Brummer, 'How I Saved the World by Gordon Brown and no, the Crash was nothing to do with me' (2010) Mail Online <www.dailymail.co.uk> accessed 23 May 2010.

In Kenya, the use of microfinance as a way of accessing financial services is fairly developed. Microfinance was introduced and dominated by the private sector and civil society organisations. Non-Governmental Organizations (NGOs) had initially created the notion that they were meant to provide non-refundable donor funds to poor households.[47] With the enactment of the Microfinance Act of 2006,[48] microfinance institutions are required to be limited liability companies. This was a move to make the institutions self-reliant and independent. There are a number of microfinance institutions with the major ones being Kenya Women Finance Trust Deposit Taking Microfinance Limited (KWFT), Rafiki Deposit Taking Microfinance Limited, Remu Deposit Taking Microfinance Limited, SUMAC Deposit Taking Microfinance Limited and Century Deposit Taking Microfinance Limited.[49]Microfinance institutions have been able to operate despite experiencing challenges that are also encountered by typical banks such as infrastructure in the rural areas and accepting a very low minimum account balance to open an account.[50]

Another step that has been taken to increase accessibility of financial services is the introduction of mobile banking and mobile money transfer services. This has particularly been effective in developing countries where the banking infrastructure is not well developed. Mobile banking has enabled banks to provide services to their customers without their customers necessarily having to be physically present at the banking halls. The customers can receive these services from the comfort of their homes. This has enabled people who had difficulties in physically accessing banks to obtain the services through mobile banking. Such services are offered by banks in conjunction with mobile telephone network operators and they include *M-Shwari*, *Eazy 247* and *M-Benki*, among many others.[51]

Mobile money transfer services have enabled the unbanked population in Kenya to access secure and fast financial services. These include sending and receiving money, paying bills and buying airtime. All these transactions are done through a mobile telephone. This method of providing access to financial services has been quite effective since a sizable proportion of the population own mobile telephones. A research conducted by Pew Research Centre in 2014 showed that 82 percent of Kenyans own mobile telephones.[52] Examples of mobile money transfer services in Kenya are *M-Pesa*, *Airtel Money*, *Orange Money*, *Yu Cash* and *Tangaza*.[53]

47 Njaramba Gichuki, *Law of Financial Institutions in Kenya* (Nairobi, Law Africa Publishing 2013) 57.

48 Act No. 19 of 2006.

49 Other microfinance institutions include; UWEZO Deposit Taking Microfinance Limited, SMEP Deposit Taking Microfinance Limited, AAR Credit Services, AdokTimu, Aga Khan Foundation, Blue Limited, Faulu Kenya DTM Limited, Elite Microfinance, Musoni Kenya Limited and Milango Microfinance (a subsidiary of KCB Bank) among others. Accessed at the Central Bank of Kenya Website <www.centralbank.go.ke> 17 March 2014.

50 ibid.

51 Njaramba Gichuki, *Law of Financial Institutions in Kenya* (Nairobi, Law Africa Publishing 2013) 230.

52 Pew Research Centre Survey Report, 'Emerging Nations Embrace Internet, Mobile Network: Cell Phones Nearly Ubiquitous in many Countries' (2014) <www.pewglobal.org/2014/02/13/emerging-nations-embrace-internet-mobile-technology> accessed 13th February 2015.

53 Njaramba Gichuki, *Law of Financial Institutions in Kenya* (Nairobi, Law Africa Publishing 2013) 235.

Establishment of agency banking has also improved access to financial services. Agency banking is the carrying out of banking business by entities, referred to as agents, on behalf of the financial institution that has contracted it to do so. This is an initiative taken by banks such as Equity Bank, Kenya Commercial Bank, Co-operative Bank and Family Bank among others that have a national outlook in their operations in Kenya. Agency banking has improved access through improvement of infrastructure. One can access banking services such as deposits, withdrawal, and account opening, from the bank agents that are found in all urban and many rural areas. Agency banking is continuously improving and growing and as it grows, the level of financial inclusion is also growing proportionately. This has been helpful to those who originally could not access financial services due to the long distance they had to travel to big towns to access banks. Examples of agency banking services established include *Equity Agent*, *Coop KwaJirani, KCB Mtaani* and *Chase Popote*.[54]

The government has also taken some initiatives to improve access to financial services. This is through projects such as the Uwezo Fund and Women Enterprises Fund. These two were established to help the minorities in the society (the youth and women) to have access to financial services. The Uwezo Fund is a youth and women fund that was launched on 8th September, 2013 and subsequently enacted through Legal Notice No. 21 was published on 21st February, 2014.[55]

Its objective is to expand access to finance through grants and credit to promote youth and women businesses and enterprises at the constituency level, thereby enhancing economic growth towards the realization of the goals of Vision 2030; to generate gainful self-employment for Kenyan youth and women; and to model an alternative framework in funding community driven development. The establishment of this Fund has played a big role in increasing the number of Kenyans that have access to financial services.[56]The Women Enterprises Fund was also set up in a bid to improve access to financial services. It is a semi-autonomous government agency under the Ministry of Devolution & Planning established to provide accessible and affordable credit to support women start and expand business for wealth and employment creation. The Fund offers loans to women which they repay with zero interest just as the Uwezo Fund.[57]

Efforts have been made to ensure financial inclusion of women, who for a long time, have been discriminated against. These attempts are, however, insufficient as stakeholders have placed much emphasis on other factors that hinder financial inclusion such as poverty and poor infrastructure and ignored the gender aspect. According to the International Labour Organisation and the African Development Bank reports, the situation is worse in developing countries such as Kenya, Bangladesh, Ethiopia and Pakistan where women encounter more systemic barriers to the access of formal financial services.

54 ibid. 273.

55 This was done under the Public Finance Management Act, Act No. 18 of 2012.

56 Uwezo Fund Website <www.uwezo.go.ke> accessed 17 March 2014.

57 Women Enterprises Fund <http://www.wef.co.ke> accessed 17 March 2014.

Women's lower financial literacy levels as well as weak business backgrounds are some of the reasons that have made financial service providers less friendly to them.[58]

The establishment of financial institutions that provide exclusive services to women is one step towards sealing the gender gap that exists in financial sector. For instance, the Kenya Women Finance Trust (KWFT) is a microfinance institution that offers financial services to women. The institution is one of the largest in the region and has played a big role in addressing gender inequalities in the financial sector by enabling a great number of women, especially those in rural areas, to access formal financial services.[59] Projects set up by the Kenya government, such as the *Uwezo* Fund and the Women Enterprises Fund discussed earlier, are also examples of steps to ensure financial inclusion of women and other minority groups such as the youth. This is a step in the right direction towards the eradication of sex based discrimination in the financial market.[60]

V. LEGAL FRAMEWORK

A. International Law

The Universal Declaration of Human Rights provides that every organ of society has human rights obligations. This is laid out in the preamble of the Declaration and it states that, ".every individual, and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education, to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.." The Declaration also states that in the enjoyment of one's rights and freedoms, one will be subject to such limitations by law that are necessary for the purpose of ensuring recognition and respect for the rights of others.[61] The phrase "every organ of society" can be interpreted to include banks and other financial institutions. However, access to financial services is not considered a human right under the Declaration.

The United Nations Declaration on the Rights of Indigenous Peoples states that, "Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration."[62] This provision is the closest international instruments have come to regarding access to financial services as a right. However, it only provides for financial and technical assistance. The law does not state whether or not indigenous peoples have a right to access financial services. By virtue of Article 2(6) of the

58 AsliDemirguc-Kunt and LeoraKlapper and Dorothe Singer, 'Financial Inclusion and Legal Discrimination Against Women: Evidence of Developing Countries' (2013) The World Bank Development Research Group April 2013 Finance and Private Sector Development Team 5.

59 Kenya Women Finance Trust Website <www.kwftdtm.com> accessed 1 August 2014.

60 Uwezo Fund Website <www.uwezo.go.ke> accessed 31 July 2014; Women Enterprises Fund website <http: //www.wef.co.>.

61 Universal Declaration of Human Rights, Article 29.

62 United Nations Declaration on the Rights of Indigenous Peoples, Article 39.

Constitution of Kenya[63], the state is bound by this Declaration.

The Convention on the Elimination of all forms of Discrimination Against Women is also an important statute that provides for financial inclusion – particularly for women. The Convention requires that all State Parties take appropriate measures to eliminate discrimination against women in the areas of economic and social life to ensure that both men and women have equal rights to access bank loans, mortgages and other forms of financial credit.[64] This Convention not only provides for financial inclusion for women, but also states that the right is to be enjoyed equally by both men and women.

The Maputo Protocol also provides financial inclusion. It provides that women have a right to enjoy sustainable development through access to credit, training, skills development and extension of services to rural and urban areas so as to reduce the levels of poverty and improve the quality of life for women.[65] This Protocol links financial inclusion to the right to development. Therefore making financial services accessible to women ensures sustainable development.

B. Municipal Law

The Constitution of Kenya provides for social and economic rights.[66] It would have been possible to stretch this provision and assume that it includes the right to access financial services. However, this has been hindered by the fact that the provision goes ahead to specify what these social and economic rights are. These are the right to health care services, right to proper housing, right to reasonable standards of sanitation, freedom from hunger, right to social security, access to adequate quantities of water and right to education. It is clear that access to financial services is not included in this provision.

Right to social security may be close to it but again it is possible to provide social security without the use of financial services.[67]Article 43 (3) provides that, "The State shall provide appropriate social security to persons who are unable to support themselves and their dependants." It places the mandate on the government to provide social security to the people, and specifically to those unable to support them. An attempt can be made to stretch this to include the right to access financial services. However, social security is too general a term and can therefore, be interpreted differently depending on what the person interpreting wants to achieve.[68]

Under Article 46, the Constitution provides for consumer rights. It provides that consumers have a right to goods and services of reasonable quality. Protection of their economic interests and compensation in the event of injury is provided as well.[69]

63 Article 2(6): Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

64 Convention on the Elimination of all forms of Discrimination Against Women, Article 13 (b).

65 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 19 (d).

66 Constitution of Kenya 2010, Article 43.

67 ibid. Article 43 (1).

68 ibid. Article 43 (3).

69 Section 46 (1).

Article 46 (3) covers goods and services provided by both public entities and private persons, which would include financial services offered by public and private providers. Therefore, as much as there is no clear provision in the Constitution stating whether or not access to financial services is a right, there is a provision for the protection of persons accessing such services? Unfortunately, a person who has no access to financial services may not have consumer rights to enforce.

The Central Bank of Kenya Act[70] provides for the formation of the Central Bank of Kenya which, among other functions, is mandated with the task of regulating the operations of all the financial institutions in Kenya. Although not exhaustively, this is a positive step by the government to regulate the activities of a sector which would otherwise act in a way to profit themselves regardless of the loss suffered by other stakeholders in the financial sector including the consumers. Consumers are further protected by the law as regards financial institutions under the Consumer Protection Act.[71]

The Banking Act[72] provides that, "…no person, other than an institution which holds a valid license or a duly approved agency conducting banking business on behalf of an institution, shall invite or accept deposits in the course of carrying on a deposit-taking business." This provision is created to help create a conducive environment for persons using banking services. This ensures that their money is safe since all the banks have to be licensed in order to accept deposits. Licensing means that such institutions have the required capital hence the assurance that the institution will hardly run into insolvency. It is also an assurance to the public that the institution is regulated by the Central Bank of Kenya – the government. This has in turn led to an increase in the number of people accessing these services.

Microfinance institutions in Kenya are regulated by the Central Bank of Kenya Act and the Microfinance Act of 2006. However, these Acts do not have any provision that proclaims access to financial services from microfinance institutions a human right. This means that despite the fact that the institutions were established with the aim of reaching the unbanked members of the society, it lacks express relevant provisions. Therefore the major problem with financial inclusion which is the fact that no particular law expressly defines it as a right is not solved despite the efforts. The formalization of the microfinance sector in Kenya through the Microfinance Act also changed the structure of the institutions and, arguably and as a result, keeps them out of the reach of those who were intended to benefit from them and who thrive on informalism.

VI. CHALLENGES OF TREATING ACCESS TO FINANCIAL SERVICES AS A HUMAN RIGHT

There are a number of challenges that arise from treating access to financial services as a human right. The first challenge is the fact that there is no law that recognises it as such. Most of the international treaties only provide for social and economic rights.

70 Central Bank of Kenya Act Chapter 491, S4.

71 No. 46 of 2012 Part VII.

72 Banking Act, Section 16 (1).

For instance, the Universal Declaration of Human Rights provides that every member of society is entitled to the realisation of economic, social and cultural rights.[73]It does not specifically declare financial inclusion as a right. The closest one can get to considering access to financial services a human right, is by stretching social and economic rights to include access to financial services. Some analysts have also considered the provision under the Declaration that all organs of society including business enterprises have human rights obligations to include the obligation of financial institutions to provide financial services to the public.[74]

The situation is not any better under the Kenyan law which, in the same manner as the Universal Declaration of Human Rights, provides for social and economic rights.[75] The fact that there is no specific provision or clause under social and economic rights that deals with access to financial services is a challenge. This is due to the fact that different interpretations will be made (at times considering it a human right and in other instances it will not be considered a right) depending on the different facts of a case. It is hard to implement a right that is not expressly provided for under both international and municipal law. This will create inconsistencies and uncertainty in law.

The issue of enforcement of the right to access financial services brings with it enormous challenges. The Hohfeldian theory provides for the conceptualisation of rights under which rights and duties are correlatives. For a person to have a right, another person must have the duty to ensure the enjoyment of that right imposed on them. This means that if at all access to financial services is to be considered a human right, the law must state clearly the person or body obliged to ensure the said right is enjoyed. The problem in this case is the fact that there is no specific person or body that the law has given the mandate to ensure that Kenyans have access to financial services. This creates a loophole in the sense that financial institutions may deny some people access to financial services and get away with it because there is no provision that imposes the duty on the institutions. It is also not expressed in the law that the government is to ensure that all Kenyans have access to financial services.[76]

Infrastructure is also a challenge. Statistics have shown that only about 60 percent of Kenyan adults have access to banking services. The percentage goes down when the access of women and youth to financial services is considered separately.[77] Although this survey puts Kenya at the top of African countries with the highest percentage of banked population (only second to South Africa), it still has a large number of people who remain without access to financial services. This hinders access to financial services from being treated as a human right because human rights are those rights that are inherent and a person has them on the basis that they are human beings.

73 Universal Declaration of Human Rights, Article 22.

74 Adam McBeth, 'Every Organ of Society: The Responsibility of Non-State Actors for the Realisation of Human Rights'[2008] Social Science Research Network.

75 Constitution of Kenya 2010, Article 43.

76 W Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710.

77 FinAccess National Survey, 'Profiling Developments in Financial Access and Usage in Kenya' (2013) 13.

The fact that some Kenyans do not have access to financial services can only be interpreted to mean that they are either being denied their rights or, access to financial services is not a human right altogether.[78]

There is also some form of discrimination that exists as regards access to financial services in Kenya. Some people are denied access to financial services on the basis of gender, nationality, religious background and social groups, among others. For instance, for one to open a bank account or a mobile money transfer account, one is required to have a national Identification Card. The problem that arises due to this requirement is that some communities in Kenya, to be specific, the Nubians, do not have Identity Cards because, apparently, they are stateless. This is discrimination against them on the basis of their nationality.[79] This form of discrimination undermines the treatment of access to financial services as a human right.

VII. RECOMMENDATIONS

As much as access to financial services is not expressly provided under any law as a human right, it is important that necessary steps are taken to recognise it as such. This is due to the fact that access to financial services is an essential part of any society and is at the centre of all human activities. This means that for other rights to be meaningfully enjoyed, economic empowerment is paramount through financial inclusion. As the Constitution provides, the government is expected to offer social security to persons who are not able to support themselves. This can substantially be achieved by offering them financial services.[80] Another instance is the right to wages for work done. This payment can only be done through financial means.[81] Many rights are hindered when access to financial services is denied.

There is need for both the government and the bankers to improve the infrastructure to enable more people access financial services. There are a number of steps that have been taken to achieve this such as the introduction of agency banking, microfinance, mobile banking and mobile money transfer. These are good steps only that they have not been exploited to the fullest. There are still some regions in Kenya that remain unbanked. This is especially the case in the most remote and marginalised parts of the country such as the northern and north eastern regions. Statistics show that access to financial services is highest in urban areas, followed by rural areas that are fairly populated and the least in marginalised areas such as Turkana County.

This disparity can be explained by the fact that banks were established mainly for business and commercial purposes. It then follows that the bankers will tend to establish more branches where business will thrive. Areas that are more densely populated with more businesses running will form a good market for banking business.

78 N. Waitathu 'Kenya Leads African Peers in Access to Finance - Report' (*Standard Digital News* 16 March 2014) <www.standardmedia.co.ke> accessed 19 March 2014.

79 M O Makoloo, 'Kenya: Minorities; Indigenous Peoples and Ethnic Diversities' [2005] Minority Rights Group International Report 16.

80 Article 43 (3).

81 The Employment Act No 11 of 2007.

This explains the reason why there are so many banks in Nairobi and hardly any in Marsabit County.[82] The government can improve basic infrastructure such as roads, transport and communication to such remote areas. This will attract investors and other business people to these regions due to the ease of physical access. Ultimately, bankers will find it attractive to open branches in the areas, hence, increase access to financial services.[83] The concept of subsidies would also make a difference where the government and financial institutions share costs to provide services to the not-so-profitable areas.

Considering the method of operation used by Musoni Kenya Limited, for instance, it can be observed that this microfinance institution has gone an extra mile to ensure access to financial services. Musoni Kenya Limited is the first 100 percent non-cash microfinance institution in Kenya. It offers all its products via mobile phone network (*M-Pesa*). This has greatly lowered its interest rates as it does not have to charge for paper work or use a large number of staff who would be needed to serve clients. This makes the cost of operation of the microfinance institution much lower as compared to other institutions, therefore making their services and products cheaper.[84]If this concept was widely replicated it would ensure not only increased access to financial services, but also improved efficiency of offering services as well as cheaper services to the consumers. This would definitely promote the purpose intended by Article 46 of the Constitution.

As discussed earlier, the Universal Declaration of Human Rights provides that every organ of society has human rights obligations to promote respect for Human Rights.[85]From the foregoing, financial institutions are also under the obligation to ensure the enjoyment of rights and freedoms by the people they serve. As much as they reserve the right to choose their clients, they should do so without violating their customers' rights. Therefore, in abiding to this provision, financial institutions should be customer friendly. They could, for example, reduce the minimum account opening balance. This would ensure that the financially disadvantaged in society are able to access financial services. The providers of financial services should stop discriminating on who can access their services based on gender.[86]

The government should legislate on financial services such as mobile money transfer. Currently, there is no clear law governing such services which puts the users of these services at the risk of not being compensated in case they suffer a loss. The government should also improve security in respect of mobile money transfer services to reduce the rampant theft and other fraud related cases that occur in relation to mobile money transfer methods.[87]

82 FinAccess National Survey 'Profiling Developments in Financial Access and Usage in Kenya' (2013) 23.

83 Constitution of Kenya 2010, Article 201 (b) (iii).

84 Musoni Website <www.musoni.co.ke> accessed 22 May 2014.

85 Universal Declaration of Human Rights, Article 29.

86 Constitution of Kenya 2010, Article 27.

87 Njaramba Gichuki, *Law of Financial Institutions in Kenya* (2nd edn, Nairobi, Law Africa Publishing 2013) 235.

Due to the operations of financial institutions and, there is a presumption in the lower economic classes that banking services are only meant for the wealthy. The poor therefore end up using primitive means of storing their financial assets, which are usually unsafe or unstable. These could include storing money in the houses and in commodities that are prone to losing value due to fluctuations in the market prices such as animals and farm products. The government and bankers should take the initiative to educate the public on the importance and benefits of using modern and formal methods of accessing financial services. This is because these modern methods are much safer as regards savings and convenient when it comes to obtaining loans.[88]

It is clear that access to financial services is a great contributor to economic development. The development of a country's economy is therefore highly dependent on the financial inclusion of all the members of society. This can be attained only when economic development is viewed as economic freedom. Only when all members of society have attained economic development through financial inclusion as well as other key contributors, can they be regarded as being free.[89]Accordingly, enacting laws and policies that will ensure all members of the society, including women, access these facilities is necessary. The government and all human rights activist should work towards the eradication of all forms of gender based discrimination. This includes review of laws that are based on cultural norms that restrict women from receiving the same financial privileges as their male counterparts. This way, financial inclusion of women will be enhanced.

It is also important for the economic rights advocates to shift their focus from the financial institutions to the members of the public. This can be done through a thorough market research to quantify the unbanked members of society and thereafter come up with ways of ensuring such members of society access financial services. Efforts to better meet customers' needs using a diversified range of products as well as rallying calls for consumer protection will go a long way in ensuring financial inclusion for all.[90] This will result not only in a financial sector that puts the interests of the customers first hence reduce exploitation by the financial service providers but also in the economic development and freedom of the society as a whole.[91]

As a long term solution to the problem of access to financial services, the government should enact legislation that clearly addresses the matter. It should clearly state whether or not access to financial services is a human right, and if so, then the person or institutions that have the duty to ensure enjoyment of this right should be stated too. This will help solve the existing uncertainty on whether access to financial services is a right and will also avoid the problem of having to overstretch the provisions of Article 43 to include access to financial services.[92]

88 KIVA Website 'About Microfinance' <http://www.kiva.org> accessed 31 July 2014.

89 Amartya Sen, *Development as Freedom* (New York, First Anchor Books 2000) 7.

90 Monique Cohen and Candace Nelson, 'Financial Literacy: A Step for Clients towards Financial Inclusion' (2011) Global Microcredit Summit Commissioned Workshop Paper – Valladolid, Spain 3.

91 Amartya Sen, Development as Freedom (First Anchor Books Edition, New York 2000) 3.

92 The Constitution of Kenya 2010.

The government could also consider borrowing some of the principles from Islamic banking. Islamic banking developed around the eighth century among the Muslim society and, has since then, spread to other parts of the world. It currently serves both Muslim and non-Muslim communities. This is banking that is done in line with the principles of *Sharia*. It is also referred to as Sharia Compliant Finance.[93] Islamic law prohibits charging of interests (*riba*) on loans given to customers and only allows the bankers, above the principal amount, to charge for the cost of servicing the loan. This is because the charging of such interests will be in violation of the doctrine of social justice. This doctrine provides for the general good of the society and fairness among all people regardless of their status in life. The government can adopt some of the Islamic banking principles. Principles such as the doctrine against exploitative interest rates on consumers will play a big role in increasing the level of access to financial services.[94]

VIII. CONCLUSION

There is no clear law providing for access to financial services as a human right – both at the international level and at the municipal level. This should be addressed as financial services are an integral part of the society. In modern times, it is inhibitive to operate without finance which can only be obtained when one has access to financial services. It is therefore important that such access is considered a right so that no individual is denied other fundamental human rights and freedoms as a result of lack of access to financial services.

The poor, youth and women are the most disadvantaged when it comes to access to financial services. There is therefore need to ensure that appropriate measures are taken and enacted into law to facilitate the financial inclusion of all members of society regardless of their gender, age or financial status. This will curb the problem of differential treatment under the law.

The rights of indigenous peoples have, though not satisfactorily, been addressed. By virtue of the United Nations Declaration on the Rights of Indigenous Peoples, States are enjoined to ensure that indigenous peoples enjoy the right to have access to financial and technical assistance.Economic rights advocates have not sufficiently explored the financial inclusion issue. The laws and policies in this area remain unclear leaving room for the service providers to exploit the members of society. Pushing for the recognition of financial inclusion as a right and the subsequent enactment of relevant laws to support the same will contribute substantially not only in the growth of the number of people with access to financial services, but also develop the economy of the country, encourage competition, and boost the demand for labour.

It is also important not to view the issue of access to financial services only in the geographical perspective. Establishment of an intense network of financial institutions throughout the country may fail to achieve the intended purpose if the members of society are not enlightened on the benefits of making use of such services. It is also recommended that the services be customer friendly in order to encourage access.

93 A Khan, 'Sharia Compliant finance' Halal Monk: A Christian on a Journey Through Islam <www.halalmonk.com/ajaz-ahmed-khan-sharia-compliant-finance> accessed 28 March 2014.

94 Yusuf A. Nzibo, 'Islamic Banking: General Overview' <www.nzibo.com> 27 March 2014.

THE 160 GIRLS DECISION: DEVELOPMENT AS THE FREEDOM FROM SEXUAL VIOLENCE AND THE LIMITS OF THE LAW IN ATTAINING THAT FREEDOM

*Agnes K. Meroka**

ABSTRACT

The Sexual Offences Act provides for stiff penalties for the offences of rape and defilement, but the police do not take seriously the enforcement of this law. In the 160 Girls decision, which is a case that embodied significant public interest concerns, the High Court of Kenya declared this police failure a violation of the right to access justice. Understood within the context of the human rights paradigm, the court's decision may be deemed progressive. However, the court still failed to render a decision that would compel the state to take positive measures to ensure the proper enforcement of the Sexual Offences Act. The court therefore determined the narrow issue of the violation of a particular human right, but failed to address the broader concern- which was the protection of women and girls from sexual violence through proper implementation and enforcement of the law. This essay argues that the court had a duty and an opportunity to determine this broader public interest concern both for the benefit of the petitioners in this case, as well as for that of the women and girls in Kenya. The court failed to discharge this duty and make use of this opportunity because the human rights paradigm, on which it significantly relied to determine the issues in this case, did not offer the tools which the court could have relied on to compel the state to take positive measures to protect women and girls from sexual violence. This essay argues that the capabilities approach can complement the human rights paradigm, and go further in protecting women and girls from sexual violence. It addresses this broader, public interest concern which the court missed by identifying the factors that limit the enforcement of the Sexual Offences Act and then using the capabilities approach to develop strategies that may be employed to address these factors.

I. BACKGROUND

11th October is marked as the International Day of the Girl Child. When this day was first celebrated in 2012, 11 girls from Meru County in Kenya, who were victims of sexual violence, together with Ripples International, which is an organization that provided shelter for the girls, filed a constitutional petition at the High Court in Meru against the Inspector General of the National Police Service (1st Respondent), the Director of Public Prosecutions (2nd Respondent) and the Minister for Justice, National Cohesion and Constitutional Affairs (3rd Respondent).

The girls filed this petition on their own behalf and on behalf of over 160 other girls who had also experienced sexual violence in the county. This petition was filed after the police had failed to investigate the girls' complaints of sexual violence, and/or to arrest the perpetrators. The girls argued that these failures by the police amounted to

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violations of their rights under the Constitution of Kenya, the Universal Declaration of Human Rights, the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the African Charter on Human and Peoples' Rights, the Children's Act 2001 (Chapter 141 of the Laws of Kenya), the Sexual Offences Act 2006 (Act No. 3 of 2006 Laws of Kenya) and the Police Act (Chapter 84 of the Laws of Kenya).

The petitioners sought the following remedies:

1. *A declaration to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' complaints of defilement violates the first eleven petitioners' fundamental rights and freedoms:*
    a) *to special protection as members of a vulnerable group'*
    b) *to equal protection and benefit of the law;*
    c) *not to be discriminated against'*
    d) *to inherent dignity and the right to have the dignity protected*
    e) *to security of the person*
    f) *not to be subjected to any form of violence from public or private sources or torture or cruel or degrading treatment; and*
    g) *to access to justice as respectively set out in Articles 21(1), 21(3), 27,28,29,48,50(1) and 53(1) (c) of the Constitution.*
2. *A declaration to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' respective complaints violates the first eleven petitioners' fundamental rights and freedoms under:*
    a) *Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights,*
    b) *Articles 2, 4, 19, 34 and 39 of the United Nations Convention on the rights of the child;*
    c) *Articles 1, 3, 4, 16 and 27 of the African Charter on the Rights and Welfare of the Child, and*
    d) *Articles 2 to 7 (inclusive) and 18 of the African Charter on Human and People's Rights.*
3. *An order of mandamus directing the 1st Respondent together with his agents, delegates and/or subordinates to conduct prompt, effective, proper and professional investigations into the 1st to 11th petitioners' respective complaints of defilement and other forms of sexual violence.*
4. *An order of mandamus directing the 3rd Respondent together with his agents, delegates and/or subordinates to-*
    a) *Formulate the National Policy Framework envisioned by Section 46 of the Sexual Offences Act, 2006 through a consultative and participatory process, ensuring its compliance with the Constitution and to disseminate, implement and widely and regularly publicize the National Policy Framework, and*
    b) *Make and/or cause the National Policy Framework in (a) above to be made a mandatory component of the training curricular at all police training colleges and institutions.*

5. *An order of mandamus directing the 3rd Respondent together with his agents, delegates and/or subordinates to implement the guidelines provided in the Reference Manual on the Sexual Offences Act, 2006 for prosecutors, Sections 27-36, excepting section 34.*

The court granted the first three prayers. It refused to grant prayers 4 and 5. The court also granted an order of mandamus directing the 1st Respondent together with his agents and/or delegates to implement Article 244 of the Constitution in as far as it is relevant to this petition.

II. APPRECIATING THE IMPORTANCE OF THE 160 GIRLS DECISION IN THE KENYAN CONTEXT

This case is no doubt a landmark case in Kenya, because the High Court held that it is the responsibility of the state to ensure access to justice for girls who have experienced sexual abuse. The court found that the police in Meru County had failed in three key areas: firstly, they failed to investigate claims of sexual abuse which were brought by young girls; secondly, they failed to arrest most sexual offenders; and thirdly, where they arrested the offenders, they handled the prosecution so poorly that the offenders would be released. Insofar as human rights litigation is concerned, this case is also novel because it found the state responsible for the violation of fundamental rights through acts of omission, rather than acts of commission.[1] The court found that the state was responsible for the violation of the rights of the girls in this case because of omissions and inaction on the part of the police, the Director of Public Prosecutions and the Minister for Justice, National Cohesion and Constitutional Affairs.

This case also underscores the fact that while there exists an elaborate set of legal provisions aimed at protecting the rights of women and girls with regard to sexual violence, these rights continue to be violated with impunity. This position is disheartening, given that it was only in 2006 when the Sexual Offences Act was passed, giving hope to women and girls throughout the country that their right to be free from sexual violence would be protected. Further, article 2(5) of the 2010 Constitution of Kenya provides that the general rules of International Law form part of the law of Kenya, while article 2(6) provides that any treaty or convention ratified by Kenya forms part of the law of Kenya. Consequently, the rules of International Law which provide for the protection of women's human rights are currently part of Kenya's national law. The 160 Girls' decision has now shown that all these legal provisions have not been sufficient in ensuring that women and girls in Kenya are free from sexual violence. In particular, it is evident that the state has failed to take seriously its constitutional and International Law obligations in protecting and safeguarding the rights of women and girls.

While the court in this case has shown its commitment to protecting women and girls in Kenya by holding the state and its agencies accountable for the violation of the fundamental human rights, the court still fell short of rendering a decision that would

1 Traditionally, the state has been found guilty of human rights violations through acts of commission, especially with regard to civil and political rights. See for instance the human rights violations compiled in the Bureau of Democracy, Human Rights and Labor 2011/2010 Country Reports on Human Rights Practices: Kenya. U.S Department of State. <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154352.htm> accessed 17 March 2014.

ensure that the state takes the necessary action to ensure that women and girls enjoy the freedom from sexual violence. Let us consider the prayers that were granted under the court order and those that were declined. Firstly, the court issued two declarations to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the petitioners' respective complaints violated the petitioners' fundamental rights under the Constitution of Kenya 2010 as well as under various International and Regional Human Rights Instruments. The court also issued an order directing the Commissioner of Police, together with his agents, delegates or subordinates to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence.

On the other hand, the court declined to issue orders compelling the Minister for Justice, National Cohesion and Constitutional Affairs to formulate a National Policy Framework to guide the implementation and administration of the Sexual Offences Act as envisioned under section 46 of the Act, and to cause that Policy to be a mandatory part of police training. The court further declined to issue orders directing the Minister to implement the guidelines contained in the Reference Manual on the Sexual Offences Act for police prosecutors. Finally, the court declined to issue orders directing the Commissioner of Police, the Director of Public Prosecutions and the Minister for Justice, National Cohesion and Constitutional Affairs to regularly account to the court on compliance and/or implementation of the orders issued by the court. In short, the court simply issued declarations to the effect that the petitioners in this case have the right to be free from sexual violence, and to access justice should this right be violated. The court failed to issue orders that would ensure that these rights were not just rights on paper but true rights, which the girls are capable of enjoying.

Considering the glaring inefficiency in the implementation and enforcement of the law on sexual violence, and the shortcomings of the decision which the court issued with regard to that inefficiency, this essay argues that the human rights paradigm on its own cannot ensure that women and girls enjoy the freedom from sexual violence. The court readily acknowledged that victims of sexual violence have a right to access justice, and that the state and its agencies had violated this right. In making a declaration to this effect, the court indeed acted progressively, however, there were key failures and weaknesses on the court's part.

Firstly, the court limited itself to considering whether the failure to enforce key provisions under the Constitution, International Law Provisions and statutory provisions, particularly under the Sexual Offence Act, amounted to a violation of the applicants' rights, but it did not consider why these laws are not being adequately enforced. The reasons as to why there is lack of proper enforcement of the law was an important issue for consideration, and which was brought out by the advocates acting for the petitioners in the prayers which were sought and which the court declined to grant.

These included prayers for orders that would have compelled the state agencies to come up with National policy Framework for the Implementation of the Sexual Offences Act, and to make that framework part of the police training; and orders that would have compelled the state agencies *guidelines provided in the Reference Manual on the Sexual Offences Act, 2006 for prosecutors.*

This means that the reason this case was taken to court was not simply to seek justice for the 11 applicants represented in the petition, but it in fact embodied significant public interest considerations which if addressed would have benefited the women of Kenya and not only the applicants in this case. Notably, this case is popularly known as the 160 Girls' decision, in acknowledgment of the fact that many other girls had suffered sexual violence and they also needed justice to be done.

If the court had concerned itself with the reason as to why there is lack of proper implementation of the law on sexual violence, it would also have had to consider ways or means of redress. Therefore, in asking why the rights of these girls were violated, the court would have identified factors which limit the proper enforcement of the Sexual Offences; and it would then have been open to the court to determine how these factors which limit enforcement of the Sexual Offences Act may be removed. The goal in all this would be the need to ensure that women and girls are indeed free from sexual violence- which is the primary reason the Sexual Offences Act was passed in 2006. Thus, within the Sexual Offences Act, law is seen as having the capacity to protect human freedoms. When that law is not functioning properly or as envisioned, it is necessary to determine what the causes of the dysfunction might be, not simply as an exercise aimed at correcting the law, but even more importantly as an exercise aimed at ensuring that human freedoms envisioned in and through that law are protected in that very same law.

The human rights paradigm in this case did not offer the tools necessary for the court to consider these broader and more important issues. Specifically, the human rights paradigm allowed for the court to complete its work by making a determination as to whether or not a right was violated, and yet there was much more that needed determination and redress. This essay therefore argues that the development as freedom and capabilities approach would go further in ensuring that the rights of women and girls envisioned in and through the law are protected so that women and girls are able to enjoy the freedom from sexual violence. This essay uses the capabilities approach to identify the factors that limit the enforcement of the Sexual Offences Act and it proposes strategies that may be employed to address these factors.

The capabilities approach enables us to ask questions about the functioning of the law in ways that promote the reasons and goals for which the law was in the first place adopted. In this instance, we would be able to ask these questions: Why isn't the Sexual Offences Act protecting women from sexual violence (as was envisioned when it was enacted) and how may the Sexual Offences Act achieve the goal of protecting women from violence? This essay uses the concept of development as freedom from poverty, poverty being the lack of human capabilities, to analyse why the police have failed to enforce the provisions of the Sexual Offences Act. It argues that poverty and deprivation must first be addressed if the law on sexual violence is to be properly enforced. Development here therefore means the capability of women to be free from sexual violence.

Thus, this essay further argues that while it is important to invest more within the police force, such investment on its own would not eradicate women's lack of capability to be free from sexual violence. Such investment must be coupled with the transformation of the cultural norms which lead to the sexual objectification of women and the condoning of such objectification.

Women's poverty in the context of sexual violence therefore arises from the lack of adequate financial investment within the police force and also from the existence of a culture that condones negative views about women's sexuality. Within the development as freedom approach, reasoned social progress in a plays a crucial role in ensuring that people are capable of enjoying the freedoms that they are entitled to. Social norms and values therefore influence policy making processes.

Culture, which is a crucial aspect of any social system, can therefore be understood to play a major role in the way in public policy. This essay therefore illustrates the ways in which social norms and values about women's sexuality in Kenya influences police responses to claims of sexual violence. It argues that there is a link between societal views concerning women's sexuality and the way negative ways in which police handle cases of sexual violence. Thus, there is a need for cultural transformation to occur in Kenya if the police are to take seriously cases of sexual violence against women and girls.

III. "DEVELOPMENT AS FREEDOM" AND THE "CAPABILITIES APPROACH": ADOPTING AN APPROACH THAT WORKS FOR WOMEN AND GIRLS

A framework anchored in development is useful in addressing violence against women and girls (VAW), because it allows for a broader analysis of VAW, and here we are able to look at the factors that contribute to, and effects of VAW at the micro (within the family) and macro (broader societal and national) economic levels, as well as the socio-political level. In this context therefore, development is understood not only with regard to economic growth, but also with regard to the concept of freedom. Consequently, the 160 Girls' Decision raises key developmental concerns.

The "development as freedom" or the "capabilities approach" as propounded by Amartya Sen[2] and developed by Martha Nussbaum[3] is useful in the analysis of the entitlements of women and girls in this context. It provides a framework through which development is analyzed as a process of "*expanding the real freedoms that people enjoy*,"[4] and thereby understanding the barriers which prevent people from enjoying these freedoms. The focus is placed on the goal of development, which is the attainment of freedom. Unlike other paradigms (particularly economic models) which would necessarily diminish the place and role of women in development, the development as freedom approach places great emphasis on the needs and concerns of women.[5]

This is especially the case because the development as freedom approach emphasizes the link between the freedoms that individuals enjoy on the one hand and societal progress on the other hand. What can women and girls truly achieve? What factors influence their (in)ability to achieve these things?

2 Amartya Sen, *Development As Freedom* (Oxford, Oxford University Press 1999).

3 Martha Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 10 Feminist Economics 33.

4 Amartya Sen, *Development as Freedom* (Oxford, Oxford University Press 1999); Nussbaum (n 3) 3.

5 Nussbaum (n3).

As Nussbaum[6] has argued, rights which have been recognized through written law are not effective unless the state takes measures to ensure the implementation of the rights. The development as freedom approach emphasizes the need for states not only to ensure that they are not impeding the freedoms of those within their boundaries, but that they are also taking the necessary positive measures to ensure the attainment of freedoms. That is, states are to give people the capabilities to enjoy freedoms.

The 160 Girls' Decision shows that despite significant developments in the law relating to sexual violence in Kenya (some of the key developments that have been brought about by the Sexual Offences Act include stiffer penalties for sexual offences particularly against children) the state has not yet taken measures to ensure the proper enforcement of that law, and therefore its citizens are not able to enjoy the freedom from sexual violence. Granted, this lack of enforcement is not specific to the law on sexual violence. The police service in Kenya has been criticized for inefficiency, corruption and the violation of fundamental civil and political rights.[7] The police are responsible for widespread human rights abuses[8]for example, wrongfully killing persons participating in political demonstrations; wrongfully detaining human rights activists; and wrongfully taking the property of civilians. Human rights language would require the police to stop committing these wrongful acts.

However, the general inefficiency and corruption on the part of the police, as well as the widespread nature of police abuses and violations of human rights mask the specific discrimination women and girls suffer when the police do not take seriously claims of sexual violence.[9] To assume that all persons, regardless of sex or gender have the same experiences of suffering when their rights are violated would cloud and make invisible the female experiences.[10] Shifting paradigmatically from the legal feminist tradition which argued for gender neutrality in (and through) the law, the concept of gender difference is now widely accepted.[11] The female experiences of suffering are different from masculine experiences of suffering, and this difference must be drawn in order to see and appreciate female experiences.[12]

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6 Nussbaum (n3).

7 Amnesty International, 'Police Reforms in Kenya: A Drop in the Ocean' (*Amnesty International*, 2013) <http://www.amnesty.org/en/library/asset/AFR32/001/2013/en/ceb38da9-d2c7-43f2-b270-fb8d52f5539e/afr320012013en.html> accessed 17 March 2014; Commonwealth Human Rights Initiative and Kenya Human Rights Commission, 'The Police, The People, The Politics: Police Accountability in Kenya' (*Commonwealth Human Rights Initiative and Kenya Human Rights Commission*, 2006). <http://www.humanrightsinitiative.org/publications/police/kenya_country_report_2006.pdf> accessed 17 March 2014.

8 See in particular the facts of police abuses and brutality in: Commission of Inquiry into Post-Election Violence (CIPEV), 'Report of the Commission of Inquiry into Post-Election Violence (CIPEV),' (Government of Kenya, 2008).

9 A Kithaka, 'Enforcement of the Sexual Offences Act in Kenya,' (Pambazuka News, 2008) <http://www.pambazuka.org/en/category/letters/49923> accessed 17 March 2014.

10 Anne Phillips, 'Feminism and the Politics of Difference Or, Where Have All the Women Gone?' In James, Susan and Palmer, Stephanie (eds), *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Oxford, Hart Publishing 2002).

11 Nicola Lacey, Unspeakable Subjects (Oxford, Hart Publishing 1998).

12 See the analysis of the effects of the Rwandan Genocide on Tutsi women in Lezlie L Green, 'Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law' (2001-2002) 33 Columbia Human Rights Law Review 733.

As Catherine MacKinnon[13] has argued, male dominance exists in nearly all aspects of life, and indeed, that which is particular to the masculine is taken as universal. It is necessary to look for and explain the female experience in order to avoid the universalizing of the masculine. While there are factors that differentiate amongst women, sex and gender differences between men and women must first be appreciated before differences amongst women can be.[14]

In the context of sexual violence in Kenya, it is important analyze the specific female experiences that arise as a result of the failure by police to enforce the law on sexual violence. Women and girls ought to be free from sexual violence; they also ought to have the freedom to bodily integrity. The (dis)functioning of the police is a barrier that limits them from enjoying these freedoms. When it comes to sexual violence, the issue is not only the violation of negative freedoms by the police- as we have seen, the police in some instances sexually abuse and violate women and girls; and also the police limit and even deny the right of access to justice for victims of sexual violence- but also the failure by the police as well as other government institutions to take positive measures to stop sexual violence. It is indeed the responsibility of the state to ensure that the police service functions properly in order to ensure that women and girls are able to enjoy the freedom from sexual violence.

Proper functioning of the police service within the context of sexual violence entails specific things. Firstly, the ability of the police to treat victims of sexual violence with respect and sympathy; secondly, the ability of the police to carry out investigations in a manner that does not compromise the evidence or intimidate the victims; and thirdly, the ability of the police to remain neutral without taking sides which may favour the perpetrators. It is not sufficient for the freedom from sexual violence to be provided under both the Constitution of Kenya 2010 and the Sexual Offences Act, 2006, if the state does not take positive measures to ensure that the police are able to deal with sexual violence in the proper manner.

Consider the cases of the women who experienced sexual violence during the post-election violence of 2007/08.[15] Not only did the police fail to record, investigate and prosecute claims of sexual violence, but in many instances, the police were the perpetrators of sexual crimes against women. Using their position as security agents, they sexually abused victims of the post-election violence who had allowed them into their homes or had gone to them seeking refuge.

13 Catherine A MacKinnon, 'Sexuality, Pornography and Method: Pleasure Under Patriarchy' (1989) 99 (2) Ethics 314.

14 This is an important point to note because gender difference theories have been perceived as essentializing women; that is, these theories fail to appreciate that there does not exist an essential female core which unites all women in a universal bond of sisterhood. Women are differentiated by ethnicity, race, class, age, disability. However, even these differences amongst women cannot be seen and appreciated unless women are given a voice; a female voice that challenges male dominance. The starting point must therefore be the appreciation of gender difference; and then other differences may be analyzed once male dominance has been exposed and challenged. For detailed analysis on this point see Emily Grabham and Davina Cooper and J Krishnadas and Didi Herman, Intersectionality and Beyond: Law, Power and the Politics of Location (New York, Routledge Cavendish, 2009).

15 The facts of these abuses are contained in Commission of Inquiry into Post-Election Violence (CIPEV) -2008, see also Kithaka (n 9).

Similarly, in this 160 Girls' Decision, one of the named perpetrators is a police officer[16] The story of Liz[17] gained widespread media coverage not only because of the shocking and inhumane way in which the 16 year old girl was attacked (she was gang raped and thrown into a pit latrine, as a result of which she suffered fistula and is now wheelchair bound) but also because the police dealt with the complaint by ordering three of the suspected rapists identified by the victim to slash grass around the police station and then set them free. Liz was raped in August 2013, but on November 2nd 2013, the police indicated that prosecution of the case against her attackers would be futile due to insufficient evidence. In February 2014, following weeks of protests by women's rights groups across the country, the director of Public Prosecution announced that the case would be proceeding to court.[18]

This essay argues that the appalling way in which women and girls are treated when they seek justice for sexual crimes is as a consequence of two key issues: the first is institutional poverty within the police service and the second is the lack of cultural transformation within the Kenyan society. The state must take positive steps to address institutional poverty within the police service and to spearhead cultural transformation so that women and girls in Kenya truly have the freedom from sexual violence.

The capabilities approach would also go a long way in enabling courts to make decisions that go beyond mere proclamations and declarations of the existence of rights. The court in the 160 Girls' decision relied heavily on principles and norms of the International Human Rights framework, and I argue that the human rights framework presents challenges which contributed to the short comings of the decision.[19] On the one hand, the court was clear that the petitioners have the right to be free from sexual violence and to seek and receive justice in the event that that right is violated. On the other hand, the court was less willing to determine whether in fact the Minister for Justice, National Cohesion and Constitutional Affairs, and the Director of Public Prosecutions have particular positive duties in protecting, promoting and enhancing those rights, and whether by failing to undertake these positive duties the two government institutions had violated the rights of the petitioners. Consequently, the court simply made a determination, which was nothing more than an acknowledgment, of the rights that the petitioners have under the Constitution and International and Regional Human Rights

16 The 4th petitioner, E.K.M., was defiled by an Administration Police Officer while aged 12 years. She conceived as a result of the rape. The perpetrator admitted the offence, and was formally charged in court. However, the police frustrated the criminal proceedings by demanding money from the victim and her family, failing to avail the investigation files in court and failing to avail DNA results on time. As a result of these failures on the part of the police, the perpetrator remained free and was therefore able to harass and intimidate the victim and her family.

17 See 'Equality Now: Ensure Justice for 16-year-old Liz & All Victims of Sexual Violence' <http://www.equalitynow.org/take_action/adolescent_girls_action541> accessed 17 March 2014.

18 Timely investigation and collection of evidence is important in cases of sexual violence, because the nature of the evidence is such that it is easily destroyed with time. Further, failure to arrest suspects who are known to the victim means that they are free to threaten and intimidate the victim and her family into withdrawing the complaint. For further details on the story of Liz's rape see: Olive Burrows, 'DPP Orders Prosecution in 'Liz' Rape Case' *Capital News* (6 February 2014) <http://www.capitalfm.co.ke/news/2014/02/dpp-orders-prosecution-in-liz-rape-case/> accessed 17 March 2014.

19 The limitations of the human rights approach have been outlined in Nussbaum (n4).

Law frameworks. The court neither determined how those rights should be realized, nor the relevant government institutions that should take the necessary positive steps to ensure the realization of those rights.

The capabilities approach would be useful here to supplement the human rights language, because it requires that the courts go beyond a simple acknowledgment of an entitlement, to making a determination as to how that entitlement may be achieved. That means that if we are to take Nussbaum's[20] list of central human capabilities in this context, the court would have to make a determination with regard to bodily integrity, that is, "*the ability to… be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction*." Therefore, the court would have to determine whether women and girls are capable of enjoying the freedom of bodily integrity in Kenya, and if it finds that this capability is limited, it would then have to consider the barriers that produce this limitation and the ways in which those barriers may be removed. This framework is more useful in addressing the concerns and needs of women, because it requires the identification of the factors which produce the suffering of women and girls and the development of strategies to remove those factors.

Having noted the limitations of the police as well as the courts in protecting and promoting the freedom from sexual violence as enshrined in the Constitution of Kenya 2010 and the Sexual Offences Act, 2006, and having highlighted the specific ways in which the language of human rights contributes to this limitations, I will now make the case for state intervention in two critical areas already identified above, that is institutional poverty within the police force and cultural transformation within the society as a whole. State intervention within these areas would mean that the barriers which limit the enjoyment of the freedom from sexual violence by girls and women are removed at the very best, or at the very least lowered.

IV. THE EFFECT OF INSTITUTIONAL POVERTY ON WOMEN AND GIRLS

In the section above I argued that the proper functioning of the police within the context of sexual violence entails specific things, and I identified three specifically. I also argued that because the police do not function properly, this limits the freedom that women and girls ought to enjoy from sexual violence. So far, great emphasis has been placed on the need to go beyond merely recognizing the freedoms that women and girls ought to enjoy, and developing strategies for the eradication of barriers that limit their enjoyment of those freedoms. Having highlighted the lack of proper functioning on the part of the police as a barrier to the enjoyment of the freedom from sexual violence by women and girls, it important to now consider the principal factors that contribute to this failure by the police and how these may be addressed.

I would, therefore, like here to draw the link between poverty within the police service and the suffering experienced by women and girls who face sexual violence. Sen's[21] definition of poverty as the deprivation of capability and not the mere lack of monetary

20 Nussbaum (n3). See her list of Central Human Capabilities in 41.

21 Sen (n 4).

funding is useful in this context. The connection between lack of monetary funding for the police, and the deprivation of the freedom from sexual violence is the point emphasized here. Poverty here refers both to the lack of monetary funding to allow efficient service by the police on the one hand; and the deprivation of women's capability to be free from sexual violence on the other.

Thus, institutional poverty here refers to the minimal funding which the state allocates to the police service, which in turn leaves the police service unable to function effectively as an institution and thus leads to diminished enjoyment of the freedom from sexual violence. This institutional poverty is seen clearly in the 160 Girls' Decision, whereby in the case of the 1st petitioner, a 5 year old girl who was defiled by her uncle, the police demanded Kshs. 1000 before they could intervene and refused to assist the 12th petitioner to rescue the first petitioner. Similarly, in the case of the 7th petitioner, the police demanded Kshs. 1000 for fuel and as a precondition for taking the 7th petitioner to hospital after she was defiled by her neighbor at the age of 8 years.

Essentially, economic arrangements must be made for the realization of rights and freedoms. However, the way in which economic arrangements are generally made reveals that gender concerns are hardly ever given priority.[22] Research shows that while the state is committed to addressing gender violence, including sexual violence, this commitment is not matched with the necessary budgetary allocation. Indeed, within the police force, it is the departments which were created and mandated to deal specifically with gender concerns that do not have any funding at all, and this underscores the argument that women are generally marginalized within frameworks for economic arrangements. [23] The gender desk is a strategy that the government established in 2004 in all police stations to address gender violence.

It is therefore surprising that as at 2009, the Ministry of State for Provincial Administration and Internal Security did not have within its budget provision for the gender recovery desk in police stations.[24] In addition, the gender desks are not necessarily manned by police officers who have received training on gender violence, resulting in the ill treatment of victims.[25] Moreover, medical personnel who are required to offer medical assistance to victims who report gender violence to the police are rarely available.[26]

The burden of institutional poverty is felt most acutely by women. Already, women are at a disadvantage because the issues that affect them specifically, the so called women's issues, are rarely given priority in the allocation of economic resources. The women in development movement indeed showed us that the allocation of economic resources to women is beneficial to the society as a whole and not only to women.[27] This movement

22 Ester Boserup, *Women's Role in Economic Development* (London and New York, Earthscan 1970).

23 Frederick Ombwori, *Status of the Gender Desks at Police Stations in Kenya: A Case Study of Nairobi Province* (Institute of Economic Affairs, 2009).

24 ibid.

25 ibid.

26 ibid.

27 Shahrashoub Razavi and Carol Miller, *From WID to GAD: Conceptual Shifts in Women and Development Discourse* (United Nations Research Institute for Social Development, Geneva 1995).

placed great emphasis on the productive nature of the roles women play in society. Consequently, it was expected that the allocation of economic resources to women would yield some sort of economic return.

There are overlaps between the core tenets of the women in development movement and the capabilities approach, because under capabilities, it is stressed that improving capabilities would empower people to earn more income; and vice versa, income is a major determinant of the capabilities that people can have. The capabilities approach goes further however, and emphasizes that the end of poverty is not simply the presence of income or money, but rather, poverty ends only when people are free from deprivation.

This means that there is dire need to increase budgetary allocation to the police force, but this on its own would not improve the way in which the police handle complaints of sexual violence against women. While indeed more money going into the police service may ensure that the gender desk receives funding, funding on its own will not ensure that the gender desk functions as it should or that the police will handle claims of sexual and gender violence properly. Consequently, increased funding for the gender desk must be accompanied by a change in the attitudes of the police. That is, the police must begin to take women's pain and suffering seriously. In the next section, I demonstrate that there is a need for the state to spearhead the process of cultural transformation.

V. LACK OF CULTURAL TRANSFORMATION

Gender violence has been described as a human rights violation which the society generally tolerates.[28] Here, I question why sexual violence, or indeed any form of gender violence, is socially tolerated, and I argue that societal attitudes about sex in general inform and shape the attitudes which the police have about sexual violence. Culture, which is '*a system of inherited conceptions expressed in symbolic forms by means of which men and women communicate, perpetuate, and develop their knowledge about and attitudes towards life*,'[29] is the main factor which informs and shapes the attitudes of the police towards women and girls who experience sexual violence.

I am by no means referring to police culture, but to the Kenyan culture more generally, because this wider Kenyan culture is what makes and shapes police culture. The starting point for cultural transformation framework is that cultures are formed, and because they are formed, they can also be transformed.[30] Therefore, cultural transformation is an essential component of the strategy that the state ought to employ in addressing sexual violence, because it is a process by which cultures may be transformed in order to incorporate within them the respect for human rights norms.

28 Ombwori (n 23); RA Odhiambo and M Owuor, 'Gender Equality' in PLO Lumumba and Morris K Mbondenyi and SO Odero (eds), *The Constitution of Kenya: Contemporary Readings* (Nairobi, Law Africa 2009).

29 This definition of culture by Clifford Geertz, *The Interpretation of Cultures* (New York, Basic Books 1973) is adopted and cited by AA An-Na'im and J Hammond, 'Cultural Transformation and Human Rights in African Societies' in AA An-Na'im and J Hammond (eds), *Cultural Transformation and Human Rights in Africa* (London and New York, Zed Books 2002).

30 An-Na'im and Hammond (n 29).

I have already stated that the capabilities approach is one that would work better for women, yet here I employ cultural transformation, an approach which argues for the incorporation of human rights norms into African cultures. I do this because the capabilities approach does not propose to do away with the human rights paradigm, but rather the former is complementary of the latter, providing solutions to key issues such as the failure of human rights norms when it comes to enforcement and realization and the universality of human rights in the context of cultural relativism.[31] Indeed, human rights approaches have been criticized as being impositional- that is the imposition of one (Western) culture upon another (African) culture.[32] In particular, women's human rights paradigms have been criticized as Western norms, which have no place in African cultures.[33] Culture on the other hand, is largely responsible for the subordination and violation of women.[34]

The process of cultural transformation is concerned with the way in which human respect and dignity may be incorporated into African cultures in a manner that does not undermine these cultures, and these are the very same concerns within the capabilities approach. Indeed, Sen makes the case for reasoned social progress, highlighting the importance of societal values in determining human behaviour. The cultural transformation framework is essentially concerned with the ways in which societal values can incorporate human rights norms so that human behaviour displays such virtues as empathy and respect. I therefore argue for the incorporation of the women's human rights, and in particular those that are contained in Articles 3, 5, 6, 15 and 16 of CEDAW into Kenyan culture. These norms would promote the virtues of respect and empathy for women and in turn this would lead to the ending of the sexual objectification of women.

An-naim and Hammond[35] argue in making the case for cultural transformation in African societies, that it is a process by which societies internalize human rights norms in order to influence change within their given cultures. In this context, cultural transformation is useful in analyzing the role that the society in general plays in determining the way in which the police handle claims of sexual violence. A key aspect of cultural transformation is the internal process of change;[36] that is a process of self-reflection. In this context, cultural transformation would entail that the society questions its ideas and attitudes about sex in order to understand how these ideas and attitudes are reflected in the police service's attitudes regarding sexual deviance.

This means that in order to know what is wrong about the attitude of the police with regard to sexual violence; we must as a society know what is right about our own attitudes with regard to "normal or non-violent sex." The idea to appreciate therefore is that the police service is to a significantly large extent a mirror reflection of the society which it serves.

31 Nussbaum (n 3).

32 Jack Donnelly, *Universal Human Rights* (New York, 3rd edn, Cornell University Press 2013).

33 *Chandra T Mohanty, '*Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) 30 Feminist Review 61.

34 Odhiambo and Owuor (n 28).

35 An-Na'im and Hammond (n 29).

36 An-Na'im and Hammond (n 29).

It is therefore necessary to understand the attitudes that the society holds towards sex in order to understand why the police disregard and ignore claims of sexual violence. Indeed, MacKinnon argues powerfully that the '*sexual objectification of women begins in the world then in the head*.'[37]

What then are our societal attitudes about "normal, non-violent sex"? Better still, what are our societal attitudes about female bodies and female experiences of sex? The examples of polygamy, prostitution and fidelity given here have been obtained through popular Kenyan media and they are indicative of societal attitudes concerning female sexuality. Let us start by looking at polygamy. In our polygamous society, it is accepted that men's sexuality cannot be satisfied by one woman. [38] It is therefore assumed that a woman needs only one man to satisfy her; that one man can satisfy a harem. Fidelity is a key requirement in polygamous unions; that one man will be faithful to more than one woman and that several women who must share the affections of one man will be faithful to that one man. Polygamy is then justified using economic arguments which show that it is as beneficial to women as it is to men![39] Conveniently, such arguments reveal the economic benefits of polygamy to women while steering clear of its sexual unfairness and inequity.

Again when we think of prostitution, it is evident that as a trade, it exists primarily to satisfy male sexual desire, and economically it may benefit women. Yet, what sexual benefit do women get out of prostitution? While soliciting for prostitution, living off the earning of prostitution, pimping and brothel ownership are criminalized under the Penal Code, it is nonetheless female sexual workers who are primarily arrested by the police for offences related to prostitution.[40] The men who buy the services of prostitutes are not targets under the law.[41]

37 MacKinnon (n 13) 315.

38 The general ideas of the Kenyan society on polygamy are available through the media. See for instance Classic FM, Maina and King'ang'i in the Morning discussion on 18th March 2014, where the general message was that the entrenching of monogamy in the law would give women unnecessary power; K24 Alfajiri Interview Social Hour on 20th March 2014, where the general message was that women push men into polygamy by failing to provide within the home a pleasurable environment for the man, so where one woman fails to please a man, then he is pushed to seek pleasure from another woman; Citizen Nipashe, with Bi Msafwari on 15th March 2014, where the general message was that a good wife must be one who does household chores without delegating such important chores as cooking and childcare to hired help, even though she is formally employed. Also, a good wife remains attractive, even after child birth. And where she fails in these household duties, she gives her husband a reason to have relationships with other women-women who can give him the pleasure that is lacking in his own home. All these ideas seem to place the responsibility for male polygamy on female failure. At what point then should men take responsibility for their actions, particularly when those actions result in the suffering of the women and children involved?

39 For a review of literature on the economic justification for polygamy as well as a detailed analysis of this justification, see DR White and ML Burton, 'Causes of Polygamy: Ecology, Economy, Kinship and Welfare' (1988) 90 American Anthropologist 871.

40 J Okal, MF Chersich, S Tsui, E Sutherland, M Temmerman and M Luchters, 'Sexual and Physical Violence against Female Sex Workers in Kenya' (2011) 23(5) AIDS Care: Psychological and Socio-Medical Aspects of HIV/AIDS 612.

41 ibid.

Still, in our society, it is appreciated that fidelity is not masculine; and in the same vein, infidelity is not feminine.[42] It is expected that men can and will have more than one sexual partner, even when they have made vows to have only one. It is expected that women will have only the one sexual partner, even where no vows have necessarily been made. Women's bodies and feminine sexuality exist to satisfy male bodies and male sexuality; to give men pleasure, even where giving that pleasure will result in the suffering of women. In this society, women are sexually objectified, even in instances of non-violent sex. When women are sexually objectified, and when in society that sexual objectification is perceived as normal, then even instances of sexual abuse and violation cannot be taken seriously.[43] Addressing sexual violence while ignoring the foundational basis of the sexual objectification of women means that we deal only with the symptomatic effects of the deeper underlying problems.

With regard to fidelity, it is important to state here that my aim is not to call for the sexual liberation of women as some feminist critiques have done.[44] These critiques argue (in a rather conflated view of equality as sameness) that gender inequality is the repression of female sexuality and therefore gender equality would be achieved if women were allowed to express their sexuality in very much the same way as men. Such arguments promote the idea that women should be able to express their sexuality without any constraint even where such expression is likely to be detrimental to other women.

These types of feminist critiques are necessarily flawed, because they fail to appreciate and address the dangers posed by the acceptance of particular sexual ideals and choices: by arguing that there should be no constraints on female sexuality, implicitly this means that there should be no constraints on male sexuality, which is an extremely dangerous position when understood from the point of view of sexual violence against women. A core argument of the capabilities approach[45] is that it is possible for people to make choices that are not self-centered and individualistic, but rather choices that would benefit the society. This means that women and men are capable of choosing to express their sexuality in ways that promote respect and empathy for each other. Such a choice would be made not for the purpose of promoting self-centered interests, but for the purpose of promoting values that are beneficial to the society.

It is also important to note that prevailing societal attitudes towards female sexuality inform the law on sexual violence.[46] In the Kenyan legal system, rape is therefore defined,

42 The media provides the general ideas on fidelity as well. See for instance NTV Mentality, Episode 2, 'Do Good Guys Finish Last? and NTV Mentality, Who are the Women to Date and Who should you Avoid?' <http://www.youtube.com/watch?v=j12NmoGzT7A> accessed 20 March 2014; K24 Alfajiri Interview Social Hour, 'Infidelity and Security in Relationships' <http://www.youtube.com/watch?v=5y9Khe2CRuo> accessed 20 March 2014.

43 MacKinnon (n 13).

44 Wendy McElroy, XXX: A Woman's Right to Pornography.(New York, St Martins Press 1995); Carol Queen and Lynn Comella, 'The Necessary Revolution: Sex Positive Feminism in the Post-Barnard Era' (2008) 11(3) The Communication Review 274.

45 Sen (n 4).

46 K. Burgess-Jackson, *Rape: A Philosophical Investigation* (Aldershot, Dartmouth Publishing 1996); L. Du Toit, *A Philosophical Investigation of Rape: The Making and the Unmaking of the Feminine Self* (New York, Routledge 2009). Du Toit makes the strong point that in her investigation on the etymology of rape, there is no recognition of the harm that women suffer as subjects in their own right as a result of rape.

under the Sexual Offences Act, to mean a man having sex with a woman without the consent of the woman.[47] What then is the deviance? That conceptually the woman was not his to have? Or that physically and emotionally he caused her unimaginable pain and suffering? If the deviance lies in the conceptual definition of rape, then the deviance is that the man who rapes has taken that which is not his [and therefore belonging to another man?]. If the deviance lies in the causing of unimaginable physical and emotional pain and suffering, then why is rape defined from the standpoint of what the perpetrator perceives of the situation (whether or not the victim consents to his actions) instead of being defined from the standpoint of the suffering and harm occasioned upon the victim by the actions of the perpetrator?

If these are the general perceptions about women and their sexuality; if through sex women are relegated to a second class status, how can the police take seriously sexual violence against women? If the society normalizes the sexual objectification of women, how can the police take seriously the suffering occasioned as a result of such objectification? Sexual violence is about sex after all; so how can the police take seriously sexual violence against women if we as a society do not take women seriously in the context of the "normal" sex?

In this regard, I argue that police reforms- training on sexual violence, greater budgetary allocation, better infrastructure for the gender desks, and such other measures- would be grossly insufficient and would not necessarily ensure that women and girls who experience gender violence are able to access justice. Societal attitudes concerning women's sexuality must first be altered; women must first be seen as human beings, not sexual objects. The suffering women experience as a result of unfair cultural practices can only be made visible and appreciated when they are no longer sexually objectified.[48]Cultural transformation in this regard would entail acceptance by society of human rights standards and the incorporation of such standards into given cultures.

Thus, while the Constitution of Kenya provides for the non-discrimination of women under Article 27, and the Kenyan state has ratified a number of International and Regional Human Rights Instruments which provide for the recognition and protection of human rights generally and those which provide specifically for the protection of women's rights, such as the Convention on Elimination of all forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), this in itself is simply a starting point.

Cultural transformation is not only achieved through the enactment of domestic laws that recognize the rights and freedoms of all persons or through the ratification of an international Human Rights instrument. People within the society must accept and put

47 Section 3 of the Sexual Offences Act defines rape as follows: "A person commits the offence termed rape if he or she causes penetration with his or her genital organs and the other person does not consent of the penetration or the consent was obtained by force." This definition does not take into consideration the harm and suffering occasioned by rape. By providing specifically in the meaning of rape the harm suffered by the victim, focus would shift from the pleasure seeking actions of the perpetrator, to the harm those actions cause.

48 MacKinnon (n 13).

into practice alternative norms which embody the respect and protection of fundamental freedoms and capabilities. I have already indicated that self-reflection is an essential aspect of the internal process of transformation; self-reflection is both individual and societal. The Kenyan state has not paid sufficient, if any, attention to this latter aspect of cultural transformation, and for this reason, it has therefore been complicit in allowing for the normalization of the sexual objectification women. Consequently, the Kenyan state has failed to protect women and girls from sexual violence. The state must therefore spearhead the process of cultural transformation, but by no means does this responsibility vest only in the state, but rather it vests in all persons in Kenya, individually and communally.

While the cultural transformation approach brings us only this far (after having shown us the shortcomings of human rights approaches that require states to take up human rights obligations, without requiring cultures to change in order to respect the human rights norms that form the basis of state obligations) it is an important strategy none the less. The process of change begins with the appreciation of the bottlenecks that holdback change from happening. Further, the roadmap to the process of self-reflection and the process of internalizing human rights norms ought to be home grown. It is then for the Kenyan society to determine how CEDAW, which is part and parcel of our laws, can become part and parcel of culture.

VI. CONCLUSION

The 160 girls' decision has demonstrated that there are limits to what the law can do in order to ensure the protection of the rights and freedoms of women and girls. Using the capabilities approach, I have shown that it is essential to move beyond the recognition of rights through the enactment of laws, as this only amounts to giving people rights on paper. It is important to develop strategies for the realization of those rights. Indeed, while it is evident that the realization of rights requires financial provisions, again, this on its own is not sufficient. Rights must then be written in peoples' hearts and minds; they must form part of the societal values and they must inform human behaviour.

I have therefore made the case for cultural transformation, as a process through which society can internalize and incorporate human rights norms as part and parcel of its culture. I have problematized the normalization of the sexual objectification of women, and argued that the isolation of sexual violence from the societal normalization of sexual objectification would necessarily limit the potential of the law in addressing sexual violence against women. I argued that sexual objectification is foundational to sexual violence while sexual deviance is only symptomatic of sexual objectification. The law is bound to fail if it focuses only on the symptomatic while ignoring the foundational. However, the foundational cannot be addressed through law alone, hence the need for cultural transformation.

This essay has stopped short of developing a roadmap through which communities may internalize human rights norms. Societies cannot be told *how* to *internalize* human rights norms; this would necessarily defeat the purpose for which the process of internalization has been proposed, which is to ensure that societies, through their own human agency, are able to appreciate and accept human rights norms as part of their cultures.

GETTING IT RIGHT: TOWARDS SOCIALLY SUSTAINABLE EXPLOITATION OF THE EXTRACTIVE INDUSTRY IN KENYA

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…a transparent and inclusive mining sector that is environmentally and socially responsible…which provides lasting benefits to the community and pursues an integrated view of the rights of various stakeholders (emphasis supplied)…is essential to addressing the adverse impacts of the mining sector and to avoid conflicts induced in mineral exploitation. Public participation in assessing the environmental and social impacts and the enforcement of impact assessment requirements is important in tackling these challenges.

-The Africa Mining Vision[1]

ABSTRACT

In the quest to enhance their material self-sufficiency, nations are supposed to take cognizance of the implications of their endeavours. This therefore calls for the adoption of sustainability attitudes by all the players in the various sectors of the economy. Being one of the drivers of the Kenyan economy, the petroleum and natural gas industry is at the opportune moment to churn a path for a successful future. The adoption of sustainable practices by this industry at its tender age will see to it that its future won't be coupled with the problems that have arisen in the past in other countries where petroleum and natural gas discoveries have been made. Social sustainability is particularly important among the other pillars of sustainability and the other pillars are predicated upon it. The petroleum and natural gas industry therefore has to take this into consideration in order to avert conflicts in future with communities amongst whom they operate.

I. INTRODUCTION

Recent discovery of oil in Kenya has put the country on the global map when it comes to resource-endowed countries. The expectation is that Kenya is poised to join the list of oil producing countries. These discoveries originally in Turkana in 2012 occurred at a time when the global oil prices were high and the returns from oil was also high. Although the global crude oil prices have since gone down to as low as 48 US dollars per barrel, these are expected to be temporary. In the mid to long-term, therefore the discoveries still elicit excitement and prospects for high economic returns and thus positive implications for the Kenyan economy.

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1 African Union, Africa Mining Vision, February 2009, Quoted in 'Mining in Africa: Managing the Impacts', available at <http://www.africaminingvision.org/amv_resources/ISGbulletin5.pdf> accessed 20 August 2014.

The discoveries have, however been accompanied by other challenges. These arise from the global discourse as to whether oil discoveries are a blessing or a curse. While the arguments in favour of blessing rely on the returns from the industry, those against and in favour of such discoveries being more of a curse rely on evidence from many countries where those discoveries have been accompanied by conflict, human rights violations and distortion of the economy. This latter phenomenon is referred to as the *dutch disease.* The process results to a situation where a boom in a natural resource sector[2] results in reduction in growth of other sectors.

As a result of the phenomenon of the resource curse or the *dutch disease*, discoveries of such natural resources as oil is normally accompanied by a broad array of socio-economic difficulties. The origin of the term was the economic consequences of the large natural gas find in the Netherlands in the late 1950s, and the resulting positive balance of trade, the strengthening of the currency and rising wages. The strengthening of the currency resulted in reduced the competitiveness of non-natural gas exports on international markets, and thus reduced the volume of exports of these goods, while at the same time leading to increased imports due to there being cheaper. In other times such discoveries have resulted in other ills like rent-seeking behaviour, fluctuations in the economy due to overreliance on oil revenues, weakening of institutions and increased non-accountability of the leadership.

Amidst this, there have been calls for a need to embrace sustainable attitudes in seeking to exploit these resources. This has come against a backdrop of the need to ensure maximum economic growth and development, while paying attention of not just the environmental but also social implications of the exploitation of the extractive industry. Against this background, this paper assesses the social implications of exploitation of oil and natural gas in Kenya. A case built for a socially sustainable petroleum and natural gas industry in Kenya. The paper cogently canvasses the issues in four interrelated parts. The first part lays a basis to the discussions by looking at the theoretical framework and some of the nomenclature that have been used to describe the human situation. Part two examines the concept of sustainability and more specifically, social sustainability. The third and penultimate section looks at the extractive industry in Kenya and social challenges emanating especially from the petroleum and natural gas industry.

The concluding part will attempt to build a case for a socially sustainable petroleum and natural gas industry in Kenya. It will be argued that social sustainability is ineluctably necessary in this industry if there is to be avoidance of conflicts with the communities amongst whom exploration and extraction activities are taking place.

II. BACKGROUND: LAYING A BASIS

Past experiences in several countries have shown that among the three pillars of sustainability, social sustainability is very essential in ensuring that a project is acceptable among members of the group to be affected by such projects. Social sustainability thus

2 See Ismail Kareem, 'The Structural Manifestation of the 'Dutch Disease': Experience from Oil Exporting Countries' IMF Working Paper, WP/10/103, <http://www.resourcegovernance.org/sites/default/files/Dutch%20Disease%20%28IMF%29%20Newest%20Version.pdf> accessed 20 August 2014.

forms an important pillar in the quest for sustainability generally. Issues on sustainability have become matters of public concern and corporates have sought to ensure that they conduct their activities in a socially responsible manner.

Societies exist around material objects and process and the stability of a society will thus be hinged on the nature of the relationships between the society and these material objects. Law has in the past been seen to be an important tool in guiding the manner in which these societies relate with the material objects within their reach. Law has therefore been seen to be a reflection of the existing relationships and also as a tool for the shaping of these relationships.

Law has in the past played the role of shaping such relationships and it has particularly put in place measures on how various entities are to interact with resources which are available for their use. These entities have in the past been required by law to ensure that their activities are aligned with the provisions of the law and there have been punitive measures to ensure compliance. Overtime, many entities have adopted voluntary measures aligned towards ensuring that their activities do not result to negative impacts on the society, economy or the environments in which they operate.

The realization by these entities that there is a need to ensure that their activities are acceptable to the communities to whom these activities are to be undertaken has brought into place social sustainability standards to be adopted by these entities. Citizens have also joined efforts in pushing for socially sustainable activities by these entities. This can be attributed to the fact that sustainability is a concept that is germane to many African societies and thus they can easily relate well with this concept.

III. THEORETICAL FRAMEWORK

The Constitution of Kenya mandates Parliament to enact legislation to ensure that investments in property benefit local communities and their economies.[3] This directive is out of the realization that investments at the local level have the potential but does not always translate to tangible benefits to local communities. This is at the heart of push and pull between investors and community members, who invariably only share in the negative impacts of any investments in their localities but rarely get meaningful employment, social investments or other direct benefits from such investments.

While the need for the investments to benefit communities is accepted, the challenge is always the modalities for ensuring the desires are actualized. In the Kenyan context this becomes even more urgent with the discoveries of oil in rural parts of Kenya. The discussions normally take two approaches. On the one hand is the process of making decisions and on the other hand the dividends from the investments. One avenue for ensuring that there is involvement is through including community participation in the development projects. Participation generally is difficult to define, so is the term community. It follows, therefore, that defining a term that comprises these two difficult terminologies is not easy.

3 Constitution of Kenya, 2010 , Article 66 (2).

Despite the difficulty in definition, the World Bank has proposed a definition of community participation as "an active process by which beneficiary/client groups influence the direction and execution of a development project with a view to enhancing their well-being in terms of income, personal growth, self-reliance or other values they cherish."[4]

Despite its stated benefits, there is also opposition to participation of communities in development projects. Arguments against participation range from delays and expense, community dynamics and lack of appreciation of the technical aspects of project implementation. However despite the obstacles to and arguments against community participation, the concept still has a lot of support since, "development in the full sense of the word is not possible without appropriate community participation."[5]

There are several theories that have been propounded to justify the need to develop good relationships between the corporate entities and the communities among whom they operate. One of the theories is the legitimacy theory. Proponents of this theory argue that the actions of an entity are supposed to be desirable or appropriate within particular socially constructed systems of norms, values, beliefs and expectations.[6] Corporates are therefore supposed to be seen to contribute towards causes that are of benefit to the community in which they operate. This can be related to a social contract between the community and the corporates where the corporate is allowed to operate among the community and in return the community will benefit from the activities of the corporate entity.

Once this legitimacy has been gained, the corporates are usually in a better position to maintain long-term relationships with the community. Corporates are therefore supposed to strive to ensure that there is an existing congruence between their activities and the norms in the wider society in which they operate. Legitimacy is therefore not a characteristic of the corporation, but a measure of societal perceptions of corporate behaviour.[7]

The society always expects the corporates operating amongst them to behave in a certain way. The activities of these corporates will lose legitimacy when they are not in accordance with the expectations of the community. Low legitimacy will have particularly dire consequences for an organization, which could ultimately lead to forfeiture of their right to operate.[8] A corporate is therefore supposed to establish systems to monitor its legitimacy levels among the community.

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4 Paul Samuel, Community Participation in Development Projects: The World Bank Experience, World Bank Discussions Papers Number 6, 1987, 2 <http://www wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/09/21/000178830_98101903572729/Rendered/PDF/multi_page.pdf> accessed 20 August 2014.

5 L Botes and D Rensburg, 'Community Participation in Development: Nine Plagues and Twelve Commandments' (2000)35(1) Community Development Journal 58.

6 MC Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches'(1995) 4 (3) Academy of Management Review, 571-610.

7 ibid.

8 Matthew Tilling, 'Refinements to Legitimacy Theory in Social and Environmental Accounting' <http://www.flinders.edu.au/sabs/business-files/research/papers/2004/04-6.pdf> accessed 24 July 2014.

Various stages of legitimacy exist and a corporate entity can be in any of the four phases with regard to its legitimacy.[9] The first phase entails the corporate entity establishing legitimacy within the community. This mostly happens during the early stages of corporate entity's inception or entry into a community to engage with a project. The corporate entity is therefore required to show to the community that it has the relevant competence to carry out the activities it is meant to.

The second phase entails maintaining legitimacy. The corporate is in this case required to ensure that the activities that it undertakes assures the community of the corporate's legitimacy. The potential challenges to be faced by the corporate are henceforth to be foreseen and dealt with. The corporate should also recognize that expectations by members of the community are dynamic and change over time and it should also align its policies towards this. This requires constant engagement and levelling of expectations between the community and the corporation. The third phase entails the corporate extending legitimacy. This manifests itself where an already established corporate extends the goodwill it enjoys elsewhere to a new community. The last phase entails defending legitimacy and this is where a corporate entity attempts to counter a threat directed towards its legitimacy.

The other theory that has been used is the psychological contract theory. This theory suggests that corporates and communities have implicit expectations for each other which remains beneath the surface and is dynamic in character.[10] Corporates are therefore required to recognize the existence of these expectations and align their activities towards meeting these expectations.

In carrying out their functions, most corporate entities usually work towards a certain end. This end, in most cases, usually seeks for the expansion of opportunities and the betterment of human life. Various nomenclatures have been advanced for this "end" and much has been discussed concerning the same. In undertaking the work there are varying ideas of what the desire end is. While for some the end is increased development and profit maximization, there has emerged consensus that in the development process, benefits must transcend the economic realm and consider both social and environmental implications, hence the concept of sustainable development.

IV. THE DEVELOPMENT TRAJECTORY

Many countries, especially in the developing world continue to face many challenges in the quest to develop. The World Bank annually publishes the *World Development Report*, which explores a particular theme in the process of development. One of the most relevant reports for this article is the 1991 report, titled *The Challenge of Development*.[11] The report made the point that development remained the most important challenge facing the entire global, with at least 20% of the world's population living below one dollar

9 ibid. 6.

10 Uwafiokun Idemudia, 'Community Perceptions and Expectations: Reinventing the Wheels of Corporate Social Responsibility Practices in the Nigerian Oil Industry' <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8594.2007.00301.x/full> accessed 24 July 2014.

11 World Bank, *World Development Report 1991: The Challenge of Development* (New York, Oxford University Press 1991).

a day, the standard categorization of poor people. Despite efforts, many countries still have not made sufficient progress in their development path. Many of these countries have thus continued to find themselves vulnerable economically and this has had global consequences.

Mass poverty in underdeveloped and developing new states has been acknowledged to be a global phenomenon.[12] These States continue to struggle to establish the necessary structures and also getting the requisite manpower to drive their economies. The pace of progress in these countries has thus been slow with resultant increasing poverty levels. The need to address levels of development has led to the universal commitment to global development due to the realization that this is a shared responsibility of everybody.[13] However in the process of realizing this commitment there is debate as to what type of development is necessary. The 1991 World Development report noted that while the future of developing countries lies in their hands, there is need to ensure that the policies and institutions put in place to spur development ensure that the market has space but that the market is regulated.[14] This has led to the emergence of several concepts in the development jargon.

A. ECONOMIC GROWTH

One of the core tenets of development has in the past been economic growth. Efforts have been made to ensure that opportunities for income generation are generated for individuals and this is meant to further the goal of increasing the levels of development.

Economic growth is to be distinguished from economic development. While the latter relates to the quantitative change in what or how goods and services are produced through shifts in resource use, production methods, workforce skills, technology, information, or financial arrangements,[15] on the other hand, the definition of economic growth as offered by Professor Kuznets refers to sustained increase in its population and product per capita.[16] Growth in this sense is seen to be a quantitative concept. In this sense therefore, economic growth is required to see to it that the welfare of human beings is improved and by this, human satisfaction is to be met.

The concept of economic growth should thus be seen to reflect on the variables of economic development. Such variables have in the recent past been seen to include human welfare. The concept of economic growth therefore necessitates the introduction of appropriate measures to ensure that the change in human welfare is correctly measured.

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12 TN Singh, 'Law's Concern for the Backward and Poor: An Indian Perspective' in Yash Vyas et al (eds), *Law and Development in the Third World* (Faculty of Law University of Nairobi 1993).

13 Rajeev Dhavan, 'Law as Concern: Reflecting on Law and Development', in Yash Vyas (eds), *Law and Development in the Third World* (Faculty of Law University of Nairobi 1993).

14 World Bank (n 11) 1.

15 Matt Kane 'Public-Sector Economic Development: Concepts and Approaches' <http://www2.econ.iastate.edu/classes/crp274/swenson/CRP523/Readings/econdevelopmentmattkane.pdf> accessed 20 August 2014.

16 S. Kunets, 'Towards a Theory of Economic Growth', in R. Lekachman (ed), *National Policy for Economic Welfare at Home and Abroad (Garden City*, Doubleday and Co 1995) 16.

B. Development

Many scholars have in the past debated on the meaning to be attached to the idea of 'development' which the nineteenth century scholars have referred to as 'progress'.[17] The definition of development remains contentious as various concepts and definitions have sprung up over time. Development consequently should be assessed within its historical perspective. Development has also been perceived by others as a social condition.[18] In this sense, development is experienced by human beings in their daily existence and endeavours. The social existence of human beings changes over time either due to natural events or through man influencing their social conditions.

The classical and neo-classical conception of development was seen to particularly equate development with economic growth and this was measured in the form of increase in productivity.[19] The level of productivity in a given society was thus used as a yardstick of their development. Industrial revolution, which increased the rates of productivity exponentially, was thus a turning point in development. The focus during the period of the industrial revolution was the maximization of income raised through exploitation of poor peasants. Moreover, the emphasis during this period was on increasing the capacity of states to manufacture finished goods.

A new approach to this concept was later developed in the late nineteen sixties. This new approach sought to depart from the purely economic connotation of development that had been espoused. The United Nations was responsible for the development of this concept. This was through the resolution adopted by UNESCO in 1970 which espoused the idea that:

> "The concept of development should include economic and social factors as well as the moral and cultural values on which depend the full development of the human personality and dignity of man in the society…Not only is man at the origin of development, not only is he its instrument and beneficiary, but above all he must be regarded as its justification and its ends."[20]

This new concept therefore looked at development as that which would lead to the transformation of man in totality and not only in the economic sense. These transformations were to result into the change in the nature of man socially, economically, politically and culturally. These would further lead to a wider social transformation which will be evident by the assumption of new and better qualities by these societies. This definition has also been adopted by donors and international development agencies which seek to reduce the rates of poverty.

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17 Kitching Gavin, *Development and Underdevelopment in Historical Perspective: Populism, Nationalism and Industrialization* (Routledge, London 1989) quoted in Okech-Owiti 'Law, Ideology and Development: Dialectics or Electicism at Play?' in Yash Vyas (ed), *Law and Development in the Third World* (Faculty of Law University of Nairobi 1993).

18 Okech-Owiti, 'Law, Ideology and Development: Dialectics or Electicism at Play?' in Yash Vyas (eds), *Law and Development in the Third World* (Faculty of Law University of Nairobi 1993).

19 ibid. 18.

20 See <http://unesdoc.unesco.org/images/0011/001140/114046E.pdf> accessed 20 August 2014.

The common theme that cuts across these various conceptions of development is the idea of 'change'. Development is thus measured in terms of the alleviation of the human condition. It entails the activities pursued by man towards realizing good change so as to improve their conditions. according to Amartya Sen development alleviates the human condition by increasing the scope of freedoms to be enjoyed by them, it ensures that the 'capabilities' of a person are expanded such that they will lead the kind of lives that they value and have reason to value.[21]

Sen has listed the freedoms that result from development as;[22]

- Political freedoms e.g. civil rights and participative freedoms
- Economic facilities, this entails the ability of a person to trade of their goods and services
- Social opportunities
- Transparency guarantees in the public bodies
- Protective security in the form of maintenance of law and order

It has thus been realised that the preoccupation with defining development through the use of criteria such as gross domestic product, per capita income or other such measures has had the effect of de-emphasizing the social, cultural, democratic and human rights aspects of personal development and human dignity.[23] Furthermore, the concept of development has been criticised by postmodernism theorists who contend that development is not concerned with prosperity of human beings but sought to establish control over them. This, it has been argued, has been done in many ways an example being the manner in which development was preoccupied with drawing citizens into the formal networks of circulation where they could be taxed hence reinforcing the control the state had over them.[24]

This has thus necessitated the development of a flexible and adaptable definition of development. Such definitions are therefore to put the people at the centre stage when it comes to determining development. This can be seen to be a shift from concentrating on the macro to focusing on the level. The end result is a focus on a multidimensional approach to defining and achieving development in a society.

In adopting this school of thought, two approaches towards development are identified. One seeks to ensure the elimination of poverty and the other looks at the long term economic and social development.[25] The former approach looks at the situation in the developing countries and focus is laid on the challenges experienced in these countries such as poverty and hunger and methods of improving these in the short term are

21 Amartya Sen, *Development as Freedom* (First Anchor Books 1999).

22 ibid. 38.

23 Sammy Alderman, 'Human Rights and Development in the 'New World Order'' in Yash Vyas, *Law and Development in the Third World* (Faculty of Law University of Nairobi 1993).

24 John Rapley, 'Understanding Development: Theory and Practice in the Third World' (3rd edn, Lynne Rienner Publishers 2007).

25 Adam Szirmai, 'The Dynamics of Socio-Economic Development: An Introduction' <http://assets.cambridge.org/97805218/17639/excerpt/9780521817639_excerpt.pdf> accessed 18 July 2014.

explored. The latter seeks to get a better understanding of the different factors having long term effects on socio-economic development.

It is noteworthy that these new concepts of development have shifted focus from emphasis on economic development to addressing of social concerns when it comes to development. The realization of economic growth has thus been seen to be sustainable if social concerns are also addressed. Amartya Sen thus writes:

> .the ends and means of development require examination and scrutiny for a fuller understanding of the development process; it is simply not adequate to take as our basic objective just the maximization of income or wealth, which is, as Aristotle noted, 'merely useful and for the sake of something else', for the same reason, economic growth cannot sensibly be treated as an end in itself, development has to be more concerned with enhancing the lives we lead and the freedoms we enjoy.[26]

This has led to the adoption of the concept of the term "human development" so as to take into account the needs of society.

C. Human Development

The term 'human development' can trace its origins to the year 1990 when the UNDP launched the first *Human Development Report (HDR).* Over the years, Human Development Reports (HDRs) have been produced by UNDP reflecting Human Development Indices for various countries. The 1990 report set the context of the use of the term and evidenced that the focus would be on people. The opening words of the first chapter of the 1990 report thus read;

> People are the real wealth of a nation. The basic objective of development is to create an enabling environment for people to live long, healthy and creative lives. This may appear to be a simple truth. But it is often forgotten in the immediate concern with the accumulation of commodities and financial wealth.[27]

According to this statement, there was consequently a necessity to depart from the classical and neo-classical notions of development whose focus was on economic growth to one much more geared towards the improving the human condition. This can be equated to the resolution adopted by UNESCO in 1970 on the goals the organization was supposed to pursue. Human development has thus been defined by the UNDP as 'a process of enlarging people's choices'.[28] The choices which to be expanded were also outlined in the report.

Human development is thus seen as a process that eventually leads to an outcome. It entails widening the choices that people have and increasing the levels of their achieved well-being.[29] By making people the focus of development efforts, it leads to the

26 Sen (n 21).

27 United Nations, Human Development Report, 1990.

28 ibid.

29 Sabrina Alkire, 'Human Development: Definitions, Critiques, and Related Concepts,' United Nations Development Programmes Human Development Reports Research Paper (June 2010).

enhancement of the range of choice that human beings have. Human development seeks to balance human capabilities with economic, social and political opportunities where they can use those capabilities.

Over the years, the UNDP's definition of human development has evolved and the place of people in the development discourse and process has been reiterated. What has come to be of essence in defining human development is the concept of participation? It has been argued that development loses its meaning once the participation of the people is not embraced. People should thus be allowed to participate in the formulation of policies, priorities and actions, and in the mobilization of resources.[30] The UNDP report for the year 1991 thus called for development of the people, by the people and for the people.

Participation is held as being instrumental in ensuring people's choices are widened and that available opportunities are also enlarged. In their report of the year 2004, the UNDP stated that the role of development is to enlarge human freedom. This is in sync with Amartya Sen's arguments that development should expand the real freedoms that people enjoy.[31] The focus is on ensuring that the development process is democratic. This 'democratic view' of human development is geared towards enabling people to have an influence on the experiences that shape their lives.

When looking at participation, the questions that one seeks to ask are; what kind of participation is under consideration? This can be either participation in decision-making, implementation or participation in the benefits; who are the people participating? Lastly; how is participation occurring? This entails looking at the basis of participation, the form of participation and the effect of participation.[32] This principle can be incorporated through people participating in the decision making process, the implementation of these decisions and their monitoring and adjustment to improve outcomes where necessary.[33]

From the foregoing, democratic development therefore calls for a situation where there is a development of the available human resources. This is to be done through the continuous improvement of the means of production and in this case, living labour. This view of human development also calls for situations where the various benefits arising from growth are able to reflect in the lives of the people.[34] The products of labour are thus to be distributed in the society. Further, there should be reward systems for those who contribute to production. Participation is at the core of ensuring this is realized.

From the sets of definitions propounded for 'human development' various variables which constitute human development can be derived. The HDR adopted in 1990 came up with a Human Development Index which contains three basic dimensions of human development; the dimension of a long, healthy life; the knowledge dimension

30 Singh (n 12) 19.

31 Sen (n 21) 3.

32 Ondotimi Songi, 'Resource Control, Community Participation and Nigeria's Petroleum Industry Bill' <http://www.eisourcebook.org/cms/Nov%202013/Nigeria,%20Resource%20Control,%20Community%20Participation%20&%20the%20PIB.pdf> accessed 24 July 2014.

33 'Human Development: Definition, Concept and Larger Context' <http://www.arab-hdr.org/publications/contents/2002/ch1-e.pdf> accessed 19 August 2014.

34 ibid. 16.

.and the dimension on living standards. Various writers have also sought to expand on the range of variables by adding more dimensions. Sen for example has supported the position that there is no 'fixed' list of dimensions of human development.[35] The range of possible dimensions that have been identified include; health and life, education, decent standard of living, political freedom and process freedoms, creativity and productivity, environment, social and relational and lastly culture and arts.[36]

In looking at human development, one cannot overlook the concept of freedom. Freedom is created where human capabilities have been enhanced through human development. Different categories of freedom thus emanate once human development has been attained. One such freedom is the freedom of economic facilities. This freedom seeks to ensure that ways are devised to ensure that economies function to generate income opportunities and promote distribution of wealth.[37] Closely related to this is the freedom of social opportunities which entail the expansion of the space for education and health care. Sen argues that development as freedom results in human beings being able to lead lives which are richer in description.[38]

The recent past has seen the rise of a new concept, the concept of sustainable development. Sustainable development has in the past been viewed by many people as a "soft" law but this notion has been abandoned by many who now realize that sustainable development is core in all human activities. Consensus is slowly emerging that in the process of development what is key is to ensure sustainability. This consensus has even led to the recent efforts to develop the Sustainable Development Goals by the UN as a successor to the Millennium Development Goals.

D. The Concept of Sustainable Development

Human history has revealed the need to ensure that the activities of human beings are carried out in a manner that ensures sustainability. This has necessitated the adoption of the concept of sustainable development, a concept that mainly originated in the environmental field but has in the recent past been seen to be important in a wide array of fields.

The genesis to the concept was the 1972 United Nations Conference on the Human Environment held in Stockholm, Sweden. The outcome of that conference was disagreement between developing and developed countries on how to address the global environmental challenges facing the world. In response to the outcome of this conference, the United Nations in 1983 established the World Commission on Environment and Development (WCED) as an independent body to address global environmental problems. The Commission finalized its work in 1987 and published its report, *Our Common Future*, commonly referred to as The *Brundtland Report.*[39]

35 Amartya Sen, *Dialogue Capabilities, Lists, and Public Reason: Continuing the Conversation*, Feminist Economics.

36 Sen (n 21) 15.

37 Szirmai (n 25) 19.

38 Amartya Sen, 'The Concept of Development', In H Chenery and TN Srinivasan (eds), *Handbook of Development Economics I* (Elsevier Science Publishers 1988).

39 World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press 1987).

The report sets out a programme for integrating environmental concerns with economic goals by governments and the private sector at international, national and local levels.[40] It argued that reconciling the development focus of the developing world and the environmental concerns of the developed world was not only possible but also imperative. In the reports proposals, the concept of sustainable development should act as the basis for striking a balance between these two approaches and sustainable development as *"development that meets the needs of the present without compromising the ability of the future generations to meet their own needs".*[41]The key aspects that emanate from this definition are; the need to ensure that human needs are met in a manner that does not affect the ability of future generations to meet their needs.

The Rio Declaration[42] also provides a definition for sustainable development and both the substantive and procedural aspects of sustainable development have been dealt with here. The substantive aspects of sustainable development listed are; intergenerational equity; the integration of environmental protection into the development process; intragenerational equity and poverty alleviation; particular attention for countries with special development and environment needs; the reduction of unsustainable consumption and production and population reductions; and effective environmental legislation.[43] On the other hand , the procedural aspects are; broad public participation and access to information and judicial review; use of precaution where there are threats of serious or irreversible damage; internalization of costs; environmental impact assessment; notification and consultation with the affected States and the involvement of major groups.[44]

The socio-political aspect of sustainable development necessitates that there is economic and social development. This is a departure from the traditional conception of sustainable development as an environmental concept. This has therefore necessitated the appreciation of the three pillars of sustainability; environmental sustainability, economic sustainability and social sustainability which have been postulated by Scholars like Strange and Bayley.[45]

Environmental sustainability entails the use of resources in a manner that ensures that the exploitation of resources is only for those necessary to meet the ends sought without depleting the resources. This enables human beings to meet their needs without exceeding the carrying capacity of supporting ecosystems to continue regenerating the services necessary to meet those needs.[46] This led to the development of global efforts to ensure the conservation of the environment.

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40 BJ Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific,' (2005) 9 (2 and 3) Asia Pacific Journal of Environmental Law 109-211, 117.

41 ibid.

42 *Rio Declaration on Environment and Development*, Report of *the United Nations Conference on Environment and Development* (1992) UN Doc. A/CONF.151/6/Rev.1.

43 ibid.

44 ibid.

45 T Strange and A Bayley, *Sustainable Development: Linking Economy, Society, Environment* (OECD 2008).

46 R Yadav and GS Pathak, 'Environmental Sustainability Through Green Banking: A Study on Private and Public Sector Banks in India,' <http://www.ssrn.com/link/OIDA-Int-Journal-Sustainable-Dev.html> accessed 10 July 2014.

This came as a realization that there was need to ensure that there were global efforts in seeking to ensure that safeguards were put in place to ensure that the environment was conserved. Such efforts culminated in the establishment of the United Nations Environmental Programme (UNEP) through the UNGA Resolution 2997 (XXVII) so as to strengthen and coordinate environmental policy, particularly in developing countries.[47]

Economic sustainability on the other hand relates to ensuring that there is production of goods and services on a periodic basis and ensuring that the levels of debts incurred are manageable. The Rio Declaration[48] has embodied this concept in Principle 5 which relates to the indispensable role of poverty alleviation in achieving sustainable development.

The last pillar is that of social sustainability. This pillar seeks to ensure that there is fairness in distribution and opportunity, adequate provision of social services including health and education, gender equity, and political accountability and participation.[49] This pillar is at the core of ensuring that communities benefit from the extractive industry in Kenya. In discussing social sustainability it is necessary to underscore that the concept has been include as part of Kenya's governance framework by dint of the provision of the Constitution adopted in August 2010.

The Constitution includes provisions on principles of governance.[50] These are to guide any entity that is involved in the process of implementing any policy decision in Kenya. One of the principles is that of sustainable development. The implication of this is that the process of exploiting the extractive industry must take into account the requirement of sustainability. For the interests of local communities, this necessitates ensuring that the third limb of sustainability, namely social sustainability is not only adhered to but also realized in practice.

V. CONCEPTUALIZING SOCIAL SUSTAINABILITY

Including social aspects to the discourse on sustainable development has been late in coming. When originally conceptualized by the Brundtland Commission, sustainable development focused on integrating environmental and developmental imperatives only. However, the concern has been that such an approach is not only narrow but fails to take into account the concerns of those to be affected by the development. Further as argued by UNDP in their annual World Development Reports, development is about people. Consequently in developments efforts a welfare-oriented approach must be embraced. This has also responded to concerns by theorists such as Banerjee who argue that;

> Sustainable development, rather than representing a major theoretical breakthrough, is very much subsumed under the dominant economic paradigm. As with development, the meanings, practices and policies of sustainable development continue to be informed by colonial thought,

47 Marie-Claire Cordonier *et al*, *Sustainable Development Law: Principles, Practices & Prospects* (Oxford University Press 2004).

48 Rio Declaration (n 42).

49 Jonathan M Harris, 'Sustainability and Sustainable Development' <http://isecoeco.org/pdf/susdev.pdf> accessed 24 June 2014.

50 Constitution of Kenya 2010, Article 10.

> resulting in the disempowerment of the majority of the world's populations, especially rural populations in the Third World. Discourses of sustainable development are also based on a unitary system of knowledge and, despite its claims of accepting plurality; there is a danger of marginalizing or co-opting traditional knowledge to the detriment of communities who depend on the land for their survival.[51]

Various authors have thus sought to define social sustainability as a key aspect of sustainable development, one that is geared towards ameliorating the conditions of human beings as a fundamental component of the development process. One of the definitions that has been postulated is that social sustainability is a life-enhancing condition within communities, and a process within communities that can achieve that condition.[52] Various aspects of social sustainability have also been elucidated by other authors. Sachs has identified the constituent elements of sustainable development to include social homogeneity, equitable incomes and access to goods, services and employment.[53] Chiu on the other hand identifies a tripartite approach to social sustainability based on conceptualizations of social limits, ecological limits and equality.[54]

The key indicators of social sustainability include equity in access to key services such as health, education and housing; equity between generations, which imputes a responsibility on the current generation to use resources in a manner that won't compromise the way the future generations enjoy the resources; a system of cultural relations in which the positive aspects of disparate cultures are valued and protected, and in which cultural integration is supported and promoted when it is desired by individuals and groups; the widespread political participation of the populace especially in the local affairs; an established system of transmitting awareness of social sustainability from one generation to another; mechanisms for a community to fulfil its own needs where possible through community action and lastly mechanisms for political advocacy to meet needs that cannot be met by community action.[55]

Among the indicators discussed above, equity transcends the rest. Equity, as an indicator of social sustainability calls for the distribution of opportunities and outcomes in a manner that is fair among the members in a society, with particular to the needs of the poor and the most vulnerable in the society. This calls for a situation where all citizens, regardless of gender, should have an equal opportunity to both survive and fulfil their

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51 Bobby Banerjee, 'Who Sustains Whose Development? Sustainable Development and The Reinvention of Nature' (2003) 24 (2) Organizational Studies, 143-180.

52 Stephen McKenzie, 'Social Sustainability: Towards Some Definitions', Hawke Research Institute Working Paper Series No.27 <https://atn.edu.au/Documents/EASS/HRI/working-papers/wp27.pdf> accessed 19 August 2014.

53 I Sachs, 'Social Sustainability and Whole Development' in Becker, E Jahn (eds), Sustainability and the Social Sciences (New York, Zed Books and UNESCO) 25-36.

54 R Chiu, *Social Equity in Housing in the Hong Kong Special Administrative Region: A Social Sustainability Perspective*, Sustainable Development 10(3), 155-162.

55 McKenzie (n 52) 12.

development potentials.[56] Efforts have been taken at the global level to provide for a social sustainability attitude. One such effort was the adoption of Agenda 21[57] at the United Nations Conference on Environment and Development.

Agenda 21 is a programme to support sustainable development in all countries. It comprises four sections one of which is entitled "Social and Economic Dimensions". This section contains chapters dealing with such issues as elimination of human poverty, human health and human settlement. Under the section on "Strengthening the Role of Major Groups" with the role of such groups as women, children, youth and indigenous people in achieving sustainable development is articulated. The report underscores that social issues are at the centre of and in indispensable component of sustainable development.

From the foregoing, it can be seen that the adoption of a socially sustainable regime in the quest for development is very essential. It is thus crucial that such activities undertaken towards economic development should lead to social progression. As Kenya gears to move to the production stage in its extractive industry, it is important that it does not just focus on economic development but instead addresses the imperatives of sustainable development as directed by Article 10 of the Constitution. This will help bridge the divide between investors and local communities, a task which is only possible if the production and exploitation deliver on the social aspect of the sustainability equation.

VI. THE EXTRACTIVE INDUSTRY IN KENYA

Extractive industries play a major role in the development of the economies of various countries, including Kenya. Kenya has experienced a renewed interest in the Oil and Gas Sector. This is attributed to the discovery of commercially viable discoveries of oil in the Turkana region in early 2012 and offshore gas in late 2012 as well as the accompanying potential for economically transformative petroleum finds.

The discoveries have moved the debate on the role of the oil and extractive sector in the country's socio-economic development to the centre stage. The government is in fact strategically placing the extractive sector especially oil and mining as the engines of socio-economic growth towards the achievement of its long-term development programme as captured in Vision 2030.

Oil exploration activities in Kenya began in the 1950s, with the drilling of the first well occurring in the 1960s. But until recently although some of these wells encountered oil and gas traces, none of them had any commercial deposits. These works were undertaken under a royalty based licensing system and have occurred in accordance with the Mining Act[58] of 1940. It was not until 1984 that the Petroleum Exploration and Production Act,[59] Cap 308, was enacted to govern petroleum exploration and improve

56 Kevin Murphy, 'The Social Pillar of Sustainable Development: A Literature Review and Framework for Policy Analysis' <http://sspp.proquest.com/static_content/vol8iss1/1008-041.murphy.pdf> accessed 19 August 2014.

57 UNCED, Agenda 21 (1992) UN Doc. A/CONF.151/26/Rev.1.

58 Chapter 306, Laws of Kenya.

59 Chapter 308, Laws of Kenya.

incentives to companies involved in exploration in Kenya. Significantly in the 1990s there were low exploration activities mainly attributed to depressed international crude oil prices which made it unattractive for prospecting companies to venture into areas perceived to be marginal. Most of the exploration activities undertaken during this period largely consisted of collection and analysis of primary data by National Oil Corporation of Kenya (NOCK). However with the increase in oil crude prices in the early 2000s, exploration by foreign companies increased resulting in the first discoveries in Lokichar in Turkana in 2012.

Despite the discoveries, the existing legal and institutional framework for the extractive industries is still out of tune with modern realities. The Petroleum (Exploration and Production) Act, for example was developed during the period when the main activity sought to be regulated was oil exploration. It may have been appropriate for a nascent petroleum sector but is not capable of addressing the requirements for a full blown extractive sector with its complexities. It does not address such issues as revenue sharing, clear delineation of sector roles and responsibilities, environmental standards, local content, and transparency.[60] The same applies to the regime governing the mining sector, hence the need for the review.

The regulation of the extractive industry has to be undertaken within the context of the Constitution. Article 61 of the Constitution defines oil and minerals as part of public land whose ownership is vested in the people of Kenya to be held on their behalf by the national government. While the position is not supported by the current Mining Act which vests minerals in the Government, the Mining Bill passed by the national assembly in 2014 and currently before the Senate adopts the constitutional position. The Mining Bill 2014 provides that the mineral resources shall be vested on the Government in trust for the people.[61]

The Mining Act and the Environmental Management and Coordination Act (EMCA) have been seen to be the major laws that seek to guide the manner in which mining is done in Kenya. The Mining Act thus vests all mineral resources to the Government and prohibits dealing with minerals without authorization.

For one to be granted licence to carry out mining operations as per the Mining Bill, several pre-conditions are to be met, these include, *inter alia,* proposals on programmes directed towards training Kenyans and providing them with employment, an Environmental Impact Assessment licence and proposals on the manner in which the investor will procure goods and services produced within the specific locality.

Most mining activities result into displacement of people from their homes and farms. Most of this displacement is usually involuntary. This therefore necessitates the payment of compensation to the affected persons. Compensation in itself is usually seen not to be enough in cases of displacement. Involuntary displacement usually has significant adverse socio-economic and environmental impacts, including abandonment of homes

60 Hunton and Williams, 'Kenya Oil and Gas Sector Development: Review and Update of the Legal, Regulatory and Fiscal Framework' (3 July 2013) <http://ices.ihubconsulting.org/wp-content/uploads/2014/03/Legal-and-Regulatory-Guidance-3-July-2013-Report.pdf> accessed 23 July 2014.

61 Mining Bill 2014, Section 6.

and loss of assets and income that cannot usually be quantified in monetary terms.[62] This has led to arguments that in case of displacement the best form of compensation is land to land compensation.

Other social impacts that result from mining activities include; increased poverty through damage to subsistence agriculture, increased internal inequalities within communities between those who benefit directly from the mining activities and those who do not and economic dependency making local communities vulnerable when the mines close or scale down their operations.63 Mining activities which usually take place among communities usually lead to distortion of the social relations in the communities. This can be attributed to the influx of foreigners within the community resulting to social tensions and dilution of the community's practices and lifestyles.

A. Social Challenges in the Extractive Industry in Kenya

The greatest challenge that bedevils the extractive industry in Kenya is the view by local communities that the industry does not take into account their interests. Instead the process results in the acquisition of their land, invariably either without any compensation, or when compensation is issued the same is not adequate. In addition the operations of the companies engaged as investors in this sector normally lead to environmental degradation, human rights violations and labour disputes. The result is poor relations between local communities and the companies.

Poor relations between members of the community and the investors mainly arise due to inadequate compensation. Compensation and benefit sharing are thorny issues and at the root of either a frosty or harmonious relationship between communities and investors. Part of the trouble arises from the process of negotiating compensation and the value attached to land. Invariably because the decision over the exploitation of extractives is vested in the national government, local communities are in most cases never consulted as part of the negotiation process. Even when they are, there is no consensus on what the compensation is for.

While the communities see the oil, natural gas and minerals as theirs for sitting on their land, the investors proceed on the basis that compensation for the mineral will already have been settled with government. The other point of departure relates to land rights. Land in Kenya has multiple values over and above the economic importance.[64] When compensation is made the non-economic value attached to land is sometimes never considered leading to disenchantment by local communities. The situation is exacerbated by the fact that most of the land in such areas is community land whose protection is hampered by the fact that the country is still yet to enact a Community Land legislation. Communities also see that the companies make huge profits. These companies also do not usually provide the members of the community with financial advice on how they should use the money given to them as compensation leading to misuse of the money and its quick depletion.

62 Robert Kibugi, 'Mineral Resources and Mining industry in Kenya' in C.O Okidi et al (eds), *Environmental Governance in Kenya: implementing the Framework Law* (E.A.E.P 2008) 361.

63 'Mining in Africa: Managing the Impacts' <http://www.africaminingvision.org/amv_resources/ISGbulletin5.pdf> accessed 19 August 2014.

64 Republic of Kenya, Sessional Paper Number 3 of 2009 on National Land Policy, September, 2009.

The process of compensation sometimes also seen result to erosion of communal values when companies resort to such measures as paying bribes to local leaders to guarantee them "acceptability" in the community. Such benefits as compensation sometimes eventually come at the detriment of deeply held community values.[65] Another Achilles heel in this sector relates to the lack of awareness among the community members on the manner in which the sector operates. Members of the community lack accurate information on the operations and technicalities of the sector leaving them to rely on propaganda. The end result is misinformation, unrealistic expectations and consequently disappointment. This justified the need for greater access to information and the importance of an Access to information law in Kenya so as to operationalise the provisions of Article 35 of the Constitution.

Closely related to this is the issue of the high expectations that the communities usually have from the companies, especially as relates to poverty alleviation and employment. These challenges arise when e the companies 'import' manpower in situations where there is shortage of skills. The influx of this specialized labour usually leads to discontent among the communities as has been witnessed particularly in Northern Kenya. One particular occurrence was seen where residents of Turkana South and East districts staged protests for alleged failure by Tullow Oil Company to offer them job opportunities and tenders.[66] Human Rights violation is another concern. There have been cases of human rights violation by the companies, for example abuse by security forces when quelling protests to cases of deaths resulting from the operations of the companies. In one instance, a truck owned by Tullow Oil is reported to have run over a herdsboy in a village called Nakukulas in Turkana County. The driver of the said truck never faced the criminal justice system resulting into tensions in the community.[67]

From the foregoing, it is imperative that the activities of the petroleum and natural gas exploration and extraction companies be modelled in a manner promotes sustainability by addressing the challenges discussed in this section.

VII. TOWARDS A SOCIALLY SUSTAINABLE PETROLEUM AND NATURAL GAS INDUSTRY IN KENYA

Social relations are usually very intricate and as such in dealing with societies, one should take cognizance of the manner in which the society is placed and the needs of that particular society. One should particularly appreciate the relationships between the society and the material objects within the society since such relationships are what determine how stable a society will be.

65 W Akpan, 'The Theory and Practice of Corporate Citizenship in Nigeria: A Petroleum Industry Beneficiary Analysis', Paper Presented at the International Research Symposium on Corporate Citizenship, 'Is Corporate Citizenship Making a Difference?' GIMPA, Accra, Ghana, 21-22 November 2006.

66 Lucas Ng'asike, 'Tullow oil suspends operations over conflict with locals', *Standard Digital* (Nairobi 28 October 2013) <http://www.standardmedia.co.ke/business/article/2000096359/tullow-oil-suspends-operations-over-conflict-with-locals> accessed 20 August 2014.

67 Interview with Ekai Nabenyo, a youth leader from Turkana County, 20 August 2014.

Sustainable development is a concept that has gained root in many fields and as such it is prudent for the petroleum and natural gas industry in Kenya to take into consideration. Social sustainability, as a pillar of sustainable development is core in seeking to attain both environmental and economic sustainability. It is also at the basis of orderly and mutually beneficially exploitation of the extractive industry. It will guarantee the investors in the extractive sector a conducive environment for their operations and the local communities support. It will also ensure that the extraction process take into account and meaningfully improve the lot of the local community.

In this regard, it is imperative that all the players in the petroleum and natural gas industry in Kenya adopt measures that will ensure that the sector operates in a manner that is socially sustainable and gain acceptability among the communities amongst whom they operate. This requires the understanding of the social impacts, risks and opportunities of projects undertaken. The Constitution, as the supreme law of Kenya, has sought to ensure that there exists a sustainability attitude through the provisions Article 10 which provide for national values and principles of governance. Article 10 (2) (d) has thus provided that one of the national values and principles of governance is sustainable development. As part of the process of operationalising a sustainability culture of public participation becomes quintessential.

Participation at an early stage has the advantage of providing to the stakeholders local knowledge about the area they seek to carry out their operations and in this case information concerning the area of operation and the social concerns in the area is usually conveyed.[68] Participation by members of the community from the earliest stages also ensures that the companies gain legitimacy among the community and helps relieve the tensions that could have developed. Participation also helps to ensure that the members of the community are able to develop realizable expectations since they will be in a position to know the manner in which these companies operate.

For social tensions to be relieved, it is imperative that "just compensation" as stipulated for in Article 40 of the Constitution be provided to those to be affected by compulsory acquisition of their property. This necessitates the adoption of a compensation formula that will take into consideration the unique demands of various communities. Amongst the considerations that should be taken into account is the value of indigenous ecology. Taking this into account will legitimize the company in the eyes of the community as the communities will feel that the companies respect their way of life. By doing this, the companies will acquire the necessary "social licence" to carry out their operations within the community. The payment of just compensation should not in itself be the end; the companies are required to ensure that basic amenities are provided to members of the community in a bid to improve their welfare.

68 Africa Mining Vision (n 63).

Another consideration is the need to create a framework to cushion the members of the community who rely on the activities of these companies from the effects of the either the completion of or suspension of operations by these companies. The companies should consult with members of the community when seeking to close so that they find a satisfactory manner of cushioning the community from the dependency on the company. The adoption of socially sustainable initiatives by the players in this industry will result to a win-win situation for both the communities and the companies as the communities will benefit from the activities of the companies while the companies will reap from the goodwill it enjoys among the communities in which they operate.

TAMING THE OPPOSITION IN KENYA: BETWEEN STATE MACHINATIONS AND LEGAL EXCESSES: 1963 - 2007

*Adams Oloo**

ABSTRACT

This article explores how successive regimes that span the Kenyatta, Moi and the first term of Kibaki exploited various mechanisms both political and legal to tame the opposition and proposes how these undermined the institutionalisation of democracy in Kenya. It demonstrates how the party and the government in power has always used state apparatus to divide and undermine the opposition.

I. INTRODUCTION

Kenya attained self-government status on 1st June 1963 under a Constitution that had a pure parliamentary and semi-federal structure based on eight regional governments.[1] As of 1st June 1963, the country had three political parties, namely, the Kenya African National Union (KANU), the Kenya African Democratic Union (KADU) and the African People's Party (APP). The country had a multi-party system which was healthy for a then emerging young democratic country.

However, in subsequent years, Kenya was transformed from a pure parliamentary and semi-federal system to a semi-presidential and centralized unitary system. Likewise, within a year of attaining self-government status, Kenya moved from a multi-party system to a de-facto one party system.

The semi-presidential system would later be transformed into an "imperial presidency."[2] The Provincial Administration replaced regional governments while the de-facto one-party state would eventually evolve into a de-jure one-party system. Arising from the foregoing the executive arm ended up subduing the legislative and judicial arms of government and the civil society was also largely emasculated by the state during the one-party era. This scenario provided the government with the requisite politico-administrative rules to circumscribe the operational space of political parties and civil society actors involved in the democratization process, especially those driving the human rights and political agenda.

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1 Constitution of Kenya 1963, Chapter Six.

2 This connotes a situation where the presidency (read executive) has an overweening influence over the supposedly independent arms of government – the legislature and the judiciary – to the extent that the two arms of government are subservient to the executive and simply rubberstamp the whims and desires of the executive. See African Union Panel of Eminent African Personalities, *Back from the Brink: The 2008 Mediation Process and Reforms in Kenya*, (African Union Commission 2014).

With the return to multi-party politics, the ruling party would continue to use state apparatus just like it did during the one-party era to both divide and undermine the opposition. The overall implication has been that since independence up and until 2007, ruling parties and coalitions engineered various mechanisms to tame the opposition. This happened both inside and outside parliament. The tactics employed encompassed both legal and extra legal means.

II. THE KENYATTA ERA

The onslaught against the opposition began immediately Kenyatta was sworn in as the first Prime Minister of Kenya. As the leader of the ruling party he was part of the KANU leadership that had, accepted the Majimbo constitution supported by KADU and the British government, in order not to delay independence any further. However, it later became evident that KANU had no intention of implementing it once they acquired power. As the subsequent paragraphs will demonstrate, the KANU government immediately embarked on deconstructing the independence constitution by amending sections that they considered were denying the executive a free hand in the governance of the country.

These amendments collectively centralized power in the executive which ended up as a unitary state with a strong executive – a major departure from the semi-federal government with an accountable executive that had been prescribed by the 1963 Constitution.[3] In addition, the intention of Kenyatta and KANU to destroy KADU became apparent after he was released from detention when he warned KADU that it would suffer once KANU took over the reins of power.[4]

Generally, the Kenyatta regime used persuasion, intimidation and state manipulation to tame KADU, which culminated in the dissolution of the official opposition party in November 1964. The same treatment faced the Kenya People's Union (KPU) between 1966 and 1969 before it was finally proscribed in 1969. And in the absence of an official opposition between 1969 and 1978 when Kenyatta died, the Kenyatta regime used both the state apparatus and legal provisions to silence opposition both official and within its ranks in the form of non-conformist KANU backbenchers.

A. The Containment of KADU and KPU

KANU won the 1963 General Election with a healthy majority and was quick to consolidate its power by creating a strong centre. On attainment of self-governance status on 1st June 1963, the KANU government made no secret of its view that regionalism was a political mistake and that the "Majimbo" component of the 1963 Constitution would not be implemented.[5]

3 Yash Pal Ghai and Patrick McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal framework of Government from Colonial Times to the Present* (Nairobi, Oxford University Press 1970); See also Hastings Okoth Ogendo, 'The Politics of Constitutional Change in Kenya since Independence: 1963-1969,' (1972) 71 African Affairs 283; Cherry Gertzel, *The Politics of Independent Kenya* (East African Publishing House 1970).

4 *Daily Nation* (Nairobi, 21 January 1962).

5 Gertzel (n 3) 33.

This became evident when the central government deliberately refused to release designated finances and functions contrary to the provisions in the Constitution beyond the date of June 1964 which was set as the timeframe when the regions would assume full financial autonomy.

A number of administrative decisions and constitutional amendments were engineered to achieve this objective. First, the constitution was amended and removed the powers enjoyed by the regional assemblies and assigned to the centre as prescribed in Chapter VI of the Constitution. The import of these amendments (that is, the first, second and third amendments) was that they transferred the executive authority of the regions which had been vested in the regional assemblies to the central government, abolished the regional governments and commenced the process of centralizing power.

Second, the 1963 Constitution had set up a regional fund where all monies to be utilized by regional governments were to be deposited. The KANU government curtailed the operations of the said regional governments by declining to deposit the said monies. Thus, starving the regional governments that would have enabled them to kick start their operations. Ultimately, the second amendment effectively annulled the provisions for independent regional revenue thus permanently crippling the operations of the regions by making them entirely dependent on grants from the centre. Subsequently, these grants would only benefit areas that were considered to be supportive of the government. Regions which were considered to be critical of the government were denied funds.[6] This state of affairs not only frustrated KADU politicians but starved the regions of the requisite finances that would have seen them take-off as autonomous governments.

Third, the KANU government used the Provincial Administration to deny KADU politicians the right to hold public rallies, as the law required politicians to get permits from the government before holding any public political rallies. A fact pointed out by Jonathan Masinde, the KADU MP for Lurambi, who complained during a parliamentary debate that the KANU government had instructed the police to prevent KADU politicians from holding political rallies.[7]

And even on instances that KADU got clearance to hold rallies, KANU youth wingers harassed KADU followers especially in KANU strongholds. This not only denied KADU the chance to open new branches but limited the opportunities for KADU to market itself.[8] Arising from the foregoing, it came as no surprise when out of frustration, three KADU MPs, namely, Taita Arap Toweet, William Murgor and J.M Seroney quit KADU on November 21, 1963. They said in a joint statement that they had come to the conclusion that they would best serve the interests of their constituents by cooperating with and working within government ranks in the National Assembly.[9]

6 Okoth-Ogendo (n 3); Maina Wachira, 'Constitutional Crisis in Kenya: An Inquiry into its Origins, Nature and Prospects for Reform' [1998] Institute of Policy Analysis and Research SAREAR Working Paper 007/98.

7 House of Representatives Official Report 21 October 1964, 3740.

8 Donald Rothchild, 'Ethnic Inequalities in Kenya,' (1969) 7 Journal of Modern African Studies 689.

9 *Daily Nation* (Nairobi, 21 November 1963).

Subsequently, there were steady defections between November 1963 and November 1964 when the party leader, Ronald Ngala, ultimately called for the dissolution of KADU.

Legally, and administratively, the KANU regime usedthe Chiefs' Authority Act (Cap 128 of the Laws of Kenya) which gave chiefs immense powers with respect to persons within their areas of jurisdiction. The KANU government used the Act to deny KADU politicians the right to hold public rallies, since the law required politicians to get permits from the government before holding any political rallies. This authority rested with the Provincial Administration but had been temporarily transferred to the police during the *majimbo* period.[10]

However, from 1965, the powers which the Provincial Administration had on paper lost during the short-lived *majimbo* framework were restored to it,[11] and subsequently, the Kenyatta administration would use the Provincial Administration as its major link between the executive and the people thus overshadowing even the ruling party.[12] The Provincial Administration continued to perform the same functions after 1965, and more importantly, would be relied upon by the executive to regulate political activities in the localities through licensing or non-licensing of meetings. The Provincial Administration thus ensured that those out of favour with the regime were never allowed to hold public meetings. It could also interrupt licensed meetings, cancel them at the 11th hour or determine the list of speakers' etc.[13]

The Provincial Administration's activities were buttressed by the Public Order Act. This Act provided for the control of public gatherings. Under the Act, no public meeting or procession could be held without a license issued by the District Commissioner of the relevant district. The Act empowered the District Commissioner to refuse issuance as well as cancelling or withdrawing a license if in his opinion a public gathering was likely to prejudice the maintenance of public orders. In addition, the Act empowered an administrative or police officer to stop or prevent the holding of any public meeting or gathering, whether licensed or not, if she felt it was causing or was likely to cause a breach of peace.

Although the original intention of the Act was to pre-empt and prevent a breakdown of peace and tranquillity, it was utilized largely for selfish political reasons. Just like the Chiefs Authority Act, successive post-independence regimes used it to obstruct and prevent smooth operations of opposition parties and other groups critical of the government's behaviour and policies. The first victims of the Act were KADU and KPU; and the operations of the two parties were curtailed through the denial of permits and licenses to hold public rallies.[14]

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10 Walter Oyugi, 'The Uneasy Alliance: Party State Relations in Kenya,' in Walter Oyugi, (ed), *Politics and Administration in East Africa* (E.A.E.P 1994) 159.

11 Gertzel (n 3); Cherry Gertzel, 'Kenya Constitutional Changes,' (1966) 3 East African Journal.

12 Oyugi (n 10).

13 Walter Oyugi, 'Ethnic Relations and the Democratisation Process in Kenya: 1990-1997,' in Okwudiba Nnoli, (ed), *Ethnic Conflicts in Africa* (CODESRIA 1998); David Throup and Charles Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Election* (James Currey 1998).

14 Nick Wanjohi, *Political Parties in Kenya: Formation, Policies and Manifestos* (Views Media 1997) 71-73.

Fourth, the merger of KANU and KADU instead of unifying the country under one party ended up with the unintended consequence on intra-party power struggles along ideological lines pitting conservatives who were pro-west and capitalist leaning led by Jomo Kenyatta, then President of KANU and country, and the radicals who were pro-east and socialist leaning led by Vice-President of the party and country Oginga Odinga. Put differently, the merger simply changed the arena of contestation from one based on a multi-party set up to one based on a one-party set up. Opposition to government policies continued from within the ruling party and party discipline became a problem. The government was unable to ensure that dissenting voices toed the line and rubberstamped government decisions.[15]

These power struggles saw the conservatives, who were in control of state power and government machinery, devise a strategy to isolate the radicals and outmanoeuvre them from key party and government positions. It was against this background that Odinga lost the powerful Home Affairs docket to a former KADU man, Daniel Moi. This subsequently set the stage for the removal of Odinga and his camp from key party positions in the ruling party elections of March 1966. This was preceded by an amendment to the party constitution in which Odinga's coveted position as sole party Vice-President was amended to now include 8 Vice-Presidents representing all the 8 provinces. This amendment had the net impact of demobilizing the opposition by ensuring that the face of opposition was decapacitated and rendered powers within the party to the conservative wing, which at the time essentially controlled the government.[16] All radical MPs lost to members of the conservative camp except Kaggia who defeated James Gichuru for the post of vice-chairman for Central Province.

This unfolding scenario left Odinga with no option but to quit KANU and together with his supporters he formed a new party known as the Kenya People's Union. The formation of the new party witnessed an immediate exodus from the ruling party that saw MPs immediately cross the floor. In order to avoid a further exodus, the government brought the Fifth Amendment to the Constitution that required those defecting from the party that sponsored them to Parliament at the previous election to resign and seek re-election on their new party ticket. To this end the amendment stipulated that the affected MPs had to vacate the seat and contest the same on their new sponsoring party.[17]

Furthermore, many others were intimidated into withdrawing their support from KPU.[18] In the ensuing 'little General Election' of 1966, there was systematic state-sponsored intimidation and massive electoral manipulation. The government employed a number of tools to achieve this end. First, local council employees and teachers were barred from participation in politics (read support to KPU) as this would lead to dismissal from office. This would see thirty five (35) civil servants sacked for supporting KPU and other demoted. Furthermore, KPU supports would lose land in settlement schemes, have their loans and trade licences withdrawn, and were removed from land consolidation committees.

15 Walter Oyugi, 'The Politics of Transition in Kenya, 1992-2003 Democratic Consolidation or Deconsolidation,' in Walter Oyugi, Peter Wanyande, and Crispin Odhiambbo-Mbai, (eds.), *The Politics of Transition in Kenya: From KANU to NARC* (Heinrich Boll Foundation 2003).

16 Okoth-Ogendo (n 3).

17 Constitution of Kenya (Amendment) Act No. 17 of 1966.

18 Throup and Hornsby (n 13).

Second, private companies which had hired KPU employees were compelled to dismiss them. Third, the rule on crossing of floors was legally applied in the local councils in 1967 to sanitize a practice that had already been put in practice the previous year. Fourth, KPU members were denied opportunities to campaign and the state further circumscribes their space of operation by locking out areas considered to be the state's strongholds. A few cases are illustrative: the use of the only broadcasting station – Voice of Kenya – to portray KPU as a tool of foreign powers; one-year imprisonment of KPU's vice-chairman for holding an unlicensed meeting; government encouragement of the use of violence against KPU. In fact in a number of incidents KANU youth wingers demolished KPU offices in the presence of government ministers.[19] The import of this is that associating with the opposition became dangerous affairs which would see the government succeed in diminishing the little support that KPU had managed to galvanize. The end result is that KPU ended with only 7 seats in parliament out of the 29 that were contested, most of whom were from Central Nyanza which was Odinga's stronghold.[20]

As soon as KPU was formed in April 1966, the Kenyatta regime devised a new legal scheme to annihilate the opposition. This was through the Constitution of Kenya (Amendment) No. 3 of 1966. This amendment largely altered the Preservation of Public Security Act. It subsequently became clear that in spite of the government's reassurance, at the time of passing the Preservation of Public Security Act, that it would use the Act solely for the purpose of maintaining public security, the Act was used almost exclusively as a weapon against political dissent.[21]

In August 1966, soon after the promulgation of the Public Security (Detained and Restricted Persons) Resolutions, eight persons were detained of which four were KPU party officials. In all, 13 persons associated with KPU were detained. Through this method, KPU was stopped from reaching the public or even surviving. Some scholars have argued that at that point time, there was no doubt whatsoever that the use of detention law had nothing to do with the preservation of "public security" but was indeed a ploy in the inter-party fight in which KANU, the party in power, sought to annihilate the opposition by resorting to detention.[22] The ploy would become even clearer when KPU was banned in 1969 and its leader and all MPs were detained giving KANU a field day on the political arena.

Other administrative mechanisms and election regulations were also enacted to undermine KPU. For instance, a new electoral regulation was enacted in 1968 which required that all candidates for local and national offices must be endorsed by a political party branch. This prevented KPU from fielding candidates in those areas where their branches had not been registered. This coupled with the government's refusal to register some KPU branches circumvented the party's operations.

19 Charles Hornsby, *Kenya: A History Since Independence* (IB Tauris 2013).

20 Adams Oloo, 'The Contemporary Opposition in Kenya: Between Internal Traits and State Manipulation,' in Godwin Murunga, and Shadrack Nasong'o, *Kenya: The Struggle for Democracy* (Codesria 2007).

21 Okech Owiti and William Mbaya, 'Public Order and Preservation of Public Security Law in Kenya,' in Smokin Wanjala and Kivutha Kibwana (eds), *Democratization and Law Reform in Kenya* (Claripress Ltd 1997).

22 ibid.; See also Okoth-Ogendo (n 3).

In 1968, 42.7 per cent of KPU applications for branch and sub-branch registrations were rejected and by 1969 this had risen to 57.9 per cent.[23] By contrast only 1.8 per cent of KANU branch registrations were rejected. The extent of the government's determination to strangulate the opposition and give advantage to the ruling party was further demonstrated in the run-up to the 1968 local government elections. All the 1,800 KPU candidates were disqualified on grounds that they had incorrectly filled their nomination papers.[24] The end result was that KPU did not have any representatives at the local government level. In October 1969, the Kisumu riots coming after the assassination of Tom Mboya, gave the government the last excuse to proscribe KPU and detain its leaders.

On the political front, KPU officials were strongly restricted in their ability to hold meetings. Their branch registrations were delayed by the Registrar of Societies.[25] The Provincial Administration was used in harassing KPU members and officials. Complaints against the administration by KPU parliamentarians during the life of KPU were commonplace. For example in September 1966, the MP for Ugenya, Odero Sar, bitterly complained in Parliament about the harassment of KPU supporters by the administration.[26] On the same day another MP, Hon Kioko, complained that the administration was threatening to withdraw the trade licenses from KPU members. Complaints were also raised concerning violence inflicted upon KPU deputy leader, Bildad Kaggia, during the Kandara by-election. The President resorted to stating that: "When you meet the KPU, deal with them as you would deal with a snake" during a public address on 20th October 1967 at a Kenyatta Day rally.[27]

B. Containing Opposition from Within: 1969–78

Kenya became a de-facto one party-state for the second time after the opposition party KPU was banned in 1969. Between 1969 and 1982, KANU was the only registered political party but theoretically other political parties could be formed to challenge KANU's monopoly of power. In reality, however, no other political party could be formed as the Registrar of Societies, who had the right to deny any society legal existence, blocked all attempts to register another party.[28] However, the single party state under Kenyatta minimally tolerated dissent, responded to criticism and dealt with local discontent and the rise of new leaders so long as Kenyatta was not challenged personally.[29]

The irony, however, was that although former KPU members and sympathizers were not allowed to form another party, they were likewise not allowed to contest on the only existing party's (KANU) ticket. In the 1974 General Elections, for example, the then national organizing-secretary of KANU issued a directive on the eve of party nominations that was meant to give former KPU ex-detainees a political lifeline.

23 Throup and Hornsby (n 13).

24 ibid., 17.

25 Throup and Hornsby (n 13).

26 House of Representatives Official Report, September 1966, 1071, col 1 cited in Oyugi (n 10) 162.

27 Throup and Hornsby (n 13).

28 Institute for Education in Democracy, *Political Party Organisation and Management in Kenya* (IED 1997).

29 Oyugi (n 10) 15.

The directive stated that the former KPU members who had not rejoined KANU but who had been adjudged to be members of good standing for at least three years since their release from detention could contest in the ruling parties' nominations.[30]

However, it turned out that most former detainees who had met these preconditions were still blocked from contesting. The affected politicians were mainly from Nyanza Province and included Oginga Odinga, Achieng Oneko, Luke Obok, Tom Okello Odongo and Ochola Mak'Anyengo. Odinga supporters believed that then MP for Bondo, Odongo Omamo, was behind the decision to bar Odinga from contesting on a KANU ticket in 1974.[31] In the wake of this, the electorate in Bondo elected an Odinga protégé, Hezekiah Ougo, in solidarity with their undisputed leader, Oginga Odinga.

Odinga was further barred from contesting in the December 1976 Siaya KANU branch elections on the flimsy ground that he had not heard a change of heart, which saw the election of the then Minister for Power and Communications, Isaak Omolo Okero.[32] A petition lodged with KANU headquarters by Odinga's supporters was rejected. After being barred from contesting branch elections in 1976, Odinga expressed interest in the 1977 botched up KANU elections for the post of party Vice-President. Consequently, the then party's organizing-secretary, Nathan Munoko, issued a rule that barred any former KPU leader from holding office in KANU. Even though the rule was mired with confusion, the party's headquarters did nothing to clarify the issue at all.[33] However, the elections were called off at the eleventh hour.

Meanwhile in the absence of an official opposition party, opposition to the ruling party was played by a section of the KANU backbench in parliament. This became moreso after the 1974 elections that witnessed the arrival of new young parliamentarians that appeared to be independent and principled. This group of backbenchers would rally political opposition from within KANU and were christened by the then Attorney General, Charles Njonjo, the 'seven bearded sisters'. These included Abuya Abuya, Chelagat Mutai, James Orengo, Koigi wa Wamwere, Lawrence Sifuma, Mashengu wa Mwachofi and Chibule wa Tsuma. Others outside the group like Martin Shikuku, J.M. Seroney, J.M. Karuiki and Charles Rubia were also critical of the regime on the floor of Parliament, although they operated within well-defined limits.[34]

Collectively, this critical group of backbenchers numbered about 40 and their leader seemed to be J.M Kariuki who was opposed to Kenyatta's policies and attempted to mobilize the masses against the ruling elite which had benefited from Kenyatta's regime. J.M Kariuki, then MP for Nyandarua North, together with Jean Marie Seroney, then MP for Tinderet, were a representation of the boiling tensions associated with the Kenyatta government's land policies. Nyandarua North was host to 49 settlement schemes and predominantly Kikuyu. In Rift Valley, Seroney was actively campaigning for Kalenjin land rights, a hallmark of which was the Nandi Hills Declaration of 1969.

30 *Weekly Review* (Nairobi, 21 March 1977) 8-9.

31 ibid. 11.

32 ibid. 8.

33 ibid. 6.

34 Throup and Hornsby (n 13) 17.

Seroney, in his attempts to gain leverage over government land policy so as to benefit his people, mobilized a coalition that could compete with the group surrounding Kenyatta.[35] J.M. Kariuki had credentials that set him apart from the other Kikuyu elite; he grew up in Rift-Valley and fought in the Mau Mau war. A populist platform was therefore consonant with his experiences. By 1972, some of the 'Gatundu Courtiers' (Kenyatta's inner circle) had started to perceive Kariuki as a threat and members of the group steadily moved to acquire control of administrative positions that they would use against people like Kariuki.[36]

To counter the "new opposition" from within, the Kenyatta regime employed a mixture of strategies. First, the administration started to deny them coverage in the state electronic media, Voice of Kenya, which was then the only outlet. In July 1972,the then MP for South Tetu, Mwai Koigi, speaking on the floor of Parliament asked, "why have instructions been issued against the Assistant Minister for Tourism and Wildlife that when he donated for Harambee projects the news cannot be broadcast over the VoK radio?"[37] The government denied the charges but Carla Heath of the University of Illinois, Urbana Champaign, however, reported statements by VoK employees that such a ban was in effect.[38]

Second, the administration also moved to act against Seroney's activities in Rift Valley using the Public Order and Security Act. Seroney was charged with sedition after issuing the Nandi Hills Declaration that lay claim to all settlement in the district for the Nandi people. In 1973, Seroney's harambee project for construction of the proposed Samoei Institute for Vocational and Technical Education, for which he had raised Harambee funds, was unlicensed by the local administration.[39]

The third occurrence and omission it appears was through "cold case" political assassinations. Two cases pointing towards political assassinations occurred in the 1960s. The first to go down under an assassin's bullet was Pio Gama Pinto, a close adviser to Jaramogi Oginga Odinga and a communist-leaning politician whose death remains unravelled until to date. The second death pointing towards political assassination was that of Tom Mboya in 1969. The assassination appeared to be connected to succession politics within KANU, and although a suspect was convicted, the political motives believed to be behind the assassination have never been unravelled.

The third death with political assassination undertones was that of J.M Kariuki. Investigations revealed that J.M. was last seen alive leaving the Hilton hotel in Nairobi in the company of GSU commander, Ben Gethi. The parliamentary report on the murder recommended investigation of Mbiyu Koinange, then a powerful minister in the office of the president among others. However, before parliament could vote on the report, Kenyatta himself was reported to have ordered the removal of the final page of the report which recommended the investigations of Koinange among others.

35 Jennifer Widner, *The Rise of a Party-State in Kenya; From 'Harambee!' to 'Nyayo!'* (University of California Press 1992) 87.

36 ilbid. 76.

37 *Daily Nation* (Nairobi, 6 July 1972).

38 Widner (n 35) 87.

39 *Daily Nation* (Nairobi, 5 February 1973).

The government through a motion by the then Attorney-General, Charles Njonjo, urged parliament not to vote on the report but to only take note of the report. The motion failed. Masinde Muliro, a cabinet minister at the time, together with two assistant ministers, John Keen and Peter Kibisu, voted to accept the report. They were subsequently sacked from their positions.[40]

From then on, the state took on a more authoritarian stance. The media, academics and dissident politicians suddenly found that they had less freedom. In Kenyatta's own words, "MPs will toe the line or I will crush them like a hawk among the chickens."[41]

Within two years after J.M.'s murder, Martin Shikuku and J.M. Seroney were arrested in the precincts of Parliament and detained for insinuating that KANU was a moribund outfit. Mark Mwithaga and Chelagat Mutai were gaoled and lost their parliamentary seats after being charged with minor crimes. Mwithaga was charged with wife battery which had taken place months earlier while Mutai was charged with incitement. This state of affairs broke up the backbench coalition. Some members began supporting the government while others mellowed in their criticism of the government.

III. THE MOI ERA

The Moi regime initially sought reconciliation as opposed to confronting opposition head on. This was because Moi, unlike his predecessor, came from a less populous community and his political base also lacked the requisite economic muscle.[42] But the regime soon realized the futility of such efforts and thus followed in the footsteps of the Kenyatta administration of annihilating opposition. Initially the Moi regime concentrated on curtailing the likely centres of opposition derived from the foundation and remnants of the cornerstone of the Kenyatta regime in tandem with ideological oppositionists. This was essential because two years before Kenyatta's death Moi had survived a GEMA sponsored "Change the Constitution" movement that was meant to stop him from constitutionally succeeding Kenyatta on an interim basis before the holding of a general election. The Constitution provided that upon the death or incapacitation of the sitting president while in office, the vice-president would rule for days before the holding of a General Election. His regimes next target was the civil society before finally turning to the political class. The Moi regime went an extra mile in taming the opposition for not only did his regime legalize the one party system but it drove the opposition underground. But just like the Kenyatta regime both state apparatus and legal mechanisms were used to circumvent opposition.

A. Containing former political dissidents: 1979–81

When Moi took over power in 1978 his first few months in office were characterized by acts geared towards political reconciliation in the country.

40 Republic of Kenya, *Mwangale Parliamentary Committee Report on JM Kariuki's Murder* (Government Printer 1975); Wanjohi (n 14).

41 David Throup, 'The Construction and Destruction of the Kenyatta State,' in Michael Schatzberg, (ed), *The Political Economy of Kenya* (Praeger 1987) 51-52.

42 Nicola Swainson, *The Development of Corporate Capitalism in Kenya* (Heinemann Educational Publishers 1980).

To this end, he released from detention J.M. Seroney, Martin Shikuku, Chelagat Mutai and prominent novelist, Ngugi wa Thiong'o, among others, in December 1978.[43] This good gesture, however, did not last long as former KPU members were not cleared to run for the 1979 elections. Among those barred were Oginga Odinga, Achieng Oneko, Luke Obok, Tom Okello Odongo, Ochola Mak'Anyengo and Okuto Bala.[44] Although not a former KPU leader, George Anyona, was also barred from contesting the 1979 General Elections. Anyona had already established himself as a formidable backbench opposition politician. Most of these former KPU members resorted to legal redress to compel KANU to allow them to run. However, President Moi, responding to legal suits filed by aspiring candidates barred from contesting the 1979 General Elections stated during a Kenyatta day address that, "the ruling party is supreme and no one can take it to court, least of all candidates aspiring to contest seats in the elections".[45]

Students at the University of Nairobi demonstrated on October 7, 1979 over the barring of Anyona and former KPU politicians and consequently the University was closed prematurely two weeks after the commencement of the new 1979/1980 Academic Year.[46] Although theoretically these former political dissidents could run if they could meet certain pre-conditions which were introduced in 1979 that required them to prove that they had changed their leftist inclinations, the final decision it appeared rested with the party president.[47]

Moi also used the 1979 General Elections to weed out politicians that his regime was not comfortable with. For example, the Central Rift-Valley provided the worst example of electoral rigging since the local government elections of 1968. It was reported that the District Commissioner in Nandi, acting on instructions from the Office of the President, ensured that Seroney, Moi's main political rival among the Kalenjin, was defeated in Tinderet by Moi's protégé, Henry Kosgey. The same fate visited Taita Toweet and Masinde Muliro. In Elgeyo-Marakwet, Moi's personal secretary, Nicholas Biwott, was elected unopposed when his challenger who had defeated him in the 1974 elections, was persuaded to step down and was appointed Chairman of the Horticultural Crops Development Authority, Director of the Co-operative Bank and finally Chairman of the Kenya Tourist Development Authority.[48]

The Moi regime resorted to legal mechanisms to silence parliamentarians whom his regime did not manage to rig out. This was done by arresting perceived opponents of the regime under tramped up charges. Such individuals would be arrested, charged in court, released on bail and from then on they would be made to make an appearance before a magistrate on many occasions and depending on their co-operation would either be convicted or the Attorney-General would enter a *nolle prosequi*. The idea was to use legal intimidation as a weapon to get opponents to toe the state line in the absence of political detention.[49]

43 Widner (n 35).

44 *Weekly Review* (Nairobi, 25 May 1979) 4-6.

45 ibid.

46 ibid.

47 ibid.

48 *Weekly Review* (Nairobi, 10 November 1979) 9-10 and 19.

49 Oyugi (n 15).

Among the politicians who suffered this fate was Waruru Kanja (then a Nyeri MP). He was first dropped as an Assistant Minister for Local Government before being arraigned in court in June 1981 charged with contravening foreign exchange regulations and was later convicted and sentenced to three years in jail. The same fate befell Chelagat Mutai, who was formerly detained but had won back her seat in Parliament after she was released from detention. After returning to her old combative self, she was arrested in 1981 and charged with falsifying her parliamentary mileage claims. She fled to Tanzania where she was given asylum.[50]

This was at a time when three Kikuyu factions opposed to Kibaki led by Kanja, Charles Njonjo and Njenga Karume emerged. Waweru Kanja joined forces with the "Nakuru radicals" and with several politicians from the Coast to constitute the most populous of the three factions. Koigi would become one of the leading lights of this group and pushed for the abolition of detention laws. Unfortunately, in November 1980, only a few months after the group's formation, Kanja was relieved of his post as Assistant Minister for Local Government because of his accusations and dealt a definitive blow to the power of the group.[51]

B. Clamping Down on the Kenyatta Foundation

Moi came to power minus the ethnic clout that Kenyatta had from the Kikuyu community. Not only were the Kikuyu numerous in numbers, they also controlled Kenya's economy. The socio-political and economic outfit that the Kikuyu's used to push their agenda was the Gikuyu, Meru, Embu Association (GEMA). It was Moi's calculation that the best way to contain the Kikuyu hegemony both politically and economically was to destroy GEMA. But he had to do this without creating suspicion that he was fighting the Kikuyu community. It was against this background that he ordered the blanket banning of all ethnic welfare associations although his target was GEMA.[52]

In addition, the years 1980 and 1981 witnessed the implementation of a number of measures aimed at safeguarding presidential power that targeted quarters that were perceived to be opposed to the Moi regime. For instance, the University of Nairobi, then a bastion of leftist activism from lecturers and students, was closed, foreign journalists were harassed, lecturers' passports were seized, warnings of 'crackdowns' were issued and the reopening of detention camps was advanced.[53] The Moi regime subsequently banned the University Academic Staff Union as well as the Students Organization of Nairobi University and the Civil Servants Union[54] as a way of containing any opposition from outside Parliament.

50 Throup and Hornsby (n 13).

51 Widner (n 35).

52 ibid. 142.

53 ibid. 144.

54 Adams Oloo, 'Civil Society and the Consolidation of the Democratic Space in Kenya, in Rok Ajulu, (ed), *Two Countries, One Dream: The Challenge of Democratic Consolidation in Kenya and South Africa*, (KMM Review Publishing Co. 2009).

However, the strongest initiative by the Moi regime to contain the opposition was spurred by Odinga and Anyona's quest to form and register an opposition party. Odinga's rehabilitation into politics by Moi had suffered a setback after he criticized the late president Kenyatta as a "land grabber"–a statement that did not go down well with Moi who did not want to be viewed by the Kikuyu as facilitating the late Kenyatta's demonization. Despite the incumbent Bondo MP, Hezekiah Ougo, having resigned from his seat to allow Odinga a smooth sailing in the subsequent by-election, the ruling party refused to clear Odinga to run for the seat. It was against this background that Odinga and Anyona initiated the plot to register an opposition party. The Moi regime responded by expelling Odinga and Anyona from KANU. During the same month, KANU's governing council passed a resolution to ask Parliament to make Kenya a one-party state by law and Anyona was detained. The legislation (Amendment Act No. 7 of 1982) to amend the constitution was rushed through the National Assembly in one afternoon and Kenya became a *de jure* single-party state in 1982.[55]

The move to make Kenya a one-party state was followed closely by the abortive 1st August attempted coup and the Moi regime's resolve to clamp down on the opposition from all quarters was strengthened. Subsequently, Koigiwa Wamwere (then an MP for Nakuru North) and Mark Bosire (then an MP for Wanjare, S. Mugirango) were arrested and detained. Parliament would vote on June 4th to reinstate the detention laws suspended between 1978 and 1982.[56] "Loyalty" to the President and warnings to opponents became the rhetoric of the regime after the attempted coup through to 1991 when the country returned to multi-partyism. Politicians would be questioned and expelled from KANU, putting an end to their political careers.[57] The August disturbances to this end put the issue of toeing the party line at the top of the Kenyan political agenda.

C. Neutralizing Njonjo and Pushing Opposition Underground

After the 1982 attempted coup, Moi began to isolate the former Attorney-General, Charles Njonjo, whom it was rumoured was scheming to take over the reins of power from Moi. In April 1980, Njonjo quit the post of Attorney General, allegedly because he had reached retirement age and announced he would run for Parliament in the then Kikuyu constituency in Kiambu District. The sitting MP, Amos Ng'ang'a, stepped down in favour of Njonjo.[58] Moi knew Njonjo had made more enemies than friends in his former capacity as Attorney-General and he took advantage of this to plot Njonjo's downfall. Njonjo's fall was as swift and complete as his rise was. He was denounced as the agent of a foreign power which was allegedly grooming him to replace Moi.[59]

55 Musambayi Katumanga and Mary Omosa, 'Leadership and Governance in Kenya,' in Peter Wanyande, Mary Omosa, and Chweya Ludeki (eds), *Governance and Transition Politics in Kenya* (University of Nairobi Press 2007).

56 Widner (n 35).

57 Joel D. Barkan, 'Divergence and Convergence in Kenya and Tanzania: Pressures for Reform,' in Joel D Barkan (ed), Beyond Capitalism and Socialism in Kenya and Tanzania (EAEP 1994) 25-6.

58 Widner (n 35).

59 Throup and Hornsby (n 13).

Radical MPs led by Lawrence Sifuma and conservative supporters of the Change the Constitution Movement of 1976 rushed to denounce Njonjo whilst he was on a trip to Britain. Lawrence Sifuma even made the first request that Njonjo be expelled from the Cabinet.[60] Mukasa Mango, then an MP for Busia East, retorted that expulsion from the Cabinet was not enough and that Njonjo should be brought before a court to face treason charges. All through these lamentations, Moi remained silent and did not repudiate the attacks.[61] Taking cue, more and more MPs and KANU branch officials hurried to disassociate themselves from Njonjo and declared their support to President Moi.

On July 1st, 1983, Njonjo took the initiative and resigned from the Cabinet but was suspended from KANU two days later. Moi thereafter set up a Judicial Commission of Inquiry into Njonjo's behavior and called for a snap General Election in 1983. Moi also reshuffled the Cabinet in October 1983 so as to get rid of Njonjo's allies. As a result, G.G. Kariuki and Stanley Oloitiptip were removed from the Cabinet. Later in 1985, another of Njonjo's allies, Robert Matano, was asked to step down and was defeated in his bid to hold onto the position of KANU's Secretary-General.[62]

The General Elections of 1983 were meant to purge the system of Njonjo's supporters and provide for a new breed of legislators who would owe their loyalty directly to Moi. Njonjo's closest allies who were defeated in the ensuing elections included G.G Kariuki and Joseph Kamotho. In these cases, electoral malpractices were near certain particularly in G.G. Kariuki's Laikipia West constituency.[63] However, some of his allies such as Charles Rubia, Stanley Oloitiptip and Arthur Magugu survived.[64]

The attempted 1982 coup gave the Moi regime more fodder with which to oppress the opposition. Having turned Kenya into a de jure one-party state, any school of thinking that was contrary to that espoused by the state was deemed dissent and attracted criminal sanction.[65] It should be noted that the genesis of the introduction of a de-jure one party state was to prevent Odinga and Anyona to form an alternative political party. The order to the Attorney General to table the legislation emanated from a KANU Governing Council meeting.[66] Of course, without an avenue for alternative voice, opposition to the state went underground. This would compel the state to rethink its containment of the opposition. Systematic persecution, torture and brutal incarceration became the tool of choice.[67]

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60 Widner (n 35).

61 Weekly Review (Nairobi, 22 April 1983) 4-7; *Weekly Review* (Nairobi, 22 May 1983) 4-5.

62 Widner (n 35).

63 *Weekly Review* (Nairobi, 23 September 1983) 3-9; *Weekly Review* (Nairobi, 30 September 1983) 3-9; *Weekly Review* (Nairobi, 28 October 1983).

64 Throup and Hornsby (n 13) 34.

65 J.K Omolo, 'The Executive and Constitutionalism in Kenya,' in Murugu Mute, and Smokin Wanjala, '*When the Constitution Begins to Flower: Paradigms for Constitutional Change in Kenya*', (Vol. 1, Claripress 2002).

66 Githu Muigai, 'Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997) a Study in the Politics of the Constitution' (DPhil thesis, University of Nairobi School of Law 2001).

67 Michael Chege, 'The Return of Multi-Party Politics,' in Joel D Barkan (ed), *Beyond Capitalism and Socialism in Kenya and Tanzania* (EAEP 1994) 63.

Due to the Moi regimes clamp down on formal opposition after 1982, opposition was driven underground. A number of movements thus sprang up, all operating clandestinely, with the sole goal of toppling the Moi regime. These included, Mwakenya, the December 12th Movement and the February 18th Movement. At the same time, suspected enemies, both real and imagined, were detained, tortured, and forced to confess to trumped-up charges of sedition. Toward the end of the decade, about 160 political prisoners were languishing in jail.[68]

The Moi regime further moved in to contain the civil society groups. Political co-optation, divide and rule and manipulation were the techniques used by the regime to strangulate Civil Society Organizations (CSOs). The Central Organization of Trade Unions (COTU) and Maendeleo Ya Wanawake were co-opted and made auxiliaries of KANU. The Kenya Consumer Organization, the Kenya Chamber of Commerce and Industry and the Federation of Kenyan Employers were befriended to keep them mute.[69] For those organizations that the regime could not befriend, they created rival organizations. Thus the Kenya Grain Growers Co-operative Union was created to rival the Kenya Farmers Association whose assets it forcibly acquired before running the KFA into the ground.[70] The Matatu Vehicles Owners Association was created to rival the Matatu Owners Association.

Only the National Council of Churches of Kenya (NCCK), the Catholic Church fraternity and some professional organizations such as the Law Society of Kenya (LSK) remained detached and critical of the Moi regime. However, prominent members of the LSK were harassed by the regime with some ending up in detention. Paul Muite, the then chairperson of the LSK, was faced with government backed law suits filed by pro-regime lawyers to challenge his leadership of the LSK.[71] In almost the same vein, the Moi regime targeted radical individuals in CSOs who were not part of the LSK. In the elections of the Church Province of Kenya, as the Anglican Church was formerly known, the then Attorney-General, Charles Njonjo, engineered the defeat of Bishop Henry Okullu who was a vocal critic of the Moi regime in favour of Manasseh Kuria. And in NCCK, the African Inland Church of which Moi was an adherent revoked its membership. In 1994, the government expelled from Kenya the Director of the Friedrich Naumann Foundation, a German NGO, Ms. Dorothe Von Brentano, for allegedly being involved in subversive activities including giving support to the opposition.

D. Electoral Fraud and Assault on the Judiciary

The 1983 General Elections as noted above were meant to rid Parliament of Njonjo loyalists. Those who survived were finally shown the door during the 1985 KANU elections. Both the 1983 and 1985 casualties were subsequently expelled from KANU and included, Stanley Oloitiptip, G.G. Kariuki, Joseph Kamotho and Jackson Kalweo. However, Kariuki, Kamotho and Kalweo would later return to KANU and serve as loyal

68 Barkan (n 57) 26-7.

69 Oloo (n 54).

70 Oloo (n 54) 214.

71 Frank Matanga, 'Kenya: A Chequered Path To Democracy,' (2003) 1 East Africa Journal of Human Rights and Development 31, 37.

supporters of Moi. By this time, KANU had tightened its disciplinary procedures and invoked rules that permitted the leadership to screen candidates for office and apply a loyalty test. Furthermore, KANU began to create youth wings to patrol the country and monitor dissent.[72]

The 1988 General Elections introduced a new level of electoral fraud. Key figures in the Moi regime were determined to utilize the elections to control Parliament and silence their critics for good. The elections were contested under the new queue voting system in which KANU party members voted in public for their candidate by lining up behind one's candidate of choice. The 'primary' was to be followed by a run-off under the secret ballot system between the top two or three candidates only if no candidate won over 70 per cent of the vote at the primary. It turned out to be the most shambolic elections ever held in Kenya and Moi himself in his own words acknowledged later that "the implementation of the queue voting system left a lot to be desired."[73]

Although the queue voting system was an internal party affair, it had a direct impact on the general elections as Kenya at the time was legally a one-party state. The provisions in the KANU nomination rules were particularly contentious. The first one provided that the party primaries would be contested through an open queue voting system in which the voters were expected to line up behind the candidates they supported. The second equally contentious rule followed from the first. It stated that any candidate getting more than 70 per cent of the votes cast in the party primaries would be considered automatically elected to the national assembly.

As expected, the queue voting elections led to several malpractices which in turn resulted in election petitions. The court redress that was anticipated, however, was not forthcoming as the High Court ruled in the first petition that it had no jurisdiction to deal with matters arising out of the nomination rules because these were the party's house rules and the court cannot interfere with the internal affairs of a society. The court suggested that the remedy for the aggrieved lay in petitioning the party's president who under the party constitution had the final say. The presidential decision itself was non-justifiable as the president himself was an interested party.

In the end, it can be summarized that it is more than likely that the KANU party nomination rules were a strategy to rig the elections and defeat those that the ruling party perceived to be disloyal.

In 1988, a constitutional amendment was passed removing security of tenure for judges and the Attorney General.[74] Although this was later rescinded, it epitomized the Moi regimes obsession with creating an "imperial presidency."Another amendment to the law in 1988 increased the time that police could hold a suspect in custody from 48 hours to 2 weeks before being taken to a court of law. This ostensibly was meant to allow the regime time for a fishing expedition on suspects deemed critical of the government and provide maximum indignation of the critics. In addition 'dissident' politicians were harassed continually and expelled from KANU, e.g., Kenneth Matiba and others such as

72 Widner (n 35).

73 *Weekly Review* (Nairobi, 7 December 1990) 15.

74 Constitution of Kenya (Amendment) Act No. 6 of 1986.

George Anyona would be embroiled in a yearlong sedition trial from June 1990 to July 1991.[75] All these, it appeared, were meant to break the "spirit" of the oppositionists.

IV. THE CALL FOR POLITICAL PLURALISM AND DIVIDE AND RULE POLITICS

Internal demands for reform came initially from prominent clergy, who as early as 1986 and especially after the rigged elections of 1988 voiced their concern about human rights abuses and the decline of political freedoms. Likewise, independent press critically examined the policies of the Moi regime and notable among these were *Finance*, the *Nairobi Law Monthly* and later *Society* and the *Economic Review*.

However, it was Kenneth Matiba's and Charles Rubia's call for pluralism in 1990 that mobilized people around this rallying call and set July 7th , 1990 as the date for the reform rally. Charles Rubia, Kenneth Matiba, and Raila Odinga and others who supported them were consequently detained before the date set for the meeting. However, Kenyans in their show of solidarity to the detained and defiance to the regime, turned up for the meeting and demonstrations ensued in Nairobi and Central Kenya, resulting in nearly thirty deaths and widespread destruction of property as police and the paramilitary General Service Unit quelled the uprising.[76] Subsequent pressure led to the repeal of Section 2A that had made Kenya a *de jure* one party state.

The Kenyatta and Moi regimes under the one-party system had perfected the art of divide and rule. But during the said periods, the divide and rule politics focused on the tribe where two titans of the community posing the greatest threat would be pitted against each other. It was against this background that Tom Mboya was pitted against Jaramogi Odinga during the Kenyatta regime and Charles Njonjo against Mwai Kibaki during the Moi regime. But with the return to multi-partyism this tactic focusing on the tribe would not have sufficed and therefore the Moi regime turned their attention into dividing the movement/party. It was against this background that the Forum for the Restoration of Democracy (FORD) movement, which appeared set to overhaul KANU from leadership, ended up in factional fights that led to the registration of two different parties thus handing Moi and KANU victory on a silver platter.

In August 1992, Odinga and Matiba consented to the registration of two FORD political parties under their respective leaderships, FORD-Kenya and FORD-Asili. This incredibly, was a KANU government suggestion.[77] The registration of the two FORDs and the continued independence of the Democratic Party (DP) paved the way for a KANU electoral victory in December that returned Moi back to power with only 36 per cent majority.[78]

The KANU government employed a constitutional bottleneck to stifle the opposition by requiring a presidential candidate to garner 25 per cent of the votes cast in 5 of the

75 *Nairobi Law Monthly* (Nairobi, April/May 1991) 16-26.

76 Chege (n 67) 59-60.

77 ibid. 61.

78 ibid.

8 provinces, a tall order for the opposition to pull at the time, considering its fractured nature. The government's behaviour in the run up to the 1992 General Elections involved the use of the civil service to intimidate or buy opponents, unfair electoral practices, carefully calculated ballot rigging and manipulation of ethnic loyalties.[79]

In its attempts to frighten the opposition, the Moi regime stood idly as ethnic clashes erupted in Western Kenya in December 1991. By May 1992, these had spread to all the areas along the borders of the Rift Valley Province, where non-Kalenjin 'migrants' had settled adjacent to traditional Kalenjin lands. By the end of 1993, between 1,200 and 1,500 people had reportedly died and between 255,000 and 300,000 had been displaced or left homeless.[80] They were intended to show the migrant communities, especially supporters of the opposition, that multiparty democracy had brought them only trouble and would continue to do so. These killings later led to a ban by the President, on political rallies of opposition leaders for a whole week, blaming the opposition for instigating the clashes.[81] The ban inevitably hampered recruitment campaigns and attempts to establish grassroots party structures.

Arising from the foregoing, it is thus clear that a key strategy employed by KANU was the declaration of their strongholds as KANU zones and the prevention of the opposition from operating in their territories. Indeed, the politically instigated ethnic clashes in the Rift Valley were intended precisely to make it impossible for the opposition to operate freely in the so-called KANU zones. And to ensure that there would be no contestation in the KANU zones, deliberate efforts were made to prevent the would-be opposition candidates from being nominated as candidates. Many were physically prevented in the Kalenjin heartland from presenting their nomination papers by a combination of KANU youths and State security agents.[82] Up to about 17 MPs were declared elected unopposed through the crude method of preventing opposition contenders from presenting their nomination papers.[83]

Another tactic used by Moi to contain the opposition in the multi-party era was through the instigation of defections. Following the swearing-in of MPs after the 1992 General Elections, defections from the opposition parties became the order of the day. Most of the 14 by-elections that were held between 1992 and 1997 were as a result of defections with the ruling party winning eight of the seats that had initially been won by the opposition.[84]

The KANU regime used the one party tactic of reneging on registering parties that were deemed to be ideologically sound and that threatened to be a platform for national mobilization. One party that suffered this fate was SAFINA. It was only finally registered at a time when the KANU regime anticipated it to fragment the opposition further.

79 ibid.

80 *Africa Watch* (1993) 56.

81 *Weekly Review* (Nairobi, 29 May 1992) 12-14 and 20-24.

82 Walter Oyugi, 'Ethnicity in the Electoral Process,' (1997) 2 African Journal of Political Science 41.

83 ibid.

84 Institute for Education in Democracy, *National Elections Data Book: Kenya*, 1963-1997 (IED 1997) 244-47.

Whereas the Moi regime continued to allow the registration of more political parties, it simultaneously refused to grant them freedom to operate. The police continued to interrupt political rallies organized by the opposition while the Provincial Administration behaved as if KANU was still the sole political party.[85]

The Moi regime's divide and rule tactics was extended to CSOs initiated agenda's. To this end, the constitutional reform agenda spearheaded by the Citizens Coalition for Constitutional Change (4Cs) suffered this fate. The KANU administration responded by dividing the opposition unity presented by this front. The administration lured away from the National Convention Assembly (NCA) (later to be referred to as the National Convention Executive Committee (NCEC) which was created during the NCA to implement the resolutions passed), its key political leaders and members of the clergy who supported it. In any case, KANU boycotted a meeting with the NCEC on 25th August 1997.

The luring away of opposition figures from the NCEC by KANU led to a massive walk out by a number of political leaders and MPs who had by then decided to pursue the issue of reform within the Inter-Parties Parliamentary group (IPPG) deal during a press conference at Ufungamano House in Nairobi. Apart from the IPPG talks, KANU had also supported the formation of an alternative pressure group-the Movement for Dialogue and Non-Violence (MODAN).

The eventual agreement on IPPG Accord managed to deliver some legal and political changes that improved the administration of electoral process that were anchored on both statutory legal reforms and administrative reforms.

However, despite the changes brought about by the IPPG Accord, the KANU administration continued to behave as if election were being held under a single-party system. The opposition was denied fair airplay on the national broadcaster KBC. The Provincial Administration was also partisan. The police in some reported cases openly interfered with rallies or 'meet-the-people' tours by opposition members especially in KANU strongholds. In some districts in Coast, North Eastern, Turkana, Samburu, West Pokot and in Rift-Valley, access was denied to opposition leaders.[86]

A. Co-operation and Merger. New Frontiers in Neutralizing Opposition

Due to a divided opposition just as in 1992, Moi and KANU once again won the 1997 election, this time by 41% of the vote in the presidential race. The opposition leaders including Mwai Kibaki of DP, Michael Wamalwa of FORD-Kenya, Charity Ngilu the Social Democratic Party and Raila Odinga of the National Democratic Party (NDP), teamed up to denounce the results as fraudulent and unacceptable.[87] It is Kibaki who having come second that later went to court to petition the election of Moi.

85 Walter Oyugi, 'Political Culture and Liberalization in Kenya: 1986-1999,' in Samwel Mushi, Rwekaza Mukandala, and Saida Yahya-Othman (eds), *Democracy and Social Transformation in East Africa* (EAEP 2004) 68.

86 ibid. 75.

87 *Daily Nation* (Nairobi, 2 January 1998); *Daily Nation* (Nairobi, 3 January 1998).

A 'Kibaki-bashing' party was held at the Narok Stadium on January 17, 1998, in which Ntimama and Kones issued the 'Narok declaration' stating: "We are ready to sell our goats and cattle to support President Moi in court, but Kibaki should be held responsible for anything that happens after this."[88] Ntimama, resorting to his usual violent rhetoric of the 'lying low like envelopes' fame in 1992, stated that challenging Moi's election would be treated as 'incitement to violence'.[89]

These violent remarks continued unabated with the state remaining ambivalent. In fact the utterances were engineered by the state. An assistant minister in the Office of the President, Simeon Kiptum arap Choge, who was also a former death row convict, warned magistrates that ruling in Kibaki's favour would lead to "automatic bloodshed all over the country."[90] The courts eventually found a technicality to throw out the petition claiming that Kibaki had not personally served Moi with the petition. In addition, violence had actually started in the Rift-Valley that January against the Kikuyu and was slowly spreading. By the time Choge was issuing threats, the death toll in Laikipia had reached 55 and in Njoro 25.[91]

The opposition front would suffer a major jolt when Raila Odinga led his party, NDP, into co-operation with KANU. This cooperation led to the election of NDP's Joab Omino as deputy speaker in Parliament. This cooperation certainly dealt a blow to opposition unity in Parliament, and was therefore, happily received by KANU. Out of this cooperation and merger, Raila became chair of the Parliamentary Committee on Constitutional Review, the Energy Minister and KANU's Secretary-General before he fell out with Moi in 2002. In addition, his party secured one more Cabinet post and two assistant ministerial positions. The merger thus stole the thunder from the opposition that appeared set to keep the KANU government on its toes as the election returned a hang parliament of KANU 107 and the combined opposition 103.

This cooperation negatively affected the operation of opposition parties in Parliament. KANU only had a majority of four MPs over the combined opposition. The co-operation, therefore, boosted KANU's position in Parliament such that opposition motions would hardly get passed. In fact, Julius Sunkuli, then an Assistant Minister, called on the government not to implement opposition members' motions passed by parliament.[92] It is worth noting that the "hang" parliament that the 1997 elections had produced would have proved difficult for the Moi regime and KANU to navigate as they would have consistently been compelled to whip the ruling party members at every turn of critical motions. The co-operation with NDP thus assuaged this worry and punctured the combined opposition potency.

88 *Sunday Nation* (Nairobi, 18 January 1998).

89 ibid.

90 *Daily Nation* (Nairobi, 28 January 1998).

91 *Daily Nation* (Nairobi, 20 January 1998); ibid.

92 Maguta Kimemia, 'Kenya: Seminar told of Govt's Action,' *Daily Nation* (Nairobi, 5 August 1998).

V. THE KIBAKI ERA: FAILED COALITIONS AND POACHING

The elusive quest for the unity of opposition parties finally bore fruit in the General Election. For the first time in Kenya's history, the opposition managed to unite behind Mwai Kibaki under the banner of the National Rainbow Alliance (NARC) which relegated KANU to the opposition for the first time since independence after the 2002 General Elections. NARC brought together 14 opposition parties and all the opposition presidential candidates who had participated in the 1997 General Election with constituent parties including the main planks which were the Liberal Democratic Party (LDP) and the National Alliance (Party) of Kenya (NAK). KANU won 63 seats in Parliament compared to NARC's 125. As an opposition party, KANU appeared shorthanded from the start. However, it did not take long before KANU got support from NARC MPs who were dissatisfied with Kibaki's Cabinet appointments.

Soon after Kibaki named his cabinet on January 3, 2003, 26 MPs mainly drawn from its LDP wing accused President Kibaki of breaking a power-sharing agreement arrived at before the 2002 General Elections. They accused the President of not honouring the Memorandum of Understanding (MoU) between NAK and LDP.[93] Otieno Kajwang, who issued the statement, stated that the MoU had stipulated that LDP and NAK were to share cabinet portfolios on 50:50 basis.[94] Kibaki had given NAK 15 Cabinet slots and LDP 8. Kibaki who was reported then to be unwell from an accident suffered during the campaign period, did little in the initial stages to quell the discontent from LDP. In fact, under his watch NARC structures including the Summit grounded to a halt.[95]

It was against this background that opposition to the Kibaki regime oscillated between a section of KANU and a section of NARC. Nowhere was this more pronounced than in the constitutional review process. The main bone of contention between LDP and NAK over the constitutional review process was whether the Bomas Draft should be changed by Parliament before it was subjected to a referendum or taken it to a referendum without any changes. LDP favoured the latter option.

Kibaki's government was thus caught in wrangles within its NARC coalition for most of 2003 and 2004. Kibaki, in his attempts to tame the discontent from the LDP faction that on occasions voted with the opposition in Parliament, reached out to Ford-People through its leader, Simeon Nyachae, and directly engagement with a section of KANU MPs. In addition, he reached out to other NAK affiliated parties especially Ford-K and SDP.

In a reshuffle in June, 2004, the President demoted LDP 'rebel' ministers to less influential ministries and promoted FORD-K leader, Musikari Kombo, to the powerful local government ministry. The June 30th cabinet reshuffle saw 5 KANU MPs (KANU was the official opposition party) and 1 FORD-P MP (FORD-P was also an opposition party) absorbed into the Cabinet in addition to 2 FORD-P MPs who were appointed Assistant Ministers. These were: John Koech (KANU) appointed Min. for East Africa Cooperation, Njenga Karume (KANU) appointed Min, for Special Programmes, Mohammed Abdi Mohammed (KANU) appointed Min. for Regional Development Authorities, Simeon

93 *Daily Nation* (Nairobi, 6 January 2003) 1.

94 ibid. 3.

95 *The East African Standard* (Nairobi, 2 January 2004).

Nyachae (FORD-P) appointed Min. for Energy. Assistant Ministers appointed from the opposition parties were: Noah Arap Too (KANU) for Home Affairs, Simeon Lesirma (KANU) for Planning and National Development, Henry Obwocha (FORD-P), for Financial Management Affairs and Kipkalia Kones (FORD-P) for Public Works. LDP Ministers had their clout reduced in this reshuffle. Kalonzo Musyoka was shifted from Min. of Foreign Affairs to Environment while Ochillo Ayacko was moved from Energy to Sports. Najib Balala was moved to the Office of the President to be in charge of National Heritage. Raila's ministry lost the Housing docket which was moved to the Lands Ministry headed by Amos Kimunya, a NAK MP.[96]

Although the President during his televised address to the nation said that the reshuffle was meant to put in place a government that reflected the aspirations of the majority of the people, the move was widely seen as targeting LDP rebels. In the same vein, Uhuru Kenyatta, Chairman of KANU and Leader of Official Opposition, protested at what he called 'poaching' from the opposition by the President.

The move to contain the LDP rebellion did not end there. LDP MPs Sospeter Ojamoong and Stephen Ondiek were replaced in the Public Account Committee (PAC) while Otieno Kajwaang, Gor Sunguh and Sammy Weya were removed from the Public Investments Committee (PIC). This was critical since these are the Watchdog committees in Parliament. In August the same year, Kalonzo Musyoka was removed from his position as chairman of the Sudanese and Somali peace talks and was replaced by John Koech, a KANU MP. The move was to further weaken LDP's power within the government.[97]

Stung by President Kibaki's actions, the 2005 referendum on the Proposed Constitution, provided KANU and 'rebel' elements within the government with an opportunity to join forces and defeat the government on its stand on the proposed constitution. These two (mostly KANU MPs, LDP MPs plus a cross section of the civil society) coalesced under the Orange banner to marshal votes against the proposed constitution. The "Yes" side led by President Kibaki was resoundingly defeated at the referendum by a margin of 57 to 43 Per cent. Kibaki reacted by sacking the whole Cabinet and retained only his Vice-President and the Attorney-General. He appointed a new Cabinet two weeks later where all ministers, mostly from LDP, who had rejected the proposed constitution were not appointed back to the Cabinet: Raila Odinga, Najib Balala, Ochillo Ayacko, Kalonzo Musyoka, William Ole Ntimama and Anyang' Nyongo. The new Cabinet was sworn-in on 9th December 2005, made up exclusively of Kibaki's close political allies.

The 2005 referendum redefined the politics of Kenya. Talks began between KANU, LDP, and the Labour Party to transform the Orange brigade into a political party. The Kibaki regime, however, appeared to have borrowed a leaf from the Moi script. It turned out that a party called ODM had been registered by Mugambi Imanyara compelling the Orange brigade to register another party under the ODM-Kenya banner.[98] But this did not come easy as the Registrar of Societies stonewalled on registering the party, akin to the Moi regime days, arguing the two parties had nearly similar names oblivious of the fact that within his record there were three parties sharing the noun FORD.

96 *Daily Nation* (Nairobi, 1 July 2004).

97 *Daily Nation* (Nairobi, 27 August 2004).

98 *The East African Standard* (Nairobi, 15 August 2007).

However, ODM-Kenya could not be registered immediately by the coalition partners due to rivalry and suspicion. KANU wanted to enter the coalition as a corporate partner while LDP wanted people to join ODM-K as individuals. Finally, a section of KANU MPs led by Uhuru Kenyatta left the ODM-K altogether retaining their corporate identity in July 2007 and endorsed Kibaki's re-election bid despite Uhuru then being the official opposition leader.

Disagreements in ODM-K did not end. This time round, disagreements were centred on the method to be used in choosing the ODM-K's presidential candidate. This brought memories of the tussle between Matiba and Jaramogi that led to a split in FORD. Kalonzo Musyoka favoured the consensus approach while Raila Odinga favoured a delegate's conference approach.

After a protracted struggle, Raila and his allies, namely, Musalia Mudavadi, William Ruto, Najib Balala, Anyang' Nyongo and Henry Kosgei, negotiated to reclaim the ODM party from Mugambi Imanyara and left ODM-K to Kalonzo Musyoka and Julia Ojiambo. As Joe Khamis chronicled later in his memoirs the states hand in the Orange split was evident akin to the FORD split in the 1990's.[99]

VI. CONCLUSION

The battle between the ruling parties or coalitions and the opposition parties has perennially been skewed in favour of the ruling party. This can mainly be attributed to the fact that the ruling party or coalitions have perennially taken advantage of their capture of the state apparatus and machinery and used them in their favour against the opposition be it civil or political. In addition to the political exigencies exercised by the state agencies the ruling parties or coalitions have also used their numerical majority in parliament to craft legal avenues to tame the opposition. While some legal avenues though draconian have appeared in the statutes such as detention laws others have been merely the misuse of statutory powers such as the refusal by successive registrars of societies to register certain political parties over the years which were considered as likely to cause a serious political challenge to the ruling party or coalition. It is also important to note that within coalitions there has always been a senior partner instrumentally which controls the state apparatus and in those circumstances the other partners have become the "opposition" from within but suffering the same fate as the traditional opposition. The evidence we have adduced to support our case on how the opposition has been tamed between 1963 to 2007 suggests that the transition to democracy in Kenya has been protracted and in fact the only successful transition in Kenya so far was in 2002 but even that transition was not complete as the country experienced a roll back and did not proceed to the next level so as to be ranked as a consolidated democracy in which the state acts as neutral arbiter between competing parties or coalitions.

99 Joe Khamisi, *The Politics of Betrayal: Diary of a Kenyan Legislator* (Trafford Publishing 2011).

LEGAL FEMINISM AND TRADITIONAL LEGAL DOCTRINE: CONTESTING THE DOMINANT PARADIGM

*Nancy M. Baraza**

ABSTRACT

Legal theory is built on the premise of criticising the existing or traditional legal theory whose assumptions are the neutrality, rationality and universality of law. Feminists have serious doubts about dominant legal methods and criticize them for representing male power structures which consider only male view of the world and ignoring the female view. From this point of view, feminists have attempted to incorporate the experience of women and women's voices in jurisprudence. From the aforesaid point of view, feminism exposes those features of law that disadvantage women. This article is an examination of the legal feminist critique of the traditional legal doctrine, specifically targeting the traditional assumptions of the neutrality, rationality and universality of law and how they obliterate the women's experiences. The article does this by discussing the meaning, context and tenets of feminist legal theory. It concludes by contextualising feminist legal theory and method in the Kenyan constitutional and legal experience.

I. INTRODUCTION

One primary purpose of law as traditionally understood is to promote stability and order by reinforcing adherence to predominant norms, representing them not only as the official values of a society, but even as universal, natural, and inevitable. Law is thus seen as setting the official standard of evaluation for what is normal and accepted – what is required, prohibited, protected, enabled, or permitted. It is accordingly represented as objective.[1] Violations, wrongs, injustices, harms, or infractions are by definition deviations from law, and typically also deviations from the status quo. The status quo is the invisible default standard of law.[2]

From these observations, feminist philosophers of law have concluded that law makes systemic bias invisible, normal, entrenched, and thus difficult to identify and to oppose.[3] Liberal legalism posits law as an essentially benign, neutral and autonomous institution. It is connected to society in that its function is to assist in the coordination of social activities and the resolution of social problems. It does so according to shared moral values and political ideals, universal principles, rational argument, doctrine and logic.

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1 Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism', in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 23.

2 ibid.

3 Martha Minnow, Making *All the Difference: Inclusion, Exclusion & American Law* (Cambridge, Harvard University Press 1991); Catherine MacKinnon, *Toward a Feminist Theory of State* (Cambridge, Harvard University Press 1989); Deborah Rhode, *Justice and Gender* (Cambridge, Harvard University Press 1989).

Law reform is seen as a valuable tool for resolving new or newly-discovered social problems and thus, legal change reflects social change. At the same time, liberalism imposes limits on the permissible scope of legal intervention in the social, particularly in relation to spheres of activity designated 'private', in order to maximize individual freedom.[4] Feminists have rejected this image of law as objective, impartial, progressive and self-limiting and have instead highlighted its tendencies to maintain and exacerbate inequality, exclusion and oppression.[5]

The subject of this paper is to examine the feminist legal theory's critique of the dominant legal doctrine and more specifically its presentation of legal rules as the objective, rational and legitimate normative mechanisms; the assumptions of objectivity, rationality, whilst other normative types are partial or subjective.

II. UNDERSTANDING FEMINISM AND THE FEMINIST

A feminist is not that person that has aroused the great deal of hostility, inspired controversy and continues to evoke fear among a sizeable portion of the general public and within and outside the academy.[6] A feminist is a less threatening individual than thus portrayed and means a person, whether woman or a man,[7] who believes in two basic propositions: that society is patriarchal in the sense that it has been shaped by and continues to be dominated by men.[8] As a result of this patriarchal structure, women do not have as much power as men and are treated differently from men; and, that women's current subordination in society is not desirable.[9]Hence the main point feminists have stressed about gender inequality is that it is not an individual matter, but is deeply ingrained in the structure of societies. Gender inequality is built into the organization of marriage and families, work and the economy, politics, religions, the arts and other cultural productions, and the very language we speak. Making women and men equal, therefore, necessitates social and not individual solutions.[10]

According to Katherine Bartlett, being a feminist is a political choice about one's positions on a variety of contestable social issues.[11] Bartlett's broad sense of feminist positions "encompasses a self-consciously critical stance toward the existing order with respect to the various ways it affects different women 'as women'".[12]

4 Katherine O'Donovan, *Sexual Division in Law* (Weidenfeld & Nicolson1985) 64-65.

5 Vanessa Munro, *Law and Politics and the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart Publishing 2007).

6 Karen Offen, 'Defining Feminism: A Comparative Historical Approach' (1988) 14 Signs 119, 120.

7 Although most of the people writing about feminist jurisprudence are women, a few men like Kenneth Karst in 'Woman's Constitution' (1984) Duke L.J. 447, and Cass Sunstein in 'Feminism and Legal Theory' (1988) 101 Harv. L. Rev. 826, have made important contributions to the genre.

8 This Article considers Hon. Mwai Kibaki, former President of the Republic of Kenya as a staunch feminist due to his strong campaign to have the Constitution of Kenya, considered one of the most women and gender friendly constitutions, endorsed at the Referendum.

9 Linda J Lacey, 'Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute' (1989) 25 Tulsa Law Review 775, 777.

10 ibid.

11 ibid.

12 ibid.

Bartlett adds that "being a feminist means owning up to the part one plays in a sexist society; it means taking responsibility – for the existence and for the transformation of "our gendered identity, our politics, and our choices".[13]Linda Gordon observes that "feminism is not a 'natural excretion of [woman's] experience but a controversial political interpretation and struggle, by no means universal to women".[14]

Defining "feminism" is not easy either. In fact Bartlett posits that it is problematic.[15]This is because feminism is not a homogenous philosophy and feminists variously disagree on some propositions such as exactly what laws and practices constitute illegitimate patriarchy, and what methods should be used to establish "equality" for women.[16]There is, however, a general consensus that feminist jurisprudence is centred on an analysis of women's position in a patriarchal society and methods of eliminating patriarchy.[17] Lucinda Finley explains that "[t]he purpose and the practice of feminist theory is to name, expose, and eliminate the unequal position of women in society."[18] In a similar vein, Leslie Bender states: "[t]he primary task of feminist scholars is to awaken women and men to the insidious ways in which patriarchy distorts [women's] lives".[19]Robin West has described one of the two aspects of feminist jurisprudence:

> The first project is the unmasking and critiquing of the patriarchy behind purportedly ungendered law and theory, or put differently, the uncovering of what we might call 'patriarchal jurisprudence' from under the protective covering of 'jurisprudence'…[20]

Suffice to state, however, that legal feminism falls within the category of critical legal thought which emerged as a reaction to the traditional knowledge theory.[21]

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13 ibid.

14 Linda Gordon, 'What's New in Women's History' in Teresa de Lauretis (ed), *Feminist Studies/ Critical Studies* (Indian University Press 1986) 30.

15 Katherine T. Bartlett argues that the label "feminist" has substantial problems. First, it can create an expectation of feminist originality or invention that feminists do not intend and cannot fulfil. This expectation itself demonstrates a preoccupation with individual achievement and ownership at odds with the feminist emphasis on collective, relational discovery. Feminists acknowledge that some important aspects of their methods and theory have roots in other legal traditions. Although permeated by bias, these traditions nonetheless have elements that should be taken seriously. Still labelling methods or practices or attitudes as feminist identifies them as a chosen part of a lager, critical agenda originating in the experiences of gender subordination. Although not every component of feminist practice and reform is unique, these components together address a set of concerns not reached by existing traditions. Secondly, use of the label "feminist" has contributed to a tendency within feminism to assume a definition of "woman" or a standard for oppositional, a tendency that feminists have criticized in others. The tendency to treat woman as a single analytic category has a number of dangers. For one thing, it obscures – even denies – differences among women and among feminists, especially differences in race, class, and sexual orientation, that ought to be taken into account. See Katherine T. Bartlett, 'Feminist Legal Methods,' (1990) 103 Harv L Rev 833.

16 Lacey (n 10) 777.

17 ibid. 780.

18 ibid.

19 ibid.

20 Robin West, 'Jurisprudence and Gender' (1988) 55 U Chi L Rev 1, 4.

21 Jennifer Lynn Orff, 'Demanding Justice without Truth: The Difficulty of Postmodern Feminist Legal Theory' 28 Loyola of Los Angeles Law Review 1197, 1199.

Traditional knowledge theory rooted in Hobbesian-Lockean- Kantian philosophy[22] posits the existence of an external, objective reality that can be "known" through the senses and ordered through reason.[23]According to most traditional knowledge theories, the way a person knows anything is by directly perceiving the world's objective reality, and then using the reasoning processes of the rational mind to order one's direct perceptions in the transcendental realm.[24]Traditional philosophy for ancient, medieval, and modern philosophers has always relied on the use of reason to obtain knowledge about the objective truth.[25]

A. Feminism in Context

Feminist jurisprudence has links to several strands of legal scholarship. It shares with "law and social sciences" scholarship frequent emphasis on the connections between law and society and the ways in which law is non-autonomous.[26] Feminism like Marxism is rooted in historical materialism. According to Catherine Mackinnon, sexuality is to feminism what work is to Marxism: that which is most one's own, yet taken away.[27] Marxist theory argues that society is fundamentally constructed of relations people form as they do and make things needed to survive humanly. Work is the social process of shaping and transforming the material and social worlds, creating people as social beings as they create value. It is that activity by which people become who they are. Class is its structure, production its consequence, capital its congealed form, and control its issue.[28] Implicit in feminist theory is a parallel argument: the moulding, direction, and expression of sexuality organizers into two sexes – women and men – which division underlies the totality of social relations.

Sexuality is that social process which creates, organizes, expresses, and directs desire, creating the social beings we know as women and men, as their relations create society. As work is to Marxism, sexuality is to feminism is socially constructed yet constructing, universal as activity yet historically specific, jointly comprised of matter and mind. As organized expropriation of the work of some for the benefit of others defines a class – workers – the organized expropriation of the sexuality of some for the use of others defines the sex, woman.[29] Heterosexuality is its structure, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue.[30]

22 ibid. 1120.

23 See Daniel Morrissey's description of Immanuel Kant's knowledge theory: The mind contains 'a certain pre-existing classification system that it uses to synthesis the raw data of experience and make it understandable.' Daniel J. Morrissey, 'Moral Truth and the Law: A New Look at an Old Link' 47 SMU L Rev 61, 68.

24 Orff (n 21) 1198.

25 ibid.

26 Lawrence Freidman, 'American Legal History: Past and Present' (1984) 34 J Legal Ed 563, 565-67, 570 (1984); Don Yeager, Review Essay: 'The Limits of Law: On Chambliss & Law, Order and Power' [1983] Am B Found Res Journal 974, 975.

27 Catherine MacKinnon, 'Marxism, Method, and the State: An Agenda for Theory' (1992) 7 Signs 515.

28 ibid.

29 ibid. 518.

30 ibid.

Marxism and feminism are theories of power and its distribution: inequality. They provide accounts of how social arrangements of patterned disparity can be internally rational yet unjust. But their specificity is not incidental. In Marxism to be deprived of one's work, in feminism of one's sexuality, defines each one's conception of lack of power per se.[31]

Feminist legal jurisprudence also has links to "Critical Legal Studies" and specifically with Critical Race Theory, both of which it shares a focus upon the "politics of distribution and retention of power in society.[32] CLS like feminism, aims to reveal underlying subordinating aspects of legal doctrine that tend to legitimize and sustain social hierarchies based on historically and culturally instilled stereotypes. Just like legal feminism, CLS not only critiques the current legal system, it critiques our social mores.[33] Matsuda, a proponent of Critical Race Theory, argues that when analysing the law and its underlying principles, the abstract nature of traditional legal theory allows people to detach themselves from the pain endured by the oppressed. Although the avoidance of the difficult complexities accompanying individual experience results in legal remedies that seem definitive on the surface, they ultimately represent a misconstruction of social reality. Once again, the lack of understanding resulting from this rigid method produces unjust outcomes and legitimizes subordinating stereotypes.

Feminist philosophy is also influenced by Michel Foucault's poststructuralist philosophy which resists universality of meanings which he argues; do not reflect ontological truths about humans or society.[34]Post structuralism rejects the idea that we could discover general laws. They build on the notion that meanings are derived from relations of difference, that these are largely unconscious, and that they form a structure.[35] The central question for poststructuralists and indeed for Foucault is how knowledge becomes possible at any particular time under specific historical conditions.[36]Foucault's concern is how it is that the human subject turns himself into an object of possible knowledge, through what forms of rationality, and under what historical conditions and finally at what price.[37]

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31 ibid.

32 Freidman (n 27) 974.

33 Emily J Cross, 'Critical Legal Studies: Challenging Traditional Legal Thought' (National Collegiate Honors Council Conference, Boston, November 2012), <http://nchchonors.org/wp-content/uploads/2012/04/Cross-Emily-University-of-Montana-Paper.pdf> accessed 14 April 2015.

34 Judith Butler, Gender Trouble: Feminism and the Subversion of Identity (Routledge 1990) identifies post structuralism as the rejection of 'the claims of totality and universality and the presumption of binary structural oppositions that implicitly operate to quell the insistent ambiguity and openness of linguistic and cultural signification. Butler suggests that post structuralism focuses on the moment of difference.

35 Bernard E Harcourt, 'An Answer to the Question: "What Is Poststructuralism?"' (2007) University of Chicago Public Law & Legal Theory Working Paper 156/2007 <http:/www.law.uchicago.edu/academics/publiclaw/index.html> accessed 12 March 2015.

36 ibid.

37 ibid.

More importantly, both Foucault and feminists make an analysis of power relations a central theme, which the latter considers as project of understanding the nature and causes of women's subordination.[38] Foucault distinguishes his concept of power from the traditional "juridico-discursive" model.[39] Earlier, many types of feminist theory had drawn on the "juridico-discursive" model of power as repression which assumed that the oppression of women can be explained by patriarchal social structures which secure the power of men over women.[40]

Increasingly, however, and in line with Foucault's poststructuralist idea of power, some feminists have called this assumption into question in their endeavour to counter what they regard as the oversimplified conception of power relations this view entails.[41] Carol Smart, applying Foucault's theories of knowledge and power to legal arena, discusses how law exercises power by claiming to 'truth' – and to possessing a method to establish the 'truth':

> Law sets itself above knowledges like psychology, sociology or common sense. It claims to have a method to establish the truth of events. The main vehicle for this claim is the legal method…A more 'public' version of this claim, however, is the criminal trial which, through the adversarial system, is thought to be a secure basis for findings guilt and innocence…If we accept that law, like science, makes a claim to truth and that this is indivisible from the exercise of power, we can see that law exercises power not simply in its material effects (judgments) but also in its ability to disqualify other knowledge and experiences… Law sets itself outside the social order, as if through the application of legal method and rigour, it becomes a thing apart which can in turn reflect upon the world from which it is divorced.[42]

In her view, not only does law thus disqualify alternative accounts of social reality- other knowledge (like feminist) and experiences (of unprivileged women and minorities), but it, by the force of its claim to 'truth,' authoritatively constructs the meaning of social reality. Rather than proposing alternative legal strategies, Smart proposes 'decentralizing' law by thinking of non-legal strategies and discouraging a resort to law.[43]

Mary Jo Frug similarly discusses the discursive power of law, analysing how law ascribes constructs female body –namely, how law terrorizes, materializes and sexualizes female bodies:

> Legal rules permit and sometimes mandate the *terrorization* of the female body. This occurs by a combination of provisions that inadequately protect women against physical abuse and that encourage women to seek refuge against insecurity … Legal rules permit and sometimes mandate the *maternalization*

38 ibid.

39 Michel Foucault, 'Body/Power' in Hubert Dreyfus, Paul Rainbow and Michel Foucault (eds), *Power/Knowledge* (U.K, Harvester 1980).

40 Irene Diamond & Lee Quinby (eds), *Feminism and Foucault: Reflections of Resistance* (Northeastern University Press 1998) 4.

41 ibid.

42 Carol Smart, *Feminism and Power of Law* (Routledge 1989) 10.

43 ibid. 11.

> of the female body. This occurs by provisions that reward women for singularly assuming responsibilities after childbirth and with those that penalize conduct-such as sexuality or labor market work-that conflicts with mothering…Legal rules permit and sometimes mandate the *sexualization* of the female body. This occurs through provisions that criminalize individual sexual conduct, such as rules against commercial sex (prostitution) or same-sex practices (homosexuality), and also through rules that legitimate and supports institutions such as pornography, advertising, and entertainment industries which eroticize the female body. Sexualization also occurs – paradoxically – in the application of rules such as rape and sexual harassment laws that are designed to protect women against sex-related injustices. These rules grant or deny women protection by interrogating their sexual promiscuity.[44]

Legal feminism, and indeed other critical energies are directed to the liberal theory which falls within the realm of traditional knowledge theory. Legal feminism rejects a belief in objective truth and the claims of certainty that traditionally follow.[45] Lacey states as follows:

> We also reject "objective" standards because we understand that what is called objectivity actually only reflects the viewpoint of the persons who always have control over language and laws…this truth is particularly evident when "objectivity" appears in the form of the mythical The Average Reasonable Person (TARP).[46]

Instead of false objectivity, feminists offer the slogan, "the personal is political" to demonstrate that there is nothing a political about the daily lives of women. Mari Matsuda explains this point as follows; "what happens in the daily lives of real people has political content in the same way as does what we normally think of as politics – the structure of economic systems and governments".[47]Women's lives and experiences are political. Apart from concerns about the substance of law, methodology is also central to feminist jurisprudence. As critics of law, feminist have challenged and sought to develop alternatives to traditional methodologies. These techniques are grounded in women's experiences of exclusion, and include "asking the women question", feminist practical reasoning and consciousness-raising. Each of these methods is both critical and constructive, and helps to reveal features of a legal issue that more traditional methods tend to overlook or suppress.[48]

Feminist jurisprudential inquiry focuses particularly on the law's role in perpetuating patriarchal hegemony and such inquiry is feminist in that it is grounded in women's concrete experiences.[49] These experiences are the source of the understanding

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44 Mary Jo Frug, *Postmodern Legal Feminism* (Routledge 1992) 129.

45 ibid.

46 Mari Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawl's Theory of Justice' (1986) 16 NML Rev 614.

47 ibid.

48 Katherine T Bartlett, 'Feminist Legal Methods' (1990) 103 Harvard Law Review 829, 845.

49 Adrienne Rich, *On Lies, Secrets. And Silence: Selected Prose 1966-1978* (W. W. Norton 1979) 215; Emily Joselson & Judy Kaye, 'Pro Se Divorce: A Strategy for Empowering Women' (1983) 1Journal of Law & Inequality 239.

and application of the personal as political.[50] Feminist jurisprudential inquiry is, methodologically and substantively, inquiry from the point of view of women's experiences, or what Bartlett defines as asking "the women question" and doing so exposes "how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups".[51] It criticizes and subverts patriarchal assumptions about law, including patriarchal attempts to present law as without a gendered "point of view".[52] Seeing, describing, and analyzing the "harms" of patriarchal law and legal systems is a part of feminist jurisprudential inquiry.

Feminist jurisprudence thus inquires not only into the harms of patriarchal law, but also into the possibility and characteristics of a world without patriarchal law, and of a non-patriarchal legal system.[53]In this regard, the first question of feminism is inquiring into women's life situation, addressing the need to collect data about women's actual experience and in doing so, addresses the need to collect data about the law's assertions regarding women's experience. Legal definitions, assumptions, or assertions – especially those which claim to be either gender specific or gender neutral – reveal what the law is saying about women and how the law operates politically and socially in relation to women's lives.[54]

B. The Three Waves of Feminism

Although concepts of feminism have been developing since as long ago as the eighteenth century, the movement is often broken down into three parts: first-, second- and third-wave feminism. While each "wave" shares the common goal of gender equality, they have been categorized as representing different eras of feminists, each with purportedly unique identities and theories of change.[55] First-wave feminism generally refers to the women's movement in the late nineteenth century and early twentieth century, whose focus was primarily on gaining women's right to vote.

The term "first-wave" was not coined until much later, in the 1970s, when the second-wave of the feminist movement, also known as the women's liberation movement, acknowledged its predecessors as the first-wave of feminism and self-proclaimed their own era as the second-wave.[56] Second-wave feminism traditionally refers to the period of activism between the 1960s and the early 1990s, and is characterized by the struggle for equality in the workplace and eliminating sexual harassment. Third-wave feminism was born in the early 1990s when then twenty-two-year-old Rebecca Walker, distraught by the way in which Anita Hill's power and credibility came into question during Senate proceedings regarding her accusations of sexual harassment against Clarence Thomas,

50 ibid.

51 Bartlet (n 49).

52 Catherine MacKinnon, 'Towards a Feminist Jurisprudence' (1980-81) 56 Indiana Law Journal 375.

53 Charlotte Bunch, 'Not by Degrees: Feminist Theory and Education' in Charlotte Bunch and Sandra Pollock (eds), *Learning Our Way: Essays In Feminist Education* (The Crossing Press 1986) 261, 262.

54 ibid.

55 Kathleen Kelly Janus, 'Finding Common Feminist Ground: The Role of the Next Generation in Shaping Feminist Legal Theory' (2013) 20 Duke Journal of Gender Law & Policy 255.

56 ibid.

wrote famously in Ms. Magazine, "I am not a post feminism feminist. I am the Third-wave." Since that time, the term third-wave feminism refers to the generation of activists who came of age during the 1990s and 2000s, and who identify themselves as subscribing to a broader, more inclusive version of feminism that extends beyond the experience of the white, middle-class woman.[57]

First-wave feminists pursued the argument of women's innate moral superiority, thus embracing what might be called "difference first-wave feminism".[58]This argument was part of a sophisticated rhetoric of equality, developed simultaneously in Europe and in the United States, which shared the modern, Western political framework of enlightenment and liberalism, anchored in universalism. From this point of view, patriarchy was understood as a fiasco that was both non-rational and non-profitable and thereby illegitimate, but nevertheless reinforced women's marginal societal status and domination and made women a cultural emblem of deficiency.[59]Politically, this view led women should not only be given access to the same resources and positions as men but also be acknowledged for their contributions and competencies. This concept is often called "equal-opportunities feminism" or "equality feminism", and it is characterised by the lack of distinction between sex and gender.[60]

One of the earliest manifestations of liberal first-wave feminism in Europe, Mary Wollstonecraft's *A Vindication of the Rights of Woman*, was written in the wake of the French Revolution. Virginia Woolf's *A Room of one's Own* and Simone de Beauvoir's *The Second Sex* are central to the canon as well, even though both writers were laying ground for radical second-wave feminism. Woolf introduced the notion of female bisexuality and unique women's voice and writing. Beauvoir espouses the notion of women's radical otherness or, rather, the cognitive and social process of "othering" women as the second sex in patriarchal societies.[61]

The main contribution of liberal feminism is showing how much modern society discriminates against women. In the United States, it was successful in breaking down many barriers to women's entry into formerly male-dominated jobs and professions, helped to equalize wage scales, and got abortion and other reproductive rights legalized. Within this wave of feminism, the women's suffrage movement fought for inclusion of sex in the text of the Fourteenth Amendment to the Constitution of the United States.[62] Many litigants and lawyers sensitive to the issue of sex discrimination raised legal issues concerning women's equality; and a major and finally successful effort to pass the Nineteenth Amendment gave women the right to vote.[63]

57 ibid. 257.

58 ibid.

59 Helen Carr and Caroline Hunter, *YL v Birmingham City Council and Others* in Rosemary Hunter *et al.* (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010) 318.

60 ibid.

61 ibid.

62 ibid.

63 For a brief description of these developments and citations to further reading, see Mary Becker et al. (eds), *Feminist Jurisprudence: Taking Women Seriously* (West Publishing 1994) 1-14.

Cultural feminism, also described as "different voice" is a feminist thought within legal academia centred on Carol Gilligan's *In a Different Voice*.[64] This theory begins with the premise that women are different from men in a number of significant ways and that these differences deserve to be celebrated and encouraged not obliterated.[65]Cultural feminists draw upon Gilligan's work to describe women's "voice" in legal analysis as well as life experiences. They assert that women's voices emphasize positive values such as caring, nurturing, and empathy.[66]

In the legal context, the ethic of care might be put into practice in a number of ways. Reforms to family law, social security law and employment law could invest the work of nurturing and care with greater value.[67] In the field of child custody, Sevenhuijsen notes that men and women are in a position of mutual dependency and hence mutual vulnerability as parents.[68] Instead of 'guaranteeing men authority rights to protect them from a (potential) dependency on women' or maintaining 'the patriarchal view that, for men, connections can only be achieved by enforceable rights'[69] the law could seek to ensure that men develop greater competence and responsiveness as carers for their children and as receivers of care. At a more conceptual level, law could take a different approach to familiar dilemmas, constructing them not as issues of competing individual rights or interests to be resolved by the application of hierarchical normative principles, but as issues of conflicting responsibilities to be resolved by a contextual analysis that pays attention to relationships, needs, dependency and care.[70]

The emergence of cultural feminism or "difference" perspectives in the law was largely shaped by efforts to understand the uniquely female experiences of pregnancy and motherhood. For example, the historical failure of the US Supreme Court's equality jurisprudence to address issues of pregnancy as implicating issues of gender equality had enormous impact on women's lives and the law. In response, the Pregnancy Discrimination Act of 1978 defined pregnancy discrimination as sex discrimination under Title – VII and generated renewed attention to the notion of difference in a variety of contexts.[71]

The term second-wave feminism refers mostly to the radical feminism of the women's liberation movement of the late 1960s and early 1970s. Inspired by the tactics of the more activist parts of liberal feminism, radical second-wave feminists used performance to shed light on what was termed as "women's oppression". Radical second-wave feminism cannot be discussed separately from other movements of the 1960s and 1970s.

64 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, (Havard University Press 1982).

65 Lacey (n 9) 785.

66 ibid.

67 West (n 20) 1–72; Robin West, Caring for Justice (New York University Press 1997) 37; Lucinda Finley 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 Notre Dame Law Review 886, 896.

68 Selma Sevenhuijsen, *Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality and Politics* (Routledge 1998) 108.

69 ibid. 109.

70 Gilligan (n 65).

71 Cynthia Grant Bowman & Elizabeth M. Schneider, 'Feminist Legal Theory, Feminist Law-making, and the Legal Profession'(1998) 67 FORDHAM L. REV. 249, 250–51.

In fact, if grew out of the leftist movements in postwar Western societies, among them the student protests, the anti-Vietnam War movement, the lesbian and gay movements, and, in the United States, the civil rights and Black power movements. These movements criticized "capitalism" and "imperialism" and focused on the notion and interests of the oppressed groups: the working class, Blacks, and in principle, also women and homosexuals.

Radical or dominant theory sidesteps both formal equality and cultural theories, focusing instead on the embedded structures of power that make men's characteristics the norm from which "difference" is constructed. Feminism emerged during the 1960s, in what is known as a "second wave" of an active women's rights movement developed from the civil rights struggle, a dint to renewed efforts both to change the law so as to abolish sex discrimination.[72] Dominance theory presented an important theoretical framework within which to understand the harms of violence against women in areas such as domestic violence, rape, sexual harassment, and pornography.[73] Radical feminists argued that their liberal counterparts were not adequate to analyse these harms, experienced almost exclusively by women, because they failed to address the patriarchal structures of power that led to and perpetuated them. Thus, dominance theory emerged from efforts to grapple with the reality and experience of male dominance and privilege in these areas.[74]

Radical feminism's political battlefield has been protection of rape victims and battered women and condemnation of pornography, prostitution, sexual harassment, and sexual coercion. Since all men derive power from their dominant social status, any sexual relationship between women and men is intrinsically unequal. Consent by women to heterosexual intercourse is, by this definition, always coerced unless it is explicitly agreed to by a fully aware, autonomous woman.

MacKinnon, perhaps the most outstanding dominant theorist, applies the dominance approach in addressing what she believes is a serious issue for society: pornography and its role in subjugating women. MacKinnon argues in chapter 11 of Toward a Feminist Theory of the State, "Pornography turns a woman into a thing to be acquired and used."[75] In a world where sexual expression is slowly becoming more and more socially accepted, and the use of sexually explicit material such as pornography is becoming less taboo, one may be inclined to question this assertion. For instance, one might adopt the liberal view of pornography as a form of "human sexual liberation". This view, according to MacKinnon, is the result of a socially constructed conception of sexuality that rests on a foundation of male dominance and hence the subordination and exploitation of woman.

In Marxian terms, when women defend pornography as a form of sexual liberation they are reasoning from a false consciousness. MacKinnon argues that the current approach to regulating pornography, the law of obscenity derived from Miller. V. California, is inadequate and wholly unrelated to pornography because e obscenity concerns a question of morality, whereas pornography is a political practice.[76]

72 ibid. 252.

73 ibid.

74 ibid.

75 Catherine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 195.

76 ibid. 196.

The dominance viewpoint led to an expansion of the parameters of rape, and to making date rape visible and legally actionable. The radical feminist political remedies -- women-only consciousness-raising groups and alternative organizations -- were vital in allowing women the "breathing space" to formulate important theories of gender inequality, to develop women's studies programs in colleges and universities, to form communities, and to produce knowledge, culture, religion, ethics, and health care from a woman's point of view

Second-wave feminists have been highly theoretical and consequently have had strong affiliations with the academy. Starting in the 1970s, second-wave feminisms generated an explosion of research and reaching on women's issues, which has now grown into a diverse disciplinary field of women's, gender, or feminist studies.

Third wave or postmodern feminism does not represent a single theory. Moreover, postmodern feminists do not believe in a single theory or a single 'truth,' and are particularly opposed to creation of any 'Grand Theory.'[77] Often following Derrida, many postmodern feminist use techniques of deconstruction to expose internal contradictions of apparently coherent system of thoughts. This has been a useful method of debunking patriarchal structures of law. Postmodern feminists are motivated by the need to develop a feminist theory and politics that honour contradictory experiences and deconstruct categorical thinking.[78]Postmodern feminist oppose any essentialism and deny that categorical, abstract theories derived through reason and assumptions about human nature can serve as the foundation of knowledge. Postmodern feminists also reject dominant view of a (legal) subject as autonomous, rational, self-interested, and free-willed individual. Rather, as Katherine Barlett writes, they see individual as '"constituted" from multiple institutional and ideological forces that, in various ways, overlap, intersect and even contradict each-other.'[79]

They also see the dichotomy of victim and oppressor a false one (as any other dichotomy). For example, Patricia Williams has explored the instability of personal identity by reflecting on her own complex personal identity in which one part of her dispossesses the other.[80] Mary Jo Frug[81] and Carol Smart[82] have stressed the importance of language- in particular legal discourse- in the construction of both personal identity and power in the society.

Rebecca Walker described the difficulty that younger feminists experience when forced to think in categories, which divide people into "Us" and "Them", or when forced to inhabit particular identities as women or feminists.[83]

77 ibid.

78 ibid.

79 Katherine T Bartlett, 'Gender Law' (1994) 1 *Duke J. of Gender L. & Pol'y* 1, 14.

80 Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press 1991).

81 Frug (n 45).

82 Smart (n 43).

83 Rebecca Walker, *To Be Real: Telling the Truth and Changing the Face of Feminism* (Anchor Books 1995) 34.

She is of the view that third-wave feminists embrace ambiguity rather than certainty, engage in multiple positions, and practice a strategy of inclusion and exploration. They also propose different politics, one that challenges notions of universal womanhood and articulates ways in which groups of women confront complex intersections of gender, sexuality, race, class and age-related concerns.[84]

Gender theorist Judith Butler signalled this paradigmatic feminist shift in her books Gender Trouble[85] and Bodies That Matter.[86]She fuelled new emergent movements such as queer and transgender politics, which take an interest in the intersections of gender and sexuality and helped, articulate "performance third-wave feminism" as a theoretical framework of the politics of transgression.[87] Central to this perspective is the understanding of gender as a discursive practice that is both a hegemonic, social matrix and a "performance gesture" with the power to disturb the chain of social repetition and open up new realities.

Focus rests on sustained tension between structure and agency, spelled out as a tension between performance and performativity, in order to overcome the split between society and subject and to situate the possibilities and means of agency and change.[88] The possibilities for change are found in the "fissures" of deferral and displacement that destabilize the distinction between the social and the material, discourse and body, and, not least, sex and gender. These conceptual pairs are now seen as inextricably linked discursive practices, anchored in the heterosexual matrix, which is now being challenged.[89] Third-wave feminism is also inspired by and bound to a generation of the new global world order characterised by the fall of communism, new threats of religious and ethnic fundamentalism, and the dual risks and promises of new info-and biotechnologies.[90]

According to Nancy Fraser, the challenges to third-wave feminism are great. She argued that in order to avoid the pitfalls of identity politics, it is necessary to introduce a concept of justice that simultaneously acknowledges and counters the claims of difference. Thus, Fraser has suggested that claims of difference should be treated partly as a question of recognition within the context of civic society and partly as a matter of redistribution within the framework of the state and the public sphere. Her aim is to reframe universalism in order to promote a new combination of, on one hand, local (singular and situated) social claims, and, on the other, the will and ability to expose universalism to a "global" democracy. She hopes to deliver an alternative to the "old" universalism, which sanctioned the particularism inherent in identity politics, claiming that in the new democracy, everyone must acknowledge the particularity of the position from which they speak, instead of claiming rights as absolute and given.[91]

84 ibid. 39.

85 ibid.

86 ibid.

87 ibid. 41.

88 ibid.

89 Butler (n 34) 93.

90 ibid.

91 ibid.

Postmodern or anti-essentialist theory contends that there is no single category "female", pointing instead to the varying perspectives resulting, for example, from the intersection of gender, race and class.[92] It developed from challenges to a notion of a single feminist legal theory and perspective and articulated the need to account for the wide range of feminist problems that emerged from women of colour, issues of ethnicity, problems of immigrant women, and cultural differences.[93]

Kimberley Crenshaw criticises feminist legal theory's failure to reflect African American women's experience of rape, while Paulette Caldwell explains how employment discrimination law fails to capture discrimination that is motivated by both sex and race. This approach has emphasised the importance of storytelling both as a way to bring descriptions of experience that are translated into law. It gives the challenge to address the intersections of race, gender, ethnicity, class, sexual orientation, age, and disability as well as to explore what commonality might mean in coalition efforts.[94]

In combination, third-wave feminism constitutes a significant move in both theory and politics toward the "performance turn". It marks a move away from thinking and acting in terms of systems, structures, fixed power relations, and thereby also "suppression" – towards highlighting the complexities, contingencies, and challenges of power and the diverse means and goals of agency. Embedded in the scientific paradigm shift from structuralism to post structuralism, the performance turn is connected to a broader intellectual transformation.[95]

C. Feminism and the Traditional Law Assumptions

Liberalism has generated the philosophy of legalism and the associated jurisprudence of legal positivism that is entrenched in academic, the political and the popular discourse of contemporary capitalist democracies.[96] Characteristic of these democracies is that most standard accounts of the nature of law hold that law presumes and reflects a world-view in which the goal is to achieve a set of presumptively coherent propositions. Whether this aim is understood as "the rule of law",[97] as the "internal morality of law",[98] or as "the soundest theory of the settled law",[99] or in other similar terms, legal systems embody comprehensive and generally long-standing conceptual systems.[100] The coherence of any particular legal system can always be challenged, but on this approach an aspiration of any legal system is coherence. The appearance or illusion of coherence is maintained

92 ibid.

93 Kimberle Crenshaw, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U. Chi. Legal F. 139, 140.

94 Bowman & Schneider (n 72) 253.

95 Yuval Davis, *Gender and Nation* (SAGE Publications 1997).

96 Allan Hunt, 'The Theory of Critical Legal Studies'(1986) 6 Oxford Journal of Legal Studies 1, 4.

97 See, for example, the entry on Friedrich Hayek.

98 See for example, the discussion of Fuller in the entry on natural law theories.

99 See for example the discussion of Dworkin in the entry on interpretation and coherence in legal reasoning.

100 Nicole Lacey, 'Theory into Practice? Pornography and the Public/Private Dichotomy,' (1993) 20 Journal of Law and Society 93.

by requirements of consistency, including following precedent, treating like cases alike, and maintaining judicial impartiality.[101]

Consistently with these tenets, the legal person envisaged by liberal legalism is rational, autonomous, self-contained, self-possessed, self-sufficient and formally equal before the law. This person relates to others at arm's length through the mechanism of contract. In the words of Anna Grear, 'the paradigmatic liberal legal subject' is 'a socially decontextualized, hyper-rational, wilful individual systematically stripped of embodied particularities in order to appear neutral and, of course, theoretically genderless, serving the mediation of power linked to property and capital accumulation'.[102] As Ann Scales explains, two of the central tenets of liberalism are that the basic unit of society is the individual, who exists prior to social organization, and that individuals are rational and self-interested, and use their rationality to achieve their needs and desires.[103]

A significant consequence of the masculinity of the legal person is that women struggle to attain legal subjectivity. Again, this point may be understood both empirically and symbolically. Empirically, to the extent that law is built around an ideal type to which they do not conform, it creates problems for women and fails to take into account their lived reality and experiences. Even today, liberal legalism's autonomous, responsible subject is never pregnant and is not a wife.[104] And to the extent that they are excluded from legal subjectivity, women are also diminished, since liberal legal theory treats persons not fitting 'the normal model of autonomous, competent individual' as marginal, inferior and different.[105]

On a symbolic level, the construction of the masculine as rational, objective and universal is premised on a binary construction of the feminine as it's opposite – as irrational, subjective and particular. Thus, the legal person exists in a symbiotic hierarchy with the devalued feminine – his existence and power depend upon the negation and exclusion of the feminine.[106] And again, as Margaret Thornton has noted liberal legalism's essentialist representation of 'woman' as less than rational has been disabling for embodied women attempting to exercise legal subjectivity.[107] One response to this observation has been Luce Irigaray's call for a legal regime that recognizes two, differentiated sexes rather than only one, universal (that is, male) sex. [108]

101 ibid.

102 Anne Grear, 'Sexing the Matrix: Embodiment, Disembodiment and the Law – Towards the Re-gendering of Legal Rationality' in Jackie Jones et al (eds), *Gender, Sexualities and Law* (Routledge 2011) 39.

103 Anne Scales, *Legal Feminism: Activism, Lawyering and Legal Theory* (New York University Press 2006).

104 Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects,' (2003) 66(3) Modern Law Review 346, 365.

105 Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press 1990) 9.

106 Ngaire Naffine, 'Can Women be Legal Persons?' in Susan James and Stephanie Palmer (eds), *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Hart Publishing 2002) 69.

107 Ngaire Naffine, The Legal Structure of Self-ownership: Or the Self-possessed Man and the Woman Possessed.(1998) 25(2) *Journal of Law and Society* 193.

108 Luce Irigaray, *Je, tous, nous: Toward a Culture of Difference* (Asiner Martin tr, Routledge 1993).

Another key element of feminist critique has centred on the public/private distinction within liberal legalism and its construction of the 'private' as a sphere of legal non-intervention and one in which 'universal' norms such as equality and human rights do not apply[109] Frances Olsen identifies three strands to this critique: first, arguments about where the boundary between 'public' and 'private' is drawn; secondly, arguments that the public/private distinction is incoherent; and thirdly, arguments that the appeal to privacy is both political and gendered; that private freedom belongs only to those with power (mostly men), and without it, privacy connotes insecurity, fear and oppression - often for women.[110]

In relation to the boundary between public and private, Olsen notes that the concept of 'privacy' 'is not a natural attribute nor descriptive in a factual sense, but rather is apolitical, contestable designation'.[111] Since law plays a crucial role in constructing and maintaining the division between 'public' and 'private',[112] it thus operates in a way that is inherently political.[113] So, for example, when law designates 'the family' as a zone of privacy into which the state does not intrude, it effectively refuses to regulate and thus permits and reinforces power differentials within families, manifested in internal hierarchies and inequalities,[114] and in harms to women and children such as domestic violence[115], marital rape and child sexual abuse.[116] Likewise, when the state promotes mediation and other forms of private ordering in family law, it tacitly sanctions the continuation of gendered power relations within the family.[117]

Other examples of law's public/private distinctions include the refusal to allow tax deductibility of childcare expenses, thus constructing those expenses as a matter of 'private 'rather than state responsibility,[118] a responsibility that falls primarily upon women. In the international law of armed conflict, a distinction is drawn between rape as an official policy of genocide or subjugation, and 'private' rapes in war which are not the subject of regulation, thus leaving many victims of wartime rape without redress[119]. Moreover, the dividing line between public and private tends to be drawn differently according to one's race, class and sexuality[120]so for example, Indigenous women and

109 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd edn, Federation Press 2002) 17.

110 ibid.

111 ibid.

112 O'Donovan (n 5).

113 Frances Olsen, 'The Myth of State Intervention in the Family' (1985) 18 University of Michigan Journal of Law Reform 835, 836.

114 Susan Moller Okin, *Justice, Gender and the Family* (Basic Books 1991).

115 Graycar and Morgan (n 110) 12.

116 ibid. 13.

117 ibid.

118 ibid.

119 Hilary Charlesworth, 'Worlds Apart: Public/Private Distinctions in International Law' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debate* (Oxford University Press 1995) 243, 244.

120 Susan Boyd, 'Challenging the Public/Private Divide: an Overview' in Susan Boyd (ed) *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (University of Toronto Press 1997) 3, 12.

their children and those dependent on welfare enjoy considerably less family privacy than do white, middle class families.[121]

Thus, four central features define this powerful doctrine of legalism of capitalist democracy: First the separation of law from other varieties of social control; second, the existence of law in the form of rules which both define the proper sphere of their own application. The third feature and which is liberalism's presentation of legal rules as the objective and legitimate normative mechanisms whilst other normative types are partial or subjective, and fourth, that these rules yield determinant and predictable results in their application in the judicial process.[122]

D. The Neutral Framework of Legal Reasoning

A standard of assumption of mainstream legal scholarship is process of legal reasoning which characterises legal rules as objective or neutral. [123] The central tenet of both positivistic scholarship and of the liberal rule of law ideal is that laws set up standards which are applied in a neutral manner to formally equal parties: the questions of inequality and power which may affect the capacity of those parties to engage effectively in legal reasoning has featured little in mainstream legal theory.[124]

However, questions of the traditional assumptions of the neutrality of the law have always been central to critical legal theory, and they now find an important place within feminist legal thought. Legal Feminism argues that law appears fair and objective when it actually predictably tends to perpetuate the power of the powerful.[125] One way of doing this is the law's use of abstractions that remove issues into a realm of concepts remove from the facts and patterns of actual power.[126]Law helps to constitute people's consciousness, entrenching notions like the divides between public and private and market and government so deeply as to make it seem natural and beyond discussion or change.[127]

One of the most compelling critical accounts of the legal system's inherent bias comes from Catherine Mackinnon, who writes about the inevitable tendency of the law to reinforce a pattern of male dominance in society.[128]Mackinnon puts forward an eloquent and persuasive explanation of a legal system which systematically oppresses women by embodying a male norm of behaviour in its laws, procedures, and institutional

121 ibid. 14, 20.

122 ibid.

123 Gilligan (n 65).

124 Nicole Lacey, 'Feminism and the Tenets of Conventional Legal Theory' (1996) 11 Humboldt ForumRechts 1 <www.humboldt-forum.de/drucksnasicht.druckansicht.php.> accessed 17 March 2015.

125 The Bridge: Critical Theory: CLS Movement, 1.

126 ibid.

127 ibid.

128 Catherine A Mackinnon, *Feminism Unmodified: Discourses of Life and Law* (Harvard University Press 1987); and, Catherine A Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989).

structures.[129] An important theme in her work is that a central underlying purpose of the law is the oppression of women. Not only is the law instrumental in reinforcing male values, it also has its own interest in perpetuating discrimination on the basis of gender.[130]

Mackinnon's radical ideas are reflected in the works of legal theorist Anne Scales[131] who writes about the ways in which legal institutions effectively exclude women's perspectives.[132] These two feminist authors perceive an underlying dynamic that is so pervasive and inimical to women's interests and make observation of ways in which the law in fact continues to discriminate against women in a systematic fashion their focus.[133]

Scales builds her theory on many of Mackinnon's observations of gender bias in the law, but she goes father to argue that the practice of law should be rehabilitated rather than abandoned. To do so, Scales presents a radically different conception of law as a practice which ought to promote societal values rather than attempt to develop a discrete, abstract, immutable body of rules: "Law is, after all, a social tool. It is only extrinsically important. Its actual value depends upon its success in promoting that which is intrinsically valuable."[134]Scales argues that the law has been diverted from this true purpose by a misguided commitment to objectivity. She then argues that feminism provides the law with a much-needed theory of differentiation: "Feminism brings law back to its purpose – to decide the moral crux of the matter in real human situations".[135]In particular, the work of Carol Gilligan on the varying ways of constructing moral problems, and their relationship to gender is instructive.[136]

E. Law's Autonomy

Another standard assumption of mainstream legal scholarship is that law is a relatively autonomous social practice, discrete from politics, ethics and religion. An extreme expression of this assumption is found in Hans Kelsen's 'pure' theory of law.[137] This mainstream assumption like the idea of legal method is discrete or distinctive, is challenged by legal feminist theory which seeks to reveal the ways in which law reflects, reproduces, expresses, constructs and reinforces power relations along sexually patterned lines: in doing so, it questions law's claims to autonomy and represents it as a practice which is continuous with deeper social political and economic forces which constantly seep through its supposed boundaries. Hence the ideal of rule of law call for modification and reinterpretation.[138]

129 Lynne Hanson, 'Feminist Jurisprudence in a Conventional Context: Is there room for Feminism in Dworkin's Theory of interpretive Concepts?' (1992) 30(2) Osgoode Hall Law Journal 356, 357.

130 ibid. 362.

131 Anne Scales, 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 Yale L.J. 1373 and Anne Scales, Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?' (1989) 12 Harvard Women's Law Journal 25.

132 Hanson (n 130) 357.

133 ibid.

134 Scales, 'The Emergence of Feminist Jurisprudence: An Essay' (n 131) 1380.

135 ibid. 1387.

136 Lacey (n 101).

137 Hans Kelsen, Pure Theory of Law (Max Knight tr, University of California Press 1967).

138 Lacey (n 101).

F. Law's Objectivity

This argument focuses on the utility of objective standards in disguising the inherently political or ideological content of the law. Such value laden law is difficult to challenge on normative grounds because it is not aware of its own perspective.[139] Lynne Scales calls this the "tyranny of objectivity" and the result is a supposedly neutral law which in fact embodies a covert male ethos. In this context, objectivity is rejected by feminists because it is a chimeric and dangerously misleading concept, making gender bias in law notoriously difficult to identify and expose.[140]

G. Law's Centrality and Rationality

In stark contrast to not only a great deal of positivist legal scholarship but also much 'law and society' work, feminist writers have often questioned law's importance or centrality to the constitution of social relations and the struggle to change those relations. Feminist views tend to diverge here. Catherine MacKinnon, for example is optimistic about using law for radical purposes; but many other feminists, notably Carol Smart – have questioned the wisdom of placing great reliance on law and of putting law much at the centre of our critical analysis.[141]

Perhaps most fundamentally of all, it is argued that contradictions and indeterminacy in legal doctrine undermine law's supposed grounding in reason, just as the smuggling in of contextual and effective factors undermines law's apparent construction of the subject as rational, self-interested actor. According to Lacey, in so far as law is successful in maintaining its self-image as a rational enterprise, this is because the emotional and effective aspects of legal practice are systematically repressed in orthodox representations.[142]Once one reads cases and other legal texts not only for their formal meaning but also as rhetoric, one sees how values and techniques which are not acknowledged on the surface of legal doctrine are in fact crucial to the way in which cases are decided.[143]

III. THE IMPACT OF LEGAL FEMINISM ON THE MYTH OF TRADITIONAL LEGAL DOCTRINE IN KENYA

There is no doubt that over the year feminist legal theory has played an important role n the development of social change and improvement of women in the area of law. In Kenya since the 1990s there have been substantial efforts by legal feminist to change the law respecting women's rights and these efforts have recently resulted in the adoption of the 2010 Constitution as well as enactment of laws that respect women's rights. This section gives a broad overview of how legal feminism has contributed to these changes.

The 1963 Constitution of Kenya with which the country was granted independence from Britain was a west-minister model Constitution that was typically libertarian in nature.

139 Hanson (n 130) 367.

140 ibid.

141 Lacey (n 101).

142 ibid.

143 Frug (n 45).

It was based on the traditional legal assumptions of neutrality, equality, universality and the "autonomous, reasonable man" – literally man to mean also woman. It was totally gender blind, overtly and covertly submerging women and gender in the traditional assumptions of the law. For instance, the Bill of Rights made the blanket assumptions of equality before the law and in property ownership. It protected the right to property (land), thus entrenching and perpetuating women's marginalization in access and ownership of land, since it was only men, through customary law practices and colonial land ownership processes and the law, ensured that only men owned and had access to land.[144]

This Constitution subjected women to customary law in matters of inheritance, adoption, marriage, divorce among others, yet customary law is inherently discriminatory to women.[145] Overtly, the constitution discriminated against women on matters of citizenship.[146] These are issues that had preoccupied feminists and feminist organization such as the Federation of Women Lawyers in Kenya (FIDA Kenya) for years.

The constitution-making process, which kicked off in earnest in 1997, created an opportunity for such feminists to participate by applying feminist methodology and feminist legal theory to influence the process of constitution-making and the eventual contents of the Constitution. Well known Kenyan feminists such as Professor Wanjiku Kabira, Lady Justice Nancy Baraza, Salome Muigai, and Lady Justice Abida-Ali Aroni among others served as commissioners on the Constitution of Kenya Review Commission and the women-friendly provisions in the Constitution of Kenya 2010 are attributable to their collective efforts together with other prominent women in the country.

The inclusion of women in the structures of the review process is was to ensure that women's voices about the law were heard and recognized at all the stages of constitution-making. Kenyan feminists were keenly aware of the contemporary debates on the gaps between constitutional positions on women's access to rights and the day-to-day experiences of women in contexts of poverty and patriarchal norms, and the broad consensus that constitution-building offers an invaluable opportunity to translate ideals of gender equity and equality into law.[147]

FIDA Kenya worked with allies to demand that the Kenyan constitutional reform process recognized the importance of women's rights to equality at the highest level of legal authority.[148]Together, they offered a wide range of skills, which included experience in legal analysis and the drafting of law, media strategy, political networking, community education, and intensive planning in often unpredictable situations. Professors who are experts in Feminist jurisprudence such as Professor Patricia Kameri-Mbote[149], Professor

144 Constitution of Kenya 1963, Section 75.

145 Constitution of Kenya 1963, Section 82.

146 Constitution of Kenya 1963, Sections 90 and 91.

147 Grace Maingi, 'The Kenyan Constitutional Reform Process: A Case Study on the work of FIDA Kenya in Securing Women's Rights' (2011) 15 Feminist Africa 74 <http://agi.ac.za/sites/agi.ac.za/files/fa_15_case_study_grace_maingi.pdf> accessed 19 April 2015.

148 ibid.

149 Patricia Kameri-Mbote, Celestine Musembi, Winifred Kamau and Nancy Baraza, *Promoting the Human Rights of Women in Kenya: A Comparative Review of the Domestic Laws* (UNIFEM Regional Office for East and Horn of Africa 2010).

Winnie Kamau, and Dr. Celestine Musembi among others wrote professional papers on feminist theory and methodologies that were used to influence the contents of the Constitution.[150] During this period, FIDA Kenya was also able to undertake civic education on the draft constitution countrywide. This initiative was geared towards drawing public attention to the process and content of the draft Constitution.

As a result of FIDA's work, and the work of other feminist activists, ensured that the constitution carried strong gains for women. Some of the gains for women that are now included in the Constitution of Kenya 2010 include but not limited to: Women are able to pass on citizenship to their children regardless of whether or not they are married to Kenyans. This is as opposed to the old constitution which only allows women married to Kenyan men to acquire citizenship through marriage. Citizenship is also not lost through marriage or the dissolution of marriage. This is a gain for women as it is not expressly stated in the old Constitution. It is a symbol of protection and safety of women by the state.

The constitution includes the right to reproductive health to women Under Article 26; Article 27 (3) also provides that women and men have equal opportunity without discrimination. Health is a basic need for human existence and Health is a basic need for human existence and survival and as such, it is a right that must be respected, promoted and protected by government and society; the elimination of gender discrimination in law, customs and practices related to land and property in land. This is a great gain for women as it seeks to rectify historical injustices that have continually faced the women of Kenya. The law as it then was had promoted discrimination of women in land and property rights by allowing for the application of customary laws which are discriminative in Nature. The customs and practices of many Kenyan communities promote discrimination of women in several areas, including land and property rights. This will benefit not only the women but Kenyan citizens generally.[151]

The Constitution states that "parliament shall enact legislation which shall regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage."[152] This is recognition of the injustices women have historically faced in relation of matrimonial property. Women's rights to matrimonial property have been largely compromised due to the patriarchal order of society that views s men as the sole owners of matrimonial property. Gender equality has been maintained even in political parties with the constitution providing for it as a basic requirement for political parties as amongst others respect and promotion of gender equality.[153]

The old Constitution supported customary laws that discriminate against women in the areas of gender-based violence, leadership, early marriage, child labour, divorce, property rights, girl child illiteracy, and other matters while 2010 Constitution recognizes women's rights above discriminatory customary laws.[154]The new Constitution also

150 Patricia Kameri-Mbote, *The Constitution of Kenya Review Commission Report* (CKRC 2002).

151 Maingi (n 147) 74.

152 ibid.

153 ibid.

154 ibid.

contains affirmative provisions meant to address past injustices that have been suffered by women due to marginalization, clearly reflecting on the theory and methods of radical feminism. Equality provisions reflect on the liberal feminist theory, while provisions relating to reproductive health and non-discrimination on the basis of pregnancy reflect the tenets of cultural feminism.

Legal feminist critique, analysis, methodology and theory have also influenced various pieces of legislation that alleviate discrimination against women. These include the passing of the passing of the Sexual Offences Act of 2006 which was a culmination of efforts by many feminist organizations and champions such as the Hon Lay Justice Njoki Ndung'u of the Supreme Court of Kenya.[155] The recently enacted Marriage Act, 2014, Matrimonial Property Act, 2014 and the pending Domestic Violence Bill, 2014 are as a result of the tireless efforts of feminist organisations and individuals and champions such as Lady Justice Nancy Baraza (as Vice-Chairman of the Kenya Law Reform Commission) to ensure that the law became a reality.

Kenyan legal feminists have not eschewed the law, much as they recognize that it has been one of the major impediments to women's rights and the flourishing of patriarchy and male dominance. Unlike Carol Smart and other postmodern feminist who are cynical about the law, they have tried to work with the law, seeking to reform it and turn it into a tool for social transformation and women empowerment in particular.

IV. CONCLUSION

Traditional legal theory has dominated legal thinking since the age of the Enlightenment. However, its main assumptions have recently come into sharp focus, mainly from critical legal thinking and specifically from legal feminism. The idea of the rational, autonomous, independent person to whom the law applies equally has been viewed as a major contributory factor to marginalization against women. Legal Feminism has hence challenged the assumptions of law's neutrality and the neutral framework of legal reasoning, law's autonomy, law's objectivity, law's centrality and rationality.

155 Onyango-Ouma, Harriet Birungi, Nancy Baraza and Njoki Ndung'u, *The Making of the Kenyan Sexual Offences Act, 2006: Behind the Scenes* (Population Council, Kwani Publishers 2009).

BOOK REVIEW

NJARAMBA GICHUKI, *LAW OF FINANCIAL INSTITUTIONS IN KENYA* (NAIROBI, 2ND EDN, LAWAFRICA 2013)

297 pages; Retail price: Apprx Kshs. 1160

*Winifred Kamau**

For a long time, there has been no comprehensive book on the law relating to financial institutions in Kenya. Authored by Njaramba Gichuki, an experienced law teacher and practitioner in the area of financial services, *Law of Financial Institutions in Kenya* was the first to plug this gap. Since its first publication in 2011 and now in its second edition, it remains the only text book in this area. The book has an expanded scope which goes beyond the traditional banker customer relationship to include a wide range of financial institutions in Kenya such as building societies and microfinance institutions, among others. The regulatory aspect of banking, including the role of the Central Bank of Kenya, is also covered. Further, the author captures the dynamism in the field of financial institutions by exploring a number of emerging issues such as mobile money transfers and credit information sharing.

The book is divided into three parts. Part I covers the institutional and regulatory framework of financial institutions. It begins with the Central Bank of Kenya, then moves on to banks, building societies, microfinance institutions, foreign exchange bureaus and other specific institutions, namely the Kenya Post Office Savings Bank and the Agricultural Finance Corporation. For each type of institution, the author discusses the formation, functions, licensing and other regulatory requirements and Part II deals with banks and covers the more traditional topics on the banker customer relationship, accounts, cheques and securities. Relevant Kenyan case law is provided to augment the classic English legal authorities. In Part III the author discusses some emerging legal issues and recent developments in the Kenyan context. These include cash dispenser machines (ATMS), plastic cards (credit and debit cards), mobile money transfer services, internet banking, credit information sharing, agency banking and money laundering.

One of the strengths of the book is its wide breadth of coverage to include non-bank financial institutions which have become increasingly relevant in Kenya. Further, in canvassing new developments and emerging issues, the author conveys the dynamism and complexity of the financial services landscape as well as the regulatory ambiguities and gaps. The influence of technology in the development of financial services is also captured, particularly with regard to mobile money transfer services. The author has also gone out of his way to present the growing jurisprudence by the Kenyan judiciary, particularly with regard to the banker customer relationship.

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This is an important contribution and is invaluable to all consumers of the book including legal practitioners.The writing style is simple and straightforward and hence easy to understand.

A major shortcoming of the book is that it has no introductory chapter. Thus the aims of the author in writing it are not expressed and neither is the scope of the book stated. An introductory chapter would have been useful in providing a broad overview of the landscape of financial institutions in Kenya, including historical and statutory developments as well as the challenges and opportunities arising from technology.

An Introduction would also serve to delineate the scope of the book and to create a common understanding of the book's coverage. As it is, there is no clear rationale why some financial institutions such as SACCOS, or even insurance companies and investment banks, are omitted from the book. Notably, the three main Parts of the book do not have headings and it is therefore not clear what the focus of each part is. In general, it would be helpful for the author to give more background information at the beginning of each chapter in order to help the reader appreciate the key issues and concerns to be addressed in the chapter. It is hoped that subsequent editions of the book will address these concerns.

Overall, *Law of Financial Institutions* is an important work and an excellent resource in the area of financial institutions. I would highly recommend it for law students and lecturers, as well as legal practitioners and judicial officers. The book is available at the University of Nairobi Bookshop and other major book stockists.

CASE REVIEW

THE *CKW* PETITION NO. 6 OF 2013 ON CONSENSUAL SEX BETWEEN MINORS: DISCRIMINATORY LAWS, DEFICIENT LAWS, OR POOR IMPLEMENTATION?

Zaina Kombo[*]
George Osino[**]
Faith Lukosi[***]

I. INTRODUCTION

The petitioner C, in this case[1] was a minor aged 16 years. He was accused of defiling a girl J, who was also aged 16 years. The charge was read and explained before the Chief Magistrate's Court, Eldoret, in Criminal Case No. 1901 of 2013.

The particulars of the offence were that on the 26th of May 2013, the petitioner C was charged with intentionally and unlawfully causing his genital organ to penetrate the genital organ of J, a girl aged 16 years. The sentence under section 8(4) of the Sexual Offences Act[2] is 15 years imprisonment.

The petitioner filed a petition in the High Court seeking a declaration that *"sections 8(1) and 11(1) of the Sexual Offences Act are invalid to the extent that they criminalise consensual sexual relationships between adolescents."* He also sought costs of the petition and any other relief that the court deemed fit.

His main point of contention was that it was the complainant who had willingly gone to the petitioner's house, where they had consensual sex and the law should not have discriminated against him. The chairman of the North Rift Chapter of the Law Society of Kenya, participating in the proceedings as *amicus curiae*, was also of the opinion that both parties ought to have been charged. He also argued that the laws were unconstitutional as they discriminated against children in matters of consensual sex.

The court dismissed the petition stating that the particular provisions were not proven to be unconstitutional as consensual sex was not permitted for persons under the age of 18.

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1 *CKW* v. *Attorney General & Another* [2014] eKLR.

2 No. 3 of 2006 Laws of Kenya.

II. ISSUES

The main issues in the case were:

> Whether Section 8 (1) and 11(1) are inconsistent with the Constitution to the extent that they criminalise consensual sexual activities between adolescents; and
>
> Whether Section 8(1) and Section 11(1) of the Sexual Offences Act are inconsistent with the Constitution of Kenya 2010 to the extent that they discriminate against the male child.

On the first issue, the petitioner contended that since consensual sex was permissible for adults, then it would be discriminatory to criminalise it against adolescents. His main argument was that the sexual activity between him and the complainant was consensual. He further argued that criminalising consensual sex between minors led to stigmatization and degradation. Consequently, according to the petitioner, this culminates to emotional stress, shame, embarrassment, anger, regret and even estrangement from his peers.

He cited the South African case of *Teddy Bear Clinic For Abused Children & Another v. Minister of Justice and Constitutional Development and Another*[3], in which the court held:

> It cannot be doubted that the criminalization of consensual sexual conduct is a form of stigmatization which is degrading and invasive …

The 1st Respondent, the Attorney General, stated that Sections 8 and 11 of the Sexual Offences Act were not inconsistent with the Constitution. They argued that nowhere in the Constitution had consensual sex between minors been legalized. The Attorney General argued that consent of the complainant cannot be an acceptable excuse for the commission of the offence. According to him, minors are not capable, in law, of giving consent.

The 2nd Respondent, the Director of Public Prosecutions, argued that the rights and fundamental freedoms contained in the Bill of Rights were not all absolute. He argued that apart from Article 25 of the Constitution, all the other rights can be limited. Under Article 25,[4] there are only four types of rights and fundamental freedoms that cannot be qualified or limited, which are:

a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;
b) Freedom from slavery or servitude;
c) The right to a fair trial; and
d) The right to an order of *habeas corpus*

The rights which the petitioner was claiming did not fall within Article 25 hence could lawfully be limited. To the extent that children's rights under the Constitution can be limited, the Court concluded that defilement had been committed notwithstanding the consent of the complainant. The absence or otherwise of consent from the child is

3 (Cct 12/13) [2013] Zacc 35.

4 The Constitution of Kenya 2010.

irrelevant, whether the accused is an adult or not. The Court's reasoning was that these are laws enacted by democratically elected leaders of the people of Kenya.

The Court mainly took into consideration the fact that when adolescents are left to sort through sexuality issues and choices among themselves, they tend to engage in more risky behaviours for a variety of reasons.The Judge cited the case of *Teddy Bear Clinic For Abused Children & Another v. Minister of Justice and Constitutional Development and Another* where Khampepe J. said;

> Of course, there may be legitimate reasons for limiting a child's fundamental rights in particular circumstances, due to the stage of his or her development, and in order to protect him or her.

The court was of the view that the provisions of law which are in issue were aimed at achieving a worthy societal goal of protecting children from engaging in premature sexual conduct. The judge, however, agreed with the petitioner's argument that a more effective intervention than the criminalization of consensual sexual acts is likely to be secured if the response was changed from a criminal one to a more child friendly response.

On the second issue, the petitioner argued that he was charged because he was a boy, whilst the girl was let scot-free. He argued that since the complainant had willingly gone to the petitioner's house, the law should not have discriminated against the petitioner.

The 1st Respondent pointed out that the Sexual Offences Act was very clear. It did not distinguish between males and females. Either gender could be charged with the offence of defilement. He further argued that the decision to prefer charges against the petitioner and to prosecute him is matters solely within the mandate of the prosecution. The Director of Public Prosecution said that the decision to prefer the charge against the petitioner was not based on his gender, but the fact that they were acting on a complaint lodged against the petitioner and it was within their mandate to charge the petitioner.

The Court agreed with the argument made by the 1st and 2nd Respondents and held that the law was clearly not discriminatory. The question was whether the law was applied in a discriminatory way. In determining this issue, the Court said that it was a matter of evidence to enable the Court to establish the reasons why the petitioner was charged with defilement whilst his willing female partner was not charged.

In responding to the question of why the girl was not charged, the prosecution argued that it had to act on a complaint that was made to the police, and the petitioner had not made such a complaint. He further stated that the case would have taken another turn if the petitioner had also made a complaint. This prompted the question, should there be a complaint made before any prosecution can be pursued? In this case, the petitioner did not lodge any complaint against the girl with whom they had had consensual sexual activity.

The Court was of the view that whether a victim has or has not lodged a complaint is not a factor in determining whether or not the offence had been committed. The Court however, acknowledged that the absence of a complaint would make it difficult for action to be taken against the offender.

III. LEGAL ANALYSIS

In the petition, the main issue for determination was the constitutional validity of the offences created under sections 8(1) and 11(1) of the Sexual Offences Act and whether they are inconsistent with the rights of Children under the Constitution. To the extent that these criminalise consensual sexual activities between adolescents, it is our opinion with all due respect to the petitioners that their approach to the issue was mistaken.

We agree with the following points which the court made in its ruling, and which are consistent with the Constitution. The Constitution does not have any provision that legalizes any consensual sexual activity. The Sexual Offences Act aims at protecting adolescents from harmful sexual conduct whether such conduct was directed at them by adults or by other adolescents. Children are vulnerable and they need protection by the law. Therefore, their rights could be limited so long as it is in their own best interest. However, this does not come without challenges and we acknowledge the deficiency on the part of the State in ensuring proper legal awareness of the said laws.

However, our contention lies with the law itself. Currently, children are subjected to the same sentences as adult sexual offenders. Children who have had consensual sexual activities with other children should not be categorized and punished in the same way as adult defilers. Generally, children need a development friendly environment to grow. It is widely accepted that children offenders are not the same as adult offenders due to such factors as mental capacities.[5]

The second issue is on whether Section 8 (1) and Section 11(1) of the Sexual Offences Act are inconsistent with the Constitution to the extent that they discriminate against the male child. It is not in question that the laws under the Sexual Offences Act[6] are gender neutral. The wording of this section is clear that any of the two persons may have initiated the penetration.

Since the law is gender neutral, the question to be interrogated here is why the girl was not charged. Was the law applied discriminatorily or was the law deficient? On the issue of whether the law was applied discriminatorily, the respondents denied any gender consideration. They argued that the decision to prefer charges against the petitioner and to prosecute him were matters solely within their mandate. The court said that it was a matter of evidence to enable it to establish the reasons why the petitioner was charged with defilement whilst his willing female partner was not charged.

On whether the law is deficient, the court acknowledged that there is no express or implied legal requirement that when two children are involved in sexual penetration with each other, both of them should be charged with the offence of defilement. At the same time, the court acknowledged that there is no legal bar to the prosecution preferring criminal charges against both the children if there is reasonable cause.

5 Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (2011) 409 Trends and Issues in Crime and Criminal Justice. See also Brittany L Smith and Glein A Kercher, 'Adolescent Sexual Behaviour and the Law' (2011) Crime Victims Institute, Sam Houston State University <http://www.crimevictimsinstitute.org/documents/Adolescent_Behavior_3.1.11.pdf> accessed 27 March 2015.

6 Act No. 3 of 2006, sections 8(1) and 11(1).

In Kenya, it is common practice, as was in this case, to see the prosecution of only the male minor. The issue of gender bias is a great concern when it comes to prosecution of minors engaging in consensual sex. The fact that comes out conspicuously in this case is that both partners in the sexual act were under the age of consent.

We are of the view that when two consenting children have sex, then under all circumstances, both should be charged. We disagree with the court that it is a matter of evidence. In this case, both were willing participants. Under what circumstances would one argue that the decision to charge one party and not both depends on the evidence as was argued in this case? What form of evidence would excuse one party and incriminate the other? It is inevitable that in a consensual sexual allegation, the same evidence to be used against one party could be used against the other party. Our society appreciates that children are very likely to engage in risky sexual behaviour. This was observed in the case of *Teddy Bear Clinic For Abused Children & Another v. Minister of Justice and Constitutional Development and Another* whereKhampepe J. Said that there may be legitimate reasons for limiting a child's fundamental rights in particular circumstances, due to the stage of his or her development, and in order to protect him or her.

Looking at the manner in which the investigations and the whole process was conducted, the element of due process as should be in a criminal trial was not fully observed. The child offender was taken through the process of investigation without the assistance of a legal representative.Article 37 of the United Nation Convention on the Rights of the child sets very high standards for treatment whenever one is dealing with a child offender. It provides that every child deprived of liberty should be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of his or her age. It further provides in Article 37(d) that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or herliberty before a court or other competent, independent and impartial authority.

IV. CONCLUSIONS AND RECOMMENDATIONS

From the foregoing, it is evident that the Sexual Offences Act of Kenya is deficient in terms of suitable sentences for children sexual offenders. The penalty for defilement is framed in a manner that is harsh for child offenders. Thus, the Act should be amended to expressly include a provision that criminalises consensual sex between minors, with a suitable sentence. A maximum penalty of about five years should be included instead of the current bare minimum sentences. The same will give allowance to the court to order a lower sentence depending on the circumstances of the case. This will also be in the letter and spirit of Article 53 (1) (f) (i),[7] which reads," *Every child has the right not to be detained, except as measure of last resort, and when detained, to be held for the shortest appropriate period of time…."*

To ensure that the punishment is carried out fairly and non-discriminatorily, it is important that the law includes a clear stipulation that where two minors engage in consensual sex, the prosecution should prosecute both parties, regardless of the party that first filed the complaint.

7 The Constitution of Kenya 2010.

Since children do not generally appreciate the legal implications of their actions,[8] there needs to be thorough legal awareness in schools and especially high schools where adolescents are likely to be sexually active. This is imperative owing to the fact that ignorance is not a defence in law.[9]

We agree with the court that professionals in matters of children psychology and in the overall wellness of children should conduct appropriate studies in Kenya, with a view to ascertaining if there are other more appropriate methods of dealing with such cases. Meanwhile, the law should be amended to cater for such cases as demonstrated above.

8 Richards (n 5).

9 The Penal Code Chapter 63, Laws of Kenya, section 7.

GUIDELINES AND EDITORIAL STYLE FOR CONTRIBUTORS

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