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We are also grateful to Dr. Attiya Waris who is the Executive Editor to the UNLJ. She has guided the Editorial Board and consistently supported and advised us in all our endeavors and specifically as pertains to the publishing of this edition. Lastly, we thank the UNLJ Editorial Board for the commitment they have shown towards this cause and the service to the UNLJ and to the publishing of this edition.

Thank You.
EDITORIAL

The University of Nairobi Law Journal (UNLJ) is a student-run Journal of the School of Law, University of Nairobi which was established in 1976 with an aim of providing a forum for debate and intellectual exchange related to the development and reform of the law.

One raison d’être of the University of Nairobi Law Journal is to participate in the discovery, transmission and preservation of knowledge whose effect is to stimulate intellectual growth and development. The Journal also aims at providing an effective platform for research for lawyers, judges, scholars and students.

The UNLJ has therefore engaged in the publication of various general and thematic issues over the last three decades and thus providing a wealthy outlet for legal ideas and has been a truly gratifying fountain of knowledge in different fields of law.

On behalf of the Editorial Board, I am delighted to unveil this edition which has contributions from authoritative scholars who address an array of legal discourses which is indicative of the informative character of the Journal.

The publication of this Journal was made possible through the efforts of many people and this is despite the many challenges that presented themselves. As Nana would put it in Muntu (a play by Joe de Graft), there seemed to lie a will counter-purposed. The publication of this edition thus stands as a monument of what faith, resilience and ambition can achieve.

To the reader, thank you for the continued support. It is with great pleasure that we bring you this eighth volume of the University of Nairobi Law Journal.

Smith Otieno  
Editor-in-Chief
FOREWORD

The University of Nairobi Law Journal is proud to complete its 23rd year of publication. In the past twenty-three years, the journal has strived to contribute to the academic discourses surrounding legal issues by publishing articles by students and established domestic and international scholars.

As a journal, we have also grown in an array of quantifiable ways. Firstly, our reputation and visibility in the legal academic community continues to broaden through an ever increasing exposure to various themes and legal opinions which has led to a diverse, up-to-date and engrossing publication. This is as a result of the tireless pursuits of our editorial board which constantly reassesses and revises the editorial process to ensure the most efficient and satisfying learning experience for both authors and staff.

Turning to our current journal issue, we again present an assorted selection of stimulating articles from scholars and students. Our current issue is a general issue and it covers articles from Human Rights Violations to contemporary Intellectual Property rights. In addition to that, we have dealt with Judicial Independence and freedom of religion; both intrinsically divergent yet sharing a common theme namely, independence. In addition to that, we have critique on the Kenyan political history and lastly a discourse on the current notion of progressive realization of socio-economic rights.

In conclusion, I would like to thank our steadfast faculty advisor, Mrs. Asala whose review was valuable and I am deeply indebted to her for the time and effort that she put into our journal.

Dr. Attiya Waris
Consulting Editor
Character Merchandising, Endorsement and Sponsorship
in Kenya and Africa

Ben Sihanya¹

1. Nomenclature and conceptualising character merchandising
What is character merchandising? How is it related to cognate expressions or concepts and doctrines like endorsement and sponsorship?

1.1 Conceptualising character merchandising
One of the most comprehensive definitions of character merchandising is by Prof David I. Bainbridge. He states:

“This occurs when the owner of the rights in some popular character or personality grants licences to others allowing them to apply drawings, photographs or other representations of the character to goods and articles which those others make or sell.”²

Prof Bainbridge adds;

“Typically, the character will be a famous fictitious character popularized by television or film. Examples are Mickey Mouse, Bob the Builder, Denis the Menace, Indiana Jones, Harry Potter, etc.”

Thus, character merchandising is the marketing of a particular character for economic gain.³ And the World Intellectual Property Organisation (WIPO) has

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³ibid.
defined character merchandising as the adaptation or exploitation by the creator of a fictional character or by a real person or by authorized third parties of the essential personality features. It is the exploitation of features such as the name, image or appearance of a character in relation to various goods or services (or both) with a view to creating in prospective customers a desire to acquire those goods or use those services (or both) because of the customers’ affinity with that character.4

Character merchandising is different from the sale of ordinary goods, and merchandise. 5 It is a marketing technique by which products are associated with well-known or famous characters, since such association effectively enhances the commercial value of the products.6 Fame is generated by enormous investments on marketing the particular character, person, trade mark or other merchandising object.7

Some famous celebrities in Kenya and Africa include Nameless (David Mathenge)8 Suzanna Owiyo,9 Walter Mongare aka Nyambane,10 Charles Bukeko

7Ibid.
10 Walter Mong’are is a Kenyancomedian, actor and mock singer. He became popular in the household sitcom Reddykyulass. He is very popular for portraying former Kenyan President
aka Papa Shirandula, Daniel Ndambuki aka Churchill aka Mwalimu King’ang’i.

Other important performers and athletes include Emmy Kosgei, Antony Kinuthia aka Peter Marangi, Julie Gichuru, Wahu Kagwi aka Wahu, David Rudisha, Dennis Oliech, and MacDonald Mariga, all from Kenya.

Equally important from the rest of Africa are Yvonne Chaka from South Africa, Genevieve Nnaji from Nigeria, Youssou N’dour from Senegal; and Haile Daniel Arap Moi (1978-2002) in Reddykulass. He featured in adverts promoting Harpic Toilet Cleaner, a product of Henkels Ltd.

Charles Bukeko is a Kenyan comedian, TV actor and an artist. He is the star of a popular Kenyan drama, Papa Shirandula (Citizen TV). Bukeko was chosen as the face of the Coca Cola “Brrr” campaign that ran internationally. See Esther Karuku (2011) “Kenya tipped on celebrity endorsements,” op. cit.

Daniel Ndambuki is a Kenyan comedian, TV actor, radio presenter and an artiste. He is the host of the popular TV programme Churchill Show. He co-hosts a morning show, Maina and King’ang’i in the Morning at Classic FM, with Maina Kageni. He was involved in the Omo Ng’arisha Maisha (clean life) Campaign. See Kenneth Kwama (2011) “Making it big through product endorsements,” The Standard, op. cit. See also Esther Karuku (2011) “Kenya Tipped On Celebrity Endorsements,” op. cit.


Antony Kinuthia is a Kenyan comedian who is currently the Dura Coat-Basco Products brand ambassador. See Kwama (2011) “Making it big through product endorsements,” The Standard, op. cit.

Julie Gichuru is the Sunday Live anchor in Citizen TV. She was formerly a Nation TV presenter and news anchor where she was identified with progressive politics. She is Dettol soap brand ambassador. See Kenya 47 (2011) “Kenyan celebrity endorsement deals - Are they on the rise?” at http://www.kenya47.com/2011/06/kenyan-celebrity-endorsement-deals-are.html (accessed 2/11/2011).

Wahu is a Kenyan musician, artiste and singer. She is featured in Rexona and Airtel adverts. See Kenneth Kwama (2011) “Making it big through product endorsements,” The Standard, op. cit.


Dennis Oliech is Kenyan footballer playing for French side Auxerre FC.

MacDonald Mariga is a Kenyan footballer playing for Italian and European champions (2009/10) Inter Milan Football Club. He featured in UAP Insurance advertisements during the 2010 FIFA World Cup.

Yvonne Chaka is a South African musician. She has promoted various products and organisations including the United Nations Children’s Fund (UNICEF) as a special ambassador.
Gebrselassie\textsuperscript{23} from Ethiopia, among others. These celebrities commonly now lend their names to all manner of goods and services, whether it is perfumes, sports, leisurewear, food or drink. The recognition of the marketing potential of this influence has driven advertisers to cleverly advertise their products by associating the products with famous identities.\textsuperscript{24} This is because it is easy to evoke the identities of the most popular celebrities without resorting to the obvious means, such as names, likeness, or voice.\textsuperscript{25}

However, it should be noted that character merchandising covers real persons. These are famous personalities in the film, music, drama, or sports industry. Character merchandising is always important in sports or other public events, film or television series, pop groups or sports clubs or, university or other institutions, or exhibitions.\textsuperscript{26}

Character merchandising also covers fictitious characters. It involves the use of the essential personality features (name or image) of fictional characters in the marketing or advertising of goods or services. It developed as a means of exploiting the popularity of cartoon characters originating from, \textit{inter alia}, a literary work being adapted to the cartoon form;\textsuperscript{27} work created as a cartoon

\begin{itemize}
\item Nnaji is a popular Nigerian (Nollywood) movie actor.
\item Youssou N’dour is a Senegalesesinger, percussionist and occasional actor.
\item \textit{ibid.}
\item For the purpose of a movie or a comic strip such as the characters Pinocchio or Alice in Wonderland.
\end{itemize}
character; in a cartoon character created mainly for the purpose of merchandising and not, originally, intended for a movie or comic strip or in a puppet or doll character designed for a film or a television show (for example, the character E.T., the Gremlins or the Muppets).

As such, character merchandising forms part of a far larger, more lucrative market with a far broader demographic reach. For instance, character sports merchandising can be considered to take in merchandising underpinned by the following three and related parameters:

(a) a (fictional or representative) character primarily based on the persona or endorsement of a well-known sports-personality (cf. Kenya’s Kipchoge Keino, the legendary long distance runner);
(b) a fictional character depicting a competition, event or league; or,
(c) a fictional character representing a sports club.

Examples include those made for films like Mickey Mouse, Donald Duck, Pluto or for comic strips Tintin, Snoopy, Astérix, or Batman.

For example, the character Zorro or even a real creature such as the shark in the film Jaws.

For example, the character Fido Dido, exploited by Fido Dido, Inc. for a number of goods including the drink “Seven-Up” which was the subject of a worldwide advertising campaign, or the numerous mascots created and used in respect of various events, such as sports competitions. See Bainbridge (2009) Intellectual Property, op. cit., at liii-lxiv, 3-23.


Kipchoge Keino is a famous Kenyan athlete who was an African champion, world champion, and an Olympic champion. He was also the world and Olympic record holder. Some of his achievements include the world record holder, 3000 m and 5000 m in 1965; Olympic record holder, 1500 m in Mexico City in 1968; All Africa Games gold medal in 1500 m and 5000 m in Brazzaville (Congo, 1965) and silver medal in 1500 m in Lagos (Nigeria, 1973); Commonwealth Games gold medal in mile and three mile (Jamaica, 1966), gold medal and bronze medal (Scotland, 1970); Olympic Games finalist in 5000 m in Tokyo in 1964, gold medal in 1500 m and silver medal in 5000 m in Mexico City in 1968, gold medal in 3000 m and silver medal in 1500 m in Munich in 1972. See Olympic.org (Official website of the Olympic movement): “Mr. Kipchoge Keino profile,” at http://www.olympic.org/mr-kipchoge-keino (accessed 3/11/2011). See also Kipchoge Keino Foundation website, at www.kipkeionfoundation.org (accessed 3/11/2011).
Some of the most famous fictitious characters used in this context being Mickey Mouse, Winnie the Pooh, or possibly Paddington Bear, and non-human characters like Bugs Bunny. In the legal sense it is critical to distinguish the marketing of fictitious characters from the marketing of real personalities. Thus, the marketing of real personalities is referred to as “personality merchandising.” As Taubman Antony notes:

“[T]he right of personality has an unsettled, hybrid quality, lacking coherence as a distinct legal doctrine. One may query the utility of this omnibus concept, given the diverse areas of law ushered beneath this umbrella: personality cases include statutory rights to privacy and publicity; conventional and expanded passing off; privacy; confidentiality; equity providing a fusion of confidentiality and human rights law; unfair competition and trade practices (including trade descriptions); moral rights; libel; malicious falsehood and trespass to the person; and trademarks.”

What is essential in character merchandising is that the essential personality features of the character are easily recognized by the appropriate segment of the public generally.

1.2 Endorsement
Endorsement refers to a person informing the public that she approves of or is happy to be associated with a certain product or service. According to a leading British intellectual property (IP) judge, Laddie, J.,

“when someone endorses a product or a service he tells the relevant public that he approves of the product or service or is happy to be associated with it. In effect he adds his name as an encouragement to members of the relevant public to buy or use the service or product.”

2 Problematizing and contextualizing character merchandising

36 Kat (2010), ibid.
What is the historical development and application of character merchandising?

2.1 Historical background of character merchandising
The concept of character merchandising began in earnest in the 1930s with the Walt Disney Enterprises. Through the merchandising division, this company exploited their cartoon characters, Mickey Mouse, Minnie Mouse and Donald Duck for commercial gain. This was done by licensing companies to manufacture and distribute merchandise such as toys, clothes and stationery bearing the name and image of these famous cartoons in the film industry. This concept is now used in the film, music and the sports industries and even in the political arena, among others. US President Barack Obama, former South African President Nelson Mandela (Madiba), and Diana (Spencer), the Princess of Wales, Mother Teresa, are some of the most famous names in character merchandising.

There are names of famous characters in Africa literature that could secure similar protection. Examples include Okonkwo in Nigerian novelist Chinua Achebe’s Things Fall Apart, Waiyaki in Kenyan novelist Ngugi wa Thiong’o’s The River Between, (Mrs) Paulina (Were) in Marjorie Oludhe Macgoye’s Coming to Birth, Akoko (Obanda) and Wandia (Mugo) Sigu in the late Margaret Ogola’s The River and the Source, Ramatoulaye in Mariama Ba’s So Long a Letter (Senegal), and Jusper (Wendo) or Aminata in the late Kenyan playwright Francis D. Imbuga’s Betrayal in the City and Aminata, respectively.

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42 Curtis James Jackson III (popularly known as 50 Cent), a US based rapper and actor, wanted to use the title Things Fall Apart in his movie and was willing to pay US$ 1 million. Chinua Achebe reportedly declined through his agents and stated that he would not accept even US$ 1 billion. 50 Cent reportedly changed the title to All Things Fall Apart. See Sean Michaels (2011) “Chinua Achebe forces 50 Cent to rename movie,” The Guardian, September 14, at http://www.guardian.co.uk/music/2011/sep/14/chinua-achebe-50-cent (accessed 3/11/2011).
The legal recognition and protection of character merchandising took a slow start. This was due to the fact that personalities and names were not considered property. It was difficult for judges to conceive persona as a “thing.” They held the view that people cannot be treated as property and further that once people had become public figures their names and characters were matters of public interest and as such could be treated as public property.

The right of publicity was first recognized in the US in the case of *Haelan Laboratories, Inc v. Topps Chewing Gum, Inc.* This was the starting point towards the protection of character.

Since then it has been the general position that where a certain character acquires a distinct identity that becomes a marketable commodity in its own right, this character should enjoy legal protection. This is the position in the US more than any other part of the world. The UK, as well as African, Asian and Latin American countries have been slow to adapt to market realities even though they have important phenomena to accord legal protection through character merchandising.

2.2 Character merchandising in relation to other IP doctrines
Character merchandising is related to many conventional and emerging intellectual property (IP) doctrines.

2.2.1 Right of publicity
Character merchandising is closely related to the right of publicity. Indeed, the recognition of the right of publicity is what led to the recognition of IP rights in particular characters and personalities. In fact it is arguable that the right of publicity is similar to the IP rights in personality merchandising. The major

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44 *Hannah Manufacturing Company v. Hillerich & Brdsky Co.* 78 F 2d 763 (5th Cir. 1935) (USA).
45 *Tolley v. J. S. Fry & Sons Ltd* [1930] 1 KB 467.
46 202 F 2d 866 (2d Cir 1953) (USA).
48 The development of character merchandising in these places as well as in Africa is discussed in detail below.
distinction is that in personality merchandising, there has to be a commercial value in the personality for it to be protected.

The right of publicity will not be accorded to fictitious characters. It only accrues to real persons.\textsuperscript{49} Therefore, while a person may have both the right of publicity as well as the right to merchandise their character and persona, a fictitious character will only enjoy the right related to its merchandising.

### 2.2.2 Trade mark v. character merchandising

Trade mark (TM) normally protects marks that distinguish products as well as indicating the origin of the products. As discussed earlier these marks have to be distinctive or capable of distinguishing a product from another.\textsuperscript{50}

In character merchandising, there is no requirement for distinctiveness of name or image but that of the character. For instance, where the name “Didier Drogba,” or “Abedi Pele” or “David Rudisha” may not be distinct and as such not registrable as a trade mark, the person and character of “Drogba,” “Abedi Pele” or “Rudisha” may have acquired a distinct character which may be protected for commercial purposes. Other sportspersons who have registered their names include: “Gazza” being registered by Paul Gascoigne, Zinedine Zidane registering “Zidane,” Eric Cantona registering “Cantona 7” and Damon Hill registering the image of his eyes looking out through the visor of his helmet.\textsuperscript{51} While Africa has world beating sports persona they have hardly registered their names.

The main relation between these two concepts would be the commercial aspect. Both trade mark and character merchandising are “tools of trade.” They are both used in the commercial aspect as ways of marketing products. It is important to note that certain aspects of fictitious characters may be registrable as trademarks. This is where the name or image of such characters meets the registration criteria for trademarks.\textsuperscript{52}


\textsuperscript{52}International Bureau of WIPO (1994) “Character Merchandising,” at 104.
Some aspects of a fictional character such as the name or logo may be registered as marks. The issue is more complicated when it comes to real persons as their names may not be distinctive or unique. As such they may not be registered. However, one way in which such registration is possible, is in the case where the person uses a nickname. This nickname may be sufficiently unique and distinctive to qualify for registration.53

2.2.3 Endorsement
Character merchandising is easily confused with endorsement, as indicated above. Endorsement refers to a person informing the public that she approves of or is happy to be associated with a certain product or service.54 On the other hand character merchandising involves exploiting images, scenes or articles which have become famous. For instance, a product bearing the name Nelson Mandela or 46664 (his prison number) would suggest that it is approved by Nelson Mandela.

Analysts have asserted that Brand Nelson Mandela or Madiba is priceless and has greatly marketed South Africa in terms of investment, politics, tourism, and sports, among others. As such, anything associated with the Brand Mandela or Madiba (his nickname) generates great sales especially at the time around his birthday.55 In 2011, number 46664, which identified Mandela when he was imprisoned in 1964, was being used as the name of South Africa’s newest fashion

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54 Per Laddie, J. in Irvine, op.cit.
A sports shirt bearing the image of David Rudisha may sell because of his image on it.

Endorsement is closely related to character merchandising due to the fact that in most cases the person or character involved is a public figure and also that both are used as marketing tools. The difference between these two is that in endorsement the public figure makes a representation that she is associated with and approves of certain products, while in character merchandising, this representation need not be made.

This distinction is crucial especially when it comes to the enforcement of the rights of the personality involved. In the UK case of Eddie Irvine v. Talk Radio the court distinguished between endorsement and character merchandising. In this case, Formula One driver, Eddie Irvine, sued Talk Radio for passing off. Talk Radio had manipulated a picture taken of Eddie holding a mobile phone by replacing the phone with a portable radio bearing the “Talk Radio” brand. They then used this image in their advertisements.

The court held that it was not a necessary feature of merchandising that the members of the public will believe that products are endorsed by the person whose name or image they bear. Thus it was held that courts would be more willing to protect endorsement than they would protect merchandising. The rationale courts use is that misrepresentation is actionable. Thus where one makes the representation that a certain public figure approves of certain products and this turns out not to be the case, then the public figure should have a legal remedy.

2.2.4 Unfair competition v. character merchandising

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57 David Lekuta Rudisha is a Kenyan middle distance athlete. He is the current International Association of Athletics Federation (IAAF) African champion, IAAF world record holder, and IAAF world champion in the 800 m race. Other famous athletes include Paul Tergat, Tekla Lorupe, Catherine Ndereba, and Pamela Jelimo, among others.

58 High Court [2002] 2 All ER 414.
Unfair competition\textsuperscript{59} cuts across all aspects of intellectual property (IP) and as such will also apply in the case of character merchandising. Using the name or image of a certain public figure to market products without authorization can be viewed as unfair competition even if the public figure is not involved in selling similar products.\textsuperscript{60} Similarly passing off certain products as being associated with a particular public figure is not only infringing the person’s character but also actionable as unfair competition.

Under unfair competition, characters and personalities may find protection against false endorsements, false sponsorship and misappropriation.

\textbf{2.2.5 Industrial design v. character merchandising}

Designs of characters that meet the criteria of registration such as aesthetic appeal and novelty may be registered under the industrial property laws of many African countries.\textsuperscript{61}

Significantly, character merchandising is not as well established in Africa as it is in industrialized states. As a result, little mention is made of industrial design in most African IP statutes. Some, characters can be protected under trade mark, copyright, industrial design and unfair competition as discussed above. Further, in Kenya and the relevant African countries where the common law is applicable, decisions of the UK courts regarding this are of persuasive authority.

\textbf{2.2.6 Copyright v. Character merchandising}


\textsuperscript{60} Cf. Competition Act 2010 (Kenya); Art 10bis of the Paris Convention for the Protection of Industrial Property (on unfair competition).

\textsuperscript{61} See section 23 of the Industrial Property Act 2001 (Kenya) and Chapter 13. It is significant that unlike Kenya and other African countries, Ghana has a Textile Design Act, which enhances the protective and promotive mechanisms of trade mark law. See the Textile Designs (Registration) Act, 1965, Act 317, and the Textile Designs (Registration) Act (Amendment) Decree of 1966, which were both repealed. However, the Textile Designs (Registration) Regulations of 1966 are still enforced.
In the context of the merchandising of fictional characters and of image merchandising the most relevant aspects of copyright are books, pamphlets and other writings, audio-visual works, drawings and photographs. Regarding personality merchandising, the relevance of copyright is primarily in the sphere of photographs.

Fictional characters may be protected in three different ways. First, for the name of a fictional character to be protected, under copyright *per se* (as such), the fictional character must have been sufficiently and clearly delineated and acquired such distinctiveness and notoriety as to be recognized by the public separately from the work in which she appears. For instance, if the character Makmende is to be protected, it must acquire a distinctiveness and notoriety which is independent of the performance of the band called Just a Band.

Second, drawings or cartoons (two-dimensional works) may be protected independently if they meet the substantive requirements of copyright protection. In that respect, it should be emphasized that a work which is original is not necessarily new, since a graphic adaptation of an already existing literary work may qualify for copyright protection. The same will apply to the drawing of a common creature. Furthermore, it is noteworthy that, mainly in the case of cartoon strips and animated cartoons, copyright protects each different original pose adopted by the character.

Third, three-dimensional works like sculptures, dolls, puppets or robots, which may be original works.

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63 Makmende is a fictional Kenyan super hero character which has enjoyed a popular resurgence after an adaptation by Kenya’s musical group called Just A Band in the music video for their song Ha-He. See Oliver Mathenge (2010) “Makmende craze sweeps the Internet,” *The Daily Nation* (Nairobi), Wednesday, March 24, at [http://www.nation.co.ke/News/Makmende%20wind%20sweeps%20the%20Internet%20/1056/886024/-/1dbat6/-/index.html](http://www.nation.co.ke/News/Makmende%20wind%20sweeps%20the%20Internet%20/1056/886024/-/1dbat6/-/index.html) (accessed 19/11/2011).


Audiovisual works including fictional characters (films, video games, photographs, film frames or stills) will, as a whole (image and soundtrack), generally enjoy copyright protection if they meet the required criteria. This will be all the more probable since audiovisual fictional characters will often have “started life” as drawings (storyboards or strip cartoons) or been described in a literary work. Copyright protection may extend to the individual visual attributes or to the physical or pictorial appearances (costumes, disguises or masks) of a fictional character.

As regards real persons, copyright does not vest in them but in the person who created the work in which the essential personality features of a real person appear. For example, in the case of a biography, copyright belongs to the author; in the case of a sculpture, drawing or painting representing a real person, the copyright belongs to the artist; in the case of a film or television series, the copyright in the work belongs to the person who made it possible for the work to be made or who supervised and directed the work of the actors (author or producer of a film or other audiovisual work).

The question is probably more debatable in respect of photographic works. The reply will depend on who owns the copyright. In most cases the author of the photographs (or more accurately of the negatives) will own the copyright. If a photograph is commissioned for private and domestic purposes, the commissioning party has usually a right to prevent the making of copies of the photograph or its being shown in public. A final problem relates to the case where the party commissioning the work is not the person who is the subject of the photograph. In any case, forms of protection other than copyright are available for the registration and administration of the commercial use of photographs.

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68 A project to write a politician’s biography in Kenya was frustrated mainly because the politician who worked with the heroes and heroines of Kenya’s independence reportedly insisted that he and not the prospective biographer (a political scientist) would be the author. Personal communication with a political scientist who sought anonymity, 2005-2012, Nairobi.
69 See section 2 (author defined) and section 31 (author as first owner) of Kenya’s Copyright Act 2001, and related African copyright laws. See also Chapters 8 and 9.
70 s. 31 Copyright Act, 2001 (Kenya). See discussion in Chapters 8 and 9.
71 *ibid.*
Sports stars may also protect their image rights under South African copyright law. However, this line of protection may be limited. In 2003, a number of senior South African Springbok rugby players brought a High Court application to interdict or injunct the distribution and sale of the DVD featuring the infamous Kamp Staaldraad training camp of the Springboks in preparation for the 2003 World Cup. The court found that the players featured in the footage would have claimed impairment to their dignity and good name and further that the producers of the DVD were in breach of South African copyright law. This was due to the fact that the footage of the Kamp Staaldraad training camp belonged to South African Rugby Union and the Union had neither consented nor assigned its ownership rights in the footage to the producers of the Kamp Staaldraad DVD.

3. Legal framework on character merchandising

The character merchandising industry has increasingly developed into a major revenue stream in many countries. Yet our research did not reveal any legislation or international agreement on character merchandising in Kenya and Africa. Intellectual property law doctrines and principles are thus crucial in this regard. Copyright, trade mark, unfair competition, and contract law can provide varying degrees of legal protection to owners of fictional and graphic characters. The degree of protection and promotion depends on the juridical strategy taken to protect the owner’s character. These include acquiring intellectual property rights at the country or state, national, federal, and regional or international levels; monitoring the market for possible infringements of these rights; enforcement of the rights acquired, and using various forms of contracts to protect ownership rights when dealing with various individuals, companies and other agencies.

The primary goal for an owner of a particular character should be that of providing legal protection that places their character in a protective environment that combines the benefits of protection and promotion under copyright, trademark and unfair competition laws.

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73 Ibid.
3.1 Character merchandising in the US, UK and Australia

Almost all industries in the US utilize character merchandising to increase their revenues through sales. Cartoons such as Mickey Mouse; sportsmen such as Tiger Woods or Michael Jordan; and music superstars such as Britney Spears, JLO, and Beyoncé Knowles, are common faces in merchandise sold in the US. They earn millions in revenue from the sale of their images and persona.

Characters are mainly protected under copyright law. The US has been at pains to describe exactly which characters shall be protected given the fact that copyright law only protects expressions of ideas and not the ideas themselves. The current position after the case of Nichols v. Universal Pictures Corp is that fictitious characters must pass the test of originality. They must also be so developed and delineated as to make them distinct. Specific aspects of characters such as image and name are also protectable under trademark.

The sports industry is again one of the major players in character merchandising in the UK. Sports personalities such as David Beckham earn millions for themselves and their clubs from personality merchandising agreements and licences. When he moved from Manchester United to Real Madrid, Man United reportedly paid him £33,300 a week to use his image on club merchandise. The book publishing industry also benefits financially from the merchandising of fictional characters such as Harry Potter. The sale of breakfast cereals that feature Harry Potter have more purchasing power than those without any image. Despite this fact, British jurisprudence is yet to give character

74 Beyoncé Knowles (born September 4, 1981) is an American Pop and R&B singer. Beyoncé rose to fame in the late 1990s as the lead singer of the R&B girl group Destiny’s Child. Beyoncé is the only artist in history to have all her studio albums win the Grammy Award for Best Contemporary R&B Album. See Beyoncé Knowles’s biography, at http://www.biography.com/people/beyonce%20knowles-39230 (accessed 26/11/11). Lately, she led in singing (lip syncing) the national anthem during the second inauguration of US President Barrack Obama on 21/2/2013.
75 45 F 2d 119 (2d Cir. 1930) (USA).
76 In the case of Warner Brothers, Inc v. American Broadcasting Co. 720 F. 2d 231 (2d Cir. 1983) (USA), Superman was held to be a protectable character due to the totality of various traits that were specific to the character such as physical looks, costumes, behavior, voice and language. Cf. Goldstein & Reese (2010) Copyright, Patent, Trademark and Related State Doctrines, op. cit., at 896.
77 See also http://www.sportsandtechnology.cim/page/0035.html (accessed 08/04/2006).
merchandising the legal recognition it deserves. This is demonstrated by the decision in the Irvine case above.\textsuperscript{80}

Australian law has taken a significant step towards the protection of characters and personalities by virtue of the Trade Marks Act 1995 which provides valuable protection for selected indicia of celebrity personality such as name, signature and likeness. This legal development was in response to the enormous growth in the merchandising of personalities in Australia in the areas of sports and entertainment. In 1995, an estimated A$ 175m was spent on sports sponsorship and advertising. This figure rose tremendously to A$ 850m in sponsorship alone in 1998.\textsuperscript{81}

Olympic swimmer Kieran Perkins was successful in an action against Telstra (then known as Telecom) for using his name and photo, without his authorisation. This was in a colour supplement inserted into the Brisbane Courier Mail newspaper. In Talmax Pty Ltd v Telstra Corp. Ltd\textsuperscript{82} the Queensland Court of Appeal reversed the decision of Byrne, J of the Queensland Trial Division. Byrne J., had held that “the publication did not misrepresent that Mr Perkins had consented to the respondent’s association of his name, image and reputation with its advertising”.\textsuperscript{83} The test used by Byrne, J. was what a “careful reader” would make of the material in question. The Court of Appeal said this was an incorrect approach because the newspaper had a wide circulation:

“[T]he ‘target’ readership accordingly included ‘the astute and the gullible, the intelligent and the not so intelligent, the well-educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations,’ and the appellants could rely on any meaning which was reasonably open to a significant number of the newspaper readership.”\textsuperscript{84}

\textsuperscript{82}Talmax Pty Ltd v. Telstra Corp. Ltd [1997] 2 Qd R, 444.
\textsuperscript{84}Talmax Pty Ltd v. Telstra Corp. Ltd [1997] 2 Qd R 444, 446, quoting from the judgment in Taco Co. of Australia Inc. v. Taco Bell Pty Ltd (1982) 42 ALR 177, at 202. Goldstein & Reese (2010), op. cit
Perkins was granted an injunction, costs and damages of $15,000 for the diminution of the opportunity to commercially exploit his name, image, and reputation.\(^{85}\)

### 3.2 Economic and moral rights in character merchandising

Like most aspects of intellectual property (IP), character merchandising has economic and moral rights.

#### 3.2.1 Economic rights in character merchandising

Economic or pecuniary interests and non-pecuniary interests accrue under character merchandising. In economic or pecuniary rights or interests, the right owner controls the right to exploit and to benefit financially or economically from such rights. These rights include: the right to use the fictional character, the right to receive benefits from the use of such character, and the right to dispose of or transfer these rights.\(^{86}\) Apart from pecuniary interests, the right owner has other interests to protect, including reputation and personal privacy, among others.

The main economic rights relevant to the merchandising of characters are the rights of reproduction, adaptation, communication to the public, broadcasting, and public performance, in any manner or form. In that respect, protection may extend to the use of the work in a different medium or in a different dimension or to promotional use. Even if the author or creator of a work protected by copyright has transferred her economic or exploitation rights, she will always be entitled to exercise her moral rights, which are non-assignable and inalienable\(^{87}\) unless she has waived them.

#### 3.2.2 Moral rights: paternity and integrity

The moral rights under character merchandising are closely related to those under copyright and performer’s rights. For instance, fictional characters fall under an author’s right to paternity and integrity. The modification or adaptation under character merchandising may affect the author’s right especially where there is distortion or mutilation. The adaptation of fictional

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\(^{87}\) Section 32 Copyright Act (Kenya) 2001.
characters in novel, short story, or poem should be in such a way that the author can still recognise the personality features of the character she created. And such adaptation must be preceded by the author’s authority or permission and accompanied by acknowledgement or attribution. Satire or parody does not supply sufficient justification to adapt an author’s fictional characters.  

3.2.3 Transferring rights
The author of such fictional characters reserves the rights to transfer her rights to the merchandiser through assignment, or a licence agreement. And for real persons the common forms include a product or service endorsement agreement or a licence agreement. This way, third parties interested in the characters can be regarded as authorized users of the character.

3.2.4 Duration of protection
Regarding the duration of protection in respect of moral rights, the laws of some countries provide that the rights will not be maintained after the death of the author or creator. Other laws provide that they will enjoy the rights for the duration of protection similar to the economic or exploitation rights. And still other laws provide that the duration of moral rights is perpetual.

4. Character merchandising, endorsement and sponsorship
Despite there being limited legal development on the subject in Africa, the practice and culture of celebrity endorsements is rapidly emerging. Some of the famous celeb endorsements in Kenya include: Equity Bank’s Karibu (welcome) Member advert which featured beauty queen Cecilia Mwangi. There is musician


Suzanne Owiyo and sports legend Paul Tergat, and face of Coca Cola “Brrr” campaign Charles Bukeko (Papa Shirandula). Others are Malta Guinness advert which featured Esther Wahome, DJ Adrian and Tanzanian singer AY. Moreover, East Africa Breweries Ltd (EABL) jitone (sacrifice) campaign against drunk driving featured Nameless (David Mathenge), while Jua Cali (Paul Julius Nunda) is featured in Orange endorsement. And UAP Insurance Company used MacDonald Mariga in its advert in the context of the World Cup 2010 wave.

Bafana goal keeper, Khune, was appointed the brand ambassador for Kiwi. The Zambia and Tanzania Kiwi commercial features David Rudisha and is shown in the East African territories.

Major transnational companies such as L’Oréal Paris (Terry Pheto) or McDonald’s (Teko Modise) have targeted black consumers through the endorsement of South African stars.

93 See Media Madness (MM) “Celebrity endorsements,” op. cit. As already stated Suzanne Owiyo is a leading musician in Kenya. See also Sihanya (forthcoming 2014) Intellectual Property and Innovation in Kenya and Africa, Transferring Technology for Sustainable Development Chapter 1.1 above.


95 See Sihanya, op.cit Chapter 1.


99 See Sihanya, op. cit Chapter 1.

100 See Sihanya op. cit Chapter 1.

5. Prospects of developing character merchandising as IP in Kenya and Africa

What are the challenges and prospects of developing character merchandising as an intellectual property doctrine in Kenya and Africa?

5.1. The challenges to character merchandising in Kenya and Africa

There are a number of reasons which explain the underdevelopment of character merchandising in Kenya and Africa. To start with, intellectual property is not fully developed as property. Though Kenya and other African states have made progress and have laws governing IP, a lot needs to be done to ensure IP is as fully developed as real, personal and other property in Kenya and Africa. It follows therefore that character merchandising is yet to develop.

In addition, the relevant industries are not as developed as they could be. Many African countries are largely producers of raw materials for European industries. Western industries then come and sell in Africa finished products which are already branded depicting their own or a few African characters. As a result, the products that are processed and branded in Kenya and Africa are limited in terms of market value. And even where products and services are generated in Kenya and Africa the branding, advertising and marketing concepts are largely Western.

Furthermore, while there are real and fictional characters in Kenya and Africa with national and transnational appeal there are challenges with packaging and promoting them in the context of merchandising. For example, in Kenya there are renowned athletes and other sports persons like Paul Tergat, Dennis Oliech and MacDonald Mariga now being used in ads. Also budding artistes like Suzzana Owiyo, Peter Marangi, Nyambane and others are beginning to appear in ads. In the fictional world, there are very few known Kenyan fictional


103 ibid.
characters. But an important one, Makmende the Hero, is a fictional character in Kenya.\textsuperscript{104}

Close to this is the fact that there is a lot of ignorance of the power of using these popular characters to sell products. Many companies have not yet appreciated the impact of using these famous characters to popularize their products. Again, known real persons and creators of fictional characters are yet to commercialize their characters. Instead, many third parties exploit the images and depiction of characters without consent or authority. This makes them lose a lot of money.

More importantly, there is no specific legislation that provides a distinct property right in character merchandising.\textsuperscript{105} The protection afforded to character merchandising in Kenya and Africa exist in numerous statutes which themselves do not provide doctrinally coherent or enough protection.

\textbf{5.2 Prospects of character merchandising in Kenya and Africa}

There are at least five positive attributes of character merchandising: First, it is a marketing tool. Second, it helps to attract sponsorship. Third, it is crucial in advertising. Fourth, it is particularly important in a new range of products. And fifth, it promotes Kenyan and African culture. There is thus an urgent need to define the rules regarding characters, agents, promoters, sponsors, the media, as well as other key interests or stakeholders in character merchandising.

There are also complaints that character merchandising may lead to cultural pollution.\textsuperscript{106} In South Africa, real persons, especially celebrities and sports stars, enjoy the commercial rewards from the commercial opportunities such as image licensing.

\textsuperscript{104} See Chapter 1.1 and 2.2.6 above. Ngugi wa Thiong’o created fictional character Matigari. Kenyan security agencies sought to arrest the character. See Ngugi wa Thiong’o Matigari, Africa World Press.


\textsuperscript{106} This is partly because it is perceived that character merchandising is largely based on Western traditions and practices as well as permissive Kenyan and African standards. It also focuses on commercial interests and profits. Kenyan or African cultural values have to be actively reviewed to secure an appropriate balance between culture and commerce; tradition and change. The question then is not whether but how to pursue character merchandising and establish appropriate regulatory regimes through IP, sports, and other areas of law.
agreements, sponsorships and celebrity endorsements. Celebrities and sports stars enjoy an array of protection from their images and voices, among others.

5.2.1 Character merchandising in South Africa

Character merchandising is more developed in South Africa than in other African countries. This was acknowledged in the case of Federation Internationale de Football v. Bartlett. However, there is no specific legislation that provides a distinct property right in character merchandising.

South African sportspersons earn substantial income not only from their on-field performances, but also from the valuable sponsorship deals and endorsements concluded between them and the vendors of certain goods or services. Some of the sportspersons have commercialised their image rights by granting exclusive licences to advertisers to enhance the reputation of the product or goods due to the association with the celebrity or sports star and thus attracting the purchasing public in exchange of royalty payments for the right of the advertiser to use and exploit their image.

The sportspersons further earn lucrative amounts through endorsements where they associate with certain products. The advertisers ride on the fame of these stars. By endorsing the product, a sportsperson gives her name as a stamp of approval, letting the general public know that she approves of the product or service. An example includes the endorsement of the Springboks by British Airways.

Trademark law gives the athlete exclusive control for a period over her registered image trademark and would thereby prevent another person from registering or attempting to register or use an identical or similar trademark.

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110 ibid.
111 ibid.
112 ibid, at 2.
The laws of Kenya and of most African states do not sufficiently address the growing commercial reality regarding the exploitation of image rights. Therefore, it is difficult to curb unscrupulous advertisers and vendors from exploiting the image rights of an athlete without the permission of the athlete or personality. Freeloaders thus continue to cause damage in the form of a dilution in the value of certain marketing aspects of the image. Moreover, there is the substantial loss of royalty earnings or licence fees associated with the lawful use and exploitation of the athlete’s or other celebrity’s image or character.

6. Reforming character merchandising in Kenya and Africa
There has been immense growth in sports, TV, media, politics, education, academics or intellectual activities, and other venues for character merchandising or related commercialization. These should now be matched by a fundamental change in African intellectual property (IP) laws that have not changed (much). As a result, there is inadequate protection of characters due to the inability of Kenyan and African laws to recognize “stand alone image rights.”

African stars in sports, education, media, environmental governance, politics, and intellectual work should take proactive measures by seeking professional help and guidance in managing their commercial rights. This is particularly the case regarding aspects of image and character merchandising rights. They should use trade mark and copyright law as well as properly negotiated and structured contracts, among others, to ensure legitimate exploitation of their rights. Lobbying is also necessary to secure appropriate legislation, policy and administrative regimes on character merchandising in Kenya and Africa.
Financing the Progressive Realisation of Socio Economic Rights in Kenya

Attiya Waris* and Laila Abdul Latif

Article 43 (1) of the Constitution of Kenya¹ provides for socio economic rights. It reads as follows:

43. (1) Every person has the right—
(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
(b) to accessible and adequate housing, and to reasonable standards of sanitation;
(c) to be free from hunger, and to have adequate food of acceptable quality;
(d) to clean and safe water in adequate quantities;
(e) to social security; and
(f) to education.
(2) A person shall not be denied emergency medical treatment.
(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependents.

Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”²

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Article 209(1) of the Kenyan Constitution\(^3\) sets out the **power to impose** taxes and charges. It states that:

**209. (1)** 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 authorise 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.

These three legal provisions set out the state responsibility and how they are intended to be achieved. Socio economic rights are to be realised progressively through the allocation of adequate financial resources and by the setting up of infrastructure county-wide. Consequently, the Kenyan government is to allocate the maximum of its available resources towards the realisation of these rights. In the event the state fails to allocate the maximum of its available resources to realising these rights, it shall be considered to be in violation of the ICESCR under the Maastricht Guidelines on violations of economic, social and cultural rights.\(^4\) However the sources of government revenue come from taxation and other forms of state revenue and are split between many needs of both recurrent and development expenditure. This is the background against which this paper shall discuss financing the progressive realisation of socio economic rights in Kenya.

\(^3\) Constitution of the Republic of Kenya (2010)

\(^4\) "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht," Human Rights Library University of Minnesota. Available at: [https://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html](https://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html)
1. Introduction

The concept of progressive realization finds its source in international human rights instruments. It is a central aspect of a state’s obligation to respect, protect and fulfill its responsibility to achieve human rights. Most states today have signed onto the ICESCR, as well as providing for the rights constitutionally and as a result they have both an international and domestic responsibility. In the context of Kenya, this means that the state is to take appropriate legislative and financial measures towards the full realization of both the ICESCR in addition to article 43 of the Kenyan Constitution.

The biggest obstacle facing human rights today is that of resource allocation and its link to the requirement for either progressive or immediate realization. The absence of this link till today has resulted in a failure to achieve all human rights in every state in the world today. This status quo is expressed in the language of article 209(1) of the Kenyan Constitution which gives the state the power to tax with no responsibility attached to it. This paper will analyse progressive fiscal realization in the context of socio-economic rights and will explore the contentious issue of maximum available resources in the Kenyan context.5

In discussing international human rights, states and scholars make numerous references to the limits to resources available. This reflects a recognition that the realization of these rights in theory can be hampered by a lack of resources and can be achieved only over time. It also means that a state’s compliance with its

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5 Progressive realization” clauses in United Nations human rights treaties: International Covenant on Economic, Social and Cultural Rights (art. 2 (1)) “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”. Convention on the Rights of the Child (art. 4) “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation”. Convention on the Rights of Persons with Disabilities (art. 4 (2)) “With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law”. 

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obligation to take appropriate measures is, without a doubt, assessed in the light of financial or other resources available to a domestic state as well as its ability to engage in international cooperation.6

Progressively realisable rights do not guarantee that the individuals who hold the right, get the good or service in question. They only impose a duty that the government takes reasonable steps towards the goal. It is in this respect that General Comment 3 on progressive realisation states that:

“it is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d’être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.”7

Thus the concept of progressive realization is sometimes misinterpreted as if States did not have to protect economic, social and cultural rights until they have sufficient resources.8 On the contrary, the treaties impose an immediate obligation to take appropriate steps towards the full realization of economic, social and cultural rights. A lack of resources cannot justify inaction or indefinite postponement of measures to implement these rights. States must demonstrate that they are making every effort to improve the enjoyment of economic, social and cultural rights, even when resources are scarce. For example, irrespective of the resources available to it, a State should, as a matter of priority, seek to ensure that everyone has access to, at the very least, minimum levels of rights, and target programmes to protect the poor, the marginalized and the disadvantaged.

6 See generally Pampel and Williamson (1989); Marmor, Mashaw and Harvey (1990) and Meeting the Challenge to Fiscal Legitimacy through Well-Being


This paper is divided into 5 parts. Part one introduces the issue. Part two analyses and attempts to unpack progressive realisation and the achievement of socio-economic rights from the theoretical perspective. Part three is a Kenyan case study setting out the achievement of socio-economic rights in Kenya to date and how the state responds to its socio-economic obligations. Part four recommends and part five concludes.

2. Financing Social Welfare or Progressive Realisation of Human Rights

Finance officials rarely look at human rights as a measure of re-distribution or collection of state revenue. However they do look at theories of social welfare. This section will point to the parallels between social welfare and socio-economic rights in order to highlight their similarities but also to show how human rights and their obligations are being fulfilled and can be progressively fulfilled.

2.1. The Historical Shifting from Social Welfare to Human Rights

Historically well-being and social welfare were and are policies applied by governments domestically through their domestic political process as a result of the society electing leaders who intend to apply certain policies. Over the years this policy has been adopted by many states both with and without reference to their particular political leanings. For example the United Kingdom which is a capitalist state also applies social welfare policies and provides among other services, state subsidised education and health services. Human rights on the other hand have developed internationally and are subsequently applied within the domestic state.

As a result, although these concepts all address broadly the same content, the concept of well-being developed first in time followed by social welfare and finally human rights. With their continuing development the obstacles and solutions are also continually being addressed. The first challenge to the achievement of social welfare and a challenge that continues to face human rights is their realisation: limited resources.

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.

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**.\(^9\)

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.\(^10\)

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.

This linked resources to the right to security and administrative services with the remainder of the resources being left to the decision making abilities of the people. Despite this important development of the linkage of welfare or rights to resources in the French Constitution, this development did not spread to other countries. Instead the world was split on the basis of class, race, gender as well as other historical factors. Over time political and civil rights took precedence over the socio-economic rights.\(^11\)

In 1948 after World War II, of the 51 founding members\(^12\) of the United Nations only 32 states were involved in the actual debates surrounding the creation of the

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\(^9\) Republic of France (1789). Declaration of the Rights of Man, Government of France

\(^10\) Constitution of the Republic of France (1793)


\(^12\) Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Saudi Arabia, Syria, Turkey, Ukrainian
Universal Declaration of Human Rights (UDHR).13 A major step was then taken in the elaboration of the general principles of the UDHR in two Covenants: the International Covenant on Civil and Political Rights (ICCPR)14 and the ICESCR15. The negotiations on the UDHR, ICCPR and ICESCR were all affected by several factors. Firstly, they are politically negotiated documents and a compromise not only in principles but also in deliberately vague terminology.16 Secondly, in 1948, when the UDHR was negotiated after the two world wars, a period of limited fiscal resources for all states, as well the political and philosophical divide between the capitalistic and communist philosophies.17 Finally, the issue of realisation was also not fully explored, instead after lengthy discussions; it was left to the state under the provision of state sovereignty.18

It was only in 1965 when the newly recognised states including Kenya continued the push for the creation of internationally recognised human rights instruments which they perceived as both a method of protecting their recently achieved independence and a recognition of the equality of all people, that the texts of the ICCPR and ICESCR were finally agreed upon.19 However, the ideological divide between capitalist and communist states could not be overcome and the result was two separate treaties. Although a group of 19 states actually urged that the UN Commission on human rights give higher priority to economic, social and cultural rights, they settled to urging states through the HRC that equal budgetary and human resources be devoted to each of the two sets of rights.20

Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela, Yugoslavia.

13 United Nations (2009)
18 Ibid (1999) 6
19 The activity of the newly independent states led to the introduction first of the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960 an later in 1965 the Declaration on the Elimination of all Forms of Racial Discrimination. Lauren (2003) 242-244. By 1966 the UN had 122 member states.
In the background fiscal discussions continued to look at provisions on health, housing, education and food as being social welfare provisions purely within the states decision making power and having no relationship whatsoever with human rights or their financing. Since the human rights discussion stopped on the point of progressive realisation states did feel they had a responsibility nor did they find it necessary to allocate resources to the achievement of rights. The failure to look at human rights discourse in the fiscal regimes of the state means that there are parallel discussions ongoing but no fiscal allocations.

States with socialist and communist leanings used economic and social rights to allocate budgets while more capitalist minded states used social welfare selectively to fund services they felt their budgets could support. However socio economic rights were also sidelined due to the use of the phrase ‘immediate realisation’ for civil and political rights which led to the push by the international community for states to work first on civil and political rights rather than the socio economic rights.

### 2.2. Financing Social Welfare

Traditionally before human rights became the main discourse in achieving improved standards of living, states achieved improvement of living standards through social welfare provision. Social welfare objectives included among others, direct spending for income security, housing, health care, education, employment and training, and social services. Society perceived states that provided social welfare as providing guarantees for a minimum standard of living, protecting citizens from loss of income beyond their control, especially retirement, sickness, disability or unemployment including public assistance and social insurance, serving both the poor and the middle class.\(^{21}\)

In addition, social welfare scholars most notably T. H. Marshall set out a model of the evolution of the rights of citizens in the western world, using the UK as the case study. He argued that civil rights developed first followed by political rights and finally, economic or social rights was introduced gradually in the nineteenth

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and twentieth centuries.\textsuperscript{22} Louis Henkin while commenting on the welfare state in the United States in the mid-1990s stated that the welfare state and all other rights are so deeply entrenched in the society that they have near-constitutional status, and that Americans have begun to think and speak of social security and other benefits as an entitlement and right.\textsuperscript{23} Onora O’Neill argued that it is impossible to proclaim universality of rights in goods and services with reference to welfare rights without connecting the right-holder to an obligation-bearer, leaving the content obscure.\textsuperscript{24}

Welfare rights are seen by some to be different from the classical rights of life, liberty and property in the nature of the content. Classical rights are said to rights to freedom of action whereas welfare rights are rights to goods. Liberty rights are seen as those that govern individual interactions, they however do not guarantee success while welfare rights are the right to have goods and services provided by others if one could not earn them themselves. In addition, liberty rights require a resource outlay that involves or includes security issues in order mainly to uphold laws.

The implementation of welfare rights however are seen to involve huge capital outlay and use of tax money. Finally, it is also argued that implementation of liberty rights do not require resources in that the ability of people to forbear from doing certain activities does not result in a function of wealth. There is no universal and non-arbitrary standard for distinguishing need from luxury and thus defining the content of welfare rights. This is dependent upon the relative wealth of a society.\textsuperscript{25} This argument has since disproved as all rights require resources and from the perspective of the fiscal state the assumption that rights such as fair trial did not require resources for court rooms and judges seemed preposterous undermining the very basis of human rights.


You cannot have a right unless it can be claimed or demanded or insisted upon, indeed claimed effectively or enforceably. …rights thus are performative-dependent, their operative reality being their claimability; a right one could not merely be ‘imperfect’ – it would be a vacuous attribute.26

This statement is what funds and fuels the distinction that remains and that which is maintained by some social welfare scholars to keep human rights in a separate category. They argue that what society claims as a right may be contradicted by its substance or administration. Thus the issue of equality of right is used to exclude social welfare benefits from the ‘rights’ category by some human rights scholars.27

2.3. Financing Socio-Economic Rights

There are three main core texts that are the source of all discourse on human rights: the UDHR, ICCPR and ICESCR. All these texts do not specifically contain a definition of human rights; however they state that the purpose of human rights is to enhance human dignity.28 Broadly speaking, as a result, human rights are the concrete expression of values that are designed to enhance human dignity. Contemporary thought is what gives these values the form of rights bestowed on individuals and groups.

Some scholars regard the absence of a definition of human rights as an impediment to its realisation. However, Donnelly regarded it as a sign of its continually evolving content which reflects the relationship of society within itself and with the state.29 This approach will be adopted in this article as it allows one to draw into human rights the existing concepts of welfare and well-being. Human rights and human dignity can thus be perceived as the modern day interpretation of social welfare as espoused by Schumpeter and economic and welfare scholars.

28 United Nations General Assembly. Universal Declaration of Human Rights (1948) article 1
29 Donnelly (2003) 1
Regionally African states formed the African Union and have negotiated and created a regional human rights treaty, the ACHPR.\textsuperscript{30} This treaty includes all of the rights in the international instruments\textsuperscript{31} except for the right to social welfare and additionally recognises both individual and peoples’ rights, family protection by the state,\textsuperscript{32} guarantees peoples’ the right to equality,\textsuperscript{33} the right to self-determination,\textsuperscript{34} to freely dispose of their wealth and national resources,\textsuperscript{35} the right to development,\textsuperscript{36} the right to peace and security\textsuperscript{37} and the right to a generally satisfactory environment.\textsuperscript{38} The fact that African states included social welfare as a separate right means that states like Kenya can cross the political divide and achieve a broader set of socio economic rights.

Domestically a state chooses what will form the list of human rights of its citizens by signing and ratifying a treaty or refusing to do so. Today, most states of the

\textsuperscript{30} A Charter is not legally binding, but it is worthwhile referring to as it constitutes the expression, at the highest level, of a democratically established consensus on what is considered as the catalogue of fundamental rights for all. The recognition of the African Charter is based on its application, use and the weight of its recommendations which are mere recommendations and not enforceable.

\textsuperscript{31} The UDHR, ICCPR and ICESCR texts list out human rights to include: the right to life, liberty and security of the person; freedom from slavery and servitude; freedom from torture or cruel, inhuman and degrading treatment; to recognition everywhere as a person before the law; equality before the law and without any discrimination to equal protection of the law; effective remedy by the competent national tribunals; arbitrary arrest, detention or exile; full equality to a fair and public hearing by an independent and impartial tribunal; right to be presumed innocent until proved guilty; protection of the law against such interference or attacks; right to freedom of movement and residence; right to seek and to enjoy in other countries asylum; right to a nationality; right to marry and to found a family; right to own property; right to freedom of thought, conscience and religion; freedom of opinion and expression; right to freedom of peaceful assembly and association; right to take part in the government;\textsuperscript{31} right of equal access to public service in his country; right to social security; right to work, right to rest and leisure, right to a standard of living adequate for the health and well-being right to education; right freely to participate in the cultural life of the community. Although the entire set of listed rights are found in the United Nations General Assembly, Universal Declaration of Human Rights (1948) articles 1-27, the latter half from the right of equal access to public services are the content of the ICESCR.

\textsuperscript{32} Organisation of the African Union. African Charter of Human and Peoples Rights (1982) article 18

\textsuperscript{33} Ibid. article 19

\textsuperscript{34} Ibid. article 20

\textsuperscript{35} Ibid. article 21

\textsuperscript{36} Ibid. article 22

\textsuperscript{37} Ibid. article 23

world have signed and ratified these treaties. Some states have either not signed or ratified both these treaties, while certain states like the USA and South Africa have abstained from ratifying the ICESCR. Kenya became a member of the United Nations in 1963 after it gained independence and adopted the UDHR. Its international human rights treaty status remained the same until 1976 when Kenya signed and acceded to both the international covenants the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). To date Kenya, has signed and ratified 7 of the 9 core international human rights treaties in addition to several other treaties. Regionally, Kenya is party to the 1986 African Charter on Human and Peoples’ Rights (ACHPR) in addition to several other regional treaties and protocols. Kenya has not registered any

39 United Nations (2004) The ICCPR was concluded in 1966 and has been ratified by 152 states, 45 states however are not yet party to this treaty and 8 states have signed it but have not as yet ratified it. The ICESCR has been ratified by 146 states, 51 states are not yet party to the treaty, and 8 states have signed it but have not as yet ratified it.
40 The following states have signed but not ratified both treaties and include China, Comoros, Cuba, Guinea-Bissau, Laos, Nauru, Pakistan and São Tomé and Principe. States that have neither signed nor ratified it include Antigua and Barbuda, Bahamas, Bhutan, Brunei, Burma (Myanmar), Fiji, Kiribati, Malaysia, Marshall Islands, Micronesia, Oman, Palau, Qatar, Saint Kitts and Nevis, Saint Lucia, Saudi Arabia, Singapore, Solomon Islands, Tonga, United Arab Emirates, Vanuatu and Vatican City (through the Holy See).
41 States that have neither signed nor ratified only the ICESCR but have signed and ratified the ICCPR include Andorra, Haiti, Mozambique, Nauru, South Africa, United States of America.
42 These covenants or treaties are internationally legally binding.
47 These regional treaties support the implementation of human rights on the regional level, and often reflect additional human rights concerns particular to specific cultural contexts.
reservations to any of the international human rights treaties declarations, charters, covenants or protocols to which it is a party. As a result, Kenya has shown that by ratifying these treaties it has accepted that its citizens are entitled to all the rights listed above.

2.4. State Responsibility and Progressive Realisation

Once a state becomes a signatory to the diverse treaties, it takes on the duty to protect, promote and respect human rights. This duty has been set out from the commencing clause of the United Nation’s Charter, later in the Tehran Declaration and the Vienna Declaration and most recently in 2004 by a General Assembly Resolution through General Comment 31 where it was states at paragraph 5 that:

The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government … are in a position to engage the responsibility of the State Party.

The above comment places the responsibility of the realisation of rights on the government. There was no further step taken to concretise the fiscal implications a statement of this nature entails. Instead, the international community avoided reference to the issue of resources, especially domestic resources like tax revenue and its allocation on the grounds of the sovereignty of nations and the importance of allowing states to pursue their own economic policies. General

ACHPR on the Establishment of an African Court on Human and Peoples’ Rights (African Court) in 2005 Kenya has accepted the jurisdiction of the African Court but not on individual complaints. The Maputo Protocol to the ACHPR on the Rights of Women in Africa has not yet been ratified by Kenya.

50 United Nations General Assembly. Proclamation of Tehran (1968)
52 General Assembly resolutions to be non-binding. Articles 10 and 14 of the UN Charter refer to General Assembly as "recommendations"; the recommendatory nature of General Assembly resolutions has repeatedly been stressed by the International Court of Justice. However, some General Assembly resolutions dealing with matters internal to the United Nations, such as budgetary decisions or instructions to lower-ranking organs, are clearly binding on their addressees.
Assembly resolutions reaffirmed that states should not interfere in the domestic policies of other countries.\textsuperscript{54}

A further analysis into the specificity of terminology regarding resource allocation, within the international arena leads to the use of the terms the ‘limitation to resources’ or resource ‘constraints’. These terms are used repeatedly almost as a refrain while espousing ‘progressive realization’ of human rights ‘obligations’.\textsuperscript{55} These terms are used to allow the delimitation and exclusion by states from the human rights obligation of undertaking their obligations.

Under human rights law, the state has the primary responsibility to respect, protect and fulfill the human rights of all those in its territory. The Conventions, Declarations, resolutions and comments together all set out the minimum standards that states agree to be bound by. However, the method used to meet these standards is seen as a matter of state concern. By participating in the international human rights framework, states agree to undertake that their constitutions, laws, policies, and budgets reflect these legal obligations and those policies will be applied in order that they move towards achieving these minimum standards.\textsuperscript{56}

Rights therefore, only become more than mere declarations if they confer power on bodies whose decisions are legally binding. Thus the people who do not live in a state having effective remedies in reality have no legally enforceable rights.\textsuperscript{57} Any and all legal rights exist in reality only when and if they have budgetary costs. If the claims to grant the right to free education for example, this will only take place in reality and on the ground in the country if there are adequate resources to build schools near communities that require this service. In Kenya

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{54} Examples include United Nations General Assembly. Declaration on Friendly Relations between States (1970) and United Nations; United Nations General Assembly. Resolution on the Permanency of Sovereignty over Natural Resources (1962)
\item \textsuperscript{55} Human Rights Committee (1990). General comment No. 3: The nature of States parties’ obligations (article 2, paragraph. 1, of the Covenant) in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, United Nations; 15.
\item \textsuperscript{57} European Union. European Convention on Human Rights (1953) article 13 states that rights are reliably enforced when subscribing states treat them as domestic law.
\end{enumerate}
\end{footnotesize}
free education was set out as a right upon independence but only in 2003 did the government actually make it fiscally and legally possible.

Discourse on the state’s obligation to respect, fulfill and protect human rights has led to the division of human rights into the immediately realisable civil and political rights and the progressively realisable economic, social and cultural rights. It was initially perceived that civil and political rights were negative and did not require state intervention or fiscal resources whereas economic social and cultural rights were a fiscal burden and on the basis of limited resources required progressive realisation. The choice to provide the latter rights was left to the political leanings of states.

As a result states that felt that economic and social rights were not their main responsibility did not sign and ratify the ICESCR like the US that believes in the self-funding of most services, whereas the states like Russia following communist and socialist ideology attempted to provide these services and so were willing to sign and ratify the ICESCR. In addition, traditional human rights scholars argued that the implementation of welfare rights involved a large outlay of resources, while the implementation of liberty rights do not require resources in that they are obligations on the state to refrain from certain activities. The realisation of economic and social rights was left entirely dependent upon the relative wealth of a society.58

The Committee on Economic, Social and Cultural Rights (CESCR) set out this distinction best in General Comment number 3:

The principal obligation of result reflected in article 2 (1) is to take steps “with a view to achieving progressively the full realization of the rights recognized” in the Covenant. The term “progressive realization” is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the ICCPR which embodies an immediate obligation to respect and ensure all of the

relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d’être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.  

It is argued by scholars and affirmed by the United Nations, that there is no division of civil and political rights from economic and social rights. However, the treaties make the separation. Conceptually they are both the same and equal. Despite this, the analysis of the terms ‘progressive realisation’ and ‘immediate’ is what divides civil and political rights from economic social and cultural rights at its very root. It has been argued by Philip Alston that the use of these terms renders the obligation devoid of meaningful content. Despite rights being termed as obligations, no state deals with them as obligations. Even if a state fails to ‘fully utilise its resources’ there is no enforcement mechanism of the United Nations at any level that can compel fulfilment. Sanctions have taken place in the past for failure to meet human rights obligations that have resulted in legislative changes but there have been no reflected changes in fiscal behaviour.

59 Human Rights Committee (1990). General comment No. 3: The nature of States parties’ obligations (article 2, paragraph. 1, of the Covenant) in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, United Nations: 17 paragraph 9 (emphasis ours)
When the final version of the ICESCR was adopted, it was celebrated as being the first comprehensive international human rights instrument to be legally binding on state parties. However some states, for example New Zealand, entered reservations when ratifying it citing resource scarcity. The lack of international enforceability which also recognises the inherently limited resources at the disposal of a state is found in numerous examples. State action to the term immediate fulfilment is evidenced by their submissions to the United Nations and its constituent bodies. Thus, despite that fact that there are tiers of achievement in human rights, no state can claim to have achieved complete and immediate achievement of human rights or even civil and political rights, if the use of the term immediate is to be understood and addressed. Among other reasons, this includes resource constraints. There are two steps to the realisation of human rights. The first is their adoption in the constitution, legislation and policy of the state and the second is the actual allocation of fiscal resources to the human rights that remain as yet unrealised and require resources a challenge that remains unresolved to date.

3. Kenya’s State Responsibility in Progressively Realisation

The Kenya Constitution under article 43 lists the socio economic rights that every person in Kenya is entitled to. These rights are the right to health, housing, food, water, social security, and education. However, the Constitution does not set out the implementation framework that is required for the realisation of these rights. Instead the implementation framework is found under article 2.1 of the ICESCR. This article provides that:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant

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by all appropriate means, including particularly the adoption of legislative measures.”

Hence, socio economic rights in Kenya are to be realised progressively through three major steps. Firstly, through the enactment of legislation on socio economic rights. Secondly, through allocation of adequate financial resources and finally, by the setting up the infrastructure necessary to realise these rights in all counties. Hence; legislation, budgetary allocation and infrastructure are a critical component in the realisation of socio economic rights in Kenya. This paper limits its discussion to financing socio economic rights and as such confines itself to analysing the budgetary allocations to the sectors responsible for realising these rights in order to address whether these rights are being achieved progressively. However, in order to make this analysis it is important to consider how the Constitutional Court of Kenya has interpreted the concept and meaning of progressive realisation and then go into considering the effect of budget allocation in achieving socio economic rights in Kenya.

3.1 Discussion on Financing the Progressive Realisation of Socio Economic Rights in Kenya

Most recently, in the Matter of the Principle of Gender Representation in the National Assembly and the Senate the concept of progressive realization was dwelled upon. In this case it was stated that this concept is not a legal term, rather it emanates from the word “progress,” defined in the Concise Oxford English Dictionary as “a gradual movement or development towards a destination.” Progressive realisation, therefore, connotes a phased-out attainment of an identified goal.

The Supreme Court Judges in this case stated that the expression “progressive realization” is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the state. The exact shape of such measures


66 Advisory Opinions Application 2 of 2012, eKLR
will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action.

Hence, certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions.

Where a Constitution takes such a fused form in its terms, the Judges believe, a court of law ought to keep an open mind while interpreting its provisions. In the circumstances of the case (gender equity), they were inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy. They said that care should be taken not to substitute one for the other. In their opinion, a norm of the kind in question in this case, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.

The Kenyan courts prior to discussing the concept and meaning of progressive realisation had a chance to examine the methods through which socio economic rights could be achieved. Accordingly, in the case of John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others, 2011 eKLR the Constitutional Court explained as follows:

“The realization of socio economic rights means the realization of the conditions of the poor and less-advantaged and the beginning of a generation that is free from socio-economic need. One of the obstacles to the realization of this objective, however is limited resources on the part of the government. The available resource is not adequate to facilitate the immediate provision of socio—economic goods
and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual. Socio-economic rights are by their very nature ideologically loaded. The realization of these rights involves the making of ideological choices, which among others, impact on the nature of the country’s economic system. This is because these rights engender positive obligations and have budgetary implications, which require making political choices. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligations”.

The Constitutional Court in the above case appears to be making three fundamental pronouncements in the process of realizing socio-economic rights for Kenya. First, the High Court makes it clear that, while adjudicating socio-economic rights disputes, the courts should not focus on the rights of the individual applicant, but should instead focus on the impact of its decision on the realization by all citizens of their socio-economic rights.67

Second, the court in the John Kabui Case, states categorically that the available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand ignoring the specific provisions of the Kenyan Constitution. As a result, the state has not paid considerable attention to the health sector in budget allocation. This has been observed from the states’ budget allocation to the health sector, which has been on a reducing scale. In 2010, 7.2 per cent of the total budget was allocated to the health sector. In 2011, only 6.1 per cent was allocated while in the current 2013/14 budget, the health sector allocation has been reduced to 5.9 per cent of the total budget. This is alarming since the health sector is the means through which the socio economic right to the highest attainable standard of health is to be realised. Hence, limited financing of this sector negatively impacts the progressive realisation of the first socio economic rights listed under article 43 (1) (a) of the Constitution of Kenya.

The Kenyan Constitution expressly imposes the burden on the state to prove inadequacy of resources, where the state alleges that resources are not adequate. In this case the state never alleged that the resources were inadequate nor did the state adduce any evidence to prove the same. Nevertheless, in its ratio decidendi, the Constitutional Court set a precedent to the effect that the state does not need to allege inadequacy of resources that instead the court shall take judicial notice of the inadequacy of resources. This approach severely militates against the full realization of socio-economic rights as envisaged in the Constitution of Kenya.

Finally the Constitutional Court in the John Kabui Case took the position that the court should leave adjudication of socio economic conflicts to the executive and legislative branches of government. This is exactly what the court meant when it stated that:

“[I]n our view, a public body (meaning the executive or legislature) should be given (presumably, by the court) leeway in determining the best way of meeting its constitutional obligation” (presumably by making socio-economic choices).

This rationale was applied in the recent case of Matthew Okwinda versus the Attorney General & 2 Others. In this case, the litigant was seeking orders to compel the government to provide him with certain medications, which with the implementation of the Constitution became the government’s obligation to provide. The government argued that legislation had not yet been enacted that set out the parameters upon which this right was to be realised and that the litigant was asking the court to do what the National Assembly ought to do, that is, to make policy and law specifying what the government’s obligations entail. The court agreed with the Attorney General and dismissed the case on grounds that the right to health was dependent upon the development of the health system and that the court cannot direct the government on how to develop its health system, rather it was the mandate of Parliament so to do.

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68 Article 20(5) of the Constitution expressly states that “In applying any right under Article 43, if the state claims that it does not have the resources to implement the right, court or other tribunal or authority shall be guided by the following principles (a) it is the responsibility of the state to show that the resources are not available.
69 Jotham Okome Arwa, supra, note 73.
70 Jotham Okome Arwa, supra, note 73.
71 Petition 94 of 2012.
The court in the John Kabui Case ignored an important consideration, which has a direct bearing on the enforceability of socio economic rights. Article 2(6) of the Constitution of Kenya expressly states that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. This means that all international instruments that have been ratified by Kenya, such as ICESCR, apply directly before domestic courts like any other statutes. The Committee on Economic, Social and Cultural Rights has *vide* its General Comment No. 3 reiterated the minimum core obligation of all states parties to ensure the satisfaction of, at the very least, minimum levels of each of the rights. This imposes on Kenya an immediate obligation as far as realization of the minimum levels socio economic rights by those who are most (or totally) deprived are concerned.

“A country may have the best written bill of rights in the world, but if the state organs and institutions, and leaders at all levels, and every individual in the country are not committed and do not pay attention to them, then the human rights so guaranteed are not worth the paper(s) they are written on.”72

Hence, monitoring budgets is particularly important when analysing the realization of socio economic rights. National budgets are key political documents reflecting states policy priorities as well as the level of public resources. It is through the budget that socio economic rights can be implemented and enforced. Analysing the budget is therefore relevant for monitoring efforts towards the progressive realization of socio economic rights, including the extent to which the most efficient use is made of the available resources. Underfunding of programmes, manifest disparities in the use of public funds for specific groups and regions, or significant decreases in funding to particular sectors may indicate a state’s failure to realize these rights progressively.

3.2 Budget Allocation to Realising Socio Economic Rights

The total budget for 2013/2014 financial year stands at Kshs 1.642 Trillion out of which Kshs 605.99 billion is for Recurrent Expenditure, Kshs 380.29 billion is for Consolidated Fund Services, Kshs 453.7 billion is for Development Expenditure,

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72 The Uganda Commission of inquiry into violations of Human Rights in Uganda. Findings, Conclusions and Recommendations, at 581.
Kshs 198.69 billion is for County Governments Allocations and Kshs 3.4 billion is for the Equalization Fund. The health sector has been allocated Kshs 34.66 billion whereas Kshs 130.56 billion has been allocated to the Ministry of Education, Science and Technology. In an effort to improve quality and transform the education system to knowledge based economy, the 2013/14 budget has allocated Kshs 10.3 billion towards free primary education, Kshs 2.6 billion for school feeding program, Kshs 20.9 billion for free day secondary education and Kshs 1.17 billion for secondary school bursary programs.

Other programs that are set to benefit include upgrade of national schools (Kshs 800 million), HELB (Kshs 4.9 billion) and youth polytechnics (Kshs 826 million). The less fortunate, the elderly and persons with disabilities have received a significant boost aimed at doubling the beneficiaries of the welfare program started under the previous government. This is through allocation of Kshs 8 billion for the orphans and vulnerable children, Kshs 3.2 billion to double the number of the elderly persons under the cash transfer scheme, Kshs 1.22 billion for the disabled persons, Kshs 400 million for presidential secondary bursary scheme, Kshs 360 million for the urban food subsidy and Kshs 100 million for albinos.

3.3. The Right to the Highest Attainable Standard of Health

The state has not paid considerable attention to the health sector in budget allocation. This has been observed from the states’ budget allocation to the health sector, which has been on a reducing scale. In 2010, 7.2 per cent of the total budget was allocated to the health sector. In 2011, only 6.1 per cent was allocated while in the current 2013/14 budget, the health sector allocation has been reduced to 5.9 per cent of the total budget. This is alarming since the health sector is the means through which the socio economic right to the highest attainable standard of health is to be realised. Hence, limited financing of this sector negatively impacts the progressive realisation of the first socio economic rights listed under article 43 (1) (a) of the Constitution of Kenya.

3.4 The Right to be Free from Hunger and the Right to Social Security

73 KPMG, Kenya 2013 Budget Brief. Regional Economic Highlights.
74 Ibid.
In this section this paper shall analyse the progressive realisation of the socio economic right to social security and to be free from hunger, and to have adequate food of acceptable quality is to be considered in light to Kenya’s history of financially investing in social protection through social insurance schemes and safety net programs and development partners.\textsuperscript{75} The paper looks at these two rights together since they are interrelated.

From 2005 to 2010, social protection expenditure in Kenya rose from Kshs 33.4 billion to 57.1 billion, which was equivalent to 2.28 percent of Gross Domestic Product (GDP) in 2010. This overall growth in social protection spending was due to increases across the contributory programmes, the civil service pension, and safety nets. Spending on contributory programmes rose by roughly 53 percent between 2005 and 2010 as a result of increasing benefits being paid as membership numbers have risen, and, for the NHIF, higher benefits paid and greater operational costs; by 2010 this amounted to 0.48 percent of GDP.\textsuperscript{76}

Similarly, the civil service pension expenditure increased yearly, which resulted in an overall increase of 70 percent between 2005 and 2010. By 2010, expenditure on the civil service pension was equivalent to 1 percent of GDP. At the same time, spending on safety nets doubled, rising from Kshs 11.9 billion in 2005 to Kshs 20.5 billion in 2010, which was equivalent to 0.80 percent of GDP.\textsuperscript{77} This was largely due to the relief and recovery response to the drought in 2008 and a rapid increase in spending on social cash transfer programmes from 2009. Overall, the average spending on the General Food Distribution (GFD) programme, which is classified as relief and recovery, amounted to 53.2 percent of all safety net spending between 2005 and 2010.

The government is the largest source of financing to social protection in Kenya (55 percent), followed by financing support from development partners (22 percent) and members of contributory schemes (22 percent).\textsuperscript{78} These sources of financing are segmented across the sector, however. Firstly, 88 percent of total government spending on social protection was channeled to the civil service

\textsuperscript{76} Ibid.
\textsuperscript{77} Ibid.
\textsuperscript{78} Ibid.
pension, whereas the remaining government financing was allocated to safety nets, and within this, increasingly to social cash transfers. Secondly, development partner (bilateral and multilateral) funding was allocated entirely to safety nets, the majority of which went to relief and recovery programmes. As a result, safety nets have been largely financed by development partners (71 percent).

In progressively realising the socio economic right to social security and to be free from hunger, and to have adequate food of acceptable quality, the state has been increasing investments in social protection which has resulted in growing coverage among its population. On average, both the contributory and safety net programmes only covered 13 percent of the population annually during 2005 - 2010 period, indicating a growing trend among contributory schemes (134 percent) and safety nets (35 percent). However, by the end of 2010, safety nets covered almost 14 percent of the population and, in spite of rapid growth; contributory schemes covered an estimated 1 percent.

3.5 The Right to Education

The Kenyan government introduced the Free Primary Education (FPE) and the Free Tuition Secondary Education (FTSE) programmes in 2003 and 2008 respectively. As the names of the programmes suggest, government pays all the tuition fees for all the pupils enrolled under the FPE programme while it pays part of the tuition for students under the FTSE programme. The costs for uniforms, school meals, transport to and from school, health care and boarding facilities and national examination costs are borne by the parents.

Some remarkable successes have been recorded under both programmes. Primary school enrolment has been rising since inception and leapt from 7.7 million in 2006 to 8.3 million in 2007, 8.6 million in 2008, and 8.8 million in 2009 to 9.4 million in 2010. Because of this progress, the country is likely to achieve Millennium Development Goal 2 (MDG2) which seeks to ensure that by 2015, all children (girls and boys) can complete a full course of primary schooling. On the introduction of FTSE, secondary school enrolment increased from 1.2 million in 2007 to 1.4 million in 2008, 1.5 million in 2009 and 1.7 million in 2010 the number of education institutions has also increased. University education has

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80 Ibid.
also recorded higher student enrolments. These rose from 112,229 in the 2006/07 academic year to 118,239 in 2007/08, 122,847 in 2008/09, 177,735 in 2009/10 and 180,078 in the 2010/11 academic year. It is arguable that the 1.3 percent growth in the 2010/11 academic year could have been higher but was limited by university infrastructural constraints and the need to keep student-teacher ratios low particularly following the introduction of module II (parallel) programmes.\textsuperscript{81}

4. Recommendations

With only 5.9 per cent of the total 1.6 trillion budget allocated to the health sector, both the national and county governments will not be able to fulfil their obligations under article 43 (1) (a) of the Constitution and General Comment 14 on the right to the highest attainable standard of health, which requires governments to progressively realise this right by putting in place legislation and allocation of budgets. This is because the funds allocated are not sufficient to put in place; one, basic structures that shall make health care easily accessible, available and/or affordable; two, purchase equipment and three, recruit sufficient health care workers.

While the Constitution provides for the right to reproductive health care, the government has limited this right to the delivery of babies making the concept and definition of free maternal care subject to discussion. Further, as a result of restricted budget, the development of the health systems in Kenya has been adversely affected. There is insufficient and inadequate financing to put up infrastructure and establish the governance institutions. There is lack of health care regulation that has caused a number of quacks and unethical practitioners providing health care service delivery that has led to a number of malpractice instances in organ harvesting and abortions. As a result, the Musyimi Task Force Report is beginning to feature in health systems development discussions in Kenya. This report recommends that Kshs 217 billion be allocated to the health sector in order to implement a three years program dubbed the health stimulus package. Hence, this paper recommends the adoption and implementation of the Musyimi Task Force Report.

\textsuperscript{81} KIM (2010). Transforming higher education: opportunities and challenges Vol I. 1st KIM annual conference on management. Journal of KIM School of Management.
A further recommendation is to compel the government to increase financing to safety nets despite the tight fiscal environment. Simulations show that it is possible to progressively increase funding to safety nets in the current fiscal environment in order to achieve high rates of coverage among poor and vulnerable groups in the short to medium term. If economic growth continues at 6 percent per year, this will generate an estimated additional Kshs 100 billion in annual government revenue. If 5 percent of these resources were allocated to social cash transfers, comprehensive coverage of poor households with members who are vulnerable (i.e., Orphans and Vulnerable Children, people over 60 years of age, the disabled or chronically ill, and People Living With HIV and AIDS (PLWHA)) could be achieved in nine years.

In these scenarios, development partners’ funding will continue to be needed in the short to medium term. There may also be scope to improve the effectiveness of safety net programmes by reorienting financing from the GFD. While this would not increase the overall funding to the sector, it would create efficiencies and improve the impact of these resources on poverty and human development in Kenya. Finally, there is a need to secure financing to respond to transitory needs among the vulnerable but not yet poor populations that are exposed to shocks. International experience suggests that contingent financing, channeled through established safety net programmes, can be an effective response. This approach could be integrated, for example, into the National Contingency Fund.

5. Conclusion

Despite the fact that Kenya is a signatory to the international treaties and covenants and has an extensive set of socio-economic rights set out in the bill of rights with additional African Charter rights including the right to social welfare. Although the provisions remain the same and the political will of the state remains singularly unwilling to support the progressive realisation of rights from a human rights perspective. However in the background of the fact that all rights require resources, the state has overlooked the fact that the recognition of a rights based approach in the re-distribution of state resources would show clearly that the state does in fact a lot to support rights. The availability of low income housing, food stamps, social security as well as free maternal health care

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82 Supra note 51.
83 Supra, note 51.
and primary education shows giant progressive steps being made in a
developing country with a very low budget of approximately 40 million USD is a
major feat not to be dismissed.
1. **Introduction**

The discourse on property rights has been intractable and part of Kenya’s socio-political history since the advent of colonialism. At the heart of the debate lies the relationship between western approaches and views on property and African traditional approaches. Colonialism brought with it, British legal order. African customary practices and rules were largely replaced with these new western rules, based on the underlying philosophy that traditional modes of property and natural resource management were inimical to sustainability. This conclusion was arrived at as a result of the assessment that African customary modes of property regulation was based on open access, a regime without any protection of property rights, one that led to what Garret Hardin famously referred to as the Tragedy of the Commons.

Colonial property theory, therefore, sought to replace African property rights and customary basis for holding property, especially as relates to land. Despite land having been at the centre of the fight for independence, the incoming leaders of independent Kenya, did not attempt to address the lopsided view of customary property holding or the complaints with the European approach to property rights, an approach that favored private tenure arguing that it was the most efficient, economical and stable property rights regime.

Several years after independence, evidence abound about the fallacy of the approach on property and land adopted during the colonial period and continued in post-independence Kenya. The recent legal and policy reforms in the land sector confirm the desire by the country to give recognition and equal protection to customary tenurial arrangements. This paper discusses the importance of this decision, arguing that it is a step towards retracing the...
country’s ecological footsteps, footsteps that began to be lost with the advent of colonialism. To make this case the paper seeks to create the nexus between the envisaged reforms to the property regimes and their regulation and sustainable development in Kenya. Drawing on lessons from wetlands management, the paper argues that to ensure that sustainable development becomes a key consideration for the country, it is necessary to borrow from customary practices and rules. This requires refocusing the debate away from the distinction between modern and customary tenure within the property rights realm and instead seeking to incorporate an ecological/conservation ethic into all property regulations and rules. The paper argues that this was ably done within customary systems, where property was not only communal but focused on access, use and sustainability.

The incorporation of an ecological ethic in all property regimes and their regulation and learning from ancient customary approaches, requires not just a change in laws and policies, but a critical restructuring of our education system and philosophy. The paper, therefore, urges for a philosophical shift in the design and approach to legal education in Kenya as a condition sine qua non of enhancing the sustainable management of Kenya’s natural resources.

2. Land, Property Rights and Sustainable Development in Kenya

Land is a critical resource for Kenya. The country, despite its stated intention of being a newly industrializing and middle income economy by 2030\(^3\) is still an agro-based economy. What with over 70\% of the population relying on agriculture for their sustenance. The Agricultural Development Strategy for 2010-2020 reaffirms this fact, pointing out that “agricultural development sector is not only the driver of Kenya’s economy but also the means of livelihood for the majority of the Kenyan People.”\(^4\) The manner in which land is owned and used, otherwise referred to as land tenure, is thus of critical importance in ensuring growth of the economy and enhancement of the livelihoods of the Kenyan people.

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Starting from the Brundtland report, *Our Common Future*, there has emerged in development and environmental literature the concept of sustainable development as an approach to ensuring that as a country develops, it does so in a manner that ensures ecological integrity and sustainability. The concept of sustainable development is, thus, central to the discourse for ensuring ecological integrity and sustainability. However, debate continues to rage, both on the necessity for striking a balance between development needs of a society but also ecological imperatives. This debate takes a critical path when the interest of property right holders is factored in. Since the colonial period, there has been a dominant jurisprudence that seeks to focus on private property rights and views property rights to land as an economic issue. An array of legal tools and regulations has consequently developed to provide security to private property holders to land.

On the other hand, the discourse on sustainable development has emerged from the middle of the last century, as a critical organizing concept for creating the balance between the need for development and that for environmental conservation. Despite its development, challenges of how to ensure that maintenance of ecological integrity becomes infused into property regulation frameworks and discourse still exist and efforts faces opposition. The opposition is largely as a result of increased efforts at recognizing private property rights and viewing such rights as sacrosanct, disregarding the public interest in conservation. This challenge, however, is not just limited to private property but has hitherto extended to all property regimes in Kenya. In the context of public property for example, the same have been used in a manner inimical to the interests of the public.

3. **Customary Rules and Sustainability in Kenya**

Customary tenure refers to the tenure regime in which land is held according to the customs of communities. In most African societies, their tenure regime guarantees rights to land on the basis of the status of the right holder and that status can be either political or social. Indeed, in most African customary traditions, rights are established to land by birth, kinship, and the investment of

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sweat and toil, as well as by social contract. The essential characteristic of customary land tenure was that land was held by the community with members of that community having clearly defined spatial and temporal use rights. There was also intergenerational transfer of such family rights in accordance with clearly established rules.

In Kenya, since the 1954 Government policy that sought to promote private tenure in land as the most suitable tenure regime to ensure agricultural productivity, there has been a systematic effort to eradicate customary tenure in land by converting it to private tenure regime. Despite this, however, customary land tenure has remained resilient and is the most widespread and dominant tenure system.

Although several communities exist in Kenya, each with its own distinct rules and customs, there are common threads that run through a system of African customary land tenure. These have been discussed by Bondi Ogolla and John Mugabe. According to these authors, the first rule regards the right of access. This is granted to individuals or groups due to their membership in some social unit or political community. The right was thus an incident of membership to the particular unit. Bondi and Mugabe state that “Individuals or families thus claim property rights from political entities (chiefs, clan-heads, and family-heads) by

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6 Toulmin, C. and Julian Quan (Eds) *Evolving Land Rights, Policy and Tenure in Africa* (London, DFID/IIED/NRI, 2000) p.3


10 Ogolla and Mugabe, Ibid.
virtue of their affiliation to the group. The content of these rights are determined by status within the group and the performance of multifarious reciprocal obligations.”

Secondly, although individuals have right of access, the right of control is vested in the political authority within the community. This control is an incident of sovereignty of that authority over resources within the unit. This power includes the power to allocate land and other resources within the group, allocate their use and defend them against outsiders.12

Thirdly, rights analogous to private property accrue to individuals who invest labour in harnessing, utilizing and maintaining the resource. Such rights can be transferred. Lastly, resources which do not require extensive investment of labour or which by their nature have to be shared are controlled and managed by the political unit. Generally, however, land is inalienable under African customary land tenure.13

African customary land tenure belongs to the category of property referred to as common property. This has been confused in some literature with open access regime. However, they differ very fundamentally. An open access regime is where nobody has the right to exclude others from the use and enjoyment of the property. Common property regime refers to the situation where an identified group of persons like a community have exclusive rights of use, exclusion and transfer. All members of the group share this right but non-members do not and can be excluded from enjoying the rights that inhere in the property.

Common property is viewed by proponents of private property rights as being inimical to efficiency and rational use of resources. According to Hardin and those who ascribe to this school of thought, people were prone to overuse common resources because of lack of an incentive to conserve. The solution to this was private property as it enabled the owners to avoid the short term benefits and instead focus on internalizing all future benefits and costs.14

11 Supra, note 4 at p.97.
12 Ibid.
14 See Rose, C. “The Comedy of the Commons: Customs, Commerce and Inherently Public
Hardin’s postulation has largely been discounted in subsequent years by scholars. Elinor Ostrom, for instance, argued that Hardin incorrectly classified the property regime he was assessing as common property yet what he was referring to was open access, where everybody has access rights and use privileges. Ostrom then pointed out that there existed several examples of common property regimes and documented some of these.

Under this regime of tenure holding, rights over land and land-based resources are held by a clearly defined group of users. They hold a clearly defined set of rights and obligations. Rights to use the resources are distributed equitably amongst members of the group and regulated through use of guidelines which traditionally were handed over from generation to generation.

In Kenya customary tenure continues to govern the management and use of land and land-based resources even despite spirited attempts to convert it to other tenure regimes. What is clear from customary practices is the focus on ecology and conservation. Many traditional rules were developed to ensure that resources were used in a sustainable manner and with regard to the interests of all members of the society but also those members yet un-born. In essence traditional societies respected rules of inter-generational equity and intra-generational equity.

4. Lessons from Wetlands Management

Wetlands is one of the two most important yet threatened ecosystems in the world currently. However, the degradation and loss of wetlands is more rapid than that of forests and of any other ecosystem. The reason could be that forests

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18 The Millennium Ecosystem Assessment points out that wetlands are the ecosystem that is
have always been viewed as a useful ecosystem, the source of trees and related products and serving important functions in society. In contrast, the utility of wetlands to society has not always been accepted and appreciated. Indeed, for a long time wetlands were viewed as useless areas and their utility could only occur as a result of conversion to more productive uses like agriculture. This resulted to wetlands being referred to in certain quarters as “wastelands.”

Modern efforts have been made to ensure conservation of wetlands. Internationally these efforts revolve around the adoption and implementation of the Convention on Wetlands of International Importance especially as Waterfowl habitat (also Known as the Ramsar Convention). The Convention seeks to “stem progressive encroachment and loss of wetlands,” ensure wetlands conservation through “combining-far-sighted national policies with co-ordinated international action.” Kenya has taken several actions as required by the Ramsar Convention including designating of wetlands onto the List of Wetlands of International importance and adoption of laws.

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21 See Wetlands are not Dangerous Swamps; They’re Worth Saving, Reuters Library Report, May 31, 1990(BC Cycle) which reports that historically most people considered wetlands to be nothing more than swamps and wastelands, the breeding grounds for insects and diseases. See also Gardner, R.C. “Banking on Entrepreneurs: Wetlands Mitigation Banking and Takings” 81 Iowa Law Review 529 (1996) which points out that at one time wetlands were considered little more than mosquito-breeding nuisances.


23 Ibid. Preamble.

Despite the oft-held view that wetlands were mostly viewed as useless grounds, traditional Kenyan communities regarded wetlands as useful areas and just like general land tenure and use rules, had rules for their conservation. These rules as seen from the example of the Bukusu saw wetlands as sources of important materials and also as sacred sites.

In traditional Kenyan society, wetlands were treated as valuable resources. Many communities used to draw food, medicinal products, fuel wood and materials for building and handicraft from wetlands. Certain communities developed cultural practices to promote conservation of wetlands. Amongst the Bukusu, for example, circumcision used to take place in sacred places in wetlands. The criteria adopted in the choice of a site include privacy and presence of ample water and mud.\(^\text{25}\)

The wetlands were important sacred sites because of what they symbolized. By having the young people smear themselves with the mud and walk back home naked, it was meant to symbolize that, firstly, the protection given by the soil is similar to that of the mother’s womb, thus keeping the young people warm as they undergo the ceremony and secondly, it was a rite of passage into manhood, marking the last time they were allowed to walk naked in public. The mud was only available in some places in the wetlands. Traditional beliefs held that these should never dry, for to do so would signify that “the generation of young men who bathed at that site would not survive and fulfill their biological and societal duties of child-bearing and development of a family unit.”\(^\text{26}\). These cultural beliefs and practices contributed to the conservation of wetlands amongst communities.

The turning point in protecting wetlands is associated with the imposition of colonial rule and introduction of colonial policies and laws, especially those relating to land tenure and land use.\(^\text{27}\). Western religions, education and health

\(^{26}\) Ibid. Page. 102.
facilities have contributed much to changing the traditional beliefs and their inherent resource conservation traits. These have been exacerbated by modern farming methods and the increase in population. This has happened against the backdrop of lack of sufficient awareness on the need to conserve wetlands and supportive laws and policies. Kenya has, however, since independence made some effort in addressing the policy and legislative landscape for wetlands management.

The importance of wetlands was first recognized by the Kenya Government in the 1963 Manifesto on conservation of natural resources. In 1969, at the first Wildlife Conference for Eastern Africa, the need to conserve and protect natural resources, including wetlands, was noted. Following the coming into force of the Ramsar Convention in 1975, Kenya sent representation to the Conference of the Parties at the meeting in Regina Canada in 1987. Kenya emphasized her commitment to conserve water catchment areas and wetlands. Kenya’s wetlands were noted for their importance as migratory routes, as well as wintering areas for birds. Subsequently, Kenya ratified the Ramsar Convention in 1990 and designated Kenya Wildlife Services (KWS) as the focal point in Kenya for the Convention. It also designated Lake Nakuru National park as the first Ramsar site in accordance with the requirements of the Ramsar Convention. Other efforts include the passage of laws. However despite these efforts, wetlands resources continue to be degraded. At the heart of these degradation lies the failure to regulate property rights in land and incorporate a conservation ethic into property regulation and resource use and management in Kenya.

5. Reforming The Property Institution: Towards an Ecological Jurisprudence
On 4th August, 2010 Kenyans held a second referendum on its constitution. This followed the vote in November 2005 at which the first attempts to adopt a new

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29 Ibid. page 92.
30 Ibid.
31 Ibid
32 Article 2 of the Ramsar Convention requires Parties to the Convention to designate at least one wetland onto the list of Wetlands of International Importance.
33 The laws passed and the extent to which they contribute to sustainable management of wetlands is discussed in section 6.3 below.
constitution failed. The referendum resulted in the adoption of a new constitution, marking the end of a search that had gone on for over twenty years. The new constitution proposed key changes to the country’s socio-economic and political governance framework.

One of the areas that have been part of the country’s constitutional reform agitation and that the new constitution addresses in detail relates to property rights and their regulation. The old constitutional order did not define the term property, however, the term was contained in section 75(1), which provided that “No property of any description shall be compulsorily taken possession of, and no interest or right over property of any description shall be compulsorily acquired.” This section related to protection against compulsory acquisition of private property without compensation. However, the constitutional protection of property largely focused on private property and not other tenure holdings, a feature carried over from the colonial heritage.34 This focus on private property and disregard for conservation aspects was at the core of the clamor for land reforms both in the constitutional and policy contexts. Bhalla summarized the restrictive nature of the concept of property under the old constitution thus:

“As already noted, the institution of property arose in answer to the society’s economic needs. Such a development took place when the pressures on the environment were still relatively low, and at a time when the fundamental links between economics and environment, under the notion of sustainable development, had not yet been sufficiently clarified. The constructive burdens of legal doctrine have, unfortunately, been carried over into the modern constitution, which now sanctifies individualistic principles that are in sharp conflict with collectivist goals of environmental conservation.”35

Reforms to the property institution have been based on the need to ensure efficiency, equity and sustainability.36 The new constitution and the national land Policy proposes several changes to the property institution. These include

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recognition of the right to property in the constitution, formation of a National Land Commission to manage all public land on behalf of the state, constitutional treatment of land and property, tenure reform involving categorization of land into three tenure categories of private, public and communal; vesting radical title on the people collectively as a nation, communities and individuals; reform of the regulatory power of the state over property rights and recognition of the right to a clean and healthy environment as a constitutional right.  

A critical component of rules on property that has implications for sustainable development is the rules on the content of the property rights, what in property literature is referred to as the “bundle of rights.” Also critical is the manner in which the rights in property are regulated by the law. Of key importance for environmental management are the rules for regulating property rights, especially by the state. The traditional powers of the state to regulate property rights are those of compulsory acquisition, or eminent domain and those of development control or police powers. These powers, although existing in the past constitution, were largely not applied in the interest of environmental conservation. Both the National Land Policy and the new constitution envisage reforms to the manner in which these powers are used. The National Land Policy provides that “the exercise of these powers shall be based on rationalized land use plans and agreed upon public needs established through democratic processes.”

On compulsory acquisition, the National Land Policy requires that its exercise be based on criteria, processes and procedures that are accountable, transparent and efficient. In our view such criteria should include ecological imperatives. In this vein the South African constitution which allows for limiting private property in the interests of environmental conservation without having to pay compensation is apt. In reforming the state’ police power, a power that exists to enable the state regulate the use of land so as to promote the public interest, the National


38 Supra, note 34 at page 13.

Land Policy requires, amongst other things for zoning, establishment of efficient, transparent and accountable standards, procedures and processes and importantly that “the exercise of development control takes into account local practices and community values on land use and environmental management.”

The new constitution incorporates these provisions of the National Land policy. Firstly the Constitution contains principles of land policy which borrows from the National Land policy. It provides that “land shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable.” The principles detailed to ensure this include those of “sustainable and productive management of land resources,” and “sound conservation and protection of ecological sensitive areas.” Secondly the Constitution provides that the principles shall be implemented through a National Land policy developed and reviewed regularly. Thirdly the constitution, includes the categorization of land into three categories same as the National Land Policy. Thirdly, the constitution seeks to reform the exercises of the powers to regulate land use by adding as a new condition that the exercise of such power shall include “land use planning.” Also important is the provision for the establishment of a National Land Commission.

Sustainable Development has been recognized by the new constitution as a principle to direct all governance processes in the country. This justifies its inclusion as one of the key national values and principles of governance in the new constitution. Further the state has a duty as part of sustainability requirements to “ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.” However, the duty of ensuring sustainable development is not for the state alone but for all actors. As noted in the Rio

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40 Supra, note 34 at page 15.
42 Ibid.
43 Ibid. Article 60 (1) (c)
44 Supra, note 39 at Article 60 (1) (e).
45 Supra, note 39, Article 60(2)
46 Supra, note 39, Article 66(1).
47 Supra, note 39, Article 67.
48 Supra, note 39, Article 10.
49 Supra, note 39, Article 69(1)(a)
Declaration, it is a cooperative process. As a result of this realization every person in Kenya is required to cooperate with the state, its organs and other person “to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.” The constitution recognizes and provides protection to communal land rights and holding as recognition of the importance of customary practices and approaches to the ownership and use of land and natural resources.

6. The Place of Higher Education in Sustainable Development

Education plays a central role in the advancement of any society. It is the principal medium through which the society enlightens its citizens on knowledge and how to transmit and share that knowledge. Importantly, education also provides the foundation for development and progress in a country. Kenya’s Vision 2030 recognizes this by identifying education as one of the key social sectors to drive the country’s march to a middle-income economy. As a socializing, instructing and training medium, education is key to sustainable development. This has led to the evolution of the concept, internationally of education for sustainable development, with the period between 2005-2014 being declared to be the United Nations Decade for Education for Sustainable Development the purpose of this period is to “to integrate the principles, values, and practices of sustainable development into all aspects of education and learning, in order to address the social, economic, cultural and environmental problems we face in the 21st century.”

Education for sustainable development aims to help people to develop the attitudes, skills and knowledge to make informed decisions for the benefit of themselves and others, now and in the future, and to act upon these decisions. The adoption of the decade is follow up to the commitments countries made at the UN Conference on Environment and Development in 1992. At that conference in Rio, parties adopted Agenda 21 as the programme of action to ensure sustainable development. Chapter 36 of Agenda 21 makes a case for

50 See article 10 of the Rio Declaration adopted at the UNCED in Rio De Janeiro, Brazil, 1992.
51 Supra, note 39, Article 69(2).
52 See Supra note 39, Article 63.
53 This was done by the UN General Assembly in December, 2002, UNGA resolution 57/254
55 Ibid.
reorienting education to support sustainable development. It follows therefore that education is indispensable in the quest for sustainable development.

Critically, therefore, Kenya to achieve the objectives of sustainable development must pay attention to education. The above call by United Nations decade on education for Sustainable development is one that Kenya has committed to and must implement. The National Environmental management Authority, towards this end spearheaded the process of development of an implementation strategy for education for Sustainable development. The strategy, based on the global objectives of the decade of education for sustainable development has set out as the objectives in Kenya, the following issues:

- Improving quality of education
- Orienting education towards sustainable development
- Public understanding and awareness towards sustainability
- Capacity building

Importantly the implementation strategy proposes the:

“Reorientation of teaching and learning processes to make them locally relevant, culturally appropriate, age and gender-sensitive, inclusive of all learners. In regard to teaching and learning, ESD should address needs in context (like geographical, location, socio-cultural and structural situation), perspectives and conditions in the pillar areas of ESD - society, environment and economy. It should be presented through action-inquiry strategies with a problem-solving orientation. ESD content should be interdisciplinary, holistic and embedded in the curriculum. It should be values-driven and promote critical and creative thinking. Research on emerging issues of concern to ESD should inform curriculum relevance, content and context.”

It follows, therefore that as part of promoting sustainable development, institutions of higher learning require reform to conform to the dictates of society and prerequisites of the UN decade for education for sustainable development.

57 Ibid.
58 Ibid.
The question that this begs is the extent to which Kenyan Universities are already doing this.

While a critical assessment of the quality and relevance of higher education in Kenya is beyond the scope of this paper, a case can be made out for reform. The call is based on history, modern changes in society and relevance. Historically, institutions of higher learning, especially universities, have curricula’ whose theoretical underpinnings are based on the English system. This is especially true of our legal education curricula, but extends to most disciplines. Many changes have occurred in the country’s socio-economic and political landscape. There are increasing demands for more innovation and relevant training from universities. These calls are made by society generally but specifically by industry and lately even by government. It follows therefore that Universities require reform to meet the modern demands of society.

In the field of sustainable development, the one area in need of reform is the nature of training. University education needs to incorporate sustainable development in the syllabus for most disciplines due to the interdisciplinary nature of the imperatives for sustainability. It should move away from being a focus for environmental sciences and law. Secondly, the underlying rationale of the teaching should incorporate traditional values and ethics. The obtaining western-focus in our educational system and approach need to be infused with traditional practices too. In the field of land, the National Land Policy and the new constitution, is already providing the framework for this by changing the perceptions and treatment in law of customary practices and mechanisms for tenurial holdings and land use. It therefore behooves higher education to follow suit and provide supportive training.

The other area relates to research and development. The success of sustainable development imperatives will require greater investment in high quality, innovative and relevant research by institutions of higher learning.

7. Conclusion

Sustainable development is a critical requirement for all countries of the world. It has travelled a long way since its international recognition, popularization and acceptance by the World Commission and Development, chaired by Gro Harlem Brundtland.\(^{60}\) It has moved from a concept to a principle and now reached the stage of being the key organizing principle for ensuring ecological sustainability and guide for the development of countries. Its incorporation in Kenya’s constitution is a demonstrating of this journey. It is therefore imperative that all institutions and people in the country take steps to ensure they contribute towards its realization.

This paper has made a case for the role that institutions of higher learning should play. These include researching into and giving local context to the meaning, application and realization of sustainable development in the country. In the process, the paper has argued that regulating property rights is a quintessential in ensuring ecological security and sustainability. While past discourse on property have overly focused on economic perspectives and ignored environmental restraints and limits, this paper argues for “an ecological perspective on property”\(^{61}\), one that recognizes that “our laws and values cannot continue to ignore the restraints imposed on human activity by our natural environment.”\(^{62}\)

To ensure sustainable development, the approach in property regulation and protection which disregards customary practices is bound to fail for being out of touch with obtaining reality, and disregarding rules for ecological stewardship that are contained in these customary practices. As Justice Weeramantry correctly observed in the famous *Case Concerning Gabčíkovo-Nagymaros Project*\(^{63}\),

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\(^{60}\) The Commission produced a report Officially known as *The Report of the World Commission on Environment and Development (WCED), Our Common Future*, (New York, Oxford University Press, 1987). In it Sustainable development was defined as “development which satisfies the needs and interest of the present generation without jeopardizing the interest of future generations to enjoy the same.”

\(^{61}\) This conception has been proposed by David Hunter in article with the same title. See Hunter, D., “An Ecological Perspective on Property: A Call for Judicial Protection on the Public’s Interest In Environmentally Critical Resources.” 12 *Harvard Environmental Law Review* 311-384(1988)

\(^{62}\) Ibid. page 311.

sustainable development concerns have always been part of traditional societies in Africa. The Judge wrote that:

“There are some principles of traditional legal systems that can be woven into the fabric of modern environmental law. They are specially pertinent to the concept of sustainable development which was well recognized in those systems. Moreover, several of these systems have particular relevance to this case, in that they relate to the harnessing of streams and rivers and show a concern that these acts of human interference with the course of nature should always be conducted with due regard to the protection of the environment. In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, The America, The Pacific, Australia- in fact, the whole world. This is a rich source which modern environmental law has largely left untapped.”

It is not just modern environmental law that has failed to tap from these rich traditional practices. In the field of property, traditionally land was communally held, the principle of trusteeship and Public trust, so critical to sustainability were always recognized. However modernity has sought to disregard this traditional practices and values. Our education system and approach has contributed immensely to this desuetude. To ensure we retrace our ecological footprints, university education will have to be reformed so as to place not just education on and for sustainable development at a the centre but also to ensure that education curriculum focus on identifying and incorporating the very useful lessons and principles from our customary practices of the past into our present policies and laws. It is only by doing so that the country will make meaningful progress in its quest for mainstreaming sustainable development considerations into all its policies and developments.

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64 Ibid. page 301.
Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems

Francis Kariuki*

1.0 Introduction

In Kenya, like in most other former African colonies, the legal system is pluralistic. The sources of law include the Constitutions, statutes, received laws, religious laws and customary laws.¹ Prior to colonialism, indigenous African tribes applied their laws and customs in resolving conflicts and disputes, and this contributed to social cohesion and peaceful coexistence. Because African customary law developed out of the customs and practices of the people in response to their circumstances and challenges in life, it essentially differs from one ethnic community to the other. The term ‘African customary law’ does not therefore infer that there exists a single custom followed by all African communities.²

With colonialism, formalized dispute resolution systems such as courts and tribunals were introduced in Kenya. As a result, the challenges of applicable law in a certain matter and the hierarchy of laws arose especially when dealing with Africans. The initial approach was to apply customary law on personal matters while there was confusion on criminal matters since in some cases both written law and African customs were applied. The general rule in most cases was that written and received law, in Kenya’s case common law, doctrines of equity and statutes of general application, ranked higher than African Customary law. Colonialists regarded African customary law as inferior to written laws and therefore had to place limitations on its application.³ Furthermore, after independence, statutes such the Judicature Act⁴ and the Magistrate Courts Act⁵ were enacted setting out the hierarchy of the laws and the purview of African customary law. These laws guided the courts when determining customary law

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² Ibid.


⁴ Cap. 8, Laws of Kenya.

⁵ Cap. 10, Laws of Kenya.
claims until 2010 when the Constitution of Kenya 2010 was promulgated providing for wider avenues for the application of customary law. This paper discusses how Kenyan courts have interpreted customary law, the emerging jurisprudence and the jurisprudence that we expect from our courts in relation to the enhanced role and profile of customary law vis-à-vis traditional dispute resolution mechanisms.

The paper has seven parts. Part I is the introduction. Part II provides a brief overview of the court system since colonialism with a bias to African customary laws and formal courts. Part III highlights the dichotomy in jurisprudence between the formal and informal courts from colonialism up to independence. Part IV highlights the courts jurisprudence on African customary law from 1967 to 2010. Part V highlights the emerging jurisprudence after the promulgation of the 2010 Constitution. Part VI projects the direction jurisprudence on African customary law may take in the future taking into account new laws, past and emerging jurisprudence. Part VII concludes that despite the fact that emerging jurisprudence from our courts is supportive of customary law, past judicial decisions and judicial attitude may continue to influence courts thinking on customary law and therefore impede the application of traditional justice systems.

2.0 An Overview of the Judicial System since Colonialism
Initially, the court system was pluralistic and depended on the race of the different inhabitants of Kenya then. Firstly, Article 52 of the 1897 Order-In-Council stated that African customary law applied to Africans provided it was not repugnant to justice and morality. Article 2(b) of the Native Courts Regulations Ordinance, 1897, recognized the use of existing dispute resolution systems, which at the time consisted of local chiefs and councils of elders. The local chiefs and councils of elders applied customary law in deciding disputes relating to their subjects. Secondly, Article 57 of the Native Courts Regulation Ordinance applied Islamic laws to Muslims. Muslim law was applied by Mudirs and from 1907 the Liwali courts. The Indians and Europeans were subject to statutes, common law and the courts.⁶

In 1930, the colonial administration revised the court system relating to indigenous Africans with the lowest courts being a panel of elders from native

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law or area and whose decisions were appealed at the Native Appeals Tribunal, the District Commissioner and lastly to the Provincial Commissioner. In 1951, the African Court replaced the Tribunal and the judicial powers of the Provincial Commissioner were transferred to the newly established Courts of Review. In 1962, lay magistrates replaced the African Courts. In 1967, the Magistrates Courts Act gave District Magistrates power to hear claims under African customary law. District Magistrates had jurisdiction all over Kenya and they effectively eliminated all African Courts. Appeals from the District Magistrate Courts went to First Class Magistrates, the High Court and then the East African Court of Appeal, which was replaced by the Court of Appeal after the collapse of the East African Community. According to Section 3(2) of the Judicature Act, African customary law was to guide the Court of Appeal, the High Court and all subordinate courts in civil matters. In addition, the courts could only apply customary law if it was not repugnant to justice and morality. The use of customary law in courts was therefore meant to ensure there was substantive justice as encapsulated in section 3(2) of the Judicature Act.

Article 162 of the 2010 Constitution establishes a two-tier court system: Superior courts and subordinate courts. The Superior courts include the Supreme Court, the Court of Appeal, the High Court, Environment and Land Court, and Industrial Court. Subordinate courts include magistrate courts, Kadhi courts, and court martial. Article 159 (2)(c) and (3) entreats court to be guided by principles of traditional dispute resolution mechanisms provided the principles do not contradict the Bill of Rights, the Constitution, other written laws or result in outcomes that are repugnant to justice and morality.

3.0 Application of African Customary Law by Kenyan Courts from Colonial era up to 1967
Since the British adopted existing legal systems, formal or informal, the law applied by the council of elders and the chiefs was the African customary law. Consequently, there was a dichotomy of courts. Informal institutions such as the council of elders, native tribunals and later African courts primarily resolved disputes among Africans. Disputes among Europeans were resolved in the

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8 Ibid.
10 Cap. 8, Laws of Kenya.
formal courts, especially the supreme courts and it is only in limited instances when Africans were tried at the formal courts.\textsuperscript{11}

On the one hand, the council of elders, African native tribunals, and later the African Courts applied customary laws. The jurisprudence from these tribunals, councils and courts show that they treated customary law with due regard as they applied the customs in both civil and criminal matters. Firstly, these courts applied to a distinct group of crimes, customary crimes and wrongs, to their respective ethnic groups. For instance, among the Luo, it was a customary crime to abuse another or to take a woman from his marital home. For example, in \textit{Maseno African Court Criminal Case 454 of 1966}, the plaintiff was able to sue the accused for wrongfully taking away a woman from her husband’s custody without permission contrary to Luo customs. Similarly, in \textit{Augustino v. Isabella w/o Onyango & Atieno w/o of Onyango},\textsuperscript{12} the plaintiff sued the defendants for defamation under the Luo customs.

Secondly, these courts, councils and tribunals could punish for offences under statutes using African customary laws. In \textit{Kosele African Court Criminal Case no 33 of 1966}, the accused was charged with indecent assault contrary to Section 144 of the Penal Code. The Court found that he was guilty for breaking the virginity of his victim. Instead of imprisoning him, the Court fined him a customary compensation of a heifer. Similarly, in \textit{Bungoma District African Court Criminal Case No. 493 of 1967}, the accused was charged with common assault contrary to section 250 of the then Penal Code. The court found him guilty and imposed a customary fine of a sheep. Although section 176 of the current Penal Code provides for compensation, no method for determining the amount exists and this may explain why courts imposed customary compensation.

Lastly, formal courts appreciated the role of these councils, courts and tribunals in resolution of disputes of personal nature. In civil and personal matters, customary laws applied to Africans irrespective of the fact that some had become Christians and rejected African customs. For example, in \textit{Benjawa Jembe v. Priscilla Nyondo},\textsuperscript{13} Barth J held that African Customary law was applicable to the estate of an African who had abandoned the customs and became a Christian.

\textsuperscript{12} Kisumu District Africa Court, CC 299/1966.
\textsuperscript{13} [1912] 4 EALR 160.
On the other hand, formal courts in general and European judges in particular, treated African customary law and traditional dispute resolution systems as inferior to other laws. In 1917, just 5 years after the *Jembe* case, Hamilton C.J. was faced with the question of the recognition of customary marriages in *R v, Amkeyo*. In this case, the question that arose during trial was whether a woman married under African customary law could testify against her husband. The common law deemed a husband and wife as one person and neither could be compelled to give evidence against the other. According to Hamilton C. J., a wife married under African customary law was not a legal wife or spouse. Consequently, the court compelled her to give evidence against her husband. This decision highlights the inferiority of African customary law in comparison to the Ordinances and common law that were in force at the time. From this decision, one cannot see a sound basis as to why a common law wife was regarded as a legal wife, while a customary law wife could not get a similar status. Why was there indifference towards African customary law considering that even common law was the English customary law?

Moreover, European judges and formal courts treated African courts, tribunals and council of elders with opprobrium. In *Lolkilit ole Ndinoni v. Netwala ole Nebele* the East African Court of Appeal dealt with two matters relating to the Maasai customary practice of blood money and the ability of Native Tribunals to apply the Limitation Ordinance of 1934. The appellant’s father, who was deceased at the time of the case, had allegedly committed homicide and the matter was taken to the Native Tribunal. However, the claim for blood money was made at the native tribunal thirty-five years after the alleged homicide. The Tribunal dismissed the suit but the Supreme Court awarded the claim. The Appellant appealed to the East African Court of Appeal. The East African Court of appeal dismissed the claim on the ground that it was repugnant to justice and morality to bring a matter for hearing after 35 years.

It is clear that the East African Court of Appeal considered claims for blood money valid but rejected bringing the matter after a long period. Despite the ruling that indirectly supported the claim for blood money, Sir Edward C.J. (Uganda) held that the Native Tribunals were not courts in the proper sense and

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14 [1917] 7 EALR 14.
15 [1952] 19 EACA.
therefore the Limitation Ordinance of 1934 was not applicable to them. The finding that the Native Tribunals were not proper courts, illustrates the Europeans attitude towards customary dispute resolution methods as inferior to formal courts.

4.0 Court Application of Customary Laws from 1967 to 2010
After independence, the legal system in Kenya changed. The 1967 Magistrate Courts Act converted the informal African Courts that heard matters relating to customary laws into formal Magistrate courts. Section 2 of the Act limited the customary claims under the law to matters of land, intestacy, family, seduction of unmarried women and girls, enticement of married women to adultery and status of women and children. This shift came through the 1963 Constitution that abolished unwritten customary crimes. Likewise, section 3(2) of the Judicature Act limits the application of customary law by stating that it is only to guide courts in civil cases.

4.1 Application of Customs to Civil and Personal Matters
After 1967 courts reinforced the formal colonial courts perspective that customary law was inferior to other legal norms. Courts were only applying customary law as a guide in cases where written laws expressly provided for its usage. In *Kamanza s/o Chiwaya v. Manza w/o Tsuma*, the High Court held that the list of claims under section 2 of the Magistrate Court Act was exhaustive and therefore barred customary law claims based on tort or contract. Claims based on tort and contracts were not included in section 2 of the Magistrates Court Act.

Most claims in which customary laws were used as a guide after 1967 fell within the ambit of section 3(2) of the Judicature Act and claims under section 2 of the Magistrates Court Act. Firstly, most claims related to probate and administration matters. For example, both in *Re Ruenji* and *Re Ogola Esates* the respective testators drew wills that did not cater for their customary wives and the courts held that these wives were not wives for purposes of succession. However, the position of customary wives in succession was codified in section 3(5) of the Law

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16 1963 Kenya Order in Council, The constitution of Kenya Schedule 2, Sections 8(8), 8(16), implemented in 1966
17 Unreported High Court Civil Appeal No. 6 of 1970.
18 *[1977]KLR.*
19 *[1978]KLR.*
of Succession Act.\textsuperscript{20} According to Section 3(5) of the Law of Succession Act, a woman married to a man under a system that allows polygamy is a wife for succession purposes under Sections 26 and 40 of the Act despite the fact that the husband may have procured prior or subsequent monogamous marriage. Claims for succession brought after 1981 based on customary marriages such as polygamy have been successful due to the backing of section 3(5) of the Law of Succession Act. For example, in 	extit{Irene Njeri Macharia v. Margaret Wairimu Njomo and Anor},\textsuperscript{21} the Court of Appeal held that a wife married under customary law could claim through section 3(5) of the Law of Succession Act.

Secondly, courts have applied customary laws in burial disputes. However, the application has been due to lack of a legal framework that deals with the dead body. The Law of Succession Act deals only with the estate of the deceased and not the dead body itself. In some circumstances, a testator may express the manner in which the dead body is to be disposed, although the personal representative is not bound to adhere to his wishes. In 	extit{Pauline Ndete Kinyota Maingi v. Rael Kinyota Maingi},\textsuperscript{22} the Court dismissed the provisions of a will of the deceased, which stated the manner of disposal of his body and applied Kamba customary law. The Court held that the wishes in the will could only be given effect to where the executor proved that the customary laws were repugnant to justice and morality. Despite this position, courts still allow a deceased testator to be buried according to his expressed intentions, further limiting the role of customary law in burial disputes. For instance, in 	extit{Eunice Moraa Mabeche v. Grace Akinyi},\textsuperscript{23} the High court allowed the burial of the deceased in a Muslim cemetery according to his expressed wishes and rejected the deceased’s mother attempt to have him buried in Kisii.\textsuperscript{24}

Similarly, under common law, there is no property in a dead body. The use of customary law in burial disputes thus is only a last resort due to the absence of other laws dealing with the matter. This shows that customary law ranks the lowest in the hierarchy of legal norms, and courts only apply it where there is a

\textsuperscript{20} Cap. 160, Laws of Kenya.
\textsuperscript{21} CACA No. 139 of 1994.
\textsuperscript{22} Civil Appeal No. 66 of 1984.
\textsuperscript{23} High Court Civil Case No.2777 of 1994.
legal lacuna. In *Virginia Edith Wambui v. Joash Ochieng Ougo and Omolo Siranga*, both the High Court and the Court of Appeal held that an African man could only be buried according to the customs of the community since he could not completely disassociate himself from the customs and practices of his tribe. The case involved a dispute over the burial of S.M. Otieno’s body after he died intestate. His wife wanted to bury him in his home at Ngong while his Umira Kager clansmen wanted to bury him at his ancestral home according to Luo customs. The High Court gave both parties the body and directed them to bury the deceased at his ancestral home. Some commentators have argued, (and the author concurs with them), that although the case was a triumph for African customary law, it failed to deal with the dichotomy between formal law and customary law but rather it reified this dichotomy. It is said the case was ‘…a missed opportunity for the court to demonstrate the potential of customary law as a relevant and dynamic force in the face of changing social circumstances.’

4.2 Courts and the Repugnancy Clause

Courts have applied Section 3(2) of the Judicature Act to declare African customary law as being repugnant to justice and morality. One challenge with the application of the repugnancy clause is that Kenyan law does not define it. As such, judges have had wide discretion in determining what is repugnant to justice and morality. Invariably, the judges have largely borrowed laws from other states to determine what actions are repugnant to justice and morality without taking heed to Lord Denning’s decision in *Nyali Limited v. Attorney-General*, where he stated that common law may only be applied in foreign lands with modifications that fit local circumstances, since in foreign lands people have their own laws and customs that they respect.

Courts have held most customary practices to be repugnant to justice and morality both in criminal and civil matters. In *Katet Nchoe and Nalangu Sekut v. R.*, the High Court held that the Maasai custom of circumcising females was repugnant to justice and morality. The courts disregarded the customs and practices of the Maasai and adopted the definition of repugnancy to justice and morality under the Ghanaian Constitution that defines a repugnant custom as

25 [1982-88]1 KAR.
27 [1955] 1 All ER 646.
28 Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010.
one that is harmful to both the social and physical well-being of a citizen. The Court held that since female genital mutilation caused pain, it was repugnant to justice and morality based on the Ghanaian definition. The decision seems rational and well-informed but a further analysis makes it fall at the seams. The decision is unjust to uncircumcised Maasai women who are shunned by their male because of being uncircumcised. It does not answer the question whether the courts will compel Maasai men to marry their uncircumcised women. Further, it does not address the circumcision of males, which is also a customary practice that causes pain. This decision shows that courts apply the repugnancy clause out of context, and in essence subvert the said customs and practices as inferior to customs and practices from elsewhere.

In *Maria Gisege Angoi v. Macella Nyomenda*, the court was faced with the question whether a woman-to-woman marriage custom among the Kisii was repugnant to justice and morality. A woman-to-woman marriage is a customary practice where a woman whose husband is dead “marries” another woman and chooses a male figure from her husband’s clan to sire children for the dead husband. The High Court held that the practice was repugnant to justice and morality since it prevented the other woman from freely choosing whom to marry. Thus, there was no marriage. The decision did not take into account the circumstances of the local communities and seems to interpret the repugnancy and morality of customs in a limiting manner.

### 4.3 Proof of Customary Laws in Evidence

The fact that customary law has to be proved in court illustrates the low place it occupies in the juridical order. The Court of Appeal of Kenya has followed the Ghanaian case of *Angu v. Attah* in *Atemo v. Imujaro* that customary law has to be evidentially proved in court for it to be regarded as law. Similarly, in *Ernest Kinyajui Kimani v. Muiru Gikanga and Another*, the court held that where customary law was not notorious or written; the party relying on it must prove it in court. Compared to the Constitution, statutes, common law and equity, which the courts take judicial notice of, customary law has to be proved.

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29 Civil Appeal No. 1 of 1981.
The main reason why common law and equity are not proved in courts is that the courts assume they have attained public notoriety. Courts simply take judicial notice of these laws despite the fact that they are unwritten. The public notoriety principle seems valid. Nonetheless, customary laws cannot attain public notoriety in the same way since most are rejected for being repugnant to justice and morality. Additionally, formal judges are taught the common law and principles of equity in their formal training and not customary law. Furthermore, customary law is specific to particular ethnic communities. African customary law is also not taught and when covered it is glanced at furtively to prove their repugnancy to morality and justice. This ensures that most African customary laws do not gain public notoriety to enable their frequent use in resolution of disputes.

However, in cases where customary laws have become notorious, courts have taken judicial notice of those customs. In *Wambugi w/o Gatimu v. Stephen Nyaga Kimani*, the Kenyan Court of Appeal denied a married woman from inheriting her father’s land on the ground that the Kikuyu custom that a married woman does not inherit her father’s land was notorious and thus the court took judicial notice of that custom. It seems that the basis of this decision is grounded in Section 60 (1) (a) read together with section 60(1)(o) of the Evidence Act which give courts discretion to take judicial notice of all written and unwritten laws having the force of law in Kenya, and practices that have gained notoriety.

The proof of customary laws has been through assessors in both civil and criminal matters. Section 87(1) of the Civil Procedure Act empowers the courts to use assessors in cases of disputes as to what the customs or laws of a caste, tribe, or community are. Likewise, up to 2007, sections 263, 269,270, 271, 272, 297, 298, 299 and 322 of the Criminal Procedure Code provided for the use of assessors in trials at the High Court. These assessors helped the courts in resolving or settling disputes where customary laws are pleaded in criminal cases among other disputes. The institution of assessors in courts was a continuation from the colonial courts. In *R v. Mohammed Iddi Omar*, Ouko J explained the institution of assessors as that formed in colonial days to enable the

34 Cap. 21, Laws of Kenya.
35 Cap. 75, Laws of Kenya.
36 [2006] eKLR.
European judges to understand the customs of local tribes when resolving cases and thus ensure that justice was contextualized to indigenous people.

Although the institution of assessors was meant to administer justice in local context, laws and judicial opinions have continued to subjugate customary law. Under the provisions of the Criminal procedure code cited above paragraph, the judge was not bound to adhere by the opinion of assessors and they could dissent from the opinions with reasons. The existence of grounds such as repugnancy and justice, substantial justice, limitation to civil cases and subjection to other written laws provided fertile grounds for rejection of customary law. Ouko J, in the Mohammed Ildi Omar case summed the position of assessors as useless since most judges could overrule their opinions. The inferiority of the customs, laws and institutions of assessors stems from the colonial period when European Judges treated them as inferior and repugnant. For instance, Thacker J in R v. Ogende s/o Omungi\(^{37}\) stated that he deplored the opinions of assessors because they were based on intertribal prejudice and resulted from pervasiveness and stupidity.

5.0 Emerging Jurisprudence from our Courts post-2010

Kenya promulgated a new constitution in 2010. Article 159 (2) (c) of the Constitution provides that courts are to be guided by the principles of traditional dispute resolution mechanisms. Article 159(3) limits the application of traditional dispute resolution mechanisms by stating that they should not be used in a manner that contravenes the Bill of Rights, is inconsistent with the Constitution or other written laws or is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality.

Court decisions coming after the promulgation of the Constitution have applied customary law principles and traditional dispute resolution mechanisms in criminal law. Firstly, the oft-cited case of R v. Mohamed Abdow Mohamed\(^{38}\) applied traditional dispute resolution mechanism in resolving a murder case. Abdow Mohamed was charged together with others not before the court for the murder of Osman Ali Abdi on 19 October 2011 in Eastleigh, within the Starehe District of Nairobi. On the date of the trial, the prosecution made an application to court to mark the matter settled based on Islamic laws and customs. The

\(^{37}\) [1941] 19 KLR 25.

\(^{38}\) [2013] eKLR.
prosecution claimed that the accused’s family had paid compensation to the deceased family in form of camels, goats, and performed rituals. The rituals were a form of blood money to the deceased’s family. Further, the prosecution claimed that witnesses to the murder were not willing to testify and therefore they could not be able to proceed with the case. The court upheld the application of the traditional dispute resolution system based on Article 159 and Article 157 that allowed the Director of Public prosecution to withdraw cases with the leave of the court. This decision depicts the widening scope of TDRMs into the arena of criminal law, a position rarely held by courts in pre-2010 jurisprudence on customary law.

Secondly, apart from diverting cases from the criminal justice system by use of traditional dispute resolution mechanisms, an emerging jurisprudence from the court entails awarding compensation for offences based on customary law. Promoting traditional justice resolution mechanism would imply that courts adopt the decisions made by traditional dispute systems while in customary compensation; the court itself applies the customs of a community, clan or tribe in punishing those found guilty under the criminal justice system. Customary compensation may be based on section 176 of the Criminal Procedure Code that allows for compensation of victims, although customary laws are not expressly provided for in the text of the Code.

In *R v. Lenaas Lenchura*, Emukule J sentenced Lenaas Lenchura using customary laws on a conviction of manslaughter. Lenchura, a World War II veteran, stabbed the deceased, Lotiyan Lekapana, at a Lerata trading center after a dispute arose between the two on who would fetch water first. The deceased was 55 years while the accused was 89 years at the time of the fight and stabbing. After a plea bargain, the accused charge of murder was reduced to manslaughter and he pleaded guilty. As such, the only question that remained was on sentencing.

The prosecution argued that the court should take into account the fact that the accused was a first offender and the circumstances under which he killed the deceased. The accused counsel submitted that water was a scarce resource in Samburu, a resource that carried the importance of life and death, and that the court should consider this. Due to the accused’s advanced age and the inability of the government to provide water, a duty imposed on it by the Constitution,

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39 Criminal Case No. 19 of 2011.
Emukule J resorted to the customary laws of the accused. He sentenced the accused to five years suspended sentence and required him to pay compensation of one female camel to the family of the deceased according to their customs.

6.0 Expected Jurisprudence to enhance Access to Justice using TDRMs

Traditional dispute resolution mechanisms (TDRM) entail the use of practices and customs of a community in resolving disputes. They form part of the cultural norms, values and traditions of a particular community. Thus, traditional disputes resolution mechanisms are firmly embedded on the customary laws of a tribe or ethnic group. Consequently, the success of TDRM in enhancing access to justice is pegged on the role and recognition of customary laws as a significant source of law.

Judicial decisions since the promulgation of the Constitution in 2010 have shown increased recognition of customary laws and TDRMs. The basis for the wide application of customary laws and TDRMs include Articles 2(4), 10, 11, 48, 67(2)(f), 159(2)(c) and 159(3). Article 2(4) of the Constitution recognizes customary law as one of the applicable sources of law in Kenya. Under this provision customary law is required to be consistent with the Constitution only and not statute law. Article 10 (2) (b) outlines the national values and principles of governance that are to guide courts in interpreting the constitution or any law. These values and principles include inclusiveness, public participation, social justice, human rights and protection of the marginalized.

Traditional justice systems can be promoted by courts to attain these values and principles. Courts are further enjoined to respect, uphold and defend the Constitution in Article 3(1). Article 48 mandates the state to promote access to justice for all people. In addition, Article 259 (1) (a) and (c) requires the Constitution to be interpreted in a manner that is purposive and leads to the development of the law. Courts are therefore enjoined to promote and encourage the use of traditional justice mechanisms to enhance access to justice and in recognition of the culture and cultural expressions of the people. This is

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because in some parts of Kenya, there are no formal courts and TDRMs are the only means to access justice. Thus, the future jurisprudence will likely take into account the principles of TDRMs.

Unlike Section 3(2) of the Judicature Act and Section 2 of the Magistrate Courts Act, Article 159 of the Constitution does not limit the application of TDRM principles to civil matters only. The courts have interpreted the Article widely to include application of TDRMs in criminal cases as was in \textit{R v. Mohamed Abdow Mohamed}. This approach is reminiscent of the pre-1967 jurisprudence when the native tribunals and African Courts adjudicated upon customary crimes and wrongs. The emerging jurisprudence shows that TDRMs could be used in conjunction with the criminal code and the courts could encourage the use of traditional justice systems especially in cases where restorative justice and peace is what is of great concern to communities as opposed to retributive justice. However, it is highly unlikely that the prosecution will charge individuals with unwritten customary law, as was the position before 1967. Moreover, emerging judicial decisions show that unlike the period between 1967 and 2010 when customary laws were not applicable in criminal law, TDRMs after 2010 are amenable to criminal law.

In land matters, Article 63 already designates community land to be land that is held on the basis of community of interests, ethnicity or culture. Article 67 (2) (f) of the Constitution requires the National Land Commission to encourage use of traditional dispute resolution in land disputes and conflicts. In addition to the Constitution and customary laws, other statutory frameworks enacted under the Constitution 2010 also provide for resolution of disputes through reconciliation and TDRMs. Section 18 (c) of the Environment and Land Court Act also entreats the court to apply the principles under Article 159 (2) of the Constitution in resolving disputes. Similarly, Section 68 of the Marriage Act 2014 provides that parties married under customary laws may be required by a court to go through customary dispute resolution mechanisms in matters concerning dissolution of marriages before filing for divorce. In \textit{Lubaru M'Imanyara v. Daniel Murungi} and


\footnotesize{42 [2013] eKLR.}
Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others\textsuperscript{43} the courts referred land marital disputes to Njuri Cheke for resolution based on Article 259(2) (c) of the Constitution.

Similarly, Section 176 of the Criminal Procedure Code provide for the use of compensation and reconciliation for settlement of crimes affecting the person such as assault provided they do not fall into the category of felonies. Inasmuch as Emukule J did not refer to Section 176 of the Criminal Procedure Code, the decision in \textit{R v. Lenaas Lenchura} seems to fall under this category. The best basis for compensation is not in monetary terms but on customary practices of the affected persons. Application of customary compensation in criminal law under written laws revert to the pre-1967 period where customary compensation was widely used in lieu of sentencing for crimes under the Penal Code and other statutes.

Despite the enhanced role of customary law and TDRMs under the Constitution, Statutes to be enacted\textsuperscript{44} and judicial opinions post-2010, history of the courts application of customary law may be an impediment to achieving justice under TDRMs. An analysis of Sections 3(2) of the Judicature Act and Article 159(2) (c) and (3) reveals striking similarities that courts may cling onto to deny TDRM oxygen to survive. In the Judicature Act, customary law is only used as a guide while in the Constitution; the courts are to be guided by TDRM principles. Both laws do not require courts to apply customary laws or TDRMs but only entreats them to use them as a guide. The implication is that courts may refuse to apply either even in appropriate cases since they are only a guide. Consequently, the judicial officers hearing a certain matter have absolute discretion on their applications within the formal justice system. However, the Constitution seems to clarify on the juridical place of customary law by recognizing it. This may contribute to greater recognition and promotion of traditional justice systems by courts in enhancing access to justice.

Nonetheless, Article 159 (3) (c) retains the hierarchical inferiority existing prior to 2010 by introducing the repugnancy clause issue in relation to traditional justice mechanisms. By implication, traditional justice systems and customary law is

\textsuperscript{43} [2012] eKLR.

\textsuperscript{44} For example, if they disallow or further limit the application of traditional justice systems in a manner inconsistent with Article 159(3) of the Constitution.
still inferior to common law and principles of equity which the courts takes judical notice of under Section 60 of the Evidence Act while customary law has to be proved in court. Additionally, Section 3 of the Judicature Act also ranks common law and principles of equity above customary laws and in effect TDRMs. The only time customary laws rank over common law is when they have been codified into statutes for instance polygamy under Section 3(5) of the Law of Succession Act. A challenge then arises due to the unwritten and un-codified nature of customary law. Inadequate codification of customary law principles into statutes ensures that customary laws and TDRMs remain at the bottom of the legal totem pole.

Thirdly, Article 159 (3) (b) of the Constitution bars the application of TDRMs when they are repugnant to justice and morality. The Constitution or statutes provide neither a definition nor what justice and morality entail. Further, courts have not interpreted justice and morality within the context of the challenged customs and TDRMS. Therefore, a judicial officer has leeway to determine what justice and morality is. More often than not, judicial officers use their own models of justice and morality or borrow from other areas and use them as standards to evaluate customary laws or TDRMs. The position ignores that different tribes, communities and ethnic groups have different customs. Using another custom to evaluate the justice and morality of an unrelated custom amounts to subjugation.

7.0 Conclusion
In conclusion, jurisprudence from the courts before 2010 show that they have treated African customary law as inferior to statutory laws in the juridical order of legal norms. The inferiority has emanated from colonial laws such as Section 3(2) of the Judicature Act and Section 2 of the Magistrate Courts Act that limits the list of claims under customary laws. The repugnancy clause has formed the basis for the disqualification and treatment of customary law as inferior. Additionally, the inferiority has been buttressed by the fact that customary law is un-codified source of law and therefore must be proved in court. This jurisprudential history if unchecked may act as an impediment to the application of TDRMS and Articles 159(2) (c) and (3) of the Constitution since TDRMs and customary laws are closely interlinked and interconnected. There is therefore a need for a change of mindset and perceptions amongst judges, lawyers and the wider citizenry towards customary law if traditional justice systems are to
contribute to enhanced access to justice for communities in Kenya. Courts must develop and generate appropriate and relevant customary law jurisprudence that will aid in the growth and promotion of traditional justice systems.
The feasibility of country-by-country reporting in Kenya

Ane Karoline Bak Foged

“We know what we want, we know what we are looking for, and how to use it, but we do not know how to get it.”

1. Introduction
Illicit financial flows and tax evasion shifts billions of dollars around the world beyond the reach of tax authorities. While most countries are affected, the phenomenon has particular dire consequences in developing countries, where corruption lead to resource waste, domestic revenue mobilisation is low, and aid reliance is a long-lasting reality. Since international tax regulation has not been able to mitigate the issue of tax evasion, campaigners have taken a different approach: Country-by-country reporting.

Country-by-country reporting (CbC) was first proposed in 2003. By 2013, it has become clear that the International Accounting Standards Board (IASB) is reluctant to promote transparency through additional disclosures in multinational corporations’ (MNCs) financial statements. Meanwhile, USA and EU have made significant steps to promote transparency by requiring disclosure of payments to governments country-by-country, however, they do not fully constitute CbC.

The impact of tax evasion on developing countries features in the international discussions, however, solutions have rarely been analysed from the perspective of a developing country. This paper examines whether or not Kenya as a developing country will have the capacity to reap the fruits of CbC.

The research presented in this paper was conducted between April and June 2013 and is based on semi-structured interviews with 20 identified stakeholders from the private sector including accounting firms, Kenya Revenue Authority (KRA) and civil society organisations.

2. Definition of country-by-country reporting

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1 KRA employee 1, Nairobi, 19.06.2013.
CbC is the proposal of an alternative international accounting standard, calling for more transparency in MNCs’ financial reporting. CbC requires that “multinational corporations publish a profit and loss account and limited balance sheet and cash flow information for almost every jurisdiction in which they trade as part of their annual financial statements”.

CbC prescribes that an MNC’s annual financial statement should state which countries the MNC operates in as well as names of its entities in each of these countries. Financial performance should be disclosed for each entity in each country with information on pre-tax profit, turnover, sales, purchases, and financing costs in relation to related and third parties. Moreover, it should disclose tax charge and actual tax payments together with tax liabilities and deferred liabilities at the beginning and end of each reporting period for each entity operating in each country.

The most important purpose of CbC is to ensure that companies are accountable both to the societies they operate in and to their investors who should be able to properly assess the conditions under which the company’s entities operate; production risks, potentially illegal behaviour and sustainability of operations.

2.1. How CbC aids tax administration
CbC can help tax administrations to ensure proper taxation of MNCs operating in their countries. Tax payments are levied on MNCs in exchange for a license to operate, constituting one side of a so-called social contract between the ruler and the ruled. In the private sector corporate responsibility is a part of this social contract and implies, at its minimum, compliance with national and international

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3 Ibid.


laws and standards. Ensuring that companies pay their taxes is to hold them accountable to this contract.

As tax administrations are users of financial statements, CbC will assist proper assessment of companies’ contribution to a country. Currently, tax administrations make risk assessments based primarily on the annual tax returns, but this information is restricted by jurisdictional borders. Since MNCs operate across borders, annual tax returns only give limited access to the nature of an entity’s activities in a complex financial system. If CbC applied to financial statements, tax administrations would have ready access information that can help them scrutinise risks that can merely be identified in tax returns.

Some tax administrations can require transfer-pricing (TP) documents on prices of goods and services transferred between related parties. TP-documents should enable tax administrations to assess whether a MNC is shifting profit and evading taxes via intra-group trade, accounting for 60% of world's trade. However, the information is most often not sufficient for tax administrations to pursue any legal actions.

Information Exchange Agreements and Double Tax Treaties are set up between countries to facilitate cooperation and ease acquisition of information on companies based outside a country’s jurisdiction. In practice, though, developing countries only enjoy few of these agreements, while generally the exchange process is often slow, bureaucratic and lengthy.

The formal information constraints imply that tax administrations need to rely on financial statements as complementary sources of data, though also here, the

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information is inadequate for tax administrations to do their work proper. CbC would this.

2.1. CbC compared to International Financial Reporting Standards (IFRS)
The main argument for CbC is that the financial statements currently do not disclose adequate information for countries and investors to assess the risks involved in company’s operations. Financial statements are primarily regulated by IASB, the standard-setting body responsible for IFRS, and though they are not formally global standards, they apply to 128 countries so far.9

Most importantly, CbC and IFRS differ in terms of level and consistence of segmentation. IFRS require companies that control one or several companies to publish one consolidated financial statement, which presents assets, liabilities, equity etc. of the parent company and its subsidiaries as those of a single economic entity.10 The level of disclosure is under discretion of the reporting entity, while disclosures of related party transactions are only required to include transfers between the reporting party and a related party.11 Consequently, intra-group related party transactions that do not involve the reporting entity are eliminated from financial statements and, thus, not accessible. Oppositely, CbC requires consolidation of all related party transactions, providing sufficient information for a proper assessment of intra-group trade.

3. International developments and the case of Kenya
Since the financial crisis in 2008, initiatives protecting countries from revenue losses and prompting transparency in the private sectors have been adopted. In 2010 the Dodd-Frank Act was passed in USA as a first step, though the reporting of payments to governments is not required consolidated and the scope is


limited to extractive industries. EU then took the baton, as they in 2013 adopted two directives that likewise require consolidated country-by-country disclosures of payments to governments both in the extractive industries and the banking sector.

The initiatives represent unilateral legislation in an otherwise internationally regulated system. They promote transparency as a feature of the future international reporting regime and though the initiatives are not international in scope, the disclosed information will be published and available to developing countries like Kenya.

To answer whether Kenya will benefit from CbC, it is necessary to ask both how CbC would look like in the Kenyan context and whether Kenya’s tax administration, KRA, has the capacity to reap its fruits.

4. CbC in Kenya
The analysis of KRA builds on articles on Kenya, official documents and interviews conducted with stakeholders of a potential adoption and implementation process of CbC in Kenya. The interviewees fall into three groups: accountants from the private sector, including accountancy firms, employees of KRA, and CSO-representatives.

4.1. How could CbC be adopted in Kenya?
CbC was formulated as an alternative to the prevalent international accounting standards, controlled by IASB. But since IASB represents the private sector, which on several occasions has expressed its opposition to CbC12, it seems unlikely that the board will adopt CbC. On the other hand, IASB has been under pressure due to the recent international developments. As the Dodd-Frank Act and the EU directives apply to a large part of IASB’s members, issues of universality, comparability and compliance costs on the part of its members could force IASB to respond by aligning their regulations.

If CbC was adopted internationally through IASB, it would apply to most MNCs operating in Kenya. Further, it would be integrated into Kenyan law by Institute of Certified Public Accountants of Kenya (ICPAK), which issues standards informing how its members prepare, verify and audit financial statements\textsuperscript{13}. IFRS have since 1998 been the accounting standards of Kenya.

There are three national channels for adoption of CbC in Kenya. Firstly, ICPAK could adopt CbC independently, aborting IFRS, if its Council deems CbC to “serve and protect public interest”\textsuperscript{14} as ICPAK’s mission statement prescribes. The second option is the Capital Market Authority (CMA), which regulates the behaviour of companies listed in Nairobi Securities Exchange, including what to disclose in their financial statements. If CMA adopts CbC, it would only apply to the limited number of listed MNC-subsidiaries, which does not covering all 200 MNCs operating in Kenya. The third option is amendment of the Companies Act, which regulates the content of the annual tax returns. If adopting the CbC, the disclosed information would only be available to KRA, who could use the information for assessing companies’ tax liabilities in Kenya.

In all three cases, political would be essential to adoption of CbC. According to the interviewees, arguments in favour of CbC, such as increased tax revenue and market competition could resonate among the politicians\textsuperscript{15}, partly due to a financing gap in government’s budget, and partly due to an increasing demand for public service provision. Just in the financial year 2012/2013, KRA missed it revenue target with approximately 10 billion\textsuperscript{16}, while the Treasury raised the revenue target for the following financial year with 7\%\textsuperscript{17}.

\textsuperscript{13} Accountants Act, section 9(3)
\textsuperscript{15} Accountant 1, Nairobi, 14.06.2013; Accountant 2, Nairobi, 06.06.2013; CSO representative 1, 11.06.2013.
Another interviewee disputed this argument, stressing the close ties between politicians and the private sector in Kenya, causing overlaps between economic and political interests represented by influential actors\textsuperscript{18}. As long as influential people profit from the secrecy, they will oppose increased transparency, and the political economy will not be in favour of CbC.

4.1.1. International versus national adoption
The predominant opinion among the interviewees was that international adoption is the only and most effective way: Global problems such as illicit financial flows and tax evasion necessitate global solutions\textsuperscript{19}. International adoption would lead to international pressure on the MNCs to comply with CbC, and KRA would not alone have the burden of enforcing CbC, ensuring compliance and validating information\textsuperscript{20}. KRA could still utilise the published information, though without the responsibility for implementation.

5. KRA
KRA is a semi-autonomous revenue authority (SARA)\textsuperscript{21}, controlling its own budget while enjoying organisational and administrative freedom from its principal, the Ministry of Finance (MoF). This limits the opportunities of political interference.

Despite elaborate \textit{de jure} autonomy, KRA suffers from \textit{de facto} constraints. Financially, KRA is challenged by resource constraints imposed by MoF. KRA is supposed to receive maximum 2\% of its estimated revenue collection\textsuperscript{22}, reimbursed from the consolidated fund that KRA transfers its collected revenue to\textsuperscript{23}. Examples of MoF utilising this formal instrument of financial control can be found in KRA’s Fifth Corporate Plan\textsuperscript{24}, where underfunding is repeatedly

\textsuperscript{18} CSO representative 2, Nairobi, 11.06.2013.
\textsuperscript{19} CSO representative 3, Nairobi, 29.05.2013.
\textsuperscript{20} Accountant 3, Nairobi, 04.06.2013; KRA employee 1, Nairobi, 19.06.2013; CSO representative 3, Nairobi, 29.05.2013; CSO representative 4, Nairobi, 05.06.2013; CSO representative 5, Nairobi, 04.06.2013.
\textsuperscript{22} Kenya Revenue Authority Act, section 16(1).
\textsuperscript{23} Kenya Revenue Authority Act, section 15.
expressed as a reason for unsuccessful implementation\textsuperscript{25}. Furthermore, while the discourse of autonomy and independence from MoF was very present among the KRA-employees, it is likely that the Large Taxpayers Office (LTO) occasionally experiences political instruction, as identified in the literature on SARAs\textsuperscript{26}, particularly in cases concerning influential taxpayers. Thus, with regards to CbC, it is possible that KRA would experience difficulties in utilising the information to enforce tax liabilities.

In terms of institutional behaviour, strict lines of downward instruction and upward communication, as described by KRA employees, ensures predictability\textsuperscript{27}, but might also result in bureaucracy due to lengthy procedures. Intrinsically, bureaucracy is not necessarily problematic, however, it can facilitate corruption if these lengthy formal procedures are utilised to obscure and delay processes for individuals’ personal benefit. One accountant mentioned having experienced KRA’s Customs using informal means in their work\textsuperscript{28}. Issues of corruption are important when considering implementation of CbC, since it is essential that businesses feel they can trust KRA with commercially sensitive information.

Large Taxpayers’ Office, in particular, was characterised by accountant interviewees as highly skilled, efficient and business-minded; the latter denoting a good understanding for taxpayers’ business operations\textsuperscript{29}. The interviewed accountants are in daily contact with KRA, which indicates flexibility, but might also imply informality between the two parties. One accountant pointed out that some large companies experience unfair treatment and harassment, when KRA attempts to find a quick fix to reach their revenue target\textsuperscript{30}. Additionally, lacking

\begin{footnotesize}
\begin{enumerate}
\item KRA 2012, pp. 22f.
\item KRA employee 1, Nairobi, 19.06.2013; KRA employee 2, Nairobi, 20.06.2013; KRA employee 3, Nairobi, 20.06.2013.
\item Accountant 4, Nairobi, 21.06.2013.
\item CSO representative 5, Nairobi, 04.06.2013; Accountant 4, Nairobi, 21.06.2013; Accountant 5, Nairobi, 24.06.2013.
\item Accountant 3, Nairobi, 04.06.2013.
\end{enumerate}
\end{footnotesize}
technical capacity was presented as a characteristic that affects KRA’s work as well as the clients’ perception of the authority.

5.1. Utilising CbC
LTO uses financial statements in the wake of a financial year, when they initialise the audit processes. They make risk assessments of all large taxpayers. Risk assessments primarily build on information gathered from the annual tax returns, compliance records etc... The financial statements are used, whenever Audit needs elaboration on information declared in the tax return.

Acknowledging that inter-governmental information exchange is lengthy and lacking in scope, while TP-documents are often insufficient, CbC would close a current information gap, which inhibits KRA from assessing a company’s tax liability properly. The ready access information from CbC would aid especially LTO, which currently seeks to obtain the same information through the formal channels. Thus, if focusing only on utilisation of information generated by CbC, it is reasonable to believe that CbC would release resources within LTO rather than demanding extra capacity.

Concerning the case of implementation, the conclusion is different. Financial constraints and lacking technical capacity coupled with the burden of validating information and ensuring compliance suggests that KRA would not have the capacity to implement CbC properly. Consequently, KRA would not benefit to the same extent as if CbC was adopted and implemented internationally.

6. Conclusion
Few interviewees saw national adoption as a real alternative: Accountants referred to IFRS as the proper adoption channel and CSO representatives stressed the importance of an international solution to ensure MNCs’ compliance. Moreover, national adoption is likely to entail a burden for the resource-constrained KRA. Thus, it does not seem as a feasible option that Kenya adopts CbC nationally. Yet, LTO is a highly competent department, which wastes time and resources assessing the risks of tax evasion among Kenya’s MNCs based on inadequate information. While KRA does have the means to source the information, these are inefficient and inadequate ways of finding what CbC, if adopted internationally, would make publicly available and from which Kenya would benefit.
Besides the economic benefits, some interviewees stressed that CbC would increase transparency and social justice. This contrasts the international debates, which have revolved around investor needs and market competition. On the same note, opponents of CbC in the global context have argued that if tax administrations do not have adequate means to source relevant information, the problem should be addressed at national rather than international level – an argument that does not seem to resonate in Kenya – global problem needs global solutions. This clearly demonstrates the importance of facilitating a debate among developing countries on policies like CbC, where specific concerns will alter the weight of presented arguments.
Legality of Mombasa Republican Council’s Quest for Secession

Erick Onderi*

The potential for splintering is highest in Africa and here the official diplomatic doctrine is mostly firmly set against secession.¹

1. INTRODUCTION
Secession in Africa has always been viewed as the work of foreign agents working for the ‘secession’- a word which after the Katanga’s experience acquired a meaning of evil.² Nations birthed from secession stretch across Africa, Asia and Europe, with historical, political, economic and even religious differences forming the basis for breakaways.³

Paucity of information on secession informs the manner in which governments deal with secessionist movements in their countries. Most countries if not all ban such movements and arrest their leaders. This form of intimidation has not served to deter more secessionist movements from being formed to agitate for secession.

The current interest on secession is attributable to two factors. The first is that there has been an increase in both successful and attempted secessions all over the world. No continent has been spared of a secession attempt in its region. The second reason is that a strong case is being made for some form of self government for groups presently contained within states (in cosmopolitan areas).

Any secession in Africa challenges the long-held norm of accepting borders drawn by colonial powers, illogical as some of them may be. This principle of uti possidetis (Latin for “as you possess”) was enshrined by participants in a meeting of the Organization of African Unity in 1964, whose final declaration “solemnly

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¹ Crawford Young, “Politics in the Congo: Decolonization and Independence.” Princeton, N.J: Princeton University Pres, P.82
² Zdenek Červenka, “Eritrea: Struggle for Self-Determination or Secession”(1977) 12 Africa Spectrum
declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence.”¹

Recognition of the *uti possidetis* principle is important as boundaries that were drawn by the colonial masters during the scramble and partition of Africa are respected. It is the Organization of Africa Union’s (renamed African Union) submission that redrawing the boundaries will be opening a Pandora’s Box.

African countries hold dearly the *uti possidetis de jure* or *uti possidetis juris* principle. The principle was first applied by Spain’s former Latin America colonies after they achieved independence. The impact of the principle was that the region’s colonial-era administrative borders would be elevated to international borders separating the newly independent states. The principle spread over the continent and was also adopted by the OAU and forms the basis for the territoriality arguments in Africa and the world in general.² There are two arguments on the principle of territoriality. Territoriality might be understood to require protection of the existing territorial status quo. It might also include territorial arguments about why existing boundaries should be redrawn.³

The principle of *uti possidetis* was seen as a hedge against claims of self-determination, particularly secessionism. This no doubt goes a long way towards explaining why movements to break up independent African states have been rare. At the same time, however, this has not in fact prevented secessionist sentiments, secessionist talk, or even outright secessionist mobilization among certain groups.⁴

Secession seeks to create new territories independent from the originally recognized territories. African leaders recognizing the precarious position they were in from groups within their countries that harbored irredentist positions,

¹ Organization of African Unity, Resolutions Adopted by the First Ordinary Session of the Assembly of Heads of State and Government Held in Cairo, UAR, dated July 17-21, 1964.
² Organization of African Unity, Resolutions Adopted by the First Ordinary Session of the Assembly of Heads of State and Government Held in Cairo, UAR, dated July 17-21, 1964.
⁴Edmond J. Keller, “Secessionism in Africa.”
sought to protect themselves by declaring the respect of the borders as they were after gaining independence.

International law recognizes a nation’s sovereign territorial integrity.\(^5\) Secession goes against this norm. The legal position on secession is that it is illegal.\(^6\) Secessionist groups have argued that the right to secede should be recognized under International law. They provide arguments that a disenfranchised and oppressed groups of people should be allowed to secede.

This article is about the circumstances that justify secession. It provides arguments on when countries should accept secession demands as demanded by a secessionist movement within their states. The secessionist demand by the Mombasa Republican Council (MRC) forms the basis for this analysis.

2. **ANALYSIS: DEFINITION OF SECESSION**

The definition of secession which different scholars choose to relies so much on how they perceive the nature of political authority. There are libertarian scholars, economists and lastly legal scholars. All these scholars have a different view on secession and what it means to them.

Allen Buchanan, a libertarian democratic philosopher defines secession as to include the ‘severance of a government’s control over territory. Libertarian scholars treat secession more as an act of individual liberation from the hegemonic of the state.\(^7\)

Legal scholar Lea Brilmayer defines secession to include not only the “repudiation by a group of person’s of their obligations to obey the State’s laws,” but also “the taking of a part of the territory claimed by an existing State.\(^8\)

Austrian school economist Jörg Guido Hülsmann argues that “secession is commonly understood as a one sided disruption of bonds with a larger organized whole to which the secessionists have been tied. Thus, secession from

\(^6\) Texas vs White [1869] 74 U.S. 700.  
a state would mean that a person or a group of persons withdraws from the state as a larger whole to which they have been attached.\textsuperscript{9} 

Hülsmann argues that the ultimate purpose of secession is “to break the compulsory ties between the secessionists and a government which they no longer accept. This definition is in sync with the legal one used in Black’s law dictionary.

Black’s law dictionary defines secession as the process or act of withdrawing especially from a religious or political association.\textsuperscript{10}

I shall apply the definition adopted by the Supreme Court of Canada in its 1998 Reference as to the definition of secession. “Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane.”\textsuperscript{11}

A. SECESSION THEORY

There are two forms of secession advanced by various theorists. These are unilateral secession and consensual secession. Unilateral secession is the secession that is undertaken without the consent of the state and without constitutional sanction. Consensual secession is secession that results either from a negotiated agreement between the state and the secessionists (as occurred when Norway seceded from Sweden in 1905) or through constitutional processes (as the supreme court of Canada recently envisioned for the secession of Quebec).

Constitutionally sanctioned secession is achieved either by the exercise of an explicit constitutional right to secede or by constitutional amendment (the High Court of Kenya in Mombasa advised the MRC in Miscellaneous Application 468 of 2010 to seek a constitutional amendment if they sought to secede from Kenya).

\footnotesize{
\textsuperscript{10} Black’s Law Dictionary 8th Ed; Bryan A. Garner, Editor in Chief
\textsuperscript{11} Reference re Secession of Quebec [1998] 2 S.C.R. 217
}
The secession demands by the MRC can best be analyzed under the unilateral theory of secession. I now follow with an analysis of what this unilateral theory entails.

B. UNILATERAL THEORY OF SECESSION

There are two major theories of the right to secede (understood herein as unilateral claim-right). These are the Remedial Right Only Theory and Primary Right Theory. This article shall delve into the Remedial Right Only Theory as this is what best explains the right to secede as postulated by the MRC.

Most secession theorists, Buchanan included, advance theories of the conditions under which secession is morally justifiable, that is, the conditions under which a group has a moral liberty-right or mere moral permission to secede, or a theory of the conditions under which a group has the claim-right to secede. These conditions legitimatize secession.

A Remedial Right Only Theory provides for a general right to secede unlike the Primary Right Theory which only provides for a special right to secede. A special right to secede is one based on a promise, contract or some form of relationship.

C. PRIMARY RIGHT THEORY

It is divided into two types. These are based on what characteristics a group must possess to have a primary right to secede. The classifications are:

i) Ascriptive group theories
ii) Associative group theories

The lack of injustice does not hinder a group from seeking secession. The theory provides for a special right to secede. The secession of Eritrea from Ethiopia can be explained under this theory. The Ethiopian constitution provided for a right to secede. This amounts to a contractual promise.

D. REMEDIAL RIGHT ONLY THEORY

This theory only covers unilateral right to secede. This theory posits that a group has a general right to secede if and only if it has suffered certain injustices, for which secession is the appropriate remedy of last resort. Under this theory when
grosse injustices are perpetrated against a particular group, within a particular region of a state, then secession is justifiable.\textsuperscript{12} This theory can be used to properly illustrate the MRC secession bid.

Secession here is applied so as to remove that group and the territory they occupy from the control of the state. Secession is allowed for groups and not individuals.\textsuperscript{13} Secession is a collective right. Richard Kiwanuka creates a distinction between individual rights and peoples (collective) rights. He suggests a three pronged approach in understanding the distinction:

i. The individual remains the primary subject of international human rights.

ii. International human right law recognizes existence of groups.

iii. Enjoyment of individual human right requires certain human rights to devolve directly upon groups.

Secession can be contrasted with another form of opposition to political authority, revolution. Unlike the revolutionary, the secessionist’s primary goal is not to overthrow the existing government or to make fundamental constitutional, economic, or sociopolitical changes within the existing state.\textsuperscript{14} Instead, he wishes to restrict the jurisdiction of the state in question so as not to include his own group and the territory it occupies. The secessionist does not deny the state’s authority as such, but only its authority over him and the other members of his group and the territory they occupy.

The Remedial Right Only Theory only covers unilateral right to secede. This theory posits that a group has a general right to secede if and only if it has suffered certain injustices, for which secession is the appropriate remedy of last resort.\textsuperscript{15} Under this theory when grosser injustices are perpetrated against a


\textsuperscript{13} Ibid


\textsuperscript{15} Di Leonardo Nicolia, “Democracy and Secession: the Case of the ‘Lega Nord Party’ in the North of Italy”
particular group, within a particular region of a state, then secession is justifiable. This theory can be used to properly illustrate the MRC secession bid.

A right to self-determination through secession exists and when a specified minority has been treated unjustly by the current state to which it belongs. In other words an existing state’s legitimacy may be questioned and a particular minority within that state may have a right to secede only if this represents a “last resort” to escape serious injustices.

Different Remedial Right Only Theories identify different injustices as warranting the remedy of secession. Legitimate secession is limited to being a means of remedying an injustice. The right to secede is only available to a part of the citizenry of a country who feel greatly oppressed. Their intention is to sever links with the government in place and exercise their own control.

Buchanan sets forth conditions under which secession can be possible under this theory. These include a persistent violation of human rights, systematic discrimination and denied access of participation in democratic governance. Lack of these conditions makes a secession bid impermissible.

This theory is restrictive on what can justify secession. Some of the acceptable qualifications are: The state grants a right to secede (as with the secession of Norway from Sweden in 1905; or if the constitution of the state includes a right to secede (as did the U.S.S.R constitution and the 1993 Ethiopian constitution; or if the agreement by which the state was initially created out of previously independent political units included the implicit or explicit assumption that secession at a later date was permissible.

It is on the third premise that the MRC lay their basis for seeking secession of the Coastal region. The leaders of this secessionist movement claim of the existence of a document signed by the then Prime Minister of the Republic of Kenya and

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17 Di Leonardo Nicolia, ““Democracy and Secession: the Case of the ‘Lega Nord Party’ in the North of Italy”
the Sultan of Zanzibar.\textsuperscript{18} The said document gave the Republic of Kenya a lease of 50 years of the protectorate Kenya (coastal region) and after the lapse of the period to revert back to the indigenous group, the owners of the land.

All Remedial Right Only Theories have one premise in common: secession is only valid as a remedial right. Hence secession is not permissible in a just state. They restrict the general (as opposed to special) right to secede in only circumstances where injustice has occurred.

The proper premise for this theory is thus that a group that feels its physical survival is under threat through actions of the state, can legitimately secede. It therefore emerges that a minority group can legitimately secede if an injustice has been occasioned on them. The Remedial Right Only Theory places an important caveat on the right to secede. No group has a (general) right to secede unless that group suffers what are un-controversially regarded as injustices and has no reasonable prospect of relief short of secession.\textsuperscript{19} Given that the majority of secessions have resulted in considerable violence, with attendant large-scale violations of human rights and massive destruction of resources, common sense urges that secession should not be taken lightly. \textsuperscript{20}

This theory is likely to gain acceptance by most states as it is a less threat to the territorial integrity of a state. States would ensure that they protect the lives of their citizens and not discriminate against any of them. This would ensure that the state is considered a just state and any secession attempt within the state would thus be considered illegitimate.

The MRC have advanced their grievances that they claim justify a legitimate secession. However the Constitution of the Republic of Kenya, 2010, has provided a raft of measures that will help solve the minor challenges faced by the coastal group. The grievances advanced by the secessionist group do not merit a valid secession as recognized under the Remedial Right Only Theory.

I shall examine the grievances advanced by the MRC vis-à-vis the conditions attendant under the Remedial Right Only Theory in the next chapter.

\textsuperscript{18} http://www.youtube.com/watch?v=erLXWI0uEVo accessed May 6, 2013
\textsuperscript{19} Allen Buchanan, Secession, pp 98
\textsuperscript{20} Ibid

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3. THE MOMBASA REPUBLICAN COUNCIL MOVEMENT

Coast Province Dynamics
The economic marginalization of the former Coast Province is a central feature of the historical narrative in the context of Kenyan politics and development. The Coast region has always been considered to belong in a class of political dissidents that suffered marginalization under the various regimes in Kenya.

The Coast consists of 13 districts and 21 constituencies, with a population of 3.3 million people, according to the 2010 national census. The main ethnic groups are the Mijikenda comprising of nine culturally and linguistically inter-related sub-groups, among them the Rabai; Chonyi; Mjibana; Duruma; Girama; Kauma; Digo and Kambe. The non-Mijikenda groups are the Taita-Taveta; Orma; Pokomo; Munyoyaya; Malokote; Bajuni; Swahili and the people of Arab descent. In total there are 15 coastal ethnic groups and a growing Caucasian community. Perception of marginalization of the region has yielded a sense of ‘otherness.’ This perception of people as outsiders as opposed to fellow citizens often leads to increased tension based on ethnicity which, in turn, creates the potential for ethnic violence.

Formation of the Movement
Historically, a layered form of sovereignty applied to East Africa’s coast that left the region’s city-states free to conduct their affairs as long as they remitted taxes and duties to Zanzibar. This ended in 1963 with the integration of the coastal protectorate into the Republic of Kenya.

The rise of the MRC has been informed by the wish of the coastal communities to exert sovereignty over their own affairs, land and resources. The MRC seems to

have replaced the mwambao movement that had the same agenda for the coastal people.24

Post-independence exclusion and regional development rigged in favour of outsiders and local elites has led to a situation where members of the indigenous population now refer to themselves as "coasterians" and to the non-coastal settlers as "Kenyans."25

The MRC claims it is a non-militant group. It claims it does not use violence in the advancement of its secessionist demands. There are media reports that disprove of this. These reports point an accusing figure at the MRC for various violence incidences at the Coast.26

The rallying call of the MRC “Pwani si Kenya” loosely translated to mean “Coast is not Kenya” seems to be gathering support among the locals who feel economically marginalized and their land taken away by non-coastal settlers.

The MRC has a facebook page that has quite a massive following.27 The MRC used the group to rally people and seek acceptance of their secession rhetoric. It is evident that the facebook page was used to ask its followers to gather outside the Coast law courts during their court secessions.

27 https://www.facebook.com/pages/Mombasa-Republican-Council-MRC/148508195220835
Kenyans believe the coastal people have visited these problems on themselves. The coastal people are perceived to be indolent, reject modernity exemplified by indifference and political passivity.

**The leadership of the MRC**

The MRC has a governing council made up of the Chairman; Vice-Chairman; Secretary General; Assistant Secretary General and a Spokesperson. The current Chairman is Rashid Kivyaso; the Vice-Chairman is Ali Mwatembe and the Spokesperson is Mohammad Rashid Mraja.\(^\text{28}\) The whole leadership structure is shrouded in mystery to avoid persecution by the Government.

It also has an office of the Coordinator, Organizing Secretary, Treasurer and several elected members. The top organ is referred to as governors. It draws its powers from an 18 man council of elders.\(^\text{29}\)

Below the top organ is the branch network. There are about five officials running each branch, including a chairman, secretary and treasurer. There is lastly a youth wing. These form the foot soldiers of the movement.\(^\text{30}\) These details prove that the organization has an elaborate network that has managed to keep the government of Kenya on its toes.

**Grievances raised by the MRC**

The Kenya’s coast has been described as the nation’s ‘least tribal’ Province due to the historical tradition of immigration and integration, but the least national in terms of power, influence and orientation.\(^\text{31}\)

The problems bedeviling the coast region can be traced to the 1895 and 1963 agreements transferring the ten-mile strip of land along the coast to the

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government of Kenya. The ten-mile strip came under the dominion of the Sultanate of Zanzibar during the 1820s. The MRC contend that these agreements are invalid as the indigenous community was not consulted and that the Kenyan state has failed to honor the provisions contained therein. These provisions are:

Firstly that the free exercise of any creed or religion will at all times be safeguarded and, in particular His Highness’s present subjects who are of the Muslim faith and their descendants will at all times be ensured of complete freedom of worship and the preservation of their own religious buildings and institutions.

Secondly that the jurisdiction of the Chief Kadhi and of all the other Kadhis will at all times be preserved and will extend to the determination of questions of Muslim law relating to personal status (for example, marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion.

Thirdly that the Administrative Offices in predominately Muslim areas should, so far as is reasonably practicable, themselves be Muslims.

Fourthly that in view of the importance of the teaching of Arabic to the maintenance of the Muslim religion, Muslim children will, so far as is reasonably practicable, be taught Arabic and, for this purpose, the present grant-in-aid to Muslim primary schools now established in the Coast Region will be maintained.

Lastly that the freehold titles to land in the Coast Region that are already registered will at all times be recognized, steps will be taken to ensure the continuation of the procedure for the registration of new freehold and the rights of freeholders will at all times be preserved save in so far as it may be necessary to acquire freehold land for public purposes, in which event full and prompt compensation will be paid.

The Ten-mile Coastal strip of the land of the Zanj stretches from Vanga near the Tanzanian border all the way up to Faza Island near Somalia.

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These provisions were intended to protect the coastal population. Successive governments have failed to honor these provisions to the detriment of the indigenous groups living in the coast region.\(^{33}\)

There has been exercise of politics of social exclusion by successive regimes. The local communities feel antagonized by the Central government. The MRC is building up on these bottled up feelings of frustration and resentment by the locals.

The Carter Commission in its pre-independence report on the coastal situation reported that “there is a strong feeling on the coast that the needs of its people have received scant attention from the government in Nairobi. The Coast people complain that land development, communications, social welfare have lagged very much behind their counterparts in the European Highlands and African reserves.”\(^{34}\)

The following are the perceived injustices as postulated by the MRC: perceived marginalization of indigenous coastal people in employment and business opportunities,\(^{35}\) loss of land due to irregular and illegal title deeds and selective issuance of title deeds to non-indigenous coastal people at the coast to the exclusion of indigenous coastal people.\(^{36}\)

The Truth, Justice and Reconciliation Commission\(^{37}\) (TJRC) has documented the grievances faced by the communities living at the Coast. These documented


\(^{37}\) The Truth, Justice and Reconciliation Commission was formed pursuant to the Truth, Justice and Reconciliation Act (TJRC Act) 2009. The broad mandate of the Commission was to inquire into gross violation of human rights and historical injustices that occurred in Kenya from 12th
issues seem to suggest the validity of the argument of marginalization of the Coast people as postulated by the MRC.

The land problem at the Coast

Grievances over land constitute the single most important driver of conflicts and ethnic tension in Kenya. Numerous Commissions formed in Kenya have documented on the emotive nature of land in Kenya. Post-election violence have always been associated to land disputes.

The land question at the Coast is a potential trigger of conflict, owing to the peculiar historical and legal origins and the impact dispossession has had on the economic fortunes of the locals. The Land Titles Act has been considered as a failure. It was enacted to help remove doubts that had arisen in regard to titles to land at the coast region and to establish a land registration court. The Land Titles Act altered the concept of land ownership under African customary tenure governing the indigenous coastal communities and created biases in the land adjudication against the indigenous communities.

The abuse of the Land Titles Act has had a great negative impact on coastal land dealing to the area having the largest single concentration of landless indigenous people.

There are ‘squatters’ on government land, absentee landlords, tenants-at-will, idle land, mass evictions and lack of access to the sea. The slow adjudication process and delay in finalization of settlement programmes have denied the locals secure access to land.

There is a feeling among the locals that successive post-independence governments maintained the status quo that did not favor them. The local

December 1963 when Kenya became independent to 28th February when the Coalition Agreement was signed.

39 The National Land Policy, 2007
40 M Mwandawiro, “Land, elections and conflicts in Kenya’s Coast Province.”
41 Chapter 282 of the Laws of Kenya.
42 Preamble to the Land Titles Act, Cap 282 of the Laws of Kenya.
44 The National Land Policy, Articles 184-186.
communities did not profit from the ventures undertaken by the government in giving huge chunks of land for sisal farmers and the establishment of a national park.45

The TJRC has documented in its Hansard46 reports from its public hearings conducted all over the Coast region that the land question has not been resolved 50 years down the line. The indigenous communities were dispossessed of the lands by the colonial government and post-colonial governments.

Submissions by locals to the TJRC seem to link their state of economic marginalization marked by poverty, illiteracy and lack of access to basic services to the acts of land-related dispossession.

Education
The Coast region is among the most ‘under-developed areas of Kenya in the provision of education. There is a slow uptake of western education at the Coast. There are various reasons given as to the education apathy at the Coast region.

Robert Makonde hypothesizes that Western education, which before World War I was introduced through mission schools, made little headway among Muslims, who feared that their children would be proselytized.47

The Coast region remains the lowest-literacy region in the country. There is a low number of trained teachers, poor facilities and infrastructure, early marriages of girls. The government of Kenya introduced free education but failed to provide the requisite facilities to ensure that studies are conducted in an ample place.

The region has only 3 national schools (Kenyatta High, Mwatate; Mama Ngina Bura Girls School and Ribe Boys High School). These schools were only recently elevated to a national school status. There was no national school for a long time at the Coast. The concern is hinged on the fact that national schools are well equipped and pick the cream of the intellectual in the students circle.48

46 Colloquial name for the Official Report of Parliamentary Debates, usually published daily, so-called after Luke Hansard, printer to the Commons.
believe it is the state strategy to ensure that they do not get quality education hence it is easy to govern them.

**Economic Marginalization**

Economic marginalization as defined by the TJRC is a situation that is produced by the process through which groups are discriminated directly or indirectly in the distribution of goods and services.

The major causes of discrimination in Kenya have been: a centralized state in terms of power and resources, major decisions are made from Nairobi; grand corruption; conflicts on land; negative ethnicity; imperial presidency. The state has perpetrated economic marginalization on some regions in the country including the Coast region.

The TJRC found out that the state adopted economic and other policies that resulted in the economic marginalization of five key regions in the country: North Eastern and Upper Eastern; Coast; Nyanza; Western and North Rift.\(^{49}\)

The road network in the coast region is not well connected save for Mombasa town; the hospitals in the region are understaffed and ill equipped to serve the increasing number of locals in the region; the schools in the region do not have qualified teachers and in some areas form four leavers are the ones who teach the students.

**High Court decision on MRC**\(^{50}\)

The MRC leadership brought a petition before the High Court in Mombasa. The questions that it sought to be answered was whether the action of the government of Kenya in proscribing a group known as Mombasa Republican Council (MRC) vide Gazette Notice No. 12585 was unconstitutional. A substantial question that arises from this is whether the Kenyan nation, striving to be open and democratic, should accept the ban as reasonable and justifiable.

Mr. Ruwa’s testimony was that the MRC is a peace initiated group aimed at attaining their rights on matters of land, natural resources, economic and political freedom and advancement of the indigenous coastal people.

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\(^{50}\) Randu Nzai Ruwa & 2 Others versus Internal Security Minister & Anor [2012] eKLR.
An affidavit filed by Francis Kimemia, the then Permanent Secretary in charge of Provincial Administration and Internal Security, sworn on 10th May 2011 raised the following issues:

That according to intelligence reports MRC is an active arm of the Republican Revolutionary Council (RRC) and that the MRC is neither a registered society nor a political party. The aim of the MRC is to disenfranchise upcountry people and to subsequently reclaim their land and that the 2006/2007 post-election violence is testimony to this.

Police and intelligence reports revealed that MRC was engaged in oathing and training of militia and was a threat to peace. That these intelligence reports also revealed that RRC were intent on having Coast Province declared a republic.

That arising from violence perpetrated by members of MRC, the government has been sued in civil claims for failing to act in the face of the threats and to protect its citizens. MRC advocates secession and discriminates against members of other communities.

Members of the MRC are engaged in criminal activities as evidenced by copies of charge sheets in Mombasa Criminal cases Nos. 1050/2010; 1947/2010; 24/2011; and 343/2011.

The respondents placed great emphasis on the preamble to the constitution of Kenya which proclaims Kenya as one indivisible sovereign state.

Patriotism and national unity are national values under Article 10 of the Constitution which binds all Kenyans. Secession is not available in Kenya and that the MRC’s call for secession is a threat to the territorial integrity and national security of the country.

It was also their assertion that the Constitution attempts to address the grievances of land, poverty and marginalization through Article 56 on the rights of minority and marginalized persons and Article 60 on the principles of land policy. Chapter 11 of the Constitution which entrenches the system of devolved government also provides a framework for resolving the grievances raised by MRC.
Opinion of the Court
The court agreed with the assertion that Kenya is one indivisible sovereign state. They also agreed with the respondents’ assertion that the Constitution does not contemplate secession. The Constitution is an elaborate and detailed document. In it the people of Kenya chose to emphasize the indivisibility and unity of the nation.

Where nations contemplate secession, they expressly declare so for example the people of Ethiopia through Article 39 of their constitution have made the following unequivocal declaration:

“every nation, nationality and people in Ethiopia has an unconditional right to self-determination, including the right to secession.”

Agitation for secession must be expressed as a fair and acceptable democratic discourse. The agitation should not offend Article 33 of the Constitution and should not be: propaganda for war, incitement to violence, hate speech, or advocacy for hatred.

The court held that secession is a political agenda and thus must have a political solution. Secession can only be achieved by far reaching amendments to the constitution. All Kenyans will decide this by a referendum in accordance with Article 255 of the Constitution. Any secession must be freely given by all Kenyans, it cannot be forced on them.

Was the Court right?
The court erred in failing to consider the other plausible theories that legitimize secession in other instances. The Remedial Right Only Theory is such an important one in instances where the state has continuously perpetrated injustice on one particular group.
The MRC had sought different orders as concerning the constitutionality of the government action in proscribing it but the fact that the judges went ahead and tried to deal with the secession question, they should have then properly dealt with it. The court failed to recognize the unilateral form of secession. The analysis by the judges was not wholesome as it should be.
Allen Buchanan’s theories should have been considered by the court and a proper finding given. The MRC then ought to have given the instances of the injustices meted against them and prove that they are a state policy against them.

It is my opinion that the judges just like most Kenyans are afraid of the consequences of secession. The territorial argument is largely skewed in favour of protecting the original territory of the country.

4. CONCLUSION

The MRC clearly have genuine concerns on how the successive governments of Kenya have treated the Coast region in terms of its policies for the region. The region has been sidelined alongside other regions in terms of development.

The issues raised by the MRC can clearly be resolved by the County government formed under the new constitutional dispensation. The locals can now have a say on how they want their resources to be used. The governor of Mombasa County, Hon Hassan Joho, has promised to ensure that the constitution is implemented to the latter.

The Buchanan theory on Remedial Right Only clearly postulates a higher test for the acceptable injustice to validate a secession bid. The MRC grievances are of such a nature that can be resolved by the County government in place and by the use of the new constitution that promotes public participation in decision making.

One hopes that this promise will be kept so as to ensure that the locals can enjoy the bountiful resources bestowed upon them. In conclusion, the territorial integrity of a state should be respected while at the same time the right of oppressed people to secede should also be upheld. It is the responsibility of every stakeholder to protect the human rights guaranteed to every citizen by the Constitution and various international Human Rights Conventions.
Towards a Better Approach in Protection of Religious Freedom: Introducing the Structural Interdict

Emmah Khisa Senge Wabuke *

INTRODUCTION

I know that we share a belief that all people, no matter where they live have the right to freedom of religion. This is not a right that is any government to give or to take away. It is our right from birth, because we are all children of God.¹

These remarks made by the former U.S.A President Ronald Reagan clearly capture the deep set emotions that freedom of religion elicits in persons the globe over. The protection of freedom of religion in international human rights law has had a long and difficult history but on concentration, one can detect a general shift of focus along three overlapping foci: an emphasis on individual rights and non-discrimination on the basis of religion and then to today’s challenge of the full implications of ‘freedom of religion or belief’.²

It may be that violent conflicts based on religious tolerance have taken a periphery position in the contemporary world but this occurrence is yet to eliminate the importance of this right as the war has shifted from the battlefields to the workplace and public schools. The development of regional and international structural frameworks to interpret human rights instruments has led to an influx of judicial pronouncements on, inter alia, the practice, limitations and realization of freedom of religion. Regrettably, these court decisions have left most disillusioned as majority took a stringent approach either in support of the right or vice versa while those that sought a middle ground often reach a compromise that in retrospect satisfies no one.

Thus, the objective of this paper is to seek the best remedy which Courts may adopt in realization of this right in order to attain the ideals sought by its drafters while recognizing its limitations and restrictions. It is the author’s assertion that this objective is met by way of employment of the structural interdict.

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¹ Remarks made on 10th June 1983 at the Annual Convention of the Anti-Defamation League of B’nai B’rith available at <http://www.religion-online.org> (accessed on 10th June 2013)
² Smith, R. & Van Den Anker, C., Essentials of Human Rights (Hodder Arnold, Euston Road, London, 2005), p 309
The interdict, or as is ubiquitously termed, the injunction is a well accepted equitable remedy by the court and it would be impossible to fully discuss its origins, implementation and challenges in this paper without oversimplifying or misrepresenting in an unhelpful way. However, suffice it to say, this remedy has gradually developed over the years into various structural forms such as interim interdict, prohibitory interdict, mandatory interdict and the structural interdict, the latter of which forms the gist of this paper.

The structural interdict frowns upon the principle of *functus officio* in the court process and instead favours continued participation in the implementation of its orders.\(^3\) This retention of power enables the court to work out a negotiated compromise between the parties or in the case of the interim structural interdict, to allow parties to engage with each other meaningfully in an effort to resolve the difficulties aired in the application.\(^4\)

For purposes of clarity, this paper is divided into various thematic areas: history of freedom of religion and the human rights movement; judicial decisions on freedom of religion; the role of structural interdict and its place in realizing religious freedom.

The author shall as far as possible restrict analysis to religious freedom as expressed in the workplace and public schools.

**2. HUMAN RIGHTS MOVEMENT AND THE BIRTH OF RELIGIOUS FREEDOM**

The idea of human rights is as modern as the internal combustion engine and from one point of view it is no less a technological device for achieving a common human purpose.\(^5\) The meaning of this term is important because how one understands it will influence one’s judgement on such issues as which rights are regarded as universal, which should be given priority, which can be overruled by other interests, which call for international pressures, which can demand programs for implementation and for which one will fight.\(^6\) The definitional process is made more difficult as rights is a chameleon-like term that

\(^3\) ibid
\(^4\) Occupiers of 15 Olivia Road & others v City of Johannesburg & others 2008 (3) SA 208 (CC)
can describe a variety of regal relationships\textsuperscript{7} such as the strict sense of the right
holder being entitled to something with a correlative duty in another, immunity,
privilege or power to create a legal relationship. This notwithstanding, scholars
have more or less arrived at an uneasy consensus on what human rights are:
freedoms, immunities, privileges, entitlements, liberties and benefits that
everyone has and can claim in the society in which he/she lives, especially
against governments on the basis of being a human being.\textsuperscript{8}

While the Universal Declaration of Human Rights\textsuperscript{9} is considered the foremost
authority in human rights law, the principles it enshrines on religious freedom is
a transformation of older ideas.

Take for example, the Biblical passage in the Old Testament where Prophet
Elijah, in an epic spiritual battle with the false prophets of Baal, challenged the
Israelites to either worship Baal or Jehovah.\textsuperscript{10} Similarly, in the New Testament, a
rich young ruler chooses not to follow Christ after engaging in a brief
conversation.\textsuperscript{11} The salient point in both these references is that God respected
religious freedom by not ‘forcing’ belief in Him on humankind.

The modern-world idea of human rights has philosophical, religious, moral,
normative and legal foundations and is traceable to a variety of national
instruments\textsuperscript{12} such as the British \textit{Magna Carta Libertatum} of 1215 which was itself
an assertion of claims to customary and legal rights against monarchs by various
medieval power-holders such as landowners and urban corporations.\textsuperscript{13} In 1776,
the American founding fathers set the essence of their conception of human
rights by stating:

\begin{quote}
\textit{We hold these truths to be self-evident, that all men are created equal, that they
are endowed by their Creator with certain unalienable rights that among these are
life, liberty and pursuit of happiness.}\textsuperscript{14}
\end{quote}

\textsuperscript{7} Supra note 6
\textsuperscript{8} Ibid Note 19
\textsuperscript{9} Enacted on 10\textsuperscript{th} December 1948
\textsuperscript{10}\textit{Holy Bible}-New King James Version at 1 Kings 18: 20-40-
\textsuperscript{11} Supra Note 10 at Matthew 19:16-23
\textsuperscript{12} Nowak, M., \textit{Civil and Political Rights} in, \textit{Human Rights: Concepts and Standards}, Janusz
Symonides, ed., (UNESCO Publishing) 2000 at 81
\textsuperscript{13} <http/www.archives.gov> (accessed on 15\textsuperscript{th} June 2013)
\textsuperscript{14} Preamble to the 1776 American Declaration of Independence
Fifteen years later, in 1791, the Bill of Rights was added as a set of amendments to the USA Constitution and included the rights to expression and assembly, due process of law and freedom of religion. The Declaration of the Rights of Man and the Citizen made by the French commoners, that is, the ‘third estate’ affirmed the rights to equality before the law, liberty and freedom of expression and religion. This 1789 Declaration was the most important historical inspiration for the Universal Declaration of Human Rights.

Internationalization of human rights started with the formation of the League of Nations with the conclusion of the First World War. In spite of its failures, this organization became an important precursor to the United Nations and informed many of its principles, especially with regard to human rights and in particular freedom of religion.

Thus, freedom of religion has acquired a strong basis in law: Article 18 of the UDHR states that everyone has the right to freedom of thought, conscience and religion which includes freedom to change his religion or belief, and freedom to manifest his religion or belief in teaching, practice, worship and observance. The International Convention on Civil and Political Rights (ICCPR) expresses this right in similar terms as the UDHR. In 1981, the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief was adopted by the General Assembly by consensus and remains the only international instrument exclusively concerned with religion or belief.

Article 8 of the Banjul Charter forbids restriction, either by law or order, to the exercise of freedom of conscience and the profession and free practice of religion. This freedom has also been recognized in the supreme law in Kenya. Article 32(1) of the Constitution provides that every person has the right to freedom of conscience, religion, thought, belief and opinion. Further, it is forbidden to deny a person access to any institution or employment because of the person’s religion or belief or to compel one to act or engage in any act that is contrary to one’s belief or religion. Further, Article 27 prohibits any form of discrimination based on among other grounds, religion.

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15 First Amendment-USA Constitution
16 Refer to Article 18-ICCPR
17 Or African Charter on Human and Peoples’ Rights
18 Article 32(3) (4)-Constitution of Kenya 2010
2.1. Components and Obligations of Freedom of Religion

The U.N Human Rights Committee, in interpreting Article 18 of the ICCPR has held that this freedom protects theistic, non-theistic and atheistic beliefs as well as the right not to profess any religion or belief.\(^\text{19}\) This has had the effect of extending this right to protect beyond what is commonly referred to as religion.

A proper reading of the provisions enshrining religious freedom in the municipal, regional and international legal regime reveals various components which can be summarized as: the right to be left alone on matters of religion, freedom of thought on all matters concerning religion, the right not to profess any religion or religious belief, the right to hold atheistic beliefs, the right to hold a religious belief, the right to hold personal religious convictions, the right to choose which religion to adhere to, the right to retain one’s religion, the right to convert religion, the right to manifest one’s religion or belief and the right to proselytize.\(^\text{20}\)

The state has the primary legal obligation to protect and respect this right accorded to every individual. However, it does not have a responsibility to grant this right as it is fundamental, hence belongs to every human being.\(^\text{21}\) Further, Article 2(2) of the ICCPR obligates states that have ratified the Convention to implement its provisions through enactment of appropriate municipal law.

Individuals are also obligated to respect other peoples’ freedoms in exercise of their personal right to religion. In manifestation of this right, individuals must take not of the derogation and limitation clauses\(^\text{22}\) in the various legal instruments so as not to infringe on other persons’ rights and freedoms.

3. INTERPRETATION OF RELIGIOUS FREEDOM BY JUDICIAL BODIES

All the highlighted human rights legislation envelops religious freedom in a composite Article which also comprises of freedom of conscience and thought. However, these additional rights must be understood to perform a facilitative role in realization of freedom of religion. In other words, while both freedom of

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21 Article 19 (3) (a)-Constitution of Kenya 2010

22 Refer for example to Article 18(3)-ICCPR and Article 24-Constitution of Kenya 2010

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thought and conscience are significant in the full realization of freedom of religion, the latter must be considered distinct of the former.\textsuperscript{23}

This position finds an easy supporter in case law which has sought to treat each of these rights separately, as in \textit{Amnesty International versus the Zambia} where the African Commission on Human and Peoples’ Rights held that deportation of political dissidents amounted to violation of, among others, freedom of conscience. In this instance, the Commission was willing to view conscience as an independent right. Thus, freedom of religion shall be considered herein as an independent right but closely related to freedom of thought, belief and opinion.

In this section, a comparative study of jurisprudence on freedom of religion in three jurisdictions shall be offered. These are the United States of America, the United Kingdom and Kenya.

\textbf{3.1. Lessons from the U.S.A}

The interpretation of the First Amendment in the context of religious freedom first found its way to the USA Supreme Court by way of a petition filed by the Jehovah’s Witnesses. In its 23 separate petitions between 1938 and 1946, the religious group helped shape the judicial course on freedom of religion.

The USA Supreme Court’s rulings on this freedom have differed sharply as the Court sought to find a balance between enforcing the right and applying its limitations. Thus, while in \textit{Engel v Vitale}\textsuperscript{24}, the Court ruled that government-imposed nondenominational prayer was unconstitutional, in \textit{Widmar v Vincent},\textsuperscript{25} it was held that a Missouri law prohibiting religious groups from using state university grounds and buildings for religious worship was unconstitutional. In the \textit{locus classicus} case \textit{Lemon v Kurtzman}\textsuperscript{26}, the Court created a three-part test for laws dealing with religious establishment.

It was held that a law was constitutional if it:

- Had a secular purpose
- Neither advanced nor inhibited religion
- Did not foster an excessive government entanglement with religion.

\textsuperscript{23} Supra note 19 at 20  
\textsuperscript{24} 370 U.S. 421 (1962)  
\textsuperscript{25} 454 U.S. 263 (1981)  
\textsuperscript{26} 403 U.S. 602 (1971)
This test, which was approved in subsequent cases indicate a movement towards secularism and separation of church from state. The political undertones that colour this debate in the national scene, however, that religious freedom is far from being settled.

3.2. Europe and Religious Freedom

The European Union has had a complicated experience with religious freedom. In 2004, France adopted a law which banned ‘conspicuous religious signs’ in public schools. These include Muslim headscarves, Sikh turbans, Jewish skullcaps and large Christian crosses.

However, this divisive matter had already manifested itself all over Europe. In Maoussakis & others v Greece27, where the plaintiff, a Jehovah’s witness was convicted and imprisoned for conducting religious meetings without official authorization, the Court held that these punishments constituted a violation of freedom of religion, the requirement of obtaining prior authorization having interfered with the freedom to practice religion which could not be justified as being prescribed by law.

In Metropolitan Church of Bessarabia v Moldova28, the claimant’s complaint when the Moldovan authorities refused to recognize the church was upheld because it interfered with the church’s right to freedom of religion.

Conversely, in R(on the application of Playfoot (A Child) v Millais School Governing Body,29 the Administrative Court disallowed the application by a student to wear a ‘purity ring’ because she was under no obligation by reason of her belief to wear it thus she could not be said to be manifesting her belief. However, in another case30, the application was granted and a waiver was issued permitting the applicant to wear the Kara (a Sikh religious steel bangle) as any contrary direction would amount to indirect discrimination on the basis of religion.

2.3. Kenya’s Unsteady March

Two cases have captured the attention of the nation on the matter of religious freedom: Republic v The Head teacher, Kenya High School& another Ex-partes Smy (a

27 (1996) 23 EHRR 387
28 (2002) 35 EHRR 13
29 (2007) EWHC 1698
30 [2008] EWHC 1865 (Admin)
Minor Suing Through Her Mother and Next Friend A B)\textsuperscript{31} and Kenya Union Mission versus Ministry of Education & 26 others.

The Kenya High School case involved, \textit{inter alia} refusal by the school for a Muslim student to wear a \textit{hijab}\textsuperscript{32} as part of the school uniform. Ruling in favour of the school, the Court held that the action taken by the school was permissible as it did not deny the student a right to education. Lady Justice Githua (as she then was) held in part that

‘...the right to manifest ones religion is one of the foundations and pillars of a democratic society...it may be necessary to restrict peoples’ manifestations of religious beliefs in order to reconcile the interests of the various groups and ensure that every person’s beliefs are respected.’

On the converse, the Kenya Union Mission, an off-shoot organization of the Seventh Day Adventist secured an interim order exempting Adventists from attending classes and exams on Saturdays as it is believed that Sabbath which commences at sunset on Friday until sunset on Saturday is a day of complete rest. The adjudication of the suit is an ongoing matter before the High Court of Kenya.\textsuperscript{33}

\textbf{3. A BETTER APPROACH: THE STRUCTURAL INTERDICT}

As can be seen in the foregoing, the Judiciary has crafted several remedies in an effort to enforce this right. However, these remedies—declaratory relief, prohibitory interdicts and mandatory orders—have proved to be ineffective as it has created disharmony in the workplace and public schools where the perceived losers see themselves as compelled to perform contrary to their wills. This animosity is especially unfortunate in both these settings where preservation of a good continuing relationship is key to success.

The Structural Interdict (S.I) is a true reflection of the judicial flexibility required by the notion of distributive justice\textsuperscript{34} and remains the most appropriate remedy to effect religious freedom in the litigation process. Unlike other forms of interdicts or remedies, such as damages, the purpose of a structural interdict is

\textsuperscript{31} [2012] eKLR
\textsuperscript{32} A loose fitting head garment covering the hair, ears and forehead
\textsuperscript{33} This interim order was given on July 2012.
\textsuperscript{34} ibid
not deterrence or compensation as such. In broad terms, its purpose is the elimination of systemic violations existing especially in institutional or organizational settings. The structural interdict is a response to the inadequacy of the traditional remedies in responding to systemic violations of a complex organizational nature which may not be effective to eliminate systemic violations because these may require negotiation, dialogue, *ex parte* communications and broad participation of parties not liable for the violation.

It was first ordered in *Brown v Board of Education.* This case was propelled by the need to realise desegregation of the racial based school system into an integrated system. The Supreme Court noted that there was a need for the courts, especially the local courts, to consider whether the actions of the school authorities constituted good faith implementation of court orders thus it advised that in discharging their roles the local courts had to be guided by the principles of equity ‘characterised by a practical flexibility in shaping the remedies and facility for adjusting and reconciling public and private needs’. The Court required that the defendants make ‘a prompt and reasonable start toward full compliance’ with the ruling of the court.

### 3.1 Nature of the structural interdict

Structural interdict has two main features: flexibility and retention of jurisdiction by the Court. These two features enable development of ongoing measures designed to eliminate the identified mischief and also promote participation of not on the parties, but also third parties in the remedy selection process.

#### 3.1.1 Flexibility

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37 Supra note 27

38 347 U.S. 483 (1954)

39 347 US 483 496.

40 347 US 483 497.


The structural interdict is very flexible because it allows for the revisiting of the remedy without having to institute fresh litigation and also allows for accommodation of changed circumstances thereof.\(^{43}\) Therefore, by stating the terms generally at the commencement of the process is to ensure that the parties have the requisite space to reach a satisfactory agreement. In this sense, therefore, flexibility in development of the SI promotes continued negotiation between the parties and other stakeholders.

### 3.1.2 Retention of jurisdiction

The courts have disregarded the traditional *functus officio* doctrine, which requires that, once a court has made a final determination of a matter, its jurisdiction over the case ceases and the case is closed.

Retention of jurisdiction by the court helps in two ways: first, it enables a party who is dissatisfied with the implementation process to seek court assistance without incurring multiple costs and second, it enables the parties to seek clarity on any issue in respect of the order.

In the Canadian case *Société des Acadiens* case, the Court made a general declaration and initially declined to assume a supervisory role because it was convinced that the defendant would comply in good faith. However, because of the general nature of the order, the Court decided to retain jurisdiction. As it turned out, the defendants were in fact the first to make use of this jurisdiction when they sought clarity on the nature of their obligations.

### 3.1.3 Participation

This is one of the cardinal principles of structural interdict. In issuing this order, Courts must ensure that those affected by the litigation participate in the remedy formulation process. However, remedial process should not be diluted by participation to the extent that reasoned decision making is lost.\(^{44}\)

### 3.2. Process in Issuance of Structural Interdicts

Iain Currie and Johan de Waal have isolated five elements common to structural interdicts.\(^{45}\) It is important to note that even though the highlighted process deals

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\(^{43}\) Supra Note 40 at 182

\(^{44}\) Supra Note 40 at 190

exclusively with government, it may also be adopted in contexts where there are private bodies exercising public functions such as public schools.

The first step is issuance of a declaration by the Court identifying how the government has infringed an individual or group’s constitutional rights or otherwise failed to comply with its constitutional obligations. Second, the court mandates government compliance with constitutional responsibilities. Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a preset date. This report, which should explicate the government’s action plan for remedying the challenged violations, gives “the responsible state agency . . . the opportunity to choose the means of compliance” with the constitutional rights in question, rather than the court itself developing or dictating a solution.

The submitted plan is typically expected “to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached.” Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations.

This stage of a structural interdict may involve multiple government presentations depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. After court approval, a final order (integrating the government plan and any court-ordered amendments) is issued.46

3.3. Models of Structural Interdicts47

Courts have used various forms of structural interdict in many of their decisions. The most common models are:

- **Bargaining Model**- This involves making remedial decisions through negotiation by the parties involved in the case. However, a major deficiency of this model is that it compromises the norm of participation because there is never

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46 Supra Note 44 at p 218
47 Supra Note 40 at p 183
any guarantee that the full range of people with a stake in the case will be included in the negotiations.

- **Legislative/Administrative Hearing Model**- this provides for public hearings and direct informal participation by interested parties. This allows for interested parties to participate in the formulation of the remedy.

In *Pennsylvania Association for Retarded Children (PARC) v Pennsylvania*\(^\text{48}\), the judge ordered extensive informal public hearings and established an advisory committee composed of representatives of the various groups with stake in the case to advice on an appropriate remedy.

- **Expert Remedial Formulation Model**-This involves appointment of experts with a mandate to develop a remedial plan. It is relevant where specialized skills are required to formulate an appropriate remedy. The Court may foster participation by making consultation part of the expert’s mandate or afford an opportunity for the parties to express their dissatisfaction.

- **Report Back to Court Model**- This requires the defendant to report back to Court with a plan on how he/she intends to remedy the violation. The other party is given an opportunity to comment on the plan.

- **Consensual Remedial Formulation Model**- the objective of this model is to seek a consensus. It is more readily opened to third party participants hence ensuring that all stakeholders are catered for. In *Odinga Mamba & others v Minister of Social Development & others*\(^\text{49}\), in a case involving resistance to closure of camps where victims of xenophobic attacks lived, the Court ordered that parties engage each other with a view to getting to an amicable settlement.

### 3.4. Case Examples of Use of Structural Interdict

Originally, structural interdicts have been used to enforce second generation rights, that is economic, social and to a lesser extent, cultural rights.

\(^{48}\) 343 F. Supp 279 (1972)

\(^{49}\) CCT 65/08
The Constitutional Court in South Africa first acknowledged structural interdicts as a valid remedy in 1998, in *Minister of Health & Others v Treatment Action Campaign & Others*[^50] when it held that litigants seeking either a declaratory or mandatory order to vindicate a constitutional right could also obtain a court order that the government body in question “take appropriate steps as soon as possible to eliminate the rights violation and to report back to the Court in question.”

The South African High Courts and Supreme Court of Appeal have since gradually increased their use of structural interdicts. High Courts have used structural interdicts in cases involving prisoners’ rights[^51] and welfare benefits[^52]. Gradually, The High Court started issuing structural interdicts in cases involving civil and political rights such as in *S v Z & 23 Similar Cases* 2004[^53] which involved rights accorded to juvenile offenders.

Similarly, in *August & another v Electoral Commission & Others*,[^54] the Court found the Electoral Commission had violated South African prisoners’ right to vote. Conceding the Court lacked the institutional competence to rectify the constitutional wrong, Judge Albie Sachs directed the Electoral Commission to do so itself, requiring the Commission “to furnish an affidavit setting out the manner in which the order will be complied with” within two weeks.[^55]

The structural interdict was also issued in *Sibiya & Others v Director of Public Prosecution, Johannesburg & Others (Sibiya 1)*[^56] to allow exercise supervisory jurisdiction over the sentence-conversion process. The *Sibiya* case is important in a number of respects such as to show the extent to which the Constitutional Court is prepared to ensure compliance with its orders in the face of lackadaisical conduct.[^57]

[^50]: No.1 (CCT9/02) [2002] ZACC
[^51]: *Strydom v Minister of Corrective Services & Others* 1999 (3) BCLR 342 (W) ¶ 23, 1998
[^52]: *Ngxuza & Others v Permanent Secretary, Dep’t of Welfare, E. Cape, & Another* (1) SACR 400 (E) at 416-19 (S. Afr.)
[^53]: 1999 (3) SA 1 (CC) (S. Africa)
[^55]: Supra Note 40 at p 205
Some South Africans have sharply criticized the Constitutional Court’s hesitance to award structural interdicts. Dennis Davis, for instance, argues that by failing to issue structural interdicts:

“[t]he Court has, in effect, surrendered its power of sanction of government inertia and, as a direct result, litigants have not obtained the shelter or drugs that even a cursory reading of [the Constitutional Court decisions in Grootboom and TAC (No2)] promised in so clear a fashion.”

The Structural Interdict is not without limitations: opponents argue that separation of powers is greatly hampered through the court’s disregard of functus officio and its inability to put the victims in the position they would have been due to its prospective nature.

However, these disadvantages are offset by the advantages afforded by this remedy such as flexibility, participation and it accords legitimacy to the process.

**Religious Freedom and Structural Interdict: Possible Solutions**

The author is of the view that the best model to be adopted in application of the structural interdict is the Consensual-Remedial Formulation Model where not only the parties shall be considered but also other third party stakeholders. This shall prevent a legitimacy and compliance challenge once the consensus-reached order is made by the Court of law.

Some possible solutions that can be met under this model include:

- The religious clothing must correspond to the uniform, for example, in the Kenya High School case, where the uniform is primarily grey, Muslim students may be implored to wear grey hijabs while Akorino students ought to be encouraged to adorn turbans which match with the uniform.
- Additional religious items such as rosaries, purity rings and holy beads must be concealed so as to abide with the equality purpose of the school.

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• Students who profess Seventh Day Adventists may be compelled to attend classes on Sundays.

4 CONCLUSION

There is no doubt, therefore, that structural interdict is by far the best remedy to employ in enforcement of freedom of religion especially in institutionalized frameworks such as the workplace and school set-up where systematic violations of the right may occur.

However, for this remedy to be fully operational, the Courts must be wary of its limitations, and in particular its parallel nature with the doctrine of separation of powers.
The merged African Court of Justice and Human Rights (ACJ&HR) as a better criminal justice system than the ICC: Are we Finding African Solution to African problems or creating African problems without solutions?

* Mbori Otieno H.*

1. Introduction
A completely new creature unprecedented before in international law is emerging in Africa. The African Court of Justice and Human Rights (ACJHR) (herein after referred to as the Merged Court) will also have a criminal chamber to try international crimes. The mandate of the court will be tripartite and this article seeks to analyze this latest facet; the introduction of an international criminal chamber.

Expansion of the jurisdiction of the ACJHR will see the merger of state-level and individual-level criminal accountability mechanism for human rights violations on an international scale. The infraction between the African Union (AU) and the International Criminal Court (ICC), was arguably warranted by the latter’s issuance of arrest warrants against sitting African heads of state and senior government officials. These developments induced the AU to take ‘retaliatory’

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measures which culminated in conferring international criminal jurisdiction on its court.\textsuperscript{4}

This article seeks to answer three interrelated research questions: First, what effect will the extension of the jurisdiction of the Merged Court have on international criminal justice in Africa?, second, will the Merged Court with jurisdiction on international crimes offer an alternative to the already discredited International Criminal Court (ICC) in Africa? and lastly is the African Union capable of financing a court with a three pronged mandate that includes international crimes? This article makes a general contribution to the debate on whether Africa can offer African solutions to African problems. It specifically focuses on the international crimes mandate that has been introduced under the African Court of Justice and Human Rights. The first part of this article focuses on the origins of the idea on the African system having an international crimes court. The second part focuses on the international crimes chamber of the African court its jurisdiction, composition and structure. The third part of this article focuses on the Draft Merged court and its amendments and whether the protocol will be adopted and ratified. The article then concludes that Africa might not be ready for the extension of jurisdiction of the Merged court to try international crimes as this stance will take away the gains already made in the African Human rights scene.

2. The origins of extending the jurisdiction of the African Court of Justice and Human Rights
The African Union (AU) is determined to establish a criminal chamber within the inactive structure of the African Court of Justice and Human Rights (hereinafter the merged court).\textsuperscript{5} In its summit held in Addis Ababa in February 2009, the AU Assembly took decision Assembly/AU/Dec. 292 (XV).\textsuperscript{6} It requested the African Union Commission (AU Commission), in consultation with the African Commission on Human and Peoples’ Rights (the African Commission) to assess

\textsuperscript{6} Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/606 (XVII).
the implications of recognizing the jurisdiction of the African Court to try international crimes.

In its decision (Assembly/AU/Dec. 292 (XV))\(^7\) of July 2010 the AU Assembly requested the African Union Commission (AU Commission) to finalize the study on the implications of extending the jurisdiction of the African Court to cover international crimes, and to submit, through the Executive Council, a report thereon to the regular session of the AU Assembly scheduled for January 2011. To implement the AU decisions stated above, the AU Commission engaged consultants to examine the implications of extending the jurisdiction of the African Court to international crimes. The consultants were to draft a Protocol for the establishment of the Criminal Chamber within the African Court. The consultants led by Mr. Donald Deya of the Pan African Lawyers Union (PALU) completed their study and submitted it to the AU Commission. Annexed to the study was the Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.\(^8\) In August 2010 and 8-12 November 2010, the AU Commission organized two workshops at Midrand, South Africa, to validate the findings of the study.\(^9\)

In its summit of 30 June to 1 July 2011 held at Malabo, Equatorial Guinea, the AU Assembly adopted decision (Assembly/AU/Dec. 366 (XVII)).\(^10\) In this decision, the Assembly requested the AU Commission to actively pursue the implementation of the AU Assembly decisions on the African Court being empowered to try serious international crimes committed on African soil and report to the AU Assembly.

In May 2012, the African Union ‘Government Experts and Ministers of Justice/Attorneys General on Legal Matters’ adopted the AU- Final Court Protocol- As adopted by the ministers 17 May 2012.\(^11\) In January 2013, the Summit of the Assembly of African Heads of State did not adopt the Draft protocol. It made recommendations that the AU Commission should further

\(^7\) Ibid.
\(^9\) Chacha Bhoke Murungu (n 5), at 1068.
\(^10\) Decision on the Implementation of the Assembly Decision on the International Criminal Court (Doc. EX.CL/670 (XIX).
consider the meaning of ‘popular uprisings’, which was excluded from the jurisdiction of the court. The Assembly also asked the Commission to report on the financial and structural implication of extending the court’s jurisdiction to international crimes.\footnote{Ademola Abass (n 4), at 29.}

The consultants from Pan African Lawyers Union (PALU) in collaboration with the African Commission have organized a number of meetings with stakeholders, including the existing African Court on Human and Peoples’ Rights (ACHR) to consider the Draft protocol. In December 2013, the African Commission organized a brainstorming meeting of experts in Arusha, Tanzania, to discuss the pending issues which includes the definition of the crime of “unconstitutional change of government” (UCG), and the financial implication of extending the jurisdiction of the court.\footnote{Journalist for Justice, ‘Briefing note on the Extension of the Jurisdiction of the African Court on Human Rights and People’s Rights to deal with criminal matters’ (2014) at <http://www.jfjustice.net/briefing-note-on-the-extension-of-the-jurisdiction-of-the-african-court-on-human-and-peoples-rights-to-deal-with-criminal-matters/> (accessed 10 April 2014).}

The AU Assembly will be bent towards adopting the Draft protocol due to the recent developments in the continent. The trials of the Kenyan head of state Hon Uhuru Kenyatta and his deputy Hon William Samoei Ruto will have a strong bearing on this question. It is therefore plausible to speculate that the Assembly will adopt the Draft Protocol.

3. **Prelude to the criminal chamber in the African court**

Arguably, there is one major factor that led to the establishment of the Criminal Chamber within the African Court. This is the flimsy reason that Africans were being tried in foreign imperialistic courts for international crimes. This was being done either by domestic courts of some European states, especially France, the UK, Spain and Belgium, or the International Criminal Court (ICC).\footnote{Chacha Bhoke Murungu, (n 5), at 1068.}

**Long term and immediate factors for the establishment of the criminal chamber**

The long term factors include the indictment of African state officials before the domestic courts of Europe, the ICC and the International Court of Justice (ICJ) which all involve African state officials.
Former Libyan president, Muammar Qaddafi was indicted in France for torture and conspiracy to commit torture and terrorist acts. The court of Cessation of France ironically rendered its judgment in favour of Qaddafi.\(^{15}\) The former Mauritanian President Maouya Ould Sid’Ahmed Taya was also indicted in France in 2005.\(^{16}\) Rwandan state officials have also indictments in relation to international crimes committed in Rwanda in 1994. In 2007, a French judge, Jean-Louis Bruguierre, indicted Rwandan state and military officials for their alleged roles in the 1994 Rwandan genocide.\(^{17}\) In early 2009, a court in Paris issued indictments against five serving heads African states alleging corruption. The five included: Denis Sassou Nguesso of Congo, Obiang Nguema of Equatorial Guinea, Omar Bongo of Gabon, Blaise Compaore of Burkina Faso and Eduardo Dos Santos of Angola.\(^{18}\)

The immediate cause is arguably relates to criminal proceedings against the sitting head of Sudan, Omar Al-Bashir, the sitting head of state in Kenya Uhuru Kenyatta and his deputy William Samoei Ruto. Following these indictments the African Union (AU) reacted and decided, first, not to co-operate with the ICC, second to initiate steps towards establishment of a criminal chamber in the African Court and lastly petition the United Nations Security Council (SC) for deferral of the cases against the Kenyan officials.

On 15 November 2013 The United Nations Security Council (UNSC) voted against the request by Kenyan leaders seeking deferral of their cases for one (1) year.\(^ {19}\) Seven (7) Council members voted in favour of the request while none voted against with eight (8) members abstaining.\(^ {20}\) Kenya called this stance n

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15 SOS Attentats et Beatrice Castelnau d’Esnault c. Gadafi, 125 International Law Reports 490, 508, 13 March 2001
16 International Federation of Human Rights Defenders (FIDH) and Others v. Ould Dah, 8 July 2002, Court of Appeal of Nimes, 1 July 2005 (Nimes Assize Court, France).
17 See Chacha Bhoke Murungu, (n 5), at1069.
18 Ibid.
20 Azerbaijan, Morocco, Pakistan, Russian Federation, Rwanda and Togo voted in favour. Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom and United States abstained.
“humiliation for Africa” and that the outcome highlighted the need for reform of the UNSC.21

4. The International Criminal Law Chamber of The African Court
The African Court of Justice and Human Rights will have an international crimes chamber. This chamber will be specifically dedicated to the prosecution of individuals with the highest criminal responsibility on international crimes committed on African soil. This part considers the Draft Protocol on the merged court as amended to introduce a criminal chamber.

General Matters
Article 1 of the Draft Protocol on the African Court of Justice and Human and Peoples’ Rights22 refers to the Court, which is conferred with international criminal jurisdiction, as ‘the African Court of Justice and Human and Peoples’ Rights. The word “peoples’” has been introduced on the previous name African Court of Justice and Human Rights. This inclusion is important. Art 2 of the “Merger Protocol” applied to the court a nomenclature that dispensed with the word “people” giving the impression that the merged court would only deal with “human” rights. The inclusion of “peoples’” was an ingenious feature of the African Charter on Human and Peoples’ Rights, which forms the basis of the human rights jurisdiction of the court.

This anomaly dealt with, the next problem is on whether the court’s international crimes jurisdiction should be captured in its name to give a real picture of its character. In describing the court as a ‘Court of justice and Human and Peoples’ Rights’ the provision obviates the international criminal jurisdiction of the court.23 Ademola suggests that the name of the court should ideally be ‘the African Court of Justice, Human and Peoples’ Rights and International Crimes.’24 This name is obviously something of a mouthful and shortening it risks denying it its real character. A shorter version would be the African Criminal, Justice, Human and Peoples’ Rights Court.

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23 Ademola Abass (n 4), 32.

24 Ibid.
Jurisdiction
Article 3 of the Draft Protocol confers the African Court; “with original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the statute annexed hereto.

Judicial jurisdiction refers to the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.25 The International Criminal Court (ICC) has jurisdiction over the most serious crimes of concern to the international community as a whole.26 These crimes are genocide, war crimes, crimes against humanity and the crime of aggression.27

The African Court will have jurisdiction over similar crimes but some other crimes have also been introduced. Article 28A of the Draft Protocol provides that the International Criminal Law Section of the Court shall have power to try persons for the following crimes: Genocide, Crimes against Humanity, War Crimes, The Crime of Unconstitutional Change of Government (UCG), Piracy, Terrorism, Mercenarism, Corruption, Money Laundering, Trafficking in Persons, Trafficking in Drugs, Trafficking in Hazardous Wastes, Illicit Exploitation of Natural Resources and the Crime of Aggression.28 These crimes are further elucidated under the draft protocol.29

The ICC has jurisdiction over individual natural persons. These individuals are individually responsible and liable for punishment under the statute. These includes those directly responsible for committing the crimes as well as others who may be liable for the crimes, for example by aiding, abetting or otherwise assisting in the commission of a crime so long as they bear the highest responsibility in the commission of the said crimes. The latter group also includes military commanders or other superiors whose responsibility is defined in the Statute.30 The Draft African Court Protocol in art 28N also provides that offences are committed by any person who in relation to any of the crimes or

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27 Ibid.
28 Draft Protocol on the African Court of Justice and Human and Peoples’ Rights, (n 14), art 28A.
offences provided incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the statute. Paragraph II and III of article 28N provides aiders, abettors and accessories are to be held culpable under the protocol.

Article 46B of the Draft Protocol provides for individual criminal responsibility. Interestingly paragraph 2 of this article provides that the official position of any accused person, whether as Head of State or Government, Minister or as a responsible government official shall not relieve them of criminal responsibility nor mitigate punishment. The move by President Uhuru Kenyatta and his deputy William Samoei Ruto to petition for immunity as sitting heads of state and government official throws cold water on this provision.

The ICC was created with the consent of the states who themselves will be subject to its jurisdiction. The African Court of Justice and Human Rights is also being created by willing African states with a strong leaning towards ensuring African solutions to African problems. The states will have agreed that it is crimes committed on their territory, or by their nationals, that may be prosecuted.31

The ICC just like other international tribunals has power to determine its own jurisdiction (its compétence de la compétence).32 Art 19 (1) of the statute provides that “the court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with art. 17.” It is a well-established principle that the International Court of Justice (ICJ) for instance has the right to determine its own jurisdiction. The ICC has in principle applied this principle on satisfying or justifying its jurisdiction in the Decision on the Prosecutor’s application for summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussiein Ali33 and in the Decision pursuant to article 61(7) (a) and

33 Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-1, para. 9.
(b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo.\(^{34}\)

**Admissibility: a court of “last resort” or a “court of first recourse?”**

The Rome statute distinguishes matters of jurisdiction and admissibility. Jurisdiction as per the Rome statute refers to the legal parameters of the court’s operation in terms of subject matter (jurisdiction *ratione materiae*), time (jurisdiction *ratione temporis*) and space (jurisdiction *ratione loci*) as well as over individuals (jurisdiction *ratione personae*).\(^{35}\) The question of admissibility on the other hand arises on a later stage, and seeks to establish whether matters over which the court properly has jurisdiction should be litigated before it.\(^{36}\)

To a large extent matters of jurisdiction are questions of whether the court should consider a situation in which a crime has been committed, whereas admissibility is concerned with the process of identification of “case”.\(^{37}\) The Draft Protocol of African Court also captures issues of admissibility in article 46H. The jurisdiction of the court is stated to be complimentary to that of the National Courts and courts of the Regional Economic Communities (RECs) where specifically provided by the communities. The court adheres to the principle of inability and unwillingness at national level.

International criminal tribunal statutes usually perform a balancing act between such courts and national courts of State parties. The principle of complementarity, which usually embodies this relationship, is recognised in article 17 of the Rome Statute. The underlying policy reason is to ensure that international tribunals remain essentially courts of “last resort.” Article 17 of the Rome Statute states that a case shall be inadmissible by the ICC except where, *inter alia* the decision of a state that has jurisdiction is based on a “unwillingness or inability… to genuinely prosecute.” Article 46(2) (b) of the Draft Protocol reflects this sentiment by providing for inadmissibility except where “the decision resulted from the unwillingness or inability of the state to prosecute.”

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\(^{34}\) Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 24.

\(^{35}\) Prosecutor v. Thomas Lubanga Dyilo, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, ICC-01/04-01/06-772.

\(^{36}\) Williams A Schabas (n 31), 68.

The Draft protocol omits the word *genuinely.* This will have the effect of lowering the evidentiary standard of “inability to prosecute.” This has the potential of opening floodgates for opportunistic states which will effectively turn the court to a court of “first recourse.”\(^{38}\)

**Structure and Administration of the Court**

The Draft Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereinafter Draft Protocol) amends art 2 of the Protocol on the Statute of the African Court of Justice and Human Rights (hereinafter African Court protocol) to include the following as the organs of the Court:

(a). The Presidency
(b). The Office of the Prosecutor;
(c). The Registry

Article 16 of the Statute of the court, which previously referred to the ‘Structure of the Court’, has now been amended to read ‘Sections of the court’, and provides that;

(1) The Court shall have three (3) Sections: A General Affairs Section. A Human and Peoples’ Rights Section and an International Criminal Law Section;
(2) The International Criminal Law Section of the Court shall have three (3) Chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.
(3) The allocation of judges to the respective Sections and Chambers shall be determined by the Court in its Rules.’

This inclusion is in tandem with the extension of the mandate of the court to include international criminal justice. The International Criminal Court (ICC) is composed of the following organs:

(a). The Presidency
(b). The Appeals Division, a Trial Division and a Pre-Trial Division
(c). The Office of the Prosecutor
(d). The registry\(^{39}\)

There are striking similarities between the two entities. While the ICC has more organs than the African Court of Justice and Human Rights, this deficiency is covered in article 16 of the statute by the International Criminal Law sections of

\(^{38}\) Ademola Abass (n 4), 44.

\(^{39}\) The Rome Statute (n 26), art 34.
the court having three (3) chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber. It almost feels as the drafters of the Draft Protocol were using the Rome Statute as a reference script.

**The composition of the court**
The Court will consist of sixteen (16) judges who are nationals of state parties. The judges are appointed upon recommendation of the court and the Assembly may, review the number of judges. The court shall not, at any one time, have more than one judge from a single member state. Just like in the former African Court of Justice, the court does not adhere to the principle of one member state, one judge. The International Criminal Court (ICC) applies the same principle by providing for eighteen (18) judges. The eighteen judges of the court are elected by the Assembly of state Parties, whom three make up the Presidency.

The ICC Statute just like the African Court of Justice and Human Rights stipulates that there be only one judge of with one nationality at any given time. Art 34 (5) of the Rome Statute requires that the judges be of “high moral character, impartiality and integrity” a phraseology that is rather typical of international instruments. Surprisingly the Protocol to the statute of the African Court of Justice and Human Rights does not have such phraseology. This anomaly is corrected by the Draft Protocol in article 3 on amendments requiring that the court be composed of impartial and independent judges elected from persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults or recognized competence and experience in international law, international human rights law, international humanitarian law or international criminal law.

The ICC judges have to be qualified for appointment to the highest judicial offices in their respective states. The judges are to have excellent knowledge of and be fluent in at last one of the working languages of the court, namely,

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41 Ibid.
42 The Rome Statute (n 26), art 34.
44 Statute of the International Court of Justice, art 2.
45 Rome Statute (n 26), art 36 (3).
English or French. Article 32 of the African Court protocol requires that the official languages of the court be the official languages of the African Union (AU). The official languages of the African Union and all its institutions shall be Arabic, English, French, Portuguese, Spanish, Kiswahili and any other African language. The sheer number of the languages that can be used in the court is worrying. The issue of whether all these languages have to be represented is also not settled in the African Court statute.

The Rome Statute also stipulates the degree of expertise in the subject matter of the court. It creates two categories of candidates, those with criminal law experience and those with international law experience. Specific reference is made to international humanitarian law and human rights law. This is similar to the provisions on the Draft Protocol of the African court that introduces amendments. The Protocol on the statute of the African Court of Justice just like the Rome statute require that state parties take into account the need to ensure representation of the principal legal systems of the world or in case of Africa equitable geographic representation.

Procedure for election of judges

Article 6 of the African Court Protocol provides that for the purpose of election, the chairperson of the African Commission shall establish two alphabetical lists of candidates. List A contains the names of candidates having recognized competence and experience in international law and List B contains the names of candidates possessing recognized competence and experience in Human Rights Law. At the first election eight (8) Judges shall be elected from amongst the candidates of list A and eight (8) from among the candidates of list B. The election shall be organized in a way as to maintain the same proportion of judges elected on the two lists. The Chairperson of the African Commission is charged with the mandate of communicating the two lists to member states, at least thirty (30) days before the ordinary Session of the Assembly or of the Council, during which elections shall take place. The ICC follows somewhat similar procedure in article 36 (5).

47 Ibid, art 35 (3) (b) (ii).
48 Rome Statute, art 8 (a), (j), (ii) and (ii), Protocol on the Statute of the African Court of Justice and Human Rights, chapter II, art 4.
Article 7 of the Protocol provides that the judges shall be elected by the Executive Council, and appointed by the Assembly. The election is through secret ballot by two-thirds majority of the member state with voting rights, from among the candidate provided for in article 6. Candidates who obtain the two-thirds majority and the highest number of votes shall be elected. However, if several rounds of election are required, the candidates with the least number of votes shall withdraw. The Rome Statute requires that individual candidates garner a two-thirds majority of States Parties present votes. In order to obtain an equitable geographic representation, it was agreed that each state would be required to vote for at least three candidates from five UN regions, namely Africa, Asia, Eastern Europe, Latin America and Caribbean and the ‘Western Europe and others’. In the election of judges the Assembly is required to ensure equitable gender representation.

**Eligibility to submit cases to the au court-competencies**

Article 29 of the African Court Protocol provides for the entities that are entitled to submit case before the court. They include:

(a). State parties to the protocol
(b). The Assembly, the parliament and other organs of the Union authorized by the assembly
(c). A staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.

Article 30 provides for other entities that may be able to submit cases before the court. These include entities whose rights have been guaranteed by the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the state parties concerned. They include:

(a). State parties to the present Protocol;
(b). the African Commission on Human and Peoples’ Rights;
(c). the African Committee of Experts on the Rights and welfare of the Child;
(d). African intergovernmental Organizations accredited to the Union or its organs;
(e). African National Human Rights Institutions;
(f) Individuals or relevant Non-Governmental Organizations accredited to the African Union or its organs, subject to the provisions of article 8 of the Protocol.

The Draft Protocol amends article 29 by including “the Peace and Security Council” and includes paragraph (d) as the office of the Prosecutor. The Draft protocol replaces paragraph (f) of the African court statute with African individuals or African Non-Governmental Organizations with observer status with the African union or its organs or institutions, but only with regard to a state that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. The Court shall not receive any case or application involving a State Party which has not made Declaration in accordance with article 8(3) of the Protocol. Article 8(3) requires that any member states that would allow NGOs and individuals should make a declaration and the said article.

**Applicable law**

Article 31 of the African Court Protocol states that the applicable law before the court shall be:

(a) The Constitutive Act;
(b) International treaties, whether general or particular, ratified by the contesting States
(c) International custom, as evidence of general practice accepted as law
(d) The general principles of law recognized universally or by African States
(e) Subject to the provisions of paragraph 1, of Article 46 of the present Statute, judicial decisions and writings of the most highly qualified publicists of various nations well as the regulations, directives and decisions of the Union, as subsidiary means for the determination of the rules of law;
(f) Any other law relevant to the determination of the case.

Paragraph 2 of the same article provides that the article shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The Draft Protocol does not introduce any changes to this article. The article has great similarities to article 38 of the ICJ Statute on sources of law.
4. **Will the draft protocol be adopted and ratified?**

African states are notoriously quick to adopt treaties, but excruciatingly slow to ratify them.\(^4^9\) Two factors have influenced this situation. First the subject-matter of the treaty, second, the perception that certain treaties threaten sovereignty. These factors will be considered in turn. The African Union Convention on Preventing and Combating Corruption (AUCPCC) was adopted in 2003 and entered into force on 5 August 2006.\(^5^0\)

**Source of a treaty**

Practice of African states over the past three decades reveals that treaties that emanate from the UN stand a better chance of ratification than those from Africa. This is the case even when both treaties address the same issue and the African one is adopted first. African Union Convention on Preventing and Combating Corruption (AUCPCC) was adopted in 2003 and entered into force on 5 August 2006.\(^5^1\) By 2013, the total number of ratifications stands at 33 or roughly 60% of the total AU membership, nine years after adoption of the Convention.

In comparison, the United Nations Convention against Corruption (UNAC) was adopted on 31 October 2003, only three months after the adoption of the AUCPCC, and entered into force on 14 December 2005, eight (8) months before the AU Convention entered into force. By 2013, 48 AU member states had ratified the UNCAC as opposed to 33 that have ratified the AUCPCC.\(^5^2\) Even for countries that have ratified both conventions, the time lapse between the ratifications show that the UNAC was ratified more rapidly.

Another classic example is the United Nations Convention on the Rights of the Child, adopted on 20 November 1989 and entered into force on 2 September 1990. This was after ten (10) months of its adoption. It is regarded as one of the most successful treaties of all time.\(^5^3\) All Africa states except Somalia and the

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\(^5^1\) Ademola Abass (n 4), 38.

\(^5^2\) See List of Countries, which have signed, ratified/acceded to the AUCPCC, available at <www.au.int/en/sites/default/files/corruption.pdf> (accessed 15 April 2014).

Sahrawi Arab Republic are parties to the Convention. The African Charter on the Rights and Welfare of the Child was adopted on 11 July 1990. It entered into force on 29 November 1999, more than nine years after its adoption.

Based on the above stated examples, the adoption ad ratification of the draft protocol will have some time lapse before adoption as it emanates for the AU.

**Subject-matter of a treaty**

As a general rule, a state is more likely to ratify a treaty if the treaty embodies a positive norm or represents a value subscribed to by many states. The near universal ratification of the UN Convention on the Rights of the Child show that issues concerning children resonate with a vast majority of states. Prosecution of international crimes encapsulates the aspiration of many African states and should, as a matter of fact inspire quick and wide ratification. The Protocol however suffers the deficiency of criminalizing corruption and unconstitutional changes of government, offences whose prosecution African leaders are unlikely to enthusiastically embrace.

5. **Treaties that ‘threaten’ the sovereignty of African states**

Every treaty inevitably relinquishes a states’ sovereignty for the collective good of the treaty. African states have claimed that the Rome Statute violates their sovereignty because it authorizes the prosecution of African leaders in The Hague. This claim flies on the face of voluntary signing and ratification of the treaty. The question that the AU has failed to consider is why African states will sign such a treaty only to have their leaders facing similar accusation at the regional court.

Ademola however argues that the Draft Protocol has a very low probability of ratification and if ratified, the court international criminal jurisdiction will be dead on arrival. Despite African states’ willingness to have the perpetrators of human rights violations held accountable, most heads of state are still not ready

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57 Ademola Abass (n 4), at 39.
58 Ibid, 42.
to be subjected to the same courts whose judges are appointed by those heads of state and who, in most cases are beneficiaries of the state.

6. **Can an unratified treaty be amended?**

The Draft protocol which forms the bulk of this part, purports to amend the Protocol on the Statute of the African Court of Justice, Human and Peoples’ Rights that is the 2008 Protocol that merged the African Court of Human and Peoples’ Rights (1998) and the African Court of Justice. The protocol had not yet entered into force at the time the Draft amendments were proposed. As of 31 January 2014, only five AU States had ratified the protocol.\(^{59}\) The question then arises, ‘Can a protocol which has not been ratified be amended?’

Amendments are permissible only to international legal instruments that have already entered into force.\(^ {60}\) The Vienna Convention on the law of treaties contemplates amendments for treaties that have already entered into force.\(^ {61}\) The rationale is that amendments are warranted by the operationalization of a treaty. Amendments serve to reduce, increase, expedite or slow down the obligations of its State parties. It is necessary that amendments to already ratified treaties be accepted or ratified by all State parties to a treaty.\(^ {62}\) There are many instances where states accept unratified amendments. These are referred to as “tacit amendments.” These are however different from “amending unratified treaties.”\(^ {63}\) Amending unratified treaties denotes the attempt to amend a treaty which in itself, has not entered into force.

The danger of the AU undertaking such an endeavor is that states that have already ratified that treaty may renegade. In context the three states that had already the ratified the Merged Court Protocol before the amendments may withdraw from the treaty. This is more so since the AU did not consult its member states before proposing the amendments.

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\(^ {59}\) List of Countries which have signed, Ratified/Acceded to the protocol on the Statute of the African Court of Justice and Human Rights <http://www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR_0.pdf> accessed on 17 February 2013).

\(^ {60}\) Ademola Abass (n 4), at 45.


\(^ {62}\) Ibid, art 39.

7. **Recommendations on the formation of the merged court**

There have been all kinds of suspicions on the motives behind the merger and extension of the jurisdiction of the African Court of Justice and Human Rights to cover international crimes. Proposals for the restructuring of the African disputes and human rights institution begun with proposals by former Nigerian president and chairperson of the Assembly of the AU Olesegun Obasanjo. In 2004 Obasanjo urged the AU to guard against the “danger of proliferation of organs of the organization.”

The extension of the merged courts’ jurisdiction has faced numerous obstacles, both legal and practical. The Coalition for the Effective African Court on Human and Peoples’ Rights (CEAC) focuses on the obstacles the court will face. The obstacles identified include the absence of:

(a). an instrument creating crimes within the jurisdiction of such a court, enumerating the elements of crimes within the scope of the court and punishment for them and establishing the procedure for proceedings with respect to such crimes. This however has been partly handled by the Draft Protocol;

(b). a regional system of enforcement and co-operation in criminal matters;

(c). a permanent continental court or tribunal;

(d). a clear regional norm of compliance with judicial decisions; and

(e). any assurance that there can be agreement on any or all of the issues above.

This part will offer recommendations on the Merged African Court of Justice and Human Rights and its extension of its jurisdiction to international crimes. The recommendations will be two pronged; firstly the establishment of two separate

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66 Coalition for the Effective African Court on Human and Peoples’ Rights (CEAC), ‘Implications of the African Court of Human and Peoples’ Rights being empowered to try international crimes such as genocide, crimes against humanity, and war crimes-an opinion’ (2009) CEAC, Darfur Consortium; EALS, ICLC, OSJI, PALU, SALC WABA
courts is suggested and secondly in case the AU has already kissed the horse and it cannot move back, recommendation will be made on how to improve the current system. Lastly the chapter will make a conclusion to the study.

8. **A way out: a separate court for International criminal justice**

This article supports Prof Viljoen’s suggestion that whatever the arguments for or against an African court with jurisdiction over international crimes, such jurisdiction should vest in a separate judicial entity, distinct from the two sections that are foreseen under the Merged Court Protocol. This article suggests having two separate courts. The Draft Protocol with amendments has not yet entered into force and African states still have a chance to retrace their steps.

The establishment of an African Court with international crimes jurisdiction has the potential of being a setback to existing human rights protection. The problems discussed above can be avoided only if the African Human Rights Court, or the future African Court of Justice and Human Rights, is allowed to exist or be established independently from any judicial institution dedicated to criminal justice.

Such an approach would also avoid the legal hiccups on which the Amended Merged Court Protocol seems to be built. The question may be posed how a Protocol that is not yet in force can be amended. This technical complexity can be dodged if the merged Court (consisting of two sections) and the African Criminal Court are treated as separate structures, each with its own distinct legal basis. One of the main reasons why the Amending Merged Protocol is such a maze of complexity is the fact that it amends a treaty that is yet to come into legal being.71

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68 Ibid.
70 Ademola Abass, (n 4) at 35.
71 Frans Viljoen, AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol, (n 64).
9. African states should take lead in prosecuting international crimes rather than diluting the mandate of an over-stretched regional court\(^72\)

Lamony argues that the problem of the AU when it comes to international criminal justice is its conflicting view on the interactions between peace and security.\(^73\) While the AU sees international criminal justice as impediment to peace, and the two mutually exclusive, the ICC meanwhile stands for justice for victims irrespective of the situation.

The Rome Statute of the International Criminal Court was adopted at a diplomatic Conference in Rome on 17 July 1998 and came into 1 July 2002. On 14 January 1999 Senegal was the first African state to ratify the Rome Statute.\(^74\) As of 9 May 2014 122 countries were state parties to the Rome Statute of the International Criminal Court. Out of this thirty four (34) are African states.\(^75\) Africa has the largest number of state parties to the Rome Statute. This number does not however come to bear when it comes to support to the court.\(^76\)

The turbulent relationship between the AU and the ICC started in July 2008 when prosecutor Luis Moreno Ocampo applied for a warrant of arrest for Omar Al-Bashir, the sitting president of the Republic of Sudan. Al-Bashir was charged with committing war crimes, crimes against humanity and the crime of genocide in the Darfur region of South Sudan. The ICC Pre-Trial Chamber I issued the arrest warrant against Al Bashir.\(^77\) Meeting shortly after the decision, the AU

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\(^{73}\) Ibid.


\(^{77}\) *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Situation in Darfur, Sudan, 4 March 2009), No. ICC-02/05-01/09.

In the same communiqué, the PSC requested the UN Security Council to exercise its powers under article 16 of the Rome Statute to defer the indictment and arrest of Al-Bashir. Consequently on 3 July 2009 at its 13\textsuperscript{th} Annual Summit the Assembly of Heads of State and Government held in Sirte, Libya, the AU decided not to cooperate with the ICC in facilitating the arrest of Al-Bashir. This signified the first clash of wills between the AU and the ICC. The ICC is currently implicated in impacting upon the dynamics of peace–building in the countries in which prosecutions are pending or ongoing.\footnote{79 Tim Murithi, \textit{The African Union and the International criminal court: An embattled Relationship?} 8 Policy Brief \textit{Institute for Justice and Reconciliation} (IRC) (2013), 4.} The argument has been that ICC would have the potential to disrupt in-country peace-building initiatives are not appropriately sequenced.

The AU maintained its position on non-cooperation on its 18\textsuperscript{th} Ordinary Session of the Assembly of the Assembly of AU heads of State and Government held in Addis Ababa, Ethiopia on Kenya and Sudan.\footnote{80 AU. Decisions, resolutions and declarations of the Assembly of the Union. Eighteenth Ordinary Session of the Assembly of Heads of State and Government, \textit{Assembly/Au/Dec.397(XVIII)}, 29 to 30 January 2012, Addis Ababa, Ethiopia, para. 8.} Some African governments have raised the contention that the ICC does not apply the law universally yet it is a universal court.\footnote{81 Adam Branch, \textit{Displacing human rights: War and intervention in Northern Uganda}. Oxford: Oxford University Press, (2011), at 213.} This would be true particularly in situations where jurisdiction of the court does not apply to some countries that are actively engaged and operating in African Conflict zones. What would be the recourse for such non-signatory states if individuals from the states were to commit war crimes in Africa? Who would administer justice in such cases? Certainly not the ICC or the UN. This discrepancy underlies the international justice regime and the power politics between Western powers like the USA and Africa.

The question in Africa has been why not Western States, Russia and Chinese leaders? This would essentially be in instances where it is thought that such
leaders have committed the most serious crimes of international concern. The AU has relied on the immunity of State officials arguments in the Kenya, Libya and Sudan cases and there has been a strong perception among African leaders of being targeted.

All this arguments notwithstanding, African has been the leading front for most armed conflicts in the past decade. It would seem reasonable that most ICC cases would be handling situations in Africa. This argument is bolstered by the fact that Southern Sudan which seceded from Sudan on 9 July 2011 making it the newest state in the community of nations is by the time of writing this article sinking into what analysts have characterised genocide.

It remains to be seen whether the relationship between the AU and ICC can be salvaged especially with Kenya taking a leading role in the anti-ICC anthem. Lamony’s position that the African Court of Justice and Human rights even with an international crimes mandate “cannot, and will not offer relief to any of the people currently indicted or under investigation by the ICC” rings true.

10. The alternative: human rights-enhancing changes to the amending merged Court Protocol

If it is so that the train has already left the station, in the sense that there is little political appetite and no space to engage critically with the notion of a tripartite court, a number of concrete suggestions are made as to the improvement, from a human rights point of view, of the Amending Merged Court Protocol.

11. The composition of the Appellate Chamber

The composition and role of the Appellate Chamber should be clarified. Article 10 of the Amending Protocol states the General Affairs Section of the court shall be duly constituted by three (3) judges, the Human and Peoples Rights Section three (3) judges, the Pre-Trial Chamber of the International Criminal Law Section one (1), The Trial Chamber of the International Criminal Law Section one (1) judge and the Appellate Chamber five (5) judges. In providing this clarification,

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84 Frans Viljoen, AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol (n 64).
85 Amending Merged Court Protocol (n 66), art 16.
regard must be had to the fact that the human rights section alone should be competent to hear cases related to human and peoples’ rights as set out in article 7 in the current version of the Statute.\textsuperscript{86} The appellate chamber, consisting of judges without competence in human rights matters specifically, should not be placed in a position in which they may affirm, reverse or revise the decision of the findings of the Human Rights Section of the Court.\textsuperscript{87} As the Protocol stands, the decisions of the Human Rights Section may be overturned by the Appellate Chamber of the International Criminal section. Such a state of affairs would seriously undermine the autonomy of both the human rights section and the General affairs section.

12. The title to the Protocol
The title of the Protocol should at the very least identify the exact, tri-functional nature of the court, and should not merely and deceptively be called ‘African Court of Justice and Human and Peoples’ Rights’.\textsuperscript{88} This amendment to the title may be an appropriate to better represent the nature of the two-section Court (by adding ‘and Peoples’ in line with the African Charter on Human and Peoples’ Rights and the naming of the current Court, the African Court of Human and Peoples’ Rights). However, the addition of a third section makes this name inappropriate, as it does not reflect the essence of the Amended Merged Court: The title should be ‘African Court of Justice, Human and Peoples’ Rights and International Criminal Justice/International Crimes’. An objection that this title is overly long or complicated merely underlines the true nature of the proposed court. A shorter version would be the African Criminal, Justice, Human and Peoples’ Rights Court.

13. Conclusion
The merger of the court and extension of the jurisdiction to cover international crimes is not an entire lose for Africa. It is suggested that the implications for this merger and extension have to be streamlined in order to serve the aspirations and needs of the African people and not only its leaders. An Africa with African solutions is desirable rather than detestable. Africans have had this twisted mentality that everything western is civilized and everything African is crude.

\textsuperscript{86} Ibid.
\textsuperscript{87} Amending Merged Court Protocol (n 66), art 17.
\textsuperscript{88} Ademola Abass, (n 4), at 32; Frans Viljoen, ‘AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol’ (n 64).
and uncivilized. This mentality should be removed by Africans understanding that it is possible to foster an Africa which upholds and respects human rights.
Introduction
Informality is a reality, this phenomenon is particularly worse when it comes to land holding. Urban areas in Kenya continue to witness massive urbanization which is coupled with increased demand for land. For the urban poor, this result to them being forced to move into/establish informal settlements. Informal settlements are thus a common feature in urban areas in Kenya forming an eyesore in these areas. Despite the many initiatives that have been undertaken in these areas, much is to be seen when it comes to the improvement of the lives of the inhabitants of the informal settlements. The government has over the years adopted the approach of formalizing tenure in these areas and also upgrading the housing units occupied by the inhabitants. This approach has however not yielded much as the number of informal settlements continue to increase and the existing informal settlements also continue to expand.

Despite all these challenges, the inhabitants of informal settlements are still able to access land for settlement and also for provision of basic services. Informal land rights delivery mechanisms exist in these areas and these systems are widely acceptable to the inhabitants of these areas. The acceptability of these systems among the inhabitants of these areas largely result from the various social contracts that exist which are used to govern the relations among these inhabitants. The main question which arises is whether there is a need to ensure that the land rights regime in the country is able to take cognizance of these property arrangements arising from the social contracts in these areas and hence ensuring that land is available to all.

Background
Throughout the history of man, land has been viewed as one of the most important resources. Land ownership has been regarded to be critically important for various reasons, key among them, the provision of housing. In urban areas, some of the main land uses include; industrialization; infrastructure

*LL.B IV, University of Nairobi. For a comprehensive look at related concepts propounded by the author in this article, refer to Smith Otieno, ‘Urban Planning: To include or to Exclude?’ (The University of Nairobi LL.B Dissertation 2015) (Unpublished)
development; housing and; recreation. The provision of decent dwellings in urban areas is therefore mainly hinged on access to land.

Despite this, several challenges have been faced in seeking to put land to optimal use. These challenges specifically arise from the nature of land distribution in the country which is unequitable resulting to the exclusion of a large number of people from the ownership of this key resource. The manner in which land has been held and distributed in the country has thus not taken cognizance of the need to ensure sustainability in order to ensure that the many challenges of landlessness that have been faced in the past are done away with.

The land regime in Kenya has witnessed the application of a multiplicity of laws which have resulted to confusion in the land regime. This system has also been exploited by the corrupt who have used it to dispossess and illegally acquire land, especially in the urban areas. The numerous land legislations that have governed land rights in Kenya have been seen to be complex to be understood by the citizens and many institutions have also been established by these Acts which are largely inaccessible to the poor citizens.

A large percentage of the populace is thus outside the legal land rights delivery regime and in order to ensure that they are able to access land, they have devised mechanisms which enable them do so. De Soto thus notes that this phenomenon is common in many areas and that the only alternative that the people living in informal settlements are usually left with is to live outside the official law using their own informally binding arrangements to protect and mobilize their assets.\(^1\) These arrangements are germane to the various informal settlements that they are found but certain characteristics are identifiable in a majority of them.

In a study carried out by Antony Lamba, it was revealed that the institutions that exist in informal areas that are tasked with the delivery of land rights are acceptable to them, furthermore, it was revealed that the informal arrangements that are in place are able to effectively deliver access to land rights for these people as compared to the formal systems.\(^2\) These land rights delivery systems

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2 Antony Lamba, ‘Land Tenure Management Systems in Informal Settlements: A Case Study in Nairobi’ (Master of Science in Geo-Information Management, Institute for Geo-Information
that exist in the informal areas have thus undergone evolution to cater for the various needs that arise at different times and it has been seen to effectively tackle land problems in informal settlements. According to De Soto therefore, it is legality that has become marginal, extralegality is the norm in these areas.\(^3\)

The concept of radical title to land in these areas is usually understood differently. To the inhabitants of these areas, it is not the state that has the radical title, but the various institutions that have been established under the informal land rights delivery systems. Any intervention by the State is therefore intrusion and uncalled for. The social contract among the inhabitants of these areas is thus seen to be stronger that the contract that they have with the state. It has thus become imperative that the state recognizes the social contracts in existence in these areas that enable the inhabitants to access land.

The following section will examine the social contract theory as envisioned by different scholars. This will entail examining the theory broadly and then looking at the precepts of this theory in a narrow perspective which entails a review of the social contract theory as applicable to the inhabitants of informal settlements where informal land rights delivery systems exist.

3. The Social Contract Theory

Social cohesion demands that rules and regulations be established in order to ensure that individuals live within the defined confines. Cooperation among individuals enable a conducive environment for the production of societal goods. The terms which define the manner in which people cooperate are in most cases usually set by the individuals who agree amongst themselves.

The notion of agreement as the foundation of “just” or “legitimate” principles for governing society is the basis of the “social contract”\(^4\). A social contract therefore results from a collective agreement among the members of the society. It is these members who define the parameters within which the sovereign authority that they want to establish is to operate and also the manner in which the subjects are required to behave.

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3 De Soto (n 1) 27.

Science and Earth Observation (ITC) 2005 ii
Some of the notable scholars that have advocated for this theory include John Rawls and Immanuel Kant who have incorporated the key ideas propounded in this theory into the modern-day realities in the society. While seeking to clarify the tenets of the social contract theory, Fredrick Rauscher proposes five variables that are identifiable within a social contract; 1) the nature of the contractual act; 2) the parties to the act; 3) what the parties are agreeing to; 4) the reasoning that leads to the agreement; 5) what the agreement is supposed to show.\(^5\)

The social contract theory therefore advances the argument that has over time been propounded by natural theorists who argue for a civil society governed by laws. These laws, as stated in the preceding section have to be ratified by the people amongst whom it is to apply and once they have done this, they become bound by the provisions of the laws. Each individual expresses their will to be bound and this collectively amounts to the social contract. This is captured well by the statements of Pufendorf who states that;

\[\text{"On the whole, to join a multitude of many men, into one Compound Person, to which one general act may be ascribed, and to which certain rights belong, as ‘tis opposed to particular members, and such rights as no particular members can claim separately from the rest; ‘tis necessary, that they shall have first united their wills and powers by the intervention of covenants without which, how a number of men, who are all naturally equal, should be linked together, is impossible to be understood."}\(^6\)

This therefore means that individuals find a common ground which they express in the form of a social contract which binds all the members of the society. Thomas Hobbes traces the historical origins of the social contract. Accordingly, Hobbes states that human beings in the past existed in a State of Nature where life was ‘solitary, nasty, brutish and short’. In order to ensure self-preservation, human beings therefore had no option but to form social groupings.

In forming these social groupings, individuals agree to relinquish some of their rights to the sovereign who in turn guarantees their protection. The sovereign who is established by the contract is high up, at the vertex of the hierarchy of

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\(^6\) Samuel Pufendorf, ‘Moral and Political Philosophy’ Stanford Encyclopedia of Philosophy
power and authority. Accordingly, the parties to this contract have rights and obligations towards each other. This is meant to ensure that there is effective protection of the members of these societies as there is clarity on what is expected from them. According to Rousseau, social contract was the solution to the problems that ailed the society. He thus stated;

‘To find a form of association which may defend and protect with the whole force of the community the person and property of every associate, and by means of which each, coalescing with all, may nevertheless obey only himself, and remain as free as before.’ Such is the fundamental problem of which the social contact furnishes the solution.

In seeking to combat the common enemy that face the people, Rousseau proposes that there was need for individuals to come together for the common good and this common good represents the will of the individuals within the society. According to Rawls, this contract entered into by individuals is based on the concept of justice. This requires that different members of the community ensure that the other members are able to enjoy the ‘good’ derived out of the social contract equitably.

These conceptions on social contract have evolved over time and have since been used to define new relations that have emerged in different areas. In informal settlements, social contracts exists which define various aspects of the societies in these areas. The fact that there exists social contracts defining property relations in these areas cannot be overstated. The following section will examine property rights that are traceable in informal settlements in order to demonstrate the social contract in these property relations. This is done through broadly looking at the concept of property rights and later on reviewing the different manifestation of these rights in informal settlements.

4. **Property Rights**

Property rights represents relations between persons and a thing (res). According to De Soto, property is not the assets themselves but it represents a consensus

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between people as to how these assets are to be held, used and exchanged. By this, property has been described by some scholars to represent a bundle of rights to which an individual is entitled to. By this, the owner of the property usually derives the right to do what they please with the property, subject to any limitations set by the law. Harold Demsetz thus states that once a transaction is completed in the marketplace, two categories (bundles) of rights are exchanged. One of the bundles that is evident in property relationships is ownership. Ownership of property establishes entitlement to the thing by a person against all other persons.

Various theories have been advanced to explain the endowment of property rights to individuals. John Locke in advancing the labour theory suggested that once a person inputs their labour on a certain property whose effect is to add to the value of the property, property rights naturally advance to this person, according to Locke, the concept of commons was done away with and individuals therefore obtained rights to own the property. These sentiments were also shared by Karl Marx who championed for workers being granted property rights.

The other theory that has been advanced to explain property rights is the explanation by natural theorists. One such theorist is Aristotle who believed that the right to property is inherent in the moral order. Jeremy Bentham, a proponent of positive law dismissed the idea propagated by natural rights theorists and according to him, property rights are positive rights which are granted. This is evident from the following passage;

“Right...is the child of law; from real laws come real rights; from imaginary laws, from nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of

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9 De Soto (n 1) 164.

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To Bentham, property rights cannot be separated from the law. The law accordingly plays the role of defining the holders of the various ‘sticks’ in the bundle of entitlements bestowed upon persons. In defining property rights and rights in general, Hohfeld introduces the concept of jural correlatives and opposites. He thus postulated that when a person has a right, there is a corresponding duty bestowed upon another person to respect those rights. According to Hohfeld, property as a legal concept does not only comprise of rights, but also privileges and powers. These rights can be bestowed upon various entities, these entities can be either individuals or groups.

Economists have argued for the bestowing of these rights upon individuals and this is meant to ensure that the tragedy of commons is avoided. In this regard, the proponents of this idea argue that market solutions prevent the tragedy of the commons that too often results when incentives to preserve common pool resources do not exist. According to these theorists therefore, the best way to ensure that property is put to best use is to ensure that the rights over the property is granted to individuals who are to internalize the externalities associated with the property.

A different argument is usually postulated by scholars who argue that property has certain social functions which it ought to address. It is thus argued that law has to ensure that property is protected in the interest of all members of the society. Protection of the broader rights of the members of the society by the property regime is meant to ensure that the social relations that are in existence are protected. This concept lays emphasis on the idea that property is more than just a commodity over which the owner has absolute say.

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14 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale LJ 710 (1917)

15 G. Hardin, ‘The Tragedy of the Commons’ in G. Hardin and J. Baden (eds.) *Managing the Commons*, 16 (1977)

16 Patricia Kameri-Mbote and others, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press 2013) 32.
5. Property regimes in Kenya

Safeguards are usually put in place to ensure the inviolability of the rights of the property owners and these safeguards are in most cases put in place by the state. Being the most common form of property in Kenya, the land ownership regime has seen the imposition of various safeguards to ensure the protection of the rights of the various persons who hold the rights to the land. In this regard, various tenure types have been recognized in Kenya. A look at tenure seeks to answer the tripartite question who owns, what interest in what land.\(^{17}\)

This concept ordinarily has at least three dimensions namely: people, time and space.\(^{18}\) It should be noted that formal property regimes have sought to identify the three dimensions with clarity in order to ensure an efficient property regime. However, it is at times not easy to identify the three dimensions and this is what usually brings conflicts in the property regime. The following section examines the land ownership regime in Kenya and this entails a look at the tenure typologies which are manifest in the Kenyan land sector.

In Kenya, there exist both formal and informal tenure. Formal tenure is that that is recognized by law while informal tenure is that which has evolved outside the law and has not been recognized by law. The Constitution recognized three forms of tenure; Public, Private and Community.\(^{19}\) The Constitutional provisions on land ownership have sought to ensure that all persons benefit equitably from the entitlements arising from property. The law has thus sought to protect the rights of various persons to hold property and this arises from the social contract that these persons have with the state.

Public land is thus identified to be the land belonging to all citizens with the state being the custodian of this land on behalf of the people. The Constitution in Article 62 provides for what shall consist of public land and this land is to be managed by the National Land Commission on behalf of both the national and the county governments. The establishment of the National Land Commission was meant to remedy the situation where public land was subject to onslaught by various corrupt persons who illegally acquired the land and these actions

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\(^{18}\) Kameri-Mbote and others (n 15) 33.

\(^{19}\) Constitution of Kenya 2010 Article 61.
were also seen to have been ratified by the government especially during the Moi era.

Practice has in the past also seen the allocation of public land through grants to private individuals who end up not putting these lands to the use specified by the grants. The National Land Commission has thus been bestowed with the power of ensuring that public land allocated to private individuals is used for the specific purposes and subject to such conditions, covenants, encumbrances or reservations that have been provided. Where public land allocated to private persons is not put to the use for which it was intended, the National Land Commission has been bestowed with the power of ensuring that the land reverts back to the county or national government. The Commission is further vested with the power of allocating land to groups seeking to ameliorate their disadvantaged positions\(^{20}\) and such include persons living in informal settlements.

The other category of land ownership that has been identified by the Constitution is private ownership. This usually occurs where there has been adjudication to identify the right holder of a given piece of land and the interest in the land registered in the name of the right holder. Private ownership is the most common form of ownership due to the various policies of individualization that have been undertaken by the government. Most of these individualization programmes adopted by the post-independence governments were inherited from the colonial government which saw communal ownership to be disadvantageous especially in the practice of agriculture. The Swynnerton Plan was one of the earliest initiatives on individualization of tenure and in order to support this, the plan read in part;

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\textit{Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer a unit of land and a system of farming whose production will support his family...He must be provided with such security of tenure through an indefeasible title as this will encourage him to invest his labour and profit into the development of his farm and will enable him to offer it as security against such financial credits as he may wish to secure...}^{21}
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(emphasis supplied)

\(^{20}\) Land Act, s.12
\(^{21}\) R.J.M. Swynnerton, \textit{A Plan to Intensify the Development of African Agriculture in Kenya}, 1955
Accordingly, individualization of tenure in Kenya has largely been aimed at the granting of title documents to individuals which is *prima facie* used as proof of ownership. The move towards individualization largely ignored the existing property arrangements that were in existence among Africans and by this, this system was not widely acceptable to many Africans. Furthermore, the process of individualization has over time been seen to be slow, expensive and complex to many poor people. Furthermore, the sanctity of title that individual tenure created has since been eroded due to corrupt practices in the land administration agencies which have led to interference with the rights of the holders of interests in land.

Community land is another category that has been provided for by the Constitution. Article 63 of the Constitution provides that this category of land shall vest in and be held by communities identified on the basis of ethnicity, culture and similar community of interest. This Constitutional provision was informed by the provision in the National Land Policy, Sessional Paper No. 3 of 2009, which called for the recognition of community rights to land. The recognition of this category of landholding comes against the backdrop of subjugation of communal forms of ownership which resulted to the dispossession of many communities of land that was lawfully theirs. The expanded scope on what shall consist of community land is meant to cater for contemporary forms of groups who may be having similar interests in land and this is majorly prevalent in urban areas.

6. Property regimes in informal settlements
Informal property arrangements are majorly predominant in informal settlements in Kenya. Even though formal law has not recognized informal tenure, this category remains resilient and it caters for a majority of people in both urban and rural areas in Kenya. The defects of formal tenure such as complexity have also driven a majority into informality in order for them to be able to access property rights. In this regard, informal tenure systems have emerged in response to a need for the establishment of an alternative means of access to land and shelter especially for the urban poor.²² Williamson *et al* define land tenure systems as the structures and processes of delivering access and

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²² Lamba (n 2).
rights in land. These systems are institutionally established and are usually dependent on the social, economic and political structures in place.

To this category of persons in informal settlements, formal law is increasingly losing its legitimacy as people continue to create property beyond its reach. The informal land rights delivery systems are acceptable to them and compared to the formal systems, these people are much comfortable with being within the scope of the informal systems. In the informal settlements, there exists land rights recording systems that have been established and this ensures that there is ease in tracing the rights holders of the different parcels of land. These systems that have been established are seen to be key in meeting the immediate needs of the persons residing in these areas such as the need for shelter. Informal settlements have been categorized into two by the UN-Habitat:

- Squatter settlements - these are settlements where land and, or buildings have been occupied without the permission of the owner
- Illegal land developments - these are settlements where initial occupation is legal but where unauthorized land developments have occurred

In order to access land rights, the inhabitants of the informal settlements use such methods like invasion, inheritance and illegal purchase and the provincial administration plays a big role in the transaction of land. In Mukuru slums, there exist cartels which deal in land and in order to operate, such groups must receive the blessing of the provincial administration in the area such as the Chiefs who also receive a cut out of the proceeds of these transactions. These groups are also the ones who authorize construction activities to be carried out within the slums and when one fails to seek their authorization before putting up a structure in the area, their structures are usually forcefully demolished. Village elders in the slums also play a critical role in regulating transactions in land and they are usually tasked with informing the chief on any developments taking place in the area.

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24 De Soto (n 1) 178.
25 UNHSP, 2003. 82-83
26 The land in this slum was originally Government land which was granted to private persons who were to set up industries in the area. Over time, individuals began encroaching on the land as it was not put to the intended use specified by the grants from the government.
A person who wants to acquire land can thus either approach the chief or the youth groups in the area and after this, a sale agreement is prepared where the chief or the group officials give consent to the sale. Once the rights over land have been granted to a person in a place such as Mukuru slums, the right holder is guaranteed protection of their land rights and this is notwithstanding the fact that they lack full ownership of the land.

These extralegal land administration mechanisms have thus devised record-keeping systems which enable ease in land transactions and also in the identification of ownership. Examples of these are evident in Mukuru slums where upon completion of a transaction in land, a person is usually granted a document which is used as proof of ownership. This is usually done mainly by the chief who before allocating land to a person, has to verify the background of the person who in the end will pay a fee to the chief for the services that have been provided by the chief. Village elders with the assistance of youth in the area also play this role. Structures have also been established in these informal settlements to ensure that the occupants of these areas are able to access basic services such as water, roads and electricity which are mainly provided in these areas by the existing cartels.

Land related disputes in these areas are usually subjected to the dispute resolution mechanisms that exist in the areas and this in most cases entails tasking the chief and village elders with adjudication of these disputes. Once these decisions have been made, mechanisms have been placed to ensure the enforcement of the decisions and everyone is expected to comply with the decision that has been arrived at. Common types of land disputes in these areas relate to non-payment of rent by tenants, blockage of access routes and sale disagreements.

From the foregoing, it can be seen that just like the inhabitants of areas with formal land titles, the occupants of informal settlements are able to access rights to land and the mechanisms that have been put to ensure this are accessible and acceptable to them. Through this, there is usually a perceived tenure security among them. This is evident from the types of structures that have been put up in these areas as the owners of these structures are usually guaranteed of the inviolability of their land rights by the administrative structures that have been established in these areas.
All these operate within the social contracts that are in place in these informal settlements which are usually oblivious of the requirements of the law. Furthermore, to new occupants in these areas, these rules apply despite them having not indicated of their consent to be bound by these rules. What is thus important is the need for the new occupants to conform to the requirements imposed by these systems. The following section thus examines the social contract in the property regimes in these informal settlements and it builds a case for the recognition of these informal arrangements.


From the preceding section, it is evident that once people are locked out of the formal property arrangements, they devise mechanisms which enable them access land rights. These arrangements devised by these people are acceptable to them and have a binding character to those who subscribe to it. The arrangements for accessing property rights devised in these informal settlements are not unique to Kenya. De Soto notes that these systems are common globally and that they result from a combination of rules which are selectively borrowed from the official legal system, with certain improvisations, and locally accepted customs.\(^\text{27}\)

In Mukuru, the fact that the rights of those who have acquired land are recorded in a register kept by either the chief or the various youth groups is evidence of interactions of the informal systems with the formal systems. This system thus borrows from the formal system where rights to land are recorded in registers kept by government agencies. All the land owners in the slum are thus bound by this system failure to which punitive measures are enforced by the administrative agencies in the slum. According to De Soto, this represents the social contract that is upheld by the community members and enforced by the various authorities in the informal settlements.

The land market in the informal settlements is thus vibrant with transaction occurring on a daily basis and modifications being done to the land administration systems accordingly. What is important in these areas is usually the devising of mechanisms which are able to be socially legitimate. Legitimacy is thus derived from the consent of the inhabitants of the informal settlements.

\(^{27}\) De Soto (n 1) 23.
Once the mechanisms adopted have gained acceptability among the members of the community, it matters not whether these mechanisms are extralegal. What matters most to these people is that the mechanisms that have been adopted are able to deliver and make land rights accessible. This is the social contract in which the inhabitants of these areas operate.

To anticipate my conclusion, it is my submission that the social contracts existent in these informal settlement should be the basis for the recognition of the land rights of the inhabitants of these areas by the formal property regimes. This is as a result of the failures that have been occasioned by the formal systems established by the government which has in turn resulted to the thriving of extralegality. Kenneth Baynes accordingly argues that in order for property rights to be granted, it is required that there be united agreement of all which is represented in the idea of a social contract.28 It is within the scope of the social contract that the rights over property are secured.

The land laws that have been enacted in Kenya are majorly guided at ensuring access to secure land rights in Kenya. This will however not be successful until the law is molded to take into consideration the fact that it is a reality that extralegal arrangements that have been devised to facilitate access to land and are widely acceptable to a majority of the populace. The only way that the laws that have been enacted to govern land can stay alive is by remaining in touch with the social contracts that have been pieced together by the real people on the ground.29 The land legislations should thus contain provisions that make reference to existing social contracts in the country. This will accordingly ensure equitable access to land by all in the country.

8. Conclusion
From the foregoing discussions, it has been shown that in order for a right to be legitimate, it must not necessarily be defined by formal law but can be shaped by the social relations in place. Social relations that have emerged in informal settlements have devised mechanisms for the granting of land rights to individuals. Failure of the formal land administration systems and land rights delivery systems are largely to blame for the emergence of these alternative

29 De Soto (n 1) 112.
systems. These extralegal land rights delivery systems have been seen to be widely acceptable to the inhabitants of the informal settlements as they ensure accesses to land rights in these areas. Formal law is thus expected to take cognizance of these relationships and ensure their protection. This will in turn ensure that access to land rights is not a preserve of the few whose rights have been recognized under the formal land administration systems.